

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Great Lakes Communications Corporation	)	
Superior Telephone Cooperative	)	
	)	
Petition for Declaratory Ruling	)	WC Docket No. 09-152
to the Iowa Utilities Board and	)	
Contingent Petition for Preemption	)	
_____	)	

**OPPOSITION OF SPRINT COMMUNICATIONS COMPANY L.P.**

Sprint Communications Company L.P. (“Sprint”), pursuant to *Public Notice* DA 09-1843 issued August 20, 2009, hereby respectfully submits its opposition to the above-captioned petition filed August 14, 2009 by Great Lakes Communications Corporation (“Great Lakes”) and Superior Telephone Cooperative (“Superior”) (collectively “Petitioners”). As more fully set forth below, the petition is totally without merit and should be summarily rejected by the Federal Communications Commission (“Commission” or “FCC”).

The Petitioners’ request for a declaratory ruling here is patently absurd. They would have the FCC declare that a yet-to-be issued-decision by the Iowa Utilities Board (“IUB”) in the complaint proceeding *Qwest Communications Corporation v. Superior Telephone Company et al.*, Docket FCU 07-2 is invalid as contrary to FCC precedent and the Communications Act. Petition at 2. Indeed, their entire claim for relief is based on statements discussing the decision made by the members of the IUB at a public meeting held August 14. Specifically, Petitioners want the FCC to declare that the pending decision is invalid because the IUB "seems to be poised

to adopt" positions they claim are unlawful.<sup>1</sup> Such statements do not provide a basis upon which to rule that the forthcoming IUB decision is or will be invalid. It may be true that federal agencies are "not constrained by Article III 'case or controversy' limitations, but rather they 'may issue a declaratory order in mere anticipation of a controversy or simply to resolve an uncertainty.' *Pfizer, Inc. v. Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1990)" Petition at 4. But an adjudicatory order – and under Section 551 of the Administrative Procedure Act, 5 U.S.C. §551, a declaratory ruling is an adjudication – must be based upon facts and not upon mere speculation. *See, e.g., First Bancorporation v. Board of Governors of the Federal Reserve System*, 728 F.2d 434 (10<sup>th</sup> Cir. 1984). Plainly, the FCC would be acting on mere speculation if it were to declare that an IUB decision that has not yet been released is void as contrary to FCC policies. There is simply no precedent – and certainly Petitioners cite none – that enables the FCC to take such an extraordinary action.<sup>2</sup>

Petitioners claim that any decision by the IUB finding that these fraudulent traffic pumping and access revenue sharing schemes violated Iowa laws and regulations, or that they were not sanctioned by the Iowa intrastate tariffs of the defendant LECs on file with the IUB, would be contrary to the FCC's decisions in *AT&T v. Jefferson*, 16 FCC Rcd 16130 (2001) (*Jefferson*); *AT&T v. Beehive*, 17 FCC Rcd 11641 (2002) (*Beehive*); *AT&T v. Frontier*, 15 FCC

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<sup>1</sup> See Petition at 2. See also *id* at 2 (IUB Order "is likely to be flatly inconsistent" and "also likely to be extraordinarily expansive in scope."); at 20 ("IUB's potential de-certification"); at 23 ("IUB is poised to reach").

<sup>2</sup> Sprint also believes that it would be unprecedented if the FCC decided to void the decision after it has been released and the FCC has had an opportunity to review the findings of the IUB as to whether the traffic pumping schemes violated Iowa laws and regulations. Those findings will undoubtedly be based upon an extensive record consisting of documents and depositions produced during discovery and a week-long hearing on the record in which members of the IUB had the opportunity to question and judge the credibility of the witnesses, especially those testifying on behalf of Petitioners and the other LECs engaged in the practice of traffic pumping.

Rcd 4041 (2002) (*Frontier*); and *Qwest v. Farmers & Merchants*, 22 FCC Rcd 17973 (2007), (*Farmers*) *modified on recon.*, 23 FCC Rcd 1615 (2008) (*Reconsideration Order*). According to Petitioners, these FCC decisions have found that such schemes were lawful under the Communications Act and thus the IUB is precluded from making any contrary findings under Iowa law.<sup>3</sup> Like their arguments before the IUB, Petitioners' argument here that the FCC has usurped a State's authority to examine the traffic pumping schemes of Petitioners and other LECs to determine whether such schemes complied with State law and regulations is simply wrong.

