Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption	WC Docket No. 09-152

GREAT LAKES COMMUNICATION CORP. AND SUPERIOR TELEPHONE COOPERATIVE REPLY IN SUPPORT OF EMERGENCY MOTION FOR STAY OF IOWA UTILITIES BOARD FINAL ORDER PENDING REVIEW

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Great Lakes Communication Corp. ("Great Lakes"), and Superior Telephone Cooperative ("Superior"), (collectively the "Movants"), by their undersigned counsel and pursuant to 47 U.S.C. §§ 154(i), 154(j) and 47 C.F.R. § 1.45(c), file this reply in support of their Emergency Motion to the Federal Communications Commission ("Commission")[1] to stay the effectiveness of the Final Order issued by the Iowa Utilities Board (the "IUB" or "Board") on September 21, 2009,[2] pending the Commission's review of the Petition for Declaratory Ruling in this docket.[3] In addition, Movant Great Lakes has asked the Commission to order the North American Numbering Plan Administrator ("NANPA") and Pooling Administrator to refrain from executing the purported directive in the Final Order to commence reclamation of Great Lakes's numbering resources. Movants respectfully request expedited treatment of this Motion under 47 C.F.R. § 1.298 due the grave injury that the Final Order will inflict on them, particularly Great Lakes.

SUMMARY

Movants have satisfied the test for obtaining a stay from the Commission, and no opposing party credibly argues otherwise. Opponents of the Motion largely fail to address the substance of the Motion, and instead resort to nonsensical procedural arguments that the Motion, which was filed eleven calendar days after release of the Final Order, is either premature or too late. They have provided the Commission no reasonable basis to deny the Motion.

The Final Order contains several findings, conclusions, and particularly Ordering Clauses that on their face purport to regulate interstate communications, or at the least impede the Iowa

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[1] WC Docket No. 09-152, Great Lakes Communication Corp. and Superior Telephone Cooperative Emergency Motion for Stay of Iowa Utilities Board Final Order Pending Review (Oct. 1, 2009) ("Motion").

[2] *Qwest Communications Corp. v. Superior Telephone Cooperative, et al.*, Docket FCU 07-2, Final Order (Iowa Utils. Bd. Sep. 21, 2009) ("Final Order"). The Board appended the Final Order to its comments filed September 21, 2009.

[3] *Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption*, WCB Dkt. No. 09-152 (Aug. 14, 2009) (the "Petition" or "Petition for Declaratory Ruling").

LECs[4] from providing interstate communications. The Commission can preempt the Final Order on this ground alone, in accordance with its decision in *Blocking Interstate Traffic in Iowa*, Memorandum Opinion and Order, 2 F.C.C.R. 2692 (1987) (**Attachment A** hereto).[5] There, the Commission affirmed a Common Carrier Bureau order holding that the Commission has authority to direct a LEC to interconnect with an IXC in order to facilitate interstate communications. There, as here, a purportedly intrastate Iowa matter significantly impacted interstate communications. Thus, just as that issue fell within the Commission's federal interstate jurisdiction, so do many of the findings and orders in the Final Order.

Other portions of the Final Order render it impossible for Movants to comply with both federal law and the Final Order, and still others irrefutably thwart longstanding, plainly articulated policy goals of both Congress and the Commission. In addition, the Final Order regards several matters on which the Commission expressly sought comment in 2007, and is expected even by the IXCs to rule on in WC Docket No. 07-135. Finally, the Final Order directly contravenes several Commission decisions, including not only the *Farmers and Merchants Order*[6] but also several previous access charge decisions as well as its statements decrying the practice of self-help in the form of refusal to pay tariffed charges. For all these reasons, Movants have demonstrated a likelihood of success on their Petition, thus satisfying the first criterion for considering injunctive relief.

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[4] The "Iowa LECs," who were the Respondents before the Board, are Movants, Farmers Tel. Co. of Riceville, Iowa, Farmers & Merchants Mut. Tel. Co. of Wayland, Iowa, Interstate 35 Tel. Co., Dixon Tel. Co., Reasnor Tel. Co., LLC, and Aventure Communication Technology, LLC.

[5] This decision was cited as authority for the Wireline Competition Bureau's decision in *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd. 11629 (2007).

[6] *Qwest Communs. Corp. v. Farmers and Merchants Mut. Tel. Co.*, File No. EB-07-MD-001, Memorandum Opinion and Order, 22 FCC Rcd. 17973 (2007). The Commission granted Qwest's request, styled as a "Petition for Reconsideration," to obtain and submit additional post-decision discovery regarding Farmers' retail invoices. 23 FCC Rcd. 1615 (2009).

Movants have demonstrated that grievous and irreparable harm will result from the Motion. The Board's purported "directive" to NANPA will drive Great Lakes out of business, and no opponent even attempts to dispute that the loss of an ongoing business constitutes irreparable harm. By federal rule, NANPA has 60 days from issuance of the Final Order to implement this plainly unlawful order. The other Iowa LECs face similar results, because the Final Order included a requirement to file reports on October 1, 2009, identifying the numbers by which the LECs serve conference call, chat line, and Voice-over-Internet-Protocol ("VoIP") international calling services. The Board plainly intends to issue similar "directives" to NANPA to reclaim those numbers as well. Movants thus have satisfied the second prong of the settled test for entering a stay.

Movants also have demonstrated that no interested third party would be harmed by entry of a stay. The Board as a matter of law cannot incur cognizable harm. The interexchange carriers ("IXCs") have not paid terminating access to the Iowa LECs in years, and owe far more than they ever paid, and thus cannot (and do not) argue credibly that they will be harmed if the Final Order is stayed. The IXCs' other protests that stay of the Final Order somehow will encourage high volumes of terminating access in other areas of the country are not only purely speculative, but also reveal the IXCs' intent to attempt to enforce the Final Order on an extraterritorial basis. This purported showing of harm thus depicts in sharp relief the reason that Movants were correct in requesting preemption of the Final Order.

Finally, the public interest demonstrably will be served by a stay. If the Final Order remains effective, several numbers presently used by the public — more specifically, used by the IXCs' retail long-distance customers — to access conference call and chat-line services will be gone. These low-cost conference call services are used by businesses, agencies, and non-profit

organizations throughout the country. In fact, as demonstrated in the Declaration of Stephanie A. Joyce, **Attachment B** hereto, the New Mexico Public Regulation Commission uses one of these services for its official business. Cutting off these services will injure the public. In addition, as the Motion demonstrates, Commission precedent instructs that it is contrary to the public interest to permit an *ultra vires* state agency order to become effective when its legality is so seriously called into question. Opponents of the Motion offer, by contrast, no credible showing that a stay would injure the public interest. Simply repeating pejorative labels, as Verizon does throughout its opposition, does not constitute a showing that the public interest will be compromised.

The record thus strongly supports grant of the Motion and entry of a stay of the Final Order pending resolution of the Petition for Declaratory Ruling.

I. THE MOTION IS NEITHER PREMATURE NOR LATE

Qwest persists in arguing that Movants were somehow premature in seeking a stay of the Final Order.[7] Yet Sprint argues that Movants were late in filing the Motion, because they waited ten calendar days to file it.[8] Other commenters resort to the refrain that the Petition itself was "premature."[9] These arguments are simply odd.

The Final Order was issued September 21, 2009. It stated in writing exactly what the Board announced orally in the "Decision Meeting" held August 14, 2009, as its findings, conclusions, and substantive order.[10] The Motion was filed October 1, 2009. The fact that some

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[7] WC Docket No. 09-152, Opposition of Qwest Communications Corporation LLC to Emergency Motion for Stay at ii (Oct. 8, 2009).

[8] WC Docket No. 09-152, Opposition of Sprint Communications Company LP at 1 n.1 (Oct. 8, 2009).

[9] WC Docket No. 09-152, Opposition of Verizon and Verizon Wireless at 2 (Oct. 8, 2009).

[10] The Board did not memorialize in the Final Order its public announcement on August 14, 2009, that Great Lakes does not qualify for the Commission's rural exemption under the access rules. WC Docket No. 09-152, Petitioners' Opposition to Motion of Qwest Communications Company, LLC to Suspend Comment Schedule at 3 (Sept. 16, 2009) (quoting August 14 Tr. at 6). The Final Order did, however, "refer the issue to the FCC" as it had promised to do on August 14. Final Order at 69.

parties are still arguing in October that the Motion and Petition lack ripeness or is otherwise non-justiciable is truly strange.

Nor is the Motion late. Movants, in keeping with the common and preferred practice, sought relief from the Board first. They filed a Motion for Stay of Effectiveness of Final Order with the Board on September 22, 2009. When after ten calendar days the Board had not resolved that motion, and because October 1 marked the first purported compliance deadline under the Final Order, Movants came to the Commission for relief. Styling the request as an Emergency Motion was therefore appropriate and necessary.

II. THERE IS NO REASONABLE DISPUTE THAT THE COMMISSION HAS AUTHORITY TO ENTER INJUNCTIVE RELIEF AS TO THE FINAL ORDER

As Movants demonstrated, the Commission has the authority to stay the Final Order. Motion at 4-5. Section 4(j) of the Communications Act of 1934, 47 U.S.C. § 154(j), gives the Commission plenary jurisdiction to protect interstate communications from state regulation, *id.*,[11] and indeed the Supreme Court has supported the Commission's use of preemptive authority against state agency action.[12] The *Vonage* case,[13] on which the Motion also relies, is a very recent and powerful example of the strength of the Commission's authority to preempt state encroachment on interstate services.

No opponent credibly argues that the Commission lacks authority to preempt state agency action. In fact, only Qwest even makes the attempt;[14] AT&T and Sprint do not address the

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[11] "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(j).

[12] Motion at 5 (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989)); *see also City of New York v. FCC*, 486 U.S. 57 (1988) (affirming Commission order preempting state cable regulation).

[13] *Vonage Holdings Corp. v. Minn. Pub. Util. Comm'n*, 394 F.3d 568 (8th Cir. 2004) (affirming *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404 (2004)).

[14] Qwest Opposition at 2-3.

question at all.[15] Qwest argues that Movants are incorrect in arguing that the Commission has "general jurisdiction to issue injunctive orders."[16] Qwest also argues that "any preemption order that [the Commission] issued would need to be enforced by court order."[17]

Movants have not made any statement that the Commission has *carte blanche* ability to enjoin state agencies, but rather are relying on existing precedent which shows that the Commission can assert preemptive authority over state commissions where its statutory jurisdiction — be it over cable rates,[18] inside wiring,[19] or interstate communications[20] — is imperiled. That action is needed now with regard to the Final Order which, as Movants have demonstrated, encroaches on the Commission's jurisdiction and flouts the Commission's authority in several ways. If, as Qwest hints, the IXCs will force Movants to take the Commission's preemption order to federal court in an enforcement action, that contingency in no way negates the fact that the Commission has the authority to enter such an order in the first instance.

