TARIFF ISSUES

I. Whether the Respondents Violated the Terms of Their Access Tariffs When They Charged Terminating Switched Access Fees for the Intrastate Toll Traffic at Issue.

The IXCs assert that the Respondents' intrastate access services tariffs do not allow them to charge terminating switched access fees for any of the traffic to the telephone numbers assigned to the FCSCs. (QCC Initial Brief, pp. 16-17). The IXCs and Consumer Advocate request that the Board order the Respondents to refund to the IXCs all of the intrastate charges that were paid and credit the IXCs for all charges that were not paid. (Id. at 107; Sprint Initial Brief, p. 45; AT&T Initial Brief, p. 36; Consumer Advocate Initial Brief, pp. 4-5).

Most of the Respondents concur in the language of the ITA Tariff for switched access service for intrastate traffic, which incorporates many terms from the interstate access tariff filed with the FCC. (QCC Complaint, p. 12). In fact, all of the Respondents' access tariffs have adopted the terms, conditions, and definitions in the NECA interstate access tariff with respect to their intrastate switched access service.[5] Therefore, the Board will review the language used for interstate purposes in conjunction with the Respondents' intrastate tariffs and will consequently make

[5] See Exhibit 3, ITA Tariff No. 1, Section 1.1 ("The regulations, rates and charges applicable to the provision of the Carrier Common Line, Switched Access and Special Access Services, and other miscellaneous services, hereinafter referred to collectively as service(s), provided by the Local Exchange Utility, herein after referred to as the Company, to Intrastate Customers, hereinafter referred to as IC's, are the same as those filed in the Exchange Carrier Association Tariff F.C.C. No. 5 with the exceptions listed herein"). (Emphasis added.) No relevant exceptions are listed.

reference to the NECA tariff. The Board's analysis, however, is limited to the intrastate application of that language.

The NECA interstate access tariff outlines the provision of switched access service by the LEC to an end user as follows:

> Switched Access Service, which is available to customers for their use in furnishing their services to end users, provides a two-point communications path between a customer designated premises and an end user's premises. It provides for the use of common terminating, switching, and trunking facilities and for the use of common subscriber plant of the Telephone Company. **Switched Access Service provides for the ability to originate calls from an end user's premises to a customer designated premises, and to terminate calls from a customer designated premises to an end user's premises in the LATA where it is provided.**

(Exhibit 35, Section 6.1, emphasis added).

This provision identifies three requirements relevant to this proceeding that must be met in order for intrastate access charges to be applied to toll traffic:

1. Calls must be delivered to an end user of the LEC's local exchange tariffs;

2. Calls must terminate at the end user's premises; and

3. Calls must terminate in the LEC's certificated local exchange area.

The Board emphasizes, and it is not disputed, that all three of these requirements must be met before a local exchange carrier can assess switched access charges to intrastate toll traffic directed to a particular telephone number.

Even though failure to meet just one of these requirements prohibits the Respondents from assessing switched access charges, the Board will apply the facts of this case to all three requirements, whether the Respondents meet the requirements or not.

The IXCs argue that the FCSC conferencing traffic associated with all eight Respondents in this case failed to meet the first two requirements and that Farmers-Riceville, Superior, Great Lakes, Aventure, Interstate, and Reasnor failed to meet the third requirement because they terminated traffic in exchanges where they do not have authorization to provide service pursuant to Iowa Code § 476.29. (QCC Initial Brief, pp. 4-5; AT&T Initial Brief, pp. 11, 21-22; Sprint Initial Brief, p. 11).

All of the Respondents argue that they entered into special service agreements with FCSCs whereby those companies became customers of the individual LECs, located certain equipment in the LECs' central offices, and provided marketing services to generate toll traffic to the LECs' exchanges. (Tr. 1835-38, 1886-87, 1986-90, 2181-82). The Respondents assert that in exchange for those marketing services, the LECs provided local exchange services and agreed to pay a marketing fee based upon the terminating toll traffic that was generated. (<u>Id.</u>). The Respondents contend that these relationships are permitted under their tariffs and existing law. (<u>Id.</u>).

A. Whether the FCSCs are End User Customers of the Respondents.

The primary question regarding the alleged tariff violations is whether the FCSCs are considered end users as defined by the Respondents' tariffs. If the FCSCs are not end users, then the intrastate toll traffic sent to the LECs and terminated to the FCSCs is not subject to switched access charges.

