**STATE OF IOWA**
**DEPARTMENT OF COMMERCE**
**UTILITIES BOARD**

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| **IN RE:**<br><br>**QWEST COMMUNICATIONS CORPORATION,**<br><br>**Complainant,**<br><br>**v.**<br><br>**SUPERIOR TELEPHONE COOPERATIVE, *et al.*,**<br><br>**Respondents.** | **DOCKET NO. FCU-07-02**<br><br>**REDACTED** |

PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW
SUBMITTED BY QWEST COMMUNICATIONS CORPORATION

## I. PROCEDURAL HISTORY OF THE CASE

In February 2007, Qwest Communications Corporation ("Qwest") filed a Complaint against the eight Respondents – Iowa local exchange carriers (six incumbent LECs, "ILECs," and two competitive LECs, "CLECs") – for engaging in what is widely known in the industry as "traffic pumping." Qwest named as Respondents: Superior Telephone Cooperative ("Superior"); Farmers Telephone Company of Riceville, Iowa ("Riceville"); Farmers & Merchants Mutual Telephone Company of Wayland, Iowa ("Merchants"); Interstate 35 Telephone Company ("Interstate 35" or "I35"); Dixon Telephone Company ("Dixon"); Reasnor Telephone Company, LLC ("Reasnor"); Great Lakes Communication Corp. ("Great Lakes"); and Aventure Communication Technology LLC ("Aventure"). Great Lakes and Aventure are the CLECs, while the other Respondents are ILECs.

On May 25, 2007, the Board placed this case in issue and stated that "[t]he complaint is docketed for investigation of the matters asserted in the complaint and such other issues as may develop during the course of the proceedings." Since that time, substantial discovery has taken place between the parties. In addition, Qwest served subpoenas upon many third-parties including many Free Calling Service

Companies ("FCSCs") and obtained documents and took depositions from those parties. The Board authorized AT&T Communications of the Midwest, Inc. and TCG Omaha (collectively "AT&T") and Sprint Communications Company LP ("Sprint") to intervene in this docket in 2007.

On March 17, 2008, Qwest, AT&T and Sprint submitted pre-filed direct testimony. On September 15, 2008, the Respondents submitted pre-filed responsive testimony. On October 15, 2008, Qwest, AT&T and Sprint submitted pre-filed reply testimony. A hearing was held before the Board from February 5, 2009 through February 12, 2009. After the hearing, the parties submitted post-hearing briefs on March 31, 2009, and responsive briefs on April 30, 2009. Having reviewed all of the evidence admitted in the case, and the post hearing briefs, the Board rules as follows:

## II. <u>Overview of How Traffic Pumping Works</u>

Traffic pumping schemes necessarily involve a few common elements, predicated upon the abuse and misuse of terminating switched access services. The LEC Respondents entered into business relationships with FCSCs. Then, the ILEC Respondents opted out of the NECA traffic sensitive pool, and claimed a right to all of the interstate and intrastate access charges associated with calling into their NPA-NXX. The Respondents that were CLECs claimed the rural exemption set forth *In re Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers, 16 FCC Rcd 9923;* 9924-25 ¶¶2-3, *2001 FCC LEXIS 2336,* FCC 01-146, CC Docket No. 96-262 (Rel'd April 27, 2001) (*Seventh Report and Order and Further Notice of Proposed Rulemaking).*

The FCSCs are based in large metropolitan areas around the United States including Los Angeles, Las Vegas, San Diego, Houston and Salt Lake City. The FCSCs are providers of conference, chat line, international calling and credit call calling services. Instead of locating their business within rural Iowa communities, the FCSCs would send conference bridges, chat line computers or routers to the LEC with whom they were doing business. The LECs install the equipment in their central office (with the exception of traffic laundering which will be described later). The LEC Respondents then assign large blocks of telephone numbers (sometimes hundreds of numbers) to the FCSCs, and the FCSCs would advertise the numbers on their websites to encourage people from Iowa and throughout the nation to call the Iowa numbers to receive the FCSCs' calling services "free" of charge. Long distance carriers such as Qwest, AT&T, and Sprint would then deliver calls destined for these telephone numbers to the Iowa LECs. This boosted substantially the long distance calling into the LEC's numbers, sometimes by tens of thousands of percentage points or more.

The LEC Respondents bill the IXCs for terminating switched access for all of the calls associated with the FCSCs with whom they did business. After the IXCs paid the access charges, the LEC Respondents would kickback a portion of those access charges (interstate and intrastate access alike) to their FCSC partners under the guise of a "marketing fee." To the extent an IXC disputed an invoice and withheld payment, the LEC would not pay the kickback to the FCSCs. The LECs would never pay the FCSCs a kickback unless they were paid terminating access by the IXCs. It is apparent that traffic pumping presents a situation where the LECs and the FCSCs with whom they do business are sharing terminating switched access revenue. Traffic pumping therefore involves a situation where the LEC Respondents would bill the IXCs for a monopoly service (access) and use a portion of the money generated from the monopoly service to support a competitive service (conference, chat, international and credit card calling). The switched access payments by the IXCs would subsidize the FCSCs' businesses.

Based on these facts, Qwest filed a Complaint stating several claims. AT&T and Sprint joined. The Respondents claimed traffic pumping is legal. Reasnor filed counterclaims against Qwest. After the hearing, the Office of Consumer Advocate ("OCA") agreed with Qwest, AT&T and Sprint on all points.

## III. THE BOARD HAS FULL AUTHORITY TO ADDRESS TRAFFIC PUMPING.

At numerous times throughout this case, the LEC Respondents have argued that the Board is without jurisdiction to hear or decide the issues involved. Each time, the Board has rejected the arguments, and stated that "the Board has jurisdiction to hear all of these issues." July 3, 2007 Order at 5. *See also* Order of August 16, 2007, and Orders of November 26, 2008 (denying Motion to Exclude Evidence and Motion to Strike). The LECs' primary jurisdictional argument is that the Board has no jurisdiction because a large percentage of the traffic is interstate traffic. This argument ignores the fact that the root of traffic pumping is the LECs' misuse and abuse of their status as local exchange carriers certificated by this Board to provide local exchange service pursuant to tariff.

The Iowa Legislature has vested the Board with clear authority to regulate Iowa LECs, including small rural LECs, in their provision of local and intrastate access services in and for the public interest. Moreover, it is undisputed that the Board – not the FCC – has jurisdiction to regulate the LECs as local exchange carriers, including the statutory requirements to file and follow local exchange tariffs. *See, e.g.*, Iowa Code §§ 476.1 ("The utilities board ... shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided."); 476.2 ("The board shall have broad general powers to effect the purposes of this chapter notwithstanding the fact that certain specific powers are hereinafter set forth."); 476.3 (LECs must charge in accordance with tariffs, and providing for complaint actions before the Board regarding "the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by a public utility subject to this chapter in contravention of this chapter"); 476.4 ("Every public utility shall file with the board tariffs showing the rates and charges for its public utility services and the rules and regulations under which such services were furnished, on April 1, 1963, which rates and charges shall be subject to investigation by the board as provided in section 476.3"); 476.5 ("No public utility subject to rate regulation shall directly or indirectly charge a greater or less compensation for its services than that prescribed in its tariffs, and no such public utility shall make or grant any unreasonable preferences or advantages as to rates or services to any person or subject any person to any unreasonable prejudice or disadvantage"); 476.11 (on complaint, Board determines terms and procedures for toll connections); 476.29(1), (9) (Board authority over certifications); 476.101 (Board authority over CLECs); 199 IAC § 22.1(1); 199 IAC § 22.14(2)(a) (persons providing intrastate access must file intrastate access tariffs with the Board); 199 IAC § 22.15(2) (intrastate access is obtained through tariffs, unless agreement re access service exists between the LEC and IXC). *See also City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 529 (Iowa 2008) (Section 476.4 requires "a public utility to file tariffs with the IUB 'showing the rates and charges for its public utility services,' and requires the IUB to promulgate rules for the filing of tariffs.").

Thus, the Board has direct authority over the LECs' provision of services, certificates of public convenience and necessity, intrastate access tariffs, local tariffs, competition in Iowa, the public interest, providing reasonable standards for communications services in Iowa, the use of numbering resources, and ensuring that LECs do not discriminate among different customers or service categories. The above authority is clearly implicated in this case.

Section 476.3 is but one example of a provision that provides the Board authority to hear each of the claims in Qwest's Complaint and to grant the relief that Qwest seeks:

> A public utility shall furnish reasonably adequate service at rates and charges in accordance with tariffs filed with the board. When there is filed with the board by any person or body politic, or filed by the board upon its own motion, a written complaint requesting the board to determine the reasonableness of the rates, charges, schedules, service, regulations, or anything done or omitted to be done by a public utility subject to this chapter in contravention of this chapter, the written complaint shall be forwarded by the board to the public utility.... 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.

Iowa Code § 476.3(1) (in relevant part). Under this statute, the Board has full authority to oversee, interpret and enforce the LEC Respondents' state tariffs – both local exchange and intrastate access. The Board's authority extends equally to CLECs:

> A competitive local exchange service provider shall not be subject to the requirements of this chapter, except that a competitive local exchange service provider shall obtain a certificate of public convenience and necessity pursuant to section 476.29, file tariffs ... file reports, information, and pay assessments pursuant to section 476.2, subsection 4, and sections 476.9, 476.10, 476.16, 476.102, and 477C.7, and shall be subject to the board's authority with respect to adequacy of service, interconnection, discontinuation of service, civil penalties, and complaints.

Iowa Code § 476.101(1) (in relevant part). The Board's rules also make plain that the Board has authority to decide this traffic pumping dispute:

> *a.* ***To allow fair competition in the public interest*** while ensuring the availability of safe and adequate communications services to the public.
>
> b. To provide ***uniform, reasonable standards for communications service*** provided by telephone utilities.

c. To ensure that the ***regulated rates*** of local exchange utilities ... will be ***reasonable and just***.

