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EX PARTE

Electronic Filing via ECFS

June 17, 2010

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: WC Docket No. 07-135 -- Iowa Solution to Traffic Pumping

Dear Ms. Dortch:

The FCC has been wrestling with the traffic pumping issue for more than three years now, and reply comments in this docket were filed on January 16, 2008, almost two and a half years ago. There is common agreement that what is called "traffic pumping" -- the practice of some small ILECs and CLECs of partnering with what are called "Free Service Providers" to provide free or below cost competitive services that artificially drive up monopoly access traffic into exchanges with access rates set based on the assumption of low traffic volumes -- is contrary to the public interest (this overall agreement is not shared by those entities who engage in the practice of traffic pumping). However, there is considerable disagreement on just how to fix the problem.

In this regard, the attached Order Adopting Rules issued by the Iowa Utilities Board on June 7, 2010 is highly relevant.[1] In the Order the IUB enacted rules meant to deal meaningfully with traffic pumping. While these rules are tailored to the specifics of Iowa law, the basic principles can be applied to the interstate traffic pumping phenomenon as well.

The basic principle of the Order is that artificially pumped intrastate traffic, as the Iowa Board defines it, is not covered by the intrastate access tariffs of local exchange carriers. Essentially, if a "high volume access" situation arises in Iowa, the involved LEC must notify all affected IXCs that high volume access traffic is being sent over their networks. IXCs and LECs then are given the opportunity to negotiate a reasonable rate for the high volume traffic, which would result in an appropriate tariff filing. If no negotiated agreement is reached, the Board will prescribe a rate for the traffic based on the incremental costs of the LEC in processing the high volume access

[1] In Re: High Volume Access Service, Order Adopting Rules, State of Iowa, Department of Commerce, Utilities Board (Issued June 7, 2010) (Order), attached hereto as Attachment A.

traffic. During the period between the initiation of high volume access traffic and the effective date of the new tariff, the LEC's intrastate access tariff does not apply to the traffic.

While tailored for the unique needs of Iowa, the Iowa solution to traffic pumping is not radically different from an approach suggested by Qwest in an *ex parte* filing in this docket on April 25, 2008.[2] Qwest's proposed rule change would prohibit a LEC from assessing tariffed switched access charges on an IXC for traffic delivered to a LEC's "business partner." A "business partner" is defined as:

1. The LEC itself;

2. Any affiliate of the LEC; or

3. Any entity that pays the LEC no net compensation, or that receives net compensation from the LEC, in connection with the LEC's delivery of telecommunications traffic to the entity.

The rights of CLECs to contract with IXCs for the processing of traffic to or from a LEC business partner, and the rights of CLECs to recover their costs of providing service by charging their end-user customers or their business partners for service, are specifically preserved (an important caveat, as almost all current traffic pumping involves CLECs).

The Iowa Board Order is particularly important because it demonstrates that reasonable regulatory solutions to the traffic pumping problem are available and feasible. While the structural approach suggested in the attached *ex parte* presentation is not the only possible manner of solving traffic pumping on a long term basis, the adoption of similar rules by the Iowa Utilities Board indicates that at least one other regulatory authority believes that a solution that focuses on removing artificially stimulated traffic from the scope of traffic covered by the LECs' access tariffs is workable and in the public interest.

This *ex parte* is being filed electronically pursuant to 47 C.F.R. §§ 1.49(f) and 1.1206(b). Please contact me at 202.429.3120 if you have any questions.

Sincerely,

/s/ Melissa E. Newman

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[2] Letter from Melissa E. Newman to Marlene H. Dortch, April 25, 2008 in WC Docket No. 07-135. A copy of this *ex parte* filing is attached hereto as Attachment B for convenience.

Attachments

cc:
Sharon Gillett (Sharon.gillett@fcc.gov)
Donald Stockdale (Donald.stockdale@fcc.gov)
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ATTACHMENT A

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: HIGH VOLUME ACCESS SERVICE	DOCKET NO. RMU-2009-0009

ORDER ADOPTING RULES

(Issued June 7, 2010)

Pursuant to the authority of Iowa Code §§ 17A.4, 17A.7, and 476.95, the Utilities Board (Board) adopts the amendments attached hereto and incorporated by reference.

On September 18, 2009, the Board issued an order in Docket No. RMU-2009-0009, In re: High Volume Access Services, "Order Commencing Rule Making." In the rule making, the Board proposed to amend 199 IAC 22 to address High Volume Access Service (HVAS) and the effect HVAS can have on a local exchange carrier's (LEC's) revenues from intrastate switched access services.[1] In particular, these amendments are focused on situations in which an LEC's rates for intrastate access services are based, indirectly, on relatively low traffic volumes, but the LEC then experiences a relatively large and rapid increase in those volumes, resulting in a substantial increase in revenues without a matching increase in the total cost of providing access service. This can happen, for example, as a result of adding

[1] Intrastate switched access services are services of telephone utilities that provide the capability to deliver intrastate telecommunications services which originate with end users to interexchange carriers (IXCs) and the capability to deliver intrastate telecommunications services from IXCs to end users. 199 IAC 22.1(3).

an HVAS customer that offers conference bridges, chat lines, help desks, or other services that are based upon high volumes of incoming or outgoing interexchange calls. The result is an increase in the LEC's access service minutes, which leads in turn to a matching increase in the amount the LEC bills to interexchange carriers (IXCs) for switched access services. When this situation is actively pursued by the LEC, it is sometimes referred to as "access stimulation."