III. OPPOSING PARTIES ARE UNABLE TO REFUTE THAT MOVANTS SATISFY THE STANDARD FOR INJUNCTIVE RELIEF

It appears that all parties agree that Movants were correct in employing the Commission's four-prong test for enjoining state agency action. Motion at 5-7.[21] That four-prong test is: (1) likelihood of prevailing on the merits; (2) irreparable harm absent a stay; (3) no

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15 *See* AT&T Opposition at 4 (federal preemption is 'not lightly to be presumed'") (no citation provided); Sprint at 1-3 (focusing directly on the four-prong test for injunctive relief).

16 Qwest Opposition at 3.

17 *Id.* at 3.

18 *Charter Commc'ns Entertainment I, LLC Petition for Determination of Effective Competition in St. Louis, Missouri*, Memorandum Opinion and Order, 22 FCC Rcd 13890 (2007) ("*Charter Order*").

19 *NARUC*, 880 F.2d at 429.

20 *Minnesota PUC*, 483 F.3d at 581.

21 WC Docket No. 09-152, Iowa Utilities Board Response to Motion and Petition for Stay at 1 (Oct. 12, 2009); AT&T Opposition at 4 n.6; Sprint Opposition at 3; *but see* Qwest Opposition at 2-3 (noting that the Commission in *Charter* "did involve federal preemption of state regulatory authority over intrastate telecommunication" but refuting that the Commission has "general jurisdiction to issue injunctive relief"); Verizon at 4 (employing same test but citing to different Commission orders).

harm to other interested parties; and (4) the public interest favors granting a stay.[22] As Movants also showed, a strong likelihood of success on the merits requires a lesser showing of irreparable harm.[23] Conversely, and what no opponent attempts to refute, a strong showing of irreparable harm — such as the imminent loss of a business — will support injunctive relief nearly by itself.[24] In fact, according to *Holiday Tours*, a case that is irrefutably a leading precedent for evaluating injunctive relief but which the opponents assiduously avoid addressing, when irreparable harm is shown"[t]here is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success."[25]

The Motion presents a compelling showing as to each prong of the *Charter* test, a fact particularly true of the irreparable harm facing Great Lakes pursuant to the Board's attempt to "direct" NANPA to reclaim its numbers.[26] No opponent has undercut any of these showings, and thus the Commission should grant the Motion.

A. Movants Have Demonstrated a Likelihood of Prevailing on the Merits of the Petition

Movants have shown three times — in the Motion, the Petition, and their Reply Comments in support of the Petition[27] — that the Final Order should be preempted under the

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22 *Charter Communs. Entertainment I, LLC Petition for Determination of Effective Competition in St. Louis, Missouri*, Memorandum Opinion and Order, 22 FCC Rcd 13890, 13892 (2007) (citing *Virginia Petroleum Jobbers Ass'n v FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958)) ("*Charter Order*").

23 Motion at 5 (citing *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*.")).

24 *Washington Metro. Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977) (refusing to vacate entry of permanent injunction against WMATC order).

25 559 F.2d at 844.

26 "The [NANPA] Administrator and the Pooling Administrator are directed to commence reclamation proceedings of all blocks of telephone numbers assigned to Great Lakes Communications [*sic*] Corp." Final Order at 81 (Ordering Clause 7).

27 WC Docket No. 09-152, Great Lakes Communication Corp. and Superior Telephone Cooperative Reply Comments in Support of Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption (Oct. 6, 2009).

Supreme Court's criteria in *Louisiana PSC*.[28] In several places, the Final Order baldly attempts to regulate interstate communications. In other places, the Final Order attempts to regulate matters that are inseparably both interstate and intrastate. In still other places, the Final Order directly contravenes prevailing federal law governing access charges. As a result of those conflicts, the Final Order creates an impossibility problem for the Iowa LECs. In addition, the Final Order thwarts significant policy goals of both Congress and the Commission — the fostering of competition and the deployment of broadband facilities — and attempts to regulate a field which the Commission has long occupied, including by releasing the 2007 Notice of Proposed Rulemaking in Docket No. WC 07-135. All of these errors constitute grounds for which the Commission is authorized, and indeed compelled, to preempt the Final Order.[29]

The *Blocking Interstate Traffic* decision (Attachment A) is directly apposite to this matter and demonstrates that the Commission should exercise its interstate jurisdiction to preempt the Final Order. In that case, several Iowa LECs filed an Application for Review to the full Commission seeking reversal of a Common Carrier Bureau decision. The Bureau had ordered the LECs to interconnect with IXCs in order to "permit the completion of interstate calls over extended area service (EAS) facilities.[30] Petitioners argued that the Bureau cannot issue such an order to a LEC, because LEC interconnection is an intrastate matter that only the Iowa Board can regulate. The Commission rejected that argument, finding that

> **The provision of telephone service involves the joint use of many facilities**, particularly exchange facilities, for the provision of **interstate**, intrastate toll, and exchange services. When facilities are jointly used in the provision of both interstate and intrastate services, we have the authority under the

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28 *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986).
29 *Louisiana PSC*, 476 U.S. at 368-69.
30 2 F.C.C.R. 2692, ¶ 1.

> Communications Act to regulate the interstate use of the facilities to provide communications.[31]

The Commission further reasoned that

> In adopting the access charge mechanism, we recognized the existence of EAS arrangements and the longstanding use of EAS facilities in part **to provide interstate access**, ... Accordingly, we find that the Bureau properly determined that the traffic in question is subject to our jurisdiction.[32]

In its 2007 Declaratory Ruling and Order, the Bureau relied on this 1987 decision in order to exercise jurisdiction over intrastate transmission facilities.[33] The Final Order presents precisely the same issue of joint use of facilities for intrastate and interstate service, including interstate access, and thus the Commission's jurisdiction to preempt much of the Final Order is settled.

Most opponents do not address with any particularity the findings and conclusions which Movants have challenged. In the main, the oppositions simply attack Movants' character.[34]

Neither Great Lakes nor Superior manufactured evidence or backdated invoices. No IXC ever even alleged that they did. AT&T's mudslinging is thus misdirected and is irrelevant to the Motion. The fact that the Final Order was so unspecific on this point[35] was simply another omission that Movants will address at the appropriate time. Focusing on the merits of the Petition, it is clear that Movants demonstrate a substantial likelihood of success.

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31 2 F.C.C.R. 2692 ¶ 2 (emphasis added).

32 *Id.* (emphasis added).

33 "Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way." *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Declaratory Ruling and Order, FCC 07-135, 22 FCC Rcd. at 11631, ¶ 6.

34 AT&T Opposition at 2.

35 *E.g.*, Final Order at 27 ("The Respondents' offer of amended agreements and backdated bills was unpersuasive and disturbing."). It would have been easy for the Board to state that Great Lakes and Superior are not included in that finding, but it did not, despite the fact that it was essentially a stipulated fact that neither company forged, backdated, or altered *any* evidence.

1. The Board did not limit its Findings or Ordering Clauses to intrastate matters.

Movants must note first that although they challenge several portions of the Final Order on the ground that the Board attempted unlawfully to regulate interstate communications, not every challenge is based on this ground. The Motion as well as the Great Lakes/Superior Reply Comments challenge many portions of the Final Order on wholly different, though equally powerful, grounds such as conflict preemption and field preemption. Some opponents attack the Motion as if it purports that the entire Final Order, all 81 pages of it, seeks to regulate interstate communications directly and thus is simply "overheated rhetoric."[36] The Motion does not, however, employ so blunt a force, but rather applies the appropriate preemptive grounds to the various aspects of the Final Order to which they apply.

Turning to the fact that in many places the Final Order attempts to regulate interstate communications, the plain language of the document itself proves Movants' point.[37] These attempts are not, as many opponents strangely persist in arguing, the result of "specious" or "speculative" extrapolations by the Movants,[38] but rather set forth in black and white several purported findings and orders that are not limited to intrastate communications. The Motion sets these items out clearly,[39] and Movants' Reply Comments meticulously replicated each item *verbatim*.[40] In order once again to make clear which items represent attempts by the Board directly to regulate interstate communications, Movants will replicate them and explain briefly why the opponents fail to refute that these items constitute *ultra vires* state agency action:

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36 AT&T Opposition at 5; *see also* IUB Opposition at 2.

37 Movants do not concede that any part of the Final Order should or can be enforced on an interstate or extraterritorial basis. As Movants have explained several times, however, it appears that the Board and the IXCs intend to enforce it in that manner and thus a preemption order from the Commission is necessary.

38 Qwest Opposition at 19; Sprint Opposition at 3.

39 Motion at 10-11.

40 Great Lakes/Superior Reply Comments at 10-17.

a. Finding of Fact No. 7: The filed tariff doctrine does not apply to the Respondents in this case.

As Movants have shown, this item does not specify which tariffs the Iowa LECs are purportedly barred from enforcing under the filed tariff doctrine.[41] Nor does the supporting text of the Final Order which simply states that "[t]he FCSCs[42] were not end users of the Respondents under the tariffs and therefore the tariffs do not apply to these calls."[43] As such, it is reasonable to conclude that the Board intended to include both intrastate and interstate tariffs in this holding. As such, the Board has directly encroached on the Commission's jurisdiction to review and enforce interstate tariffs. 47 U.S.C. §§ 203, 204.[44]

Congress expressly placed interstate tariffs within the Commission's exclusive jurisdiction, and thus this Finding of Fact should be preempted.[45] As Movants have shown, State Commissions have no jurisdiction to interpret or determine the enforceability of interstate tariffs.[46] "[T]he review and rejection by a state regulatory agency of a federal tariff is in direct conflict with the Communications Act of 1934 and is preempted under the Supremacy Clause of the United States Constitution."[47] In deciding that apparently none of the Iowa LECs' tariffs, including their interstate access tariffs, are enforceable under the filed tariff doctrine, the Board

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41 *Id.* at 10-11.

42 "FCSC" stands for "Free Calling Service Provider." Qwest created this term and the Board has adopted it This term refers to the conference call, chat-line, and VoIP-based international calling service providers to whom the Iowa LECs, including Petitioners, provide local exchange service. The retail customers of the IXCs have used these services, thus generating call traffic to the Iowa LECs for which they have billed tariffed terminating access charges.

