

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

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<b>In the Matter of</b>	)	
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<b>Great Lakes Communications Corp. and Superior Telephone Cooperative Petition for Declaratory Ruling</b>	)	<b>WC Docket No. 09-152</b>
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<b>In the Matter of</b>	)	
	)	
<b>Establishing Just and Reasonable Rates for Local Exchange Carriers</b>	)	<b>WC Docket No. 07-135</b>
	)	
_____	)	

**AT&T's OPPOSITION TO PETITION FOR DECLARATORY RULING**

AT&T Inc. ("AT&T") hereby opposes the Petition for Declaratory Ruling to the Iowa Utilities Board ("IUB") and Contingent Petition for Preemption ("Petition") filed by Great Lakes Communications Corp. and Superior Telephone Cooperative (collectively, "Petitioners").

The Petition is another in a long series of misguided filings and presentations by traffic-pumping local exchange carriers ("LECs"). These LECs ask yet again that the Commission intervene in fact-based adjudications and simply declare that, whatever the facts, their traffic stimulation schemes are *per se* reasonable as a matter of federal law.<sup>1</sup>

Like the prior filings, this Petition is frivolous on its face. Based upon an exhaustive record, the IUB has determined that certain Iowa-certificated LECs' traffic pumping schemes

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<sup>1</sup> See, e.g., Petition for Declaratory Ruling That LEC Agreements Do Not Violate The Communications Act, WC Docket No. 07-135 (filed May 20, 2009); *Ex Parte* Letter from R. Buntrock, Counsel to Sancom and NVC, to Marlene Dortch, FCC, WC Docket No. 07-135 (filed July 17, 2009).

violated Iowa tariffs, Iowa law and Iowa public policy. The Petition sought to have the Commission issue a declaratory ruling and also to preempt the IUB from issuing a final order. *See* Pet. at 1. On September 21, 2009, the IUB issued its final order,<sup>2</sup> and consequently, the Petitioners' request that the Commission stop the IUB from issuing a final order – which was absurd on its face – is now moot.<sup>3</sup>

Because the IUB's Final Order was released on the day that these comments are due, it is not possible to evaluate fully the IUB's written findings and legal conclusions against the arguments made in the Petition. Nevertheless, even a cursory review of the IUB's written order indicates that the Petition's predictions that the IUB's written order would be "extraordinarily expansive" and "flatly inconsistent with the rulings and policies of this Commission" (Pet. at 3) were wrong. In its Final Order, the IUB addressed its jurisdiction, and reiterated that it "is aware of its jurisdictional limitations with respect to interstate and international traffic and as such has limited its findings in this final order to the intrastate issues" in the case. IUB Final Order at 77; *see also id.* at 77-78 (making findings of fact, based on extensive record evidence, regarding the LECs' noncompliance with their "*intrastate* switched access or local exchange tariffs"); *id.* at 79 (ordering refunds of charges associated with "the delivery of *intrastate* interexchange calls" at issue); *id.* at 64, 68-69 (making certain factual findings on issues of universal service and use of

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<sup>2</sup> *See* Final Order, *In Re Qwest Commc'ns Corp. v. Superior Tel. Coop. et al.*, Docket No. FCU-07-2 (issued Sept. 21, 2009) ("IUB Final Order").

<sup>3</sup> Further, the request for preemption was inconsistent with the "respect for the separate spheres of governmental authority preserved in our federalist system. . . . [T]he exercise of federal supremacy is not lightly to be presumed," and "[p]re-emption of state law by federal statute or regulation is not favored in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) (internal quotations omitted).

the Commission’s rural exemption under 47 C.F.R. § 61.26, but deciding to “report this information to the FCC for further action as the FCC deems appropriate”).

On the other hand, it is not necessary to evaluate fully the IUB’s written decision in order to reject Petitioners’ primary substantive argument (Pet. at 6-10) that *any* IUB finding that Petitioners acted unlawfully must conflict with federal law because the Commission has “already resolved” claims “identical” to the ones decided by the IUB (and pending in other traffic pumping cases in courts across the country). Indeed, the Commission has *already* repeatedly rejected the argument that its *Jefferson Telephone et al.* and *Farmers I* decisions foreclose the many pending legal challenges to traffic stimulation schemes.<sup>4</sup> Further, although the Petitioners and other traffic pumping LECs have trotted out these same *Jefferson Telephone* and *Farmers I* arguments in each of the numerous pending traffic-pumping cases, not a single court has accepted these arguments, and the courts have instead found that a factual inquiry – like the one conducted by the IUB – is required to resolve such disputes.<sup>5</sup>

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<sup>4</sup> See Mem. Op. & Order, *Qwest Commc’ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, 22 FCC Rcd. 17973, ¶ 34 n.115 (2007) (“*Farmers I*”) (finding that *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130 (2001) (“*Jefferson*”) and related cases do not hold that “the Commission has already found that it is lawful to impose access charges” in traffic-stimulation arrangements), *recon. granted in part*, Order on Recon., 23 FCC Rcd. 1615, ¶ 7 (2008) (“*Farmers II*”), *recon pending* (filed May 18, 2008); *Request for Review by Intercall, Inc.*, 23 FCC Rcd. 10731, ¶ 21 (2008) (“*Intercall*”) (it is “misplaced” to attempt to “cast the decision in [*Farmers I*] as evidence that the Commission has determined that conference calling companies are end users”).