A "Notice of Intended Action" was published in the Iowa Administrative Bulletin at IAB Vol. XXXII, No. 8 (10/07/2009), p. 1022, as ARC 8227B. Written comments were filed on or before October 27, 2009, by the following participants: Iowa Telecommunications Association (ITA); Rural Iowa Independent Telephone Association (RIITA); Iowa Association of Municipal Utilities (IAMU); Reasnor Telephone Company (Reasnor); Aventure Communication Technology, LLC (Aventure); Greenway Communications, LLC (Greenway); Qwest Communications Corporation (QCC); AT&T Communications of the Midwest, Inc. (AT&T); MCImetro Access Transmission Services, LLC, d/b/a Verizon Access Transmission Services, and MCI Communications Services, Inc., d/b/a Verizon Business Services (collectively "Verizon"); Iowa Coalition of Access Payers[2] (ICAP); and the Consumer Advocate Division of the Department of Justice (Consumer Advocate). A public hearing to receive oral comments on the proposed amendments was held on December 8, 2009. On January 11, 2010, the Board issued an order allowing for

[2] The Iowa Coalition of Access Payers consists of Sprint Communications Corporation, LP; U.S. Cellular Corporation; T-Mobile Central, L.L.C.; and Level 3 Communications, LLC.

additional comments on the proposed rules. Additional comments were filed by Consumer Advocate, ITA, RIITA, QCC, AT&T, Verizon, ICAP, and two additional participants, XO Communications Services, Inc. (XO Communications), and McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services (PAETEC).

This order will summarize the comments received about the proposed rules and will explain any revisions made to the rules. Other editorial changes may be made by the Code Editor before publication. The final version of the adopted amendments will be available in the Iowa Administrative Bulletin. These amendments will become effective on August 4, 2010.

BACKGROUND

The Federal Communications Commission (FCC) has described access stimulation and the economic incentives for it under the federal system of rate regulation as follows:

> Oversimplifying somewhat, to establish their rates, rate-of-return carriers calculate a revenue requirement, which is intended to recover expenses plus a reasonable rate of return. Once the revenue requirement is determined, carriers propose prices for all interstate services, which, when multiplied by historical or projected demand, are targeted to equal the revenue requirement. If, after rates are set, actual demand and expenses differ from the estimated demand and expenses, the realized rate-of-return may be greater or less than the targeted rate of return. The limited information we have suggests that, in certain instances, some LECs are experiencing dramatic increases in demand for switched access services. If the average cost per minute falls as demand grows, the realized rates of return are likely

> to exceed the authorized rate of return and thus the tariffed rates become unjust and unreasonable at some point. It is well established that there is a large fixed cost to purchasing a local switch and that the marginal or incremental cost of increasing the capacity of a local switch is low (some contend that it is zero) and certainly less than the average cost per minute of the local switch. Thus, if the average revenue per minute remains constant as demand grows, but the average cost per minute falls (which occurs if the marginal cost per minute is less than the average cost per minute) then profits (or return) will rise. This principle is equally applicable to all LECs. Moreover, the cost of local switching increases incrementally, while the price for local switching is established based on average costs, which are significantly higher. As a result, most of the switch costs are recovered by the demand used to establish the local switching rate. Carriers offering tandem switching services would experience a similar effect for their tandem switching costs. Accordingly, when local switching demand increases significantly, a carrier's increased revenues generally will exceed any cost increases. As a result, a carriers' rate of return at some point is likely to exceed the maximum allowed rate of return, making the rates unjust and unreasonable.
>
> A similar effect to that associated with local switching would also occur in the transport segment of the exchange access network. As demand increases, the number of circuits needed for transmission will increase. Again, the incremental cost is lower than the average cost (although the disparity is likely not as great as in the local switching case), which would lead to the rates for transport becoming unreasonable at some point as demand increases.

In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135, "Notice of Proposed Rulemaking" at ¶¶ 14-15 (FCC October 2, 2007) (hereinafter the FCC Notice).

The system in Iowa is slightly different because the Board does not have rate regulation jurisdiction over a LEC's intrastate access charges to the same extent as

the FCC has over interstate access charges. Iowa Code § 476.11 gives the Board jurisdiction over the terms and procedures under which toll (or interexchange) communications are interchanged, but only after a written complaint is filed by one of the telephone companies involved. This complaint-based jurisdiction means the Board is unable to order individual LECs to file new tariffs for switched access service rates on its own initiative, as the FCC has proposed to do in the FCC Notice. Thus, while the Board is aware of the FCC Notice and has given it consideration when preparing this order, the Board is not proposing to adopt the same type of rules that the FCC has described.

Even in a reduced-regulation environment, the cost of filing an individual intrastate access service tariff for each LEC can be substantial. Filing costs are particularly important when those costs are being spread over a fairly small customer base, resulting in a relatively large cost per customer. In order to reduce that burden, the Board has adopted rules that allow associations of local exchange utilities to file intrastate access service tariffs. Non-rate-regulated local exchange utilities may then concur in the association tariff. See 199 IAC 22.14(2)(b)(1). Most small LECs have opted into the association tariff filed with the Board by ITA. The access rates contained in ITA's intrastate tariff have generally mirrored interstate rates filed by the National Exchange Carrier Association (NECA) with the FCC. However, when NECA began the process of reducing some of its interstate rates, ITA elected not to adopt the reduced rates in its intrastate tariff.

In July of 2007, several IXCs filed objections to rate changes proposed by ITA for its intrastate access tariff. After holding formal contested case proceedings on the proposed changes, the Board ordered certain of the rates in ITA's intrastate tariff to be set at the same level as NECA's current rates for those elements.[3] Those rates in ITA's intrastate tariff continue to be based on the NECA rates, which are supported by interstate costs. This has been a cost-effective method of setting intrastate rates in the ITA tariff, but it did not allow for the possible effect of HVAS.

All elements of association tariffs are subject to Board review and approval, pursuant to 199 IAC 22.14(2)(b)(2). These rules give the Board jurisdiction to address the HVAS situation as it arises under an association tariff. Because HVAS situations tend to be fact-sensitive and individualized, the Board has concluded that HVAS calls should not be billed for access services pursuant to an association tariff. Under the adopted rules, any LEC providing HVAS must file an individual tariff for that service (although it may continue to concur in an association tariff for all other access services).

To the extent an individual LEC opts to file an individual tariff for intrastate access services, either HVAS only or for all such services, the Board's rate jurisdiction is limited to the circumstances specified in § 476.11. Even for those situations, however, the Board proposed to adopt rules setting out the standards by which it will rule on the reasonableness of an individual LEC tariff if a complaint is

[3] In re: Iowa Telecommunications Association, Docket Nos. TF-07-125, TF-07-139, "Final Order" (May 30, 2008).

filed pursuant to § 476.11. To that end, the adopted rules specify certain procedures that will be required in order to ensure reasonable HVAS access rates, such as prohibiting the application of association access rates to HVAS traffic, a requirement to engage in good faith negotiations for intrastate access rates, and final Board approval of HVAS tariff provisions.