The NECA tariff outlines the provision of access service by the LEC to the end user as follows:

> The Telephone Company will provide End User Access Service (End User Access) **to end users who obtain local exchange service from the Telephone Company under its general and/or local exchange tariffs.**

(Exhibit 523, Section 4, emphasis added). This condition must be met if an entity is to be considered an end user under the Respondents' switched access tariffs.

1. Whether the FCSCs subscribed to services of the Respondents' access or local exchange tariffs.

IXCs' Position

The IXCs assert that the FCSCs did not subscribe to the services of the Respondents' access tariff as is required by the language of the tariff. (QCC Initial Brief, p. 18). In particular, QCC argues that none of the Respondents charged or expected payment for local exchange service and therefore the FCSCs could not have subscribed to service. (Id. at 20-21). QCC states that none of the Respondents issued a timely invoice for local exchange service to a FCSC and that despite having relationships with more than 30 FCSCs, none of the Respondents issued an invoice for services until 2007, when four of the Respondents issued backdated invoices after the initiation of this proceeding. (Id. at 22). QCC alleges that some Respondents also attempted to retroactively amend their agreements with the FCSCs, in an attempt to restate the arrangement in a manner more favorable to their case.[6] (Id. at 29-31). The amendments were drafted to give the appearance they were executed long before they were actually created. (Id.).

QCC asserts that six of the Respondents claim they netted the charges for local exchange service against the amounts the Respondents paid to the FCSCs.[7] According to QCC, there is no documentary evidence in the record to support that claim. (QCC Initial Brief, p. 25). QCC claims that if netting had taken place, the Respondents' accounting records would have shown it, but there are no documents in the record that suggest any of the eight Respondents actually engaged in a financial netting process. (Id.).

Respondents' Position

The Respondents contend that the FCSCs paid for local service, but that the FCSCs were billed in non-standard ways. (ILEC Group[8] Initial Brief, pp. 22-23; Reasnor Initial Brief, pp. 10-13; Aventure Initial Brief, p. 3). The Respondents claim

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[6] The Board considered additional detailed evidence on this issue found in the confidential record in this case, specifically at Confidential Exhibits 49 and 1356, and Tr. 2056, 2060-61, 2073-74, 2078-80.
[7] Qwest Initial Brief, p. 25, stating that only Aventure and Reasnor claim not to have netted local exchange payments. However, Aventure states on page 5 of its initial brief that in some instances, Aventure used the concept of netting.
[8] The ILEC Group consists of 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.

that charges for local services were factored into the negotiated marketing fees with the FCSCs. (Id.). The Respondents assert that their failure to bill for local services does not mean that the FCSCs were not local service customers. (Id.). According to the Respondents, when a customer receives local service from a LEC, the customer is required to pay the tariffed rate for those services, but payment need not be in cash; payment can be made through an offset or bartering. (ILEC Group Initial Brief, pp. 22-23).

The Respondents assert that the backdating of bills is a normal business practice and is allowed by Board rule 199 IAC 22.4(3)"k," which allows a utility to back bill a customer for under-charges for a period not to exceed five years. (Id. at 33-40). The Respondents also state that it is a legitimate practice for two parties to agree to an effective date for a contract that is earlier than the date the contract is executed. (Id.). As such, the Respondents claim that the backdating of the bills and contract amendments in this case was legitimate and was not deceptive, as QCC contends. (Id.).

Some of the Respondents point to the terms of two contracts between FCSCs and the LECs to demonstrate that the FCSCs subscribed to the LECs' tariffed services. (Id. at 20). These Respondents contend that throughout the first contract, the FCSC is referred to as "Customer" and that the contract specifically states that the LEC agrees to provide the customer with certain telecommunications services and those services shall be subject to the terms and conditions of the LEC's tariffs.

(Id.). These Respondents state that the second contract requires that the LEC provide local service to the FCSC and that the FCSC will be the LEC's sole customer of record for those services. (Id. at 20). The Respondents argue that the language of these contracts indicates that the Respondents always considered the FCSCs to be end user customers. (Id.).

