

DATE: March 31, 2009

FILED WITH
Executive Secretary

COMPANY NAME: Sprint Communications Company, L.P.

MAR 31 2009

SUBJECT MATTER: Post Hearing Brief of Sprint Communications Company L.P.
PUBLIC VERSION

IOWA UTILITIES BOARD

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INITIAL FILING: Yes No

DOCKET NO.: FCU-07-2

COPIES FILED: +10

FILED WITH
Executive Secretary

MAR 31 2009

IOWA UTILITIES BOARD

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE:)	
)	
QWEST COMMUNICATIONS CORP,)	
)	
Complainant,)	
)	
vs.)	DOCKET NO. FCU-07-2
)	
SUPERIOR TELEPHONE COOPERATIVE; THE)	
FARMERS TELEPHONE COMPANY OF)	POST HEARING BRIEF OF
RICEVILLE, IOWA; THE FARMERS &)	SPRINT COMMUNICATIONS
MERCHANTS MUTUAL TELEPHONE COMPANY)	COMPANY L.P.
OF WAYLAND, IOWA; INTERSTATE 35)	
TELEPHONE COMPANY, d/b/a INTERSTATE)	<i>PUBLIC VERSION</i>
COMMUNICATION COMPANY; DIXON)	
TELEPHONE COMPANY; REASNOR)	
TELEPHONE COMPANY, LLC; GREAT LAKES)	
COMMUNICATION CORP; AND AVENTURE)	
COMMUNICATIONS TECHNOLOGY, LLC,)	
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Respondents;)	
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This is not a rate case. No one is seeking to change the intrastate access rate of any local exchange carrier (LEC) in this proceeding. As a result, incantation by the LECs – as they have done periodically throughout this case – of the “Filed Rate Doctrine” is irrelevant. What Sprint seeks to change is much larger than rates. Sprint seeks to end a pattern and practice of access pumping that has been improper from its inception, that has stolen from Sprint millions of dollars on intrastate access in Iowa and tens (possibly hundreds) of millions of dollars in total nationwide, and that has shown complete disregard for federal and state regulators, for the marketplace, for industry norms, and for the simple but powerful matter of right and wrong.

When the Board is compelled to ask a witness if “you know that lying is wrong,”¹ or if they were playing by the rules or instead looking to take advantage of the absence of a rule,² it is clear that what the Board will need to address is bigger than just rates, and will require thorough, powerful and diligent action to uphold the law. The Board must address a culture of greed and a sense of entitlement, a belief among a small subset of carriers and a belief encouraged by a small but recurring group of names – of consultants, attorneys, accountants and other enabling entities – that gaming the system is acceptable, regardless of who it harms and how much.

Worse still this group is permeated by the belief that they are above the spirit of the law, and that should they be caught, they will be saved by technicalities in the letter of that law – or by a lack of political will to justly penalize the mythologized rural Ma-and-Pa telcos of Iowa. The record in this case, finalized in a truly extraordinary hearing, made undeniable the indefensible acts of the LECs – actions often admitted by the LECs’ own sworn witnesses. This brief and those of other victimized interexchange carriers (IXCs) will show that those acts also violated the law.

¹ Transcript (Tr.) 2085:13-25

² Tr. 1939:16-19

This Board must stop the scheme conducted by LECs and free calling service companies (FCSCs) against the IXC's, and must change the culture that fed its creation. The LECs argued at hearing that they were following the best guidance available, and that nothing prohibited the routing of millions of minutes of conference, chat, and international traffic through high-rate exchanges in Iowa. In their greed, the LECs badly miscalculated: the "free lunch" they attempted to take at the IXC's' expense was from the beginning unreasonable, the charges unjust, the advantages to the LECs discriminatory, and the specifics contrary to the LECs' own tariffs. And that is just the scheme; the cover-up, as is so often the case, was just as bad, just as unlawful. Iowa law and the LECs own tariffs provide the Board with all of the authority the Board needs to stop the scam, make the IXC's whole, prevent such abuses in the future, and ensure the integrity of the Iowa telecommunications industry under the Board's jurisdiction.

BACKGROUND: A SUMMARY OF A SCAM

Because the Board has been immersed in access pumping issues, in this and other similar cases, for two years, Sprint provides only a brief overview of the nature and mechanics of the illegal practices at issue in this case. While each LEC's practices have certain unique aspects, they have important commonalities that greatly outweigh the differences.

Iowa's telecom landscape is unique in that Iowa has some of the highest access rates Sprint pays in the nation. One reason for this is that Iowa has a uniquely high number of small rural LECs. Traditionally, the theory was that such rural LECs served areas where the cost to provide service is high, and the volume of minutes over which to spread those costs is low resulting in a high rate. *See, e.g.*, Tr. 1754, 1785 (Appleby discussing traditional theory of access rates). These LECs also benefit from favorable regulatory status and the perception that they are

honest, community entities – features that often allow them to fly “under the radar” with light regulatory oversight. It is no accident that Iowa has become the focal point for access pumping.

An access pumping scheme begins when a rural Iowa LEC pairs up with one or more FCSCs. These FCSCs have no offices in Iowa – most are very distant, in places like Las Vegas, southern California, and Utah. The FCSCs have no prior ties to Iowa, no particular concentration of business here – in short, the FCSCs have no natural nexus to Iowa at all. The choice of Iowa is entirely opportunistic. What the FCSCs do have is a service that is not tied to geography; conference bridges and routers can be placed anywhere. But the FCSCs can’t provide their service alone; they need to connect to the public switched telephone network, and they need telephone numbers. The Iowa LECs had exactly what the FCSCs needed to complete their service, and by jointly providing the assets the FCSCs and LECs became partners in crime.

Working together, the Iowa LECs and the FCSCs conspired to drive massive amounts of access traffic through the highest rate exchanges, creating a multi-million dollar revenue stream. The FCSCs would collocate conference bridges, routers and other equipment in a central office or switching center of an Iowa LEC. The LEC would assign large ranges of numbers from the LEC’s block to the FCSC. The FCSC would then advertise free services to the public, usually on the Internet, including the rural Iowa phone number. The caller had no idea where the number was hosted, no tie to the local Iowa community – the call, after arriving in a rural Iowa exchange, would continue to an international location or onto a chat or conference with users elsewhere. Where did the newfound millions of dollars come from in this calling pattern? Not from the users who receive the conference, chat, or international services – they get the service for free. Not from the Iowa LEC or the FCSC who created the scheme and who offer the service

– they’re making the millions. The millions of dollars come entirely from unwitting and captive third parties: IXCs like Sprint.

There are several keys to this scheme. First, the calls have to be advertised as free, or at least at below-market prices, to generate the largest amount of traffic over the access network. Second, the partnering LEC has to be able to set its access rates high enough to establish a suitable revenue stream – which is to say, a LEC looking at receiving a stream of millions of access minutes has to be able (and unscrupulous enough) to set high access rates based on a very small stream of historical access minutes. Third, the access revenue, which is allegedly designed to serve a very particular purpose and cover the rural LECs’ allegedly high costs, has to be split and shared among partners such that everyone profits – except, of course, the IXCs. Finally, the scheme has to be able to run undetected or without regulatory interference for a long enough period of time such that everyone can make their millions – except, of course, the IXCs.

The extreme jumps in traffic volume, the sharing of access revenue, the offering of a service that is free to the user, the development of a business model predicated entirely on revenues from a third-party that is a stranger to the transaction, and the use of tricks like rotating telephone numbers,³ backdated documents,⁴ unbooked transactions,⁵ and misrepresenting traffic routes⁶ is an unusual and uncommon practice in the industry. But the LECs appear to argue that none of these acts are expressly unlawful, and therefore they were just “using all the advantages”

³ Tr. 1725:50-53 (Walker testifying that in her investigation the phone numbers “frequently changed making it difficult for Sprint” to investigate).

⁴ See Tr. 2056-2065

⁵ See Tr. 1892:21-25 (Laudner admitting in deposition that the allegedly netted revenue from the FCSCs was not accounted for); Tr. 2099 (McGuire admitting that he likely did not pay taxes on the alleged revenue from the FCSCs because no bills were ever issued); Tr. 2157-58 (Hunt admitting he made no accounting entries showing revenue from FCSCs).

⁶ Tr. 2261:5 – 2262:7 (McKenna admitting that calls claimed to be terminating in Sloan, Hornick and Castana were actually going to equipment in Salix, where the switch was loaded with numbers assigned to Sloan, Hornick and Castana).

under the rules.⁷ Aside from the moral and policy implications of that line of defense, the LECs have played too fast and too loose, and they simply gambled wrong. Under Iowa law it is not the case that everything not expressly prohibited is fair game. The legislature removed from the Board the burden of having to always predict the next scam and prevent it specifically: Iowa Code § 467.3 broadly makes unlawful any practice that is unreasonable, unjust or discriminatory. That the standard is not action-specific is a feature – it means that it is the carrier’s burden to remain a safe distance from the edge; it deters envelope-pushing, which is good public policy. Most important, it easily captures the access pumping at issue in this case. Furthermore, there is a specific prohibition: the language of the LECs’ own tariffs, which allow access charges only on calls terminating to end user customers who are not carriers. The FCSCs are not “end users” or “customers” either under the tariffs or in any common sense understanding of those terms. As a result, the traffic at issue in this case has been unlawful from the start, and has never been subject to tariffed access charges. It is time for the Board to bring this scam to an end, force the LECs to give up their ill-gotten gains, and make the IXCs whole.

ARGUMENT

I. THE LEC ACCESS PUMPING SCHEME, AND THE ACCESS CHARGES BILLED TO IXCs AS A RESULT OF IT, ARE UNLAWFUL UNDER IOWA CODE § 476.3 AND THE LECs’ OWN TARIFFS.

There are two broad ways in which the LECs’ actions in this case were unlawful, and under each of them the result is that the LECs never had authority to charge access on the disputed traffic. First, the access pumping scheme is unreasonable, unjust and discriminatory under Iowa Code § 476.3. Second, the pumped traffic was not appropriately billed as access

⁷ See Tr. 2333 (McKenna, discussing with Board Member Tanner whether pumping is appropriate and whether Aventure would continue to do so). Notably, Mr. McKenna first claimed to merely be taking full advantage of the rules – but as Board Member Tanner points out at the top of Tr. 2334, Mr. McKenna was not actually aware of what the rules are.

traffic under the terms of the LECs' own tariffs. Finally, there are a number of "side effects" of the scheme that corroborate the broader unreasonableness of these arrangements, and which the Board should also address.