The adopted rules define an HVAS situation in terms of a rapid increase in access volumes (access growth of more than 100 percent in six months). For established LECs, this should be an effective test. The Board realizes that a new entrant's intrastate access billings are likely to exceed the HVAS threshold proposed in these rules even if the company is not engaged in true HVAS activities, simply because the company's normal intrastate access volumes are likely to be increasing rapidly (when measured on a percentage growth basis). It has generally been the Board's policy to issue a certificate of public convenience and necessity to a new entrant in the telecommunications industry in Iowa within six months of the date the new carrier plans to commence service to enable the company to apply for, and activate, new telephone numbers within the time permitted by the North American Numbering Plan. Under these adopted rules, a new entrant should provide notice to all affected carriers, pursuant to 199 IAC 22.14(2)"e," within the six-month period before it begins providing local exchange service. Under the same rule, any negotiations between the new entrant and interexchange utilities should conclude within 60 days. Therefore, a new entrant should be able to have an approved and

effective access tariff on file with the Board by the time it begins providing service in Iowa.

SUMMARY OF COMMENTS AND DESCRIPTION OF AMENDMENTS ADOPTED

Item 1

In Item 1 of the proposed rules, the Board included a new definition in 199 IAC 22.1(3) for high volume access services, based upon the effect a single customer, or group of similar customers, may have on a LEC's total access billings in a specified time frame. The proposal was that if a LEC's total access billings increase, or are expected to increase, by more than 100 percent in less than six months, there will be a presumption that an HVAS situation exists. The Board invited comment on whether this is an appropriate mechanism to identify HVAS situations and whether the proposed numerical thresholds are appropriate. The intent was to identify situations that represent a true HVAS without also including normal variations in access billings or typical levels of growth in access services.

The Board proposed the following definition of HVAS:

> "High Volume Access Services" (HVAS) is any service that results in an increase in total billings for intrastate exchange access for a local exchange utility in excess of 100 percent in less than six months. By way of illustration and not limitation, HVAS typically results in significant increases in interexchange call volumes and can include chat lines, conference bridges, call center operations, help desk provisioning, or similar operations. These services may be advertised to consumers as being free or for the cost of a long distance call. The call service operators often provide marketing activities for HVAS in exchange for direct

> payments, revenue sharing, concessions, or commissions from local service providers.

The Board received comments from several parties regarding the proposed threshold of 100 percent increase in less than six months as a means of identifying an HVAS situation. ITA, RIITA, IAMU, and Reasnor expressed concern that temporary, one-time spikes in toll traffic could trigger an HVAS proceeding. Greenway noted that a new entrant to the Iowa telecommunications market might be subject to an HVAS proceeding because its start-up operation could potentially see a 100 percent increase in less than six months of initiating service. Verizon and ICAP, however, argued that a 100 percent increase in six months is too high; they proposed a 25 percent increase in access billings as an identifier of an HVAS situation.

In its January 11, 2010, order allowing for additional comments, the Board asked whether the rules should preclude revenue sharing agreements as an alternative means to identify or discourage HVAS situations. Both XO Communications and PAETEC cautioned the Board against banning revenue sharing agreements stating that there are legitimate business arrangements that could be implicated under such a prohibition. Consumer Advocate agreed that a complete prohibition on revenue sharing agreements would be overbroad.

From this record it is clear that there is no single, accurate number for the threshold for an HVAS situation. Instead, there is a range of reasonable alternatives, as evidenced by comments saying 100 percent is too low and other comments saying is too high. The Board will implement the rules as proposed, with a 100

percent increase in less than six months threshold, which is within the range supported by the comments. If it becomes clear that this threshold should be changed, the Board will adjust it in a future rule making.

The Board finds that a blanket prohibition on revenue sharing agreements could result in unintended consequences in the form of prohibiting legitimate business arrangements (sales on commission, for example). The Board will not alter this rule to ban such agreements.

Item 2

Item 2 of the proposed rules addresses association tariffs and requires that such tariffs prohibit the application of association tariff rates to HVAS. The Board proposed the following amendment to paragraph 22.14(2)"d":

> (8) A provision prohibiting the application of association access service rates to HVAS traffic.

There was general support by the participants for the rule as proposed in Item 2. Verizon, however, suggested that further audit and accountability requirements are necessary to maintain compliance with the proposed rule. Verizon supports the adoption of a requirement that LECs provide annual certifications to the Board that they are not engaged in illegitimate traffic pumping.

The Board requested additional comments on the issue of LEC certifications in its January 11, 2010, order. In general, most LECs were opposed to certifications while some of the IXCs and ICAP were in favor of certifications. ICAP also argued

that any certification would need to be tied to an enforcement mechanism to be meaningful.

Consumer Advocate opposed certifications, stating that carriers involved in HVAS may be able to provide certifications by relying on their own interpretations of the rule. Consumer Advocate asserted that the continued vigilance of IXCs will be required to uncover and address HVAS abuses. RIITA argued that a certification mechanism would be another regulatory burden on small telephone companies.

The Board will adopt the rule under Item 2 as originally proposed. The additional comments have persuaded the Board that a certification process will not be an effective means of verifying compliance with the rule because certifications could be subject to individual interpretation and, therefore, would not be an effective mechanism. In addition, the Board is sensitive to adopting rules that increase the number of compliance filings on small utilities. The Board will monitor the effectiveness of these rules and will determine whether future modifications are necessary based on the experience gained from implementing these rules.

Item 3

In Item 3, the Board proposed new paragraph 22.14(2)"e" that would require LECs that are adding a new HVAS customer, or otherwise expecting or experiencing an HVAS situation, to notify the relevant IXCs of the telephone numbers involved and, for new customers, the expected date the HVAS service will be initiated. This notification will allow the IXCs to commence negotiations with the LEC regarding the terms and procedures for exchange of the HVAS toll traffic, with the possibility of

seeking a Board resolution pursuant to Iowa Code § 476.11, if necessary. If the parties are able to negotiate new tariff provisions for HVAS, then this notice and negotiation period may also provide time for filing the agreed-upon tariff with the Board, prior to initiation of service. This timing is important; the LEC will have no access rate to apply to HVAS traffic until its individual HVAS tariff is accepted for filing and has become effective.