The Respondents also argue that they are within their rights to provide local exchange service to FCSCs outside the standard terms of their tariffs. (See e.g., Aventure Initial Brief, p. 3). Generally, the Respondents assert that when the FCSCs signed contracts with the Respondents, they effectively entered their names upon the records of the LECs and subscribed to tariffed services. (Id., ILEC Group Initial Brief, pp. 22-24).

Some of the Respondents acknowledge that they have made no attempt to collect payments from the FCSCs for the local services they allegedly provided. (ILEC Group Initial Brief, pp. 22-24). They state that their lack of action in collecting payment is due to the fact they were unlikely to receive payment from the FCSCs and these Respondents state that they do not want to engage in additional litigation with little or no prospect of benefit. (Id.).

Aventure specifically responds to the allegation that the FCSCs associated with Aventure did not subscribe to local service by stating that it entered into written agreements with FCSCs and paid them a marketing fee from the access charges it received for terminating calls. (Aventure Initial Brief, pp. 5, 12). Aventure states that under those agreements, Aventure permitted its FCSC customers to co-locate conference bridges and Voice-over Internet Protocol (VoIP) gateways at Aventure's central office in Salix, Iowa. (Id. at 2-3). Aventure states that it billed the FCSCs $5 per line and that while it has not been paid by its FCSC customers, Aventure contends that it expects to be paid and has paid sales tax on those receivables. (Id. at 3, Exhibits 625 -26). Aventure states that it has reported the unpaid revenue to the FCC for purposes of USF payment. (Aventure Reply Brief, p. 4).

Analysis

Based on the evidence in the record, the Board finds that the FCSCs did not subscribe to the services in the Respondents' access and local exchange tariffs and therefore are not end users of the Respondents. Typically, when an end user customer obtains local exchange service, that service includes subscription to the access tariffs. This is because the access tariffs include charges that are billed on the local exchange invoice, including an end user common line (EUCL) charge and a federal USF charge. Therefore, when a customer pays a LEC's invoice, the customer proves that it has obtained local exchange service and that it has subscribed for access service. As long as that customer is not a carrier, that customer would be considered an end user under the access tariff.

The Board finds that the lack of timely, legitimate billing for tariffed services by the Respondents demonstrates that the FCSCs did not actually subscribe to a billable tariffed service. Moreover, there is convincing evidence in the record that the

Respondents did not intend to bill the FCSCs for any services under their tariffs, as required in order for intrastate access charges to apply.[9] Specifically, the Respondents did not comply with the billing requirements of their tariffs when they did not send the FCSCs monthly local exchange invoices (Exhibit 1355), they did not bill the FCSCs the EUCL on any invoices (Exhibit 1355), they did not bill the FCSCs a federal USF charge on any invoices (Exhibit 1355),[10] and they did not bill the FCSCs for ISDN Line Ports, ISDN BRI arrangements, or ISDN PRI arrangements on any invoices (Exhibit 1355).

Net Billing

The Respondents' "net billing" argument is not supported by the evidence. The Respondents claimed that the FCSCs subscribed to and were billed for tariffed services, but the FCSCs were billed in non-standard ways, such as net billing the cost for local service against the negotiated marketing fee. (ILEC Group Initial Brief, pp. 22-23; Reasnor Initial Brief, pp. 10-13; Aventure Initial Brief, p. 3). Despite the substantial amount of supporting documents, exhibits, and workpapers that have been produced in this case, there is no written evidence supporting the Respondents' assertion that they netted charges to the FCSCs. The Respondents were unable to produce invoices or any written correspondence to support their claim that the cost of subscribing to the Respondents' tariffs was offset by the FCSCs' marketing fees (or

[9] The Board has considered additional detailed evidence on this issue in the confidential portion of the record at Confidential Exhibit 1, Confidential Tr. 963, 1373-74, 1901-04.
[10] The Board notes that three of the Respondents are exempt from this billing requirement. (Confidential Tr. 67).

any other fees). (Tr. 1893). As a practical matter, had net billing occurred or been contemplated when these business arrangements were entered into, at least one of the Respondents' accounting records would reflect it. Without exception, they do not.