***d. To ensure that no telephone utility shall unreasonably discriminate among different customers or service categories.***

199 IAC § 22.1(1) (emphasis added). This case raises a number of issues concerning the public interest, local telephone service, and discrimination between purported end users.

The source of the LECs' revenues does not alter the fundamental issues before the Board, nor the Board's jurisdictional ability to hear or decide the matter. For example, the Board's unquestioned authority over the LECs provision of local service and local exchange tariffs means that the Board has the power to determine whether the FCSCs are "end users" under the local exchange tariffs. Similarly, the Board's unquestioned authority to prevent unreasonable discrimination gives the Board the wide latitude even if the sources of discriminatory payments is interstate switched access charges.

Moreover, the assertion that the Board has no ability to issue regulation that impacts the LECs' ability to make or receive interstate calling ignores the obvious. The LECs can only operate in this state to the extent the Board had granted them certification. The Board has regulatory authority over the LECs' certificates. Iowa Code § 476.29. To the extent the Board pulls a LEC's certification for violation of Iowa law, the LEC cannot continue to operate in the state, even as a purely interstate provider. The state's delegation of authority to the Board recognizes that, while these regulated entities are located in specific exchange areas in Iowa, they may be using their state certifications and tariffs as the underlying basis to engage improper conduct impacting interstate calling as well. Iowa Code § 476.15 grants the Board the full extent of power to regulate, consistent with federal law. Federal law also recognizes the Board's authority over the Iowa LECs. The Communications Act provides for a joint "cooperative federalism" for regulation of telecommunications, expressly stating in several sections that the state commissions retain extensive authority to regulate. For example, Section 253 of the Communications Act provides in relevant part:

> No State ... statute or regulation, or other ... requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(a),(b). The actions which the IXCs ask the Board to take in this case are fully consistent with Section 253. Similarly, several sections of Title 47 in fact recognize the state commissions retain authority to regulate local exchange carriers in any manner that does not conflict with federal law.

> The IUB found that the [access] tariffs at issue in this case did not apply to the type of traffic involved in this dispute, namely local traffic. * * *
>
> In the absence of a clear mandate from the FCC or Congress stating how charges for this type of traffic should be determined, or what type of arrangement between carriers should exist, the Act has left it to the state commissions to make the decision, as long as it does not violate federal law and until the FCC rules otherwise.

*Iowa Network Services, Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006), *cert. den'd* 127 S. Ct. 2255 (2007). "States' continuing exercise of authority over telecommunications issues forms part of a deliberately constructed model of cooperative federalism, under which the States, subject to the boundaries set by Congress and federal regulators, are called upon to apply their expertise and judgment and have the freedom to do so. *BellSouth Telecommunications, Inc. v. Sanford*, 494 F.3d 439, 448-49 (4th Cir. 2007) (collecting several sections of Title 47 regarding "role of state agencies … [as] an important part of the entire regulatory scheme."). The Board thus has authority to address the traffic pumping issues raised in this case regardless of the type of calls that were pumped – intrastate, interstate or international.

The LECs' additional, narrower jurisdictional arguments are addressed below with the issues to which they pertain. In sum, the Board has full jurisdictional scope to hear and address all of the following violations of Respondents' switched access tariffs.

## IV. <u>THE BOARD HEREBY FINDS THAT THE LEC RESPONDENTS DID NOT PROVIDE THE FCSCS WITH LOCAL EXCHANGE SERVICE AND THAT THE CALLS DO NOT QUALIFY FOR SWITCHED ACCESS UNDER THE LECS' INTRASTATE ACCESS TARIFFS.</u>

One of the primary issues in this case is whether the calls at issue qualify for switched access charges under the LEC Respondents' respective access tariffs. It is black letter law that the LEC Respondents can charge switched access charges only on calls that qualify under the switched access tariffs. *See, e.g.*, Iowa Code § 476.3(1) ("A public utility shall furnish reasonably adequate service at rates and charges in accordance with tariffs filed with the board."); Iowa Code § 476.4 ("Every public utility shall file with the board tariffs showing the rates and charges for its public utility services and the rules and regulations under which such services were furnished..."); Iowa Code § 476.5 (prohibiting provision of tariffed services directly or indirectly for rates other than as provided by tariff); 199 IAC § 22.14(2)(a) ("Tariffs providing for intrastate access services shall be filed with the board by a telephone utility which provides such services."). It is also black letter law that the filed rate doctrine applies to the rates, terms and conditions of a tariff. *Teleconnect Co. v. USWEST Communications, Inc.*, 508 N.W.2d 644, 647-648 (Iowa 1993); *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 681 (8th Cir. 2009) (filed rate doctrine barred claim that carrier should have provided services that were not covered by the tariff/interconnection agreement); *AT&T Communications of The Midwest, Inc. v. Iowa Utilities Bd.*, 687 N.W.2d 554, 562 (Iowa 2004) ("the legal rights of the utility ... are measured exclusively by the published tariff."); *AT&T Co. v. Cent. Office Tel.*, 524 U.S. 214, 223-224 (1998) ("Rates... have meaning only when one knows the services to which they are attached"); *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 195 (2nd Cir. 2001) ("*Central Office* defines 'rate' broadly to include both monetary and non-monetary terms of a contract"). Thus, the LEC Respondents can charge switched access only to the extent the calls qualify for such charges under their tariffs. *See, e.g., AT&T Corp. v. F.C.C.*, 317 F.3d 227, 238-239 (D.C. Cir. 2003).

The LECs' switched access tariffs (interstate and intrastate alike) require that (a) calls be to an end-user, (b) delivered to an end-user's premises, and (c) terminated in the carriers' certificated local exchange before terminating switched access charges can apply. Various provisions of the access tariffs make this plain. First, "switched access service" is defined as follows:

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

> ***terminate calls from a customer designated premises to an end user's premises in the LATA where it is provided.***

NECA Tariff No. 5 § 6.1 (emphasis added). Similarly, the tariff defines "access minute" as: "On the terminating end of an interstate or foreign call, usage is measured from the time the call is ***received by the end user*** in the ***terminating exchange***." *Id.* at 262 (quoting Exhibit 35 (NECA Tariff No. 5) at §2.6 (emphasis added)). The LEC Respondents intrastate tariff specifically incorporates the NECA tariff; thus, this language is identical for both the intrastate and interstate switched access tariffs.

This concept is not novel. The Board has already held that calls must be delivered to retail end-users for access charges to apply:

> Access charges are intended to allow local exchange carriers to charge interexchange carriers for connecting ***end users*** to their chosen interexchange carriers. The right to file a tariff for intrastate access charges must be limited to companies that ***directly serve the retail customers, or end users***.
>
> * * *
>
> In a worst-case scenario, a wholesale service provider in the position of 360networks would claim a regulatory right to receive access charges for calls that the VoIP provider claims are not subject to the Board's regulatory authority. Again, this record reveals no reason to conclude that this separation of regulatory rights and responsibilities would be in the public interest.
>
> For these reasons, the proper interpretation of the Board's rule is that access charges can only be collected by local exchange carriers that are actually providing service directly to ***end users, that is, to retail customers***. Any other interpretation would be contrary to the public interest and must therefore be rejected.

*In re 360Networks (USA) Inc.*, 2006 WL 2558996, Docket TF-06-234 (Aug. 30, 2006) (emphasis added).

The only way LECs have "retail customers" is when they provide local exchange service within their certificated exchange. The access tariffs, local exchange tariffs, Iowa law and various cases make plain that the calls must also terminate in the LEC Respondents' certificated exchange for terminating switched access payments to apply. Specifically, the access tariffs state that to be an end-user the LECs "***will provide*** End User Access Service (End User Access) ***to end users who obtain local exchange*** service from the Telephone Company under its general and/or ***local exchange tariffs***. Moreover, for switched access to apply, calls must traverse a "common line." NECA Tariff at §6.1 et seq. (switched access charges apply to use of "common subscriber plant" including common line). Common lines can only be purchased from the local exchange tariffs:

> The term "Common Line" denotes a line, trunk, pay telephone line or other facility provided under the ***general and/or local exchange service tariffs*** of the Telephone Company, terminated on a central office switch. A common line-residence is a line or trunk provided under the Telephone Company, terminated on a central office switch. A common line-business is a line provided under the business regulations of the general and/or ***local exchange service tariffs***.

NECA Tariff § 2.6, page 2-65. See also 199 IAC § 22.15(2). Thus, the purchase of local exchange services from the local exchange tariffs is required for switched access chargesto apply.

Moreover, the LEC Respondents' local exchange tariffs, Iowa statutes, and the Board's regulations allow the LECs to provide local exchange service only in their certificated exchanges. Iowa Code § 476.29(4), (6); 199 IAC § 22.1(5), 22.20, 22.20(1). Accordingly, the applicable exchange areas must be identified in the LECs' tariffs. The Modified Final Judgment (MFJ), which first established the access charge structure as a part of the divestiture of the Bell Operating Companies from AT&T, also established that calls must terminate in the certificated exchange:

> ***"Exchange Access" . . . shall be provided by facilities in an exchange area for the transmission, switching or routing, within the exchange area, of interexchange traffic originating or terminating within the exchange area,*** and shall include switching traffic within the exchange area above the end office and delivery and receipt of such traffic at a point or points within an exchange area designated by an interexchange carrier for the connection of its facilities with those of the BOC.

*United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982) (emphasis added).

Thus, switched access charges cannot apply to the extent that (a) the FCSCs are not end-users of the LEC Respondents' local exchange tariffs; (b) the calls were not delivered to an end-user's premises; and (c) the calls did not terminate in the LEC Respondents' certificated exchanges. If any of these requirements are missing, switched access cannot apply.

As stated above, this Board has full authority to determine whether the FCSCs are purchasing local exchange services from the LECs out of their local exchange tariffs. At hearing, Qwest proved that all of the LEC Respondents fail to satisfy the first (end-user) and second (end-user premises) requirements, and many of the LEC Respondents fail to satisfy the third-requirement (termination in a certificated exchange) as well.

### A. The Board Finds the FCSCs are Not End Users of the LECs' Local Exchange Tariffs; Nor are They Purchasing Local Exchange Services.