The proposed rule also provides that if the Board has to resolve the matter in § 476.11 proceedings, the access rates for toll traffic to the HVAS telephone numbers may be based on the incremental cost of providing the service, not including any marketing or other payments made to the HVAS customer. In order to accommodate the potential uncertainty associated with projected HVAS traffic volumes, the rule allows for the use of rate bands that will vary with different traffic levels, presumably with lower rates for higher volumes of HVAS traffic.

The Board proposed to amend subrule 22.14(2) by inserting the following new paragraph:

> e. A local exchange utility that is adding a new HVAS customer or otherwise reasonably anticipates an HVAS situation shall notify interexchange utilities of the situation, the telephone numbers that will be assigned to the HVAS customer (if applicable), and the expected date service to the HVAS customer will be initiated, if applicable. Notice should be sent to each interexchange utility that paid for intrastate access services from the local exchange carrier in the preceding 12 months, by a method calculated to provide adequate notice. Any interexchange utility may request negotiations concerning the access rates applicable to calls to or from the HVAS customer.

> A local exchange utility that experiences an increase in intrastate access billings that qualifies as an HVAS situation, but did not add a new HVAS customer or otherwise anticipate the situation, shall notify interexchange utilities of the HVAS situation at the earliest reasonable opportunity, as described in the preceding paragraph. Any interexchange utility may request negotiations concerning whether the local exchange utility's access rates, as a whole or for HVAS services only, should be changed to reflect the increased access traffic.
>
> When a utility requests negotiations concerning intrastate access services, the parties shall negotiate in good faith to achieve reasonable terms and procedures for the exchange of traffic. No access charges shall apply to the HVAS traffic until an access tariff for HVAS is accepted for filing by the board and has become effective. At any time that any party believes negotiations will not be successful, any party may file a written complaint with the Board pursuant to section 476.11. In any such proceeding, the Board will consider setting the rate for access services for HVAS traffic based upon the incremental cost of providing HVAS service, although any other relevant evidence may also be considered. The incremental cost will not include marketing or other payments made to HVAS customers. The resulting rates for access services may include a range of rates based upon the volume of access traffic or other relevant factors.

Several participants provided comments on this proposed rule. ICAP asked that the notice requirements to an IXC of an HVAS situation, be expanded to include several additional types of carriers, such as wireless carriers, carriers providing underlying services for Voice over Internet Protocol (VoIP) services, and LECs authorized to provide service in the same exchange. The Board agrees and will revise the adopted rule to include "any carrier with whom the local exchange carrier exchanged traffic in the preceding 12 months, and all other local exchange carriers authorized to provide service in the subject to the first paragraph of 199 IAC 22.1(e)."

ICAP also recommended that the Board and Consumer Advocate be notified of an HVAS situation involving negotiations between carriers and the filing of a proposed tariff. The Board does not find that it is necessary to notify the Board or Consumer Advocate prior to the commencement of HVAS negotiations since the Board would not be a party to those negotiations and Consumer Advocate would not normally be a party either. However, if the negotiations are successful and an HVAS tariff is filed, the Board and Consumer Advocate would receive notice of such a filing pursuant to the current rules governing the filing of tariffs. Alternatively, if the negotiations fail, the Board and Consumer Advocate would also receive notice if the parties seek Board resolution of the HVAS dispute pursuant to Iowa Code § 476.11. The Board will not revise the proposed rule to include this requirement.

RIITA expressed concern that large carriers might ignore attempts by smaller carriers to enter negotiations over an HVAS situation. RIITA recommended that small carriers be allowed to file their HVAS tariffs after they provide notice. RIITA argues that if a carrier objects to an HVAS tariff, the standard process for challenging a tariff should be followed, including the collection of the proposed rate on a temporary basis, subject to refund if the proposed rate is not approved.

However, QCC and Consumer Advocate recommended instead that the rules establish a 60-day timeframe for completing the HVAS negotiations and suggested that if negotiations are not successful, the parties could then petition the Board for an expedited proceeding. The Board finds this recommendation to be reasonable, as it strikes a balance between the need for time for negotiations and the need to prevent

undue delay. Accordingly, the Board has incorporated a 60-day negotiation period in the proposed rule.

In its January 11, 2010, order, the Board requested additional comments regarding a means by which new entrants could provide effective notice of an HVAS situation to the IXC community. AT&T and Consumer Advocate suggested that new entrants publish notice on the Board's Web site. Consumer Advocate also suggested that a new entrant could provide notice to all IXCs that are billed by Iowa Network Services (INS). ICAP suggested that a new entrant use records that are kept by the Board to provide notice to affected carriers. Verizon asserted that new entrants should also notify wireless carriers, providers of Voice over Internet Protocol (VoIP) services, and all other LECs providing service in the service area.

The Board finds that these suggestions do not provide a viable proposal for notifying IXCs of an HVAS situation. The Board will not allow other entities to post information on the Board's Web site for purposes of legal notice. If an issue was to arise with a particular posting and the Board's processes were somehow implicated, the Board's ability to resolve the issue would be compromised. The proposals relating to identifying the entities to be notified are also rejected. INS records, Board records, and similar sources may be useful in identifying these entities, but it is not clear that any of them will be adequate in all situations.

The first paragraph of the proposed rule provides that "notice shall be sent ... by a method calculated to provide adequate notice." Because the burden of providing adequate notice is the responsibility of the party proposing to provide

HVAS services, the Board will not add a more specific notice mechanism to the proposed rules at this time, but will consider the issue on a case-by-case basis.

