COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

COMPLAINT OF SPRINT COMMUNICATIONS COMPANY L.P. AGAINST BLUEGRASS TELEPHONE COMPANY, INC. D/B/A KENTUCKY TELEPHONE COMPANY FOR THE UNLAWFUL IMPOSITION OF ACCESS CHARGES	)	CASE NO. 2010-00012

ORDER TO SATISFY OR ANSWER

Bluegrass Telephone Company, Inc. d/b/a Kentucky Telephone Company ("Kentucky Telephone") is hereby notified that it has been named as defendant in a formal complaint filed on January 6, 2010, a copy of which is attached hereto.

IT IS THEREFORE ORDERED that:

1. Pursuant to 807 KAR 5:001, Section 12, Kentucky Telephone shall satisfy the matters complained of or file a written answer to the complaint within 10 days of the date of service of this Order.

2. Kentucky Telephone shall not terminate service to Sprint Communications Company L.P. during the pendency of this complaint.

3. Should documents of any kind be filed with the Commission in the course of this proceeding, the documents shall also be served on all parties of record.

ATTEST:

Executive Director

By the Commission

ENTERED

JAN 22 2010

KENTUCKY PUBLIC SERVICE COMMISSION

RECEIVED

JAN 06 2010

PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

IN THE MATTER OF COMPLAINT OF SPRINT COMMUNICATIONS COMPANY L.P. AGAINST BLUEGRASS TELEPHONE COMPANY, INC. d/b/a KENTUCKY TELEPHONE COMPANY FOR THE UNLAWFUL IMPOSITION OF ACCESS CHARGES

Case No. 2010-00012

COMPLAINT OF SPRINT COMMUNICATIONS COMPANY L.P. AGAINST BLUEGRASS TELEPHONE COMPANY, INC. d/b/a KENTUCKY TELEPHONE COMPANY AND REQUEST FOR EXPEDITED RELIEF

Pursuant to Kentucky Revised Statutes ("KRS") Section 278.040 and Section 278.260, Sprint Communications Company L.P. ("Sprint") brings this Complaint against Bluegrass Telephone Company, Inc. d/b/a Kentucky Telephone Company ("KTC") for the unlawful imposition of access charges. Sprint requests that the Public Service Commission of the Commonwealth of Kentucky ("Commission") determine that KTC has improperly billed intrastate switched access charges, and issue an expedited ruling prohibiting KTC from terminating service to Sprint during the pendency of this Complaint.

PARTIES

1. Sprint Communications Company L.P. ("Sprint"), a Delaware limited partnership, is a competitive local exchange carrier ("CLEC"), and an interexchange carrier, and is authorized by the Commission to provide telecommunications service in Kentucky. Sprint's principal place of business is 6200 Sprint Parkway, Overland Park, Kansas 66251.

2. Sprint brings this Complaint in its capacity as an interexchange carrier. KTC has improperly billed Sprint terminating intrastate switched access charges for calls to chat lines, free or nearly free conference calling services, and other similar services. Sprint requests an order

that access charges do not apply to that traffic, and an expedited ruling preventing KTC from terminating service to Sprint or otherwise engaging in self-help remedies.

3. The name and address of Sprint's representative in this proceeding is as follows:

John N. Hughes
Attorney at Law
124 West Todd Street
Frankfort, KY 40601
502.227.7270 (o)
502.875.7059 (fax)

and

Philip R. Schenkenberg (pro hac vice application to be filed)
Briggs and Morgan, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
612.977.8400 (o)
612.977.8650 (fax)

4. KTC is a CLEC and is certified to provide telecommunications services in the Commonwealth of Kentucky. KTC's principal place of business is 101 Mill Street, Leitchfield, Kentucky 42754.

5. The names, addresses, and contact information for KTC's current primary legal representatives during negotiations with Sprint are:

Russell D. Lukas
Lukas, Nace, Gutierrez & Sachs, Chartered
1650 Tysons Boulevard, Suite 1500
McLean, VA 22102

JURISDICTION

6. Pursuant to KRS Section 278.040, the Commission has jurisdiction "over the regulation of rates and service of utilities" within the Commonwealth.

7. Pursuant to KRS Section 278.260, the Commission is vested with the express authority to investigate and remedy "complaints as to rates or service of any utility."

8. Pursuant to KRS Section 278.030(1), "[e]very utility may demand, collect and receive fair, just and reasonable rates for the services rendered or to be rendered by it to any person."

9. Subsection (2) of KRS Section 278.030 allows a utility to "employ in the conduct of its business suitable and reasonable classifications of its service, patrons and rates."

FORMAL COMPLAINT

Background

10. KRS 278.030 requires KTC's rates, including its rates for intrastate switched access services, to be fair, just and reasonable as determined by the Commission.

11. In accordance with Kentucky law, including the filed rate doctrine, intrastate switched access charges may be assessed only pursuant to and in a manner consistent with a filed and approved tariff. In the absence of tariff authority to bill for a call, intrastate switched access charges may not be billed, and no payment is due. *See* KRS 278.160 (no utility shall charge, demand, collect or receive greater compensation than proscribed by tariff); *Cincinnati Bell Tel. Co. v. Ky. Pub. Serv. Comm'n*, 223 S.W.3d 829, 837-39 (Ky. Ct. App. 1007).

12. KTC has been identified by Sprint as a LEC engaged in traffic pumping activities.

13. Traffic pumping occurs when a LEC partners with a second company ("Call Connection Company") that has established free or nearly free conference calling, chat-line, or similar services that callers use to connect to other callers or recordings. The Call Connection Company generates huge call volumes to numbers assigned to the LEC, the LEC unlawfully bills those calls as if they are subject to access charges, interexchange carriers unwittingly pay those bills, and the LEC and Call Connection Company share the profits. These schemes normally occur in rural areas where LECs have high enough access rates to incent them to share profits with the Call Connection Companies.

14. Many call connection companies operate what are called party lines that are geared toward pornographic or adult content. Exhibit A to this Complaint is an Internet advertisement for "Talkee," which advertises 270-200-2775 – a KTC number – as the "Chicago Alibi" chat line. These are not 900 calls with protections for minors. As the advertisement says, these chat lines are "open to anyone with a telephone."

15. For many reasons, LECs do not provide switched access services to interexchange carriers ("IXCs") for calls delivered to Call Connection Companies. For example, the Iowa Utilities Board ("IUB") decided on September 21, 2009, in its docket FCU 07-02 that intrastate switched access charges do not apply to calls delivered to Call Connection Companies because: 1) Call Connection Companies are not end users of local exchange service; 2) such calls are not terminated to an end user's premises; and 3) such calls do not terminate in the LEC's certificated local exchange area. The IUB ordered LECs to refund improperly billed intrastate switched access charges billed to IXCs, including Sprint. This order is attached as Exhibit B hereto.

16. Similarly, the Federal Communications Commission ("FCC") decided on November 25, 2009, that Call Connection Companies served by an ILEC in Iowa were not end users under the ILEC's tariff, and thus calls to those Call Connection Companies did not impose access charge liability on the delivering interexchange carrier. *In the Matter of Qwest Communications Corp. v. Farmers and Merchants Mutual Tel. Co.*, File No. EB-07-MD-001, Second Order On Reconsideration (Nov. 25, 2009). This order is attached as Exhibit C hereto.

17. For reasons identified by the IUB and the FCC, and for other reasons, calls delivered to Call Connection Companies are not subject to switched access charges under the KTC's intrastate switched access tariff.

Sprint's Disputes

18. In October 2009, Sprint received a bill for switched access services from KTC for the September 1 through September 30, 2009, time period. A portion of the bill was for intrastate switched access services.

19. Having identified KTC as engaged in traffic pumping activities, Sprint disputed the bill in a manner consisted with KTC's federal and state access tariffs. Sprint has similarly disputed KTC's November 2, 2009, and December 1, 2009, switched access bills, which were each for the preceding calendar month time period.

KTC's Response to Sprint's Disputes

20. KTC responded to Sprint's disputes not by following procedures set forth in its tariffs and applicable statutes and Commission rules, but instead by engaging in self help attempts to seek to coerce Sprint to pay the disputed charges.

21. On or about November 18, 2009, KTC activated two web sites to post a "warning" to Sprint. *See* Confidential Exhibit D hereto.

22. On November 18, 2009, KTC's president Joe McClung sent Sprint representatives an email advising that these internet sites had been activated, and that for 30 days calls from Sprint numbers would be intercepted and callers would be provided a message referring customers to these sites. He further threatened to permanently disconnect trunks within 60 days.

23. In an apparent attempt to harass Sprint and compel payment outside of normal business and regulatory channels, Mr. McClung sent the email threatening disconnection to various high-level Sprint executives. Mr. McClung sent the same email to personnel of the FCC and the IUB, stating at one point that he wanted to see how Sprint would like being judged in the Court of Public Opinion. Sprint has since taken measures of email control for the Sprint executives' e-mail accounts to avoid further correspondence from Mr. McClung. In fact, all

email from Mr. McClung, or his company, are currently being filtered through Corporate Security.

24. As the parties exchanged communications on Sprint's disputes, KTC acknowledged the IUB's decision but represented that KTC's call connection company partners were differently situated than those partnered with the Iowa LECs. KTC did not, however, provide any evidence of such differences.

Sprint Requests an In-Depth Review

25. On November 25, 2009, Sprint invoked its rights under KTC's state and federal access tariffs to request an in-depth review of the disputed amount. *See* Exhibit E hereto; KTC Tariff No. 3 § 2.6.3; KTC FCC Tariff No. 1. § 2.6.C.4.a. In an attempt to evaluate KTC's claim that access tariffs applied to calls delivered to its traffic pumping partners, Sprint requested that KTC provide it with certain information:

> In furtherance of this in-depth review, Sprint requests that Kentucky Tel. provide it with the following information:
>
> 1. Please identify the portion of total access minutes on the October 2009 and November 2009 switched access bills that are delivered by Kentucky Tel. to Call Connection Companies. This will allow Sprint to determine whether there is some legitimate access traffic at issue.
>
> 2. Please identify the five Call Connection Companies to whom you deliver the greatest number of minutes. For each of those Call Connection Companies, identify the numbers assigned to that company and the location of the company's server. In addition, provide any written contracts in place with those Call Connection Companies during September and October 2009, a copy of bills issued to those companies for those periods, and the total traffic delivered to each. If any contract terms or billing arrangements are not in writing, please describe those to us. Sprint will maintain the confidentiality of this information.
>
> 3. Please describe generally the operations engaged in by each of the top five Call Connection Companies. (For example, chat lines/conferencing service/access to recordings/international calling, etc.).

Exhibit E hereto.

26. On December 10, 2009, KTC's counsel responded to Sprint's request and indicated that an in-depth review had been completed, and that Sprint's billing disputes were denied. KTC provided none of the information that Sprint had requested. *See* Exhibit F hereto.

27. KTC's December 10, 2009, denial again suggested that KTC could (and perhaps would) seek to disconnect Sprint's service.

Sprint's Requested Relief

28. By filing this action Sprint seeks a determination that KTC has improperly billed Sprint intrastate switched access charges for September, October and November 2009, and that its dispute of such charges pursuant to KTC's KY Tariff No. 3 should have been resolved in Sprint's favor.

29. Sprint further seeks a determination that based on the relationship between KTC and its Call Connection Company partners, KTC does not provide intrastate switched access services for such calls.

30. Sprint further seeks a determination that KTC's Call Connection Company partners do not receive local exchange service in accordance with KTC's Kentucky Local Exchange Services Tariff No. 1.

31. Sprint seeks an order prohibiting KTC from terminating Sprint's service during the pendency of this Complaint. KTC's Tariff No. 3 recognizes that disputed amounts can be withheld while a dispute is pending. *See* KTC Tariff No. 3 §§ 2.6.3(B), 2.6.3(C)(1). This Complaint is filed following the filing of billing disputes, and following Sprint's request for an in-depth review pursuant to KTC Tariff No. 3 § 2.6.3(D). While Section 2.6.4(A) allows discontinuance of service upon 24 hours notice, that does not apply to amounts subject to formal disputes, and is subject to 807 KAR 5:006(14)(1), which requires a utility to make a reasonable effort to obtain customer compliance and provide 10 days advance notice of disconnection.

32. The Commission has recently expressed its displeasure with carriers' use of call blocking while carrier-to-carrier disputes are ongoing. In Case No. 2008-00203, the Commission stated:

> We are disconcerted by Windstream's unilateral action in blocking the traffic and only informing us *after* the traffic was blocked. Although we acknowledge that the complex and novel nature of this dispute could lead to differing interpretations of the Commission's jurisdiction, we believe that it would have been prudent to have informed the Commission of the dispute *before* blocking the traffic. We are somewhat mollified by Windstream's subsequent acknowledgment of the Commission's jurisdiction and Windstream's pledge that it would give the Commission advance notice prior to taking similar action in the future.

In the Matter of Investigation into Traffic Dispute Between Brandenburg Telephone Company, Windstream Kentucky East and Verizon Access, Case No. 2008-00203, Order, p. 12 (Aug. 26, 2009).

33. Sprint further requests that the Commission find the self-help remedies described in paragraphs 20-23 above, and designed to coerce Sprint into paying a bill that is currently subject to an ongoing dispute process, to constitute unjust and unreasonable conduct.

34. Finally, Sprint requests that the PSC order that KTC and its representatives communicate with Sprint about this matter only through documents submitted to the Commission as part of the record with copies to counsel to avoid any disputes that might arise from informal contacts among the parties.

WHEREFORE, Sprint requests that the Commission take the following actions:

1. Order that KTC improperly billed intrastate switched access charges to Sprint for calls to Call Connection Companies in September, October and November, 2009, and order KTC to cease billing Sprint for intrastate calls to Call Connection Companies.

2. Order KTC to communicate with Sprint only through documents submitted to the Commission during the pendency of this Complaint;

3. Determine that KTC has engaged in unjust and unreasonable self-help remedies;

4. Determine that Call Connection Companies are not subscribers of KTC's local exchange service; and

5. Grant to Sprint such other and further relief as the Commission deems just and equitable.

Respectfully submitted this 5th day of January, 2010.

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612.977.8650 (fax)

ATTORNEYS FOR SPRINT
COMMUNICATIONS COMPANY L.P.

2445619v2

EXHIBIT A

Talkee People Goes Online!

Post photos, personals, find chat lines in your area or nationwide.

Welcome

Talkee is a network of ***free*** telephone chat (party) lines in most areas.

These party lines are open to anyone with a telephone. As PC-to-phone telephony quality improves, you may use your PC here to access these lines.

In addition to our regular lines herein, some suggested National and Internet chat lines are:

- **Seattle Raven**

  206-834-6530

- **Chicago Alibi**

  270-200-2775

- **American Donut**

  712 429 0405

- **Donut**

  985-655-2685

- **The Chicago Alibi**

270-200-2775

- **Butt Monkey**

985-655-2655

- **Male Box**

985-655-2653

Telephone chat lines hold up to 488 callers per chat (party) line. They are a world unto themselves, as you will discover, with many features:

- Voice Mail
- Personals
- Bulletin Boards
- Virtual Chat
- Locator

30 Party Line Rooms hold up to eight (8) people each. It is easy to zip around the system. Before calling, familiarize yourself with the layout by looking at the telephone chat (party) line diagram.

We are adding new lines daily so stay in touch.

Remember we offer these lines free of any charges in most areas. If you are dialing into a free chat line area, the only costs you will ever see are whatever your own carrier charges for the normal calls (if any).

Remember as Internet telephony quality improves, you will be able to come here on your own PC and click a call through to a chat line of your choice.

Any Web site, portal, or company desiring their own line accessible by the net and telephone areinvited to email us. Volume is everything. And anyone desiring their own conference room with 30 people capacity and a personal phone number to it can get it all for free at the MrConference Web site.

For more information:

Telephone: (775) 832-6765
Fax: (775) 831-8669
E-mail: talkee2006@yahoo.com

jojico.com Design and Development

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EXHIBIT B

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: QWEST COMMUNICATIONS CORPORATION, Complainant, vs. SUPERIOR TELEPHONE COOPERATIVE; THE FARMERS TELEPHONE COMPANY OF RICEVILLE, IOWA; THE FARMERS & MERCHANTS MUTUAL TELEPHONE COMPANY OF WAYLAND, IOWA; INTERSTATE 35 TELEPHONE COMPANY, d/b/a INTERSTATE COMMUNICATIONS COMPANY; DIXON TELEPHONE COMPANY; REASNOR TELEPHONE COMPANY, LLC; GREAT LAKES COMMUNICATION CORP.; AND AVENTURE COMMUNICATION TECHNOLOGY, LLC, Respondents;	DOCKET NO. FCU-07-2
REASNOR TELEPHONE COMPANY, LLC, Counterclaimant, vs. QWEST COMMUNICATIONS CORPORATION AND QWEST CORPORATION, Counterclaim Respondents.	

FINAL ORDER

(Issued September 21, 2009)

B

SUMMARY[1]

This order addresses a formal complaint that QCC filed against eight local exchange carriers alleging that they engaged in a deliberate plan to dramatically increase the amount of terminating access traffic delivered to their exchanges via agreements with conference calling companies. AT&T and Sprint intervened in the complaint.

QCC alleges that the Respondents in this case attempted to manipulate the access charge regulatory system in order to collect millions of dollars from interexchange carriers (IXCs) at rates that far exceeded the cost of providing switched access services. They started with access rates that were indirectly based on their cost of providing low volumes of access services, then entered into agreements with free conference calling companies that were intended to increase traffic volumes by 10,000 percent or more at the same rates, when the total cost of providing access service had not increased significantly.

In this order, the Board finds that the Respondents failed to comply with the terms and conditions of their own intrastate access tariffs, so the calls in question were not subject to access charges and refunds and credits are required. The conference calling companies were not "end users" as defined in the access tariffs because they did not order, purchase, get billed for, or pay for local exchange service. Calls to the conference bridges were not terminated at the end user's premises, as required by the tariff. Many of the calls were laundered in an attempt to make it appear they were terminated in one Respondent's exchange, when in fact they were terminated in another exchange where the Respondent was not authorized to provide service.

When QCC filed complaints with the Board and with the Federal Communications Commission (FCC), some of the Respondents attempted to manufacture evidence to make it appear that they had complied with their tariffs when they had not.

Based on the record in these proceedings, the Board finds that the intrastate interexchange calls to the conference calling companies were not subject to access charges. Refunds and credits to the IXCs are ordered. The Board also announces that it is initiating a proceeding to consider proposed rules intended to prevent this abuse in the future.

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[1] This summary is provided for the convenience of the reader. It is not a substitute for the more complete analysis in the full order and in no way limits or alters the full order. As a summary, it is more informal and less accurate than the full order.

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STATEMENT OF THE CASE

On February 20, 2007, Qwest Communications Corporation (QCC) filed with the Utilities Board (Board) a complaint pursuant to Iowa Code §§ 476.2, 476.3, and 476.5; 199 IAC chapters 4 and 7; and 199 IAC 22.14 alleging violations of the terms, conditions, and application of the intrastate tariffs of the following telecommunications carriers: Superior Telephone Cooperative (Superior); The Farmers Telephone Company of Riceville, Iowa (Farmers-Riceville); The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa (Farmers & Merchants); Interstate 35 Telephone Company, d/b/a Interstate Communications Company (Interstate); Dixon Telephone Company (Dixon); Reasnor Telephone Company, LLC (Reasnor); Great Lakes Communications Corp. (Great Lakes); and Aventure Communication Technology, LLC (Aventure) (collectively referred to as Respondents).

In support of its complaint, QCC claims that the Respondents are engaging in a fraudulent practice that involves free conference calls, chat rooms, pornographic calling, podcasts, voice mail, and international calling services. QCC asserts that the Respondents partnered with free calling service companies (FCSCs), which are based in large metropolitan areas such as Los Angeles, California, Las Vegas, Nevada, and Salt Lake City, Utah, and use conference bridges, chat line computers, and routers in Iowa.

OVERVIEW

QCC characterizes this practice as "traffic pumping." This section will provide an overview of the traffic pumping scheme as alleged by QCC.