At hearing, Qwest put forward an overwhelming amount of evidence proving that the FCSCs are not end-users purchasing services pursuant to the local exchange tariffs. See Exhibit 1355.[1] We agree with Qwest and find the service provided to the FCSCs do not qualify as local exchange service because the service to FCSCs was: [CONFIDENTIAL].

In addition: [CONFIDENTIAL]

Moreover, in every circumstance, the contracts between the LECs and FCSCs were confidential. In order to discuss the terms of the contracts, the LECs required the parties to go into confidential session. The LECs failure to make the make the services they provide to FCSCs either public or publically available is absolute proof that the LECs did not provide the FCSCs with local exchange service. In Iowa, LECs must offer local services via tariff to the public at large so all similarly situated customers can partake. Iowa Code §§ 476.3, 476.4, 476.5; 476.101. The Communications Act makes this point as well. "Local Exchange Carrier" is defined as "any person that is engaged in the provision of telephone exchange service or exchange access." 47 U.S.C. § 153(26). Both "telephone exchange service" and "exchange access" are defined terms and both require the provision of a "telecommunications service." 47 U.S.C. § 153(47)(B). "Telecommunications Service" is defined as:

> Telecommunications Service – means the offering of telecommunications ***for a fee directly to the public*** or to such classes of users as to be ***effectively available directly to the public***, regardless of the facilities used.

47 U.S.C. § 153(46) (emphasis added). Thus, to provide local exchange services, a LEC must offer the service (a) for a fee, and (b) directly to the public or classes of users.

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[1] The several rationales for these findings are strewn throughout Jeff Owens' 500 pages of direct and rebuttal testimony. See Exhibit 1 (Owens Direct) and Exhibit 1275 (Owens Rebuttal).

The evidence is overwhelming that the LEC Respondents provided the FCSCs with service at no charge. [CONFIDENTIAL] This pattern is contrary to the definition of "customer" which is one who is "responsible by law for payment" for service. 199 IAC §§ 22.1(1), 22.1(3).

These foundational definitions make it plain that the LEC Respondents are not offering local exchange services to the FCSCs. First, they are not offering services for a fee; [CONFIDENTIAL] The confidential nature of the relationships combined with the fact that the Respondents did not make any public offerings makes this plain. Moreover, the LEC Respondents admit that the deal for each FCSC was often unique. All of the evidence points to the same conclusion: therefore the Board finds that the LEC Respondents did not provide the FCSCs with local exchange service. As a result, the FCSCs cannot be end users, and the LECs did not deliver calls over a common line, both of which are required to impose terminating switched access charges.

**B. <u>The Board Finds the FCSCs Are the LEC Respondents' Business Partners.</u>**

The facts show that the LEC Respondents and FCSCs are engaged in a joint business enterprise that is best defined as "joint venturers": a form of business partnership. *Firstar Bank Sioux City, N.A. v. Beemer Enterprises, Inc.*, 976 F. Supp. 1233, 1242 (N.D. Iowa 1997) (under Iowa law, the usual indicia of joint venture include a common undertaking and right to share in profits, citing *Thomas v. Hansen,* 524 N.W.2d 145 (Iowa 1994)); *Ringier America, Inc. v. Land O'Lakes, Inc.*, 106 F.3d 825, 828 (8th Cir. 1997) (applying Minnesota law, joint venture is species of partnership). The LECs argue that they cannot be partners because they do not share losses; however, this is not required by Iowa law. *Thomas v. Hansen,* 524 N.W.2d 145, 146 (Iowa 1994) (under Iowa law, it is not necessary for all of the usual indicia of joint venture, including a duty to share in losses, to be present). The LECs and their FCSC partners [CONFIDENTIAL]

This conclusion is also consistent with the evidence. The LEC Respondents routinely [CONFIDENTIAL] The Board also concludes that irrespective of whether all of the formal elements of a partnership are met with precision under Iowa law, the relationship between the LECs and the FCSCs and their scheme to share in monies obtained from the IXCs provide further evidence that, at the very least, the FCSCs are not retail end users under the local tariffs. The Board thus finds by virtue of overwhelming evidence that the FCSCs were business partners, not end-user customers.

### C. The Board Finds the LEC Respondents' Never Netted Payments for Local Exchange Service.

All of the LEC Respondents except Aventure and Reasnor argue that they charged a fee to their FCSC partners because they "netted" the payments to the FCSCs by paying them less than they would have for their services. In other words, they argue that the FCSCs paid for services pursuant to local exchange tariff, and the payments they made to the FCSCs already factored in this payment. The evidence is overwhelming that this netting never occurred. [CONFIDENTIAL]

[CONFIDENTIAL] In this entire and voluminous record there is not one document, not even one hand-written note showing or even suggesting that netting was contemplated. If netting had truly occurred, the LECs' accounting records should reflect it; taxes (excise taxes, sales taxes, etc.) would have been paid; USF surcharges would have been paid; the LECs would have reported their network connections to the FCSCs as access lines in reports to the FCC and to USAC; some data would have been input to billing systems; records of some form would exist. None of this evidence exists.

The LEC Respondents verbal testimony that they netted is not credible. If netting had truly occurred, there would be some documentation evidencing it. The point is exemplified by the testimony of Rex McGuire. In his deposition taken in January 2008, Mr. McGuire testified [CONFIDENTIAL] It is the Board's duty to weigh credibility, and the Board is performing that function here. *Arndt v. City of Le Claire,* 728 N.W.2d 389, 394-395 (Iowa 2007) ("[i]t is the commissioner's duty as the trier of fact to determine the credibility of the witnesses," citing *Dunlavey v. Economy Fire and Cas. Co.,* 526 N.W.2d 845, 853 -854 (Iowa 1995)). All of the evidence is that netting never occurred and that the LEC Respondents created the netting concept as an after the fact rationalization.

### D. The Board Finds Some of the LECs Back-Dated in an Attempt to Deceive and Defraud.

The LEC Respondents claim they netted is also inconsistent with the creation of back-dated contract amendments and invoices by [CONFIDENTIAL] and Merchants. The LEC Respondents claim the back dating is a "red herring." The Board disagrees. The Board is highly troubled by this conduct which the Board concludes was performed to deceive the long distance carriers, the Federal Communications Commission, this Board, and the public.

The evidence clearly demonstrates that these backdated documents were generated in an attempt to justify payments that the LECs learned may have to be refunded. [CONFIDENTIAL]

The timing of the backdating also shows an attempt to deceive. [CONFIDENTIAL]

The Board agrees with the testimony from Darin Rohead of Powerhouse that [CONFIDENTIAL]

Finally, the Board rejects the claim that the type of back-dating found in this case is traditional and an industry norm. The backdating was created to conceal and defraud. "When a party is once found to be fabricating or suppressing documents, the natural, indeed, the inevitable conclusion is that he has something to conceal, and is conscious of guilt." *Warner Barnes & Co. v. Kokosai Kisen Kabushiti Kaisha*, 102 F.2d 450 (2d Cir.), *modified*, 103 F.3d 430 (2d Cir. 1939) (J. Learned Hand). This is consistent with many cases that find this very type of backdating scheme improper. *U.S. v. Treacy*, 2008 WL 4934051, 4 (S.D.N.Y. November 19, 2008); *see also Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (plaintiff's claims dismissed because plaintiff had manufactured a backdated agreement which he had the other contract party sign to support plaintiff's claims); *U.S. Small Business Admin. v. Smith Stratton, Wise, Heher & Brennan, LLP*, 2009 WL 323211, 5 (E.D.Pa. Feb. 6, 2009) ("although the written consulting agreement asserted by ACI Defendants is dated November 22, 1999, the evidence shows that this document was created in late 2000, after the fees were actually disbursed. There is evidence from which a fact finder could determine that the agreement was purposefully backdated to deceive the SBA and auditors."); *Wolfe v. GC Services Ltd. Partnership-Delaware*, 2009 WL 230637, 7-9 (E.D. Mich. 2009) (collecting cases, dismissed claim because plaintiff fabricated call log to support claims).

In sum, this Board accords no weight to any findings or rulings in the *Merchants* decision issued by the FCC on October 2, 2007.

### E. <u>The Board Finds the Evidence Contradicts Reasnor's Claim that it Forgot To Issue Invoices.</u>

Instead of claiming it netted, Reasnor argues it simply [CONFIDENTIAL] The evidence shows Reasnor's claim that it forgot to issue invoices is untrue.

### F. <u>The Board Finds the Record Evidence Does Not Support Aventure's Claim That It Issued Invoices to the FCSCs.</u>

Aventure does not claim it netted, instead Aventure claims it issued invoices for [CONFIDENTIAL]. The evidence does not support this view either. Aventure maintains a price list for the services it offers to customers at its offices. Exhibit 170. Nowhere on that list does Aventure have a $5 per month rate. Thus, the $5 rate is not tariffed or otherwise publically offered. Moreover, Aventure sent invoices to a broker, not to its FCSC partners, and never received payment on a single invoice. The only FCSC [CONFIDENTIAL]. Thus, Aventure never charged a fee to its FCSC partners either.

### G. <u>The Board Finds the FCSCs Are Carriers or Wholesalers, Not End Users.</u>

The LECs' intrastate and interstate access tariffs both say that access charges can only be assessed if calls are delivered to an end-user. They also state that access charges cannot be assessed when calls are delivered to a carrier. A recent decision by the FCC shows the FCSCs are carriers. *In re Request for Review of InterCall, Inc. of Decision of the Universal Service Administrator,* 23 FCC Rcd. 10731, 2008 WL 2597359 (Rel'd June 30, 2008). Ron Laudner recognized that the [CONFIDENTIAL].