The Board will also add a provision to the proposed rule whereby an IXC could file a complaint against a LEC if it believes the LEC is engaged in activity that raises HVAS issues, but the activity does not meet the "100 percent increase in less than six months" threshold. The Board will add the following paragraph to the adopted rule to provide for this situation:

> Any interexchange utility that believes a situation has occurred or is occurring that does not specifically meet the HVAS threshold requirements defined in subrule 22.1(3), but which raises the same general concerns and issues as an HVAS situation, may file a complaint with the board, pursuant to these rules.

Item 4

Item 4 is a proposed amendment to rule 22.20(5) that would allow the Board to revoke a LEC's certificate of public convenience and necessity, issued pursuant to Iowa Code § 476.29, for failure to address an HVAS situation as required by Board rules. This would be in addition to any other remedies or penalties that may be available to the Board in a particular proceeding, such as civil penalties. The Board does not intend to revoke a LEC's certificate for failure to properly forecast unexpected growth in access billings, but a LEC that is adding a conference calling customer or a customer that offers help desk services, for example, and fails to notify the IXCs as required by the rules may find its certificate at risk.

The Board proposed the following amendment to subrule 22.20(5):

> Certificate revocation. Any five subscribers or potential subscribers, an interexchange utility, or consumer advocate upon filing a sworn statement showing a generalized pattern of inadequate telephone service or facilities may petition the board to begin formal certificate revocation proceedings against a local exchange utility. For the purposes of this rule, inadequate telephone service or facilities may include the failure to treat high-volume access (HVAS) charges in a manner consistent with the requirements of 199—2.14(2)"e"(476). While similar in nature to a complaint filed under rule 199—6.2(476), a petition under this rule shall be addressed by the board under the following procedure and not the procedure found in 199—Chapter 6.

Several of the LECs expressed concern about the certificate revocation provision in the HVAS rules. ITA stated that the proposed rule conflicts with the intent of Iowa Code § 476.29(9), arguing that the Legislature tied revocation of certificates to inadequate service or facilities. According to ITA, the HVAS issue ties to appropriate rates, not service or facilities. IAMU stated that the proposed remedy, certificate revocation, is worse than the HVAS problem.

AT&T, on the other hand, argued that certificate revocation may be an appropriate solution to an HVAS problem and Verizon stated that the Board already possesses the authority to revoke certificates pursuant to Iowa Code § 476.29. Verizon stated that the proposed change to subrule 22.20(5) should be expressed as recognition of the Board's established revocation authority and not the creation of a new remedy.

The Board agrees with AT&T and Verizon that the Board is vested with the authority to revoke certificates pursuant to Iowa Code § 476.29. The Board also finds

that engaging in HVAS in an abusive manner is a serious problem for the telecommunications industry in Iowa.[4] Parties contemplating the provision of HVAS services should be notified of the potential consequences. Therefore, the Board disagrees with ITA and IAMU and will express its established authority to initiate certificate revocation proceedings against a LEC.

Both Verizon and ICAP also asked for additional audit and accountability requirements to ensure compliance with the proposed HVAS rules. However, abuses in the switched access regime may be largely driven by the magnitude of interstate revenues, which typically represent larger sums than the intrastate revenue streams under the Board's regulatory authority. Recently, the FCC has indicated its intent to begin the process of access charge reform through the National Broadband Plan (NBP).[5] The Board will not create additional accountability requirements in these rules at this time, but may do so if appropriate in the future.

The Board will adopt the amendments as discussed in this order. The amendments will become effective on August 4, 2010.

IT IS THEREFORE ORDERED:

1. The rule making identified as Docket No. RMU-2009-0009 is adopted.

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[4] See In re: Qwest Communications Corp, vs. Superior Tel. Coop, "Final Decision and Order," Docket No. FCU-07-2 (September 21, 2009); and In the Matter of Qwest Communications Corp. vs. Farmers and Merchants Mutual Tel. Co., FCC File No. EB-07-MD-001, "Second Order on Reconsideration" (November 25, 2009).

[5] See, "Connecting America: The National Broadband Plan," issued by the FCC on March 16, 2010. The National Broadband Plan can be downloaded at http://download.broadband.gov/plan/national-broadband-plan.pdf.

2. The Executive Secretary is directed to submit for publication in the Iowa Administrative Bulletin an "Adopted and Filed" notice in the form attached to and incorporated by reference in this order.

UTILITIES BOARD

/s/ Robert B. Berntsen

/s/ Krista K. Tanner

/s/ Darrell Hanson

ATTEST:

/s/ Joan Conrad
Executive Secretary

Dated at Des Moines, Iowa, this 7th day of June 2010.

UTILITIES DIVISION [199]

Adopted and Filed

Pursuant to Iowa Code sections 17A.4, 17A.7, and 476.95, the Utilities Board (Board) gives notice that on June 7, 2010, the Board issued an order in Docket No. RMU-2009-0009, In re: High Volume Access Services [199 IAC 22], "Order Adopting Rules," by which the Board adopted amendments to 199 IAC 22. The adopted rules address High Volume Access Service (HVAS) and the effect HVAS can have on a local exchange carrier's (LEC's) revenues from intrastate switched access services.[1] In particular, these amendments are focused on situations in which a LEC's rates for intrastate access services are based, indirectly, on relatively low traffic volumes, but the LEC then experiences a relatively large and rapid increase in those volumes, resulting in a substantial increase in revenues without a matching increase in the total cost of providing access service.

A Notice of Intended Action was published in the Iowa Administrative Bulletin at IAB Vol. XXXII, No. 8 (10/07/2009) p. 1022, as ARC 8227B. Written comments were filed on or before October 27, 2009, by the following participants: Iowa Telecommunications Association (ITA); Rural Iowa Independent Telephone Association (RIITA); Iowa Association of Municipal Utilities (IAMU); Reasnor Telephone Company (Reasnor); Aventure Communication Technology, LLC (Aventure); Greenway Communications,

[1] Intrastate access services are services of telephone utilities that provide the capability to deliver intrastate telecommunications services which originate with end users to interexchange carriers (IXCs) and the capability to deliver intrastate telecommunications services from IXCs to end users. 199 IAC 22.1(3).

