

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

FILED/ACCEPTED

NOV - 9 2010

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Tekstar Communications, Inc.)
)
F.C.C. Tariff No. 2)

Tariff F.C.C. No. 2
Transmittal No. 3

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~~Federal Communications Commission
Bureau / Office~~

APPLICATION FOR REVIEW

Sprint Communications Company LP ("Sprint") pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, applies for Commission review of the Wireline Competition Bureau's action allowing the above-captioned tariff to take effect. See Public Notice DA 10-1917, released October 6, 2010 ("Public Notice").

In its Petition to Suspend or Reject the above-captioned Tekstar tariff, Sprint pointed out that Tekstar's tariff impermissibly cross-referenced its state tariff for local exchange services in clear violation of Section 61.74(a) of the Commission's rules, 47 C.F.R. § 61.74(a). Petition at 2. Nevertheless, the Bureau issued the Public Notice denying Sprint's Petition and permitted Tekstar's tariff to become effective. The Bureau's action was clearly erroneous.

It is well established that an agency "has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face" and "will reject a tariff that conflicts with a statute, agency regulation or order, or with a rate fixed in a contract sanctioned by statute." *Associated Press v. FCC*, 448 F.2d 1095 (D.C. Cir. 1971). The Commission and the Bureau have commonly rejected tariffs that meet this standard. See, e.g., *Western Union Telegraph Company*, Mimeo No. 36130, Common Carrier Bureau,

released September 22, 1980 (“Western Union Order”)¹ and *GTE Telephone Operating Companies*, DA 95-2477, Common Carrier Bureau, released December 14, 1995.

Moreover, the Commission and the Common Carrier Bureau have rejected tariffs that impermissibly cross reference other documents. *See, e.g., Southwestern Bell Telephone Co.*, 4 FCC Rcd 2624 (Com. Car. Bur. 1988) and *Lincoln Telephone and Telegraph Co.*, 78 FCC 2d 1219 (1980). Tariffs that impermissibly cross-reference other documents have been found illegal in formal complaint proceedings as well, *see Bell Atlantic v. Global NAPS*, 15 FCC Rcd 5997 (2000), *aff’d sub nom. Global NAPS v. FCC*, 247 F.3d 252 (D.C. Cir. 2001), *cert. den.* 534 U.S. 1079 (2002).

The reason why cross-referencing is not permitted is explained by Section 61.2(a) of the Commission’s rules, 47 C.F.R. § 1.2(a): “In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.” Cross-referencing makes it difficult or impossible for the reader to understand the application of a tariff without having to hunt down references external to the tariff. As the Commission explained in *Bell Atlantic v. Global NAPS*, *supra*, at 6006:

[T]o determine whether Global NAPs' Tariff applies, Bell Atlantic must consult the terms of its interconnection agreement to ascertain whether compensation for the delivery of ISP-bound traffic is required. Consequently, the Tariff's cross-reference to the interconnection agreement constitutes far more than a technical defect; it constitutes a fundamental flaw in the Tariff's clarity. Accordingly, even assuming, *arguendo*, that a tariff's reference to an exogenous document is improper only if the exogenous document contains information necessary to understand the tariff, the Tariff's bare cross-reference to an “interconnection agreement” violates section 61.74(a) of our rules and renders the Tariff unlawful.

¹ “As we believe that any such tariff provision must contain clear standards as well as greater specificity and explanation of terms, we conclude that Western Union’s tariff proposal violates Section 61.55(f) of the Commission’s Rules, 47 C.F.R. § 61.55(f), which requires that tariff language be clear and unambiguous.” *Western Union Order* at para. 3.