43 Final Order at 34.

44 "Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require[.]" *Id.* § 203. "Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof[.]" *Id.* § 204.

45 *Louisiana PSC*, 476 U.S. at 368 ("Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law[.]").

46 Great Lakes/Superior Reply Comments at 9 (quoting *MCI Telecomms. Corp. v. Com. of Virginia State Corp. Comm'n*, 11 F. Supp. 2d 669, 675 (E.D. Va. 1998) (emphasis added), *vacated as moot sub nom. MCI Telecomms. Corp. v. State Corp. Comm'n*, 178 F.3d 1285 (4th Cir. 1999) (Table) ("all parties now agree that MCIV neither imposed nor collected the charges")).

47 11 F. Supp. 2d at 675.

has violated this precept and overstepped its bounds. This Finding of Fact thus stands in violation of the Supremacy Clause and should be preempted as a usurpation of the Commission's jurisdiction.

b. Finding of Fact No. 9: At least one Respondent has improperly assigned all of its telephone numbers to FCSCs, which are not end users.

Movants have explained that the question whether any carrier has "improperly assigned" telephone numbers is far outside the bounds of the Board's limited jurisdiction with regard to numbering resources.[48] Section 252(e) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, gives "'exclusive jurisdiction'" over numbering resources to the Commission.[49] Congress empowered the Commission to delegate its jurisdiction to the states, and in 2001 the Commission did so "in order 'to ensure the return of unused numbers to the NANP inventory for assignment to other carriers.'"[50] This delegation does not mean, as Movants explained, that states are "empowered to make policy decisions regarding to whom numbers may be given."[51]

The Board nonetheless has held that numbers were "improperly assigned," a matter for which not one opponent can provide any statute or rule authorizing such a conclusion. This item therefore fits squarely within the category of "attempting to regulate interstate services"[52] and should be preempted as a direct encroachment on the Commission's jurisdiction.[53]

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48 Motion at 14-17; Great Lakes/Superior Reply Comments at 11-13.

49 Motion at 11 (quoting 47 U.S.C. § 252(e)(1)).

50 Motion at 12 (quoting *In the Matter of Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rule Making, CC Docket 99-200, FCC 00-104, 15 FCC Rcd. 7574, 7579 ¶ 5 (2000)).

51 Motion at 11.

52 *Id.* at 9.

53 *Louisiana PSC*, 476 U.S. at 368.

c. **<u>Ordering Clause No. 1</u>: The Board finds that the Respondents named in this complaint violated the terms of their access tariffs when they charged QCC,[54] Sprint, and AT&T for terminating switched access fees for the traffic at issue in this case.**

In this item, the Board again failed to specify which of "their access tariffs" the Iowa LECs purportedly have violated. As Movants have previously explained, this item is not made any more clear by the phrase "for the traffic at issue in this case," because the Board's insistence on reviewing, analyzing, and relying upon evidence of interstate tariffs and traffic supports the conclusion that the "traffic at issue" includes interstate traffic.[55] As written, and as Movants anticipate the IXCs will argue in the many federal access charge lawsuits presently underway,[56] the Final Order affects interstate access tariffs.[57] As such, it trespasses on the Commission's interstate jurisdiction[58] and should be preempted.[59]

d. **<u>Ordering Clause No. 3</u>: The Board directs QCC, Sprint, and AT&T to file their calculations of the amount of terminating switched access fees for the traffic at issue in this case and eligible for refund or credit within 30 days of the date of this order. QCC, Sprint, and AT&T are authorized to conduct additional discovery to make those calculations if necessary.**

Here again, the Board fails to identify which "switched access fees" are at issue and thus Movants must treat the Final Order as an infringement on interstate communications. As Movants have stated, including the word "intrastate" in an ordering clause is a simple task, and

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[54] "QCC" is Qwest Communications Corporation, the IXC entity of Qwest that brought the complaint.

[55] Great Lakes/Superior Reply Comments at 15; Motion at 12 n.39.

[56] Petition at 4, 9; Aventure Communication Technology, LLC Emergency Petition for Stay at 2 (Oct. 6, 2009); Reply Comments of Aventure Communication Technology, LLC at 3 (Oct. 6, 2009).

[57] Both Qwest and Sprint have filed the Final Order in several federal lawsuits as being authority supporting their claims and defenses. *E.g.*, *Sancom, Inc. v. Qwest Communications Corp.*, Case No. 07-cv-4147-KES, Qwest Notice of Supplemental Authority for Qwest's Oppositions to Sancom's Pending Motions for Summary Judgment (Oct. 1, 2009); *Sancom, Inc. v. Sprint Communications Co.*, LP, Case No. 07-cv-4107-LLP, Sprint Notice of Supplemental Authority (Oct. 6, 2009).

[58] *MCI*, 11 F. Supp. 2d at 675.

[59] *Louisiana PSC*, 476 U.S. at 368.

yet the Board failed to do so.[60] Though the Board in its Opposition assures the Commission that "the Board's decision is addressed only to matters within the jurisdiction of the IUB,"[61] neither the Board nor any other opponent can explain why the Ordering Clauses repeatedly omit the word "intrastate" when referring to tariffs, traffic, and revenues.

As the Motion explains at great length,[62] the Final Order includes pages of discussion and analysis of how the NECA access pool operates, how the rates are set, and what the NECA interstate access tariff says — <u>even when the law is clear that the Iowa LECs' local exchange tariffs govern the issue</u>.[63] The Board's whole motivation for the Final Order lies in its assessment of how the Iowa LECs created a "scheme" of opting out of the NECA *interstate* access rate, then "encourage[d] people from Iowa and throughout the country to call the Iowa numbers," such that "a substantial increase in the long-distance traffic" occurred.[64] This "increase" was supported not by intrastate traffic figures, but by evidence of *interstate* traffic.[65] Based on this lengthy "analysis" in the Final Order, as Movants argued, "the Board is simply not credible when it claims it 'has limited its findings in this final order to the intrastate issues raised in QCC's complaint.'"[66]

The Board's failure to specify that only *intrastate* "switched access fees" are subject to this Ordering Clause thus should not be considered a simple oversight. Rather, it should be treated as an attempt to regulate interstate access revenues, and because the Board refuses to

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60 Great Lakes/Superior Reply Comments at 14.

61 IUB Opposition at 2.

62 Motion at 9-11.

63 *See* Section III.A.2.d (Board relied on NECA tariff for definition of local end user "premises" and eschewed local tariffs).

64 Final Order at 6-7.

65 Petition at 30 (demonstrating that intrastate traffic at issue was *de minimis*); Great Lakes/Superior Reply Comments at 3 (demonstrating same).

66 Motion at 10 (quoting Final Order at 77).

clarify the issue in any meaningful way, the Commission should hold that the Final Order is preempted as to any interstate rate, tariff, call, and access charge revenues.

e. Ordering Clause No. 7: The North American Numbering Plan Administrator and the Pooling Administrator are directed to commence reclamation proceedings of all blocks of telephone numbers assigned to Great Lakes Communications [*sic*] Corp.

Movants have shown that the Board has exceeded its authority in this item, because it has attempted to enforce its flawed decision — that conference call and chat-line providers cannot be "end users" — as a substitute for finding that Great Lakes had never assigned its telephone numbers at all.[67] In addition, neither the Board nor any IXC complainant put Great Lakes on notice that its numbers were in jeopardy, and thus Great Lakes was deprived of its guaranteed due process right to challenge the finding that its numbers were not "assigned."[68] Having failed to comport with the requisite procedure for number reclamation, the Board cannot assume the jurisdiction to "direct" NANPA to reclaim any numbers.

* * *

In attempting to refute Movants' argument on this point, Qwest takes the trouble of listing the pages of the Final Order on which the Board purportedly specified that its decision rests on and affects only intrastate communications.[69] That presentation was ill conceived, for two reasons. First, Qwest is incorrect, because the pages it cites do in fact fail to limit the decision to intrastate matters. For example:

Final Order page 24 — The Board discusses interstate matters such as the "end user common line (EUCL) charge and a federal USF charge."

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[67] Motion at 14-17; Great Lakes/Superior Reply Comments at 16-18.

[68] "State Commissions shall provide service providers an opportunity to explain the circumstances causing the delay in activating and commencing assignment of their numbering resources prior to initiating reclamation." 47 C.F.R. § 52.15 (i)(4).

[69] Qwest Opposition at 5 n.10.

Final Order pages 35-36 — The Board recites the IXCs' argument regarding the definition of "premises" as it appears in the NECA interstate access tariff.

Final Order pages 37-38 — The Board refused to follow the LECs' local exchange tariffs as they define "premises," despite the fact that the question is whether the local customers of the LECs had established a "premises."

Final Order page 61 — The Board discusses 1-900 calls which plainly are interstate calls.

Final Order pages 62-63 — The Board discusses whether Aventure inappropriately obtained federal Universal Service Fund money.

Final Order pages 67-69 — The Board discusses Great Lakes's reliance on the rural exemption which the Commission established within its regime for regulating LEC interstate access charges.[70]

Final Order pages 77-78 —— The Board issues several Findings of Fact and Ordering Clauses that, as shown above, fail to state that "intrastate" services and revenue are the relevant subject matter.

The Final Order simply fails to show the jurisdictional limitations that the Board and the IXCs argue it contains. It is vague, possibly intentionally so, and is already causing a great deal of confusion as to the limits of its reach. Both the final findings and the supporting text of the Final Order are silent in several places as to whether intrastate or interstate communications are at issue. In the few instances in which the text of the Final Order does identify "intrastate" tariffs or calls as the focus, the companion Ordering Clause does not — in the event of such conflicts, an enforcing tribunal must go through the task of "[p]arsing with care the words of the" order in

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[70] *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146, 16 FCC Rcd. 9923, 9968 ¶¶ 65-68 (2001) ("*Access Charge Seventh Report and Order*"), *recon. denied* Eighth Report and Order and Fifth Order on Reconsideration, FCC 04-110, 19 FCC Rcd. 9108 (2004).

question,[71] and of course the litigants must brief their positions extensively. And it bears repeating that it was the Board that chose not to be clear in the Findings and Ordering Clauses, though to have done so would have taken no trouble.[72] As such, the constant refrain from the opponents that "the Iowa Board was acutely conscious of ... the plenary jurisdiction of the [FCC]" ring hollow.[73]

Secondly, the very fact that Qwest combed the Final Order to find any mention of "intrastate" issues proves Movants' point: the Final Order in many places, and particularly in the Findings of Fact and Ordering Clauses, does not specific which type of communications are being addressed. Qwest's list of page citations is an admission that the pages which it does not list do in fact directly regulate interstate communications or at the very least do not specify which communications are being regulated.