LLC (Greenway); Qwest Communications Corporation (QCC); AT&T Communications of the Midwest, Inc. (AT&T); MCImetro Access Transmission Services, LLC, d/b/a Verizon Access Transmission Services, and MCI Communications Services, Inc., d/b/a Verizon Business Services (collectively "Verizon"); Iowa Coalition of Access Payers[2] (ICAP); and the Consumer Advocate Division of the Department of Justice (Consumer Advocate).

A public hearing to receive oral comments on the proposed amendments was held on December 8, 2009. On January 11, 2010, the Board issued an order allowing for additional comments on the proposed rules and proposals presented at the oral comment hearing. Additional written comments were filed by Consumer Advocate, ITA, RIITA, QCC, AT&T, Verizon, ICAP, and two additional participants, XO Communications Services, Inc. (XO Communications), and McLeodUSA Telecommunications Services, Inc., d/b/a PAETEC Business Services (PAETEC).

A copy of the Board's order and a summary of the oral and written comments, along with staff recommendations, are available through the Board's electronic filing system, which can be accessed at http://efs.iowa.gov. Based on the comments submitted in this proceeding, the Board determined that the proposed amendments to 199 IAC 22 should be adopted with some modifications, as described in the order adopting rules.

The Board does not find it necessary to propose a separate waiver provision in the rule making. The Board's general waiver provision in 199 IAC 1.3 is applicable to these amendments.

[2] The Iowa Coalition of Access Payers consists of Sprint Communications Corporation, LP; U.S. Cellular Corporation; T-Mobile Central, L.L.C.; and Level 3 Communications, LLC.

These amendments are intended to implement Iowa Code sections 17A.4, 476.1, 476.2, 476.4, 476.5, 476.11, and 476.95.

The following amendments are adopted.

Item 1. Adopt the following **new** definition of "High-volume access service (HVAS)" in subrule **22.1(3)**:

"High-volume access service (HVAS)" is any service that results in an increase in total billings for intrastate exchange access for a local exchange utility in excess of 100 percent in less than six months. By way of illustration and not limitation, HVAS typically results in significant increases in interexchange call volumes and can include chat lines, conference bridges, call center operations, help desk provisioning, or similar operations. These services may be advertised to consumers as being free or for the cost of a long-distance call. The call service operators often provide marketing activities for HVAS in exchange for direct payments, revenue sharing, concessions, or commissions from local service providers.

Item 2. Adopt the following **new** subparagraph **22.14(2)"d"(8)**:

(8) A provision prohibiting the application of association access service rates to HVAS traffic.

Item 3. Adopt the following **new** paragraph **22.14(2)"e"**:

e. A local exchange utility that is adding a new HVAS customer or otherwise reasonably anticipates an HVAS situation shall ~~notify interexchange utilities~~ provide notice of the situation, the telephone numbers that will be assigned to the HVAS customer (if applicable), and the expected date service to the HVAS customer will be initiated, if applicable. Notice should be sent to each interexchange utility that paid for

intrastate access services from the local exchange carrier in the preceding 12 months~~,~~; to any carrier with whom the local exchange carrier exchanged traffic in the preceding 12 months; and all other local exchange carriers authorized to provide service in the subject exchange; by a method calculated to provide adequate notice. Any interexchange utility may request negotiations concerning the access rates applicable to calls to or from the HVAS customer.

Any interexchange utility that believes a situation has occurred or is occurring that does not specifically meet the HVAS threshold requirements defined in subrule 22.1(3), but which raises the same general concerns and issues as an HVAS situation, may file a complaint with the board pursuant to these rules.

A local exchange utility that experiences an increase in intrastate access billings that qualifies as an HVAS situation, but did not add a new HVAS customer or otherwise anticipate the situation, shall notify interexchange utilities of the HVAS situation at the earliest reasonable opportunity, as described in the preceding paragraph. Any interexchange utility may request negotiations concerning whether the local exchange utility's access rates, as a whole or for HVAS only, should be changed to reflect the increased access traffic.

When a utility requests negotiations concerning intrastate access services, the parties shall negotiate in good faith to achieve reasonable terms and procedures for the exchange of traffic. No access charges shall apply to the HVAS traffic until an access tariff for HVAS is accepted for filing by the board and has become effective. At any time that any party believes negotiations will not be successful, any party may file a written complaint with the board pursuant to Iowa Code section 476.11. In any such

proceeding, the board will consider setting the rate for access services for HVAS traffic based upon the incremental cost of providing HVAS, although any other relevant evidence may also be considered. The incremental cost will not include marketing or other payments made to HVAS customers. The resulting rates for access services may include a range of rates based upon the volume of access traffic or other relevant factors. Any interexchange carrier that believes a situation has occurred or is occurring that does not specifically meet the HVAS threshold requirements defined in subrule 22.1(3), but which raises the same general concerns and issues as an HVAS situation, may file a complaint with the board.

Item 4. Amend subrule 22.20(5), introductory paragraph, as follows:

22.20(5) Certificate revocation. Any five subscribers or potential subscribers, an interexchange utility, or consumer advocate upon filing a sworn statement showing a generalized pattern of inadequate telephone service or facilities may petition the board to begin formal certificate revocation proceedings against a local exchange utility. For the purposes of this rule, inadequate telephone service or facilities may include the failure to bill high-volume intrastate access (HVAS) charges in a manner consistent with the requirements of 199 IAC 22.14. While similar in nature to a complaint filed under rule 199—6.2(476), a petition under this rule shall be addressed by the board under the following procedure and not the procedure found in 199—Chapter 6.

June 7, 2010

/s/ Robert B. Berntsen
Robert B. Berntsen
Chair

ATTACHMENT B

Melissa E. Newman
Vice President – Federal Regulatory
Qwest Communications International, Inc.

607 14th Street NW
Suite 950
Washington, DC 20007
202.429.3120

EX PARTE

Electronic Filing via ECFS

April 25, 2008

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

Re: *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68

In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135

Dear Ms. Dortch:

On April 24, 2008, Andy Crain, Bob McKenna, Shirley Bloomfield, Melissa Newman and Lynn Starr, all of Qwest, and Russ Hanser, representing Qwest, met with Dana Shaffer, Deena Shetler, Randy Clarke, Chris Barnekov, Jay Atkinson, Victoria Goldberg, Doug Slotten, Lynne Engledow, Al Lewis and Marcus Maher of the Wireline Competition Bureau to discuss the above-captioned proceedings.