With respect to Aventure's assertion that it specifically charged the FCSCs associated with Aventure a $5 per line, per month fee, QCC provided convincing evidence that the invoices created by Aventure were never sent to the FCSCs. (QCC Initial Brief, pp. 40-41). Instead, they were sent to an intermediary broker and Aventure did not receive payment on any of those invoices. (Tr. 2292-93; Exhibit 1381). Further, there is no evidence that Aventure took any action to attempt to collect on the invoices. It is not clear when Aventure sent the invoices for this untariffed rate, but they were not legitimate bills for which Aventure expected to be paid.[11]

Backdating

QCC argues that after it filed its complaint with the Board in February 2007, and filed the complaint against Farmers & Merchants with the FCC in May 2007, Reasnor, Farmers & Merchants, Dixon, and Interstate created backdated contract amendments and invoices in an attempt to conceal the fact that the conferencing companies were not local exchange customers or end users. (QCC Initial Brief, p. 27; Confidential Exhibit 1356, Tab 6). QCC contends that these LECs attempted to change the terms of their contracts with the FCSCs in a deceptive effort to make it

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[11] The Board has considered additional detailed evidence on this point found in the confidential portion of the record at Confidential Exhibit 1381.

appear that the FCSCs had always been treated as end users that subscribed to the local exchange tariffs. (QCC Initial Brief, p. 27).

The Respondents' offer of amended agreements and backdated bills was unpersuasive and disturbing. The Respondents were unable to offer any evidence that the contract amendments reflected the original intent of the parties; rather, there is evidence that the backdated contract amendments altered (or attempted to alter) the terms of the contracts, in some cases years after the relationship terminated. For example, some of the FCSCs refused to execute the amendments, despite the pleas of the Respondents, because they would have changed the original deal to the disadvantage of the FCSCs. (Id. at 30; Confidential Exhibit 1356). Instead of supporting the Respondents' case, the backdated bills and contract amendments used by the Respondents in this case are evidence against them. They show that the Respondents knew they had not served the FCSCs as required by their tariffs, leading to this belated attempt to create new arrangements and hide the deficiencies of the previous arrangements.[12]

QCC's claims that the backdated bills and amendments were created to deceive QCC and federal and state regulators are particularly troubling. The FCC issued an order on October 2, 2007, in QCC's complaint against Farmers &

[12] The Board has considered additional detailed evidence on this issue found in the confidential portion of the record found in Confidential Exhibit 1356.

Merchants that is relevant to this question.[13] As part of that order, the FCC determined that the FCSCs doing business with Farmers & Merchants were considered end users as that term is defined in Farmers & Merchants' tariff.[14] In that October 2 order, the FCC concluded that since the FCSCs were end users of Farmers & Merchants, then access charges for the termination of interstate traffic to the FCSCs were legally permissible, even if they were not contemplated at the time the tariffs were approved.[15]

QCC contends that the FCC reached this conclusion in part by relying on backdated documents that were submitted to the FCC during that proceeding. (QCC Initial Brief, p. 31). The FCC agreed with QCC's contention when it issued an order on January 29, 2008,[16] agreeing to reconsider its October 2 decision after QCC identified evidence of the relationship between Farmers & Merchants and FCSCs that "should have been produced in the underlying proceeding."[17] Specifically, the FCC stated:

> When we ruled on whether Farmers properly charged Qwest terminating access to the conference calling companies, a key issue was whether those companies were "end users." That question, in turn, depended on whether the companies were customers that "subscribed to the services offered under [Farmers'] tariff." We found

[13] *In the Matter of Qwest Communications Corp. vs. Farmers & Merchants*, "Memorandum Opinion and Order," FCC 07-175, File No. EB-07-MD-001 (released October 2, 2007) (hereinafter referred to as "October 2 Order").
[14] October 2 Order, ¶ 35.
[15] Id.
[16] *In the Matter of Qwest Communications Corp. vs. Farmers & Merchants*, "Order on Reconsideration," FCC 08-29, File No. EB-07-MD-001 (released January 29, 2008) (hereinafter referred to as "January 29 Order").
[17] See January 29 Order, ¶ 7.

> that the conference calling companies did subscribe to the services under Farmers' tariff based on Farmers' representation that they purchased interstate End User Access Service and paid the federal subscriber line charge. Qwest now calls that representation into question, however, by pointing out that Farmers' invoices to, and agreements with, the conference calling companies were backdated. In fact, Qwest suggests that this backdating may have occurred after the legality of Farmers' access charges was called into question.