The scheme originates with local exchange carrier (LEC) members of the National Exchange Carrier Association (NECA) traffic sensitive pool for interstate access charges. The NECA pool generally ensures that a LEC will receive a minimum amount of access revenues, but excess access billings must be shared with other LECs that are also members of the pool. (Tr. 972-73). Carriers are allowed to opt-out of the NECA pool but continue to use NECA rates for a maximum period of two years and, during this time, the carriers may keep all of their access billings. (Id.). After two years, carriers that have opted out of the NECA pool must re-enter the pool or be able to support their rates. Without evidentiary support for the existing rates, the LEC's access rates would be reduced to a level that can be supported. (Id.).

The fundamentals of traffic pumping begin with an incumbent local exchange carrier (ILEC) with relatively high terminating switched access rates, or a competitive local exchange carrier (CLEC) either benchmarking off a rural ILEC or claiming it is otherwise entitled to charge a higher access rate. (Id.). The LEC enters into an arrangement with either a broker or directly with one or more FCSCs. (Id.). The FCSC sends equipment such as conference bridges, chat line computers, or routers to the LEC. (Id.). The LEC installs that equipment in its central office and then

assigns large blocks of telephone numbers to the FCSC. (QCC Initial Brief, p. 2). The FCSC advertises the numbers on its Web sites to encourage people from Iowa and throughout the country to call the Iowa numbers to receive the FCSC's calling services free of charge. (Id.). This allows people to obtain free conference calling, free international calling, and free calling to pornographic content numbers. (Id.). This scenario creates a substantial increase in the long distance traffic to the LEC's numbers, sometimes 100-fold. (Id.).

The IXCs then are required to deliver calls destined for these telephone numbers to the Iowa LECs. (Id.). The LECs bill the IXCs for that traffic using relatively high interstate switched access rates ($0.05 to $0.13 per minute) that were filed in individual tariffs after opting out of the NECA pool and similarly high intrastate switched access rates (approximately $0.09 per minute). (Id.). The Federal Communications Commission (FCC) and the Board allowed high rural LEC access rates based on the assumption that rural LECs receive low long distance traffic volumes due to the small number of end users in their rural exchange areas, which are generally expensive to serve. (Id.). By opting out of the NECA pool, the LECs are able to keep all of the additional revenue for themselves instead of sharing it with other members of the pool. However, if the LECs stay out of the NECA pool longer than two years, they have to recalculate their interstate rates based on the actual volumes produced by this traffic pumping scheme, which would lower access rates from over $0.05 per minute to fractions of a penny. (Id.).

IXCs would deliver their long distance customers' calls to these LECs and the LECs would, in turn, bill the IXCs for terminating switched access for all of the calls associated with the FCSCs with whom they did business. (Id.). After the IXCs pay the access charges, the LECs kickback a portion of those revenues to their FCSC partners as part of a marketing fee. (Id.). Therefore, traffic pumping presents a situation where LECs bill IXCs for a monopoly service (access) and use a portion of the money generated from the monopoly service to support a competitive service (conference, chat, international, and credit card calling) that generates the abnormally high volume of incoming calls, forcing the IXCs to use and pay for the monopoly service. (Id.).

In addition, traffic pumping can lead to other schemes, such as the improper backdating of invoices and contracts, traffic laundering, telephone numbering abuses, and potentially misrepresented universal service fund (USF) certifications. (Id. at 4-5). For example, LECs failed to bill FCSCs for any local exchange services then issued backdated invoices and contract amendments suggesting that the services were charged but were netted against the FCSCs' marketing services. Other LECs pretended to switch and route the traffic into their own exchanges, but in fact, allowed the traffic to be switched in another LECs' exchange, even though the first LEC claimed credit for and billed for the traffic.

PROCEDURAL HISTORY

QCC filed its complaint with the Board in February 2007, alleging that the Respondents engaged in traffic pumping. QCC alleges that traffic pumping, as described above, is inconsistent with the switched access services language of the Iowa Telecommunications Association Tariff No. 1 (ITA Tariff) to which the Respondents subscribe. (QCC Complaint, p. 12). Section 1.1 of the ITA Tariff states:

> [T]he provision of [switched access service] is specifically intended to provide exchange network access to [interexchange carriers delivering intrastate switched access traffic] for their own use or in furnishing their authorized intrastate services to End Users, and for operational purposes directly related to the furnishing of their authorized services. Operational purposes include testing and maintenance circuits, demonstration and experimental services and spare services.

(Id.). QCC claims that the revenue received by the Respondents is not being used for the purposes stated in the ITA Tariff. In addition, the Respondents are charging QCC for terminating calls via their intrastate tariffs for calls that are actually terminated outside of the Respondents' local calling areas as specified in their certificates issued pursuant to Iowa Code § 476.29. (Id. at 13).

QCC also alleged that the Respondents are unlawfully discriminating against their other customers when they share revenues on a preferential basis with the FCSC customers and that the arrangements between the Respondents and the

FCSCs constitute an unfair and unreasonable practice under Iowa Code § 476.5 and 199 IAC 22.1(1)"a" and "d." (Id. at 14).

On March 12, 2007, Reasnor filed a motion for summary judgment with the Board and sought dismissal from this case, stating that it provides legitimate access service to QCC and that the Board does not have the authority to regulate the rates of small ILECs such as Reasnor.

On March 30, 2007, Superior, Great Lakes, and Aventure filed a joint motion to dismiss alleging the Board lacks the jurisdiction to regulate the rates of small LECs and therefore lacks the jurisdiction to hear QCC's complaint.

Also on March 30, 2007, Farmers-Riceville, Farmers & Merchants, Interstate, and Dixon filed a joint motion to dismiss QCC's complaint, stating that the Board does not have jurisdiction over the rates that QCC is being charged by these LECs for terminating access.

On May 25, 2007, the Board issued an order denying Reasnor's motion for summary judgment and the other motions to dismiss, stating that there were genuine issues of material fact regarding the issues raised by QCC in its petition and by the Respondents' local and intrastate access service tariffs. The Board also determined that it has the authority to hear QCC's complaint as it relates to intrastate traffic.

On July 17, 2007, Reasnor filed an answer to QCC's complaint. As part of its answer, Reasnor made certain counterclaims against QCC, alleging: 1) unlawful self-help, 2) unlawful discrimination by revenue sharing and service discounts, and 3)

unreasonable practices. QCC responded to the counterclaims on August 7, 2007, and Reasnor amended its counterclaims on August 21, 2007, to add Qwest Corporation and its affiliates as respondents.[2]

AT&T Communications of the Midwest, Inc., and TCG Omaha (collectively AT&T) and Sprint Communications Company L.P. (Sprint) intervened on October 16 and October 19, 2007, respectively.

On November 15, 2007, the Board issued an order stating that the counterclaims against Qwest Corporation are improper in this case, but that the counterclaims against QCC are properly a part of this action.

Pursuant to the procedural schedule established and amended in this proceeding, QCC, Sprint, and AT&T filed their prepared direct testimony, with supporting exhibits and workpapers, on March 17, 2008. The Respondents filed their rebuttal testimony on or about September 15, 2008, and Qwest, Sprint, and AT&T filed their reply testimony on or about October 15, 2008.

A hearing to receive all pre-filed testimony and allow for the cross-examination of all witnesses was held February 5 through 12, 2009.

Initial briefs were filed by QCC, Sprint, AT&T, the Consumer Advocate Division of the Department of Justice (Consumer Advocate), and the Respondents on or about March 31, 2009. Reply briefs were filed on or about April 30, 2009.

---

[2] While Reasnor's initial counterclaims involved only QCC, as this case developed, Reasnor's counterclaims also included an unlawful self help claim against Sprint.

On August 17, 2009, after the Board's public meeting to discuss the decision in this case, Great Lakes and Superior filed a motion for stay of these proceedings based upon a petition filed with the FCC on August 14, 2009.

JURISDICTION

QCC filed its complaint pursuant to Iowa Code §§ 476.2, 476.3, and 476.5, 199 IAC chapters 4 and 7, and 199 IAC 22.14, alleging violations of the terms, conditions, and application of the Respondents' intrastate tariffs. QCC, Sprint, and AT&T (hereinafter collectively referred to as the interexchange carriers (IXCs)) argue that the Respondents failed to comply with the requirements of their intrastate access service tariffs in connection with the FCSCs and seek, in part, refunds of all switched access charges associated with the delivery of intrastate traffic to numbers or destinations associated with FCSCs.

The Respondents argue that their tariffs were properly applied to the FCSCs, that the IXCs must pay the intrastate switched access rates billed to them, and that the Board does not have the authority to regulate their access service rates.

The Board finds that it has the authority to interpret the LECs' intrastate access service tariffs, apply those terms to the facts of this case, as found by the Board after notice and hearing, and to order relief in the form of refunds, if appropriate.

Public utilities in Iowa, including LECs, are required to comply with the terms and conditions of their tariffs, pursuant to the first unnumbered paragraph of Iowa Code § 476.5:

> No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs, and no such public utility shall make or grant any unreasonable preferences or advantages as to rates or services to any person or subject any person to any unreasonable prejudice or disadvantage.

The Board finds that the LEC Respondents are public utilities "subject to rate regulation" for purposes of this case. Iowa Code § 476.11 states, in relevant part, that

> Whenever toll connection between the lines or facilities of two or more telephone companies has been made, or is demanded under the statutes of this state and the companies concerned cannot agree as to the terms and procedures under which toll communications shall be interchanged, the board upon complaint in writing, after hearing had upon reasonable notice, shall determine such terms and procedures.

When a complaint between two or more telephone companies is filed with the Board, the Board has the authority under § 476.11 to determine the terms and procedures under which toll communications is interchanged. Since one of the terms of interconnection is the rate charged for certain services, such as access services, the Board has the authority to regulate those rates.[3] Thus, the Respondents are

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[3] See Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co., 165 N.W.2d 771, 775 (Iowa 1969), holding that the Board's authority over "terms and procedures" pursuant to § 490A.11 includes financial matters. Section 490A.11 was re-numbered as § 476.11 in 1976.

public utilities "subject to rate regulation" because the Board has the authority to regulate their access service rates. As such, the Respondents are required to comply with the terms and conditions of their tariffs as set forth in Iowa Code § 476.5.

Moreover, pursuant to Iowa Code § 476.3(1), the Board has the statutory authority to review a public utility's activities, interpret the language of the tariff, and apply that language to the facts to determine whether the utility has complied with the terms and conditions of its tariff. Specifically, the last sentence of that section provides:

> When the board, after a hearing held after reasonable notice, finds a public utility's rates, charges, schedules, service, or regulations are unjust, unreasonable, discriminatory, or otherwise in violation of any provision of law, the board shall determine just, reasonable, and nondiscriminatory rates, charges, schedules, service, or regulations to be observed and enforced.[4]

Accordingly, the Board finds that the Respondents are public utilities subject to rate regulation, pursuant to § 476.11, and as such are required to comply with the terms and conditions of their tariffs, pursuant to § 476.5. The Board also finds that it

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[4] The original language of this section said that the Board "shall determine just, reasonable ... regulations to be *thereafter* observed and enforced." (Emphasis added.) The courts interpreted this language to mean that the agency could grant prospective relief only, that is, the Board could not order refunds. Oliver v. Iowa Power and Light Co., 183 N.W.2d 687 (Iowa 1971). The result was that a customer who was aggrieved by a public utility's unreasonable tariff interpretation could come to the Board (then named the Iowa State Commerce Commission) for future relief, but had to maintain a separate action in a court in order to seek refunds or other reparations.

In 1981, the statute was amended to remove the word "thereafter" from the last sentence, as well as to make some other grammatical changes. 1981 Iowa Acts ch. 156, § 5. The courts found this to be a substantive change, Mid-Iowa Community Action v. Iowa State Commerce Comm'n, 421 N.W.2d 899 (Iowa 1988) and concluded that the agency now has the authority to investigate complaints regarding the reasonableness of a utility's regulated activities and, in appropriate cases, order refunds.

has the jurisdiction and authority to assess the Respondents' interconnections with the IXCs, pursuant to § 476.11, interpret their tariffs, apply the terms of their tariffs to the facts in this case, as found by the Board after notice and hearing, and to order refunds, if appropriate, pursuant to § 476.3, and act to ensure fair competition in the public interest, pursuant to 199 IAC 22.1(1).

STATEMENT REGARDING CONFIDENTIAL RECORDS

The parties to this case entered into protective agreements as a part of the discovery process. Pursuant to these agreements, the Board has received a substantial amount of the evidence as confidential filings, pursuant to Board rule 199 IAC 1.9. The Board has considered all of the evidence in the record in reaching its decision, but in recognition of the parties' protective agreements, this order will not reveal the specifics of any evidence submitted as confidential. Nonetheless, the Board relies on that evidence as part of the basis for this decision and the confidential exhibits and testimony will be referred to and characterized as necessary.

The Board has issued a number of orders in this matter granting confidential treatment to various documents and the information contained therein. These orders are based entirely on the protective agreements and the representations of the party who asserts the information is confidential. The parties are reminded that pursuant to 199 IAC 1.9, if any person should request to inspect any of that information, the Board will give notice to the interested parties and withhold the information from

public inspection for 14 days to allow the party who claims confidentiality to seek injunctive relief. In any such proceeding, the burden will be on the party claiming confidentiality to prove that the information is exempt from public disclosure pursuant to Iowa Code § 22.7. Otherwise, the information will be made available to the public pursuant to § 22.2.

ISSUES

This case is best divided into three separate categories for consideration. The first category consists of the alleged tariff violations, the central issue of which is whether the FCSCs are considered end users under the terms of the Respondents' applicable tariffs. This tariff category focuses primarily on the past actions of the parties.

The second category pertains to public interest issues where the IXCs ask the Board to put measures into place that will deter or halt the access pumping schemes that are at issue in this complaint. These issues primarily address prospective matters.

The third category pertains to the counterclaims raised by Reasnor against QCC and Sprint.

This order will address each category individually and will analyze the relevant sub-issues associated with each issue in the appropriate section.

TARIFF ISSUES

I. Whether the Respondents Violated the Terms of Their Access Tariffs When They Charged Terminating Switched Access Fees for the Intrastate Toll Traffic at Issue.

The IXCs assert that the Respondents' intrastate access services tariffs do not allow them to charge terminating switched access fees for any of the traffic to the telephone numbers assigned to the FCSCs. (QCC Initial Brief, pp. 16-17). The IXCs and Consumer Advocate request that the Board order the Respondents to refund to the IXCs all of the intrastate charges that were paid and credit the IXCs for all charges that were not paid. (Id. at 107; Sprint Initial Brief, p. 45; AT&T Initial Brief, p. 36; Consumer Advocate Initial Brief, pp. 4-5).

Most of the Respondents concur in the language of the ITA Tariff for switched access service for intrastate traffic, which incorporates many terms from the interstate access tariff filed with the FCC. (QCC Complaint, p. 12). In fact, all of the Respondents' access tariffs have adopted the terms, conditions, and definitions in the NECA interstate access tariff with respect to their intrastate switched access service.[5] Therefore, the Board will review the language used for interstate purposes in conjunction with the Respondents' intrastate tariffs and will consequently make

[5] See Exhibit 3, ITA Tariff No. 1, Section 1.1 ("The regulations, rates and charges applicable to the provision of the Carrier Common Line, Switched Access and Special Access Services, and other miscellaneous services, hereinafter referred to collectively as service(s), provided by the Local Exchange Utility, herein after referred to as the Company, to Intrastate Customers, hereinafter referred to as IC's, are the same as those filed in the Exchange Carrier Association Tariff F.C.C. No. 5 with the exceptions listed herein"). (Emphasis added.) No relevant exceptions are listed.

reference to the NECA tariff. The Board's analysis, however, is limited to the intrastate application of that language.

The NECA interstate access tariff outlines the provision of switched access service by the LEC to an end user as follows:

> Switched Access Service, which is available to customers for their use in furnishing their services to end users, provides a two-point communications path between a customer designated premises and an end user's premises. It provides for the use of common terminating, switching, and trunking facilities and for the use of common subscriber plant of the Telephone Company. **Switched Access Service provides for the ability to *originate calls from an end user's premises to a* customer designated premises, and to terminate calls from a customer designated premises to an end user's premises in the LATA where it is provided.**

(Exhibit 35, Section 6.1, emphasis added).

This provision identifies three requirements relevant to this proceeding that must be met in order for intrastate access charges to be applied to toll traffic:

1. Calls must be delivered to an end user of the LEC's local exchange tariffs;
2. Calls must terminate at the end user's premises; and
3. Calls must terminate in the LEC's certificated local exchange area.

The Board emphasizes, and it is not disputed, that all three of these requirements must be met before a local exchange carrier can assess switched access charges to intrastate toll traffic directed to a particular telephone number.

Even though failure to meet just one of these requirements prohibits the Respondents from assessing switched access charges, the Board will apply the facts of this case to all three requirements, whether the Respondents meet the requirements or not.

The IXCs argue that the FCSC conferencing traffic associated with all eight Respondents in this case failed to meet the first two requirements and that Farmers-Riceville, Superior, Great Lakes, Aventure, Interstate, and Reasnor failed to meet the third requirement because they terminated traffic in exchanges where they do not have authorization to provide service pursuant to Iowa Code § 476.29. (QCC Initial Brief, pp. 4-5; AT&T Initial Brief, pp. 11, 21-22; Sprint Initial Brief, p. 11).

All of the Respondents argue that they entered into special service agreements with FCSCs whereby those companies became customers of the individual LECs, located certain equipment in the LECs' central offices, and provided marketing services to generate toll traffic to the LECs' exchanges. (Tr. 1835-38, 1886-87, 1986-90, 2181-82). The Respondents assert that in exchange for those marketing services, the LECs provided local exchange services and agreed to pay a marketing fee based upon the terminating toll traffic that was generated. (Id.). The Respondents contend that these relationships are permitted under their tariffs and existing law. (Id.).

A. Whether the FCSCs are End User Customers of the Respondents.

The primary question regarding the alleged tariff violations is whether the FCSCs are considered end users as defined by the Respondents' tariffs. If the FCSCs are not end users, then the intrastate toll traffic sent to the LECs and terminated to the FCSCs is not subject to switched access charges.

The NECA tariff outlines the provision of access service by the LEC to the end user as follows:

> The Telephone Company will provide End User Access Service (End User Access) **to end users who obtain local exchange service from the Telephone Company under its general and/or local exchange tariffs**.

(Exhibit 523, Section 4, emphasis added). This condition must be met if an entity is to be considered an end user under the Respondents' switched access tariffs.

1. Whether the FCSCs subscribed to services of the Respondents' access or local exchange tariffs.

IXCs' Position

The IXCs assert that the FCSCs did not subscribe to the services of the Respondents' access tariff as is required by the language of the tariff. (QCC Initial Brief, p. 18). In particular, QCC argues that none of the Respondents charged or expected payment for local exchange service and therefore the FCSCs could not have subscribed to service. (Id. at 20-21). QCC states that none of the Respondents issued a timely invoice for local exchange service to a FCSC and that despite having relationships with more than 30 FCSCs, none of the Respondents issued an invoice

for services until 2007, when four of the Respondents issued backdated invoices after the initiation of this proceeding. (Id. at 22). QCC alleges that some Respondents also attempted to retroactively amend their agreements with the FCSCs, in an attempt to restate the arrangement in a manner more favorable to their case.[6] (Id. at 29-31). The amendments were drafted to give the appearance they were executed long before they were actually created. (Id.).

QCC asserts that six of the Respondents claim they netted the charges for local exchange service against the amounts the Respondents paid to the FCSCs.[7] According to QCC, there is no documentary evidence in the record to support that claim. (QCC Initial Brief, p. 25). QCC claims that if netting had taken place, the Respondents' accounting records would have shown it, but there are no documents in the record that suggest any of the eight Respondents actually engaged in a financial netting process. (Id.).

