

# Arent Fox

December 10, 2009

**VIA ECF**

Marlene Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Ross A. Buntrock**

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**Re: Withdrawal of Great Lakes Communication Corp. and Superior Telephone Cooperative Petition for Declaratory Ruling and Contingent Petition for Preemption; WC Docket 09-152**

Dear Ms. Dortch:

Great Lakes Communication Corp. ("Great Lakes") and Superior Telephone Cooperative ("Superior") hereby withdraw their Petition for Declaratory Ruling and Contingent Petition for Preemption, docketed as WC Docket 09-152.

On December 3, 2009, the Iowa Utilities Board ("IUB") issued an Order Granting Motion and Granting Application for Rehearing, In Part ("Partial Rehearing Order"), a copy of which is attached hereto. In the Partial Rehearing Order, the IUB rescinded Ordering Clause No. 7 of its September 21, 2009 Order, which had directed the North American Numbering Plan Administrator to immediately commence reclamation of Great Lakes's telephone numbers. The Partial Rehearing Order also confirms that the IUB intends to address the remaining issues raised by Great Lakes and Superior, as well as the other local exchange carriers, in a subsequent order. Accordingly, Great Lakes and Superior withdraw their pending petition, though they reserve the right to re-file the petition when or if it becomes necessary.

Sincerely,



Ross A. Buntrock

Attachment

cc: Sharon Gillett, Bureau Chief, Wireline Competition Bureau  
Al Lewis, Division Chief, Pricing Policy Division, Wireline Competition Bureau

**ATTACHMENT**

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:

QWEST COMMUNICATIONS  
CORPORATION,

Complainant,

vs.

SUPERIOR TELEPHONE COOPERATIVE;  
THE FARMERS TELEPHONE COMPANY OF  
RICEVILLE, IOWA; THE FARMERS &  
MERCHANTS MUTUAL TELEPHONE  
COMPANY OF WAYLAND, IOWA;  
INTERSTATE 35 TELEPHONE COMPANY,  
d/b/a INTERSTATE COMMUNICATIONS  
COMPANY; DIXON TELEPHONE COMPANY;  
REASNOR TELEPHONE COMPANY, LLC;  
GREAT LAKES COMMUNICATION CORP.;  
AND AVENTURE COMMUNICATION  
TECHNOLOGY, LLC,

Respondents;

DOCKET NO. FCU-07-2

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REASNOR TELEPHONE COMPANY, LLC,

Counterclaimant,

vs.

QWEST COMMUNICATIONS  
CORPORATION AND QWEST  
CORPORATION,

Counterclaim Respondents.

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**ORDER GRANTING MOTION AND  
GRANTING APPLICATION FOR REHEARING, IN PART**

(Issued December 3, 2009)

On November 23, 2009, Qwest Communications Corporation (QCC) filed with the Utilities Board (Board) an emergency motion to withdraw Ordering Clause No. 7 from its final order issued in this docket on September 21, 2009, which directs the North American Numbering Plan Administrator (NANPA) to reclaim the telephone number blocks from Great Lakes Communications Corp. (Great Lakes) pursuant to 47 C.F.R. § 51.15(i)(5).

In support of its motion, QCC states that Great Lakes has sought injunctive relief of Ordering Clause No. 7 from the U.S. District Court for the Northern District of Iowa, claiming that the Board exceeded its delegated authority by ordering telephone number reclamation for Great Lakes. QCC asserts the Board has the authority to order such reclamation, but that litigating this issue simultaneously before the Board, the Court, and the FCC is cost and time prohibitive. QCC states that Great Lakes has filed pleadings and made arguments to the Northern District of Iowa stating that the Board should have issued a request to the Federal Communications Commission (FCC) to conduct an audit relating to Great Lakes' use of numbering resources, rather than ordering number reclamation. QCC asserts that this alternative relief promoted by Great Lakes is acceptable. QCC requests that the Board substitute Ordering Clause No. 7 with an ordering clause requesting the FCC initiate an audit of Great Lakes' use of telephone numbering resources pursuant to 47 C.F.R. § 52.15(k).