(See January 29 Order, ¶ 7).

While the FCC has not made a final ruling in the Farmers & Merchants proceeding, it is clear that the FCC's order granting reconsideration hinges on a review of the documents that were backdated and "bear no indication that they were backdated." (Id. at ¶ 9).

The Respondents' assertion that backdating bills is a common industry practice that is sanctioned by the Board is inapplicable here. Proper backdating of invoices generally requires identifying the date when the invoice was issued and includes the dates for which the back billing is effective. The result is a clear record showing what happened and why. This was not the way backdating was implemented by any of the eight Respondents in this case. Here, the Respondents' invoices gave the appearance of having been created contemporaneously with the provision of service, despite having been created much later, sometimes years after the service was rendered.

The Board views this practice as an attempt by the four Respondents engaging in backdating to manufacture evidence, after the fact, to make the transaction look like something that was not contemplated by the Respondents or the FCSCs when they first entered into these arrangements. The effort reflects badly on those Respondents and the credibility of their cases.

Special Contract Arrangements

The Respondents also contend that it is an acceptable practice to provide local exchange service to the FCSCs outside the standard terms of their tariffs through special contract arrangements. (Aventure Initial Brief, p. 3; ILEC Group Initial Brief, pp. 22-24). Aventure, for example, says it offered "Special Contract Arrangements" to "Customers." However, Aventure's tariff limits the availability of special contracts to "customers," and the definition of the term "customer" in Aventure's access tariff provides that "in most cases, the Customer is an Interexchange Carrier utilizing the Company's Switched or Dedicated Access services described in this tariff to reach its End User customer(s)." (Exhibit 612). Moreover, the definition of "end user" in Aventure's interstate access tariff provides that "in many contexts, the End User is the customer of an Interexchange Carrier who in turn uses the Company's Switched or Dedicated Access services." (Id.).

Thus, the language of Aventure's access tariff only contemplates Aventure's offering of special contract arrangements to its IXC customers, who in turn use Aventure's switched access service to reach end users. Aventure's interpretation of this language as allowing it to make special contract arrangements with FCSCs ignores the distinction between the IXCs and end users.

Contracts as Subscriptions

Other Respondents assert that it does not matter whether the FCSCs were billed for service or whether a LEC charged or collected a specific fee or tax. (ILEC Group, pp. 22-24). Those Respondents argue that when the FCSCs signed contracts with the LECs, they entered their names upon the records of the LECs and therefore subscribed to service. (Id.; Aventure Initial Brief, p. 3). These Respondents look to the FCC's October 2, 2007, order to support this argument. (Id.). In the October 2 Order, the FCC stated that "[t]he record shows that the conference calling companies did subscribe, *i.e.*, enter their names for, Farmers' tariffed services." (Exhibit 703, ¶ 38; October 2 Order). However, in reaching its determination, the FCC assumed that in addition to subscribing for service, the FCSCs also paid for that service. (Exhibit 703, ¶ 38, pp. 15-16). The FCC emphasized the need for payment of services in its January 29 Order granting reconsideration:

> When we ruled on whether Farmers properly charged Qwest terminating access to the conference calling companies, a key issue was whether those companies were 'end users.' That question, in turn, depended on whether the companies were customers that 'subscribe[d] to the services offered under [Farmers'] tariff.' We found that the conference calling companies did subscribe to services under Farmer's tariff based on Farmers' representation that they purchased interstate End User Access Service **and paid the federal subscriber line charge.**

(See, January 29 Order, ¶ 7; emphasis added).

The Respondents' assertion that payment for service is not a necessary component of status as an end user is contradicted by this language. Part of subscription to services includes being billed for and paying for that service. The Respondents' assertion to the contrary is not persuasive.

Partners or Customers

The IXCs argue that the FCSCs are actually business partners of the Respondents and not end users. (QCC Initial Brief, pp. 41-45). The Respondents respond that the FCSCs are not partners because the primary indicator of a partnership is the right to share profits and the obligation to share losses. (ILEC Group Initial Brief, p. 24). It is not disputed in this case that the Respondents shared a portion of their access revenues with the FCSCs, pursuant to contract.