Respondents' Position

The Respondents contend that the FCSCs paid for local service, but that the FCSCs were billed in non-standard ways. (ILEC Group[8] Initial Brief, pp. 22-23; Reasnor Initial Brief, pp. 10-13; Aventure Initial Brief, p. 3). The Respondents claim

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[6] The Board considered additional detailed evidence on this issue found in the confidential record in this case, specifically at Confidential Exhibits 49 and 1356, and Tr. 2056, 2060-61, 2073-74, 2078-80.
[7] Qwest Initial Brief, p. 25, stating that only Aventure and Reasnor claim not to have netted local exchange payments. However, Aventure states on page 5 of its initial brief that in some instances, Aventure used the concept of netting.
[8] The ILEC Group consists of The Farmers Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; and Dixon Telephone Company.

that charges for local services were factored into the negotiated marketing fees with the FCSCs. (Id.). The Respondents assert that their failure to bill for local services does not mean that the FCSCs were not local service customers. (Id.). According to the Respondents, when a customer receives local service from a LEC, the customer is required to pay the tariffed rate for those services, but payment need not be in cash; payment can be made through an offset or bartering. (ILEC Group Initial Brief, pp. 22-23).

The Respondents assert that the backdating of bills is a normal business practice and is allowed by Board rule 199 IAC 22.4(3)"k," which allows a utility to back bill a customer for under-charges for a period not to exceed five years. (Id. at 33-40). The Respondents also state that it is a legitimate practice for two parties to agree to an effective date for a contract that is earlier than the date the contract is executed. (Id.). As such, the Respondents claim that the backdating of the bills and contract amendments in this case was legitimate and was not deceptive, as QCC contends. (Id.).

Some of the Respondents point to the terms of two contracts between FCSCs and the LECs to demonstrate that the FCSCs subscribed to the LECs' tariffed services. (Id. at 20). These Respondents contend that throughout the first contract, the FCSC is referred to as "Customer" and that the contract specifically states that the LEC agrees to provide the customer with certain telecommunications services and those services shall be subject to the terms and conditions of the LEC's tariffs.

(Id.). These Respondents state that the second contract requires that the LEC provide local service to the FCSC and that the FCSC will be the LEC's sole customer of record for those services. (Id. at 20). The Respondents argue that the language of these contracts indicates that the Respondents always considered the FCSCs to be end user customers. (Id.).

The Respondents also argue that they are within their rights to provide local exchange service to FCSCs outside the standard terms of their tariffs. (See e.g., Aventure Initial Brief, p. 3). Generally, the Respondents assert that when the FCSCs signed contracts with the Respondents, they effectively entered their names upon the records of the LECs and subscribed to tariffed services. (Id., ILEC Group Initial Brief, pp. 22-24).

Some of the Respondents acknowledge that they have made no attempt to collect payments from the FCSCs for the local services they allegedly provided. (ILEC Group Initial Brief, pp. 22-24). They state that their lack of action in collecting payment is due to the fact they were unlikely to receive payment from the FCSCs and these Respondents state that they do not want to engage in additional litigation with little or no prospect of benefit. (Id.).

Aventure specifically responds to the allegation that the FCSCs associated with Aventure did not subscribe to local service by stating that it entered into written agreements with FCSCs and paid them a marketing fee from the access charges it received for terminating calls. (Aventure Initial Brief, pp. 5, 12). Aventure states that

under those agreements, Aventure permitted its FCSC customers to co-locate conference bridges and Voice-over Internet Protocol (VoIP) gateways at Aventure's central office in Salix, Iowa. (Id. at 2-3). Aventure states that it billed the FCSCs $5 per line and that while it has not been paid by its FCSC customers, Aventure contends that it expects to be paid and has paid sales tax on those receivables. (Id. at 3, Exhibits 625 -26). Aventure states that it has reported the unpaid revenue to the FCC for purposes of USF payment. (Aventure Reply Brief, p. 4).

Analysis

Based on the evidence in the record, the Board finds that the FCSCs did not subscribe to the services in the Respondents' access and local exchange tariffs and therefore are not end users of the Respondents. Typically, when an end user customer obtains local exchange service, that service includes subscription to the access tariffs. This is because the access tariffs include charges that are billed on the local exchange invoice, including an end user common line (EUCL) charge and a federal USF charge. Therefore, when a customer pays a LEC's invoice, the customer proves that it has obtained local exchange service and that it has subscribed for access service. As long as that customer is not a carrier, that customer would be considered an end user under the access tariff.

The Board finds that the lack of timely, legitimate billing for tariffed services by the Respondents demonstrates that the FCSCs did not actually subscribe to a billable tariffed service. Moreover, there is convincing evidence in the record that the

Respondents did not intend to bill the FCSCs for any services under their tariffs, as required in order for intrastate access charges to apply.[9] Specifically, the Respondents did not comply with the billing requirements of their tariffs when they did not send the FCSCs monthly local exchange invoices (Exhibit 1355), they did not bill the FCSCs the EUCL on any invoices (Exhibit 1355), they did not bill the FCSCs a federal USF charge on any invoices (Exhibit 1355),[10] and they did not bill the FCSCs for ISDN Line Ports, ISDN BRI arrangements, or ISDN PRI arrangements on any invoices (Exhibit 1355).

Net Billing

The Respondents' "net billing" argument is not supported by the evidence. The Respondents claimed that the FCSCs subscribed to and were billed for tariffed services, but the FCSCs were billed in non-standard ways, such as net billing the cost for local service against the negotiated marketing fee. (ILEC Group Initial Brief, pp. 22-23; Reasnor Initial Brief, pp. 10-13; Aventure Initial Brief, p. 3). Despite the substantial amount of supporting documents, exhibits, and workpapers that have been produced in this case, there is no written evidence supporting the Respondents' assertion that they netted charges to the FCSCs. The Respondents were unable to produce invoices or any written correspondence to support their claim that the cost of subscribing to the Respondents' tariffs was offset by the FCSCs' marketing fees (or

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[9] The Board has considered additional detailed evidence on this issue in the confidential portion of the record at Confidential Exhibit 1, Confidential Tr. 963, 1373-74, 1901-04.
[10] The Board notes that three of the Respondents are exempt from this billing requirement. (Confidential Tr. 67).

any other fees). (Tr. 1893). As a practical matter, had net billing occurred or been contemplated when these business arrangements were entered into, at least one of the Respondents' accounting records would reflect it. Without exception, they do not.

With respect to Aventure's assertion that it specifically charged the FCSCs associated with Aventure a $5 per line, per month fee, QCC provided convincing evidence that the invoices created by Aventure were never sent to the FCSCs. (QCC Initial Brief, pp. 40-41). Instead, they were sent to an intermediary broker and Aventure did not receive payment on any of those invoices. (Tr. 2292-93; Exhibit 1381). Further, there is no evidence that Aventure took any action to attempt to collect on the invoices. It is not clear when Aventure sent the invoices for this untariffed rate, but they were not legitimate bills for which Aventure expected to be paid.[11]

Backdating

QCC argues that after it filed its complaint with the Board in February 2007, and filed the complaint against Farmers & Merchants with the FCC in May 2007, Reasnor, Farmers & Merchants, Dixon, and Interstate created backdated contract amendments and invoices in an attempt to conceal the fact that the conferencing companies were not local exchange customers or end users. (QCC Initial Brief, p. 27; Confidential Exhibit 1356, Tab 6). QCC contends that these LECs attempted to change the terms of their contracts with the FCSCs in a deceptive effort to make it

[11] The Board has considered additional detailed evidence on this point found in the confidential portion of the record at Confidential Exhibit 1381.

appear that the FCSCs had always been treated as end users that subscribed to the local exchange tariffs. (QCC Initial Brief, p. 27).

The Respondents' offer of amended agreements and backdated bills was unpersuasive and disturbing. The Respondents were unable to offer any evidence that the contract amendments reflected the original intent of the parties; rather, there is evidence that the backdated contract amendments altered (or attempted to alter) the terms of the contracts, in some cases years after the relationship terminated. For example, some of the FCSCs refused to execute the amendments, despite the pleas of the Respondents, because they would have changed the original deal to the disadvantage of the FCSCs. (Id. at 30; Confidential Exhibit 1356). Instead of supporting the Respondents' case, the backdated bills and contract amendments used by the Respondents in this case are evidence against them. They show that the Respondents knew they had not served the FCSCs as required by their tariffs, leading to this belated attempt to create new arrangements and hide the deficiencies of the previous arrangements.[12]

QCC's claims that the backdated bills and amendments were created to deceive QCC and federal and state regulators are particularly troubling. The FCC issued an order on October 2, 2007, in QCC's complaint against Farmers &

[12] The Board has considered additional detailed evidence on this issue found in the confidential portion of the record found in Confidential Exhibit 1356.

Merchants that is relevant to this question.[13] As part of that order, the FCC determined that the FCSCs doing business with Farmers & Merchants were considered end users as that term is defined in Farmers & Merchants' tariff.[14] In that October 2 order, the FCC concluded that since the FCSCs were end users of Farmers & Merchants, then access charges for the termination of interstate traffic to the FCSCs were legally permissible, even if they were not contemplated at the time the tariffs were approved.[15]

QCC contends that the FCC reached this conclusion in part by relying on backdated documents that were submitted to the FCC during that proceeding. (QCC Initial Brief, p. 31). The FCC agreed with QCC's contention when it issued an order on January 29, 2008,[16] agreeing to reconsider its October 2 decision after QCC identified evidence of the relationship between Farmers & Merchants and FCSCs that "should have been produced in the underlying proceeding."[17] Specifically, the FCC stated:

> When we ruled on whether Farmers properly charged Qwest terminating access to the conference calling companies, a key issue was whether those companies were "end users." That question, in turn, depended on whether the companies were customers that "subscribed to the services offered under [Farmers'] tariff." We found

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[13] *In the Matter of Qwest Communications Corp. vs. Farmers & Merchants*, "Memorandum Opinion and Order," FCC 07-175, File No. EB-07-MD-001 (released October 2, 2007) (hereinafter referred to as "October 2 Order").
[14] October 2 Order, ¶ 35.
[15] Id.
[16] *In the Matter of Qwest Communications Corp. vs. Farmers & Merchants*, "Order on Reconsideration," FCC 08-29, File No. EB-07-MD-001 (released January 29, 2008) (hereinafter referred to as "January 29 Order").
[17] See January 29 Order, ¶ 7.

> that the conference calling companies did subscribe to the services under Farmers' tariff based on Farmers' representation that they purchased interstate End User Access Service and paid the federal subscriber line charge. Qwest now calls that representation into question, however, by pointing out that Farmers' invoices to, and agreements with, the conference calling companies were backdated. In fact, Qwest suggests that this backdating may have occurred after the legality of Farmers' access charges was called into question.

(See January 29 Order, ¶ 7).

While the FCC has not made a final ruling in the Farmers & Merchants proceeding, it is clear that the FCC's order granting reconsideration hinges on a review of the documents that were backdated and "bear no indication that they were backdated." (Id. at ¶ 9).

The Respondents' assertion that backdating bills is a common industry practice that is sanctioned by the Board is inapplicable here. Proper backdating of invoices generally requires identifying the date when the invoice was issued and includes the dates for which the back billing is effective. The result is a clear record showing what happened and why. This was not the way backdating was implemented by any of the eight Respondents in this case. Here, the Respondents' invoices gave the appearance of having been created contemporaneously with the provision of service, despite having been created much later, sometimes years after the service was rendered.

The Board views this practice as an attempt by the four Respondents engaging in backdating to manufacture evidence, after the fact, to make the

transaction look like something that was not contemplated by the Respondents or the FCSCs when they first entered into these arrangements. The effort reflects badly on those Respondents and the credibility of their cases.

Special Contract Arrangements

The Respondents also contend that it is an acceptable practice to provide local exchange service to the FCSCs outside the standard terms of their tariffs through special contract arrangements. (Aventure Initial Brief, p. 3; ILEC Group Initial Brief, pp. 22-24). Aventure, for example, says it offered "Special Contract Arrangements" to "Customers." However, Aventure's tariff limits the availability of special contracts to "customers," and the definition of the term "customer" in Aventure's access tariff provides that "in most cases, the Customer is an Interexchange Carrier utilizing the Company's Switched or Dedicated Access services described in this tariff to reach its End User customer(s)." (Exhibit 612). Moreover, the definition of "end user" in Aventure's interstate access tariff provides that "in many contexts, the End User is the customer of an Interexchange Carrier who in turn uses the Company's Switched or Dedicated Access services." (Id.).

Thus, the language of Aventure's access tariff only contemplates Aventure's offering of special contract arrangements to its IXC customers, who in turn use Aventure's switched access service to reach end users. Aventure's interpretation of this language as allowing it to make special contract arrangements with FCSCs ignores the distinction between the IXCs and end users.

Contracts as Subscriptions

Other Respondents assert that it does not matter whether the FCSCs were billed for service or whether a LEC charged or collected a specific fee or tax. (ILEC Group, pp. 22-24). Those Respondents argue that when the FCSCs signed contracts with the LECs, they entered their names upon the records of the LECs and therefore subscribed to service. (Id.; Aventure Initial Brief, p. 3). These Respondents look to the FCC's October 2, 2007, order to support this argument. (Id.). In the October 2 Order, the FCC stated that "[t]he record shows that the conference calling companies did subscribe, *i.e.*, enter their names for, Farmers' tariffed services." (Exhibit 703, ¶ 38; October 2 Order). However, in reaching its determination, the FCC assumed that in addition to subscribing for service, the FCSCs also paid for that service. (Exhibit 703, ¶ 38, pp. 15-16). The FCC emphasized the need for payment of services in its January 29 Order granting reconsideration:

> When we ruled on whether Farmers properly charged Qwest terminating access to the conference calling companies, a key issue was whether those companies were 'end users.' That question, in turn, depended on whether the companies were customers that 'subscribe[d] to the services offered under [Farmers'] tariff.' We found that the conference calling companies did subscribe to services under Farmer's tariff based on Farmers' representation that they purchased interstate End User Access Service **and paid the federal subscriber line charge.**

(See, January 29 Order, ¶ 7; emphasis added).

The Respondents' assertion that payment for service is not a necessary component of status as an end user is contradicted by this language. Part of subscription to services includes being billed for and paying for that service. The Respondents' assertion to the contrary is not persuasive.

Partners or Customers

The IXCs argue that the FCSCs are actually business partners of the Respondents and not end users. (QCC Initial Brief, pp. 41-45). The Respondents respond that the FCSCs are not partners because the primary indicator of a partnership is the right to share profits and the obligation to share losses. (ILEC Group Initial Brief, p. 24). It is not disputed in this case that the Respondents shared a portion of their access revenues with the FCSCs, pursuant to contract.

The Respondents assert that in *AT&T vs. Jefferson*,[18] the FCC determined that the sharing of access revenue with customers is an acceptable practice and does not automatically make the FCSCs business partners, as the IXCs suggest. In *Jefferson*, however, the FCC emphasized the narrowness of its holding, stating that

> [w]e find simply that, based on the specific facts and arguments presented here, AT&T has failed to demonstrate that Jefferson violated its duty as a common carrier or section 202(a) by entering into an access revenue-sharing agreement with an end-user information provider. We express no view on whether a different record could have demonstrated that the revenue-sharing agreement at issue in this complaint (or other revenue-sharing agreements between LECs and end user

[18] *In the Matter of AT&T Corp. v. Jefferson Tel. Co.*, "Memorandum Opinion and Order," 16 F.C.C.R. 16130, 16 FCC Rcd. 16130, FCC 01-243 (rel. August 31, 2001).

> customers) ran afoul of sections 201(b), 202(a), or other statutory or regulatory requirements.

(*Jefferson*, ¶ 16).

Like the FCC, this Board will not find that sharing access revenue with true end users is always reasonable or unreasonable. That is a case-specific determination to be made based on the record of each case. Here, the Board finds that the total amount of access revenue that the Respondents kept for themselves was sufficient to cover the Respondents' total costs of terminating calls plus some amount of profit. If that were not the case, there would be no incentive for a LEC to enter into a contract with an FCSC. Thus, the Board concludes that the FCSCs and the LECs were sharing profits.

The record also shows that some agreements entered into between the Respondents and FCSCs provide for the Respondents sharing access revenues with FCSCs only if the IXCs paid the Respondents' access invoices. (ILEC Group Initial Brief, pp. 24-25; Tr. 1142-43; Exhibit 915). If a LEC was not paid by the IXC for terminating calls to an FCSC, that LEC would not recover its costs of terminating those calls and the LEC and FCSC would each experience a loss of profit. Since the FCSCs contracted to share the profits and the losses with the Respondents, this arrangement satisfies the Respondents' definition of "partnership" and supports the IXCs' argument that the FCSCs in this case were acting as business partners rather than end users.

Filed Tariff Doctrine

Finally, the Respondents argue that the filed tariff doctrine should allow them to go back and apply the terms of the tariff to the FCSCs, but this argument misses the point. The FCSCs were not end users of the Respondents under the tariffs and therefore the tariffs do not apply to these calls.

Conclusion

For the reasons outlined above, the Board finds that the FCSCs are not end users of the Respondents for purposes of the intrastate access tariffs. The FCSCs did not subscribe to the Respondents' access or local service tariffs and the FCSCs did not expect to pay for and did not pay for any of the Respondents' local exchange service offerings. The record does not support the Respondents' argument that they net billed the FCSCs for tariffed services and the Respondents' offer of amended contract agreements and backdated bills was unpersuasive, to say the least. The Board also finds that the Respondents treated the FCSCs more like business partners than end user customers by sharing profits and losses with them.

Moreover, the Board finds that the acts of some of the Respondents regarding backdating of bills and contract amendments to make the contracts and bills look like they were older was an abuse of a generally-accepted practice. The backdated documents were created to conceal truths from the FCC and this Board, calling into question the credibility of all of the testimony and supporting documents attributed to those Respondents.

2. Whether Calls Terminated at the End User's Premises.

As stated earlier, the tariff provision regarding switched access service identifies three requirements that must be met in order for intrastate access charges to be applied to toll traffic. The three requirements are as follows:

1. Calls must be delivered to an end user of the LEC's local exchange tariffs;
2. Calls must terminate at the end user's premises; and
3. Calls must terminate in the LEC's certificated local exchange area.

It is not disputed that all three of these requirements must be met before a local exchange carrier can assess switched access charges to intrastate toll traffic.

In the previous section, the Board determined that the FCSCs in this case were not end users of the Respondents, so the Respondents did not comply with the requirements of the tariff for the application of intrastate access charges. However, the Board will also consider whether the Respondents complied with the remaining requirements for the application of intrastate access charges.

IXC's Position

The Respondents' intrastate access tariff requires that the calls must terminate at an end user's premises. (Exhibit 35; NECA No. 5 § 6.1). QCC points out that the Respondents' intrastate access tariff employs the following definition of the term "premises":

> The term "premises" denotes a building or buildings on contiguous property (except Railroad Right-of-Way, etc.) not separated by a public highway.

(Exhibit 35 (NECA tariff at § 2.6); QCC Initial Brief, p. 46).

QCC asserts that all of the FCSCs' conferencing equipment was located in the Respondents' central offices; none of the FCSCs owned, leased, or had any recognizable property rights in those offices or sole control of equipment in those buildings. (QCC Initial Brief, p. 47; Confidential Transcript, pp. 870-71). QCC argues that without recognizable property rights, the FCSCs cannot meet the definition of the term "premises" as set forth in the Respondents' intrastate access tariffs. (QCC Initial Brief, pp. 47-48; Tr. 864-65).

Respondents' Position

The Respondents argue that the tariff language defines customer premise equipment as being either "terminal equipment located on the customer's premise owned by the customer or owned by the telephone utility or some other supplier and leased to the customer" or "equipment located on the customer's premise owned by the customer." (ILEC Group Initial Brief, p. 26). The Respondents assert that QCC and the IXCs are wrongfully claiming that the space that is the customer premise must be owned or leased by the customer. (Id.). In addition, the Respondents point to the definition of "premises" contained in the companies' local exchange tariffs:

> The space occupied by an individual customer in a building, in adjoining buildings, or on contiguous property, including property separated only by public thoroughfare, a railroad right-of-way, or natural barrier.

(Id. at 27; Exhibit 38). The Respondents argue that this language supports their assertion that there is not an ownership or lease requirement by the customer in order to define a customer's premise; it is sufficient if the customer occupies the space. (ILEC Group Initial Brief, p. 27).

The Respondents also make the same net billing argument that they made regarding the subscription for tariffed services. Specifically, the Respondents claim that the FCSCs effectively made lease payments for their space, which were netted out of the payments from the Respondents to the FCSCs.