The Final Order thus overtly trespasses on the exclusive interstate jurisdiction that Congress gave the Commission and should be preempted.[74]

2. No opponent has argued persuasively that the Board was correct in ignoring *Farmers*, *Beehive*, *Frontier*, and *Jefferson*.

The Petition indeed relies on the Commission's prior decisions in *Farmers and Merchants*, *Beehive*,[75] *Frontier*,[76] and *Jefferson*[77] to establish that the Final Order contravenes

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71 *BP West Coast Products, LLC. v. Federal Energy Reg'y Comm'n*, 374 F.3d 1263, 1278 (D.C. Cir. 2004).

72 Movants again note that the Board denied several motions to dismiss Qwest's claims to the extent they regarded interstate traffic, as well as Movants' Motion to Exclude Evidence requesting that the Board not hear or consider evidence regarding interstate calls and traffic. The Board's rationale for denying that motion was that "QCC's initial complaint is sufficiently broad to relate to the categories of evidence raised by the Respondents." Docket FCU 07-2, Order Denying Motion to Exclude Evidence (Nov. 26, 2008). In other words, the Board construed Qwest's Complaint all along as pertaining to interstate calls and traffic, rendering evidence of such traffic admissible.

73 "In this matter, however, words are not enough. The Board may have been 'aware of its jurisdictional limitations,' but as demonstrated herein it did not abide by them." Great Lakes/Superior Comments at 2 (quoting AT&T Opposition to Petition for Declaratory Ruling at 2).

74 *Louisiana PSC*, 476 U.S. at 368.

75 *AT&T v. Beehive Tel. Co.*, Memorandum Opinion and Order, 17 FCC Rcd. 11641 (2002)

76 *AT&T Corp. v. Frontier Commc'ns of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd. 404 (2002).

federal law.[78] Movants demonstrated that the Commission's previous decisions on LEC access charges show that each time the IXCs have challenged the LECs' right to collect access they have lost. Motion at 13. It is inexplicable that the IXCs nonetheless argue that none of those decisions can have any bearing on Qwest's complaint before the Iowa Board, particularly when the Board interpreted the same tariff language in the Final Order that the Commission interpreted in *Farmers and Merchants*.[79]

The Board openly ignored the *Farmers and Merchants Order* on the ground that it is not final.[80] As Movants have explained, however, the Board reached this conclusion on its own, and the "Commission never has stated that the *Farmers and Merchants Order* is vacated, reversed, stayed, or otherwise invalid precedent."[81] Opponents of the Motion continue to assert that the Board was correct in ignoring the *Farmers and Merchants Order*[82] and yet none of them address Movants' clear demonstration that as a matter of law the order remains in effect.[83] The subsequent Order on Reconsideration dealt only with an issue of discovery spoliation and simply gave Qwest the right to conduct additional discovery and to submit that discovery for review.[84] The Commission expressly stated that "[w]e take no view at this time as to whether that evidence ultimately will persuade us to change our decision on the merits[.]"[85] And in the completely unrelated Universal Service decision in the *InterCall Order*[86] on which Qwest continues to

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77 *AT&T Corp. v. Jefferson Tel. Co.*, Memorandum Opinion and Order, 16 FCC Rcd. 16130 (2001)
78 Petition at 10, 12-13, 21-22.
79 AT&T Opposition at 6; Sprint Opposition at 3-4.
80 Final Order at 29.
81 Great Lakes/Superior Reply Comments at 23.
82 AT&T Opposition at 6; Qwest Opposition at 12.
83 Great Lakes/Superior Reply Comments at 23-24.
84 Order on Reconsideration, 23 FCC Rcd. 1615, ¶ 1.
85 23 FCC Rcd. at 1617, ¶ 6.
86 *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Memorandum Opinion and Order, 23 FCC Rcd. 10731 (2008).

rely,[87] the Commission could not have been more clear that its decision regarded only the question of Universal Service contributions, and not the question of what is an end user for purposes of access charges: "Nothing in this order is intended to address issues relating to access charge tariffs or other types of intercarrier compensation."[88] Movants did, contrary to Qwest's assertion, deal with *InterCall* in this proceeding and previously demonstrated that it does not support the notion that *Farmers and Merchants* is no longer prevailing law.[89]

Movants have established a clear basis for conflict preemption[90] of the Final Order based on several of the Board's Findings of Fact and Ordering Clauses. Set forth in detail in Movants' Reply Comments,[91] they are:

a. <u>Finding of Fact No. 1</u>: The FCSCs did not subscribe to the Respondents' intrastate switched access or local exchange tariffs.

The Commission held in the *Farmers and Merchants Order* that a person or entity "subscribes" to local exchange service when they "enter [their] name for service."[92] The Commission explicitly rejected Qwest's argument that the status of subscribership depends on paying the carrier: "Qwest offers scant support for its assertion that one cannot subscribe to a service without making a net payment to the service provider."[93] The Board nonetheless concluded that "the lack of timely, legitimate billing for tariffed services" by the Iowa LECs to their customers means that they "did not actually subscribe to a billable tariffed service."[94]

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87 Qwest Opposition at 13-14.

88 23 FCC Rcd. at 10740 ¶ 19 n.49.

89 Great Lakes/Superior Reply Comments at 24 n.27. These Reply Comments were filed two days prior to the Qwest Opposition.

90 Preemption of state action is appropriate where "there is an outright or actual conflict between federal and state law." *Louisiana PSC*, 476 U.S. at 368; *see also Kinley v. Iowa Utils. Bd.*, 999 F.3d 354, 358 n.3 (8th Cir. 1993) (federal Hazardous Liquid Pipeline Safety Act preempts state regulation).

91 Great Lakes/Superior Reply Comments at 18-29.

92 22 FCC Rcd. at 17987, ¶ 38.

93 *Id.*

94 Final Order at 24.

The Board thus inserted into the definition of "subscriber" a "net payment" obligation that the Commission rejected in a case having the same complainant, Qwest, and one of the same respondents, Farmers and Merchants Mutual Telephone Company, and the same set of tariffs, services, and facts. Virtually the same case, completely opposite result. And not only did the Board fail to defer to the Commission's conclusion as it should have done,[95] it assumed the power to ignore it. In so doing, the Board created an "outright conflict" with federal law which warrants preemption of the Final Order.[96]

b. Finding of Fact No. 2: FCSCs are not end users as defined by the Respondents' tariffs.

This finding, as Movants have explained,[97] bears the same error as the Board's "subscriber" conclusion that has been discredited above. Whereas the Commission stated that an "end user" is "'any customer of an interstate or foreign telecommunications services that is not a carrier,'"[98] and that Farmers' conference call customers satisfy that definition, the Board nonetheless concluded that the same entities cannot be "end users" of the Iowa LECs, including the same Farmers LEC that was before the Commission.[99] Even more strangely, the Board purported to follow the same tariff, NECA Tariff No. 5, that the FCC analyzed. The Board nonetheless once again reached precisely the opposite conclusion from the Commission's and refuses to recognize conference call and chat-line providers as "end users."

Thus Final Order again has created an "outright conflict" with federal law and should be preempted.[100]

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95 *SBC Commc'n v. FCC*, 138 F.3d 410, 416-417 (D.C. Cir. 1998) ("Congress has clearly charged the FCC, and not the State commissions, with deciding" matters related to interstate telecommunications service).

96 *Louisiana PSC*, 476 U.S. at 368.

97 Petition at 23-24; Motion at 13; Great Lakes/Superior Reply Comments at 22-24.

98 22 FCC Rcd. at 17987, ¶ 36 (quoting NECA Tariff § 2.6).

99 Final Order at 80.

100 *Louisiana PSC*, 476 U.S. at 368.

c. Finding of Fact No. 8: The sharing of revenues between Respondents and FCSCs is not inherently unreasonable, but may be an indication that a particular service arrangement is unreasonable.

The Board opined in the Final Order that revenue sharing is unreasonable if, among other things, a LEC experiences "considerably greater" access volume than some unquantified previous "low historical volume" and "has substantial market power, even monopoly power."[101] The Board pretends that this conclusion is quite constrained, and that it has not "made a finding that revenue sharing arrangements are inherently unreasonable."[102] Whether or not unwittingly, however, the Board has issued a decision that means that all sharing of access revenue, by all LECs, is unreasonable, and surely the IXCs are going to interpret and attempt to enforce it that way. Accordingly, the Board's decision must be preempted on the ground that it directly contravenes almost a decade of apposite Commission precedent.

As Movants have explained, the Commission has never found that sharing access revenue is unreasonable, discriminatory, or otherwise unlawful.[103] Four times the IXCs challenged revenue sharing under the Communications Act, and four times they lost. As Movants previously have summarized these facts:

> In *Jefferson*, the Commission held that sharing access revenue does not constitute discrimination in violation of either section 201(b) or 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a). 16 FCC Rcd. at 16133. In *Frontier*, the Commission again refused to hold that sharing access revenue is unlawful discrimination under section 201(b) or 202(a). 17 FCC Rcd. at 4142 ¶ 2. And later that year in *Beehive*, the Commission denied three counts in AT&T's complaint that the LEC had violated section 201(b) and 202(a) by sharing access revenue. 17 FCC Rcd. at 11655 ¶ 29.[104]

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101 Final Order at 58, 59.

102 *Id.* at 57.

103 Petition at 21-22; Motion at 13; Great Lakes/Superior Reply Comments at 26.

104 Great Lakes/Superior Reply Comments at 26.

The Commission made the same finding in the *Farmers and Merchants Order*.[105]

What is telling is that the Board never mentions any of these cases in the Final Order. And the fact that the Commission found these cases not to be controlling in *Farmers and Merchants*[106] does not mean that they are not powerful, persuasive opinions that reject the IXCs' attempt to avoid paying access charges on the ground that the revenues will be shared.

Anyone familiar with access charge regulation knows or should know that the Commission held in 2001 that a LECs have ""monopoly power ... over access to their end users."[107] Even so, the Commission has since held three times that sharing access revenue is not unlawful.[108] The Board ignored and directly contravened that controlling precedent and thus has created another "outright conflict" with federal law.[109] The Final Order therefore should be preempted.

d. <u>Finding of Fact No. 10</u>: The intrastate toll traffic did not terminate at the end user's premises.