The Respondents assert that in *AT&T vs. Jefferson*,[18] the FCC determined that the sharing of access revenue with customers is an acceptable practice and does not automatically make the FCSCs business partners, as the IXCs suggest. In *Jefferson*, however, the FCC emphasized the narrowness of its holding, stating that

> [w]e find simply that, based on the specific facts and arguments presented here, AT&T has failed to demonstrate that Jefferson violated its duty as a common carrier or section 202(a) by entering into an access revenue-sharing agreement with an end-user information provider. We express no view on whether a different record could have demonstrated that the revenue-sharing agreement at issue in this complaint (or other revenue-sharing agreements between LECs and end user

[18] *In the Matter of AT&T Corp. v. Jefferson Tel. Co.*, "Memorandum Opinion and Order," 16 F.C.C.R. 16130, 16 FCC Rcd. 16130, FCC 01-243 (rel. August 31, 2001).

> customers) ran afoul of sections 201(b), 202(a), or other statutory or regulatory requirements.

(*Jefferson*, ¶ 16).

Like the FCC, this Board will not find that sharing access revenue with true end users is always reasonable or unreasonable. That is a case-specific determination to be made based on the record of each case. Here, the Board finds that the total amount of access revenue that the Respondents kept for themselves was sufficient to cover the Respondents' total costs of terminating calls plus some amount of profit. If that were not the case, there would be no incentive for a LEC to enter into a contract with an FCSC. Thus, the Board concludes that the FCSCs and the LECs were sharing profits.

The record also shows that some agreements entered into between the Respondents and FCSCs provide for the Respondents sharing access revenues with FCSCs only if the IXCs paid the Respondents' access invoices. (ILEC Group Initial Brief, pp. 24-25; Tr. 1142-43; Exhibit 915). If a LEC was not paid by the IXC for terminating calls to an FCSC, that LEC would not recover its costs of terminating those calls and the LEC and FCSC would each experience a loss of profit. Since the FCSCs contracted to share the profits and the losses with the Respondents, this arrangement satisfies the Respondents' definition of "partnership" and supports the IXCs' argument that the FCSCs in this case were acting as business partners rather than end users.

Filed Tariff Doctrine

Finally, the Respondents argue that the filed tariff doctrine should allow them to go back and apply the terms of the tariff to the FCSCs, but this argument misses the point. The FCSCs were not end users of the Respondents under the tariffs and therefore the tariffs do not apply to these calls.

Conclusion

For the reasons outlined above, the Board finds that the FCSCs are not end users of the Respondents for purposes of the intrastate access tariffs. The FCSCs did not subscribe to the Respondents' access or local service tariffs and the FCSCs did not expect to pay for and did not pay for any of the Respondents' local exchange service offerings. The record does not support the Respondents' argument that they net billed the FCSCs for tariffed services and the Respondents' offer of amended contract agreements and backdated bills was unpersuasive, to say the least. The Board also finds that the Respondents treated the FCSCs more like business partners than end user customers by sharing profits and losses with them.

Moreover, the Board finds that the acts of some of the Respondents regarding backdating of bills and contract amendments to make the contracts and bills look like they were older was an abuse of a generally-accepted practice. The backdated documents were created to conceal truths from the FCC and this Board, calling into question the credibility of all of the testimony and supporting documents attributed to those Respondents.

2. Whether Calls Terminated at the End User's Premises.

As stated earlier, the tariff provision regarding switched access service identifies three requirements that must be met in order for intrastate access charges to be applied to toll traffic. The three requirements are as follows:

1. Calls must be delivered to an end user of the LEC's local exchange tariffs;
2. Calls must terminate at the end user's premises; and
3. Calls must terminate in the LEC's certificated local exchange area.

It is not disputed that all three of these requirements must be met before a local exchange carrier can assess switched access charges to intrastate toll traffic.

In the previous section, the Board determined that the FCSCs in this case were not end users of the Respondents, so the Respondents did not comply with the requirements of the tariff for the application of intrastate access charges. However, the Board will also consider whether the Respondents complied with the remaining requirements for the application of intrastate access charges.

IXC's Position

The Respondents' intrastate access tariff requires that the calls must terminate at an end user's premises. (Exhibit 35; NECA No. 5 § 6.1). QCC points out that the Respondents' intrastate access tariff employs the following definition of the term "premises":

> The term "premises" denotes a building or buildings on contiguous property (except Railroad Right-of-Way, etc.) not separated by a public highway.