Analysis

The Respondents generally rely upon the definitions of premises and customer premises equipment found in their local exchange tariffs. However, this complaint specifically pertains to whether IXCs must pay switched access charges on intrastate toll traffic that is delivered to the FCSCs. Therefore, the terms of the switched access tariffs govern and the terms and conditions from the Respondents' local exchange tariffs are not directly applicable in this case.

The requirement of an end user's premises is found in the term "Switched Access Service":

> Switched Access Service, which is available to customers for their use in furnishing their services to end users, provides a two-point communications path between a customer designated premises and an end-user's premises. It provides for the use of common terminating, switching, and trunking facilities and for the use of common subscriber plant of the Telephone Company. Switched Access Service provides for the ability to

> originate calls from an end user's premises to a customer designated premises, and to terminate calls from a customer designated premises to an end-user's premises.

(Exhibit 523 § 6.1). This definition describes two different premises involved in the provision of switched access service: the customer (IXC) designated premises and the end user's premises. There is no dispute in this case about the meaning of the term "customer designated premises" as being the demarcation between the telephone company and the IXC customer. (Exhibit 523 § 6.1.3).

The term "end user's premises," while not specifically defined in the tariff, generally denotes a building or buildings that is owned, leased, or otherwise controlled by the end user. (Exhibit 35 (NECA Tariff § 2.6.1)). "End user's premises" could also mean a collocation arrangement where the end user pays for floor space or power in a LEC's central office and has exclusive access or control over that space. (Tr. 541). Generally, in such a collocation arrangement, the end user's equipment or facilities are separate from that of the LEC and are under the control or ownership of the end user; for example, the equipment is locked in a caged area where the end user is the only entity with access to the area. There is no evidence in the record demonstrating that the FCSCs paid any of the Respondents for collocation or that the equipment was segregated in the manner described in any of the Respondents' facilities.

As discussed in the previous section, the evidence in this case supports the conclusion that the services provided by the Respondents to the FCSCs were

provided at no charge and without expectation of payment and that the FCSCs had a business partnership with the Respondents. This conclusion is further supported by the fact that it was the Respondents who possessed and controlled the space where the FCSCs' equipment was housed and where the traffic terminated. Based on the evidence in this record, the conferencing traffic terminated at the Respondents' premises, rather than at an end user's premises.

The Board is not persuaded by the Respondents' assertion that the FCSCs' ownership of the actual conference call bridges and other equipment satisfies this criterion. This issue is whether the FCSCs own or control the premises, defined by the tariff as the buildings and not the equipment, and there is insufficient evidence in the record to conclude that they did.

With respect to the Respondents' net billing argument, that is, that the lease payments for the space were netted out of the payments from the Respondents to the FCSCs, the Respondents have not identified any persuasive documentary evidence in the record to support that argument. Specifically, there are no timely written agreements reflecting the alleged netting arrangements, there are no accounting records to support the netting argument, and there are no monthly billings that document any lease payments were actually netted against the FCSCs' share of the intrastate access revenues. The FCSCs' share was a percentage of the revenues; it is not credible to believe that the lease payments were intended to vary with the revenues when the amount of space was fixed.

For the reasons identified above, the Board finds that the intrastate toll traffic was not terminated at the end user's premises in a manner that satisfies the requirements of the Respondents' access service tariffs.

3. Whether the Toll Traffic Terminated Within the Respondents' Certificated Local Exchange Areas.

Having previously discussed the first two requirements for the assessment of terminating access charges, the third provision of switched access service identified in the Respondents' tariffs and relevant to this case is that terminating access charges can only be assessed for calls that terminate in the Respondents' certificated local exchange service area. The Respondents are not all equally affected by this issue; the facts vary from one company to another. This section will address each variation of facts separately.

a. Whether International, Calling Card, and Prerecorded Playback Calls Terminate Within the Respondents' Certificated Local Exchange Area.

IXCs' Position

QCC asserts that Aventure, Farmers–Riceville, Great Lakes, Interstate, and Superior had relationships with FCSCs that included one or more of the following kinds of calls: international, calling card, and prerecorded playback calls. (QCC Initial Brief, p. 49). QCC and AT&T contend that these kinds of calls did not terminate in these Respondents' local exchange areas. (Id.; AT&T Initial Brief, p. 25). QCC claims that the FCC has generally used an "end-to-end" analysis to determine where a call terminates concluding that termination of a call occurs in the geographic

location of the called party, not at points along the route of the call.[19] (Id. at 47). The IXCs argue that with these types of calls, the termination is at a location away from the Respondents' certificated local exchange area and therefore, intrastate terminating access charges do not apply to these calls. (Id. at 47-48).

Respondents' Position

The Respondents contend that the international calls at issue are similar to a call-forwarding scenario. (ILEC Group Initial Brief, p. 30). The Respondents assert that in a call-forwarding situation, there is no question that access charges apply; there is an originating and terminating access charge applicable to the first call and an originating and terminating access charge applicable to the second call. (Id.). For these international calls, the calling party dials a number provided by the FCSC, then enters the international telephone number of the called party. (Id. at 29-30). In these international calls, the Respondents claim that the FCSC takes all responsibility for originating the second call over the Internet to the international location and the IXC's portion of the call terminates at the FCSC, which is located in the Respondents' certificated local exchange area. (Id. at 30).

Calling card calls and calls to prerecorded playback systems are processed in a similar manner. The calling party dials the FCSC's telephone number, then dials additional numbers to specify the desired final endpoint.

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[19] October 2 Order, citing Bell Atlantic Tel. Cos.v. FCC, 206 F.3d 1 (D.C. Cir. 2000).

Analysis

The record supports the conclusion that the international, calling card, and prerecorded playback calls described in this complaint were not subject to intrastate terminating access charges because the calls did not terminate in the Respondents' exchanges. The record reflects that Aventure, Farmers-Riceville, Great Lakes, Interstate, and Superior had business relationships with FCSCs that helped to complete these types of calls. The calls were delivered to a router in one of these Respondents' central offices. The calls were then converted from a traditional voice call to a VoIP call and the call would be forwarded to its ultimate destination, far from these Respondents' local service areas and often to an international location. (QCC Initial Brief, p. 49).

The end-to-end analysis used by the FCC requires that termination occurs in the geographic location of the called party and does not depend on the intermediate route or intermediate events that occur in the process of the call going to its final destination.[20] This analysis applies to the international and calling card calls at issue in this case. In each case, the called party is not the FCSC; it is a person or business located somewhere other than the Respondents' exchanges. Therefore, these calls are not subject to intrastate terminating switched access charges in Iowa.

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[20] See AT&T Co. v. FCC, 454 F.3d 329 (D.C. Cir. 2006).

The Board also finds that this end-to-end analysis applies to pre-recorded playback calling. A pre-recorded playback call involves a conference call that is recorded and stored on a server in some location and when callers reach the conference bridge, the bridge calls out to the recording server in another location and connects the callers to that server. A proper end-to-end analysis regarding these calls demonstrates that these calls did not end in the exchange where the conference bridge was located, but rather in an alternative location where the recording server is located. There is no evidence in this record that the recording servers were in the Respondents' local exchange area. Therefore, intrastate terminating access charges should not have been assessed on these calls as if they were completed in a Respondent's exchange.

b. Whether Laundered Traffic Terminated Within the LEC's Certificated Local Exchange Area.

IXCs' Position

QCC alleges that Farmers-Riceville, Superior, and Reasnor were engaging in traffic laundering, which QCC describes as the billing of terminating access rates of one LEC for calls that terminated in a different LEC's exchange. (QCC Initial Brief, p. 52; Confidential Exhibit 1275, p. 17). Specifically, QCC argues that most of Farmers-Riceville's conferencing traffic was routed to the Rudd, Iowa, exchange served by Farmers & Merchants, but that Farmers-Riceville, not Farmers & Merchants, billed its terminating access charges for the toll traffic. (Tr. 1884-85). QCC states that Superior's traffic was laundered because it did not terminate in the Superior

exchange; instead, it terminated in Great Lakes' central office in Spencer, Iowa. (QCC Initial Brief, p. 52). QCC alleges that Superior's switched access rates were applied to the FCSC traffic, even though none of the traffic ever touched the Superior exchange. (Id. at 52-53). Similarly, QCC argues that Reasnor's traffic was laundered because the toll calls actually went to Sully Telephone Association's (Sully's) exchange, not to Reasnor's exchange. (Id. at 55).

Respondents' Position

Farmers-Riceville responds by stating that even though the physical location of the conferencing equipment was in the Rudd exchange (served by Farmers & Merchants), the location of the equipment made no functional difference. (ILEC Group Initial Brief, p. 28). Farmers-Riceville states that all the traffic at issue was on Farmers-Riceville's facilities and was designated to its numbers and its customers. (Id., Tr. 1859-61). Farmers-Riceville describes this arrangement as a host/remote configuration and argues there is no requirement that all functionality be available in the remote (Rudd) location for those services to be considered services of Farmers-Riceville. (Id. at 29).

Superior responds that this arrangement was part of foreign exchange (FX) service. (Great Lakes/Superior Initial Brief, p. 16, referencing Confidential Tr. 2594). Superior argues that it used Great Lakes' switch after reaching an oral agreement to use the space and switching in Great Lakes' central office. (Id. at 14-15). Superior

also states, and QCC agrees, that Superior's telephone numbers were used but calls were completed through Great Lakes' switch. (Tr. 557).

Reasnor also disputes the laundering charge, stating the arrangement was FX service and that its local exchange tariff does not impose separate charges for FX service. (Reasnor Reply Brief, p. 17).

Analysis

QCC explained that most of the Respondents in this case are or were members of the NECA traffic sensitive pool for purposes of interstate access charges. The NECA pool generally ensures that a LEC will receive a minimum amount of access revenues, but excess access revenues must be shared with other LECs that are also members of the pool. (Confidential Exhibit 1, pp. 49-51). Carriers are allowed to opt-out of the NECA pool for a maximum period of two years and during this time, the carriers may keep all of their access revenues. (Tr. 973; Confidential Exhibit 1). After two years, carriers that have opted-out of the NECA pool must re-enter the pool or be able show cost support for their rates. (Id.). Without support for the existing rates, the access rates would be reduced to a level that can be supported; in the case of one of the Respondents, that level may be as low as approximately $0.0025 per minute. (Confidential Exhibit 1, p. 174).

QCC argues that in an effort to prevent their access rates from being reduced to such levels, the Respondents transferred the access billings to another LEC that would then opt out of the NECA pool for the next two-year period and bill at higher

rates. The FCSC conferencing bridges, however, remained in the exchange of the original LEC. (Confidential Exhibit 1275). QCC labels this practice traffic laundering.

Although the Board already determined that the FCSCs were not end-users, for purposes of this discussion, the Board will assume they were. Under that assumption, the issue of traffic laundering hinges upon whether the call was received in the exchange of the LEC that is billing for terminating access service. The switched access tariffs require the following:

> On the terminating end of an interstate or foreign call, usage is measured from the time the call is received by the end user in the terminating exchange.

(Exhibit 523 (NECA Tariff No. 5, § 2.6), emphasis added).

QCC's basic position is that if, for example, toll calls are received in an exchange of LEC A, then the access rates for LEC A must be applied to those toll calls. QCC contends that in this case, toll calls were received in an exchange served by LEC A, but the access rates for LEC B were applied to those toll calls, even though LEC B did not have authority to serve that exchange. The record shows that in at least one case, the result was that IXCs were billed far higher access charges than if the access rates of LEC A had been applied to toll calls that were actually received in LEC A's exchange. (Confidential Exhibit 1, pp. 123-24). In other situations, the laundering of the toll traffic would allow an ILEC to bypass the access sharing requirements of the NECA pool for an additional two years by transitioning access billing to an affiliated LEC. (Id. at 173-74).

QCC alleges that Farmers-Riceville, Reasnor, and Superior engaged in traffic laundering by applying their access rates to intrastate toll calls that were terminated in an exchange of an affiliated LEC for the purpose of increasing access charges to the IXCs or to avoid the access sharing requirements of the NECA pool for an additional two years. (QCC Reply Brief, p. 26). QCC states that these three Respondents were not certificated to provide service in the exchanges of their affiliated LECS, where the intrastate toll traffic terminated. (Id.).

The Board notes that if traffic laundering were deemed permissible, then any LEC could increase access revenues by partnering with a LEC with higher access rates. For example, QCC's own local exchange affiliate LEC, Qwest Corporation, has access rates that are capped at $0.0055 per minute. (QCC Initial Brief, p. 82). Traffic laundering would allow Qwest Corporation to bypass that low access rate by simply obtaining telephone numbers from a LEC with higher access rates. Accordingly, Qwest Corporation might obtain telephone numbers from a LEC, such as Superior, and multiply its access billings from $0.0055 per minute to $0.136 per minute. (Id. at 52). If Qwest Corporation were to take such steps to increase access billings, it would surely be found in violation of its access tariffs. The confidential record in this case shows that Farmers-Riceville, Superior, and Reasnor were billing IXCs for toll traffic that was routed to an exchange of an affiliated LEC, with the consequences described above. (Tr. 158-59, 205-12, 250-57).

QCC provided convincing testimony that the traffic routing was concealed from the IXCs because telephone numbers of LEC B were assigned to traffic routed to the exchange of LEC A. (Tr. 974). QCC testified that IXCs would look at the telephone number and the local exchange routing guide and would assume a toll call was being delivered to a particular exchange. Not until QCC conducted discovery in this case did it learn that the calls were not being routed as indicated by the telephone numbers. QCC testified, and the Board agrees, that most of the LECs charged with laundering traffic were attempting to hide the true routing of traffic from QCC and other IXCs. (Tr. 830-31).

Superior's claims that it was providing FX service to FCSCs as a response to QCC's traffic laundering allegations are not persuasive. The confidential record in this case provides detailed insight into the business relationships between Superior, the FCSCs, a broker, and Great Lakes. (Confidential Exhibit 1, pp. 1275-1278). In analyzing the business relationships between these four entities, the Board concludes there was no reason why an FCSC would have requested FX service from Superior and no credible evidence that it did. Additionally, Superior's witnesses at the hearing admitted that there were no facilities between Superior and Great Lakes. (Tr. 2611-12, 2723-24). This lack of facilities defeats the FX claim. Overall, Superior's FX claim appears to be an after-the-fact attempt to apply the terms and conditions of its local exchange tariff to the FCSCs in order to deflect the traffic laundering charges brought by QCC.

Similarly, the confidential record in this case provides insight into the relationships between Reasnor, an FCSC, and Sully. (Confidential Exhibit 1, pp. 58-60, 215-23). In analyzing the relationships between these three entities, the Board sees no reason why the FCSC would have requested FX service from Reasnor and no credible evidence that it did. (Confidential Exhibit 1, pp. 215-23; Exhibit 1275, p. 70; Exhibit 49, p. 20). Additionally, at the outset of this proceeding, the owner of Reasnor stated in an affidavit that the conference bridges for the FCSC were located in the Reasnor exchange, not the Sully exchange. (QCC Initial Brief, p. 57; Affidavit of Gary Neil; Exhibit A to Reasnor's Motion for Summary Judgment, filed March 12, 2007). After the statements in the affidavit proved to be untrue, Reasnor argued that there was FX service between Reasnor and Sully. Reasnor's FX claim was fabricated after-the-fact in order to deflect the traffic laundering charges brought by QCC.

The Board notes that most of the specific details pertaining to QCC's traffic laundering charges in this case are protected by the confidentiality agreement among the parties. Nevertheless, the Board has fully considered both the confidential and public record relating to this issue and finds that any intrastate toll calls that did not terminate in Farmers-Riceville's, Superior's, or Reasnor's certificated local exchange areas, but were assessed these companies' intrastate access rates, failed to meet the tariff requirements for billing intrastate switched access because they were not terminated in the exchange for which terminating access was billed.

c. Whether Great Lakes' and Superior's Traffic Terminated Within their Certificated Local Exchange Areas.

IXCs' Position

QCC asserts that Great Lakes is certificated by the Board, pursuant to Iowa Code § 476.29, to provide telecommunications service only in the Lake Park and Milford, Iowa, exchanges and that Great Lakes' local exchange tariff identifies only Lake Park and Milford as exchanges where Great Lakes provides service. (QCC Initial Brief, p. 58; Tr. 2624-26; Exhibits 723, 1384-85). QCC claims, however, that Great Lakes provides all of its services for FCSCs in Spencer, Iowa, despite not being certificated to provide service in that exchange. (Id.; Tr. 2410-11, 2417, 2419-20, 2461-62). QCC argues that since Great Lakes is not certificated in the Spencer exchange, none of the FCSCs associated with Great Lakes and located in Spencer could be end users of Great Lakes' local exchange service, as required by the terms of the tariff. (QCC Initial Brief, p. 60).

QCC also states that Superior is not certified to provide service in the Spencer, Iowa, exchange, but rather is only authorized to provide service in the Superior exchange. (Id. at 61). All of Superior's FCSC traffic was terminated in Spencer. QCC asserts that Superior's lack of certification in the Spencer exchange means that Superior cannot provide service to end users in Spencer. (Id.).

Respondents' Position

Great Lakes responds by stating that the issue of its certification in the Spencer exchange was not included in QCC's complaint and the Board therefore

should not make its determination regarding Great Lakes' assessment of access charges based on the certification issue. (Great Lakes/Superior Reply Brief, p. 13). Great Lakes argues that it should be considered certificated in all of Qwest Corporation's exchanges in Iowa since that is what it proposed in its original application for a certificate of public convenience and necessity and because it adhered to the Board's certification process in good faith. (Id. at 13-16). Great Lakes also argues that it was never informed by the Board that its certificate or tariff were defective. (Id. at 15).

Superior responds to QCC's allegations by restating its earlier argument that it served its FCSC customers, located in Spencer, by its tariffed FX service. (Exhibit 1389).

Analysis

Great Lakes suggested that the issue of its certification in the Spencer exchange was not included in QCC's complaint and therefore, the Board should not consider the certification issue when determining whether Great Lakes appropriately assessed intrastate access charges. (Great Lakes/Superior Reply Brief, p. 13). The Board already considered this argument following a motion to exclude evidence filed by Great Lakes and Superior on November 12, 2008. In that motion, Great Lakes and Superior asserted that the scope of their certificates is irrelevant and excludable evidence pursuant to Iowa Rule of Evidence 5.402. The Board issued an order on November 26, 2008, denying Great Lakes and Superior's motion stating that the

evidence regarding the certificates was relevant to put QCC's claims into an appropriate context. Because the Board has already ruled that evidence regarding Great Lakes and Superior's certificates is relevant, the Board will not revisit the issue now.

Great Lakes' certificate of public convenience and necessity clearly states that Great Lakes is authorized to provide service in the exchanges identified in its tariffs. (Exhibit 1385). Great Lakes' local exchange tariff states that it provides service in the Lake Park and Milford exchanges. (Tr. 2461). Great Lakes testified that it sought an amendment to its certificate by the Board to allow Great Lakes to provide service in the Spencer exchange, but a review of the certificate indicates that an amendment was not what was required. Instead, Great Lakes needed to amend its tariff. The evidence in the record demonstrates that Great Lakes did not amend its tariff to include the provision of service in the Spencer exchange and, therefore, Great Lakes is not authorized to provide service in the Spencer exchange.

Pursuant to Iowa Code § 17A.14(4), the Board will take official notice of the North American Numbering Plan Administrator (NANPA) records, which show that Great Lakes was assigned telephone numbers only for the Lake Park and Milford exchanges.[21] Based on these records, Great Lakes appears to have been using its Lake Park and Milford telephone numbers to terminate conferencing traffic in the Spencer exchange, where it was not approved to provide service. The fact that

[21] The Board finds that these records are simple statements of fact, which are not subject to dispute. Therefore, fairness to the parties does not require an opportunity to contest the facts.

Great Lakes was not using Spencer, Iowa, phone numbers to terminate calls in the Spencer exchange supports the conclusion that Great Lakes is not certificated in the Spencer, Iowa, exchange and that it improperly assessed terminating access charges for intrastate toll traffic terminating in the Spencer exchange.