The attached documents were used as a basis for the discussion.

Please contact me at 202.429.3120 if you have any questions.

Sincerely,

/s/ Melissa E. Newman

Attachments

Copy via email to:
Dana Shaffer
Deena Shetler
Randy Clarke
Chris Barnekov
Jay Atkinson
Victoria Goldberg
Doug Slotten
Lynne Engledow
Al Lewis
Marcus Maher

RECIPROCAL COMPENSATION FOR ISP-BOUND TRAFFIC

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic

CC Docket Nos. 96-98 and 99-68

Qwest *ex parte* presentation
April 24, 2008

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WORLDCOM REMAND ORDER

- In the *WorldCom* remand order, the DC Circuit Court recognized that a legal basis for bill and keep for ISP-bound traffic can be established.
- The Court expressly declined to review other legal theories that could have supported the Commission's decision, other than whether Section 251(g) created a carve-out from reciprocal compensation for issues that arose after the adoption of the Act.
- Core requests that the Commission return retroactively to a regulatory structure that it has repeatedly declared to be contrary to the public interest.
  - There is no legal basis for the Commission to reverse its findings in this record.

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THIS PROCEEDING IS GOVERNED BY THE FCC'S FINDINGS AND CONCLUSIONS

- The FCC has already analyzed the record and reached a number of conclusions which are not challenged.
  - "[T]he application of a CPNP regime, such as reciprocal compensation, to ISP-bound traffic undermines the operation of competitive markets." Para 71.
  - Reciprocal compensation for ISP-bound traffic has "created incentives for inefficient entry of LECs intent on serving ISPs exclusively and not offering viable local telephone competition, as Congress intended to facilitate with the 1996 Act." Para 21.
  - Reciprocal compensation for ISP-bound traffic "has created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access regime." Para 21.
  - "We are concerned, however, that intercarrier payments for ISP-bound traffic have created severe market distortions." Para 76.
  - "We are convinced that viable, long-term competition among efficient providers of local exchange and exchange access services cannot be sustained where the intercarrier compensation regime does not reward efficiency and may produce retail rates that do not reflect the costs of the services provided." Para 71.
  - "There is convincing evidence in the record that at least some carriers have targeted ISPs as customers merely to take advantage of these intercarrier payments." Para 2.

THESE CONCLUSIONS WERE REAFFIRMED BY THE COMMISSION AND THE COURT

- In the Core forbearance proceeding, the Commission held: "Core does not challenge the Commission's conclusion that rate caps help avoid arbitrage and market distortions that otherwise would result from the availability of reciprocal compensation for ISP-bound traffic." 19 FCC Rcd 20179, para 18

- In affirming the Core decision, the DC Court of appeals found that: "Core offers no ground for concluding that the FCC's [economic] analysis is unreasonable." *(In re: Core Communications, Inc.)* 455 F. 3d 267, 279 (DC Cir. 2006).

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RECIPROCAL COMPENSATION FOR ISP-BOUND TRAFFIC CREATES ECONOMIC DISTORTIONS

- Assessing reciprocal compensation on ISP-bound traffic enables CLECs and ISPs to offer services that are paid for by someone other than the customer/cost causer.

- The Commission has recognized that the distortions are extreme:
  - CLECs terminating 18 times more traffic than originating.
  - One CLEC terminating 40 times more traffic than originating.
  - CLECs actively seeking ISPs as customers in order to collect ISP reciprocal compensation.
  - CLECs organized for sole purpose of serving ISPs.

- Assessing reciprocal compensation on ISP-bound traffic provides an artificial subsidy to dial-up and creates a disincentive for migration to broadband.

THE PROBLEM PERSISTS

- Qwest delivered the following ISP-bound minutes to CLECs
  - 2005: 61,050,635,531
  - 2006: 50,157,670,907
  - 2007: 37,014,863,156
- If reciprocal compensation at voice levels is reinstated, this trend will likely be reversed.

THE COMMISSION HAS FOUR VIABLE OPTIONS

- Option 1: The Commission can rule that Section 251(b)(5) does not apply to ISP-bound calls because they are not local.
  - Verizon May 17, 2004 *ex parte* filing explains this option in detail.

- Option 2: The Commission can rule that the reciprocal compensation is not justified on ISP-bound calls because the costs are not caused by the "originating" carrier.

- Option 3: The Commission can adopt specific rules for ISP-bound calls under the reciprocal compensation sections of the Act.

- Option 4: The Commission can forbear from the reciprocal compensation provisions of the Act (specifically, Section 252(d)(2)(A)(i)) and preserve its rules governing ISP traffic.

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OPTION 2: FIND THAT RECIPROCAL COMPENSATION IS NOT JUSTIFIED ON ISP-BOUND CALLS

- Section 252(d)(2)(A)(i) applies to costs that are "associated with the transport and termination" of carrying calls "that originate on the network facilities of the other carrier."

- The costs associated with an ISP-bound call are not "associated with" the transport and termination of the call. They are caused by the ISP, which is actively soliciting traffic and is compensated for the traffic that it processes.

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OPTION 3: ADOPT SPECIFIC RULES FOR ISP-BOUND CALLS UNDER THE RECIPROCAL COMPENSATION SECTIONS OF THE ACT

- Given the findings on the record, the Commission can adopt specific rules for ISP-bound traffic that avoid the economic dislocations that would be caused by the Core approach.
- Bill and keep is expressly permitted by the Act and can be applied on an interim basis to only ISP traffic.
- Or the Commission can ratify what it has done, that is, specific reciprocal compensation prices for ISP traffic.
- Section 251(i) preserves jurisdiction pursuant to Section 201.

OPTION 4: FORBEAR FROM SECTION 252(d)(2)(A)(i)

- The Commission can forbear from applying the reciprocal compensation rules to ISP-bound traffic.

- Forbearance would allow the Commission to adopt rules applicable to ISP-bound traffic under Sections 201 and 202.