(Exhibit 35 (NECA tariff at § 2.6); QCC Initial Brief, p. 46).

QCC asserts that all of the FCSCs' conferencing equipment was located in the Respondents' central offices; none of the FCSCs owned, leased, or had any recognizable property rights in those offices or sole control of equipment in those buildings. (QCC Initial Brief, p. 47; Confidential Transcript, pp. 870-71). QCC argues that without recognizable property rights, the FCSCs cannot meet the definition of the term "premises" as set forth in the Respondents' intrastate access tariffs. (QCC Initial Brief, pp. 47-48; Tr. 864-65).

Respondents' Position

The Respondents argue that the tariff language defines customer premise equipment as being either "terminal equipment located on the customer's premise owned by the customer or owned by the telephone utility or some other supplier and leased to the customer" or "equipment located on the customer's premise owned by the customer." (ILEC Group Initial Brief, p. 26). The Respondents assert that QCC and the IXCs are wrongfully claiming that the space that is the customer premise must be owned or leased by the customer. (Id.). In addition, the Respondents point to the definition of "premises" contained in the companies' local exchange tariffs:

> The space occupied by an individual customer in a building, in adjoining buildings, or on contiguous property, including property separated only by public thoroughfare, a railroad right-of-way, or natural barrier.

(Id. at 27; Exhibit 38). The Respondents argue that this language supports their assertion that there is not an ownership or lease requirement by the customer in order to define a customer's premise; it is sufficient if the customer occupies the space. (ILEC Group Initial Brief, p. 27).

The Respondents also make the same net billing argument that they made regarding the subscription for tariffed services. Specifically, the Respondents claim that the FCSCs effectively made lease payments for their space, which were netted out of the payments from the Respondents to the FCSCs.

Analysis

The Respondents generally rely upon the definitions of premises and customer premises equipment found in their local exchange tariffs. However, this complaint specifically pertains to whether IXCs must pay switched access charges on intrastate toll traffic that is delivered to the FCSCs. Therefore, the terms of the switched access tariffs govern and the terms and conditions from the Respondents' local exchange tariffs are not directly applicable in this case.

The requirement of an end user's premises is found in the term "Switched Access Service":

> Switched Access Service, which is available to customers for their use in furnishing their services to end users, provides a two-point communications path between a customer designated premises and an end-user's premises. It provides for the use of common terminating, switching, and trunking facilities and for the use of common subscriber plant of the Telephone Company. Switched Access Service provides for the ability to

> originate calls from an end user's premises to a customer designated premises, and to terminate calls from a customer designated premises to an end-user's premises.

(Exhibit 523 § 6.1). This definition describes two different premises involved in the provision of switched access service: the customer (IXC) designated premises and the end user's premises. There is no dispute in this case about the meaning of the term "customer designated premises" as being the demarcation between the telephone company and the IXC customer. (Exhibit 523 § 6.1.3).

The term "end user's premises," while not specifically defined in the tariff, generally denotes a building or buildings that is owned, leased, or otherwise controlled by the end user. (Exhibit 35 (NECA Tariff § 2.6.1)). "End user's premises" could also mean a collocation arrangement where the end user pays for floor space or power in a LEC's central office and has exclusive access or control over that space. (Tr. 541). Generally, in such a collocation arrangement, the end user's equipment or facilities are separate from that of the LEC and are under the control or ownership of the end user; for example, the equipment is locked in a caged area where the end user is the only entity with access to the area. There is no evidence in the record demonstrating that the FCSCs paid any of the Respondents for collocation or that the equipment was segregated in the manner described in any of the Respondents' facilities.

As discussed in the previous section, the evidence in this case supports the conclusion that the services provided by the Respondents to the FCSCs were provided at no charge and without expectation of payment and that the FCSCs had a business partnership with the Respondents. This conclusion is further supported by the fact that it was the Respondents who possessed and controlled the space where the FCSCs' equipment was housed and where the traffic terminated. Based on the evidence in this record, the conferencing traffic terminated at the Respondents' premises, rather than at an end user's premises.

The Board is not persuaded by the Respondents' assertion that the FCSCs' ownership of the actual conference call bridges and other equipment satisfies this criterion. This issue is whether the FCSCs own or control the premises, defined by the tariff as the buildings and not the equipment, and there is insufficient evidence in the record to conclude that they did.