With respect to Superior, both Superior's tariff and its Articles of Incorporation authorize it to provide service only in the Superior exchange. (Exhibit 1387; Tr. 2605-06). The record reflects that Superior was terminating Superior's FCSC traffic in the Spencer exchange, where Superior is not certificated. Even though Superior's local exchange tariff contains a FX offering, the service between the Superior exchange and the Spencer exchange was not FX service since none of the FCSCs obtained local exchange service, a prerequisite for FX service, pursuant to the terms and conditions of the tariff. Therefore, the record supports the conclusion that Superior assessed intrastate switched access charges for FCSC traffic in an exchange where it does not have a certificate.

B. Conclusions Regarding Tariff Issues

For the reasons discussed above, the Board finds that none of the FCSCs associated with the Respondents were end users for purposes of the Respondents' intrastate exchange access tariffs, none of the intrastate toll traffic associated with the FCSCs terminated at an end user's premises, and much of the intrastate toll traffic associated with the FCSCs did not terminate in the Respondents' certificated local exchange area. For each of these reasons, intrastate access charges did not

apply to calls to the FCSCs and should not have been billed to the IXCs for calls to numbers assigned to the FCSCs.

Pursuant to the Board's authority set forth in Iowa Code § 476.3, the Board directs the Respondents to refund the improperly collected intrastate access charges to QCC and the IXC intervenors in this proceeding, AT&T and Sprint. Because the precise amount of the refunds is not clear in this record, the Board asks QCC, AT&T, and Sprint to file their calculations of the amount of improper intrastate access charges they were billed by, and the amounts they paid to, the Respondents within 30 days of the date of this order. QCC, AT&T, and Sprint are authorized to conduct additional discovery from the Respondents if necessary to make those calculations.

PUBLIC INTEREST ISSUES

I. Whether the Sharing of Access Revenues Between the Respondents and the FCSCs is an Unreasonable and Discriminatory Practice.

IXCs' Positions

QCC asserts that the sharing of access revenues by a LEC with its alleged customers is abusive and constitutes an unjust and unreasonable practice under Iowa Code § 476.3. (QCC Initial Brief, p. 77). QCC claims that the FCSCs guaranteed a certain volume of traffic to the Respondents, some exceeding one million minutes of traffic per month. (Id.). QCC states that the FCSCs met and exceeded those promises and that all of the Respondents shared terminating access revenues with the FCSCs. (Id.). QCC argues that intrastate access service rates are

intended to cover the LEC's cost of providing intrastate access services and that if a LEC is able to share its access revenues with a FCSC, then those access rates cannot be cost-based and must be unjust and unreasonable. (Id. at 77-79).

QCC also argues that the access stimulation that occurred in this case promotes two forms of discrimination, in violation of Iowa Code § 476.5. (Id. at 99-100). First, QCC claims that if the Respondents are correct that the FCSCs are considered local exchange customers, then the access sharing arrangements discriminate against other local exchange customers who do not receive similar access sharing payments. (Id. at 99-101). Second, QCC argues that FCSCs that share access revenues receive their telephone service without charge while other local exchange customers must pay for their service. (Id.).

Sprint asserts that the LECs' provision of intrastate access services is a monopoly because the IXCs, as purchasers of those services, have no real choice but to pay the LEC provider to terminate their calls. (Tr. 1753-54). Sprint argues that access services in general are priced higher than the actual cost of providing the service, but the access subsidies were not intended to fund the types of services provided by the FCSCs in this case. (Id.).

Similarly, AT&T argues that the higher access rates charged by rural carriers are meant to subsidize high cost rural access to the public switched network; the rates were never intended to allow LECs to shift the costs of conferencing services onto IXCs. (Tr. 1659). AT&T argues that the Respondents and their FCSC partners

are exploiting the access regime and asks the Board to expressly condition the granting of certificates of public convenience and necessity, issued pursuant to Iowa Code § 476.29(2), to LECs that do not participate in traffic stimulation. (Id.). AT&T also asks the Board to permit IXCs to withhold payments of intrastate access charges when the volume of traffic to a particular LEC increases suddenly. (Id.).

Consumer Advocate asserts that the Respondents have abused the switched access system, which was created for the express purpose of helping to pay the higher costs per customer incurred by LECs that serve low density service areas, in order to promote the universal availability of telephone service at reasonable retail rates. (Consumer Advocate Initial Brief, pp. 4-5).

Respondents' Positions

The Respondents contend that determining the level of access rates is not the subject of this proceeding and that there is no legal support for the proposition that receipt of an enhanced rate of return on access charges is an unjust and unreasonable practice. (ILEC Group Reply Brief, pp. 47-48). The Respondents claim that the Board can only look at the level of access rates in a rate proceeding. (Id.).

With respect to the allegations of unlawful discrimination, the Respondents generally argue that QCC failed to prove that the Respondents discriminated against other local service customers when they shared access revenues on a preferential basis with the conferencing customers. (Id. at 66-68). The Respondents claim that

the FCSCs were not similarly situated to any other local service customer (i.e., there were no other customers who performed marketing services for them in a similar manner), and therefore there was no discrimination. (Id. at 66-68; Aventure Initial Brief, pp. 12-13).

Analysis

Considering the complete record in this case, the Board will not make a finding that revenue sharing arrangements are inherently unreasonable. This record is focused on FCSCs and access stimulation schemes and lacks information about whether there are other revenue-sharing arrangements that may be reasonable or what the distinguishing characteristics of those services might be. In the absence of a multi-service investigation, a broad finding of unreasonableness would be inappropriate and could have unintended consequences.

The sharing of access revenues may often be an indication that a particular service arrangement is unreasonable. If access rates are set at a level intended to recover the costs of providing access services, then a carrier's willingness to share a substantial portion of its access revenue with a FCSC is evidence that the carrier's rates are too high for the volume of traffic being terminated.

In fact, it is the level of intrastate access rates, in part, that makes the access sharing possible and profitable for the Respondents in this case.[22] The evidence

[22] The Respondents' interstate access rates were also a factor, and perhaps even the more important factor given the percentage of FCSC traffic that is interstate. However, that part of this transaction is outside the Board's jurisdiction.

shows that some Respondents' access rates were as high as $0.136 per minute for terminating toll calls. AT&T and the other IXCs argue that these higher access rates were intended, in part, to subsidize high cost rural access to the public switched network. The IXCs argue that such subsidies should be limited to reasonable levels, if they are allowed at all. When FCSCs get involved, however, the numbers can change very quickly. For example, one Respondent (which billed more than $0.13 per minute for access) billed QCC for an average of less than 600,000 access minutes per year prior to its involvement with FCSCs. In the year FCSC services were initiated, the Respondent billed QCC for nearly 60 million access minutes, a 100-fold increase in toll traffic.[23] To the extent that per-minute rates at this level included an implicit subsidy, then this rapid 100-fold increase in access minutes produced an unreasonable result because it caused a similar increase in the subsidy without a matching increase in costs.

The Board emphasizes that it is not making a determination in this case regarding the use or provision of access charges in general. The Board's concern is that in circumstances like those presented in this case where (1) a carrier's access rates are set with reference to a relatively low historical volume of access services, (2) the current and future volume of those services is considerably greater, (3) the incremental cost of increased traffic is less than the charge per minute, (4) the carrier is willing to share a substantial portion of its access revenues, and (5) the carrier has

[23] Additional detailed evidence on this issue is available in the confidential portion of the record at Confidential Tr. 160; Confidential Exhibit 1, p. 123.

substantial market power, even monopoly power, over those services, then the result is an unreasonable rate or service arrangement, in the absence of any other factors.

The Board also emphasizes that its finding that the Respondents' actions produced an unreasonable result regarding the assessment of access charges is not a basis for the Board's directive that the Respondents provide refunds or other retrospective relief to the IXCs. Rather, the Board's finding that these actions culminated in an unreasonable outcome is only a basis for addressing this situation on a prospective basis.

In an effort to curb this unreasonable result going forward, the Board is initiating a rule making to consider amendments to the Board's rules regarding high volume access services. This rule making will be independent of any other rule making associated with access charges; it will solely address high volume access services and will propose methods to prevent these unreasonable results in similar situations.

II. Whether the Board Should Restrict Conferencing Services that Promote Pornographic Content on Lines that Cannot be Blocked.

IXCs' Positions

QCC states that the traffic stimulation demonstrated in this case violates the public interest because it fails to protect children from communications involving pornographic content. (Tr. 1304-06). QCC argues that a significant portion of the traffic at issue in this case involved free "adult content" or pornographic calling and that parents do not have the ability to block these types of calls or to restrict their

children from accessing these services because they are accessed just like a toll call, without the traditional blocking methods associated with 900 prefixes, for example. (Id.).

QCC claims that 47 U.S.C. § 223(c)"1" pertains to indecent content conferencing provided over toll-free lines. (QCC Initial Brief, pp. 90-91) QCC states that this statute and the FCC's decisions promulgated pursuant to the statute are intended to protect minors from indecent communications. (Id.). QCC provides the following quote from the FCC to support its position:

> We conclude that our regulations represent a narrowly tailored method of achieving a compelling government interest, namely, protecting children from indecent material. The regulations are designed to make indecent communications available to adults who affirmatively request the service, but unavailable to minors ... . Without the additional restrictions on access put in place by dial-a-porn providers (scrambling, access codes, credit cards), children will still be able to gain access to indecent communications.

In re: Regulations Concerning Indecent Communications by Telephone, 5 FCC Rcd. 4926, FCC 90-230, ¶ 16 (released June 29, 1990), aff'd, Information Providers Coalition for Defense of the First Amendment vs. FCC, 928 F.2d 866, 874-76 (9th Cir. 1991).

Respondents' Positions

Some of the Respondents contend that QCC's focus on the content of the calls is a diversionary tactic designed to create an emotional reaction and prejudice the Board's view of the case. (ILEC Group Initial Brief, pp. 40-41). Generally, the

Respondents assert that 47 U.S.C. § 223(c)"1" does not apply in this case, arguing that the statute only applies to pay-per-call services or 1-900 calls. (ILEC Group Initial Brief, pp. 42-43). Several of the Respondents claim that they were unaware of the content of the calls. (Tr. 1995, 2131). Other Respondents argue that there is not an Iowa statute that prohibits the transmission of indecent content over toll-free calls, such as the calls at issue in this case. (Great Lakes/Superior Initial Brief, p. 41).

Analysis

In their briefs, QCC and the Respondents argue over whether 47 U.S.C. § 223(c)"1" pertains to indecent content conferencing over toll-free lines. While QCC asserts that the federal statute applies, it does not present evidence that the statute has been applied to restrict pornographic conferencing over toll-free lines. Moreover, it is a federal statute, the enforcement of which is not for the Board. Clear violations of the statute might be relevant to the Board's consideration of the reasonableness of the service, but that situation is not presented in this case.

The evidence in this case shows that several Respondents partnered with FCSCs that provided free calling services for indecent or pornographic content. (Tr. 1054). The record also shows that by using these free calling services, there were no technological measures in place to protect minors from making calls to access these pornographic services, such as a 1-900 number, which enables parents to place a block on the call. (Tr. 1054-55). The Board finds that the lack of any

mechanism for parents to regulate their minor children's access to pornographic or indecent services over the telephone is contrary to the public interest.

The Board should not, and will not, attempt to regulate the content of telephone calls. However, the agency has the authority to protect and promote the ability of parents to control access to obscene calling services in Iowa by their children, in order to promote the public interest. Therefore, the Board will initiate a rule making, independent of the rule making for high volume access services discussed previously, to consider amendments to the Board's rules that are modeled after 47 U.S.C. § 223 and to restrict access to obscene calling services in Iowa.

III. Whether the Board Should Address Aventure's Federal Universal Service Fund Support.

IXCs' Positions

QCC claims that the evidence in this case demonstrates that Aventure defrauded the federal USF by 1) seeking payments due exclusively to interactions with FCSCs; 2) inflating the number of lines it serves; and 3) inflating the number of exchanges it serves. (QCC Initial Brief, pp. 88-89). QCC states that Aventure's designation as an eligible telecommunications carrier (ETC) authorizes Aventure to seek payments from the USF and that the Board has jurisdiction over Aventure's use of USF money because the Board determines Aventure's designation as an ETC, pursuant to delegated authority. (Id.). QCC and AT&T ask the Board to revoke Aventure's ETC designation because of the alleged abuses of the high cost USF support. (Id.; AT&T Initial Brief, pp. 36-41).

Respondents' Positions

Aventure states that the IXCs did not raise the USF issue against Aventure in their formal complaint and therefore, they must initiate another complaint before the Board or FCC to properly address this issue. (Aventure Brief, p. 4). Nevertheless, Aventure states that the instructions on the FCC's line count form (Form 525) indicate that the FCC does not distinguish among different types of line uses.[24] (Aventure Reply Brief, pp. 4-5). Aventure states that such lines include all business class lines that are assessed the end user common line charge and therefore, Aventure contends, its practice of reporting lines provided for conference calling service is authorized by the FCC. (Id.).

Analysis

QCC submitted evidence into the record that indicates Aventure received the majority of its USF support for conferencing services, that the line counts Aventure submitted may have included a substantial number of test lines, and that Aventure may have overstated the actual number of exchanges it served. FCC Form 525, referenced by Aventure, appears to take count of bona fide customer lines. Based on the Board's ruling in this order that the FCSCs were not end users, Aventure's line counts to the FCC on this form may be in error.

In addition, Aventure stated at the hearing in this proceeding that it reported approximately 3,000 lines to the FCC for line count purposes. (Tr. 2331, 2339).

[24] Aventure states that in columns 30 and 31 of Form 525, the ETC must report the number of lines for residential and single line business and the number of multi-line business lines.

However, most of these lines were for FCSC traffic and in fact, from late 2005 through 2007, Aventure served only FCSCs. (Tr. 2250). Aventure obtained its first traditional customers in January 2008 and currently serves 140 traditional customers.

It appears, based on the record, that Aventure is alone among the Respondents in reporting conference calling lines for USF purposes. However, the administration of the federal USF is not this Board's responsibility or within its jurisdiction. Therefore, the Board will report this information to the FCC for further action as the FCC deems appropriate. Because the Board is not making a final determination regarding Aventure's status as an eligible telecommunications carrier for purposes of receiving federal USF, Aventure's argument that the issue was untimely raised by the IXCs is moot.

IV. Whether the Board Should Address the Use of Telephone Numbering Resources for FCSCs.

IXCs' Positions

QCC asserts that the Respondents have abused numbering resources by not assigning numbers according to FCC requirements. (QCC Reply Brief, pp. 39-41). Specifically, QCC states that thousands of phone numbers have been assigned to FCSCs that are not end users. QCC asks the Board to use its authority to reclaim telephone numbers assigned to FCSCs. (Id.). Specifically, QCC cites to 47 C.F.R. § 52.15(i)"5," which states:

> The NANPA and the Pooling Administrator shall abide by the state commission's determination to reclaim numbering resources if the state commission is satisfied

> that the service provider has not activated and commenced assignment to end users of their numbering resources within six months of receipt.

(Id.).

Similarly, Sprint asserts that the Board has authority over the assignment of numbering resources and can remedy the invalid use of numbers. (Sprint Initial Brief, pp. 40-41). Sprint argues that to the extent some Respondents are providing services in violation of their certificates, the Board should report the information to NANPA or the FCC or should initiate a proceeding to reclaim those numbering resources. (Id.).

Respondents' Positions

Great Lakes and Superior argue that the assignment and use of telephone numbers is not within the Board's authority and any finding on these matters would be an unlawful action. (Great Lakes/Superior Reply Brief, pp. 31-32).

Most of the Respondents argue that the Board has limited authority over telephone numbering resources, stating that most of that authority lies with the FCC, yet some of the Respondents agree the Board has delegated authority to reclaim telephone numbers. (ILEC Group Initial Brief, pp. 54-56).

Analysis

With respect to the Board's authority and jurisdiction over telephone numbering administration, 47 U.S.C. § 251(e) provides:

> The Commission shall create or designate one or more impartial entities to administer telecommunications

> numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from designating to State commissions or other entities all or any portion of such jurisdiction.

The NANPA and the Pooling Administrator are the impartial entities designated by the FCC to administer telephone numbering, including the assignment of telephone numbers. State commissions have also been given a role in numbering administration, including reclamation. Specifically, 47 C.F.R. § 52.15(i) grants state commissions the authority to reclaim telephone numbers.

When the NANPA or the Pooling Administrator assigns blocks of telephone numbers, the service provider is required to begin assigning those telephone numbers to end users within six months. Service providers confirm to NANPA or the Pooling Administrator that blocks of telephone numbers have been activated and are being assigned to end users. If a state commission is satisfied that this is not the case, then the state commission can direct the NANPA or Pooling Administrator to reclaim any blocks of numbers that do not satisfy that criteria.

The Board determined earlier in this order that the FCSCs associated with the Respondents are not end users because they did not subscribe to the terms and conditions of the Respondents' tariffs. For Great Lakes in particular, the record in this proceeding indicates that since receiving a certificate in 2005, it has served only FCSCs. (Tr. 2423). Because FCSCs are not end users, Great Lakes should not

have numbers activated for pure FCSC use. Therefore, the Board will direct the NANPA and Pooling Administrator to commence reclamation of Great Lakes' numbering resources.

The remaining seven Respondents are directed to file reports with the Board within ten days of this order demonstrating whether they have any numbering blocks with no end users assigned and how many non-FCSC end users currently have numbers out of each block.

Because the evidence in this record shows that Great Lakes and Aventure have few, if any, customers and that Great Lakes has provided service in an exchange that is not covered by its certificates, the Board will initiate a subsequent proceeding asking Great Lakes and Aventure to show cause why their certificates, issued pursuant to Iowa Code § 476.29, should not be revoked.

V. Whether the Board Should Make a Declaratory Finding Regarding the Rural Exemptions Claimed by Aventure and Great Lakes.

IXCs' Positions

QCC asks the Board to make a declaratory finding pertaining to the rural exemptions claimed by Great Lakes and Aventure. (QCC Initial Brief, p. 82). QCC states that CLECs are permitted to claim a rural exemption under federal law and may charge higher interstate access rates than the ILEC serving the same exchange if the CLEC meets two conditions: 1) it must compete for customers with the ILEC, and 2) one hundred percent of the CLEC's customers must be located in a rural exchange. (Id.). QCC states that Great Lakes has no outside plant and serves only

FCSCs, therefore, it does not compete with QCC. (Id. at 82-83). QCC also argues that Aventure's true central office is in Sioux City, Iowa, which is a non-rural exchange and therefore does not qualify for a rural exemption. (Id. at 84).

Respondents' Positions

Both Great Lakes and Aventure argue that they comply with their rural exemptions, which allows them to charge higher access rates than QCC and that the Board does not have jurisdiction to resolve the issue because it involves federal telecommunications policy. (Aventure Initial Brief, pp. 2-3; Great Lakes/Superior Initial Brief, pp. 38-40).

Analysis

Pursuant to 47 C.F.R. § 61.26, a rural CLEC must meet specific requirements when serving in an exchange of a non-rural ILEC in order to charge interstate access rates higher than the ILEC's. Failure to meet these requirements means that the rural CLEC's interstate access rates must mirror the interstate access rates of the ILEC.

QCC admits that the rural exemption has no bearing on the intrastate access rates that are at issue in this proceeding. (Tr. 832). The Board's jurisdiction over access charges only pertains to intrastate switched access.

Since the rural exemption provisions that QCC refers to relate to interstate access charges and this Board's jurisdiction is limited to intrastate access charges, a

finding by the Board on this matter would be inappropriate. The FCC will be informed of this situation by this Order and may take action, if appropriate.

COUNTERCLAIMS

I. Whether QCC and Sprint Engaged in Unlawful Self Help by Refusing to Pay Tariffed Charges for Switched Access.

Reasnor's Position

Reasnor contends that QCC and Sprint engaged in unlawful self-help by refusing to pay tariffed charges for intrastate switched access. (Reasnor Initial Brief, pp. 39-40). Reasnor argues that a carrier has the right to collect its tariffed charges, even when those charges may be disputed among the parties, and that QCC and Sprint not only withheld disputed charges, but also refused to make payments on undisputed access invoices in violation of the Telecommunications Act of 1976. (Id. at 40-44).[25] Reasnor also claims that QCC participated in call blocking by rerouting calls to other carriers and that Sprint choked traffic by moving FCSC traffic to limited capacity trunks in violation of Iowa Code § 476.20(1).