<sup>5</sup> See, e.g., *Northern Valley Commc’ns, LLC v. MCI Commc’ns Servs., Inc.*, 2008 WL 2627519, \*5 (D.S.D. June 26, 2008) (finding that *Farmers I* was “distinguishable” and not “dispositive” on claims that access charges were owed in connection with traffic pumping schemes, and more discovery was needed); *Sancom, Inc. v. Qwest Commc’ns Corp.*, 2008 WL 2627465, \*3 (D.S.D. Jun 26, 2008) (same); *Sancom, Inc. v. Sprint Commc’ns Co. L.P.*, 618 F. Supp. 2d 1086, 1091 (D.S.D. 2009) (because of the “uncertain status” of the *Farmers I* case, courts have “stressed the importance of developing the factual background in resolving the issues presented in these tariff disputes”); *All American Tel. Co. v. AT&T Corp.*, 2009 WL 691325 (S.D.N.Y. March 16, 2009) (reconsidering and vacating prior order that had relied on *Farmers I* and instead holding that tariff issues “require a more developed record” to be developed in discovery).

Although they have done so with regularity, it is nonetheless still shocking to see the LECs rely on *Farmers I* as a precedent for the claim that all conference calling companies are necessarily “end users” under all LEC access tariffs. *See* Pet. at 8. The Commission is reconsidering its determination in *Farmers I* even as to Farmers itself because Farmers procured it through fraud by withholding evidence that contradicts the Farmers’ representations relied on by the Commission in its initial order. *See Farmers II* ¶¶ 7-8. The Commission has also since made clear that it is “misplaced” to attempt to “cast the decision in [*Farmers I*] as evidence that the Commission has determined that conference calling companies are end users.”<sup>6</sup> In any event, contrary to the Petitioners’ claim that this is a legal issue, the Commission also has stated that “whether the conference calling companies were end users under Farmer’s tariffs” was a “factual issue,” *Intercall* ¶ 21, and thus the holding relied on by the LECs would not validate all other traffic pumping schemes even if it were not being reconsidered. Consequently, the fact that the IUB’s final written order in its proceeding relies on the robust factual record developed in that proceeding – and not on statements in *Farmers I* that reflected what the IUB termed “manufacture[d] evidence” (IUB Final Order at 29) – does not conflict with the decisions of the Commission and federal courts, but rather is entirely consistent with them.

Similarly, the fact that the IUB’s written order emphasized the “narrowness of [the] holding” in the *Jefferson* case and refused to apply it to the specific Iowa-based allegations at issue in the complaint proceeding (IUB Final Order at 32-33) means that the IUB agrees with the Commission’s own treatment of that case. *Cf.* Pet. at 6-7. In a portion of the *Farmers I* decision that is not subject to reconsideration, the Commission squarely held that *Jefferson* and its

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<sup>6</sup> *Intercall* ¶ 21. As explained in that order, the Commission’s initial decision in *Farmers I*, merely “assum[ed] certain facts as the parties presented them. Specifically, the Commission’s statement that conference calling companies are end users was premised on Farmer’s assertion that this was how they were defined in Farmer’s tariff.” *Id.*

progeny do *not* “suggest that the Commission has already found that it is lawful to impose access charges for the type of services at issue” in traffic-pumping cases where the dispute is whether the LECs have provided access services pursuant to the terms of their tariffs. *Farmers I*, n.115. Rather, those cases are “inapposite” because “the issue of whether access charges were appropriate was never addressed.” *Id.*

As to the remainder of the Petition, because the IUB has just issued its Final Order, it is simply premature and unnecessary to respond in detail to the Petitioners’ claims that the IUB’s actions exceed its authority. However, it must be noted that the same LEC lawyers now demanding that the Commission preempt the IUB’s decision were, only a few weeks ago, trumpeting the unofficial remarks of a state public utility Chairman as “set[ting] the record straight” on traffic pumping issues – or, rather, they were doing so until that Chairman took the unusual step of making an *ex parte* filing to the Commission explaining that these lawyers’ filings “result[ed] in a mischaracterization of what I said.”<sup>7</sup> Apparently, these LECs believe that the Commission should respect state regulators’ traffic-pumping determinations – until the regulators disagree with the substance of the LECs’ positions.