A. Access Pumping is an Unreasonable Practice and the LECs Have Known or Should Have Known it was Unreasonable from the Inception of the Scheme.

Iowa Code § 476.3 provides, in relevant part

1. A public utility shall furnish reasonably adequate service at rates and charges *in accordance with tariffs* filed with the board. . . 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.

(Emphasis added.) There is no straight-faced argument to be made that the access pumping scheme was ever appropriate. It is "unreasonable" to create a business model predicated entirely on forcing a captive third party to pay for a service you are offering as "free." It is "unjust" to knowingly set rates based on historical traffic when you are aware that your traffic is about to jump 1000-fold.⁸ And it is unreasonable for parties who know well that the policy behind access rates is to pay for the allegedly high cost of rural service to then split that access revenue as a kickback – if there is enough extra revenue to share, then the revenue was well beyond the LECs' cost and beyond what was required to serve the policy in the first place. *See* 199 Iowa Admin. Code 22.14(2)(a)(tying intrastate access rates to intrastate costs of service).

If there is any doubt, however, as to whether the LECs knew what they were doing was unreasonable, the proof is in the cover-up. If your actions are legitimate, there is no need to cover them up. The LECs' behavior betrays their knowledge that the access pumping scheme

⁸ *See* Tr. 1710 (Julie Walker explaining the initial discovery of pumped traffic and testifying that the first extreme spike Sprint noticed involved monthly billings increasing more than 1150-fold – 115,000% – within a single calendar year).

was improper. The FCSC services were not offered to traditional local exchange customers, the dial-in numbers were often changed,⁹ [REDACTED],¹⁰ and the LECs ultimately falsified documents to try and create the appearance of a very different relationship between the LECs and the FCSCs than what actually existed.¹¹

While the access pumping scheme was, from its inception, contrary to Iowa Code § 476.3, the LECs will likely claim that there was no specific prohibition on the various parts of the pumping arrangement. As Sprint demonstrates above, such specific prohibition is not necessary. Moreover, if the transaction is “sham arrangement,” there is no entitlement to charges from the IXCs:

The Commission determined that an AT&T customer who called Audiobridge was not thereby making a “reasonable request” for service [under 47 U.S.C. § 201(a)] because AT&T would have had to purchase a service that was “unreasonably priced and the product of a *sham arrangement*.”

AT&T Corp. v. FCC, 317 F.3d 227, 233 (D.C. Cir. 2003)(hereafter “*Total*”)(affirming FCC determination that Total had set up a sham to increase access revenues). In that particular case, the “sham arrangement” was the creation of an alter ego entity to evade regulatory restrictions, but there is no indication that such alter egos are the only kind of “sham arrangement” that would deny a LEC recovery. In this case, the facts are similar and in some cases worse than those in *Total*. Great Lakes and Clear Link, for example, appear to have a similarly symbiotic relationship, except that Clear Link doesn’t even pretend to be a carrier – Great Lakes is a LEC set up with common ownership with an access traffic broker for the purpose of the access

⁹ Tr. 1725:46-53; see also Tr. 1003:19-1004:8.

¹⁰ Tr. 971-980; Tr. 1281:17-1283:16.

¹¹ See generally Qwest Exh. 1356 ([REDACTED]).

pumping scam.¹² Reasnor and Sully are almost exactly on point with the facts in *Total*.¹³ Aventure, during the relevant period, had no non-FCSC customers.¹⁴ It didn't need to set up an alter ego; Aventure's own business consisted solely of efforts to force IXCs, like AT&T in the *Total* case, to pay unreasonable charges. Farmers-Riceville set up Omnitel, and artificially moved traffic among its various exchanges to conduct the access pumping scheme.¹⁵ Ultimately, the Board should consider the entire arrangement a "sham arrangement" in that it is predicated on the FCSC being a local exchange customer under the LECs' local exchange tariffs, which the evidence conclusively proves is not true. And in this case, it didn't end with creating sham entities or similar traffic laundering scenarios – here the LECs went the next step and made arrangements to run hundreds of millions of minutes through the sham arrangements, vastly increasing the damage. Such sham arrangements are inherently unreasonable and unjust.

Under Iowa Code § 476.3, upon a finding that charges assessed and services provided are unreasonable, unjust or discriminatory, the Board *shall* determine just practices to be enforced, but also just charges. Because of the unlawful nature of the LECs' access pumping scheme, and the severe economic damage it has inflicted on IXCs for years now, the only just charge is zero, as Sprint explains further in its discussion of remedies, below.

B. Under the Terms of the LECs' Own Tariffs, Traffic to the FCSCs is Not and Never has been Eligible for Access Charges.

While the "unreasonable, unjust and non-discriminatory" standard of Iowa Code § 476.3 provides a broad framework for finding the disputed traffic unreasonable and unlawful, there is in fact a specific prohibition on what the LECs were doing: their own tariffs. The LEC tariffs

¹² Tr. 302:12, 313:6, 382:3-19; Tr. 2411 (Both Great Lakes and Clear Link established by Jerry Nelson and Joshua Nelson)

¹³ Tr. 1778

¹⁴ Tr. 2338-39 ("BOARD MEMBER TANNER: And when do you think you obtained your first traditional customer? THE WITNESS: I believe it was in January of 2008."); *see also* Tr. 2637:10 ("Great Lakes said they had no other customers")

¹⁵ Tr. 1870:17-1890:25; Tr. 232:5-235:10.

have the force of law, and they define the services offered and the services for which the LEC can assess charges. Here, the access charges the LECs billed Sprint were not supported by their tariffs.

There are numerous examples of where the elements of the access pumping scheme do not comport with the LECs' tariffs, but the most important – and a complete bar to assessing access charges – is that the calls were not terminating to an “end user.” This is critical: the LEC intrastate access tariffs expressly provide that the access service provides the termination of calls to end users. End Users are customers who are not themselves carriers,¹⁶ and “End User Access Service” is provided only to “users who obtain local exchange service from the Telephone Company under its. . . local exchange tariff.”¹⁷ A “customer,” under the LECs' local exchange tariff, is one who contracts for local exchange service and is responsible for the payment of charges.¹⁸

In the access pumping arrangement, the FCSCs fail to meet these criteria in almost every regard: the services provided to FCSCs were not local exchange services, the FCSCs did not and were never expected to pay any charges, the FCSCs were situated more like carriers or partners in the joint provision of a service than as end users, and the calls were not terminating to equipment at end user premises. This is a critical point not only because it establishes that the traffic at issue was never subject to the charges in the access tariffs, but also because it removes any relevance of the FCC's initial *Farmers & Merchants Order*.¹⁹ There is no evidence or indicia that the FCSCs were ever “subscribers” to the LECs' local exchange services. To the

¹⁶ See, e.g., NECA Tariff No. 5, § 2.6, “End User.”

¹⁷ *Id.* at § 4.

¹⁸ Tr. 52:6-54:21; Tr. 855-858.

¹⁹ *Qwest Communications Corp. v. Farmers & Merchs. Mut. Tel. Co.*, Order, 22 FCC Rcd 17973 (2007) (subsequent history omitted) (“*Farmers & Merchants Order*”).

contrary, the evidence strongly supports Sprint's view that the FCSCs were partners or carriers, not end users:

- There is no evidence that the FCSCs placed orders for any specific local exchange service; the LECs' position appears to be that all of the orders were verbal²⁰;
- It is undisputed that the FCSCs were receiving money from the LECs, not paying the LECs; the LECs attempt to explain this away by claiming payments were "netted"²¹ but as Sprint explains below, there is no evidence the FCSCs ever compensated the LECs through netting or otherwise;
- The FCSCs were given control over large ranges of numbering resources – they could determine which numbers to put in service and when²²; control of numbering resources is normally held by carriers;
- As Board Member Hansen pointed out, the LECs and FCSCs signed contracts which were expressly wholesale contracts; a wholesale provider is, by definition, a distributor or intermediary, not an end user – they are providing services to retail end users²³;
- The LECs themselves generally referred to the FCSCs as "partners,"²⁴ or even in some instances "carriers";
- The FCSC had no customer premise equipment because they had no customer premises in Iowa – they have no offices, no buildings; the equipment owned by or assigned to the FCSCs was in each instance located within the LECs' switching facility (collocation itself is generally for carriers, not end users). The FCSCs paid no rent or lease costs and had no physical control over the space; it was not the FCSC's premise in any rational understanding of that term.²⁵

The lack of any payments from the FCSCs to the LECs merits a closer look, because that issue by itself provides an example of the many ways in which the access pumping scheme is

²⁰ Tr. 2284:10-13.

²¹ Tr. 1993:5-13, Tr. 2004:3-13; Tr. 2039:22-2040:4.

²² Tr. 1994:19-1995:3; Tr. 2149:24-2150:23 (Dixon would provide the FCSC a block of numbers and the FCSC would assign specific numbers out of that block); Tr. 2160:21-2162:3.

²³ Mr. Laudner conceded that under the "wholesale" contract Farmers-Riceville had with Free Conferencing established a "carrier to carrier" or "provider to provider" relationship, not an end user relationship. *See* Tr. 1942:23 – 1943:1 (responding to Board Member Hanson). Board Member Hanson astutely questioned all of the LECs on the "wholesale" nature of the contracts they voluntarily entered, and none had an adequate explanation, because there is none to be had. The FCSCs are not an end user; they are either a carrier (completing calls to individual end users elsewhere), a joint provider of the service, or they are in a wholesale relationship with the LEC. For example, the FCSCs collocate in the LEC central office like a carrier – something other customers do not do. *See also* Tr. 2092:2-2096:7; Tr. 2169:25-2170:25.

²⁴ Tr. 858:3-6; Tr. 1899:25-1903:20; Exh. 948, 949, 1373 and 1375.

²⁵ [REDACTED] Tr. 248:1-13.

unreasonable and unlawful, and it shows that the LECs were aware that they were violating their own tariffs. The key requirement for the LECs to be able to charge Sprint access charges in the traffic in this case is that the FCSCs must be customers for (or, put differently, must subscribe to) services under the LEC local exchange tariff. If the FCSC are not end user customers of defined local exchange service, access charges do not attach to the traffic. The definitions in those tariffs, however, all contemplate that a "customer" is one responsible for payment to the LEC. The Filed Rate Doctrine requires that a user be treated in accordance with the tariff, the same as any other purchaser under the tariff -- a customer must order specifically described services and pay specifically tariffed rates.