IXCs' Response

QCC responds that it was justified in withholding payments to Reasnor because the traffic in question was not subject to the switched access tariffs. (QCC

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[25] Tr. 2794-95; Reasnor Initial Brief, pp. 40-41, citing *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647, 11659 ¶ 27 (1999); *Business WATS, Inc. v. American Tel. & Telegraph Co.*, 7 FCC Rcd 7942, ¶ 2 (1992); *In re: MCI Telecommunications Corp.*, 62 FCC 2d 703, 705-706 (1976); *In re: Communique Telecommunications, Inc.*, 10 FCC Rcd at 10405 n. 73; *Nat'l Communications Ass'n, Inc. v. AT&T Co.*, No. 93 Civ. 3707 (LAP), 201 U.S. Dist. LEXIS 951, 15-16 (W.D.N.Y. Feb 5, 2001).

Initial Brief, pp. 103-104). QCC and Sprint argue that withholding payment of disputed access charges is permitted under the tariff dispute resolution provisions. (Id. at 105; Sprint Initial Brief, p. 34; Tr. 1715). QCC contends that it did not engage in call blocking, but rather terminated a least-cost routing provision whereby QCC carried the traffic to various communities for other carriers. (QCC Reply Brief, pp. 50-51).

Analysis

There are two forms of self-help at issue here: the first is QCC's and Sprint's actions in withholding payment of disputed access charges and the second is QCC's and Sprint's alleged call blocking.

With respect to the first form of self-help, the Board finds that unilaterally withholding payment is not a preferred form of dispute resolution in economic disputes between carriers unless it is clearly contemplated under the applicable dispute resolution provisions, which it was not in this case. However, based on the rulings the Board has made regarding the tariff compliance issues, specifically that terminating intrastate access charges were improperly assessed to the IXCs in this case, no money within the Board's jurisdiction is owed by QCC or Sprint to Reasnor or to any other Respondent and there is no need for any remedy in this case.

With respect to the allegations of call blocking, the Board finds that there is not credible evidence in the record to support a finding that QCC engaged in call blocking. The record indicates that QCC was acting as a least cost router for a

number of other IXCs. Under least cost routing arrangements, IXCs contract with other carriers who can deliver toll traffic to certain locations at lower cost. QCC states that when conferencing traffic began to peak, QCC sent notices to IXCs stating that it would no longer be the least cost router to certain exchanges in Iowa. The Board finds that if there were undelivered calls to Reasnor, it is possible that this occurred after QCC ceased delivering calls as a least cost router for another carrier, which would not be an instance of call blocking.

However, the Board finds that the evidence in the record supports a finding that Sprint engaged in call blocking by routing FCSC traffic to inadequate facilities, effectively choking the traffic. In contrast to the actions taken by QCC, the record does not indicate that Sprint provided notice to any other party that it would not be delivering certain calls. Sprint states that the measures it took when delivering calls were meant to protect its customers and its network, but these measures also prevented Sprint from being charged for terminating switched access on any calls that could not be delivered to a LEC associated with a FCSC. Therefore, the Board finds that the measures taken by Sprint amounted to call blocking.

Reasnor asks the Board to impose civil penalties if it finds that call blocking occurred. Iowa Code § 476.51 provides that the Board is to give a utility written notice of a specific violation before civil penalties can be assessed. Therefore, the Board places Sprint on notice that it improperly engaged in call blocking and any

subsequent findings of call blocking may result in the imposition of civil penalties pursuant to Iowa Code § 476.51.

II. Unlawful Discrimination by QCC Through Payments to Customers

Reasnor's Position

Reasnor claims that QCC engaged in unlawful discrimination in violation of Iowa Code § 476.5 and 199 IAC 22.1(1)"d" because it makes payments to some, but not all of its customers. (Reasnor Initial Brief, pp. 47-48). Reasnor provided a list of 21 agents for operator services to whom QCC pays special commissions based on the volume of traffic generated. (Id. at 52-55; Confidential Exhibits 555-89). Reasnor contends that the purpose of this marketing program is to stimulate the use of QCC's services in order to increase traffic volumes and revenues. (Reasnor Initial Brief, pp. 52-55). Reasnor argues that QCC cannot complain that the Respondents have entered into marketing arrangements with conferencing companies to increase traffic levels when QCC hired agents to do the same. (Id.).

QCC's Position

QCC responds that the agent programs noted by Reasnor involve hotels that offer operator services to their customers. (Tr. 1110, 1312-13; Exhibit 1293). QCC states that the end user of the operator service is the person making the call from the hotel and QCC charges those end users its tariffed rate plus the hotel's property-imposed fee (PIF), which is also tariffed. (Id.). QCC claims that the PIF is sent to the agent, who presumably shares some or all of the PIF with the hotel. QCC argues

that there is no act of discrimination because QCC follows its tariff and commissions are paid to sales agents, not to customers. (Id.).

Analysis

This claim appears to be based on the premise that, through its operator services, QCC shares revenues with some customers by paying commissions based on the amount of traffic they generate. The Board has previously held in this order that revenue sharing is not inherently unreasonable, so this counterclaim is unavailing. QCC is not sharing its own revenues; it is collecting the PIF on behalf of the hotel. Moreover, the record demonstrates that QCC is paying these commissions to sales agents, which is not at all similar to sharing revenues with a customer. QCC's practices in this area are not relevant to this case.

III. Whether QCC Discriminated Against its Wholesale Carrier-Customers by Offering Them Unequal Discounts.

Reasnor's Position

Reasnor argues that QCC discriminates against its wholesale carrier-customers by offering them unequal discounts in violation of Iowa Code § 476.3. (Reasnor Initial Brief, p. 54). Reasnor provided the discount schedules that QCC offers to five of its wholesale customers. (Confidential Exhibits 580, 582-85). Reasnor states that the carriers are substantially similar to each other, yet QCC provides the carriers unequal discounts based upon the same monthly revenues. (Reasnor Initial Brief, pp. 54-56).

Reasnor also alleges QCC is in violation of 47 U.S.C. § 254(g), which addressed geographic rate averaging (which requires IXCs to charge rates in rural and high cost areas that are no higher than rates in urban areas) and rate integration (which requires IXCs to charge rates in each state that are no higher than rates in any other state). (Id. at 57).

QCC's Position

Regarding Reasnor's claim that QCC discriminates against wholesale carrier-customers, QCC responds stating that it is appropriate for least cost routing to be structured with different rates for different IXCs because of different routing. (QCC Reply Brief, pp, 48-49). QCC contends that it is impossible to discriminate in the provision of wholesale long distance services to other IXCs because there is no monopoly, wholesale long distance services are fully competitive, and those services have been deregulated for many years. (Id.).

QCC responds to Reasnor's allegations regarding QCC violations of 47 U.S.C. § 254(g) by stating that the rate averaging and rate integration requirements do not pertain to wholesale long distance contracts. (Id. at 51). QCC states that the requirements under § 254(g) require IXCs to offer the same prices to subscribers; carriers purchasing wholesale services from QCC are not subscribers under this provision. (Id.).

Analysis

Reasnor argues that QCC is engaged in unlawful discrimination by offering different service discounts to different wholesale customers. However, that situation is not comparable to the Respondents' activities in this case. QCC is offering discounts in a competitive market that is deregulated and detariffed because market forces are believed to be sufficient to ensure nondiscriminatory treatment. If QCC is overcharging a wholesale customer, presumably some other provider will step up and offer cheaper service to that customer. Reasnor has not shown a market failure that could potentially justify re-regulation.

Reasnor also argues that QCC's wholesale rates are in violation of the prohibition of geographic deaveraging, but the FCC's rate integration and rate averaging rules under 47 C.F.R. § 1801 pertain only to retail subscribers not to the wholesale carriers that deliver toll traffic.

Finally, Reasnor's claims that QCC is somehow providing preferential discounts to its local exchange affiliate appeared for the first time in Reasnor's initial brief. The Board finds that Reasnor raised this claim too late into the proceeding and therefore, the Board will not consider it.

IV. Conclusions.

The Board will deny Reasnor's counterclaims against QCC for alleged self-help and unlawful discrimination. The Board finds that the evidence in the record supports a finding that Sprint engaged in call blocking. Therefore, the Board places

Sprint on notice that it improperly engaged in call blocking and any subsequent findings of call blocking may result in the imposition of civil penalties pursuant to Iowa Code § 476.51.

MOTION TO STAY PROCEEDINGS

On August 17, 2009, Great Lakes and Superior filed a joint motion to stay the issuance of a final order in this proceeding. In support of its motion, Great Lakes and Superior state that because only a small portion of the traffic at issue in this case deals with intrastate calls (the majority of the call traffic being interstate in nature), this case is preempted by the FCC. Great Lakes and Superior filed a Petition for Declaratory Ruling and a Petition for Preemption with the FCC on August 14, 2009,[26] seeking a ruling that all matters relating to interstate access charges are exclusively within federal jurisdiction and seeking that the FCC preempt any Board action that encroaches on that jurisdiction. Great Lakes and Superior supplemented its motion on August 21, 2009.

On August 24, 2009, Aventure joined in Great Lakes and Superior's motion.

On August 28, 2009, QCC, AT&T, and Sprint filed resistances to the motion all of which generally argue that the Board is within its jurisdiction to determine this case because it is authorized to interpret the Respondents' local exchange tariffs, which is the basis for this complaint. The IXCs also argue that the motion is impractical

[26] See "In the Matter of Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption," WC Docket No. 09-152 (filed August 14, 2009).

because it is attempting to stay an order that is based on a decision that has already been announced.[27]

On August 31, 2009, Consumer Advocate filed a resistance stating that the Board has the authority to determine QCC's complaint with respect to intrastate traffic.

On September 1, 2009, Great Lakes and Superior filed a motion for leave to file a reply supporting its August 17, 2009, motion as well as its reply and generally restate their earlier arguments.

The Board has considered the motion and the responses and finds that the motion is improper. The Board announced its decision at the August 14, 2009, decision meeting stating its findings regarding QCC's complaint with respect to the intrastate portion of traffic that is at issue here. The Board is aware of its jurisdictional limitations with respect to interstate and international traffic and as such has limited its findings in this final order to the intrastate issues raised in QCC's complaint. Therefore, the Board will deny Great Lakes and Superior's motion.

FINDINGS OF FACT

1. The FCSCs did not subscribe to the Respondents' intrastate switched access or local exchange tariffs.

[27] A decision meeting in this matter was held by the Board on August 14, 2009, at which the Board announced its findings regarding QCC's complaint.

2. FCSCs are not end users as defined by the Respondents' tariffs.

3. The Respondents did not net, or offset, fees to the FCSCs.

4. Certain Respondents improperly backdated bills and contract amendments to misrepresent transactions with the FCSCs.

5. The Respondents did not provide local exchange service to FCSCs through special contract arrangements.

6. The Respondents and FCSCs acted as business partners.

7. The filed tariff doctrine does not apply to the Respondents in this case.

8. The sharing of revenues between Respondents and FCSCs is not inherently unreasonable, but may be an indication that a particular service arrangement is unreasonable.

9. At least one Respondent has improperly assigned all of its telephone numbers to FCSCs, which are not end users.

10. The intrastate toll traffic did not terminate at the end user's premises.

11. The intrastate toll traffic, including international, calling card, and prerecorded playback calls, did not terminate within the Respondents' certificated local exchange areas and were not subject to intrastate terminating access charges.

12. Some Respondents engaged in traffic laundering by billing the terminating access rates of one LEC for calls that terminated in a different LEC's exchange.

13. Several Respondents partnered with FCSCs that provided free calling services for obscene or pornographic content creating an inability for parents to regulate their children's access to pornographic services over the telephone, which is contrary to the public interest.

14. QCC did not engage in unlawful discrimination.

15. QCC and Sprint withheld payment of access charges, but no remedy is necessary or appropriate.

16. Sprint blocked calls and is notified that it may be assessed a civil penalty for a future infraction.

CONCLUSIONS OF LAW

The Board has jurisdiction of the intrastate claims in this matter pursuant to Iowa Code chapter 476.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The Board finds that the Respondents named in this complaint violated the terms of their access tariffs when they charged QCC, Sprint, and AT&T for terminating switched access fees for the traffic at issue in this case.

2. The Board directs the Respondents named in this complaint to refund the terminating switched access fees charges associated with the delivery of intrastate interexchange calls to numbers or destinations assigned to or associated with FCSCs and that were paid by QCC, Sprint, or AT&T. The Respondents are also

directed to credit QCC, Sprint, and AT&T for any such charges that were billed but not paid.

3. The Board directs QCC, Sprint, and AT&T to file their calculations of the amount of terminating switched access fees for the traffic at issue in this case and eligible for refund or credit within 30 days of the date of this order. QCC, Sprint, and AT&T are authorized to conduct additional discovery to make those calculations if necessary.

4. All of the Respondents, with the exception of Great Lakes, are directed to file reports with the Board within ten days of the date of this order stating whether they have any telephone numbering blocks that are not assigned to end users and state how many non-FCSC end users currently have numbers out of each telephone numbering block.

5. The motion to stay proceedings filed in this docket on August 17, 2009, by Great Lakes and Superior is denied.

6. Sprint is hereby on notice that it improperly engaged in call blocking in the manner described in this order, in violation of Iowa Code § 476.20, and any subsequent violations of the same statute, rule, or Board order may result in the imposition of civil penalties pursuant to Iowa Code § 476.51.

7. The North American Numbering Plan Administrator and the Pooling Administrator are directed to commence reclamation proceedings of all blocks of telephone numbers assigned to Great Lakes Communications Corp.

UTILITIES BOARD

/s/ Robert B. Berntsen

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Darrell Hanson

Dated at Des Moines, Iowa, this 21st day of September, 2009.

EXHIBIT C

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

In the Matter of	)	
Qwest Communications Corporation,	)	
Complainant,	)	
v.	)	**File No. EB-07-MD-001**
Farmers and Merchants Mutual Telephone Company,	)	
Defendant.	)	

SECOND ORDER ON RECONSIDERATION

Adopted: November 24, 2009 **Released: November 25, 2009**

By the Commission:

I. INTRODUCTION

1. In this Order, we reconsider our October 2, 2007 Order in this case,[1] and grant Counts II and III of the formal complaint that Qwest Communications Corporation ("Qwest") filed against Farmers and Merchants Mutual Telephone Company ("Farmers") under section 208 of the Communications Act of 1934, as amended ("Act").[2] We find that the evidence brought to light by Qwest's Petition for Reconsideration[3] warrants a change of our earlier ruling and compels the conclusion that Farmers violated sections 203(c) and 201(b) of the Act.[4] Farmers, accordingly, is liable to Qwest for damages suffered as a result of Farmers' violations. Qwest elected in its Complaint to have the amount of any damages determined in a separate proceeding;[5] Qwest may file a supplemental complaint for damages within sixty days of the release of this

[1] *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) ("October 2 Order").

[2] Formal Complaint of Qwest Communications Corp., File No. EB-07-MD-001 (filed May 2, 2007) ("Complaint").

[3] Qwest Communication Corp.'s Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed Nov. 1, 2007) ("Petition for Reconsideration").

[4] 47 U.S.C. §§ 203(c), 201(b). Section 203(c) prohibits carriers from imposing any charge not specified in their tariffs ("no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in the schedule then in effect"). 47 U.S.C. § 203(c). Section 201(b) requires that "all charges, practices, classifications, and regulations for and in connection with . . . communication service shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful." 47 U.S.C. § 201(b).

[5] Complaint at 27, ¶ 59.

order.[6]

II. BACKGROUND[7]

2. Qwest is an interexchange carrier, serving customers throughout the United States.[8] Farmers is the incumbent local exchange carrier in Wayland, Iowa, serving approximately 800 access lines for local residents.[9] Farmers provides local exchange and exchange access services.[10] Qwest purchases tariffed access service from Farmers, which enables Qwest's long distance customers to terminate calls to customers located in Farmers' exchange.[11]

3. In 2005 and 2006, Farmers entered into a number of commercial arrangements with conference calling companies for the purpose of increasing its interstate switched access traffic and revenues.[12] Under the agreements, conference calling companies sent their traffic to numbers located in Farmers' exchange and, in return, Farmers paid the companies money or other consideration.[13] The agreements resulted in a substantial increase in the number of calls bound for Farmers' exchange.[14] As a result, the amounts of Farmers' monthly bills to Qwest for terminating access charges rose precipitously.[15]

4. Qwest filed a Complaint with the Commission on May 2, 2007, alleging that Farmers had violated section 201(b) of the Act by earning an excessive rate of return on switched access services (Count I).[16] In the October 2 Order, we found that Farmers' agreements with the conference calling companies, which were entered into contemporaneously with Farmers' exit from the traffic-sensitive cost and revenue pool administered by the National Exchange Carrier Association ("NECA"), resulted in Farmers vastly exceeding the prescribed rate of return in violation of section 201(b) of the Act.[17] The October 2 Order further found that Farmers' tariff had "deemed lawful" status,[18] however, and accordingly held that Qwest could not recover damages from Farmers.[19]

5. The Complaint also alleged that Farmers' imposition of interstate access charges

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[6] *See* 47 C.F.R. § 1.722(e).

[7] This Order contains an abbreviated background section. A full recitation of the facts appears in paragraphs 3 through 13 of the October 2 Order, which we incorporate by reference. October 2 Order, 22 FCC Rcd at 17974-77, ¶¶ 3-13.

[8] Complaint at 4, ¶ 4; Joint Statement, File No. EB-07-MD-001 (filed June 6, 2007) ("Joint Statement") at 1, ¶ 2.

[9] Joint Statement at 1-2, ¶ 4.

[10] Joint Statement at 2, ¶ 5.

[11] Joint Statement at 1-2, ¶ 4.

[12] Joint Statement at 4, ¶ 13.

[13] Joint Statement at 4, ¶ 13.

[14] Joint Statement at 4, ¶¶ 12-13.

[15] Complaint at 13-14, ¶ 22.

[16] Complaint at 20-22, ¶¶ 37-41.

[17] October 2 Order, 22 FCC Rcd at 17974-76, ¶¶ 4-11, 25. *See* October 2 Order, 22 FCC Rcd at 17974-75, ¶¶ 4-6 for a more detailed discussion of the relevant rate of return regulations.

[18] *See* 47 U.S.C. § 204(a)(3).

[19] October 2 Order, 22 FCC Rcd at 17983-84, ¶¶ 26-27.

was inconsistent with its tariff (Counts II and III).[20] Specifically, Qwest argued that the tariff did not allow Farmers to assess terminating access charges on calls to the conference calling companies because the service provided did not constitute switched access as defined in Farmers' tariff.[21] The tariff then in effect provided that switched access service allows the customer "to originate calls from an end user's premises to a customer designated premises" and "to terminate calls from a customer designated premises to an end user's premises."[22] The tariff defined an "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier," and a "customer" as any entity that "subscribes to the services offered under this tariff."[23] Qwest asserted that the conference calling companies were not Farmers' customers, because they did not pay Farmers for any services offered under Farmers' tariff.[24] Thus, Qwest argued, delivering calls to the conference calling companies did not constitute terminating access service for which Qwest could be billed.[25] Farmers responded that the conference calling companies were end users because they purchased interstate End User Access Service from Farmers' tariff and paid the federal subscriber line charge ("SLC").[26]

6. The October 2 Order denied Counts II and III of the Complaint. Citing Farmers' representations that the conference calling companies purchased tariffed access service and paid the SLC,[27] the October 2 Order found that the conference calling companies were Farmers' customers and, therefore, "end users," as defined in the tariff.[28] Accordingly, because the conference calling companies were determined to be end users based upon these facts, the October 2 Order further concluded that Farmers had imposed access charges on Qwest in accordance with Farmers' tariff.[29]

7. On November 1, 2007, Qwest filed the Petition for Reconsideration and a Motion to Compel Production of Documents,[30] arguing that newly-available information called into question the veracity of Farmers' evidence that the conference calling companies were customers of its tariffed service.[31] In particular, Qwest argued that Farmers had back-dated contracts and invoices to make it *appear* that the conference calling companies had been purchasing tariffed

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[20] October 2 Order, 22 FCC Rcd at 17987-88, ¶¶ 38-39.

[21] October 2 Order, 22 FCC Rcd at 17985-87, ¶¶ 30, 35.