The Board refused to find that calls to the conference call and chat-line customers of the Iowa LECs "terminate" at a "premises" and thus are compensable under the access regime. This conclusion, as Movants explained, also directly contravenes the Commission's holding in the *Farmers and Merchants Order* in which the calls were found to "terminate" and Farmers was told that it "can 'charge terminating access charges for calls terminated to the conference calling companies' under the Farmer's tariff."[110]

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105 22 FCC Rcd. at 17988, ¶ 38.

106 22 FCC Rcd. at 17986 n. 115.

107 *Access Charge Reform Seventh Report and Order*, 16 FCC Rcd. at 9938 ¶ 38.

108 *Beehive*, *Frontier*, and the *Farmers and Merchants Order* all were issued after the 2001 *Access Charge Seventh Report and Order*. *See supra* notes 75-77.

109 *Louisiana PSC*, 476 U.S. at 368.

110 Great Lakes/Superior Reply Comments at 27 (quoting 22 FCC Rcd. at 17988 ¶ 38).

This Finding of Fact was the product of the Board's having relied on the wrong tariff for the definition of "premises." Unbelievably, the Board insisted that an access tariff, and not the local exchange tariff, can define the "premises" of a local exchange service customer.[111] In addition to applying the wrong tariff and thus the wrong law,[112] the Board compounded its error by grafting onto the NECA access tariff definition the requirement that one must "own or control the premises" in order to establish a "premises" under the access regime.[113] These errors render Finding of Fact No. 10 reversible on the merits — the Petition is absolutely constrained to the jurisdictional problems with the Board's decision — and also typify the Board's persistent refusal to apply prevailing federal law as articulated in the *Farmers and Merchants Order*. That refusal led "inexorably" to yet another conflict with federal law[114] that renders the Final Order subject to preemption under *Louisiana PSC*.

e. Finding of Fact No. 5: The Respondents did not provide local exchange service to FCSCs through special contract arrangements.

Movants have previously explained that the Board refused to find that service contracts executed between conference call and chat-line providers and the Iowa LECs establish them as the end user customers of local exchange service.[115] Although several LECs, including Movants, showed that their local exchange service tariffs specifically empower the LECs to arrange service by special contract, the Board nonetheless found that the contracts somehow do not establish a customer-carrier relationship. Its entire analysis focused on only one LEC's tariff[116]

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111 Final Order at 37.

112 As between a carrier and an end user, a tariff is "considered to the 'the law'" and thus acts as controlling law for defining services and service arrangements. *Iowa Network Servs., Inc. v. Qwest Corp.*, 466 F.3d 1091, 1097 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2255 (2007).

113 Final Order at 39.

114 Great Lakes/Superior Reply Comments at 26.

115 *Id.* at 28-29.

116 Final Order at 30 (discussing only the Aventure local tariff).

and ignored the other LECs' showings, including that of Superior.[117] And its conclusion again clashes directly with the Commission's ruling in the *Farmers and Merchants Order*.

The Commission ruled that "Farmers' tariff therefore allows Farmers to charge terminating access charges for calls terminated to" these entities.[118] The record before the Commission showed that Farmers and its customers had been "'entering into agreements'" — in other words, Farmers had exercised its right to establish individual service contracts with customers.[119] Indeed, most of the discovery disputes and allegations in that case surrounded those contracts.[120] Having seen those contracts and reviewed Farmers' tariff, the Commission held that the conference call and chat line entities are "end users" and "subscribers," and thus calls to these entities are compensable under the access charge regime. The Board directly contravened that holding in Finding of Fact No. 5.

The Board stands in "outright or actual conflict"[121] with federal law by refusing to find that calls to conference bridges and chat lines "terminate" in such a way that the LECs may impose terminating access charges. As such, the Final Order should be preempted.

3. Movants also have demonstrated that the Final Order endorses the IXCs' resort to unlawful self-help in derogation of the Commission's repeated rejections of self-help.

Movants have also raised the issue of unlawful self-help as grounds for preemption, namely that the Final Order endorsed, after the fact, the IXCs' self-help refusal to pay access

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117 The Superior local exchange tariff states that a "Contract" is "[t]he agreement between a customer and the Company under which services and facilities are furnished in accordance with the applicable provisions of the tariff." Superior Telephone Cooperative Telephone Tariff, Sheet 23.

118 *Farmers and Merchants Order*, 22 FCC Rcd. at 17987 ¶ 38.

119 22 FCC Rcd. at 17976, ¶ 10.

120 Order on Reconsideration, 23 FCC Rcd. at 1616 ¶ 3 ("backdated contract amendments"). It bears repeating that no IXC ever has alleged, presented evidence, or argued that Superior or Great Lakes ever backdated any document or submitted false or forged invoices to any entity.

121 *Louisiana PSC*, 476 U.S. at 368.

charges to the Iowa LECs.[122] Qwest, Sprint, and AT&T stopped paying the Iowa LECs in approximately the Fall of 2006; the Board held that this self-help was permissible because in the end, almost three years later, it turned out that, pursuant to the Final Order, the IXCs do not owe access charges "and there is no need for any remedy in this case."[123]

This *ex post facto* blessing of self-help refusals to pay tariffed charges flies directly in the face of several Commission decisions rejecting this practice. "[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties... ."[124] In 1992, the Commission held that it was inappropriate for a reseller simply to refuse to pay AT&T for tariffed services, but rather the reseller "should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper[.]"[125] In 1999, the Commission affirmed a Common Carrier Bureau order requiring AT&T to pay access amounts due in arrears to MGC, plus interest, because such self-help "amounts to impermissible self-help and a violation of section 201(b) of the [Communications] Act."[126] The Commission also held several carriers, including Frontier Communications, liable in 1999 for self-help refusal to pay payphone service provider compensation.[127]

In addition to these decisions, the *Access Charge Seventh Report and Order* is certainly the controlling precedent rejecting the exercise of self-help. There the Commission criticized the IXCs for simply refusing to pay CLEC access charges that they did not want to pay: "We are

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122 Petition at 27-29; Reply Comments at 35-36.

123 Final Order at 70.

124 *Tel-Central of Jefferson City, Missouri, Inc. v. United Telephone of Missouri, Inc.*, 4 FCC Rcd. 8338, 8339, ¶ 9 (1989); *see also Communique Telecommunications, Inc. DBA Logicall*, 10 FCC Rcd. 10399, 10405, ¶ 36 (1995); Petition for Declaratory Ruling at 27-29 (discussing Commission policy and precedent regarding withholding of tariffed access charges).

125 *Business WATS, Inc. v. American Tel. & Tel. Co.*, 7 FCC Rcd. 7942 ¶ 2 (1992).

126 *MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd. 11647, 11659 ¶ 27 (Com. Car. Bur. 1999), *aff'd*, Memorandum Opinion and Order, 15 FCC Rcd. 308(1999).

127 *Bell Atlantic-Delaware, et al. v. Frontier Communications, et al.*, Memorandum Opinion and Order, 14 FCC Rcd. 16050 (Com. Car. Bur. 1999), *aff'd*, Memorandum Opinion and Order, 15 FCC Rcd. 7475 (2000).

concerned that the IXCs appear routinely to be flouting their obligations under the tariff system."[128] The Board, in sharp contrast, excused the IXCs for exactly the same "flouting" of tariff obligations. This holding creates another direct conflict with federal law for which preemption is warranted.[129]

4. No opponent has argued persuasively that impossibility and field preemption are inapplicable.

Movants have explained three times now[130] that the Final Order creates a situation in which compliance with both the Final Order and federal law is "physically impossible" and thus preempted is warranted.[131] Findings of Fact No. 1 ("subscribe"), 2 ("end users"), and 5 ("special contracts") — all of which are addressed in Section III.A.1 and III.A.2 above — contain holdings that are exactly the opposite of the Commission's holdings on the same issues and facts. As such, "the Board places the Iowa LECs in the scenario in which their arrangements for intrastate access service must be materially different than their arrangements for interstate services[.]"[132] If the Final Order is permitted to remain effective, the same entity will be a "subscriber" under federal law but not under state law. Likewise, that entity will be an "end user" under federal law but not under state law. And the same contract will establish a valid customer relationship for interstate calls, but not for intrastate calls. The situation is completely untenable, and is exactly the situation which the Supreme Court empowers the Commission to put to rest via preemption.

Opponents raise no serious argument on this point. AT&T calls Movants' impossibility argument "silly" on the ground that "they have always tracked and billed the intrastate and

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128 *Access Charge Seventh Report and Order*, 16 FCC Rcd. 9923, 9932, ¶ 23 (citations omitted).
129 *Louisiana PSC*, 476 U.S. at 368.
130 Petition at 25-26; Motion at 18; Great Lakes/Superior Reply Comments at 29-32.
131 *Louisiana PSC*, 476 U.S. 368.
132 Great Lakes/Superior Reply Comments at 29.

interstate traffic separately."[133] That argument is obtuse: no LEC ever has denied the ability to separate intrastate and interstate traffic, and the problem is not one of "tracking" but of how a LEC can arrange its services such that it will be paid the terminating access that LECs, including the LEC affiliates of the opponent IXCs, have received for over 25 years. AT&T has no answer this, the actual problem raised in the Petition and for which preemption is necessary.

Qwest attempts to refute Movants' impossibility argument rests on a misinterpretation of *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990). Qwest argues that this case stands for the proposition that preemption under the "impossibility" test requires a finding that the "'the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects.'"[134] Qwest misreads the opinion and misunderstands *Louisiana PSC*. It is clear from the quoted portion of *Maryland PSC* that the D.C. Circuit was dealing with the question whether traffic is separable. The case was a challenge by the Maryland Commission to the FCC order detariffing several interstate services and preempting states from attempting to require those interstate services to be tariffed.[135] The specific item in question was DNP, or "disconnection non-payment," which necessarily blocked both interstate and intrastate calls.[136] The D.C. Circuit thus correctly held that Maryland could not regulate DNP on an intrastate basis, because the interstate aspects of DNP were inseparable.[137] The petition for review of the FCC order was denied.