As an initial matter, there can be no dispute as to the fact that there is no evidence any FCSC made any payments to any LEC. There is no evidence that any contemporaneous invoices were ever sent to FCSCs or that there was an expectation of payment. When confronted with this fact, however, the LECs' response was two-fold, and both responses were damning.

As a first response, the LECs scrambled to falsify invoices, and any "customer" contracts needed to support the invoices, with the appearance that they had been contemporaneously sent over the months of the LECs relationship with FCSCs. None of the LECs had a reasonable explanation of why they failed to bill the FCSCs.²⁶ As Qwest witness Jeff Owens said, it strains credibility that every LEC simply forgot to bill every FCSC every month for two years.²⁷

²⁶ Tr. 2406:17-2407:9 (more efficient to retain a portion of access revenue paid to Great Lakes); Tr. 2248 (comparing LEC free service offering to other carrier's tariff discount offerings); Tr. 2785 (██████████); Tr. 1989 and 1993 (first contends charges for services provided were netted, later contends backbilled because discovered tariffs required written bills); Tr. 2129-2130 (initially didn't realize tariffs required Dixon to issue written bill, so although Dixon allegedly calculated services in the revenue split, fees were also eventually billed).

²⁷ Tr. 606 ("There are instances where LECs may, for one reason or another, fail to bill a local-exchange service to a local-exchange customer, but we have the unusual situation in this case where we have every single LEC and every single CLEC failed to bill. There are--and it's just not credible that every single LEC forgot to render a bill to every single FCSC in every single month in which these services were provided. So I think the "I forgot to bill" is not a good explanation for the lack of invoices in this case.")

Moreover, if the LECs merely forgot to bill, there would not be any reason the bills ultimately created would not indicate the date they were actually created and sent. It is true that “backbilling” occasionally occurs in the industry, but “backdating” is another matter altogether: if there is intent to deceive, backdating is, frankly, fraud.²⁸ There is ample evidence that the backdated bills were not merely to remedy forgetfulness. [REDACTED]

[REDACTED].²⁹ More important, however, is that there is clear evidence that the backdating was done with unmistakable intent to deceive. The timing is practically an admission of guilt: [REDACTED]

[REDACTED].³⁰ Most condemning of all, however, is that there is direct evidence that the motive for backdating was not to rectify a mistake or to get paid – [REDACTED]. [REDACTED]

[REDACTED]. Note the chosen date for the backdating of contracts and invoices has nothing to do with when the relationship really started –

[REDACTED]. Why was this necessary? [REDACTED]

[REDACTED] and they should return all of those revenues.

²⁸ Tr. 1723:15-1724:44; Tr. 741:10-743:4.

²⁹ Tr. 2062:6-2063:4;

³⁰ Tr. 2056:16-2062:16.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Qwest Exh. 1356, Tab 23. In the end, nearly all of the defendant LECs *did* falsify documents. Those that didn't made no effort to be paid at all. Either way, the FCSCs were never responsible for payments under the tariffs, and therefore were not customers, subscribers, or end users.

When it became obvious that the backdated documents would not enable them to prevail on the issue of whether FCSCs were customers, the LECs tried a second approach. The LECs argued that in fact the FCSCs *had* paid the LECs for services – through a “netting” arrangement. The LECs claim that the particular split of the access charges between the LEC and the FCSC already takes into account the price for providing local services. They asserted that the share paid to the FCSC is net of the charges that would be owed to the LEC.³¹ Unfortunately for the LECs, this argument has just as many problems as the backdated invoices. As an initial matter, the LECs' two arguments are inconsistent. If the LECs had been paid already through this netting arrangement, the sending of additional invoices would be seeking double recovery.³²

In fact, however, there was never a netting arrangement. There is no document that would reflect such an arrangement; to the contrary, [REDACTED]

[REDACTED]

[REDACTED]

³¹ Tr. 1891:14-20; 1893:21-25.

³² Tr. 2165:9-2167:24

³³ Tr. 2044:15-2046:23; Tr. 2486:3-15; Tr. 2489:2-21; *see also* Tr. 2158:15-2159:11.

██████████³⁴ There are no calculations reflecting such netting. And if there really was netting, the revenue paid to the FCSCs would not be based simply the number of minutes of traffic generated but on that number minus the amount “paid” for the specific local exchange services they were provided at the rates tariffed for those services. There is no evidence of that whatsoever. The evidence before the Board makes very clear what is really going on. The LECs are providing their services, equipment and office space for free because it is not really provided to the FCSCs *per se*. Rather, the LEC is simply doing its part in the joint provision of the free calling service. The LEC and the FCSC partner -- they each contribute part of the equipment and expertise needed -- to provide a service by which they both make millions of dollars at the expense of IXCs and IXC customers. There is no netting because there is no paying customer as between the LEC and FCSC. They are conducting business together. As a result, there was never a legal basis for charging IXCs access for calls delivered to FCSC equipment.

Moreover, even if the LECs were being truthful about the netting arrangement, it would not matter. The Board should impose the common sense requirement that a customer is someone who pays a supplier on a *net* basis. If you are ultimately being paid more than you are paying, it is hard to see how you are a “customer.” Furthermore, even if the FCSCs are “paying” for *something* under the LECs’ netting theory, there is no evidence in the record that those payments were for *local exchange services* or that those payments were at the tariffed rates. Absent that evidence, the Board should not be willing to just take the LECs’ word for it – and absent that evidence, these calls still are not subject to access charges under the LECs’ tariffs.

³⁴ Tr. 2063:5-2064:6 (“Q. So you're not accounting for any of these purported local services provided to the free calling parties, are you? A. Correct.”)

C. The Efforts to Cover Up the Access Pumping Scheme, and the Additional Impacts Not Directly Related to Charges to IXCs, Show the Magnitude of the Problem the Board Needs to Remedy.

While the core elements of the scheme were unreasonable, unlawful, and contrary to the LECs' tariffs, to truly appreciate that this is much more than a rate dispute, to see just how unreasonable this access pumping scheme is, the Board should also be mindful of the adverse ancillary impacts and the unlawful acts that were part of the cover up. These are all part of the totality of the scheme that make it so obviously in violation of Iowa Code § 476.3, that show how contrary to public policy the LECs' actions were, and show why harsh punishment is appropriate. While it is not exhaustive, just a short list of the other lawless acts and problems with the scheme includes:

Easy access to pornography. The LECs and their FCSC partners used regular rural numbers as part of the plan to maximize access rates.

Unfortunately, much of the traffic they drove was to explicit pornographic chat, conference, and information lines. Because they did not use 900 or 976 numbers, and the LECs took no responsibility for the content of services they were helping to provide, minors had easy access to adult materials, and there was little a parent could have done to control such access.

Improper subsidization. The access pumping scheme allowed LECs to generate unearned windfalls well in excess of reasonable rates of return. By their own admission, the LECs used the excess subsidy generated over monopoly facilities to pay for facilities that would be used in competitive markets, or to keep competitors out of their markets.

Fraud on the Universal Service Fund. The evidence suggests that several carriers, the CLECs in particular, greatly exaggerated their line counts to USAC based on counting numbers assigned to FCSCs. In some cases, this was compounded by the fact that the same carriers were not paying anything into the universal service fund for the FCSC lines, which were kept off of the books. In the case of Aventure, the only lines of service Aventure was providing was service to FCSCs for a two-year period in which Aventure reported approximately 3,000 lines for purposes of receiving USF – many from exchanges where no traffic ever traveled.³⁵

Failure to Pay Sales Tax. To the extent the LECs argue that the FCSCs were providing some payment for services, whether via a netting scheme or in-kind, many of [REDACTED] [REDACTED] – which, if they are end user retail services, would be a substantial violation of the tax laws. The absence of tax payments is also further evidence that these purported netting arrangements did not involve real payments at all. The reason these “revenues” did not go through the LECs’ accounting systems and generate tax payments is that there were no real bills and no actual payments. Nonetheless, if the LECs want to argue that netting occurred, they should have to face the consequences of that argument: they would be in violation of tax laws. Either way, the LECs’ actions are unlawful.

Provision of Services in Unauthorized, Uncertificated, or Untariffed Exchanges. In several instances, Respondent LECs were shown to have been

³⁵ Tr. 2267:2-2271:17.

providing FCSC services out of exchanges where they were not certificated or where they did not offer service in their tariffs. For example, Great Lakes provided all of its services from its switch in Spencer – an exchange it had not listed in its tariff as part of its service territory. Similarly, Sioux City is not part of Aventure’s declared territory (if Aventure “claimed” Sioux City – or if the Board finds Aventure in fact is providing services in Sioux City – Aventure would lose its rural exemption). But most of the switching provided by Aventure in this case occurred in Sioux City, and some of the calls in this case were completed there.

Use of Prohibited VNXX-like Services. Related to providing service from uncertificated or untariffed exchanges, many of the LECs engaged in types of traffic laundering or an additional arbitrage by claiming calls were serving a particular (higher-cost) exchange when in fact the traffic was delivered somewhere else. In some cases, the only exchange traffic was actually touching was an exchange where the carrier was not even authorized to serve. The LECs tried to defend this by claiming it was no different than FX service. The Board has long distinguished, however, between FX and VNXX. In FX, the ordering end user customer purchases a local service in the foreign exchange for the purpose of having visibility there, and then buys a specially priced interexchange service to carry actual traffic from that exchange back to the true “home” of the end user customer. For the most part, none of those features are present here. The FCSCs aren’t purchasing FX -- they aren’t requesting any particular location. There is no evidence they even knew that the LECs were laundering some of the

traffic. Here there is no presence in the foreign exchange, and no traffic travels there. What the LECs generally meant in the hearing by this “FX-like” service was that a telephone number from a foreign exchange was loaded into the home exchange switch – and a call went from that number to FCSC equipment in the same building. This is not even VNXX, where a local number is provided in a foreign exchange by a carrier that neither has nor purchases a presence of product there for the purposes of carrying traffic back to a distant point of interconnection between the VNXX provider and the underlying LEC. This is much worse: it is one additional step removed, virtual-VNXX if you will, in that there is not even a product purchased in the foreign exchange and no traffic ever touches the foreign exchange. This is all a fiction created in the home exchange switch, a misuse of numbering resources purely to arbitrage access, driven not by an ordering customer, but by the LEC itself trying to maximize its own revenue. It violates all of the principles the Board has set forth in rejecting VNXX in that it (a) is even more wasteful of numbering resources (the VNXX applications in IUB Dockets ARB-05-4 and SPU-02-11 were only going to require a handful of local routing numbers) and (b) it is much more extreme in generating traffic for which a captive third-party will have to bear the costs without making prior arrangements for compensation. The Board’s position on these issues was known well before the LECs in this case began their access pumping.