[22] Farmers' tariff incorporates National Exchange Carrier Association Tariff F.C.C. No. 5 ("NECA Tariff" or "Farmers' FCC Tariff") terms with respect to switched access services. *See* Complaint, Exhibit 9, Kiesling Associates LLP Tariff F.C.C. No. 1 ("Kiesling Tariff") at § 6. The quoted language appears in the NECA Tariff. *See* Complaint, Exhibit 7, NECA Tariff at § 6.1.

[23] Response to Enforcement Bureau Request for Additional Briefing, File No. EB-07-MD-001 (Aug. 1, 2008) ("Qwest Additional Briefing Response"), Appendix, NECA Tariff at 2.6 (pp. 2-65.1, 2-68).

[24] October 2 Order, 22 FCC Rcd at 17985, ¶ 37.

[25] *See* October 2 Order, 22 FCC Rcd at 17987-88, ¶¶ 35-38.

[26] *See* October 2 Order, 22 FCC Rcd at 17987, ¶ 37.

[27] October 2 Order, 22 FCC Rcd at 17987, ¶ 37.

[28] October 2 Order, 22 FCC Rcd at 17987-88, ¶ 38.

[29] October 2 Order, 22 FCC Rcd at 17987-88, ¶ 38. The October 2 Order also rejected Qwest's argument that Farmers had improperly imposed terminating access charges for traffic that it did not terminate. *See* October 2 Order, 22 FCC Rcd at 17985-86, ¶¶ 31-34. Qwest does not challenge that determination in its Petition for Reconsideration.

[30] Motion to Compel Production of Documents, File No. EB-07-MD-001 (filed Nov. 1, 2007) ("Motion to Compel").

[31] Petition for Reconsideration at 9.

services.[32] Qwest asked the Commission to reconsider the October 2 Order and find that the conference calling companies were not customers under Farmers' tariff, but rather were "business partners working together with Farmers in its deliberate scheme to manipulate the Commission's rules and exceed the authorized rate of return."[33]

8. On January 29, 2008, we granted the Petition for Reconsideration in part by initiating additional proceedings that would allow us to rule on the merits of Qwest's arguments concerning the newly-identified evidence.[34] We found that the questions raised about the integrity of our process, and about the reliability of Farmers' representations, warranted additional discovery.[35] We therefore granted Qwest's Motion to Compel, and directed Farmers to produce certain documents that had been submitted in a proceeding before the Iowa Utilities Board.[36] We also permitted Qwest to supplement its Petition for Reconsideration at the conclusion of the additional discovery.[37]

9. Qwest filed its Second Supplement to Petition for Partial Reconsideration on May 29, 2008.[38] In that filing, Qwest offered evidence that the conference calling companies had never, in fact, taken tariffed services from Farmers.[39] According to Qwest, once Farmers' activities came under legal scrutiny:

> Farmers realized that it would not be entitled to the access revenues that its plan was designed to generate unless it could persuade the Commission that the [conference calling companies] were its customers under tariff. It thus undertook to fabricate evidence of a tariffed customer-carrier relationship that did not in fact exist, sending back-dated bills to the [conference calling companies] and executing contract "addenda" purporting to have taken effect months or years earlier. Farmers then selectively submitted some of these documents into the record in this proceeding without any indication that they had not been issued contemporaneously with the provision of service, while withholding other contemporaneous documents that showed the nature of the fabrication.[40]

The new evidence produced in this proceeding substantiates Qwest's allegations.

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[32] Petition for Reconsideration at 9-13.

[33] Petition for Reconsideration at 2, 9, 13-14.

[34] *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, Order on Reconsideration, 23 FCC Rcd at 1617, ¶ 6 ("Order on Reconsideration").

[35] Order on Reconsideration, 23 FCC Rcd at 1619-20, ¶ 11.

[36] Order on Reconsideration, 23 FCC Rcd at 1618-20, ¶¶ 8, 11. A related case was initiated before the Iowa Utilities Board. *See Qwest v. Superior Telephone Cooperative, et al.*, Docket No. FCU-07-2 (Complaint filed Feb. 20, 2007).

[37] Order on Reconsideration, 23 FCC Rcd at 1619-20, ¶ 11. Additional discovery was ordered by letter ruling dated March 7, 2008. Letter from Lisa B. Griffin, Deputy Chief, MDRD, EB, FCC, to David H. Solomon, Counsel for Qwest, and James U. Troup, Counsel for Farmers, File No. EB-07-MD-001 (rel. Mar. 7, 2008).

[38] Second Supplement to Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed May 29, 2008) ("Second Supplement").

[39] Second Supplement at 4-15.

[40] Second Supplement at 2.

III. DISCUSSION

New Evidence Demonstrates that the Conference Calling Companies Were Not End Users Under Farmers' Switched Access Service Tariff, and thus Farmers Was Not Entitled to Charge Qwest Tariffed Switched Access Rates.

10. The central question in this reconsideration proceeding is whether the conference calling companies were "end users" within the meaning of the switched access provisions of Farmers' tariff. The answer to that inquiry is key because it, in turn, determines whether the service that Farmers provided to Qwest was tariffed switched access service for which Farmers could charge tariffed rates. Under Farmers' tariff:

- Switched access service allows a customer "to originate calls from an *end user's* premises to a customer designated premises" and "to terminate calls from a customer designated premises to an *end user's* premises."[41]
- An "*end user*" is "any *customer* of an interstate or foreign telecommunications service that is not a carrier."[42]
- A "*customer*" is any entity that "subscribes to the *services offered under this tariff*."[43]

The tariff's definition of the term "customer" is critical to our analysis because a person or entity is not an "end user" unless the person or entity is also a "customer." The tariff requires that to be a customer, the person or entity must subscribe to the services offered under the tariff. In this case, the record demonstrates that the conference calling companies did not subscribe, nor did they seek to subscribe, to the services offered under the tariff. To the contrary, the evidence demonstrates that the conference call companies and Farmers expressly structured their telecommunications service contracts ***to avoid*** strict adherence to the terms of Farmers' filed tariff. Therefore, we conclude that these companies were neither "customers" nor "end users" within the meaning of the tariff.[44] Thus, Farmers was not entitled to charge Qwest switched access charges under the terms of Farmers' tariff.[45]

11. The October 2 Order's finding that the conference calling companies were "end users" was based entirely on Farmers' then-uncontested averment that the companies "subscribed to Farmers' interstate service, specifically, interstate End User Access Service, and were billed the federal subscriber line charge."[46] However, new evidence that Farmers previously withheld contradicts that claim and demonstrates that the conference calling companies and Farmers

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[41] NECA Tariff at § 6.1 (emphasis added).

[42] NECA Tariff at § 2.6 (emphasis added).

[43] *Id.* (emphasis added).

[44] Consequently, Farmers' reliance on the October 2 Order's description of "free subscriptions," October 2 Order, 22 FCC Rcd at 17987, ¶ 38, is unavailing, because we find that the conference calling companies did not subscribe to a service offered under Farmers' interstate tariff.

[45] *Cf. Qwest Commc'n Corp. v. Superior Tel. Coop.*, Final Order, Docket No. FCU-07-2 (Iowa Util. Bd. issued Sept. 21, 2009) at 34 (finding that "free calling service companies" ("FCSCs") were not end users of rural LECs for purposes of intrastate access tariffs, because the FCSCs "did not subscribe to the [LECs'] access or local service tariffs and the FCSCs did not expect to pay for and did not pay for any of the [LECs'] local exchange service offerings").

[46] Answer at vii; *see* October 2 Order, 22 FCC Rcd at 17987, ¶ 37.

structured their business arrangements pursuant to contracts and not the terms and conditions set forth in the tariff. As a result, the parties failed to establish a carrier/customer relationship under the terms of the tariff.

12. Nothing in the contracts between the conference calling companies and Farmers, or in the parties' business dealings, suggests that the conference calling companies were customers as defined under Farmers' tariff. Under the contracts, the conference calling companies established a free service accessed via toll calls placed over long-distance networks and delivered to the conference calling companies over Farmers' network.[47] In return, Farmers agreed to provide a host of services to support the conference calling companies' business venture, and significantly, to pay the conference calling companies a per-minute fee for the traffic generated through their mutual relationship.[48] Further, nothing in the contracts suggests that the conference calling companies would subscribe to any tariffed Farmers' service or pay Farmers for their connections to the interexchange network, as would ordinary end-user customers under the tariff.[49]

13. Moreover, Farmers provided connections to the conference calling companies in a manner that differed from those made available to customers of its tariffed service. For example, Farmers provided the conference calling companies with high-capacity DS3 trunks that fed into trunk-side connections, to a brand new "soft switch" that Farmers purchased specifically to handle traffic bound for the conference calling companies rather than the Nortel DMS-10 circuit switch used to serve all of Farmer's other customers.[50] That soft-switch was connected directly to the conference calling companies' conference bridges, which were located in Farmers' end office.[51]

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[47] *See* Deposition of Rex McGuire in Iowa Utilities Board Docket No. FCU-07-2 (Jan. 11, 2008) (submitted into EB-07-MD-001 record on Apr. 10, 2008) ("McGuire Deposition") at 27.

[48] Farmers provided all inbound and outbound telephone lines and services, collocation space, rack space, digital subscriber line services and other dedicated Internet access, electrical power, fire protection, generator and/or battery backup, switch technician labor, switch programming, and dedicated DS3 trunks to its switches. Farmers also incurred the costs associated with installation charges, monthly recurring charges, and referral message fees. *See* Farmers Documents 0654, 0660, 0662, 0666-67, and 0673; McGuire Deposition at 239-40. Farmers agreed to pay the companies a fee for both inbound as well as outbound traffic. *See* McGuire Deposition at 196-98; Farmers' Documents 0650, 0654, 0656, 0661-62, 0668, and 0674.

[49] *See* discussion *infra* at paragraph 19. In fact, one agreement expressly states that there would be no charge for *any* of the services that Farmers provided the conference calling company. [Redacted confidential information regarding the terms of Farmers' contract with a conference calling company.] The newly presented evidence of back-dated documents, including invoices and contract "addenda," has changed our understanding of the dealings between the parties and causes us to revise the Commission's earlier conclusion that "The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users." October 2 Order, 22 FCC Rcd at 17988, ¶ 38. To the contrary, the flow of money between these parties is essential to analyzing their relationship because the tariff expressly contemplates and requires payments to Farmers, not payments that flow in the reverse direction.

[50] McGuire Deposition at 99-107. Farmers also purchased a new stand-by generator to accommodate the increased traffic Farmers handled as a result of its business relationships with the conference calling companies. McGuire Deposition at 102. The total cost for all of the additional equipment provided by Farmers to support this business relationship was approximately $430,000. McGuire Deposition at 107. Prior to this litigation, Farmers did not bill the conference calling companies for any of this equipment, facilities, power, or services that it provided. McGuire Deposition at 124, 171, 206, 219-20.

[51] McGuire Deposition at 30-33, 49-50.

14. Additionally, Farmers' agreements with the conference calling companies did not resemble traditional agreements for the provision of its tariffed switched access services. For example, the first agreement between Farmers and a conference calling company expressly stated that Farmers was *prohibited* from providing the services involved to any competitor.[52] Such an exclusivity clause is antithetical to the notion of tariffed service.[53] Although Farmers later entered into contracts with three conference calling companies that it considered not to be competitors of the first conference calling company,[54] Farmers nonetheless turned away other companies with which it could have entered into service arrangements.[55] Moreover, each of the contracts that Farmers did sign contained unique terms not available under its tariff, further supporting our conclusion that the parties never established a carrier/customer relationship under the terms of the filed tariff. For example, while each agreement required Farmers to pay the conference calling companies a given sum per minute of traffic that Farmers delivered, that figure differed among the companies.[56] Further, the contracts obligated each conference calling company to generate different amounts of traffic.[57] In addition, the duration of the contracts varied, as did the notice periods for cancellation of service during the contracts' terms.[58] Before each of the contracts was signed, the Farmers board of directors had to approve its particular terms,[59] and the provisions of the agreements were kept confidential.[60]

15. The conclusion that the conference calling companies were not customers within the meaning of the tariff language at issue here is further bolstered by the parties' actions in implementing their agreements. Stated simply, the parties in no way behaved as if they were operating under tariff until *after* Farmers became embroiled in litigation over the traffic stimulation plan. Even then, the parties' conduct belies the conclusion that Farmers was providing the services offered under its tariff to the conference calling companies.

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[52] Farmers Document No. F0666. Farmers subsequently attempted to renegotiate the exclusivity clause, but the company involved refused to do so. [Redacted confidential information regarding communications between Farmers and a conference calling company regarding the exclusivity terms in the parties' agreement.]

[53] "Only common carrier services can be tariffed." *MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 313-14, ¶ 244 (1982). One of the hallmarks of a common carrier service is that the carrier offering the service "holds [itself] out to serve indifferently all potential users." *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640-41 (D.C. Cir. 1976) ("*NARUC I*"), *cert. denied*, 96 S. Ct. 2203 (1976)); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976). In other words, the carrier does not make individualized decisions regarding "whether and on what terms to deal." *NARUC I*, 525 F.2d at 641. *See also Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9177-78 ¶¶ 785-86 (1997) (subsequent history omitted). We note that Farmers and the conference calling providers appear to have deliberately structured their relationships in a manner that is contrary to a traditional tariff offering.

[54] McGuire Deposition at 139.

[55] [Redacted confidential information regarding Farmers' decision not to implement agreements with certain conference calling companies.]

[56] [Redacted confidential information regarding the volume commitments agreed to by conference calling companies and the amounts Farmers agreed to pay each for their volume commitments.]

[57] [Redacted confidential information regarding the volume commitments made by conference calling companies.]

[58] [Redacted confidential information regarding the cancellation notice terms in Farmers' contracts with various conference calling companies.]

[59] *See* Second Supplement at 20 (citing McGuire Deposition at 191-92). *See* McGuire Deposition at 59.

[60] Farmers Document Nos. 0649, 0661, 0667, and 0674.

16. Qwest has convincingly demonstrated that Farmers never intended to treat the conference calling companies as customers of any of Farmers' tariffed services. When it began conducting business with the conference calling companies, Farmers did not enter their account information into its customer billing systems in accordance with its standard business practices for tariffed services.[61] Thus, contrary to Farmers' representation in the underlying proceeding, its regular business records did not indicate that the companies were purchasing the End User Access Service offered in Farmer's tariff.[62] And, despite the tariff requirement that Farmers bill and collect on a monthly basis for tariffed services,[63] Farmers did not contemporaneously bill the conference calling companies for any services that it provided them, including the outbound traffic generated by them.[64] Indeed, Farmers took no steps to bill the conference calling companies until shortly before discovery was due in the underlying proceeding in this case. [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.][65]

17. Faced with this (previously undisclosed) proof that it issued backdated bills on the eve of submitting its answer and supporting documents in this case, Farmers asserts that such backdating is merely standard practice and that it issued backdated invoices at that point "in order to comply with [its] interstate End User Access Service tariff, section 69.104 of the Commission's rules, and the filed rate doctrine."[66] But this assertion is unpersuasive given Farmers' conduct throughout its business relationships with the conference calling companies. [Redacted confidential information regarding Farmers' business dealings with a conference calling company.][67] This conduct is inconsistent with the provision of tariffed services, and further evidences Farmers' and conference calling companies' apparent intent from the very beginning to operate in a manner that did not comport with Farmers' tariffed services offering.[68]

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[61] [Redacted confidential deposition citations.]

[62] Answer at vii, 27; Answer Exhibit B, Declaration of Rex McGuire at 3, ¶ 6.

[63] Farmers' Iowa Tariff, Part II, Section K.1.b (Mar. 17, 2006). *See also* Farmers' FCC Tariff at § 2.4.1 (B)(1).

[64] [Redacted confidential deposition citations.] There is no evidence in the record that Farmers provided free outbound calling services to anyone other than the free conferencing companies who purportedly received the same tariffed services from Farmers.

[65] [Redacted confidential deposition citations.] Regarding late charges, [Redacted confidential information. *See* accompanying text.] Regarding collection efforts, *see* Second Supplement Opposition at 18; Responses to Qwest's Interrogatories, File No. EB-07-MD-001 (filed Apr. 7, 2008) ("Farmers' Interrogatory Responses") at 3, 4, 6, and 8 ("Farmers has not attempted to collect unpaid revenues owed to Farmers by any of the conference calling companies").

[66] Farmers' Interrogatory Responses at 2-8. Farmers' reliance upon FCC 96-430, a sealed, unreleased Commission order does not justify its efforts to backbill the conference calling companies. *See* Second Supplement Opposition at 21-22. Contrary to Farmers' contention, moreover, the Commission has not established specific standards regarding the justness and reasonableness of carrier backbilling practices. *See* Opposition to Petition for Reconsideration at 18-19; Second Supplement Opposition at 17. Rather, the Commission determines the justness and reasonableness of a carrier's backbilling practices based upon a review of the specific circumstances on a case-by-case basis. *Kenneth E. Brooten vs. AT&T*, Memorandum Opinion and Order, 12 FCC Rcd 13343, 13350, ¶ 13 (Com. Car. Bur. 1997); *American Network, Inc., Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, Memorandum Opinion and Order, 4 FCC Rcd 550, 552, ¶ 19 (Com. Car. Bur. 1989). There is no question that the facts relating to Farmers' back billing are very different from the facts that gave rise to the Commission orders relied upon by Farmers.

[67] [Redacted confidential information. *See* accompanying text.]

[68] [Redacted confidential information regarding Farmers' expectations from its business arrangements with the conference calling companies.]

The evidence overwhelmingly demonstrates that Farmers willingly incurred all of the expenses associated with providing the underlying services to the conference calling companies, including the payment of a fee to these companies, in exchange for these companies directing the "free service" they offered to the public to Farmers' exchange.

18. In addition, [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.][69] [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.],[70] [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.][71] These actions persuade us that Farmers had no intention of operating in accordance with its tariff, at tariffed rates, in its dealings with the conference calling companies. In the midst of litigation, Farmers generated backdated invoices to create the appearance of compliance with its tariff provisions.

19. Similarly, after litigation commenced, [Redacted confidential information regarding Farmers' efforts to backdate and amend its agreements with the conference calling companies.][72] [Redacted confidential information regarding Farmers' efforts to backdate and amends its agreements with the conference calling companies.][73] Again, however, we are unconvinced that these contract amendments were mere clarifications of the parties' original intent.[74]

20. Instead, it appears that Farmers undertook to persuade the conference calling companies to sign the contract amendments as part of its litigation strategy. [Redacted confidential information regarding Farmers' efforts to backdate and amend its agreements with the conference calling companies after Qwest initiated litigation.][75] [Redacted confidential information regarding Farmers' efforts to backdate and amend its agreements with the conference calling companies after Qwest initiated litigation.][76] Moreover, the manner in which Farmers unsuccessfully attempted to clarify its agreement with [Redacted confidential information regarding the identity of a conference calling company.] resembled more of a negotiation than simply the documentation of a pre-existing understanding between them.[77] Perhaps most telling, even the contract amendments did not change the way in which Farmers conducted business with the conference calling companies – [Redacted confidential information regarding Farmers' communications with the conference calling companies.][78] Farmers' after-the-fact attempt to document a different business relationship with the conference calling companies is not sufficient

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[69] Second Supplement at 13.

[70] [Redacted confidential information. *See* accompanying text.]

[71] *See* Second Supplement at 13.

[72] Second Supplement Opposition at 22.

[73] *See* Petition for Reconsideration Opposition at 19; Second Supplement Opposition at 17, 22-23. [Redacted confidential information. *See* accompanying text.]

[74] [Redacted confidential information. *See* accompanying text.] Nor has Farmers provided any evidence that the contract addenda reflected the actual understanding of the conference calling companies' relationship with Farmers.

[75] Second Supplement Opposition at 17. *See* McGuire Deposition at 266-71 (acknowledging Farmers' efforts to obtain signed addendum prior to its attorney's meeting with the FCC).

[76] [Redacted confidential information. *See* accompanying text.]

[77] [Redacted confidential information. *See* accompanying text.]

[78] McGuire Deposition at 133.

to counter the evidence of how they actually conducted business.