Maryland PSC did not raise the "impossibility" problem of which the Petition complains. As *Louisiana PSC* states, preemption is warranted where "compliance with both federal and state

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133 AT&T Opposition at 6, 7.
134 Qwest Opposition at 17 (quoting 909 F.2d at 1510).
135 *Detariffing of Billing and Collection Servs.*, Report and Order, 102 F.C.C.2d 1150 (1986).
136 909 F.2d at 1511.
137 *Id.* at 1515.

law is physically impossible."[138] Here, the Final Order reached the opposite conclusions on several aspects of the Iowa LECs' service from what the Commission has held on those same aspects. The Iowa LECs therefore cannot serve both masters. Preemption is therefore necessary in order to resolve this "impossibility scenario."[139]

Movants have also explained that "field preemption"[140] is appropriate,[141] because the Commission opened a comprehensive proceeding on LEC and rural LEC access charges in October 2007.[142] The Commission at this time is reviewing comments and letters regarding the very matters on which the Final Order attempts to rule, including:

- service arrangements between LECs and conference call, chat-line and similar service providers;[143]
- are LEC terminating access charges supported by cost evidence, or can they be so supported;[144]
- the sharing of access revenue between LECs and their customers.[145]

In fact, the 07-135 NPRM, which addresses *possible* changes to existing law, so plainly occupies the field of LEC terminating access charges that opponents of the Motion argue that the Commission will resolve the disputes outlined in the Petition by issuing an order in 07-135.[146] The fact that the Commission has not issued final rules in the 07-135 is irrelevant — it is clear that, to the extent it had not done so before, the Commission had taken over, in October 2007, the

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138 476 U.S. at 368.

139 Motion at 18.

140 *Southwestern Bell Wireless Inc. v. Johnson County Bd. of County Comm'rs*, 199 F.3d 1185, 1190 (10th Cir. 1999). Field preemption applies to both federal statutes and federal administrative rules. *Id.* at 1192.

141 Petition at 26-27; Motion at 17-18; Great Lakes/Superior Reply Comments at 32-33.

142 *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd. 17989 (2007) ("07-135 NPRM").

143 07-135 NPRM ¶ 11.

144 *Id.* ¶ 16.

145 *Id.* ¶¶ 18-19.

146 AT&T Opposition at 3; Sprint Opposition at 3. Sprint actually chastises Movants for "causing the FCC to devote scarce resources ... that could be better spent in other endeavors such as issuing a final decision in its [07-135] rulemaking proceeding[.]" Sprint Opposition at 3. Apparently Sprint believes that only the IXCs, who spearheaded WC Docket 07-135, deserve to be heard at the Commission, but not the LECs who have been denied years' worth of access charges.

very questions that the Board has purported to resolve in the Final Order. And the Board, as Movants have made clear herein and in their Reply Comments, either attempts to regulate interstate services or create conflicts and an impossibility problem for the Iowa LECs. The Commission thus should hold that the Final Order is preempted on the ground that the 07-135 NPRM occupies the field of LEC access charges, including the issues which Qwest brought before the Iowa Board.

In addition, the Commission has openly occupied the field of Voice-over-Internet-Protocol, or VoIP-based communications which the Final Order also purports to regulate. The Final Order states that VoIP-based international calls, in which the called party reaches an Iowa number via analog signal, at which point a service provider then converts and re-originates the call as a VoIP data transmission, are not compensable for terminating access.[147] Movants have shown that this portion of the Final Order "encroaches on Commission jurisdiction" over international and IP-based traffic.[148] The Commission preempted state commissions from attempting to regulate VoIP-based calls in the *Vonage* case,[149] and thus has demonstrated its express jurisdiction over this traffic and its intent to remain the regulator in this field. The Commission likewise should preempt the portion of the Final Order regarding VoIP-based international calls.

5. Opponents fail to address arguments that the Final Order is an "obstacle" to the accomplishment of Congress's and the Commission's pro-competitive and broadband deployment goals.

Great Lakes and Superior,[150] as well as some commenters,[151] have shown that the Final Order disrupts the Iowa LECs' service and deprives them of a significant revenue stream, and

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147 Final Order at 42-43.
148 Motion at 18-19 (citing 47 U.S.C. § 152(a)).
149 *Vonage Order*, 19 FCC Rcd. 22404, *aff'd*, *Minnesota PUC*, 483 F.3d at 580.
150 Petition at 18-20.

thus impedes competition and broadband deployment. The Supreme Court held that preemption of state action is warranted if that action "stands as an obstacle to the accomplishment and executive of the full objectives of Congress."[152]

Congress's stated objective in the Telecommunications Act of 1996 was to encourage competition in the local telecommunications market, and included a specific grant of preemptive authority in section 253 of that statute.[153] In addition, Congress devoted section 706 to the encouraging of "deployment ... of advanced telecommunications capability."[154] The Commission's ongoing efforts to implement Congress's broadband goals are reported literally every day, and presently there are at least five requests for comment on broadband access, innovation, deployment, and mapping underway.[155]

The Final Order is an "obstacle" to both of these goals. First, it purports to "direct" NANPA to strip Great Lakes of the numbers it uses to serve conference call and chat-line providers,[156] thus driving Great Lakes from the market. The Final Order also imperils the numbers of every other Iowa LEC, because the post-order filing requirement regarding use of numbers foreshadows subsequent proceedings in which other LECs' numbers will be attacked as

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151 WC Docket No. 09-152, Comments of All-American Telephone Co., Inc. at 9-11 (Sept. 21, 2009); Comments of Northern Valley Communications, LLC and Sancom, Inc. in Support of Petition at 14, 21 (Sept. 21, 2009).

152 *Louisiana PSC*, 476 U.S. at 368-69.

153 Section 253 states in pertinent part:

> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253(d).

154 47 U.S.C. § 157 nt.

155 *E.g.*, GN Docket Nos. 09-47, *et al.*, *Contribution of Federal, State, Tribal, and Local Government to Broadband*, DA 09-2122 (Sept. 25, 2009); *Comments Sought on Opportunities for Disadvantaged Businesses in the Age of Broadband*, DA 09-2137 (Sept. 28, 2009); *Comment Sought on Broadband Clearinghouse*, DA 09-2167 (Oct. 2,2009); *Comment Sought on Impact of Middle and Second Mile Access on Broadband Availability and Deployment*, DA 09-2186 (Oct. 8, 2009).

156 *See* Section III.A.1.e, *supra*.

well. Second, the Final Order, as stated above, exonerates the IXCs for refusing to pay millions of dollars in validly accrued terminating access charges,[157] and purports to require the Iowa LECs to refund "switched access fees" to the extent they ever received them.[158] The record before the Board was clear that the LECs intended to use access revenue to pay for broadband deployment.[159] In attempting to foreclose that revenue stream, the Final Order essentially precludes the Iowa LECs from deploying facilities. This result is plainly an "obstacle" to long-articulated federal policy goals.

The entire Final Order, in its rationale, findings, and ordering clauses, has created this "obstacle" to federal policy.[160] Movants therefore respectfully request that the Commission preempt the Final Order on this independent ground.

B. No Commenter Can Deny that Loss of a Business, a Result that Great Lakes Now Faces, Constitutes Irreparable Harm

The Final Order purports, as Movants have shown and no opposing party denies, to "direct" NANPA to reclaim the numbers that Great Lakes presently is using to serve conference call and chat-line services. Motion at 21.[161] This directive, if followed, would put Great Lakes out of business. *Id.* Not one opponent even attempts to refute Movants' showing that the loss of a business constitutes irreparable harm.

Verizon argues that "[t]he hallmark of a successful showing of irreparable harm is a

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157 *See* Section III.A.3, *supra.*

158 *See* Section III.A.1.d, *supra.*

159 Great Lakes/Superior Reply Comments at 37 n.43.

160 *Louisiana PSC*, 476 U.S. at 368-69.

161 *See also* AT&T Opposition at 7-8; IUB Opposition at 4-5; Qwest Opposition at 14-15; Sprint Opposition at 4-5. Verizon curiously asserts that Movants "simply predict over a few paragraphs" that the Board's follow-up proceedings — a show cause proceeding to revoke the Great Lakes and Aventure certificates of authority and the already-begun rulemaking on "High-Volume Access Service" — as their show of irreparable harm. Verizon Opposition at 3. Yet Movants' discussion of the harm Great Lakes faces is very prominent in the Motion: "The Board's directive will simply drive Great Lakes out of business." Motion at 21.

demonstration of damages that extend beyond economic burden."[162] Movants agree, and have in fact provided such a demonstration. Great Lakes is the entity facing the most immediate harm

By federal rule, NANPA must reclaim unassigned telephone numbers within **60 days** of receiving final verification from the resident state commission that the numbers in fact are not in use.[163] The Board believes that it has in fact issued an enforceable "directive" to NANPA that Great Lakes' numbers are in fact not assigned.[164] Plainly the Board intends to ensure that its "directive" is carried out, which directive issued on September 21, 2009. Reclaiming Great Lakes' numbers, no one can disagree, will render it unable to provide service to any conference call or chat-line service provider at all. It would put Great Lakes out of business, and that is why Movants have been forced to seek relief from the Commission and to do so on an expedited basis. The situation is thus strikingly similar to the DNP issue in *Maryland PSC*, in which a purportedly state-based action would imperil interstate communications and thus was preempted.[165]

The other Iowa LECs are also at risk, as Movants likewise showed.[166] The Final Order required these LECs to file reports on October 1, 2009, stating which of their numbers are assigned to conference call and chat-line service,[167] an order that certainly presages the Board's forthcoming action to reclaim *those* numbers as well. These LECs thus face discontinuance of service as well, a result that will cause irreparable damage.

No opponent has credibly argued that Movants failed to satisfy the irreparable harm criterion for injunctive relief. The Commission thus should grant the Motion.

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162 Verizon Opposition at 3 n. 10 (citing *Access Charge Reform*, Order, 12 FCC Rcd. 10175, ¶ 30 (1997)).

163 47 C.F.R. § 52.15(i)(6).

164 *E.g.*, IUB Opposition at 4 (a state commission may "order reclamation when a service provider has received numbering resources but 'has not activated any commenced assignment to end users … within six months of receipt,' … and that is exactly what the Board did") (quoting 47 C.F.R. § 52.15(i)(5)).

165 909 F.2d at 1511.