Here, and as Sprint argued in its Petition, Section 2.6 of Tekstar's Tariff FCC No. 2 defines the term "end user" as any customer that, *inter alia*, "subscribes" to local exchange service from Tekstar. The term "subscribes" is further defined to mean someone who obtains local exchange service from Tekstar under its local exchange tariff under the terms and conditions of that tariff:

For purposes of switched access service, the term "subscribes" as used both in this definition and in the definition of "Customer" in reference to an end user that is not a carrier means (i) to obtain from the Telephone Company local exchange service under the terms and conditions of the Telephone Company's local exchange tariff, and to be billed and pay for such services under any applicable terms governing the payment for the services provided thereunder..."

Tekstar impermissibly cross-referenced its local exchange tariff because the definitions of "subscribes" and "Customer" are only knowable by consulting Tekstar's local exchange tariff, a document that is not part of its federal tariff. Such a document is also subject to change without notice to the Commission and to other interested and affected parties.

As the Commission is well aware from the extensive litigation in the *Qwest v. Farmers and Merchants* case, knowing who is an "End User" is essential to understanding whether Tekstar's federal tariff applies.² Omitting such critical information from a federal tariff clearly violates Section 61.74 of the Commission's rules and Tekstar's tariff should have been rejected for that reason.

² See *Qwest v. Farmers and Merchants Mutual Telephone Co.*, Second Order on Reconsideration, 24 FCC Rcd 14801 (2009), *recon. den.* FCC No. 10-43, released March 17, 2010, *review pending sub nom.* *Farmers and Merchants v. FCC*, Case No. 10-1093, D. C. Circuit, filed May 7, 2010 at para. 10: "The central question in this reconsideration proceeding is whether the conference calling companies were "end users" within the meaning of the switched access provisions of Farmers' tariff. The answer to that inquiry is key because it, in turn, determines whether the service that Farmers provided to Qwest was tariffed switched access service for which Farmers could charge tariffed rates."

As stated, the Commission has previously rejected tariffs that contain impermissible cross referencing. *Southwestern Bell, supra* and *Lincoln Telephone, supra*. It did not do so here and its Public Notice provided no explanation for its failure to address this violation of its rules. Elementary considerations of justice and fair play require the Commission to treat Tekstar's tariff identically. If there was some reason not to do so, the Commission must explain why. *See Melody Music v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

In its Reply, Tekstar failed to explain why it had not obtained a waiver of the Commission's rules. Rather, Tekstar attempted to justify its failure by citing other carriers' tariffs that refer to their local exchange service tariffs. Merely providing other examples of references to other carriers' local exchange service tariffs (and who may have obtained waivers of Section 61.74) does not justify violation of the Commission's rules.

Nor can Tekstar justify the cross-reference by arguing that "the alleged 'reference' to the local exchange tariff in Tekstar's interstate tariff does not incorporate or rely upon any content whatsoever in the local exchange tariff" (Reply, p. 3). Given the fact that Sprint and other carriers have been arguing about the definition of "end users" and opposing the unlawful arbitrage Tekstar and other "traffic pumpers" have been engaging in for years, there is no reason to accept its assurances that the cross-reference is of no consequence and that a waiver of the Commission's rules is unnecessary.

Of particular importance to the traffic pumping issue is whether the conference calling services are, in fact, "end users." If they do not meet the criteria for an "end user, they may not subscribe to Tekstar's access service. In order to insure that an entity is an

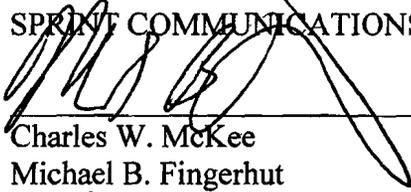
“end user,” Tekstar must specify the local services to which the customer must subscribe. The Commission and interested parties, such as Sprint, should not have to guess which local services the conference calling companies are taking from the local tariff. This is precisely why Section 61.74(a) prohibits cross-referencing to any document or instrument other than those set forth in Section 61.74,

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Accordingly, Sprint requests that the Commission reverse the Bureau’s erroneous decision and find Tekstar’s tariff unlawful because it so clearly violates of Section 61.74 of the Commission’s Rules.

Respectfully submitted,

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