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<sup>7</sup> *Ex Parte* Letter from Ross Buntrock, Counsel to Sancom & NVC, to Marlene Dortch, FCC, WC Docket No. 07-135, at 1-2 (filed July 17, 2009); *Ex Parte* Letter from Rolayne Ailts Wiest, Counsel for S.D. Pub. Utils. Comm’n, to Marlene Dortch, FCC, WC Docket No. 07-135, (filed Aug. 4, 2009) (attaching letter from Dustin Johnson, Chairman of the South Dakota Public Utilities Commission, stating that “I believe the presentation [by Sancom and NVC] fails to accurately represent my statements in their entirety which may lead to my statements being misunderstood by anyone who did not read the newspaper article NVC and Sancom cited. . . . In their *ex parte* presentation, . . . NVC and Sancom cite a quotation from me, but fail to state the entire quotation, which, in my opinion, results in a mischaracterization of what I said in that article. . . . As the entire quotation makes clear, I was not, as alleged by NVC and Sancom, setting ‘the record straight’ regarding these lawsuits. Nor was I, as further alleged, refuting ‘the IXCs’ claims in this proceeding, and in civil actions across the country . . .’ To the contrary, I clearly stated that these types of cases would be governed by the specific facts. Obviously, I was not passing judgment on the validity of these or any other lawsuits regarding access stimulation.”).

The Petition is just the latest of many incarnations of the LECs' consistent strategy, in traffic pumping disputes across the country, to attempt to hide the facts of their unlawful schemes from scrutiny. The IUB, however, commendably compiled a thorough factual record of the Iowa LECs' traffic pumping practices, and reached the only possible conclusion based on these facts. Having lost before the IUB, the Petitioners view the IUB's decision as "sour grapes," and they improperly sought to have the Commission muzzle the IUB from publicly releasing its factual findings and legal conclusions.

Although there never was any possible basis for the Commission to take the unprecedented action the Petitioners sought, the Commission should take immediate action in its traffic-stimulation rulemaking proceeding (WC Docket No. 07-135), in which the record clearly demonstrates the numerous public interest harms arising from these schemes.<sup>8</sup> Short of complete intercarrier compensation reform, the best way to put an end to such schemes would be to issue clear rules that deter and prohibit the types of revenue-sharing agreements that promote traffic

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<sup>8</sup> See, e.g., *Ex Parte* Letter from Robert Quinn, AT&T, to Marlene Dortch, FCC, at 1, WC Docket No. 07-135 (filed Aug. 11, 2009) (traffic pumping CLECs have both "high rates and high volumes making a mockery" of the Commission's rules allowing rural CLECs to mirror the rates of rural ILECs); *Ex Parte* Letter of David Frankel, ZipDX, to Marlene Dortch, FCC, at 4, WC Docket No. 07-135 (May 4, 2009) ("Legitimate providers [of conferencing] . . . are being harmed" by traffic pumping schemes because, *inter alia*, the "presence of these 'free' services distorts the market," and "[e]nd-users are being 'taught' that these services can be 'free.' But in fact they are not free, and this model is not sustainable"); *Ex Parte* Letter from Michael Fingerhut, Sprint, to Marlene Dortch, FCC, at 1, WC Docket No. 07-135 (Apr. 29, 2009) (LECs engaging in traffic pumping schemes have been able "fraudulently [to] obtain universal service fund support" and also have permitted "minors to easily access explicit pornographic chat, conference and information lines without the protections afforded parents" in the Communications Act).

stimulation schemes and that otherwise prevent unscrupulous LECs from gaming the Commission's access charge rules.<sup>9</sup>

Further, the release of the IUB's Final Order, with its detailed review of the comprehensive factual record, also means that the Commission should immediately conclude its *Farmers* proceeding. As indicated above, traffic pumping LECs have consistently attempted to rely on the Commission's resolution of the tariff-based claims in *Farmers I* (¶¶ 35-39) to justify their traffic-pumping schemes, despite the Commission's holding that it was reconsidering that aspect of the decision (*Farmers II* ¶¶ 6-11). The evidence now before the Commission undoubtedly demonstrates that the Commission's conclusions on this issue in *Farmers I* were based on "an attempt . . . to manufacture evidence" by Farmers, an effort that the IUB found in its proceeding to be "unpersuasive," "disturbing," and "particularly troubling." IUB Final Order at 27, 29-30; *id.* at 30 (the attempt to backdate bills for services "reflects badly" on Farmers and the other Iowa LECs engaged in such practices). In short, it has been nearly two years since the Commission issued its decision in *Farmers I*, and it is now indisputable that the decision is based on documents that were fabricated "to make the transaction look like something that was not contemplated." IUB Final Order at 30. Accordingly, the Commission should act immediately to ensure that the integrity of its complaint proceedings is not further damaged by this misconduct.

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<sup>9</sup> See, e.g., *Ex Parte* Joint Letter from Brian Benison, AT&T, and Steve Kraskin, Counsel to Rural Independent Competitive Alliance, WC Docket No. 07-135 (Nov. 25, 2008) (joint proposal from AT&T and RICA to revise the Commission's CLEC access charge rules so that CLECs may charge the rates of a rural ILEC only if "the CLEC terminates 1500 or fewer minutes of use of interstate switched exchange access traffic per working loop per month" and provides specified certifications; also proposing declaration that certain revenue sharing arrangements in connection with traffic pumping activities are an unreasonable practice); AT&T Comments, WC Docket No. 07-135 (filed Dec. 17, 2007) (making various proposals for modest rule changes that would deter and prohibit traffic pumping).

Respectfully submitted,

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