21. Despite this extensive evidence, Farmers argues that the application of the "filed rate doctrine" to the relationship between itself and the conference calling providers compels a finding that the service it provided to the conference calling companies was pursuant to its tariff and, as a result, we should impute the status of tariffed "customers" to the conference calling companies even if they were taking services under terms that were wholly outside the scope of the tariff.[79] We disagree. The purpose of the filed rate doctrine is to prevent unreasonable and unjust discrimination among similarly-situated customers of a particular common carrier's service, and to ensure that carriers impose like charges for like services.[80] But here, the facts developed on reconsideration show a purposeful deviation from the tariff's terms that allowed the conference calling companies to reap benefits from a free service offered only to them, which thereby enabled Farmers to dramatically increase its access charge billing to Qwest. These facts make apparent that Farmers and the conference calling companies never established - - and in fact purposefully avoided - - a "customer" relationship cognizable under the tariff.

22. Therefore the filed rate doctrine offers Farmers no refuge in its dispute with Qwest and cannot rescue Farmers from its decision to circumvent the tariff.[81] The record demonstrates that the service that the conferencing companies received under their unique arrangement with Farmers bore little resemblance to the services described in the tariff.[82] Because the conference calling companies did not subscribe to the services offered under Farmers' filed tariff, they were not "customers" or "end users."[83] In turn, the service Farmers

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[79] Farmers and Merchants Mutual Telephone Company Opposition to Petition for Reconsideration, File No. EB-07-MD-001 (filed Nov. 13, 2007) at 16-17 ("Petition for Reconsideration Opposition"); Second Supplement Opposition at 16.

[80] For a general description of the filed rate doctrine *see, e.g.*, *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Petition for Declaratory Ruling on Issues Contained in Thorpe v. GTE*, Memorandum Opinion and Order, 23 FCC Rcd 6371, 6388, ¶ 31 (2008). We decline to formally resolve the issue of the application of the filed rate doctrine between Farmers and the conference calling providers because it does not affect the outcome of this case, for the reasons described below. Moreover, binding a third party such as Qwest by the application of the filed rate doctrine between Farmers and the conference calling providers would in no way advance the purpose of the filed rate doctrine.

[81] The facts on reconsideration, as noted, show that the service Farmers provided to the conference calling companies did not conform to Farmers' filed tariff and thus did not create a "customer" relationship under that tariff. Therefore, even if the filed rate doctrine applies between those companies (a question we do not resolve today), the doctrine would not retroactively render the conference calling companies "customers" within the meaning of the tariff because the parties operated outside the tariff's purview. *See Nordlicht v. New York Telephone Co.*, 617 F. Supp. 200, 227-28 (S.D.N.Y. 1985) *aff'd*, 799 F.2d 859 (2d Cir. 1986) *cert. denied*, 479 U.S. 1055 (1987) (observing, in dicta, that "[t]he filed tariff doctrine is designed to protect utilities charging filed rates for lawfully provided service. It is of no help to a defendant which fraudulently induces a plaintiff to pay a filed rate [that he should not have had to pay] or which otherwise exacts payment by fraud. There is nothing in the policy underpinnings of the doctrine which would cause it to protect a defendant which unlawfully exacts payment, even at a lawful rate.").

[82] *See supra* paras. 12-14.

[83] Farmers' tariff defines "customer" as any entity that "subscribes to the *services offered under this tariff*." NECA Tariff §2.6; see also supra, §[10] (providing relevant tariff definitions). Farmers conveniently ignores this critical definition when arguing for an overbroad definition of "end user." *See* Farmers and Merchants Mutual Tel. Co. Opposition to Second Supplement to Qwest's Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed June 12, 2008), at 18. Moreover, although we find the definitions of "customer" and "end user" as used in the filed tariff to be unambiguous, we note that "it is well established that any ambiguity in a tariff is interpreted against the party filing the tariff." *Halprin, Temple, Goodman & Sugrue v. MCI*, Order on Reconsideration, 14 FCC Rcd 21092, 21100, ¶ 19 n. 50

(continued ...)

provided to Qwest for calls of the conference calling companies was not "switched access service" as defined in the tariff. We therefore find that the filed rate doctrine does not require Farmers to charge Qwest its tariffed switched access charges, nor does it require Qwest to pay Farmers such charges, for terminating the conference calling companies' calls.

23. Farmers also argues that it *could* properly charge Qwest for switched access under its tariff even if the conference calling companies were not end users.[84] We disagree. As explained above, section 6.1 of Farmers' tariff establishes that Switched Access Service is used to terminate traffic to end users:

> Switched Access Service, which is available to customers for their use in furnishing their services to end users, provides a two-point communications path *between a customer designated premises and an end user's premises.*[85]

Farmers argues that, notwithstanding this provision, "[t]here are hundreds of pages in the Kiesling and NECA tariffs that must be construed as a whole to determine the terms and conditions that apply to the provision of 'exchange access.'"[86] Farmers, however, identifies "only a few examples."[87] In particular, Farmers points to NECA tariff sections 6.1.1(A) (Terminating Calling), 6.1.3(A) (Tandem Switched Transport and Local Transport), and 6.1.3(B)(1) (Local Switching), as describing particular access services without specific reference to "end users." Each of these provisions, however, is a subsection of section 6.1, which limits the scope of the tariff to traffic transmitted to end users. It is a well settled rule that "[t]ariffs are to be interpreted according to the reasonable construction of their language."[88] Under such a rule of construction, if a service does not constitute "switched access" within the meaning of tariff section 6.1, then it cannot constitute "switched access" within the meaning of a subordinate subsection. The tariff itself confirms that this is the proper reading. In describing the tariff section numbering system, the "Tariff Users Guide" section[89] of NECA Tariff FCC No. 5 states that "[a]n alpha-numeric numbering plan is used to number tariff regulations and rates. Each level is subordinate to and

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(Continued from previous page)
(1999) (citing *The Associated Press Request for Declaratory Ruling*, File No. TS-11-74, Memorandum Opinion and Order, 72 FCC 2d 760, 764-65, ¶ 11 (1979) (quoting *Commodity News Services v. Western Union*, 29 FCC 1208, 1213, *aff'd*, 29 FCC 1205 (1960)). Thus, construing the language in the filed tariff against Farmers, we find that Farmers has not demonstrated that the conference calling companies, in this instance, constitute customers or end users under its filed tariff.

[84] Second Supplement Opposition at 4-10. Because Farmers raised new arguments in this filing, Commission staff permitted Qwest to file a response. Email from Suzanne Tetreault, Special Counsel, EB, MDRD, FCC, to David Solomon, Russell Hanser, Counsel for Qwest, and James U. Troup, Tony S. Lee, Counsel for Farmers, File No. EB-07-MD-001 (dated July 23, 2008). *See* Qwest Additional Briefing Response. On August 7, 2008, Farmers filed a Motion for Leave to File a Surreply, with a copy of its Surreply attached. Motion for Leave to File Surreply, File No. EB-07-MD-001 (filed Aug. 7, 2008). That motion is granted.

[85] NECA Tariff, § 6.1 (emphasis added).

[86] Second Supplement Opposition at 6.

[87] Second Supplement Opposition at 6-10.

[88] *See Commodity News Services, Inc. v. Western Union Telegraph Co.*, Initial Decision, 29 FCC 1208, 1213, *aff'd*, 29 FCC 1205 (1960).

[89] Under Commission rules, a carrier may include a tariff user's guide explaining how to use its tariff. 47 C.F.R. § 61.54(e).

dependent on its next higher level."[90] Thus, section 6.1's limitations on the scope of "switched access" must be read into the subsections cited by Farmers, even if not repeated in each of those subsections.

24. Farmers also turns to the Act and Commission rules to bolster its theory of what constitutes switched access under its tariff.[91] Farmers argues that the service it provided Qwest constitutes "switched access" within the meaning of the Act and Commission rules, even if the conference calling companies are not end users.[92] Farmers then asserts that the scope of its tariff "should be construed consistently with the definition of 'exchange access' under federal law."[93] The fact remains, however, that the relevant tariff defines switched access service as providing a communications path *to an end user*.[94] Whether or not this definition is narrower than that used for purposes of the Act and Commission rules, it is nonetheless the definition to which Farmers is bound for purposes of determining whether its charges are in compliance with its tariff.[95] We will not expand the term "switched access" as used in the tariff before us to encompass more than the tariff itself delineates. The unusual facts of this case (*i.e.*, the relationship between Farmers and the conference calling companies) do not alter the fact that Farmers is bound by the terms of its tariff.[96]

25. In sum, Farmers sought to organize its business relationship with the conference calling companies through individualized contracts that involved an exchange of services and business relationship quite distinct from Farmers' tariffed switched access service. And Farmers did not offer the same terms of service to others that requested it. Notwithstanding the back-dated contract amendments that Farmers cites as evidence of the parties' intent that the conference calling companies would purchase service under Farmers' tariff, we find that the evidence of the parties' actual course of dealing demonstrates that there was no purchase of tariffed services. Farmers has not offered any explanation as to why it failed to enter the

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[90] NECA Tariff at 30 (emphasis added).

[91] Second Supplement Opposition at 6-10.

[92] Second Supplement Opposition at 10.

[93] Second Supplement Opposition at 6-7.

[94] *See* n.85 *supra*.

[95] Farmers also asserts that the tariff cannot be read to limit the definition of "end users" to purchasers of tariffed services because it has purportedly used that term in a contrary manner in other parts of the tariff. Second Supplement Opposition at 11. This does not, however, overcome the explicit tariff definition of "end user" as an entity that subscribes to services under Farmers' tariff.

[96] This is not to say that Farmers is precluded from receiving any compensation at all for the services it has provided to Qwest. *See, e.g.*, *New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133, ¶ 12 (2000) (fact that a carrier's tariff did not include rates or terms governing the service provided did not mean that the customer was entitled to damages equal to the full amount billed; rather "where, as here, the carrier had no other reasonable opportunity to obtain compensation for services rendered . . . a proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate"), *aff'g New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com. Car. Bur. 1993) (finding no basis in the Supreme Court's "*Maislin* [decision] or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff"). *See also America's Choice, Inc. v. LCI Internat'l Telecom Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 22494, 22504, ¶ 24 (Com. Car. Bur. 1996) (holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed"). Qwest has bifurcated its claim for damages in this case, and thus the precise amount of any damages due will be calculated in a separate proceeding.

conference calling companies into its customer systems in the normal course of its business. Nor does it offer any persuasive explanation as to why it failed to bill the conference calling companies and collect payment as required under its tariff over its two year relationship with them. The facts that Farmers sent no bills until shortly before the first round of discovery in this case, and then sent no further bills until the Commission ordered additional discovery, constitute very strong evidence that Farmers neither believed that it was providing, nor intended to provide, tariffed services to the conference calling companies. Accordingly, based upon the totality of the circumstances and facts of this case, we conclude that the conference calling companies do not constitute "end users" within the meaning of the tariff provisions at issue.[97]

26. Because we find that the conference calling companies were not "end users" within the meaning of Farmers' tariff, Farmers' transport of traffic to them did not constitute "switched access" under the tariff. We therefore conclude that Farmers' practice of charging Qwest tariffed switched access rates for its termination of traffic from the conference calling companies is unjust and unreasonable in violation of section 201(b) of the Act.[98]

IV. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 203, 206, 207, 208, 209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, 209, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Qwest's Petition for Partial Reconsideration IS GRANTED IN PART to the extent indicated herein.

28. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 203, 206, 207, 208, 209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, 209, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Counts II and III of the Complaint ARE GRANTED to the extent indicated herein.

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[97] We note, moreover, that if Farmers had been providing interstate end-user telecommunications services to Qwest or the conference calling companies, then Farmers should have timely reported revenues from those end-user services and paid universal service contributions based on them. 47 C.F.R. § 54.706. [Redacted confidential information regarding Farmers' Form 499 filings.]

[98] As Qwest points out, in a factually similar case involving calls to a chat line, the Commission held that a sham arrangement "designed solely to extract inflated access charges from IXC's" constituted an unreasonable practice in connection with access service that violated section 201(b) of the Act. *Total Telecomms. Servs., Inc., and Atlas Tel. Co. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726, 5733, ¶ 16 (2001), *aff'd in relevant part*, 317 F.3d 227 (D.C. Cir. 2003). Here it also appears that Farmers sought to inflate the access charges to Qwest by paying the conference calling companies for their traffic, rather than charging them for those minutes as the tariff requires. We also uphold the Commission's previous finding that Farmers earned an excessive rate of return. *See* October 2 Order, 22 FCC Rcd at 17980-83. Although the October 2 Order held that Farmers had violated section 201(b) of the Act by virtue of its overearnings, the Commission nevertheless ruled that Qwest could not recover damages because the Farmers tariff at issue was "deemed lawful" pursuant to section 204(a)(3) of the Act. 47 U.S.C. § 204(a)(3); October 2 Order, 22 FCC Rcd at 17983-84, ¶¶ 25-27. In its Petition for Reconsideration, Qwest also asked the Commission to rule that Farmers' tariff was not deemed lawful in light of what Qwest refers to as "Farmers' furtive manipulation designed to conceal its rate of return violation." We note that our earlier finding that Farmers' tariff was deemed lawful does not preclude Qwest from collecting damages based on the conclusions in this Order. The tariffed rates are deemed lawful only to the extent that the tariff actually applies, and we have now determined that the tariff *does not apply* to the services that Farmers provided to Qwest with respect to traffic destined for the conference calling providers. Accordingly, it is not necessary to resolve that portion of Qwest's Petition for Reconsideration that asks us to reconsider whether the tariff was deemed lawful.

29. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 203, 206, 207, 208, 209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, 209, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Farmers' Motion for Leave to File Surreply is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

EXHIBIT D

CONFIDENTIAL

EXHIBIT E

Regina S. Roach
Access Verification Manager
Sprint
6500 Sprint Parkway
Overland Park, KS 66251
(913) 762-6383

November 25, 2009

Via Overnight Federal Express

Mr. Joseph McClung
Bluegrass Telephone Company, Inc.
d/b/a Kentucky Telephone Company
101 Mill Street
Leitchfield, KY 42754

Re: Sprint Communications Company LP's Access Charge Dispute with Bluegrass Telephone Company, Inc.

Dear Mr. McClung:

Sprint Communications Company L.P. ("Sprint") has filed billing disputes with Bluegrass Telephone Company, Inc. d/b/a Kentucky Telephone Company ("Kentucky Tel.") with respect to its October 2009 and November 2009 bills for interstate and intrastate switched access services. Sprint has disputed these invoices because it believes the calls at issue do not qualify as calls subject to Kentucky Tel.'s switched access tariffs. These calls are routed by Kentucky Tel. to conference call and chat line providers (referred to as "Call Connection Companies") in a manner that does not subject Sprint to access charge liability.

The parties have exchanged correspondence but have been unable to resolve the dispute. As a result, Sprint hereby invokes its right under Section 2.6.3(D)(1) of Kentucky Tel.'s KY P.S.C. Tariff No. 3, and Section 2.6.C.4.a of Kentucky Tel.'s FCC Tariff No. 1 to request that Kentucky Tel. provide an in-depth review of the disputed amount. In the event the dispute is not resolved through this process, Sprint intends to file a complaint with an appropriate regulatory agency.

In furtherance of this in-depth review, Sprint requests that Kentucky Tel. provide it with the following information:

1. Please identify the portion of total access minutes on the October 2009 and November 2009 switched access bills that are delivered by Kentucky Tel. to Call Connection Companies. This will allow Sprint to determine whether there is some legitimate access traffic at issue.

2. Please identify the five Call Connection Companies to whom you deliver the greatest number of minutes. For each of those Call Connection Companies, identify the numbers assigned to that company and the location of the company's server. In addition, provide any written contracts in place with those Call Connection Companies during September and October 2009, a copy of bills issued to those companies for those periods, and the total traffic delivered to each.

If any contract terms or billing arrangements are not in writing, please describe those to us. Sprint will maintain the confidentiality of this information.

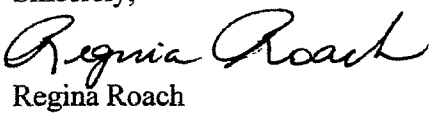
3. Please describe generally the operations engaged in by each of the top five Call Connection Companies. (For example, chat lines/conferencing service/access to recordings/international calling, etc.)

We are hopeful that our review of this information will allow us to better evaluate your representation that calls delivered to Call Connection Companies are legitimate access calls. If that is demonstrated to our satisfaction, we will withdraw our dispute.

Because we have invoked dispute resolution mechanisms under your tariffs, Kentucky Tel. may not seek to disconnect Sprint's trunks, and may not engage in any other self-help actions designed to force Sprint to pay disputed amounts. Please confirm that Kentucky Tel. will respect the dispute resolutions mechanisms in its tariffs during this process.

We look forward to confirmation within 7 days that Kentucky Tel. will provide the above information. If there is a need to discuss our request further, please let me know and we will schedule a call.

Sincerely,



Regina Roach

Cc: Philip R. Schenkenberg

EXHIBIT F

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TAMARA DAVIS BROWN*

*NOT ADMITTED IN VA

Writer's Direct Dial
(703) 584-8660
rlukas@fcclaw.com

December 10, 2009

VIA EMAIL & U.S. MAIL

Joseph Cowin, Senior Counsel
Sprint Nextel – Legal Department
6450 Sprint Parkway
Overland Park, Kansas 66251

Dear Mr. Cowin:

My client, Bluegrass Telephone Company, Inc. d/b/a Kentucky Telephone Company ("the Company"), is in receipt of a letter dated November 25, 2009, from Ms. Regina S. Roach, who I understand is employed by Sprint United Management Company, which is the management subsidiary of Sprint Nextel Corporation. Ms. Roach stated that she was invoking the rights of Sprint Communications Company L.P. ("Sprint") to have the Company conduct an in-depth review with respect the billing disputes submitted with respect to the Company's October 2009 and November 2009 bills for interstate and intrastate access services. Assuming that Ms. Roach had the authority to invoke Sprint's rights, the Company conducted an in-depth review of the disputed amounts and has asked me to inform you of its disposition of the disputes.

Based on its investigation and review of the matter, the Company concluded that its access charges were billed to Sprint in accordance with its Kentucky P.S.C. Tariff No. 3 ("PSC Tariff") and its FCC Tariff No. 1 ("FCC Tariff"). Accordingly, Sprint's billing disputes were denied by the Company effective today.

If it disagrees with the Company's disposition of the billing disputes, Sprint may file complaints with the Kentucky Public Service Commission and the Federal Communications Commission. According to Ms. Roach, Sprint intends to file a complaint with "an appropriate regulatory agency." When it does, please serve me with a copy of the complaint.

Please be advised that Sprint has the right to cancel or terminate the Company's access service pursuant to §§ 2.6.5 and 2.8 of its PSC Tariff and §§ 2.6.E and 2.8 of its FCC Tariff. If it elects to exercise its rights to cancel or terminate, Sprint may do so upon providing the Company

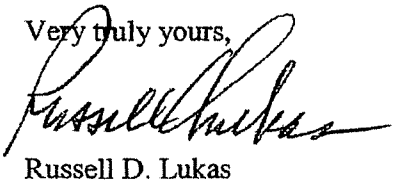
thirty (30) days written notice of its desire to cancel or terminate the Company's access service. Unless and until it cancels or terminates service, Sprint will remain responsible for payment of all bills for service under § 2.8.1 of the PSC Tariff and § 2.6.E of the FCC Tariff.

Because Sprint's billing disputes have been resolved in the Company's favor, Sprint is obliged to comply with its payment obligations under § 2.6 of the Company's tariffs. It is also liable for late payment penalties under § 2.6.2.E of the PSC Tariff and § 2.6.B.5 of the FCC Tariff.

Upon nonpayment of the previously-disputed charges included in the Company's October 2009 and November 2009 bills to Sprint, the Company may discontinue Sprint's service after giving it 24 hours prior written notice under § 2.6.4.A of the PSC Tariff and § 2.6.D.1 of the FCC Tariff.

Should you have any questions with regard to this matter, please direct them to me.

Very truly yours,



Russell D. Lukas

cc: Joe McClung

Honorable John N Hughes
Attorney at Law
124 West Todd Street
Frankfort, KY 40601

Joe McClung
President
Bluegrass Telephone Company, Inc. dba
101 Mill Street
Leitchfield, KY 42754