The FCC's *Jefferson* decision was based on the facts specific to that case and the arguments made by the parties. Indeed, the FCC emphasized that its decision was limited and that it did not sanction as a general matter access revenue-sharing arrangements. As the FCC explained:

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 of 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 201(b), 202(b) or other statutory or regulatory requirements.<sup>4</sup>

Although Petitioners ignore this language, it is clear that given the "narrowness of [the FCC's] holding," *Jefferson* provides no help to Petitioners' claim that the IUB cannot decide the

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<sup>3</sup> See e.g., Petition at 7 ("the *Jefferson*, *Frontier* and *Beehive* decisions all dealt with exactly the same commercial arrangement that the IXCs characterize as 'traffic pumping'..."); *id.* at 8 (the FCC's *Farmers* decision rejected Qwest's arguments challenging the lawfulness of access pumping schemes); and *id.* at 12 ("Jefferson and *Farmers and Merchants* are dispositive in favor of Petitioners").

<sup>4</sup> *Jefferson*, 17 FCC Rcd at 16137 ¶ 16.

lawfulness of access revenue-sharing arrangements under Iowa statutory and regulatory law and the tariffs on file with the IUB governing local and intrastate services provided by the LECs.

The FCC's decision in *Beehive* also provides no support for the proposition that access revenue-sharing arrangements are lawful or that State decisions to the contrary have been preempted. Indeed, the FCC stressed that its decision did not address access revenue-sharing schemes:

AT&T alleges in its Complaint that the access revenue-sharing arrangement between Beehive and Joy breached Beehive's common carrier duties, in violation of section 201(b) of the Act, and constituted unreasonable discrimination, in violation of section 202(a) of the Act. AT&T's allegations and arguments are identical to those raised and denied in *AT&T v. Jefferson* and *AT&T v. Frontier*. Thus, for the reasons explained in those orders, we conclude that AT&T has failed on this record to meet its burden of demonstrating that Beehive violated either section 201(b) or section 202(a) of the Act.<sup>5</sup>

Moreover, we decline to reach two issues that AT&T raised for the first time in its briefs, because the tardy raising of these issues renders the record insufficient to permit a reasoned decision. Specifically, in its briefs, AT&T maintains for the first time that the revenue-sharing arrangement between Beehive and Joy also violated section 201(b) by "evading the requirements" of TDDRA.<sup>6</sup>

Similarly, the FCC's *Frontier* decision is unavailing. In that three paragraph order the FCC referring to its decision *Jefferson* found that AT&T failed to meet its burden of demonstrating the practice at issue was unlawful under Sections 201(b) and 202(a) of the Act. The FCC simply did not find that the access pumping and access revenue-sharing schemes at issue in the Iowa proceeding were lawful under the Act.

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<sup>5</sup> *Beehive*, 17 FCC Rcd at 11655 ¶ 29 (footnotes omitted).

<sup>6</sup> *Beehive*, 17 FCC Rcd at 11655 fn. 99 (citations omitted).

The final case relied upon by Petitioners as justification for declaring invalid an IUB decision finding that the traffic pumping schemes of the Petitioners and other LECs violated Iowa law is the FCC's *Farmers* decision. It is passing strange that Petitioners would claim this decision is "dispositive in favor of Petitioners"<sup>7</sup> and thus any decision by a State concluding that traffic pumping schemes are unlawful under State law and the tariffs on file with the State must be declared null and void even before it has been issued. *Farmers* did not find that the traffic pumping schemes that enable the LECs to earn extraordinary rates of return – and the FCC found that Farmers did earn excessive returns in violation of Section 201(b) of the Act, 22 FCC Rcd at 17980-83 – were lawful under the Communications Act.<sup>8</sup> The FCC simply found that based on the record then before it, Qwest had "failed to prove that Farmers' imposition of terminating access charges is inconsistent with its tariff."<sup>9</sup> The FCC is now reconsidering this finding in light of the fact that Farmers withheld critical information relevant to the issue as to whether the traffic in question was subject to the Farmers access tariffs. *Order on Reconsideration*, 22 FCC Rcd 1615, 1620 ¶ 11 (2008) ("[W]e find that Qwest has identified documents that are potentially relevant to this case, and that Farmers ought to have produced.").

Moreover, the Commission admonished Farmers, explaining that Farmers' failure to produce relevant documents raised questions "about the integrity of [the FCC's] process and about the reliability of Farmers' representations." *Id.* The Petitioners here also demonstrate a

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<sup>7</sup> Petition at 13.

<sup>8</sup> At the same time the Commission issued its decision in *Farmers*, it issued a *Notice of Proposed Rulemaking* in WC Docket No. 07-135 (*Establishing Just and Reasonable Rates for Local Exchange Carriers*), 22 FCC Rcd 17989 (2007) (*Traffic Pumping NPRM*) looking toward modifying its rules to ensure that LECs like Farmers and the Petitioners could no longer "manipulate[] the rules to achieve a result unintended by the rules." *Farmers*, 22 FCC Rcd at 17984. Such rulemaking and its purpose belies Petitioners' allegation that the Commission found that the traffic pumping schemes at issue in *Farmers* passed muster under the Communications Act.