166 Motion at 21-22.

167 Final Order at 80 (Ordering Clause 4).

C. The IXCs Cannot Possibly Be Harmed By Delaying a Refund of Access Charges that Would Be a Fraction of the Amounts They Never Paid

Movants demonstrated that the only other parties that could incur cognizable harm,[168] the IXCs in Iowa, in fact will not be harmed at all by a stay, because they never paid the terminating access charges in the first place.[169] The IXCs owe millions of dollars to the Iowa LECs,[170] and have paid but a fraction of those amounts. The refunds which the Final Order would require are simply dwarfed by the amounts which the IXCs never paid. As such, it is impossible that the IXCs can be harmed by a stay of the Final Order. The Board's protests to the contrary[171] are simply disproven by the public record evidence from the Iowa proceeding. It is telling that no IXC attempts to argue that their inability immediately to obtain refunds will harm them.[172]

Sprint argues that a stay of the Final Order will harm it because "Sprint and other interexchange carriers ('IXCs') are likely to be the victim of even more fraudulent ... schemes."[173] A logical connection is missing from this statement; it appears that Sprint is arguing that the Final Order will somehow affect communications in other states or cause LECs in other states to alter their provision of access services. If so, Sprint is revealing that the Final Order indeed has a reach far beyond the Board's jurisdiction, and that the IXCs are indeed hoping to enforce the Final Order outside of Iowa. As such, this argument not only fails to show how a stay will harm other parties, but also underscores how correct Movants are to have sought the Commission's review of the Final Order due to its inherently *ultra vires* nature. Moreover, Sprint's purported "harm" is completely speculative — it is guessing at how other LECs would

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168 The Board as a matter of law is not "harmed" by a stay of the Final Order. Motion at 22 n.60 (citing *Charter Order*, 22 FCC Rcd. at 13892, ¶ 7).

169 Motion at 22-23.

170 The Petition shows that as to Great Lakes and Superior alone more than $3.6 million is owed, of which more than $3.4 million is for interstate access services. Petition at 30.

171 IUB Opposition at 8.

172 *See* AT&T Opposition at 12; Qwest Opposition at 18-19 (does not address question of harm to other parties); Sprint Opposition at 5-6; Verizon Opposition at 3-5.

173 Sprint Opposition at 5.

behave if the Final Order remained effective — and thus is not a valid showing of harm under any test for injunctive relief.[174]

D. Enforcing An Unlawful Order Is Not in the Public Interest, and Cutting Off the Conference Call Customers of Movants Would Harm the Public

Movants have shown that grant of a stay would serve the public interest[175] by ensuring that resources are not wasted in complying with an unlawful order,[176] and by preserving the availability to the public of the conference call and chat-line services.[177] Indeed, public agencies, such as the New Mexico Public Regulation Commission ("NMPRC"), use these conference services to conduct official business.[178] Stripping Great Lakes of all of the numbers it uses to serve conference call customers would materially diminish the availability of these services, including the service used by the NMPRC. This result will harm the public, and thus a stay of the Final Order is in the public interest.

The opponents fail adequately to address this public interest showing. The Board simply argues that its "decision advances the public interest by enforcing the relevant statutes, rules, and

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[174] Opponents of a motion for injunctive relief cannot raise merely speculative harm to third parties as grounds to deny relief. *North Carolina Growers' Ass'n v. Solis*, 2009 WL 1905067 *5-6 (M.D.N.C.) (refusing to credit harm alleged by defendants that was "speculative at best" and noting defendants could recover economic damages owed if they ultimately prevailed on merits, further tipping scales in favor of issuing preliminary injunction); *see also TGI Friday's Inc. v. Great Northwest Restaurants, Inc.*, 2009 WL 2568269 *8 (N.D. Tex.) (court "gives less weight to speculative harms the injunction may indirectly cause defendants to suffer.")

[175] Verizon asserts that Movants "make no attempt" to proffer "*any* public interest benefits" in support of the Motion. Verizon Opposition at 4 (emphasis in original). This statement is curious, because Movants described two different ways in which a stay would benefit the public. Verizon's assertion, together with its other erroneous assertion discussed in Footnote 161 above, indicate that Verizon simply has not read the Motion which it is opposing.

[176] "'The public interest counsels against such waste.'" Motion. at 24 (quoting *Charter Order*, 22 FCC Rcd. at 13893 ¶ 9).

[177] Motion at 23-24.

[178] As stated in the attached Declaration of Stephanie A. Joyce (Oct. 19, 2009), the NMPRC uses the services of Free Conference Corporation to provide telephonic access for hearings. On September 23, 2009, Ms. Joyce participated in an adjudicatory hearing before the NMPRC via a Free Conference Corp. conference bridge. The NMPRC uses this service because "it is free to them." Great Lakes serves Free Conference Corp. with local exchange service, as well as more than 25 other conference call service providers.

intrastate tariff provisions."[179] As Movants have shown, however, the Board is "enforcing" several matters and tariffs that are not within its jurisdiction to enforce. Qwest offers the admonition that the Commission should "utilize its preemptive jurisdiction sparingly" because "state regulators are themselves part of the apparatus of sovereign states."[180] That statement is of no help and says nothing to refute Movants' showing that waste and service disruption are matters that should be avoided. AT&T argues that LEC terminating access charges are "significantly inflating long distance carriers' costs" and that conference call and chat-line services are "clogging up transport and switching facilities."[181] AT&T knows, however, that its own long distance customers, and the customers of the other IXCs, are calling these numbers and want to use these services. It is not the Iowa LECs who are dialing the phone numbers of the Movants' end user customers. The IXCs' customers are dialing the phones, and they are, according to Sprint, the true "cost causer" in this situation.[182]

The fact that the public are using these services demonstrates why the Final Order is contrary to the public interest and should be stayed. Sprint's public interest argument is simply a repetition of its argument regarding purported harm to other parties: the IXCs do not like paying terminating access charges for conference and chat-line calls.[183] Sprint, like the other opponents, ignores Movants' compelling demonstration that complying with the Final Order is very likely a wasteful exercise and it will cause the disconnection of popular, valuable conferencing services.

There being no meaningful reason to deny that the public interest will be served by a stay, Movants have satisfied this criterion.[184] The Commission therefore should grant Movants'

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179 IUB Opposition at 9.
180 Qwest Opposition at 9.
181 AT&T Opposition at 12.
182 Sprint Opposition at 6.
183 *Id.*
184 *Charter Order*, 22 FCC Rcd. at 13892, ¶ 7.

request that the Final Order be stayed pending review of its several findings, conclusions, and ordering clauses.

CONCLUSION

For all these reasons, the Commission should stay the Iowa Utilities Board Final Order unless and until the Commission denies the Petition for Declaratory Ruling and Contingent Preemption.

October 19, 2009

Respectfully submitted,

By: Ross A Buntrock

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Counsel to
Great Lakes Communication Corp. and
Superior Telephone Cooperative

CERTIFICATE OF SERVICE

I, Edilma Carr, hereby certify that on this 19th day of October, 2009, the foregoing Great Lakes Communication Corp. and Superior Telephone Cooperative Reply in Support of Emergency Motion for Stay of Iowa Utilities Board Final Order Pending Review to be served on the following persons via ECFS, First Class Mail *, or electronic mail **:

s/Edilma Carr
Edilma Carr

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ATTACHMENT A

C
62 Rad. Reg. 2d (P & F) 539, 2 F.C.C.R. 2692, 2 FCC Rcd. 2692, 1987 WL 344893 (F.C.C.)

FCC 87–51

**1 In the Matter of
Blocking Interstate Traffic in Iowa

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1987; Released: February 9, 1987

*2692 By the Commission:

I. Introduction

1. On October 18, 1985, North Central Telephone Company, Woolstock Mutual Telephone Association, Cooperative Telephone Exchange, and Heart of Iowa Telephone Cooperative (petitioners) filed an application for review (application) of the Common Carrier Bureau's Iowa Order,[FN1] which required petitioners to interconnect their facilities with those of an interexchange carrier in order to permit the completion of interstate calls over extended area service (EAS) facilities.[FN2] Petitioners request that we set aside the Bureau's decision on the grounds that the order, in violation of the Commission's jurisdiction, created an unfettered right for interstate, interexchange carriers to use the petitioners' EAS facilities without the petitioners receiving any compensation for that use. In the alternative, petitioners request prescription of interim compensation terms by which they may be compensated for interstate access services rendered to the interexchange carrier, Teleconnect Company (Teleconnect). The Iowa State Commerce Commission (Iowa Commission) concurred in and adopted petitioners' application. Teleconnect filed an opposition to the application. We deny the application for the reasons set forth below.

II. Background

2. In the Iowa Order, the Bureau addressed an emergency petition from Teleconnect that alleged that the petitioners were blocking interstate calls transiting EAS facilities to reach Teleconnect's switches obtaining Feature Group A (FGA) access in Northwestern Bell Telephone Company exchanges in Marshalltown and Webster City, Iowa. Teleconnect asserted that this blocking violated the Communications Act and Commission policy and requested the issuance of a cease and desist order against the petitioners and the Iowa Commission. Petitioners and the Iowa Commission contended that the EAS blocking in question involved only local EAS service that did not cross state lines, and thus, asserted that this Commission had no jurisdiction to require the removal of the blocking arrangements that had been installed on the EAS lines. The Iowa Commission argued that Teleconnect could obtain a point of presence (POP) in the petitioners' exchanges, or could provide secondary exchange carriers (EC),[FN3] such as petitioners, with minutes of use data. The Iowa Commission suggested that it would serve this Commission's objectives if we allowed the Iowa Commission's tariff review processes to resolve the question of compensation for the use made of the EAS facilities by Teleconnect in accordance with several decisions it had issued on the regulation of EAS arrangements.

3. In the Iowa Order, the Bureau decided that no action was necessary with respect to the Iowa Commission's orders on blocking and compensation. Finding the orders ambiguous, the Bureau assumed that the Iowa orders merely authorized the blocking of intrastate communications, and, therefore, concluded that they did not give rise to any need for Bureau action. The Bureau held that this Commission had jurisdiction over interstate calls transiting EAS facilities to reach an interstate carrier's POP and concluded that the blocking of interstate traffic transiting EAS facilities to reach the access numbers of Teleconnect from the petitioners' exchanges was in violation of the Communications Act and Commission policy. Petitioners were ordered to interconnect their facilities with those of Teleconnect by reinstating the ability of their customers to access Teleconnect's POPs for interstate calling over EAS facilities within one business day of the receipt of the Order.

**2 III. Discussion

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4. Petitioners request that we set aside the Bureau's decision, or, alternatively, that we prescribe interim rates covering the use made of the EAS facilities. Petitioners cite essentially the same arguments raised before the Bureau. Like the Bureau, we find those arguments unpersuasive.