Unlawful Discrimination Among LEC Customers. The LECs cannot have it both ways: they must argue that the FCSCs were customers for local exchange services, but if they are, they certainly were treated differently from any other

LEC customer. It is a certainty that no other customer of the defendant LECs' local exchange services was actually getting paid on a net basis to be a "customer." No other customers were allowed to collocate their equipment in the LEC central office. No other customers had separate contracts that they would not have to pay for their services. If the FCSCs were customers of local exchange services, the LECs engaged in extreme violations of the anti-discrimination provisions of state and federal law. The LECs cannot respond by acknowledging the truth: that the FCSCs are not local exchange customers but partners. Acknowledging this would make clear that tariff switched access charges are not available for traffic to the FCSCs. Either way the traffic, terms, conditions and practices in this case have been unlawful from the inception of the scheme.

The Likelihood of Perjured Testimony. As the Board surely noticed, several witnesses gave testimony under oath in a deposition that was then directly contradicted by their own testimony under oath in the hearing room. Similarly, witnesses gave testimony under oath on cross examination only to say the exact opposite under oath on redirect. Finally, at least Farmers & Merchants had to certify the veracity of discovery it provided to the FCC, and other carriers likely have signed reports and filings with USAC, the Board, state and federal tax authorities, the Iowa Secretary of State and others that, in light of the facts in evidence in this docket, were likely perjured.

In sum, in both the big picture and in the specifics, the LECs and their partners have been knowingly engaged in a scam that did severe economic harm to Sprint and other specific carriers,

but also gravely violated the public interest. They should have known, and in fact have known, all along that their scheme was unreasonable, unjust and discriminatory. The traffic has, at all times, been outside of the terms of the LECs' tariffs, has been in violation of Iowa Code § 476.3, has been a "sham arrangement," has represented an improper subsidization improperly protecting the LECs from competition, and for many of the carriers has been in violation of the Board's VNXX cases. The traffic, terms, conditions, charges and practices that are part of the access pumping scheme, because they were never legitimate or lawful, cannot be subject to access charges.

II. SPRINT HAS SUFFERED SUBSTANTIAL HARM FROM THE ACCESS PUMPING SCHEME AND WILL CONTINUE TO LOSE MILLIONS OF DOLLARS UNLESS THE SCHEME IS STOPPED.

Any remedy ordered in this case should allow the recovery of all access charges invoiced for the invalid traffic, including credits for amounts not paid as a result of the dispute and refunds of amounts paid to the LECs for invalid traffic.³⁶ As concisely stated at hearing:

Board Member Tanner: Just so we're clear, is Sprint seeking recovery of past--or a refund of access charges in this case?

Sprint Witness, Julie Walker: Absolutely.³⁷

Sprint initially discovered suspect traffic with one rural LEC in October 2006.³⁸ Sprint gathered call detail records for traffic terminated to the rural LEC from its switches in the long distance network.³⁹ Sprint analyzed the data and identified certain telephone numbers to which

³⁶ In its intervention Sprint stated its intention to participate as a party and "seek relief specific to Sprint." Sprint Communications Company LP's Petition to Intervene, dated October 19, 2007. By Order issued November 20, 2007, the Board granted Sprint full intervention. Order Affirming Intervention, Denying Motion to Strike, Granting Intervention and Granting Admissions Pro Hac Vice; *see also* Tr. 2082 ("Mr. Dublinske: Okay. You understand that the interexchange carriers are seeking refunds of amounts that were paid to you in this proceeding; correct? Mr. McGuire: Correct.")

³⁷ Tr. at 1741.

³⁸ Tr. 1710. (l. 57-60)

³⁹ Tr. 1711.

calls of long duration and high frequency were made.⁴⁰ After the review of the traffic for that initial LEC showed that more than 99% of the traffic was associated with free international calling and chat-lines Sprint expanded its investigation.⁴¹ The investigation confirmed traffic spikes for other Iowa carriers typically with 99% of the traffic associated with international calling, conference calls and chat-lines. Sprint estimated that the total access charge amounts paid for the invalid traffic prior to September 2006 was \$25 million and at the time testimony was filed Sprint had filed approximately \$50 million in disputes.⁴² Sprint has continued to investigate and identify such traffic and related access charges. Sprint witness, Ms. Walker stated in response to cross examination that as of the hearing date Sprint had disputed approximately \$100 million with about half of that amount attributable to carriers in Iowa.⁴³ As to the eight LEC defendants in this case, Sprint had identified disputes totaling \$22,794,506.41 as of March 2008.⁴⁴ For the LEC Defendants approximately 92% of that traffic with Sprint was interstate and 8% is intrastate.⁴⁵ In addition to the amounts Ms. Walker identified in her Direct Testimony, Sprint has discovered additional amounts totaling at least \$14 million that was paid to the LEC Defendants prior to when Sprint initiated disputes and began withholding payment assessed for invalid traffic.⁴⁶ However, as stated by Sprint witness Ms. Walker, it is difficult to fully identify the invalid traffic and the remedy ordered should include the ability to recover all of the access charges associated with the invalid traffic, both amounts erroneously paid and amounts disputed and withheld.⁴⁷ For the LEC defendants, the amount that should be refunded to Sprint for

⁴⁰ *Id.*

⁴¹ Tr. 1711-1714.

⁴² Tr. 1716.

⁴³ Tr. at 1739 and 1744; Tr. 1715 ("Most of the carriers engaged in traffic pumping are in Iowa").

⁴⁴ Walker Direct Exh. JAW-2.

⁴⁵ Tr. 1715.

⁴⁶ Tr. at 1745.

⁴⁷ Tr. at 1741 (Board member Tanner: "So is the relief you're seeking a declaration that the application of tariffed charges were invalid, then, rather than an amount, and then Sprint would go collect? Walker response: "Right.")

intrastate access amounts previously paid is approximately 8% of the identified \$14 million and the amount that had been disputed as of March 2008 that should be credited for intrastate amounts disputed is approximately 8% of the \$22.8 million. The amounts in dispute have continued to accrue for those LECs that are still engaging in traffic pumping. Thus it is clear that Sprint, in order to be made whole, should be permitted to seek refunds of amounts paid and credits for all amounts in dispute and withheld.

III. THE BOARD SHOULD CRAFT BROAD, POWERFUL REMEDIES TO MATCH THE MAGNITUDE OF THE LECs' WRONGDOING, TO MAKE THE DAMAGED IXC'S WHOLE, AND TO ENSURE THROUGH SPECIFIC RULINGS AND DETERRENCE THAT SUCH SCAMS ARE NOT POSSIBLE IN IOWA.

As stated above the Board should order a remedy that allows recovery for all access charges assessed for the stimulated traffic and also results in the cessation of access pumping going forward. The record in this case supports a finding that the traffic stimulation activity and the sharing of access revenue with third parties are outside of the LECs' tariffs and are unreasonable practices. Furthermore, this record demonstrates that tariffed access charges do not apply to the traffic in question. A finding that the LECs' access pumping and related activities are outside of the tariffs and constitute an unreasonable practice contrary to the public interest would entitle interexchange carriers to recover amounts paid on the invalid traffic, obtain credits for amounts withheld and preclude the LECs from engaging in such activity in the future. Such a ruling should encourage LECs engaged in access pumping activity that are not a party to this proceeding to resolve disputes without resorting to similar litigation that would likely reach the same result.

and Tr. at 1742 (Board Member Tanner: "Do you feel your efforts have captured a majority of the traffic in question?" Walker response: "I would want to say yes, but in what we've experienced with access pumping, nothing surprises me. I honestly can say that I don't feel 100 percent-- I feel confident that we've captured what I think now is the big hitters. We've got new audits in place. You know, we're now very much prepared to find access pumping, but I can't say that, you know, we don't think there's other stuff.")

A. Effect of Board Decision on Traffic Pumping Disputes Generally

This Board is in a unique position to issue a decision on the most complete record of any access stimulation case that is currently pending. As pointed out by numerous witnesses and as recognized by the FCC itself, the FCC did not have the benefit of the full and complete record presented in this case before making its initial decision in the *Farmers Order*⁴⁸ case.⁴⁹ For example, in granting the motion to reconsider, the FCC stated:

We disagree with Farmers' contention that Qwest's Motion to Compel is untimely. As discussed in this Order, it appears possible that Farmers did not produce relevant evidence in response to discovery requests in this proceeding. Accordingly, we now initiate additional proceedings pursuant to section 1.106(k)(ii) of the Commission's rules to ensure the record here is complete.⁵⁰

In the Order on Reconsideration not only did the FCC recognize that certain evidence had not been produced in its proceeding, but also that such evidence was not available for consideration in making its initial October 2, 2007 decision:

First, Farmers argues that there is no "new" evidence because Qwest knew, or should have known long before the reconsideration stage of this proceeding that Farmers backdated contracts and invoices. We disagree. The contracts and invoices that Farmers produced bear no indication that they were backdated.⁵¹

⁴⁸ *Qwest Communications Corp. v. Farmers and Merchants Mutual Tel. Co.*, File No. EB-07-MD-001, Order, 22 FCC Rcd 17973 (2007) (subsequent history omitted) ("*Farmers Order*").

⁴⁹ Tr. 536 ("In its order of reconsideration, the FCC demanded that Farmers provide additional evidence, evidence that it did not have when it rendered this original decision, evidence that would address the backdating of contracts and amendments by Farmers so that the FCC could render an appropriate decision."); Tr. 649-650 ("Owens: Well, I don't think the FCC had all the information available to it that we have in this proceeding. Q. Do you know that for a fact? A. Yes, I know that for a fact. The FCC in its order on reconsideration in January of 2008 made it abundantly clear that it felt it did not have all the information that it was entitled to receive under discovery in this complaint proceeding, and it ordered Farmers & Merchants to provide all the information it had provided to the Iowa Board and any other information that was relevant to the provision of services by Farmers to the four FCSCs in its complaint proceeding, so the record is absolutely clear that the FCC didn't have all the information it needed."); Tr. 823-824; Tr. 1807-1813; Tr. 2066 ("Mr. Steese: At the FCC there's not a proceeding like this where you can sit down and cross-examine, is there? Mr. McGuire: No.")