Granting QCC's motion should make it unnecessary for the U.S. District Court to address Great Lakes' request for injunctive relief relating to Ordering Clause No. 7. Great Lakes sought injunctive relief from the Court arguing that the Board exceeded its delegated authority by ordering the reclamation of its telephone numbers.<sup>1</sup> A hearing on the matter was held before Chief Magistrate Judge Paul A. Zoss on November 13, 2009, and on November 17, 2009, Judge Zoss issued a report and recommendation to grant Great Lakes' request for a preliminary injunction to prohibit the enforcement of Ordering Clause No. 7. Id. Judge Zoss determined that Great Lakes was likely to prevail on the merits because, according to the report and recommendation, the Board incorrectly determined that the conference calling companies were not end users of Great Lakes and that the Board's conclusion was contrary to the holding in Qwest Communications Corp. v. Farmers and Merchants Mutual Tele. Co., in which the FCC found that conference calling companies were considered end users.<sup>2</sup> Judge Zoss also indicated that the federal rules giving the Board its authority over telephone number reclamation were unclear with respect to this situation, in which numbers were provided to Great Lakes and were activated, but the Board found they were not assigned to end users and they were not activated in the correct exchanges. Specifically, the report said that "the obvious purpose of [47 C.F.R. § 52.15(i)"5"] was to give state commissions the authority to reclaim

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<sup>1</sup> See Great Lakes Comm. Corp., et al. vs. IUB, et al., "Report and Recommendation on Plaintiffs' Motion for Preliminary Injunction," No. C09-4085-DEO (issued November 17, 2009).

<sup>2</sup> Qwest Communications Corp. v. Farmers and Merchants Tel. Co., "Memorandum Opinion and Order," 22 FCC Rcd 17973 (Issued October 2, 2007) (hereinafter October 2 Order).

telephone numbers that are not being used so they can be put in service by someone else . . . . To say the telephone numbers provided to Great Lakes were not assigned or activated turns the regulation on its head." Id., at 26-27. The report and recommendation is scheduled to come before the Court for hearing beginning on December 21, 2009. It is anticipated that if the Board withdraws Ordering Clause No. 7 as proposed by QCC, the Court's hearing will be unnecessary.

On November 24, 2009, the Board issued an order shortening the time for responses to QCC's motion and requiring that responses be filed on or before November 30, 2009.

On November 25, 2009, Great Lakes filed a response to QCC's motion stating that while Great Lakes agrees with QCC that the Board should amend Ordering Clause No. 7, it does not agree that QCC's motion is the proper vehicle through which to grant such relief. Great Lakes argues that the proper procedure under which this relief should be sought is through an application for rehearing pursuant to 199 IAC 7.27. Great Lakes states that its application for rehearing was timely filed and has been fully briefed and that the Board should grant its application and modify the final order by withdrawing Ordering Clause No. 7.

Also on November 25, 2009, a response to QCC's motion was filed by The Farmers Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; and Dixon Telephone Company (hereinafter

“ILEC Group”). The ILEC Group states that it resists QCC’s motion because it is untimely and that the Board lacks the authority or jurisdiction to grant QCC’s new request for relief at this stage of the proceedings. The ILEC Group asserts that there is no procedural rule which would allow QCC to modify its claims for relief after the Board has issued a final order and the time for rehearing has expired.

Meanwhile, also on November 25, 2009, the FCC issued its “Second Order On Reconsideration” in the matter of Qwest Communications Corp. v. Farmers and Merchants Mutual Tele. Co., File No. EB-07-MD-001 (the FCC Order). In that docket, the FCC considered a case related to this one (FCC Order at ¶ 8, n. 36). Based upon the evidence presented to the FCC in that docket, the FCC concluded that when Farmers and Merchants Mutual Tele. Co. (Farmers), a local exchange carrier, entered into business arrangements with conference calling companies that were functionally identical to the arrangements between Great Lakes and other conference calling companies, the conference calling companies were not “customers” or “end users” within the meaning of the relevant tariffs and Farmers was not entitled to charge Qwest switched access charges under the terms of Farmers’ tariff. (FCC Order at ¶ 10.) The FCC Order appears to be based on substantially the same evidence as the Board considered in this docket and the FCC has independently made the same basic findings and reached the same conclusions as the Board.

Specifically, the FCC finds that Farmers structured its business arrangements pursuant to contracts, not the terms and conditions of the tariff, and therefore failed to establish a carrier/customer relationship under the tariff. (FCC Order at ¶ 11.) The Board found that Great Lakes (and the other LEC respondents in this docket) had entered into contracts with the conference calling companies that involved sharing of profits and losses, which “satisfies the Respondents’ definition of ‘partnership’ and supports the IXCs’ arguments that the [conference calling companies] in this case were acting as business partners rather than end users.” (Final Order at p. 33.)