Moreover, in addition to being partners, the contracts between the LECs and their FCSC partners are titled [CONFIDENTIAL]. The Board has already found that access charges can only be assessed when delivered to "retail" end-user customers. *In re 360Networks (USA) Inc.,* 2006 Iowa PUC LEXIS 376, 2006 WL 2558996, Docket TF-06-234 (Aug. 30, 2006) ("the Board's rule is that access charges can only be collected by local exchange carriers that are actually providing service directly to ***end users, that is, to retail customers***."). The Board finds that switched access charges cannot be assessed as a result of calls delivered to wholesale providers. Thus, whether the FCSCs are carriers, wholesalers or partners, switched access charges do not apply per the plain language of the tariffs.

## H. The Board Finds That None of the Calls Delivered to Numbers Associated with FCSCs Were Terminated to an End-User's Premises.

The second requirement to bill terminating switched access is that the call must terminate to an end-user's premises. The definitions for "premises" are identical in both the interstate and intrastate tariffs: "The term "Premises" denotes a building or buildings on continuous property (except Railroad Right-of-Way, etc.) not separated by a public highway. Exhibit 35 (NECA Tariff No. 5) at §2.6. Thus, the calls in question must be delivered to an end-user's "building or buildings." None of the FCSCs own, lease, or have any recognizable property right in a building or buildings anywhere in Iowa. All of the FCSCs placed equipment in buildings owned or leased by their LEC partners. The FCSCs did not lease space from the LEC Respondents in those buildings and did not pay for power. They simply placed equipment in those buildings. The LEC Respondents argue that the equipment placed in the central office constitutes the FCSC's premises. Tr. at 2467-2469. However, the definition of "premises" does not say "equipment;" it says "building or buildings." The Board also finds that the FCSCs did not control any portion of a building or buildings. Thus, the Board finds that the FCSC equipment cannot be a premises under the plain language of the tariff.

There are a few LECs whose failure to meet this definition is even more apparent. [CONFIDENTIAL] Thus, these LECs fail to meet the end-user premises requirement for this reason as well.

## I. Much of the Respondents' FCSC Traffic Did Not Terminate in the Certificated Local Exchange Area For Which Respondents Billed Their Access Charges.

There are two issues the Board must decide here. First, the Board finds that under the FCC's end-to-end analysis, the international, credit card and pre-recorded conferencing calls do not terminate in the LEC's local exchange and therefore cannot be subjected to terminating switched access charges. In addition, the Board finds that [CONFIDENTIAL] cannot charge terminating switched access for calls delivered to FCSCs because the calls did not terminate in the LECs' certificated exchanges. The Board will set forth is rationale on these points below.

### *1. The FCC's End-to-End Analysis.*

Several of the LEC Respondents [CONFIDENTIAL] had business relationships with FCSCs who performed international calling and or credit card calling. In these situations, calls would be delivered to a "router" in one of the LECs' central offices, the call would be converted from a traditional voice call to a VOIP call, the caller would input some additional digits, and the calls would then be forwarded to its ultimate destination far from the LEC's exchange, and often to a foreign country. Exhibit 1 (Owens Direct) at 42-43.

The FCC has used an 'end-to-end' analysis to determine where a call terminates. *See, e.g., Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). Essentially, the end-to-end framework means that termination occurs in the geographic location of the called party, *i.e.,* the end of the call, and does not depend on the intermediate route or intermediate events that occur in the process of the call going to that called party. *In re Long Distance/USA Inc.*, 10 FCC Rcd. 1634, ¶ 13 (1995) (a call "extends from the inception of a call to its completion, regardless of any intermediate facilities."). The FCC has reiterated its application of the end-to-end analysis in several contexts, including calling cards. *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Servs.*, 20 FCC Rcd. 4826, ¶ 26 (2005) ("even if there are multiple communications, the Commission has found that neither the path of the communication nor the location of any intermediate switching point is relevant to the jurisdictional analysis"), *petition for review denied, AT&T Co. v. F.C.C.,* 454 F.3d 329, (D.C. Cir. 2006); *Qwest Services Corp. v. F.C.C.,* 509 F.3d 531, 535 (D.C. Cir. 2007) (citing *inter alia, AT&T Petition re Enhanced Prepaid Calling Card Services*; vacating FCC's order in part as to other issues); *In re High-Cost Universal Service Support, et al.,* FCC 08-262 n.69 (November 5, 2008) (Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, noting end-to-end analysis applies to ISP-bound traffic, ADSL, VoIP, cable modem service).

The Board finds that end-to-end analysis applies to all of the international and calling card calling, and that these calls are not subject to switched access in Iowa. In addition, the Board finds that the end-to end analysis also applies to Free Conference's "pre-recorded" playback calling. Pre-recorded playback is where [CONFIDENTIAL].

2. ***Traffic Laundering*** [CONFIDENTIAL]

The evidence shows that several of the LEC Respondents [CONFIDENTIAL] charged terminating access for calls they did not terminate, and for calls that did not terminate in their certificated exchange. In these circumstances, these LECs charged for switched access as though they terminated the calls knowing full well that other LECs had actually terminated the traffic. Qwest coined the term traffic laundering for this conduct and it is another circumstance where the LECs were engaged in concealment of the truth. The certificates of these LECs only give them the right to provide local exchange service in their certificated exchange(s) for which they have filed tariffs referencing their certificated exchanges. Iowa Code § 476.29(4), (6); 199 IAC § 22.1(5), 22.20, 22.20(1). Ron Laudner, Riceville's General Manager, admitted [CONFIDENTIAL]. Given that these LECs must terminate the calls to charge terminating switched access, the Board finds that switched access charges do not apply to any of the calls associated with Riceville, Superior and Reasnor for this reason as well.

**J. The Board Finds [CONFIDENTIAL] Did Nothing but Provide Telephone Numbers; Therefore, It is Not Entitled to Switched Access.**

[CONFIDENTIAL] argues that it is entitled to switched access claiming it had [CONFIDENTIAL] to terminate calls in the [CONFIDENTIAL] exchange, an exchange where it is admittedly not certificated. The facts do not support this position, nor does the law justify switched access even if an oral agreement existed.

The facts show that Superior opted out of the NECA pool, set a 13.6 cent per minute access rate, and created a business relationship with a company [CONFIDENTIAL].

Superior also argues that it provided FCSCs with a foreign exchange ("FX") service. The evidence does not support this claim; indeed, all of the evidence shows Superior did not provide FX service. Superior Tom Mart, Superior's Board Member, admitted that there were no facilities between Superior and Great Lakes, which defeats the FX argument. Superior's expert also admitted that the service [CONFIDENTIAL]. Thus, under the filed-tariff doctrine, it cannot be FX service.

Finally, the Board finds it legally impossible for the FCSCs to be Superior's customers. Superior is a cooperative governed by Iowa Code 499.1. Cooperatives can limit their business to members:

> Any association may restrict the amount of business done with nonmembers and may limit its dealings or any class thereof to members only.

Iowa Code § 499.3. Superior admitted that it was authorized to do business only with "members." Exhibit 1386. There is no evidence in the record to support that any FSCS are members of Superior.

In the end, Superior's expert stated on three separate occasions, that he [CONFIDENTIAL].

**K. <u>The Board Finds that Sully Sold the Reasnor Exchange to Reasnor Telephone as a Sham, and Never Provided [CONFIDENTIAL]with FX Service.</u>**

Reasnor argues that it purchased the Sully exchange in the ordinary course of business and provided FX service to [CONFIDENTIAL]. The Board finds that the facts do not support either of these assertions; indeed, the record evidence all shows otherwise.

From 2003-2005, Sully Telephone Company [CONFIDENTIAL].

The Board finds Reasnor's claim that it provided FX service to [CONFIDENTIAL] equally unsupportable. The local exchange tariffs require customers to request service orally or in writing. [CONFIDENTIAL] The facts show this never occurred. The Board finds that Reasnor's claim of FX service was created after the fact. Arie Scholten [CONFIDENTIAL].

Thus, Reasnor [CONFIDENTIAL].

**L. <u>The Board Finds that Great Lakes Is Not Certificated to Provide Service in Spencer and Therefore Cannot Charge Switched Access on Any Traffic.</u>**

Qwest presented conclusive evidence that Great Lakes is not certificated in the Spencer exchange. The Board issued an order that authorized Great Lakes to provide service in the Lake Park exchange. Exhibits 1384-1385. Thereafter, Great Lakes obtained authority to add the Milford exchange. Exhibit 723. Great Lakes argues that it attempted to obtain greater authority; however, Great Lakes' own local exchange tariffs specifically state that Great Lakes only offers services in the Lake Park and Milford exchanges. Exhibit 47 at § A(1)(b); Tr. at 2623. Thus, Great Lakes is not certificated in Spencer where Great Lakes provides 100% of its services, all of which are for FCSCs. [CONFIDENTIAL].

Providing service outside of the LEC's certificated exchange areas is contrary to the Board's rules: the Board only certifies LECs for operation in particular exchange areas.

> 22.1(5) *Basic utility obligations.* Each telephone utility shall provide telephone service to the public ***in its service area*** in accordance with its rules and tariffs on file with the board. Such service shall normally meet or exceed the standards set forth in these rules governing "Rates Charged and Service Supplied By Telephone Utilities."

199 IAC 22.1(5) (emphasis added). Great Lakes does not meet this fundamental requirement. This is not a mere technical defect as claimed by Great Lakes, but a substantive failure. The Board therefore finds that this substantive failure means Great Lakes does not provide local exchange service to anyone within the state of Iowa. Moreover, given that [CONFIDENTIAL], the Board hereby revokes Great Lakes certificate of authority because Great Lakes is operating contrary to its certificate and contrary to the public interest.