⁵⁰ *Qwest Communs. Corp. v. Farmers & Merchs. Mut. Tel. Co.*, Order on Reconsideration, 23 FCC Rcd 1615, fn 26 (2008) (citations omitted).

⁵¹ *Id.* at ¶ 9 (citations omitted); The FCC also noted: "In addition, to the extent there are documents that Farmers did not produce in the IUB Proceeding or the instant proceeding, but that nonetheless are responsive to discovery requests in either proceeding, Farmers must produce them now." *Id.* fn 48.

No other traffic stimulation case currently pending has been through the rigorous discovery, testimony and hearing process of this case.⁵² This Board has an opportunity to engage in leadership on a critical industry issue, one that, unfortunately, has been centered in the Board's backyard. A well reasoned, strong order in this case would guide subsequent behavior, settlement discussions and other proceedings involving the assessment of access charges on stimulated traffic. Although the Board's decision will only be directly applicable to the LECs in this proceeding, a decision that access charges do not apply to access stimulation traffic and to traffic that results from access sharing arrangements, and prohibiting LECs from sharing access revenues with third parties, should provide guidance to other carriers not specifically named in this case.⁵³

B. The LEC Defenses are Without Merit

The LECs attempt to raise various defenses to support their actions, and their assessment and collection of access charges on the stimulated traffic. However, upon full review, it is clear that none of the defenses are valid and they all should be rejected.

First, Reasnor's witness, Mr. Zingaretti claims Sprint could have avoided paying the disputed access charges, a ridiculous claim, given that Sprint obviously would take any practical and legal step to avoid these charges. Mr. Zingaretti identifies certain situations that do not apply

⁵² For example, the FCC's *Farmers & Merchants* case did not include any opportunity to see the witnesses and test their credibility. Tr. 823:12-824:11 (in all my experience with the FCC, they don't do hearings. It is purely a paper process where evidence is given to the FCC on paper. . . . BOARD MEMBER TANNER: There's no cross-examination of witnesses then? THE WITNESS: No.)

⁵³ Tr. at 1743-44 (Board Member Tanner: "And this is related to a previous question, but has Sprint identified other Iowa carriers not included in this proceeding as having free calling traffic and related access charges?" Walker: "Yes." Board Member Tanner: "And how does Sprint intend to address its concerns with those companies?" Walker: "Well, we continue to withhold disputed amounts we know. We're hopeful that relief will be given if the Board concurs that our issue is obviously damaging and valid. And that whatever comes out of this hearing I guess is what I think would pass on to how we would fix--the other carriers would adopt what remedies we get from here as to how we fix the disputes we both have currently outstanding, and then how to handle going forward, but we'll continue to withhold access payments.")

to the traffic at issue.⁵⁴ For example, if the long distance carrier was providing 800 service to the conference calling company, the long distance carrier may be able to terminate service.⁵⁵

However, for the traffic at issue, Sprint has not sold the free conference calling companies 800 service.⁵⁶ Mr. Zingaretti also suggests that Sprint could have imposed limitations on its customers.⁵⁷ Sprint is precluded from imposing surcharges on its retail customers (at least for interstate, wireline calls) for calls to chat-line and conference calling providers under Section 254(g) of the federal Telecommunications Act of 1996.⁵⁸ Furthermore, imposition of such a surcharge, as a practical matter, would be impossible.⁵⁹ Identifying the phone numbers used for conference calling and chat lines is very difficult and expensive. It would require an extensive process to identify the number and then customer notification (which would be expensive).⁶⁰ It is likely that the companies would simply change the phone numbers further complicating a surcharge proposal. [REDACTED]

[REDACTED].⁶¹ However, the cited contract is a negotiated wholesale contract not a retail long distance service contract.⁶² As stated above, charging different retail rates may be precluded under Section 254(g). Even if it were possible, this Board

⁵⁴ Tr. 1766.

⁵⁵ See Tr. 2757-2758.

⁵⁶ Tr. 1767.

⁵⁷ See Tr. 2757-2758.

⁵⁸ See *In re Policy and rules Concerning the Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 19 FCC Rcd 6746, ¶ 7 (2004) ("We find that IT&E may not implement a rate schedule containing rates that vary based on the location to which the call is terminated. We find, as did the Bureau, that such an approach is impermissible because it would allow a carrier to charge its subscribers in every state a higher rate for calls destined for one state than the carrier assesses for calls of the same distance and duration to other states.").

⁵⁹ Tr. 1767.

⁶⁰ Tr. 1768.

⁶¹ Tr. 2805, Exh. 49.

⁶² Tr. 1768.

should not adopt a policy that encourages such a surcharge. That would result in long distance companies charging customers higher rates for calls made to rural areas such as Iowa.⁶³

Second, the LECs have claimed that the IXC could have remedied the problem by either raising rates assessed on their customers to force the customer to use other carriers or by routing the traffic to other carriers. Contending that Sprint could have foisted its traffic on another carrier is not justification for the practice at issue. As stated by Sprint witness Mr. Appleby "A mugger cannot justify a mugging by saying his victim could have prevented the crime by pointing out a better target on the other side of the street."⁶⁴ Mr. Zingaretti also claims that [REDACTED]

[REDACTED].⁶⁵ However, this is inconsistent with the LECs' opposition to the blocking of traffic to the free conference calling companies.⁶⁶ The FCC issued an order at the time that IXCs were first discovering and disputing the access stimulation activity stating "we remind carriers that the Commission, except in rare circumstances not found here, does not allow carriers to engage in call blocking."⁶⁷ The LECs' claim that there is no problem, because the IXCs can avoid sending the traffic is also inconsistent with their claim that they need the access revenue associated with these calls. If the interexchange carriers could avoid sending the traffic, they would also avoid paying the access charges.

⁶³ Tr. 1769.

⁶⁴ Tr. 1768.

⁶⁵ See Tr. 2757-2758.

⁶⁶ Tr. 1769-1771.

⁶⁷ *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, 22 FCC Rcd 11629, ¶ 7 (2007). However, the FCC decline to adopt Farmers position that withholding payment on access charges constituted unlawful self-help. Exh. 703, Memorandum Opinion and Order, FCC 07-175, ¶¶ 28-29 (The FCC denied Farmers request that the FCC find that Qwest engaged in self-help by withholding payment on access charges: "Farmers asserts that Qwest has only made partial payments for the terminating access services Farmers provided. According to Farmers, "[e]ach time that Qwest has withheld payment of Farmers's tariffed charges, it has violated Farmers's tariff and engaged in unlawful self-help." We decline to rule as Farmers requests.")

Third, Mr. Zingaretti contends that Sprint has a conference calling business analogous to the LECs' conference services. Mr. Zingaretti is incorrect. Sprint does not currently have a conference calling service.⁶⁸ When Sprint had a conference calling company it was significantly different from the services the LECs are offering.⁶⁹ The revenues from Sprint's conference calling services were derived "from the customers of the service, not from any kickbacks."⁷⁰

Fourth, the LECs have asserted that their intrastate rates are not regulated. This assertion fails for two reasons. The LECs are incorrect that the Board does not have jurisdiction over their access rates. In a recent case involving the Iowa Telecommunications Association intrastate tariff, the Board found that it had jurisdiction to review changes to the ITA tariff and determine if the "revised access rates proposed by ITA are just, reasonable and non-discriminatory."⁷¹ Furthermore, this issue in this case is whether the rates *applied* to the traffic at issue, not the rates themselves.

Fifth, the LECs have attempted to characterize the services as foreign exchange ("FX") type services.⁷² As is explained more fully above, they are not. Generally a customer orders and pays for a telephone number in a foreign exchange to establish a local presence in that exchange and so that customers in that local exchange can call the number without incurring toll charges.⁷³ That is not what happened here. As just one example, in the case of [REDACTED]

⁶⁸ Tr. 1772.

⁶⁹ *Id.*

⁷⁰ Tr. 1773.

⁷¹ *In re Iowa Telecommunications Association*, Docket No. TF-07-125, Order Setting Procedural Schedule and Setting Date for Hearing, November 10, 2007 at 10. ("The Board finds that § 476.1 does not exempt ILECs from complying with § 476.11, which grants the Board authority, upon complaint, to regulate carriers' interconnections with respect to toll traffic and necessarily includes the switched access services toll providers must purchase to originate and terminate most interexchange calls.")

⁷² Tr. 2754; Tr. 2594 ([REDACTED])

⁷³ Tr. 1778-1779; *see also* Tr. 2469 ("Board Member Hanson: Is there anybody that you consider a customer who has any connection to Spencer other than that's where the equipment sits? Mr. Nelson: I would guess not.")

800 service business was significant enough to increase traffic volumes significantly, harm IXCs and warrant price controls. That is clearly not true for this revenue sharing scheme.⁸¹

Similarly, the LECs have pointed to the FCC's decisions in *Beehive*⁸², *Frontier*⁸³ and *Jefferson*⁸⁴ as claiming that the FCC rules permit LECs to charge access on the services at issue. As pointed out at the hearing, the FCC has concluded that these cases are not dispositive on the issue of access revenue sharing.⁸⁵

In the *Jefferson* case the FCC based its decision on the facts specific to that case and the specific claims made in that case.⁸⁶ Whether Jefferson discriminated against one customer over another was not addressed because evidence for such a claim was not presented.⁸⁷ However, that is not the case here.⁸⁸ The FCC also did not address whether revenue-sharing violated Section 201(b), Section 202(a) or other requirements. The FCC stated:

Although we deny AT&T's complaint, we emphasize the narrowness of our holding in this proceeding. We 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*

⁸¹ Tr. 1776.

⁸² *In the Matter of AT&T Corporation, Complainant, v. Beehive Telephone Company, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 11641 (2002) ("*Beehive*").

⁸³ *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc. et al.*, Memorandum Opinion and Order, 17 FCC Rcd 4041 (2002) ("*Frontier*").

⁸⁴ Exh. 1354; *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001) ("*Jefferson*").

⁸⁵ Tr. 840-843.

⁸⁶ *Jefferson* at ¶ 1.

⁸⁷ *Jefferson* at ¶ 15 ("AT&T's contention fails to state a discrimination claim under Section 202(a) because AT&T fails to allege that Jefferson treated one customer differently from another. Notably, AT&T fails to allege either that Jefferson offered a better deal to IAN than to similarly situated end-user customers.")