Similarly, the FCC found that the business records maintained by the local exchange carrier did not indicate that the conference calling companies were purchasing end user access services pursuant to the carrier’s tariff. (FCC Order at ¶ 16.) This parallels the Board’s finding that the conference calling companies “did not actually subscribe to a billable tariffed service” and that the LEC respondents did not send monthly local exchange invoices to the conference calling companies and they did not bill the companies a federal USF charge, an end user common line charge, or for the telecommunications services they were allegedly subscribing to. (Final Order at 24-25.)

The FCC also rejected Farmers’ attempt to find refuge in the filed rate doctrine. (FCC Order at ¶¶ 20-21.) The Board made a parallel finding. (Final Order at p. 34.)

In conclusion, the FCC found that the conference calling companies were not “end users” within the meaning of Farmers’ tariff, so Farmers’ transport of communications traffic to them did not constitute “switched access” under the tariff. The FCC concluded that Farmers’ charges to Qwest for termination of conference calling company traffic was unjust, unreasonable, and in violation of law. (FCC Order at ¶ 26.) The Board made a parallel finding and conclusion when it said:

For the reasons discussed above, the Board finds that none of the [conference calling companies] associated with the Respondents were end users for purposes of the Respondents’ intrastate exchange access tariffs, none of the intrastate toll traffic associated with the [companies] terminated at an end user’s premises, and much of the intrastate toll traffic associated with the [companies] did not terminate in the Respondents’ certificated local exchange area. For each of these reasons, intrastate access charges did not apply to calls to the [companies] and should not have been billed to the IXCs for calls to numbers assigned to the [conference calling companies].

(Final Order at pp. 53-54.)

In summary, the FCC Order represents a finding that the conference calling companies were not end users within the meaning of the tariff and that the interstate access charges assessed by the LEC Respondents for calls to conference calling companies were invalid for all of the same reasons that their intrastate access bills were invalid. That is the substance of the Board’s Final Order in this matter and Qwest’s motion should be considered against the backdrop of the FCC’s parallel ruling.

As part of its case in this docket, QCC asked that the Board reclaim the respondents' telephone numbers that were not assigned to end users and cited to 47 C.F.R. § 52.15(i)"5" as the federal regulation that gives the Board the authority to take such an action. That regulation states:

The [North American Numbering Plan Administrator] and the Pooling Administrator shall abide by the state commission's determination to reclaim numbering resources if the state commission is satisfied that the service provider has not activated and commenced assignment to end users of their numbering resources within six months of receipt.

In its final order in the underlying proceeding, the Board determined that the conference calling companies were not end users and found that a fair reading of the appropriate federal regulations gives the Board the authority to determine that Great Lakes, which provides service solely to conference calling companies, had not activated and commenced assignment to end users of the numbering resources assigned to Great Lakes within six months of receipt. Accordingly, the Board adopted Ordering Clause No. 7, directing the NANPA and the Pooling Administrator to begin reclamation proceedings of all blocks of telephone numbers assigned to Great Lakes.

Great Lakes timely filed an application for reconsideration with the Board that includes a request for reconsideration of Ordering Clause No. 7. Great Lakes also sought and received a temporary restraining order preventing enforcement of Ordering Clause No. 7 and requested a preliminary injunction against enforcement of

the clause. That request for preliminary injunction was the subject of the report and recommendation previously described.

The issuance of the FCC Order on November 25 appears to remove one of the bases for the report and recommendation. As discussed previously in this order, on November 25, 2009, the FCC found that conference calling companies in situations like this case are not end users, changing the October 2, 2007, ruling and revising those conclusions. However, the interpretation of the FCC rules regarding the Board's authority over number reclamation continues to be contested and the issue of injunctive relief remains active before the Court.

There is no applicable procedural rule in Chapter 199 of the Iowa Administrative Code that clearly allows QCC to modify its claim for relief after the Board has issued a final order and the time for rehearing has expired. Nevertheless, the Court expects that the Board will rule on QCC's motion independently of the pending requests for reconsideration, since the Court delayed further injunction proceedings for the purpose of giving the Board sufficient time to rule on QCC's motion.<sup>3</sup>

The Board finds that it has authority to rule on QCC's motion at this time, by implicit delegation from the Court if by no other means, but recognizes the unusual factual circumstances that are involved in this case. The Board further finds that it

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<sup>3</sup> See *Great Lakes Comm. Corp., et al. vs. IUB, et al.*, Case No. C09-4085-DEO, "Order re: Report and Recommendation on Plaintiff's Motion for Preliminary Injunction," Document No. 84 (issued November 25, 2009).

has authority to adopt Ordering Clause No. 7, but it also has the option of requesting that the FCC consider and address the number reclamation matter. Further, the Board recognizes that litigating this issue in multiple forums is not efficient. Therefore, the Board will consider QCC's motion in conjunction with Great Lakes' application for reconsideration for the purpose of accelerating a final determination of this issue.