5. We first address the petitioners' argument that the Bureau erred because this Commission lacks jurisdiction to require that EAS facilities be used to provide interstate access. They argue that "the inherently local nature of the EAS arrangements renders it highly doubtful that Congress ever intended to vest the FCC with the authority to prescribe how EAS facilities can be used in the first instance." [FN4] They note that, under Sections 2(b) and 221(b) of the Communications Act,[FN5] an EAS arrangement is an "exchange area" for purposes of the Communications Act and that this Commission lacks jurisdiction to prescribe "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services." Petitioners argue that the Bureau's action is "tantamount to the prescription of a 'classification,' 'practice,' 'service,' 'facility,' or 'regulation' for an exchange service in contravention of the Act's plain language." [FN6]

6. Petitioners' argument is not well taken. The provision of telephone service involves the joint use of many facilities, particularly exchange facilities, for the provision of interstate, intrastate toll, and exchange services. When facilities are jointly used in the provision of both interstate and intrastate services, we have the authority under the Communications Act to regulate the interstate use of the facilities to provide communications.[FN7] The problem at hand is the use of EAS facilities for interstate access, which is not an intrastate service or exchange service under the Act. In adopting the access charge mechanism, we recognized the existence of EAS arrangements and the longstanding use of EAS facilities in part to provide interstate access, indicated that interstate access should continue to be provided over EAS facilities under the access charge regime, and provided for ECs to recover their costs associated with the provision of the EAS ***2693** facilities for the purpose of providing interstate exchange access.[FN8] Accordingly, we find that the Bureau properly determined that the traffic in question is subject to our jurisdiction.[FN9]

7. Petitioners also argue that the Bureau's requiring them to provide the interconnections was confiscatory because they were not receiving any compensation for the use made of their EAS facilities. Two subsequent events have addressed the compensation question, resolving it for all practical purposes.[FN10] First, the National Exchange Carrier Association, Inc. (NECA), has filed tariff revisions, effective July 24, 1986, that enable secondary ECs in multicarrier EAS arrangements to bill switched access end office and local transport charges in addition to those now billed by the primary EC for FGA access service to the interexchange carrier when a revenue sharing agreement does not exist between the secondary and primary ECs.[FN11] Second, we have ordered the retroactive sharing, subject to certain specified conditions, of exchange access revenues from May 25, 1984, through July 23, 1986, among primary and secondary ECs to permit the equitable compensation of all ECs involved in the provision of exchange access.[FN12] Accordingly, with compensation mechanisms readily available, petitioners' arguments are moot.[FN13]

****3** 8. Petitioners again assert that their blocking of interstate communications is permissible because Teleconnect and its subscribers have alternatives for interstate access—the subscribers can call a Teleconnect access number not associated with an EAS arrangement, or Teleconnect can obtain FGA service in the secondary exchanges. This contention is misdirected. It is not an issue whether other arrangements could be used by Teleconnect or its subscribers. Rather, the issue is whether the EAS facilities in question can be used to obtain interstate access. We have answered that question in the affirmative above.

9. Petitioners also contend that the provision of toll access over EAS trunks, as the Bureau's order requires, will result in increased traffic demand on the EAS circuits, increased probability of blocking on such circuits, and, ultimately, demands for the installation of additional circuits that will increase the costs for EAS service. While petitioners are correct that continued provision of FGA access service will increase the demand on EAS trunks more than it otherwise would be, it does not necessarily follow that EAS costs or blocking on EAS trunks will increase. We have recognized throughout the development of the access charge mechanism that the costs of EAS trunks must be allocated between state and interstate

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jurisdictions.[FN14] Thus, a proportionate share of the costs of the EAS trunks, representing those costs required to meet the demand created by interstate FGA usage, is assigned to the interstate jurisdiction and, as Teleconnect observes, is recovered from interstate access charges. Increased blocking will occur only if the ECs do not install EAS trunks necessary to handle both the interstate and intrastate demand. Since a proportionate share of those costs will be recovered through interstate charges, the ECs will have no incentive not to install the EAS trunks necessary to handle the interstate demand.

10. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and (j), and 201–205, 47 U.S.C. Sections 154(i) and (j), 201–205, that the application for review filed by North Central Telephone Company, Woolstock Mutual Telephone Association, Cooperative Telephone Exchange, and Heart of Iowa Telephone Cooperative is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William Tricarico

Secretary

FN1 Blocking Interstate Traffic in Iowa, Mimeo No. 1702 (released September 18, 1985).

FN2 In an EAS arrangement, a customer in one exchange can call a local number in another exchange that is part of the extended area without paying a toll charge. An exchange subscriber in one exchange can therefore access an interexchange carrier's network toll free by calling its seven-digit access number even if that interexchange switch is located in a different exchange. Exchange switches typically recognize such calls as EAS calls, not as interexchange calls for which access charges are applicable.

FN3 A secondary EC is any EC in an EAS arrangement in whose exchange a FGA connection is not made, but from whose exchange customers can call the interexchange switch or point of presence (POP) of an other common carrier (OCC) in the primary exchange on a toll-free basis. FGA traffic is normally routed over an EAS trunk between the switches of the primary and secondary ECs. The primary EC is the EC in whose exchange the OCC has its POP.

FN4 Application at 10.

FN5 47 U.S.C. Sections 152(b) and 221(b).

FN6 Id. at 12 (emphasis in original).

FN7 The limiting statutory language quoted by petitioners refers to intrastate "services," not intrastate "facilities" within an "exchange area." Thus, petitioners' reliance on Northwestern Bell Telephone Company, 92 FCC2d 625 (1982), is unavailing. Indeed, to hold that subscribers to the primary EC's exchange service can access the POP of an OCC while a subscriber in the secondary EC's exchange cannot would appear to create a clear violation of the nondiscrimination provision of Section 202(a) of the Act. 47 U.S.C. Section 202(a). See generally New York Telephone Co. v. FCC, 631 F.2d 1059 (2d Cir.1980).

FN8 MTS and WATS Market Structure Inquiry (Phase I), 93 FCC2d 241 (1983), modified on recon., 97 FCC2d 682 (1983), modified on further recon., 97 FCC2d 834 (1984), affirmed in principal part and remanded in part sub nom. National Association of Regulatory Utility Commissioners v. FCC, 737 F.2d 1095 (D.C.Cir.1984), cert. denied, 105 S.Ct. 1224, 1225 (1985), modified on further recon., 49 Fed.Reg. 46,383 (1984), recon. denied, 50 Fed.Reg. 18,249 (1985), further recon. denied, 50 Fed.Reg. 43,707 (1985), appeal pending sub nom. U.S. Telephone, Inc. v. FCC, No. 84–1115 (D.C.Cir. Mar. 23, 1984).

FN9 Petitioners reiterate their argument that a hearing pursuant to Section 205, 47 U.S.C. Section 205, must be held before the Commission can order them to provide interconnection. If the hearing requirement of Section 205 is applicable, and it is not clear that it is, the proceedings associated with the Teleconnect petition were adequate to meet the hearing requirement of that section of the Act. See generally Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3rd Cir.1974), cert. denied, 422 U.S. 1026. Petitioners' argument is thus without any basis in law.

FN10 Even if these compensation arrangements were not already in place, petitioners' claim of confiscation would be unavailing. We clearly recognized the right

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of the secondary ECs to receive compensation for the use made of EAS facilities in the provision of interstate access when we adopted the access charge rules. We provided that such compensation could occur through either a revenue sharing arrangement with the primary EC or through a tariff filed by the secondary EC setting forth charges to be paid by the interexchange carrier directly to the secondary EC. MTS and WATS Market Structure Inquiry (Phase I), 97 FCC2d at 758–59. The lack of an agreement between a primary and secondary EC for the sharing of access revenues or the failure of an EC or its agent to file a tariff to allow the charging of a tariffed rate does not constitute confiscation on the part of this Commission.

FN11 National Exchange Carrier Association, Inc. Tariff No. 1 (Transmittal No. 132), Mimeo No. 5897 (released Jul. 23, 1986).

FN12 Amendment of Part 69 of the Commission's Rules to Ensure Application of Access Charges to All Interstate Toll Traffic, FCC 86–596 (released Jan. 9, 1987).

FN13 These same two events eliminate any need to consider the petitioners' alternative request that we prescribe an interim rate to compensate them for the use made of their EAS facilities in conjunction with interstate exchange access. NECA's tariff now allows petitioners to obtain compensation for such usage of their facilities even if they do not have a revenue sharing arrangement with Northwestern Bell Telephone Company.

FN14 See note 8, supra; Amendment of Part 69 of the Commission's Rules to Ensure Application of Access Charges to All Interstate Toll Traffic, FCC 85–644 (released Dec. 31, 1985).

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62 Rad. Reg. 2d (P & F) 539, 2 F.C.C.R. 2692, 2 FCC Rcd. 2692, 1987 WL 344893 (F.C.C.)
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ATTACHMENT B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition for Declaratory Ruling to the Iowa Utilities Board and Contingent Petition for Preemption	WC Docket No. 09-152

DECLARATION OF STEPHANIE A. JOYCE IN SUPPORT OF EMERGENCY MOTION FOR STAY OF IOWA UTILITIES BOARD FINAL ORDER PENDING REVIEW

I, Stephanie A. Joyce, do hereby aver the following:

1. My business address is 1050 Connecticut Avenue, N.W., Washington DC 20036.

2. I am over 18 years of age and could testify competently to the facts set forth herein.

3. On September 23, 2009, I participated via telephone in an adjudicatory hearing before the New Mexico Public Regulation Commission ("NMPRC"). I and several other persons were provided with information for using a conference bridge.

4. The conference bridge was arranged by a staffperson of the NMPRC. The dial-in number was (218) 339-2500. The customer service number for the chosen conferencing service was 877-482-5838, and the customer service website was identified by the staffperson as service@freeconferencecall.com.

5. I gave no input of any kind as to which conference bridge service would be used for this telephonic hearing. In fact, I was not aware that the NMPRC would arrange the conference bridge.

6. The Hearing Examiner stated the NMPRC uses this conferencing service because "it is free to them," meaning the NMPRC. It is my understanding that the NMPRC regularly uses Free Conferencing Corporation in conducting its business.

7. I have verified that the dial-in number provided by the NMPRC is a number used by Free Conferencing Corporation, and that the customer service number and email address are owned by Free Conferencing Corporation.

8. Great Lakes Communication Corporation, a Petitioner and Movant in this proceeding, provides local exchange service to Free Conferencing Corporation in Iowa.

On this 19th day of October, 2009, I affirm, under penalty of perjury and pursuant to 18 U.S.C. § 1623, that the foregoing is true and correct.

Stephanie A. Joyce

SUBSCRIBED TO AN SWORN BEFORE ME this 19th day of Oct, 2009.

NOTARY PUBLIC

Melissa T. Jones, Notary Public
Washington, D. C.

My Commission expires: 01/31/2010