⁸⁸ Tr. 638-639 ("Mr. Owens: My claim of discrimination is that there are parties in the State of Iowa who, had they known that local-exchange carriers were offering something akin to local-exchange service for free and that included the payment of terminating access charges to the customer, that I have--I'm fairly confident that there would be a large number of customers in the State of Iowa who would be interested in pursuing such an arrangement. . . . I think the fact that the offering was made to one party and not to Qwest or anyone else means that we have been discriminated against."); Tr. 843.

(or other revenue-sharing agreements between LECs and end-user customers) ran afoul of 201(b), 202(a), or other statutory or regulatory requirements.⁸⁹

Further, the *Jefferson* decision did not address many of the issues raised in this case.⁹⁰

In *Beehive*, the FCC reached a similar conclusion and did not rule on the merits of revenue-sharing arrangements:

AT&T alleges in its Complaint that the access revenue-sharing arrangement between Beehive and Joy breached Beehive's common carrier duties, in violation of section 201(b) of the Act, and constituted unreasonable discrimination, in violation of section 202(a) of the Act. AT&T's allegations and arguments are identical to those raised and denied in *AT&T v. Jefferson* and *AT&T v. Frontier*. Thus, for the reasons explained in those orders, we conclude that AT&T has failed on this record to meet its burden of demonstrating that Beehive violated either section 201(b) or section 202(a) of the Act.⁹¹

Moreover, we decline to reach two issues that AT&T raised for the first time in its briefs, because the tardy raising of these issues renders the record insufficient to permit a reasoned decision. Specifically, in its briefs, AT&T maintains for the first time that the revenue-sharing arrangement between Beehive and Joy also violated section 201(b) by "evading the requirements" of TDDRA.⁹²

Similarly, the FCC in *Frontier* did not reach a decision on whether access revenue-sharing arrangements constitute unreasonable practices. Rather the FCC determined that AT&T did not meet its burden of demonstrating that the defendants violated 202(a) or 201(b), not that the practice was reasonable.⁹³

Incredibly, the LECs rely on the FCC's October 2, 2007 Order as controlling and authorizing the very behavior at issue. However, as discussed above, that decision was based on an incomplete record and the order is currently under reconsideration. The FCC plainly expressed displeasure at Farmers'

⁸⁹ *Jefferson* at ¶ 16 (emphasis added).

⁹⁰ Tr. 844-845 ("Q. Did the Jefferson decision ever address whether the free calling parties were end users? A. No. Q. Did they address whether the calls were being delivered to an end-user premises? A. No. Q. Did it address the issue of discrimination between end users? A. No. Q. Did it address situations where traffic is not being delivered to the LECs local calling area? A. No. Q. Did it address calls flowing through local exchange areas and going to distant lands? A. No. Q. Did it address issues where carriers failed to bill the FCSCs for any local exchange services? A. No. Q. Did it address back-billing or manufacture of evidence? A. No. Q. Did it address many of the other issues we have in this proceeding? A. I don't believe so.")

⁹¹ *Beehive* ¶ 29 (citations omitted).

⁹² *Id* at fn. 99 (citations omitted).

⁹³ *Frontier* ¶ 1.

failure to produce documents relevant to that proceeding, even to the point of suggesting the integrity of the process may have been compromised:

Qwest has identified evidence concerning the relationship between Farmers and Merchants Mutual Telephone Company (“Farmers”) and certain conference calling companies that should have been produced in the initial underlying proceeding, and we grant the Petition to the extent that we initiate additional proceedings to consider the relevance of that new evidence.

....

In order to protect the integrity of our process, we must have access to a full record, including these newly-identified documents.⁹⁴

Thus, upon review of the cited cases, the LECs’ arguments that they were “simply following the rules” and were relying on prior precedent are baseless and not supported by the existing orders.

Farmers attempted to rely on the same three cases in the Qwest complaint filed before the FCC; in the October 7, 2007 Memorandum Opinion and Order, the FCC stated:

We also find inapposite a number of cases cited by Farmers to suggest that the Commission has already found that it is lawful to impose access charges for the type of service at issue here. *See* Farmers’ Legal Analysis at 10 (citing *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001); *AT&T v. Frontier Communications of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 4041 (2001); *Beehive II*, 17 FCC Rcd at 11641). ***In those cases, the issue of whether access charges were appropriate was never addressed. The parties and the Commission simply assumed that the LECs involved were providing access service, and the dispute was about the lawfulness of their rates.***⁹⁵

(Emphasis added.) It appears clear to everyone except the access pumpers that existing law did not authorize the collection of access charges for traffic related to traffic pumping or authorize access revenue sharing.⁹⁶ In any event, this Board – with the benefit of the most complete record and an opportunity to see the witnesses on cross-examination (which the FCC does not) should

⁹⁴ Order on Reconsideration, FCC 08-29, ¶¶ 1, 8.

⁹⁵ Exh. 703, Memorandum Opinion and Order, FCC 07-175, fn 115; Tr. 841-842.

⁹⁶ *See also* Exh. 309 (JAA-6, USTELECOM Letter to the FCC “[T]he line of cases apparently being relied upon by the traffic pumpers simply does not validate their agreements to share access charge revenues with third-parties (or, in some cases affiliated) chat lines and conference calling businesses in order to manufacture hundred-fold traffic increases. In those cases, the Commission expressly declined to find that access revenue-sharing arrangements were inherently legal”)

independently conclude that traffic pumping and the accompanying access sharing are unlawful using the Board's own jurisdiction over the local exchange tariffs, the activities of the local carriers it regulates, its control over numbering resources, and its own broad complaint authority. This Board should independently review the record before it and make a decision based on the existing law and on this record that access charges are not due on the services provided by the LECs that are at issue, and that LECs are prohibited from sharing access revenues with third parties.

Last, the LECs have attempted to argue that the Board should not order a refund of the invalid access charges because the LECs do not have the funds. The LECs' claims regarding their financial viability (or lack thereof) are unsubstantiated. They are also irrelevant: if the funds were improperly collected, the LECs are not entitled to them – claimed hardship does not make the IXCs any less entitled to their remedies. As stated by Mr. Appleby:

What should matter to the Board is the absurd way these proceeds were obtained, not how they were invested. In evaluating the legality of the LECs' scheme, how the LECs spent those proceeds should be no more relevant than how an accused bank robber spends the proceeds he is accused of having stolen.⁹⁷

Moreover, any alleged hardship on behalf of the LECs is self-inflicted. Once the LECs knew that interexchange carriers were disputing the charges and litigation was initiated they did not take steps to set up litigation reserves based on the likelihood of losing their claims (and as pointed out above, claims they should have known were not supported by the rules).⁹⁸

⁹⁷ Tr. 1786.

⁹⁸ Tr. 2082 (Mr. Dublinske: Okay. You understand that the interexchange carriers are seeking refunds of amounts that were paid to you in this proceeding; correct? A. Correct. Q. Kiesling & Associates, one of the consulting functions they provide for you is accounting? A. Yes. Q. At any point did you talk to them about setting up a litigation reserve for this matter? A. I don't believe so. Q. And when you knew that these claims were filed seeking refunds, did you at any time start setting aside money in the event that refunds were required? A. No.)

[REDACTED]

[REDACTED]

The interexchange carriers should not be penalized because the LECs after engaging in unreasonable practices including entering into business arrangements to share access revenues with third parties failed to establish a litigation reserve and spent their ill-gotten gains.¹⁰⁰

⁹⁹ Tr. 2031:21-2033:6; Exh. 1008 (agreement between Free Conference Company and Farmers & Merchants)

¹⁰⁰ The LECs complain that the IXCs engaged in "self-help" by withholding payments. This is, as an initial matter, untrue: withholding of disputed amounts is contemplated under the tariffs and thus is not improper self-help. But the LECs' argument is nonetheless hypocritical. The LECs now argue that because they spent the money as fast as they received it (often on projects that unfairly subsidized long-term protections against competitors entering their markets) they should not have to pay it back. It is obvious that in such circumstances, self-help is the only way for a carrier to have protection against a later defense of "lack of funds." If the Board allows a "lack of funds" defense to an appropriate remedy, it will actually encourage extensive self-help going forward as withholding will be the only way to ensure you have not lost the money forever.

C. Proposed Specific Remedies

The Board has authority to decide these claims under Iowa Code § 476.3(1) and “to determine the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done” by a public utility. All of the respondents are local exchange companies regulated and certificated by the Board.¹⁰¹ As stated in Qwest’s Complaint, the interexchange carriers request that the Board determine “the reasonableness of the terms and conditions under which Respondents offer switched access services.”¹⁰²

It is important that the remedy be broad enough to address the various scenarios presented in the record in this case and specific enough that it captures the actions of the bad actors of which the LECs in this case are representative. Sprint is not seeking a remedy that would negatively impact the access regime and the charges assessed by LECs that truly are playing by the rules and only recovering access charges for valid traffic. Sprint seeks targeted remedies to address the unreasonable activities of the LECs engaged in the traffic stimulation activity, and to recover past, illegal gains by the LECs.¹⁰³ Without a clear directive that access sharing arrangements and access stimulation activity is prohibited under the existing rules, LECs

¹⁰¹ Qwest Complaint ¶¶ 3-11.

¹⁰² *Id.* ¶ 13.

¹⁰³ Tr. 1762 (“The main remedy Sprint proposed is to prohibit the payment of kickbacks to third parties for generating access traffic. That will have no effect on traffic that is not generated deliberately to increase access charges. Sprint has also indicated that the LECs’ charges fall outside the scope of their tariffs. An issue of tariff interpretation cannot change the entire access regime as it is based on the specific language in the tariffs.”); *See also* JAA-6, USTELECOM Letter to the FCC (“I am writing today to respond to the campaign of misinformation being waged by companies engage in the unscrupulous practice of “Traffic Pumping” and to urge the Commission to act quickly to protect the integrity of the access charge system from these bad actors. . . . Moreover, these types of arbitrage schemes harm all carriers by undermining the integrity of the inter-carrier compensation system.”); and *See also* JAA-6 April 30, 2007 Letter from small local exchange carriers to the FCC Commissioners (“It is important for the Commission to understand that it is only a very small number of companies that are taking advantage of these improper access pumping practices. The vast majority of rural companies take their filing requirements seriously. But we are very concerned that schemes designed to inappropriately inflate access revenues irreparably diminish the integrity of the access charge system.”)

will continue to engage in such behavior and perpetuate the carrier disputes.¹⁰⁴ Sprint recommended that the Board (i) find that the LECs engaged in unreasonable practices in violation of Iowa Code 476.3, (ii) prohibit the sharing of access revenue with third parties, (iii) determine that chat line providers, conference calling companies and similar service providers are not customers of the LECs but rather business partners and (iv) hold that access charges are not applicable to such traffic.¹⁰⁵ Under Iowa Code § 476.3, the Board has authority to direct a remedy to address the unreasonable practice.