### M. <u>The Board Finds the LEC Respondents Were Providing Private Carriage to Their FCSC Partners.</u>

One requirement of switched access charges is that the LECs are providing common carriage, i.e., are acting as common carriers in providing services to the FCSCs. Common carriage is when a carrier "indiscriminately offer[ed] its services to a class of users so as to be effectively available to the public." *Iowa Telecommunications Services, Inc. v. IUB*, 545 F. Supp. 2d 869, 875 (S.D. Iowa 2008). Specifically, the law requires the LECs must be "telecommunications carriers" within the meaning of the Communications Act:

> A "telecommunications carrier" is "any provider of telecommunications services." 47 U.S.C. § 153(44). "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be directly to the public, regardless of the facilities used." *Id.* at § 153(46). To determine whether a provider is offering services "directly to the public," the Federal Communications Commission ("FCC") and various courts have applied a "common carrier" test. *See In re AT & T Submarine Sys., Inc.*, 11 FCC Rcd. 14885 (1996); *Iowa v. FCC*, 218 F.3d 756, 758 (D.C.Cir.2000); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C.Cir.1999) .... Under this test, a provider cannot be a telecommunications carrier unless it is a common carrier. *Iowa*, 218 F.3d at 758. ***The test for common carriage is two-fold: the carrier must (1) hold itself out indiscriminately or indifferently to the clientele it serves;*** *Nat'l Ass'n of Regulatory Util. Comm'r v. FCC*, 525 F.2d 630, 641 (D.C.Cir.1976)...; ***and (2) have a system that allows "customers [to] 'transmit intelligence of their own design and choosing.'*** " *Nat'l Ass'n of Regulatory Util. Comm'r v. FCC*, 533 F.2d 601, 609 (D.C.Cir.1976) ...(quoting *Indus. Radiolocation*

*Serv.*, 5 F.C.C.2d 197, 202 (1966)).

*Iowa Telecommunications*, 545 F. Supp. 2d at 876 (emphasis added). "[A] carrier offering its services only to [a] legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class." *Id.* at 878. In addition, providing services for free by definition is not common carriage. 47 U.S.C. §153(44) (telecommunications carrier provides service "for a fee"); *In re pulver.com's Free World Dialup*, 19 FCC Rcd 3307, 3312-13 ¶ 10 (Rel'd Feb. 19, 2004) ("In addition, as its name suggests, [Free World Dialup] is free of charge to users and, in order to be a telecommunications service, the service provider must assess a fee for its service.").

The Board finds that the LEC Respondents do not hold themselves out "indiscriminately or indifferently" to "a legally defined class of users." Rather, the LEC Respondents are (1) providing their FCSC services to an illegally defined class of users (FCSCs), (2) on terms that require the payment of kickbacks, which payments vary by FCSC without corresponding differences in the services provided to the FCSCs, (3) only providing these services to the FCSCs with whom they choose to contract, instead of offering the services to all FCSCs or bona fide customers; (4) keeping their FCSC contracts confidential, i.e., not available to the public, despite the requirement that local exchange services must be provided pursuant to filed tariff; (5) providing services to FCSCs [CONFIDENTIAL]; and (6) not offering such services to any actual end users. Indeed, some of the contracts between LECs and FCSCs have [CONFIDENTIAL]. Thus, the Respondents utterly fail to meet the common carriage requirement of switched access. The LECs are providing their FCSC partners with private carriage, which means this is an additional reason why the calls associated with FCSCs are not subject to access charges.

**N. <u>The LECs' Attempts to Get Paid Even if the Calls Fall Outside of Their Access Tariffs Violate the File Rate Doctrine.</u>**

The LEC Respondents all ask the Board to award compensation even though the calls to the FCSCs do not qualify for compensation under their access tariffs. They argue the tariff language does not matter because they provided some type of service to the IXCs. This is a *quantum meruit* argument that asks the Board to ignore the filed-rate doctrine. The Board hereby declines the request. The filed-rate doctrine bars the very relief the LECs seek. *Equal Access Corp. v. IUB,* 510 N.W.2d 147, 150-151 (Iowa 1993); *State Public Defender v. Iowa Dist. Court for Woodbury County*, 731 N.W.2d 680, 684 (Iowa 2007). This argument is doubly inappropriate for the LECs (Riceville, Superior, Great Lakes and Reasnor) that laundered traffic and thereby not only failed to meet their tariff terms but also provided the service outside of the exchange area for which it was billed.

The filed rate doctrine bars claims for *quantum meruit* or unjust enrichment because carriers cannot avoid the filed tariff requirement by pointing to purported benefits that the other party may have received that were not covered by the carriers' filed tariffs. *See, e.g., MCI WorldCom Network Servs., Inc. v. Paetec Commc'ns, Inc.*, 2005 U.S. Dist. LEXIS 37786, 2005 WL 2145499, at *5 (E.D. Va. Aug. 31, 2005), *aff'd*, 204 Fed. Appx. 271 (4th Cir. 2006) (barred unjust enrichment claim; carrier not entitled to payment on services not defined by tariff); *Union Tel. Co. v. Qwest Corp.,* 2004 U.S. Dist. LEXIS 28417, 2004 WL 4960780, at *15 (D. Wyo. May 11, 2004), *aff'd,* 495 F.3d 1187 (10th Cir. 2007) (barred unjust enrichment claim; no right to compensation for services not in plaintiff's tariff, regardless of compensation defendant received from its customers); *Alliance Communs. Coop., Inc. v. Global Crossing Telecomms., Inc.*, 2007 U.S. Dist. LEXIS 48091, 25-27 (D.S.D. July 2, 2007) (same). Further, to obtain the benefit of an equitable doctrine, one must act equitably itself. The overwhelming evidence of fraud, deceit, and the scheme to bilk long distance carriers demonstrates that the LEC Respondents cannot be beneficiaries of any equitable doctrine in this case. Thus, the filed-rate doctrine and the law of equity bar the LECs' equitable recovery arguments.

## V. THE BOARD FINDS THAT FCC'S DECISIONS IN *MERCHANTS* (UNDER RECONSIDERATION) AND *JEFFERSON* ARE INAPPOSITE TO THIS CASE.

Every LEC Respondent relies heavily upon the FCC's decision in *In re Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, 22 FCC Rcd 17973, FCC 07-175 (rel. Oct. 2, 2007), partial reconsideration and further proceeding granted, 23 FCC Rcd 1615, FCC 08-29 (January 29, 2008). The Board finds this reliance misplaced. As stated above, that decision was procured by Merchants' fraud, and in addition the decision is subject to FCC reconsideration and is not final.

Indeed, the FCC's decision on reconsideration cited 47 C.F.R. § 1.106 and thus expressly held the decision was not final:

> If the Commission or designated authority initiates further proceedings, ***a ruling on the merits of the matter will be deferred pending completion of such proceedings.*** Following completion of such further proceedings, the Commission or designated authority may affirm, reverse, or modify its original order, or it may set aside the order and remand the matter for such further proceedings… as may be appropriate.

47 C.F.R. § 1.106(k)(2) (emphasis added). *See also Verizon Maryland Inc. v. RCN Telecom Services, Inc.*, 232 F.Supp.2d 539, 549 -550 (D. Md. 2002) (no preclusive effect in commission's first order finding parties' intent in interconnection agreement, because the commission entered a second order that reconsidered the issue) (citing *McGowen v. Harris,* 666 F.2d 60, 65 (4th Cir. 1981)). *Cf., Alabama Mun. Distributors Group v. FERC,* 312 F.3d 470, 474 (D.C. Cir. 2002) (administrative decisions that are not appealable have no preclusive effect for future litigation). Indeed, every court to consider the argument has held the decision is not yet final. Most recently, the South Dakota District Court held:

> [T]his Court is not convinced that FCC's October 2, 2007 decision in *Farmers & Merchants* is at this time properly characterized as settled precedent. Although more than five months have passed since Qwest submitted its amended petition, this Court believes it is as likely that the passage of time indicates that the FCC is in some way modifying its *Farmers and Merchants* decision as it is that the FCC has determined that the decision will remain unmodified without having issued an order stating the same.

*Sancom, Inc. v. Sprint Communications,* 2009 WL 903720, Civ. No. 07-4107-LLP (D.S.D. March 30, 2009). *See also Aventure Communications Technology, L.L.C. v. MCI Communications Services, Inc.* 2008 WL 4280371, 2 (N.D. Iowa 2008) (Magistrate Judge Walters) ("The Court has deferred supplemental briefing on pending motions to dismiss in three similar cases until the FCC has issued a final decision in *Qwest Communications Corp. v. Farmers & Merchants Mutual Telephone Co.* which is under reconsideration."); *Sancom, Inc. v. Qwest Communications Corp,* 2008 U.S. Dist. LEXIS 49491 at *15 n.1 (D.S.D. June 26, 2008); *Northern Valley Communications L.L.C. v. MCI Communications Services, Inc.*, 2008 U.S. Dist. LEXIS 49484 at *12 n.1 (D.S.D. June 26, 2008) (each case noting the FCC's pending reconsideration; distinguished the facts and claims in *Merchants*). Thus, the Board bases its decision on the record evidence before it, and not upon the FCC's non-final decision.

The LEC Respondents also rely upon *AT&T Corporation v. Jefferson Telephone Company*, 16 FCC Rcd 16130 (2001), and claim this decision and its progeny show the FCC has already found traffic pumping schemes are legal. The cases do not stand for the propositions cited by the LEC Respondents. In these cases, AT&T limited its argument to issues raised in a 1996 NPRM and in a "1995 advisory letter issued by the Chief of the Enforcement Division." *Id.* at ¶13. The FCC rejected these two arguments, but stated that the decision was narrow:

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

*Id* at ¶16 (emphasis added). Indeed, the FCC specifically stated that no one alleged that Jefferson discriminated by treating its conferencing partner different than true end-user customers. *Id.* at ¶15. In other words, the *Jefferson* decision did not address any of the questions at issue before the Board in this proceeding. The LEC Respondents arguments attempt to read more into the decision than exists. No matter how many times the LECs say "*Jefferson*" and "*Farmers and Merchants*" it does not change the unalterable fact that these decisions do not help them in the slightest.

The Board also rejects the Farmers Respondents claim that they relied upon the *Jefferson* decision as a precondition for entering into the traffic pumping scheme. There is no evidence to support this assertion. Moreover, in motions filed in this case, the Farmers Respondents admitted they did not rely upon advice from lawyers before entering into their illegal traffic pumping schemes.