The Board issued its final order in Docket No. FCU-07-2 on September 21, 2009. On September 25, 2009, Great Lakes timely filed an application for rehearing, which included, among other things, a request to eliminate Ordering Clause No. 7 on the grounds that the Board exceeded its delegated authority and contradicted applicable federal law by authorizing the reclamation of Great Lakes' telephone numbers. Other applications for reconsideration were timely filed by the remaining respondents in this proceeding on September 30, 2009, and October 9, 2009. None of those respondents raised a specific issue with respect to Ordering Clause No. 7.

On October 9, 2009, the Board issued a scheduling order to address the multiple petitions. Iowa Code § 476.12 provides that when an application for rehearing is filed with the Board, the Board "shall either grant or refuse the application for rehearing within thirty days after the filing of the application or may give the interested parties notice and opportunity to be heard and after consideration of all facts, including those arising since the making of the order, abrogate or modify its order." (Emphasis added). In this case, the Board established a schedule to give

the parties notice and a coordinated opportunity to be heard regarding the applications, as required by statute. By granting the interested parties notice and opportunity to be heard, the Board chose the statutory alternative that did not require it to grant or refuse the applications for rehearing within 30 days of filing. Therefore, the Board will address Great Lakes' petition for rehearing solely with respect to Ordering Clause No. 7 at this time. All other issues raised in Great Lakes' petition, as well as the issues raised by the remaining respondents in their respective petitions, will be addressed in a subsequent order that will consider all of the facts and arguments.

In its application for rehearing, Great Lakes argues that the Board's authority over telephone number reclamation is limited to circumstances when there is a "clear and unquestionable showing that numbers have not been activated in a timely manner."<sup>4</sup> Great Lakes asserts that the Board's final order fails to make a determination that Great Lakes never activated its numbers, which Great Lakes claims is a threshold determination that must be made before reclamation may be commenced.<sup>5</sup> Great Lakes also states that the Board's decision erroneously rests on the determination that conference calling companies are not end users, which Great Lakes asserts is contrary to the FCC's decision in its October 2 Order.

In its motion, QCC states that in the course of the federal proceeding before Judge Zoss, Great Lakes argued that the proper procedure for the Board to take with

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<sup>4</sup> See Great Lakes Application for Rehearing, p. 25.

<sup>5</sup> Id.

respect to the reclamation of Great Lakes' numbers is to ask the FCC to conduct a "for cause audit" of Great Lakes' use of its numbers.<sup>6</sup> QCC states that a "for cause audit" would be an acceptable remedy in lieu of the direction for number reclamation and moves to withdraw its original request for reclamation and supplant it with a request for a "for cause audit."

The Board finds that a fair reading of the federal rules provides the Board with sufficient authority to order reclamation in this case. However, the Board recognizes the unusual factual circumstances in this case and concludes that QCC's request to supplant its request for number reclamation with a request for a "for cause audit" is an acceptable remedy. Therefore, the Board will grant QCC's motion and will also grant Great Lakes' request for reconsideration with respect to Ordering Clause No. 7. The Board hereby abrogates the directive of Ordering Clause No. 7 and will seek a for cause audit of Great Lakes numbering practices with the FCC as allowed by 47 C.F.R. § 52.15(k).

**IT IS THEREFORE ORDERED:**

1. The emergency motion to withdraw Ordering Clause No. 7 filed by Qwest Communications Corporation on November 23, 2009, is granted as described in this order.
2. The application for rehearing filed by Great Lakes Communications Corp. on September 25, 2009, is granted solely with respect to Ordering Clause

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<sup>6</sup> QCC Motion, p. 6; Proceeding before Judge Zoss, Tr. 193.

No. 7. All other issues raised in the application remain before the Board for a final determination.

3. Ordering Clause No. 7 of the Board's final order in Docket No. FCU-07-2, issued September 21, 2009, is withdrawn.

4. The Board will direct its staff to request that the Federal Communications Corporation initiate a "for cause audit" to investigate the use of telephone numbering resources assigned to Great Lakes Communications Corp., as authorized by 47 C.F.R. § 52.15(k).

**UTILITIES BOARD**

/s/ Robert B. Berntsen

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Darrell Hanson

Dated at Des Moines, Iowa, this 3<sup>rd</sup> day of December, 2009.