With respect to the Respondents' net billing argument, that is, that the lease payments for the space were netted out of the payments from the Respondents to the FCSCs, the Respondents have not identified any persuasive documentary evidence in the record to support that argument. Specifically, there are no timely written agreements reflecting the alleged netting arrangements, there are no accounting records to support the netting argument, and there are no monthly billings that document any lease payments were actually netted against the FCSCs' share of the intrastate access revenues. The FCSCs' share was a percentage of the revenues; it is not credible to believe that the lease payments were intended to vary with the revenues when the amount of space was fixed.

For the reasons identified above, the Board finds that the intrastate toll traffic was not terminated at the end user's premises in a manner that satisfies the requirements of the Respondents' access service tariffs.

3. Whether the Toll Traffic Terminated Within the Respondents' Certificated Local Exchange Areas.

Having previously discussed the first two requirements for the assessment of terminating access charges, the third provision of switched access service identified in the Respondents' tariffs and relevant to this case is that terminating access charges can only be assessed for calls that terminate in the Respondents' certificated local exchange service area. The Respondents are not all equally affected by this issue; the facts vary from one company to another. This section will address each variation of facts separately.

a. Whether International, Calling Card, and Prerecorded Playback Calls Terminate Within the Respondents' Certificated Local Exchange Area.

IXCs' Position

QCC asserts that Aventure, Farmers–Riceville, Great Lakes, Interstate, and Superior had relationships with FCSCs that included one or more of the following kinds of calls: international, calling card, and prerecorded playback calls. (QCC Initial Brief, p. 49). QCC and AT&T contend that these kinds of calls did not terminate in these Respondents' local exchange areas. (Id.; AT&T Initial Brief, p. 25). QCC claims that the FCC has generally used an "end-to-end" analysis to determine where a call terminates concluding that termination of a call occurs in the geographic location of the called party, not at points along the route of the call.[19] (Id. at 47). The IXCs argue that with these types of calls, the termination is at a location away from the Respondents' certificated local exchange area and therefore, intrastate terminating access charges do not apply to these calls. (Id. at 47-48).

Respondents' Position

The Respondents contend that the international calls at issue are similar to a call-forwarding scenario. (ILEC Group Initial Brief, p. 30). The Respondents assert that in a call-forwarding situation, there is no question that access charges apply; there is an originating and terminating access charge applicable to the first call and an originating and terminating access charge applicable to the second call. (Id.). For these international calls, the calling party dials a number provided by the FCSC, then enters the international telephone number of the called party. (Id. at 29-30). In these international calls, the Respondents claim that the FCSC takes all responsibility for originating the second call over the Internet to the international location and the IXC's portion of the call terminates at the FCSC, which is located in the Respondents' certificated local exchange area. (Id. at 30).

Calling card calls and calls to prerecorded playback systems are processed in a similar manner. The calling party dials the FCSC's telephone number, then dials additional numbers to specify the desired final endpoint.

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[19] October 2 Order, citing Bell Atlantic Tel. Cos.v. FCC, 206 F.3d 1 (D.C. Cir. 2000).

Analysis

The record supports the conclusion that the international, calling card, and prerecorded playback calls described in this complaint were not subject to intrastate terminating access charges because the calls did not terminate in the Respondents' exchanges. The record reflects that Aventure, Farmers-Riceville, Great Lakes, Interstate, and Superior had business relationships with FCSCs that helped to complete these types of calls. The calls were delivered to a router in one of these Respondents' central offices. The calls were then converted from a traditional voice call to a VoIP call and the call would be forwarded to its ultimate destination, far from these Respondents' local service areas and often to an international location. (QCC Initial Brief, p. 49).

The end-to-end analysis used by the FCC requires that termination occurs in the geographic location of the called party and does not depend on the intermediate route or intermediate events that occur in the process of the call going to its final destination.[20] This analysis applies to the international and calling card calls at issue in this case. In each case, the called party is not the FCSC; it is a person or business located somewhere other than the Respondents' exchanges. Therefore, these calls are not subject to intrastate terminating switched access charges in Iowa.

[20] See AT&T Co. v. FCC, 454 F.3d 329 (D.C. Cir. 2006).