## VI. THE BOARD HEREBY ORDERS REFUNDS FOR THE FULL AMOUNT OF INTRASTATE ACCESS FEES ON RESPONDENTS' FCSC TRAFFIC.

Because the Respondents did not provide terminating switched access services on the FCSC traffic, the Board hereby enters an order finding that Qwest is not liable to any of the Respondents for any switched access fees on the Respondents' FCSC traffic from July 1, 2005 forward. The Board also orders the LECs to refund all intrastate access charges to Qwest with interest at the tariff rate. Iowa Code Sections 476.3 and 476.11, and 199 IAC § 22.14 give the Board the authority to order refunds for charges that were collected unlawfully. "The authority to order refunds follows as a necessary part of rate-setting authority." *Equal Access Corp. v. IUB*, 510 N.W.2d 147, 150 (Iowa 1993) (citing *Mid-Iowa Community Action, Inc. v. Iowa State Commerce Comm'n*, 421 N.W.2d 899, 901 (Iowa 1988)).

The Board hereby orders the LECs to refund the intrastate access charges at issue in this case. Those amounts are as follows:

[CONFIDENTIAL]

The Board orders the parties to confer to calculate appropriate interest charges per the tariff.

Respondents argued that Qwest did not calculate Qwest's losses with sufficient certainty. This is incorrect. The Board has authority to determine refund amounts without needing exact certitude in the amounts:

> The fourth principle is that complaints involving provision of services without a tariff should be resolved efficiently, without other proceedings and the need for lengthy fact-finding proceedings. The board stated that attempting to derive an exact refund formula in this case would consume an inordinate amount of time and board resources and probably would still not yield a mutually acceptable result.
>
> * * *
>
> Regarding the refund to be ordered, the board summarized its views this way:
>
> Ideally the refund amount in this case would be carefully calibrated to prevent Equal Access from benefiting for provision of untariffed services, and to deter other alternative operator services companies from providing services without tariffs. However, the record in this proceeding only allows the Board to estimate the appropriate refund amount to accomplish such a result. It is highly doubtful that an accurate figure could be reached through extended and complex further litigation.

*Equal Access*, 510 N.W. 2d at 151 (affirming the Board's refund order).

Moreover, the Board finds Mr. Devolites' calculations had a high degree of accuracy. Mr. Devolites used a super-computer, analyzed over 20 million telephone calls, and calculated the exact number of minutes that each LEC delivered to telephone numbers the Respondents admit were associated with their FCSC partners. Mr. Devolites then broke down those numbers by FCSC, once again based on data provided by the Respondents. While Mr. Devolites assumed the LECs billed Qwest the LECs' tariffed terminating access rates, this assumption is an eminently reasonable presumption to make.

The Farmers Respondents argue that the Board cannot award damages, and Qwest seeks damages for situations where another IXC delivered the call for Qwest into the LECs for calls associated with FCSCs. We disagree with the Farmer's Respondents' analysis. Qwest seeks a refund of the exact amount it paid for termination of the calls. Thus, Qwest seeks a refund, and the Board believes this refund appropriate.

## VII. <u>THE BOARD FINDS THAT TRAFFIC PUMPING IS AN UNJUST AND UNREASONABLE PRACTICE UNDER IOWA CODE SECTION 476.3.</u>

As noted above, Section 476.3 provides the Board the authority to determine that any practice by an Iowa LEC is "unjust, unreasonable, discriminatory or otherwise in violation of any provision of law." Iowa Code § 476.3(1). In accordance with Section 476.3, the Board has promulgated Rule 22.1, which requires construing the Board's rules consistent with their purpose, including:

> *a.* ***To allow fair competition in the public interest*** while ensuring the availability of safe adequate communications services to the public.
>
> *b.* ***To provide uniform, reasonable standards*** for communications service provided by telephone utilities.
>
> ***
>
> *d.* ***To ensure that no telephone utility shall unreasonably discriminate among different customers or service categories.***

199 IAC § 22.1(1)(a), (b) (d) (emphasis added). Under Section 476.3 and Rule 22.1, and based on the record evidence, the Board finds traffic pumping is an unjust and unreasonable practice, and in violation of the public interest.

### A. <u>The Board Finds It is an Unjust and Unreasonable Practices for the LECs to Share Access Revenue.</u>

There is no dispute but that traffic pumping involves the sharing of access revenue. "Access charges are the means whereby local telephone companies recover from [long distance companies] their share of the cost of the local plant that is used in the origination and termination of interstate calls." *Ohio Bell Tel. Co. v. FCC*, 949 F.2d 864, 868 (6th Cir. 1991) (quoting *National Assoc. of Regulatory Util.*

*Comm'rs v. FCC*, 737 F.2d 1095, 1103-05 (D.C. Cir 1984). Iowa law and Board decisions both recognize the same cost-recovery purpose of access charges. Iowa Code §§ 476.3 (LEC rates and charges must be "just, reasonable, and nondiscriminatory"); 476.4 (tariff charges must be reasonable, and on filing a proposed tariff, the LEC bears the burden of proving its reasonableness); 476.11 (LEC must provide "just, reasonable, and nondiscriminatory arrangements for interconnection of its telecommunications services with another telecommunications provider."); *AT&T Communs. of the Midwest, Inc. v. IUB.*, 687 N.W.2d 554, 558-559 (Iowa 2004) (Board did not err in finding CLECs access rates, which were substantially higher than ILECs' access rates, "unlawful and a deliberate abuse of their monopoly over access services;" reversed as to new rates due to lack of authority to *sua sponte* waive rule requiring CCL charge). To the extent that the LECs have access revenues available to split with their FCSC partners, the Board finds that means the LECs' access charges are not fulfilling their purpose. Splitting access revenue is an abuse of the access charge regime and is therefore an unfair and unreasonable practice. The Board therefore finds that it is an unjust and unreasonable practice and contrary to the public interest to share access revenues.

Moreover, the LEC Respondents argue that FCSCs are customers. While the Board finds the evidence shows the FCSCs are not end-users, the LEC Respondents traffic pumping was premised on their plan to discriminate between customers. Traffic pumping works only if the LECs kickback a portion of switched access revenues to FCSCs. The written contracts between the LECs and FCSCs make this plain. In addition, traffic pumping involves providing services to FCSCs for free. The Board finds that both the kickbacks and the free service constitute illegal and unreasonable discrimination in violation of Iowa law. Given that traffic pumping is premised on one or both of these forms of discrimination, the Board hereby concludes that traffic pumping is *per se* an unjust and unreasonable practice and contrary to the public interest.

## B. **The Board Finds It is Unjust and Unreasonable Practice for CLECs Participating in Traffic Pumping to Claim the Rural Exemption.**

Aventure and Great Lakes are both CLECs and both claim entitlement to the FCC's rural exemption. The parties agree that to satisfy the rural exemption, the CLEC must (1) "compete" for customers with the price-cap ILEC, and (2) one-hundred percent of their customers must be based in a rural exchange (meaning an MSA with less than 50,000 residents). The Board hereby issues a declaratory ruling that FCSCs cannot meet the rural exemption's residency requirements, and it is an unjust and unreasonable practice for a CLEC (and a violation of Great Lakes and Aventure's certificates of authority) to claim the rural exemption when they serve FCSCs.

The Board finds that Great Lakes and Aventure necessarily serve customers in metropolitan areas. For example, Free Conference and Global Conference are based in Los Angeles (see Exhibits 147, 105), and Audiocom is based in Las Vegas (Exhibit 915). Unlike traditional end-users who have a physical presence in the local exchange, FCSCs do nothing but send equipment (conference bridges, chat boxes, and routers) to the LECs' central offices. The FCSCs do not live in the community, pay taxes, or have a home or business there. Indeed, in virtually every circumstance, the FCSC did not even visit the rural community. The Board hereby finds that a piece of equipment cannot dictate the residency of a purported customer. For Iowa LECs to claim the rural exemption in Iowa, they must serve businesses that have an actual presence in Iowa and satisfy the requirements of residency such as paying taxes.

Moreover, the Board finds that neither Great Lakes nor Aventure (through December 2007) met the competition requirements of the rural exemption. [CONFIDENTIAL] Thus, the Board finds that at all relevant times, Great Lakes and Aventure did not satisfy the competition requirement of rural exemption, and knew they did not satisfy this aspect of the rural exemption.

The Board also finds that Aventure serves customers out of the Sioux City exchange, a city with greater than 50,000 people. The Board makes this finding based on the following facts. Aventure's true central office is in Sioux City. Aventure placed its tandem switch in its Sioux City central office. Aventure placed routers serving FCSCs in the Sioux City Central Office. Finally, a vast percentage of Aventure's contracts with FCSCs specifically [CONFIDENTIAL]. Thus, the Board finds that Aventure did not satisfy the requirement of rural exemption that it only serve customers out of MSAs of less than 50,000 people. Aventure knew or should have known it did not satisfy this requirement.

Great Lakes and Aventure's primary argument is that the Board does not have authority to make this finding. The Board disagrees. The Board has the authority to make any decision affecting certification requirements of Iowa LECs, and to determine whether any LEC practice violates the public interest in Iowa. Iowa Code § 476.29(1), (9). *See also* Iowa Code § 476.101 ("A certificate of public convenience and necessity to provide local telephone service shall not be interpreted as conveying a monopoly, exclusive privilege, or franchise.").

### C. <u>The Board Finds Traffic Pumping is an Unjust and Unreasonable Practice Insofar as Aventure Abused the Universal Service Fund.</u>

The evidence also showed that Aventure claimed [CONFIDENTIAL]. Exhibit 1041. Moreover, the Board finds that the material in Aventure's USF Application was false and misleading as well. Aventure claimed to serve [CONFIDENTIAL]. Exhibit 1042; Tr. at 2270. Aventure admitted the rest were "test" lines that were never in service. Tr. at 2270-71; Exhibit 192 (Greeno Depo.) at 66. In addition, Aventure claimed to serve customers in many exchanges where it has no presence whatsoever. The Board thereby finds that Aventure actively defrauded the Universal Service Fund by (1) seeking payments due exclusively to interactions with FCSCs, (b) by grossly inflating the number of access lines it serves, and (c) by grossly inflating the number of exchanges it operates in. As a result, the Board revokes Aventure's ETC designation, which the Board has express authority to do. 47 U.S.C. § 254; 199 IAC §39.2; *In re: Dallas County Wireless, Inc.*, 2008 Iowa PUC LEXIS 154 (Iowa PUC April 10, 2008). The Board also finds that seeking universal service payments for service provided to FCSCs is an unjust and unreasonable practice and contrary to the public interest.