Terminating access is a monopoly service.¹⁰⁶ Without regulatory control, a provider of monopoly service can establish any prices, rates and conditions for the service.¹⁰⁷ Access charges have historically been priced higher than the cost of providing service. The access subsidies have been used to support the cost of basic service in rural areas.¹⁰⁸ LECs in Iowa have entered into business arrangements with conference calling companies, chat line providers, international calling service providers and similar service providers to stimulate access traffic in exchange for sharing in these access subsidies.¹⁰⁹ The traffic stimulating arrangements have artificially inflated traffic volumes and thus driven access subsidies, based on low traffic volumes, to levels much larger than were intended.¹¹⁰ The arrangement between the LECs and the conference calling companies is not a standard carrier-customer relationship.¹¹¹ The service providers are

¹⁰⁴ Tr. 1939 (“yes, I would continue the conferencing business if the rules that were put in place for conferencing allowed for us to make money at conferencing.”); Tr. 2232 (“Board Member Tanner: Well, I may not have been clear. If Interstate 35 were to prevail against the IXCs in this docket, would it resume the free conferencing business? Mr. McGowan: We would look at that as a business opportunity under the rules. If the rules change, we would abide by those rules.”)

¹⁰⁵ Tr. 1753.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Tr. 1754.

¹⁰⁹ Tr. 1754; Tr. 1765.

¹¹⁰ Tr. 1755.

¹¹¹ *Id.*; see also Tr. 1823 (Board Member Tanner: On page 5 of your direct testimony you state LECs don't usually pay their customers for generating access revenues for them. Can you think of any situations where LECs do pay

effectively carriers, providing a telecommunications service by connecting callers.¹¹² The average access minutes per month for originating and terminating calls to an Iowa line are approximately 503.¹¹³ For the LECs in this case the average minutes billed to Sprint ranged from 258% to 4164% of the Iowa average per line.¹¹⁴

Revenue sharing distorts the ordinary business incentives of conference calling providers, chat line providers, international calling service providers and similar providers, which now decide whether to offer service not based on what they charge customer but rather on their ability to impose costs on other carriers and their customers.¹¹⁵ Access subsidies were not intended to supply kickbacks to these service providers. The access rates are designed to allow LECs to recover their costs and are based on typical traffic volumes (volumes that existed prior to access pumping). The traffic pumping activity generates a windfall for the LECs and conference calling and chat line providers. [REDACTED]

[REDACTED].¹¹⁶ To remedy these problems the Board should clarify that a business arrangement in which a LEC shares access revenues with a third party is an unreasonable practice under existing law. In addition, in order to prevent LECs from circumventing the Board's intent by engaging in the same practice on their own and not partnering with third parties, the Board should prohibit LECs from engaging in traffic stimulation activity where the LEC itself is acting as a "free conferencing calling service provider" or offering similar services to generate increased traffic volumes and access

their customers for generating access revenues? Mr. Appleby: Not that I'm aware of. Access revenue sharing is--it just doesn't occur very often until this recent phenomenon that we're all experiencing now.")

¹¹² Tr. 1755-1756.

¹¹³ Tr. 1759.

¹¹⁴ *Id.*

¹¹⁵ Tr. 1762; Tr. 1765.

¹¹⁶ Tr. 1766.

revenues.¹¹⁷ Further, the Board should determine that such a business arrangement is not a carrier-customer relationship. Rather the conference calling companies are acting as carriers. Finally, the Board should issue an injunction to prohibit access revenue sharing with third parties going forward.

As discussed above, the free conference calling companies, chat line providers, international calling service providers and similar providers are not end users under the local exchange tariffs. In most instances the providers did not purchase or pay for local exchange service and there was no evidence that they were in any meaningful sense subscribers of the LECs' retail services.¹¹⁸ At the hearing Mr. Owens stated that he knew of more than 20 reasons why the service being provided to the free conference calling service providers, chat line providers and similar providers by the LECs was not local exchange service and on redirect Mr. Owens provided a summary list of reasons detailed in his testimony.¹¹⁹ Although every reason did not apply to every LEC, at least some of the reasons did apply to each LEC and Mr. Owens

¹¹⁷ Tr. 1824-1825 ("Board Member Hanson: Mr. Appleby, on page 11 of your direct testimony, starting at line 249--you won't need to look it up, I don't think--you state that you feel the Board should prohibit LECs from entering into business arrangements in which they share access revenues with any third party. If we were to decide that this is a situation that needs to be corrected, and we were to decide to do it by adopting your recommendation, if a LEC were to provision their own--its own conferencing business independent of the third party conferencing company, wouldn't that be a way of circumventing this remedy that you're proposing? Mr. Appleby: It is an issue that we've actually discussed in preparation for this, and it's hard to separate out the multiple functions that a vertically integrated company could operate under. An example is when a LEC is also the IXC, and they pay access charges to each other. The IXC pays the LEC, and the LEC collects, but then when the financials for the corporation actually go out the door, all those intra-company transactions go away, right? So there's really no financial impact of those high access rates, okay? So the same thing could be--could occur here if we're not careful, and so therefore I think you'd have to almost put additional safeguards on the LECs actually offering their own free conference calling services.")

¹¹⁸ See Tr. 1781-1784; see also e.g. Tr. at 835 ("Board Member Hansen: Is it your position that if Farmers Riceville had been providing service according to its tariffs, that there should have been a monthly end use common line charge for each of those 5,376 equivalent loops? Owens: I hesitate because we'll start with the assumption or the knowledge that those loops weren't in Riceville's exchange. They were in the Mutual exchange of the Rudd central office operated by Mutual. So setting aside the fact these loops weren't in the Riceville exchange, yes. To the extent they provided connections out of a legitimate tariff in Riceville, then the end user common line charge would apply.")

¹¹⁹ Exh. 1355; Tr. at 846-854 ("I thought it would be helpful to summarize the instances where the FCSC service differed from the terms and conditions in the LECs' local exchange tariff and interstate tariff that applies to end users, and that is this list.")

identified the individual LECs associated with each listed reason.¹²⁰ Assessing access charges when the LECs were not providing local service, and where the FCSCs were not end users under the LECs' tariffs, is unlawful: access charges are directly linked to the specific tariff terms which in this case were violated. The LECs should be directed to credit all disputed amounts and refund all amounts previously paid on the invalid traffic, and cease billing interexchange carriers for such services.

As discussed above, some of the carriers used, and some are continuing to use, numbering resources contrary to industry standards by assigning numbers to exchanges where they are not certificated and otherwise have no presence (the end user premises were not located in the exchange to which the numbers were assigned).¹²¹ The FCC is permitted to, and has in fact, delegated certain authority to the state commissions over numbering resources.¹²² In order to obtain numbering resources carriers must provide evidence that they are authorized by the appropriate state commission to provide service.¹²³ Thus, the Board has authority over assignment of numbering resources and could remedy the invalid use of numbers.¹²⁴ To the extent some LECs are providing service in violation of their certification the Board should report

¹²⁰ *Id.*

¹²¹ Tr. at 2260:9-2264:12 (discussing assignment of numbers from multiple exchanges to equipment located in Salix).

¹²² 47 U.S.C. § 251(e)(1) provides: The Commission shall 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 delegating to State commissions or other entities all or any portion of such jurisdiction.* (emphasis added)

¹²³ See *Numbering Resource Optimization*, CC Docket No. 99-200, FCC 00-104, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 7574 (Mar 31, 2000) (Numbering Resource Order). ("Specifically, carriers must provide, as part of their applications for initial numbering resources, evidence (*e.g.*, state commission order or state certificate to operate as a carrier) demonstrating that they are licensed and/or certified to provide service in the area in which they seek numbering resource.")

¹²⁴ Tr. at 827-828, 878-884 ("the industry clearly recognizes the important role that this Board has in the administration of the assignment of central office codes that are used within the State of Iowa."); see also Exh. 1359, ATIS Central Office Code Assignment Guidelines.

that information to NANPA or the FCC for investigation or reclamation of those numbering resources (or should initiate a proceeding of its own to reclaim those numbering resources).

As another indication that the LECs engaged in unreasonable practices, some of the conference calling and chat line traffic contained adult content and the LECs did not take any steps to limit access by minors to such adult content, it didn't even occur to them that they should even though it was evident that the conference calling companies were providing adult content. [REDACTED]

[REDACTED]¹²⁵ [REDACTED]

[REDACTED]¹²⁶ For example, when

questioned by Board Member Tanner, Mr. McKenna for Aventure stated they did not use 900 numbers for adult content or restrict the use of services for adult content through contractual terms:

BOARD MEMBER TANNER: So with these customers that you have that provide free conferencing services, do you know if they provide adult content?

THE WITNESS: I do not know that.

BOARD MEMBER TANNER: Have you taken steps to find out?

THE WITNESS: No.

BOARD MEMBER TANNER: Have you taken steps to ensure that any adult content they are providing is properly labeled by a 900 number so that there are precautions in place so that parents know that they can put a block, or even if their children are calling adult content places?

THE WITNESS: No, we don't, but I think there should be something put in place.

¹²⁵ Tr. 1714, Exh. JAW-1; *see also* Tr. 968-972.

¹²⁶ Tr. 1980-1981 ("Board Member Tanner: Have you taken any steps to amend contracts or taken any precautionary steps to make sure that they are not using your services for adult content, without identifying the traffic as such? Mr. Laudner: You can be sure that we will ask those questions and be sure that either those safety mechanisms are in the contracts, as we think the customers should be--you know, the customers should provide the safety--I don't have any way to provide a safety mechanism, other than to ensure that the customer would have the appropriate safety mechanisms in place."); *see also* Tr. 2040-2044 [REDACTED]

[REDACTED]; *see also*, Tr. 2340.

BOARD MEMBER TANNER: You believe that, but you haven't done it.

THE WITNESS: We haven't done it, because we don't know if they do it or not.