<sup>9</sup> *Farmers*, 22 FCC Rcd at 17988 ¶ 39.

total lack of respect for the integrity of the FCC's processes. They have filed what can only be characterized as a frivolous petition asking the FCC to take an unprecedented action of voiding a state decision before it has been issued.<sup>10</sup> At the same time, Petitioners are using the fact that their meritless Petition is before the FCC as a way to prevent the IUB from concluding the *Qwest v. Superior* proceeding. Thus it has asked the IUB not to issue its decision in that proceeding because the FCC is now considering their request to declare the yet-to-be issued decision null and void.<sup>11</sup> Of course, if the FCC were to issue the requested declaratory ruling, there would no need for the IUB to release its decision and the merits of the case would never be reached by either regulatory body.

In short, Petitioners "strategy" here, like the strategy employed by Farmers in the complaint proceeding, is to prevent the disclosure of facts that would clearly demonstrate that they have been and are currently engaged in unlawful and fraudulent activities. That Petitioners believe it necessary to prevent the FCC from ever seeing evidence highly relevant to the FCC's review of the traffic pumping activities of Petitioners and other of their ilk in the *Traffic Pumping NPRM* exposes Petitioners' contempt for the integrity of FCC's decision making process. For this reason alone, the Petition should be summarily rejected.

The FCC should also summarily reject Petitioners' request that the FCC declare "any action by the IUB impinging on the rates, terms or revenue derived from interstate or intrastate is preempted." Petition at 17. Indeed, without a decision to review there is no way for the FCC to determine if the preemption is even warranted. In any event, there is absolutely no authority

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<sup>10</sup> Sprint believes that such action could not – and would not – withstand review by a court of appeals.

<sup>11</sup> See Motion of Great Lakes filed August 17, 2009 in *Qwest v. Superior Telephone Cooperative, et al.* Docket NO. FCU-07-2. Sprint has vigorously opposed this unprecedented and unfounded motion. Taken together, the Petition at issue here and the Motion before the IUB demonstrates a total lack of respect for both regulatory bodies.

enabling the FCC to preempt state regulation of intrastate telecommunications services that may implicate interstate services.

Petitioners appear to rely upon the Supreme Court’s opinion in *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890 (1986). Such reliance is unfounded. Petitioners argue that the IUB decision “merits preemption under all of the provisions of the *Louisiana PSC* test.”<sup>12</sup> That the Supreme Court found that the FCC’s preemption decision being examined in that case, *i.e.*, state depreciation regulations used in setting intrastate rates that were inconsistent with the depreciation regulations prescribed by the FCC, could not meet the so-called “*Louisiana PSC* test” is ignored by Petitioners. Petitioners also ignore the fact that, as the Supreme Court explained, the Communications Act “establishes, among other things, a system of dual state and federal regulation over telephone service”;<sup>13</sup> and, that the provision preserving the right of the States to regulate intrastate matters – Section 152(b) – “fences off from FCC reach or regulation intrastate matters ... including matters ‘in connection with’ intrastate service” using language “as sweeping as the wording of the provision declaring the purpose of the Act and the role of the FCC.”<sup>14</sup> Plainly *Louisiana PSC* is of no help to Petitioners.

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<sup>12</sup> Petition at 18.

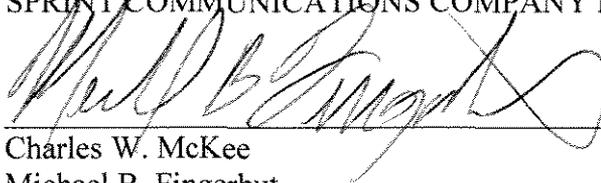
<sup>13</sup> *Louisiana PSC* at 1894 citing 47 U.S.C. §§ 151 & 152(b). The FCC has recognized that given the dual jurisdictional system, state action that may have an ancillary impact on regulation in the federal sphere does not justify preemption. See *Diamond International v. AT&T*, 70 FCC 2d 656 (1979), *affirmed sub nom. Diamond International v. FCC*, 627 F.2d 489 (D.C. Cir 1980); *Thrifty Call* 19 FCC Rcd 22240 (2004).

<sup>14</sup> *Louisiana PSC* at 1899.

For the reasons set forth above, the FCC should summarily reject the instant Petition.

Respectfully submitted,

SPRINT COMMUNICATIONS COMPANY L.P.

A handwritten signature in black ink, appearing to read "Michael B. Fingerhut", is written over a horizontal line.

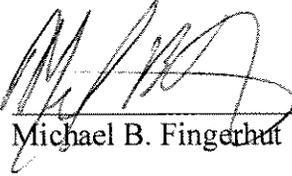
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September 21, 2009

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments of Sprint Communications Company L.P. was filed electronically or by First Class US Mail on this 21<sup>st</sup> day of September, 2009 to the parties listed below.



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