### D. <u>The Board Finds that Traffic Pumping is Unjust and Unreasonable Because It Abuses Numbering Resources.</u>

The Board has the power to regulate the Respondents' use of numbering resources. The Board has recognized previously that the FCC gives authority to the state commissions to overrule NANPA denials of requests for numbering resources. *In re Qwest Corp.*, 2008 Iowa PUC LEXIS 138, Docket No.

WRU-08-10-272 (March 24, 2008) (citing 47 C.F.R. § 52.15(g)(4); FCC 01-362, ¶ 64). The Board finds that traffic pumping abuses numbering resources. Some of the LECs Respondents (Great Lakes and Aventure) obtained tens of thousands of telephone numbers from NANPA for the express purpose of traffic pumping. In addition, the LEC Respondents all assigned hundreds of numbers to FCSCs. In addition, the LECs involved in traffic laundering (Riceville, Superior, Reasnor, and Great Lakes) used numbers in exchange areas different than the exchange to which the NPA-NXX was assigned. ATIS, the "standards making body for the telecommunications industry", specifically recognizes that LECs are required to use numbers in the exchange to which they are assigned. Exhibit 1359 at §2.1.4. Thus, the Board traffic pumping is an unjust and unreasonable practice in violation of the public interest because it abuses numbering resources.

**E. The Board Finds Traffic Pumping is Unjust and Unreasonable Practice Insofar as It Involves Pornographic Services with No Means for Parental Blocking.**

Most of the LEC Respondents [CONFIDENTIAL] partnered with FCSCs who provided free pornographic calling. In every circumstance, children could call the telephone numbers assigned to these pornographers and there was no technological measure in place to protect children from making such calls. The Board finds traffic pumping is an unfair and unreasonable practice because it is contrary to the compelling public interest of protecting children from pornographic or adult-content communications. This public interest is most clearly evidenced by the federal telecommunications laws codified in 47 U.S.C. § 223, and the FCC's regulations and decisions promulgated thereunder to protect minors from "indecent communications."

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

*In re Regulations Concerning Indecent Communications by Telephone,* 5 FCC Rcd. 4926, FCC 90-230 ¶ 16 (Rel'd Jun 29, 1990), *aff'd, Information Providers Coalition for Defense of the First Amendment v. FCC,* 928 F.2d 866, 874-876 (9th Cir. 1991) (emphasis added).

The Board finds the LECs' failure to ensure protections were in place for minor children is inexcusable. This is particularly true for [CONFIDENTIAL]. These practices are clearly not in the public interest.

The Board has authority to regulate Iowa LECs for consumer protection and other public interests. *See, e.g.,* Iowa Code § 476.95 (4) ("Regulatory flexibility is appropriate when competition provides customers with competitive choices in the variety, quality, and pricing of communications services, and when consistent with consumer protection and other relevant public interests."); 476.3 (Board authority to resolve complaints as to "anything done or omitted to be done by a public utility subject to this chapter in contravention of this chapter"); 476.29(1) (certificates should be granted if the Board finds the "service proposed to be rendered will promote the public convenience and necessity"). The Board's ruling on traffic pumping is necessary to "protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Thus traffic pumping is an unjust and unreasonable practice insofar as it involves adult content calling with no technological protections to protect minors.

### F. The Board Finds Traffic Pumping Is Unjust and Unreasonable Because it Forces Legitimate Service Providers to Compete With the FCSC's Wrongfully "Free" Services, And Does Not Contribute to Economic Development in Iowa.

The Board also finds that traffic pumping is an unfair and unreasonable practice and contrary to the public interest because it distorts the markets for legitimate conference call (and other calling) services. Traffic pumping depends upon long distance carriers subsidizing the very existence of the FCSCs. The LECs split the switched access charges with FCSCs, who in turn provide "free" conference, pornographic chat, and international calling services to end users. This harms true providers of these services who properly charge fees for such services. *See also* 47 U.S.C. § 254(f) (bars using a monopoly service like switched access to subsidize a competitive service like conferencing). Moreover, the Board finds that traffic pumping does not result in economic development for Iowa. The FCSCs pay no taxes, and pay no fees. The FCSCs do not add a single person to the work force in Iowa. The FCSCs do not have a presence in Iowa. The FCSCs do not make charitable contributions, or help to pay for parks, or roads. Thus, there is no public good that comes from traffic pumping.

### G. Given that Traffic Pumping in An Unreasonable Practice and Contrary to the Public Interest, Participating in Traffic Pumping is Contrary to the LECs' Certifications.

Having found that there are many reasons why traffic pumping is an unjust and unreasonable practice and contrary to the public interest, the LECs participation in traffic pumping also violated their certifications from this Board. The Board also finds that participation in a scheme to bilk money from the IXCs, abuse of control of terminating switched access, misrepresentation of evidence, traffic laundering and the like as set forth above is, in and of itself, an unjust and unreasonable practice, contrary to the public interest, and in violation of the LECs' certificates of authority.

## VIII. THE BOARD REJECTS REASNOR'S COUNTERCLAIMS AS UNSUPPORTED BY THE EVIDENCE.

Reasnor claims that Qwest's decision to withhold switched access payments from Reasnor constitutes unlawful self help. Reasnor also claims that Qwest discriminates in the provision of retail services and wholesale services. The Board rejects each such claim, as none are supportable.

The Board finds that Qwest's decision to withhold payments from Reasnor was appropriate, part of a good faith dispute, and obviously the Board finds the calls are not subject to switched access. The Board finds it appropriate to withhold payment of access fees when the carrier is disputing whether access charges apply to the calls in question. This exact issue was recently addressed by a court upon appeal from a decision of the Board:

> To prevail on its self-claim [sic], INS must prove Qwest unlawfully withheld payment due under the terms of valid and applicable tariff.
>
> * * *
>
> In addition, unlike the defendant in the case cited by INS, Qwest filed with the IUB - the agency that regulates and supervises intrastate transport of telephone calls within the State of Iowa - its petition for declaratory ruling, and the Board held Qwest was not liable to INS for access charges, leaving to future negotiation the determination of any applicable compensation, thereby confirming the reasonableness of Qwest's actions.
>
> In finding Qwest is not liable to INS under the Amended FCC Tariff, and that the original federal tariff is no longer applicable, it follows INS' self-help claim is likewise not applicable.

*Iowa Network Services, Inc. v. Qwest Corp.*, 385 F. Supp. 2d 850, 902-904 (S.D. Iowa 2005), *aff'd*, 466 F.3d 1091 (8th Cir. 2006) (notes omitted; addressing 47 U.S.C. §201(b) unreasonable practice claim).

Similarly, we reject Reasnor's argument that it was improper for Qwest to withhold payment of a few hundred dollars of legitimate access payments each month to help satisfy the hundreds of thousands of dollars in illegitimate access payments it made to Reasnor. First, short-paying invoices fully accords with the billing dispute terms of the intrastate access tariff in which Reasnor concurs, NECA Tariff FCC No. 5 at § 2.4.1(D)(1). Moreover, short paying is a traditional practice when a good faith dispute exists about whether a particular type of calling fall within an access tariff. *In re McLeodUSA Telec. Services, Inc., v. Qwest Corp.*, 2006 WL 2134628, 8 (I.U.B. July 27, 2006), *aff'd on rehearing*, 2007 WL 3169126, 8 (I.U.B. April 17, 2007). The facts show that Reasnor collected millions of dollars in unjustified access charges associated with [CONFIDENTIAL]; withholding payment on a few hundred dollars each month cannot possibly harm Reasnor.

Reasnor also argues that Qwest's hospitality plus program discriminates between retail end users, by paying one set of customers a fee, and failing to provide the fee to other customers. Brief at 49-53. The evidence does not support this argument. Qwest's Hospitality-Plus program is a tariffed product for operator services. In this situation, agents sign up hotels for operator services. Qwest charges those who make operator assisted calls from the hotels its tariff rates, and the hotel's "Property Imposed Fee" or PIF. The PIF itself is contained in Qwest's tariffs. Qwest keeps its tariff charges, and sends the PIF to the agent. The end-user of the service – the person in the hotel room making the call – is aware of the charges (including the PIF) and pays the charges. Thus, the Board finds this program is not discriminatory. Qwest simply follows its tariff. The FCC has specifically addressed hospitality plus programs and found them appropriate. Tr. at 1328; Exhibit 1371.

Reasnor also complains that its counterclaim is without support because Qwest "did not produce any agreements with retail customers." The Board disagrees. Qwest disclosed that it provides customers with products under the rates, terms and conditions contained in its Rate and Service Schedule (RSS: a functional tariff after long distance deregulation). Each and every time that a retail customer and Qwest negotiate terms and conditions different than the RSS, Qwest posts the rates, terms and conditions for that agreement on its website at the following address: http://tariffs.qwest.com:8000/0west_Service Agreements/LD Xpl/LD FAQs/Index.htm. That website has a hotlink entitled "Customized Service Arrangements." When that link is opened, it states: "A Customized Service Arrangement or CSA is an individually negotiated transaction tailored to meet the telecommunications needs of the customer for whom it was designated. A CSA frequently involves a combination of domestic, interstate, interexchange service(s) and international service(s)." Each of the CSAs from the last several years are posted. This shows Reasnor has equal access to each and every contractual arrangement that Qwest has with retail customers. More importantly, the Board finds Qwest does not discriminate because Qwest posts its contractual terms and offers them to customers on a non-discriminatory basis.