BOARD MEMBER TANNER: Do you think-- You know this gets back to surely you understand how this doesn't look good when you say, "Well, we play by the rules," but you don't really seem to be undertaking any effort to know or follow the rules. It's kind of an ignorance of the law, ignorance of the facts defense. Is that what you're putting out here as a defense today?

THE WITNESS: No. When we hook up a customer, I don't feel it is my job to find out what that customer does with the service. They order a service. We provide that. We bill them for it. I don't think it's up to me to monitor everything that all my customers do. For instance, if--I'm using this as an example--porno shop opens up. They want a telephone line. I will have to give them that phone line. I can't refuse to give them a phone line.

BOARD MEMBER TANNER: Right, but everyone knows it's a porno shop, because they have giant signs, right?

THE WITNESS: That's true. That's true.

BOARD MEMBER TANNER: So we know what we're dealing with.

THE WITNESS: But when I'm dealing with a conference company, the conference companies I deal with are--do conferencing. I don't know that anybody else--when they say conferencing, I take that as a fact. I don't delve into--I don't think it's my responsibility at this point in time to find out exactly what they're doing. Now, their model might change. There is no way for me to know that at this point in time, or they might get into something else and use the same numbers for that.

BOARD MEMBER TANNER: Right. But you could put something in your agreement that says we will not serve customers who provide this content without the appropriate disclosures or notification. You could do that?

THE WITNESS: I agree, and that should be put in there, and probably will be put in there.¹²⁷

To the extent carriers provided access to adult content without warranted safeguards the LECs engaged in unreasonable practices.

In some instances the carriers (e.g. Aventure) included the line counts for the conference calling lines and chat lines in reports to the USAC for payment from the Universal Service Fund.¹²⁸ Collection of universal service funds to "support" free conference calling and chat lines is inconsistent with the purpose of universal service to ensure affordable service in high cost

¹²⁷ Tr. 2340-2344

¹²⁸ Tr. 2267-2271. Aventure contends that reporting these line counts were acceptable because the issue was raised in its request for a waiver to file its report past the deadline. The FCC granted the waiver without addressing whether it was appropriate to include the lines used for traffic pumping. *See*, In the Matter of Universal Service High-Cost Filing Deadlines, WC Docket No. 08-71; CC Docket No. 96-45, Order, DA 08-2336, 23 FCC Rcd 15325 (2008).

areas.¹²⁹ In addition to conference lines, Aventure included lines that were used as test lines.¹³⁰ The Board should notify USAC of the information regarding inappropriate line reports and resulting payment of universal service funds for these invalid lines (lines that were not used for services to “end users”) to permit USAC to initiate an investigation and potential recovery of universal service monies that were inappropriately paid to the subject LECs.

As discussed above, some LECs indicated that they allegedly netted or offset amounts that were due for services provided to the conference calling and chat line service providers. However, in some instances it appears that the LECs did not properly account for such offset or netted amounts. To the extent the LECs collected revenues (through payments, offsetting or netting) for some type of service (although clearly not tariff local exchange service) it is likely that the LECs did not pay applicable taxes.¹³¹ The Board should notify the Iowa Department of Revenue of the information gained through this proceeding to permit the Department to initiate investigations, pursue collection of appropriate taxes not previously paid and proceed with any other applicable remedies.

¹²⁹ Tr. 2331-2332 (“Board Member Tanner, Q: And how many lines did Aventure report to the FCC for line count purposes? Mr. McKenna: I'd have to look, ma'am. Q: Can you approximate? A: 3,000, maybe. Q: How many of those are free conference calling services? A: Probably most of them. Q: Do you think it's the purpose of USF to provide--to make sure every consumer has access to free calling services? A: Say that one more time. Q: Do you think it's the purpose of the universal service fund to ensure that consumers have adequate reasonable cost access to free conference calling services? A: I can't answer that. Q: What's your understanding of USF, the purpose of USF? A: It's so--it's a way to recover some high costs in the high cost areas.”)

¹³⁰ Tr. 2269 (“Q. And you realize that these numbers, these lines associated with various exchanges, are what determine USF payments? You're aware of that? A. Yes. Q. And you're also aware that many of these lines were never even in service to anyone, they were just test lines so you could make sure the calls worked; true? A. Some of them are, yes.”); *see also*, Tr. 2270:18-2271:3 (“Q. And he admitted that several of these were test lines; true? A. True.”)

¹³¹ Tr. 2235: (“Board Member Hanson: If we assume that this was--that you have been compensated for a retail sale of communication services, you may have heard my discussion with the previous witness, that there's--I think a good chance that sales tax would have been owed on that transaction, whether or not an actual check was written or if it was deducted from an amount that was paid. Would it be your understanding that it would be your responsibility to remit that sales tax to the state whether or not you get any more funds from the conference companies? Mr. McGowan: Yes. I think we would definitely want to make that correct and right and remit whatever taxes are due associated with the services that we provided to the free conference calling companies.”)

For some carriers evidence was presented that those carriers were providing service contrary to their certificates.¹³² A “utility must have a certificate of public convenience and necessity issued by the board before furnishing land-line local telephone service in this state.”¹³³ In granting a certificate the Board must determine whether “the service proposed to be rendered will promote the public convenience and necessity” and whether “the service is consistent with the public interest.”¹³⁴ The Board has authority pursuant to Iowa Code § 476.29 to limit or revoke a carrier’s certificate.¹³⁵ The evidence in this proceeding supports a finding that the carriers provided services that are not consistent with the public interest and in some instances carriers provided service outside their authorized territories. As a result the Board should take action regarding the carriers’ certification. The Board should initiate show cause proceedings to determine whether certification should be limited, conditioned or revoked.

In addition to determining that the LECs practices in relation to this traffic are unreasonable and prohibiting such practices in the future, including a prohibition on sharing access revenues with third parties, the Board should impose additional protections to deter future similar behavior. First, if a carrier’s traffic volumes increase above a certain threshold the interexchange carrier should be permitted to withhold payment and an investigation into the traffic type should be initiated. Qwest proposed that if traffic volumes increase 30% above

¹³² See Tr. 2460-2462 (“Board Member Tanner: What are the telephone exchanges shown by your tariffs? Mr. Nelson: I believe they have Milford and Lake Park in the tariff. Q: So Milford and Lake Park, but not Spencer? A: That is correct. Q: So you’re currently operating in Spencer, but not certificated? A: To my understanding we have a certificate to serve in all Qwest exchanges. Q: But the certificate authorizes you to furnish local exchange service in the exchanges shown by your tariffs? A: Then Spencer is not in the local tariff.”)

¹³³ Iowa Code § 476.29(1).

¹³⁴ Iowa Code § 476.29(2).

¹³⁵ Iowa Code § 476.29(9); see e.g., *Servisense.Com, Inc.*, Docket No. FCU-02-17, Order Revoking Certificate, 2002 Iowa PUC LEXIS 45 (October 18, 2002); see also *KMC Telecom V, Inc.*, Docket No. FCU-03-3, Order Taking Official Notice, Suspending Certificate, And Giving Notice Of Possible Revocation Of Certificate, 2003 Iowa PUC LEXIS 11 (January 8, 2003).

typical volumes the interexchange carrier could withhold payment.¹³⁶ This requirement would not be in lieu of an obligation not to engage in revenue sharing or access pumping but rather a threshold that could be used for ease in administrative purposes. A determination that traffic volumes below the 30% increase were related to traffic pumping and access sharing arrangements would require a refund of amounts previously paid or credits for amounts invoiced for the invalid traffic. Second, the Board could impose conditions under Iowa Code § 476.29(2) when granting certification that would prohibit local exchange carriers from using the granted authorization to engage in access pumping activities.¹³⁷ A clear signal should be sent that such unreasonable practices will be considered in determining whether certification of a particular carrier is in the public interest.

As a result of the LECs engaging in unreasonable practices the LECs have invoiced and collected access charges for invalid traffic. Therefore all access charges invoiced for traffic under these access sharing arrangements and for services provided to conference calling companies, chat line service providers, international service providers and other similar providers should be refunded or credited to the interexchange carriers.

SUMMARY AND CONCLUSION

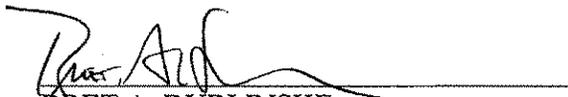
The record in this case is clear and powerful: the LECs and their FCSC partners engaged in an unlawful and unreasonable scheme to cheat the IXCs out of millions of dollars. The scheme itself was illegal both in general and in many of its particulars. The cover up required even more unlawful acts. The extraordinary increases in traffic volumes and billing, and the deceptive ways they were obtained, is unreasonable and unjust under Iowa Code § 476.3. The

¹³⁶ Tr. at 829; *see also* Owens Direct at 117-118 (if volume of LEC traffic increases 30% or more IXC should be permitted to withhold payment)

¹³⁷ Iowa Code § 476.29(2) (“The board may establish reasonable conditions or restrictions on the certificate at the time of issuance.”)

access charges billed to the IXCs under the scheme were unauthorized and unlawful under the terms of the LECs' own tariffs. The splitting of those access revenues betrays the entire policy behind Iowa's high access rates, and allowed for discriminatory and anti-competitive subsidies for the LECs' basic services. In sum, the access pumping scheme has been unlawful and unreasonable from its inception, and as the efforts at covering it up prove, the LECs knew this to be true. The LECs were not entitled to bill access charges, and are not entitled to their ill-gotten gains. The Board must take all necessary steps to make the IXCs whole, to deny the LECs any benefits from their unlawful acts, to stop access pumping going forward, and to make a strong statement that Iowa, under the jurisdiction of this Board, will not be known as a place where anything goes and abuses are tolerated. The Board should grant Sprint's requested relief as described in this brief.

Respectfully submitted this 31st day of March, 2009.


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he had a copy of the foregoing hand delivered to the persons listed below at the addresses indicated this 31st day of March, 2009:

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Consumer Advocate Division
310 Maple Street
Des Moines, Iowa 50319

Iowa Utilities Board
350 Maple Street
Des Moines, Iowa 50309

The undersigned certifies that a copy of the foregoing was mailed to the persons listed below at the addresses indicated, stamped with the appropriate postage for ordinary mail and deposited this 31st day of March, 2009 in a United States mail receptacle, in Des Moines, Iowa:

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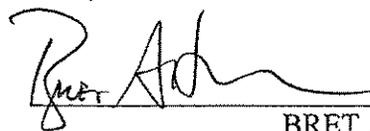
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