- The forbearance criteria are clearly met:
  - Reciprocal compensation for ISP-bound traffic is not necessary to ensure reasonable and non-discriminatory rates—in fact, Core's proposal would ensure the opposite.
  - Reciprocal compensation for ISP-bound traffic is not necessary to protect consumers.
  - Eliminating reciprocal compensation for ISP-bound traffic is clearly in the public interest, as the Commission has already found.

ACCESS STIMULATION

Establishing Just and Reasonable Rates for Local Exchange Carriers

WC Docket No. 07-135

Qwest *ex parte* presentation
April 24, 2008

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ACCESS STIMULATION HARMS CONSUMERS

- Rural LEC rates are set based on expectation that traffic volumes will be relatively low.
  - As Commission recognized in *Qwest v. Farmers*, these rates become unreasonably high when traffic volumes skyrocket.
- Access stimulation is inefficient because it divorces cost causation from payment responsibility.
  - Costs associated with free conference calls are not borne by the callers (who pay only the long-distance charge), but rather by IXCs (which must deliver the traffic) and their other end users.
  - As with any externality, this leads to inefficient pricing and use of the free calling services.
  - Divorcing cost causation from payment discourages efficient investment and impedes competition.

ANY SOLUTION MUST ADDRESS CLECs

- Access stimulation traffic is rapidly shifting from ILECs to CLECs, some owned by rural ILECs.
  - The FCC has curbed most ILEC abuse.
  - One year ago, 80% of access stimulation minutes were delivered to rural ILECs; now just 20% are ILEC-bound.
  - Total access stimulation traffic has not decreased.

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NO EVIDENCE OF MARKET-BASED SOLUTION

- Rules for rural CLEC access charges don't limit access stimulation.
  - Not regulated by specific rate-of-return prescriptions.
    - But still subject to statutory "just and reasonable" rate requirements.
  - Rates benchmarked to rural ILEC or to NECA rate.
    - But not subject to NECA sliding scale that reduces settlements as traffic increases.
  - Not required to file regular tariffs.
    - But still get benefit of filed-rate doctrine and "deemed lawful" rules.
- No evidence that market-based solutions are practical.
  - Agreements not feasible given filed-rate doctrine, obligation to deliver traffic, and rate-averaging obligations.
  - Access stimulation violates sound economic principles.
  - If agreements exist, no evidence of what they contain.
    - No agreements in FCC record.
    - Not filed with Iowa Board, as required.
  - No evidence of how CLECs are meeting nondiscrimination obligations.

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SOLUTIONS

- The access stimulation problem can be addressed either:
  - by controlling rates, or
  - by forcing cost-causers to bear their costs.

- Qwest's comments and prior *ex partes* have focused largely on rate-control solutions involving re-filing triggers and certifications. Qwest continues to support this approach.

- Qwest also supports a second solution: Eliminating the externality by forcing cost-causers to bear their own costs.

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RESTRUCTURING INCENTIVES: A NEW SOLUTION

- A LEC may not apply switched access charges to traffic that is terminated to (or originated by) an entity that is the LEC's "business partner."
  - "Business partner" is defined as a user of LEC telecommunications service that receives more net compensation from the LEC in connection with the traffic than it pays the LEC for the related telecommunications services.

- Clarify that where a LEC claims to deliver traffic to its own affiliate or to itself, it is not providing switched access. (This is meant to prevent efforts to evade "business partner" classification.)

- CLECs will still have the ability to recover costs via
  - switched access charges assessed via contract on IXCs, and
  - revenues received from "business partners".

BENEFITS OF A CONDUCT-BASED SOLUTION

- Simple and mostly self-enforcing.
- Deals equally with ILECs and CLECs.
  - No solution can be viable if it does not address CLEC access stimulation schemes.
- Gets to the root of the problem: uneconomic behavior abusing the regulatory process.
- Applies only to those engaged in access stimulation.
- Does not eliminate or modify the rural CLEC exemption.
- Does not overrule the *Jefferson Telephone* decision.
- Does not further regulate CLEC rate levels.
- Does not require modification of the Commission's interpretation of "deemed lawful."

CONDUCT-BASED OPTIONS

- Option A: It is unlawful for a LEC to apply its tariffed switched access charges to "business partner" traffic.
- Option B: Service to a LEC "business partner" shall not be covered by a LEC switched access tariff.
- Neither option would require a CLEC to file a new tariff.
- As noted above, neither option deprives a CLEC of the opportunity to recover costs.

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OPTION A: PROPOSED RULE

Rule 61.xx

(a) It shall be unreasonable and unlawful for a LEC to apply tariffed interstate switched access charges to an IXC in connection with the LEC's carriage of traffic from the IXC to the LEC's own business partner.

(b) For purposes of this section, the term "business partner" shall include each of the following:

(1) The LEC itself;

(2) Any affiliate of the LEC; or

(3) Any entity that pays the LEC no net compensation, or that receives net compensation from the LEC, in connection with the LEC's delivery of telecommunications traffic to the entity.

(c) For purposes of this section, all payments exchanged between a LEC and an entity, in cash or in kind, and including any offsets, shall be considered to have been made "in connection with the LEC's carriage of traffic" to the entity except where the LEC can demonstrate that such payments were made as consideration for a separate service unrelated to the LEC's provision of local service or exchange access to the entity.

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OPTION B: PROPOSED RULE

Rule 61.xx

(a) No LEC tariff for carrier's carrier access charges filed pursuant to Section 69.5(b) of this Chapter shall apply to traffic in connection with the LEC's carriage of interstate traffic from an IXC to the LEC's own business partner.

(b) For purposes of this section, the term "business partner" shall include each of the following:

(1) The LEC itself;

(2) Any affiliate of the LEC; or

(3) Any entity that pays the LEC no net compensation, or that receives net compensation from the LEC, in connection with the LEC's delivery of telecommunications traffic to the entity.

(c) For purposes of this section, all payments exchanged between a LEC and an entity, in cash or in kind, and including any offsets, shall be considered to have been made "in connection with the LEC's carriage of traffic" to the entity except where the LEC can demonstrate that such payments were made as consideration for a separate service unrelated to the LEC's provision of local service or exchange access to the entity.

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