The LECs also argue that Qwest's Business Partners Program ("QBPP") is identical to the LEC Respondents traffic pumping arrangements. The Board finds that QBPP is nothing like the traffic pumping; the Board finds it different in every conceivable way. QBPP is Qwest's outside sales force, and participants sell Qwest's tariff products for a commission. Moreover, QBPP participants are sales agents, not customers. QBPP cannot possibly result in discrimination between customers, because QBPP members are not customers. QBPP is different from traffic pumping because:

1. For traffic pumping, the LECs provide rebates to purported customers. With QBPP, customers receive no benefits.
2. For traffic pumping, purported customers get services free of charge. With QBPP customers pay tariff rates.
3. For traffic pumping, the LECs ask IXCs to subsidize the conference/chat services even though the IXCs do use the services. For QBPP, those using the services actually purchase them again at tariff rates.

In sum, the Board finds there is no true comparison between QBPP and traffic pumping.

Reasnor also claims that Qwest unlawfully discriminates in its provision of wholesale long distance services to other IXCs, by offering to least cost route for different IXCs for different rates. The

Board rejects this claim because Reasnor never raised this claim or presented any evidence on this claim. Moreover, even if Reasnor had raised the claim, Qwest is entitled to provide contract carriage to other long distance providers via contract because the services are competitive and detariffed. *Ting v. AT&T,* 319 F.3d 1126, 1131-1133 (9th Cir. 2003) (noting FCC's decision that as to long distance services, "enforcement of the tariffing provision is neither necessary to ensure just and reasonable, non-discriminatory rates, nor necessary for the protection of consumers."). Moreover, given the competitive nature of the service, Qwest did not discriminate in the provision of services to other long distance carriers. *See, e.g., Orloff v FCC*, 352 F. 3d 415, 421 (D.C. Cir. 2003) (in non-tariffed context, carrier's prices and sales concessions are subject not to Section 203 of the Act, but to market forces). The Board also finds that Qwest's wholesale least cost routing contracts with other IXCs did not violate any Iowa law or regulations.

Reasnor also argues that Qwest violated rate averaging and rate integration requirements by charging different prices in least-cost routing (wholesale) long distance contracts. Section 254(g) of the Communications Act require IXCs to offer the same prices to "subscribers." Carriers purchasing wholesale services from Qwest are not "subscribers" under this provision.[2] Thus, the Board rejects this argument.

Reasnor's final argument is that Qwest provides Qwest Corporation, an affiliated company, with discriminatory discounts on high capacity circuits. The entire basis of Reasnor's claim is one clause in a contract that Reasnor never raised in testimony or even in hearing. The Board rejects the claim for this reason. In addition, however, Reasnor did not present any evidence that Qwest Corporation receives favorable treatment. The only evidence in the record on this point is an affidavit from Doug Hsiao. *See* Qwest Confidential Response to Reasnor's Motions to Compel, January 7, 2009, at Exhibit C. Mr. Hsiao testifies that Qwest does not provide Qwest Corporation with favorable treatment. Having no evidence to

[2] 47 CFR §1801(b) (rate integration), tracking 47 U.S.C. § 254(g), states: "A provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each U.S. state at rates no higher than the rates charged to its subscribers in any other state." 47 CFR § 1801(a) (rate averaging) is similar, requiring the averaging of rates among high cost and non-high cost areas.

the contrary, Reasnor has failed to meet its burden on this aspect of its claim.

In sum, the Board rejects Reasnor's counterclaims in their entirety.

## IX. Additional Findings and Conclusions

In addition to the points raised above, to eliminate any confusion, the Board hereby finds as follows:

1. The Board that it has jurisdiction to decide the issues presented in this case.
2. The Board finds that the FCSCs did not purchase local exchange services from the LEC Respondents.
3. The Board finds that the LECs did not offer or provide to the FCSCs any service authorized by the local exchange tariffs or otherwise make a public offering for the service.
4. The Board finds that the LECs did not offer service to FCSCs for a fee.
5. The Board finds that none of the LECs netted for the services provided to the FCSCs.
6. The Board finds that the backdated contracts and invoices were illegitimate and an attempt to deceive the FCC, the long distance carriers, the Board, and the public.
7. The Board finds that the FCSCs are not "end-users" under the LEC Respondents' local exchange tariff or any intrastate access tariff.
8. The Board finds that the FCSCs are involved in a joint undertaking and therefore business partners of each other.
9. The Board finds that the FCSCs were wholesalers and or carriers, not end-users, and therefore calls delivered to FCSCs are not subject to switched access.
10. The Board finds that none of the calls in question terminated to an end-user premises as defined by the LEC Respondents' intrastate tariffs.
11. The Board declares that to become an end-user premises under the access tariffs, that end users must either own, lease, or control a "building or building" or defined portions of a "building or buildings," which necessarily requires a lease or ownership.

12. The Board declares that the LEC Respondents did not provide a common carrier service to the FCSCs.

13. The Board finds that the LEC Respondents did not terminate any of the international calling, credit-card calling or pre-recorded playback calling at issue in this case.

14. The Board finds that Reasnor, Superior and Riceville did not terminate any of the calls associated with FCSCs because that traffic was delivered to a calling area in which they were not a certificated LEC.

15. The Board finds that Reasnor and Superior did not provide FCSCs with foreign exchange service.

16. [CONFIDENTIAL]

17. The Board finds that Sully sold the Reasnor exchange to Reasnor telephone so that Sully could attempt, improperly, to generate switched access revenues associated with [CONFIDENTIAL] and that, as a result, the transaction was fraudulent from the outset.

18. The Board finds that Great Lakes is acting beyond its certification and local exchange tariff by offering services in Spencer, Iowa. The Board also finds that, as a result, Great Lakes is not entitled to switched access for any of its calls, all of which are delivered to FCSCs.

19. The Board finds that Qwest is entitled to recover intrastate switched access revenues as defined in this Order with interest.

20. The Board finds that the LECs are not entitled to any compensation for the calls delivered to numbers associated with FCSCs because that calling is outside of the switched access tariffs.

21. The Board finds that the sharing of access revenue is an unjust and unreasonable practice.

22. The Board finds that it is an unjust and unreasonable practice for CLECs involved in traffic pumping to claim the rural exemption.

23. The Board declares that the arrangements between the LEC Respondents and the FCSCs to obtain and share revenues from long distance carriers through the offering of free calling services constitute unjust and unreasonable practices and constitute violations of the public interest and the LEC Respondents' certifications.

24. The Board finds Great Lakes and Aventure failed to satisfy the rural exemption and the facts that took them outside of the exemption were well known to them. Specifically:

   a. The Board enters a declaratory finding that Great Lakes has never competed with Qwest in the Spencer exchange for end-user customers. It has no [CONFIDENTIAL].

   b. The Board enters a declaratory finding that Aventure did not compete for customers with the incumbent LEC in the Sioux City, Salix or any other exchange between its inception and December 2007 because it was building its network. As such, Aventure did not qualify for the rural exemption from its inception through December 2007 for failure to compete.

   c. The Board enters a declaratory finding that Aventure serves and has always served customers based in the Sioux City exchange. Given that it serves customers in an MSA of greater than 50,000 people, Aventure does not qualify and has never qualified for the rural exemption.

   d. The Board enters a declaratory ruling that FCSCs are not residents of the communities where their conference bridges are located. FCSCs do not pay taxes, employee residents or otherwise have a physical presence in the community. It is counter-intuitive to find that placement of a computer in a rural area creates residency in that rural community. As such, FCSCs are not residents of Spencer, Iowa, Salix, Iowa or whatever rural community houses their computers. Rural residency requires more. As such, Great Lakes and Aventure are serving FCSCs from the locations where they actually exist, including Los Angeles, Las Vegas and San Diego. Given that these communities are greater than 50,000 people, neither Aventure nor Great Lakes have ever qualified for the rural exemption.

25. The Board hereby revokes Great Lakes' certification.

26. The Board finds that Aventure defrauded the universal service fund by seeking USF contributions for FCSCs. Thus, the Board revokes Aventure ETC designation.

27. The Board finds that it is an unjust and unreasonable practice to knowingly enter into a business relationship with an adult call provider who does not place technological measures in place to protect children.

28. The Board finds that traffic pumping is an unjust and unreasonable practice because it abuses numbering resources.

29. The Board finds that traffic pumping is an unjust and unreasonable practice because it negatively impacts the ability of true conference/chat line providers to compete on an even playing field.

30. The Board orders the LECs to immediately cease and desist sharing of access revenues with FCSCs and to immediately disconnect the telephone numbers associated with such services;

31. The Board orders the LECs to immediately cease billing IXCs such as Qwest for switched access fees on FCSC traffic.

32. The Board orders Superior, Reasnor, Riceville and Great Lakes to immediately cease traffic laundering.

33. The Board orders all of the LEC Respondents to immediately represent to the Board, as a condition for retaining their certificates of authority from the Board, that they will no longer engage in traffic pumping, and will not allow for provision of adult content services on telephone numbers that cannot be blocked.

34. The Board finds that traffic pumping is premised upon illegal discrimination.

35. The Board finds that Reasnor has failed to prove its counterclaims.

36. The Board holds that it intends the telecommunications industry to consider this decision as being binding precedent that the Board intends to follow in any future traffic pumping cases.

37. The Board also finds that to the extent it did not address an issue raised in a brief directly, the Board rejects that argument.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **PRELIMINARY STATEMENT FOR THE RECORD OF QWEST COMMUNICATIONS COMPANY, LLC** to be 1) filed with the FCC via its Electronic Comment Filing System in WC Docket No. 09-152; 2) served via e-mail on Mr. Doug Slotten, Federal Communications Commission, Wireline Competition Bureau, Pricing Policy Division at Douglas.slotten@fcc.gov and Ms. Lynne Engledow, Federal Communications Commission, Wireline Competition Bureau, Pricing Policy Division at lynne.engledow@fcc.gov; 3) served via e-mail on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com; and 4) served via first-class U.S. Mail, postage prepaid, on counsel for Great Lakes Communication Corp. and Superior Telephone Cooperative, as follows:

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/s/Richard Grozier

August 28, 2009