STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: SPRINT COMMUNICATIONS COMPANY L.P., Complainant, vs. IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM, Respondent.	DOCKET NO. FCU-2010-0001

ORDER

(Issued February 4 , 2011)

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INTRODUCTION

In resolving this dispute, the Utilities Board (Board) will decide whether certain interexchange Voice over Internet Protocol (VoIP) traffic delivered by Sprint Communications Company L.P. (Sprint) to Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom,[1] is jurisdictionally interstate or intrastate. If the traffic is jurisdictionally interstate, then it is under the jurisdiction of the Federal Communications Commission (FCC). If the traffic is jurisdictionally intrastate, then it is subject to the Board's jurisdiction and subject to the access charges in Iowa Telecom's intrastate switched access tariff.

The parties explain the origin of this dispute in various ways. Iowa Telecom notes that since the mid-1990s carriers have provided voice services formatted in the Internet Protocol (IP) for some part of transmission of traffic and have used the networks of local exchange carriers (LECs) to originate or terminate calls to and from end users with telephone service from providers that use the time division multiplexing (TDM) format, sometimes known as "plain old telephone service." (Iowa Telecom Initial Brief, p. 15.)

Sprint admits it previously paid Iowa Telecom access charges for the VoIP traffic in question, but explains it revisited this practice given that the status of VoIP traffic has been unclear for years. (Sprint Initial Brief, unnumbered page 2.) Sprint

[1] Pursuant to a reorganization proceeding identified as Docket No. SPU-2009-0010, Iowa Telecom merged with Windstream Corporation and was renamed Windstream Iowa Communications, Inc. Because this complaint proceeding was initiated before Iowa Telecom was renamed, the Board will refer to the company as Iowa Telecom throughout this order.

asserts that other carriers have stopped paying access charges or have never paid them, putting Sprint in a position of paying out charges on VoIP traffic it carries to and from LECs, but not receiving payment on traffic it terminates. (Sprint Reply Brief, pp. 27-28.)

The Consumer Advocate Division of the Department of Justice (Consumer Advocate) puts the dispute in context, explaining that the FCC has recently begun to consider the transition from a circuit-switched network to an all IP-network, observing that broadband "is a growing platform over which the consumer accesses a multitude of services, including voice, data, and video in an integrated way across applications and providers" (Consumer Advocate Brief, p. 7, citing *A National Broadband Plan for Our Future*, GN Docket No. 09-47, 09-51, 09-137, NBP Public Notice #25 *Comments Sought on Transition from Circuit-Switched Network to All-IP Network*, DA 09-2517 at 1-2 (December 1, 2009)).

Consumer Advocate observes that the FCC's 2004 decision to preempt Minnesota's regulation of a particular form of VoIP service provided by Vonage, Inc., has failed to produce regulatory certainty. (Consumer Advocate Brief, pp. 6-7.) According to Consumer Advocate, regulatory uncertainty "has been driven by continuing technological evolution in IP-based services and the lack of further definitive action by the FCC." (Consumer Advocate Brief, p. 7.) In its brief, Consumer Advocate includes the following comments from the Pennsylvania Public

Utilities Commission in the FCC's inquiry on the transition to an all-IP network, which highlight the problems that result in the absence of regulatory certainty:

> Telecommunications facilities and services are jointly regulated by the states and the FCC whereas the FCC loosely regulates Information Services. The FCC inconsistently classifies some network facilities and services as "information service[s]" but other networks or services are classified as "telecommunications" with shared jurisdiction. It is intuitively understood, and the FCC has already acknowledged, that broadband network facilities are *jointly* used for the provision of telecommunications and information services. For example, fiber optic broadband facilities are jointly used for the *transmission* of legacy PSTN [public switched telephone network] voice traffic, the transmission of IP-based VoIP calls, the interconnection function between telecommunications common carriers and information service providers, etc. To arbitrarily label broadband network facilities as "information services" defeats on paper this network engineering reality and creates unwarranted regulatory implications both at the federal and state regulatory jurisdictions in major areas such as non-discriminatory interconnection and intercarrier compensation.

(Consumer Advocate Brief, p. 8, citing Comments of Pennsylvania Pub. Util. Comm'n, GN Dockets No. 09-47, 09-51, 09-137, NBP Public Notice #25 at 2-3, filed December 21, 2009.)

This case also involves an issue regarding whether Sprint properly disputed Iowa Telecom's access charges as permitted under Iowa Telecom's switched access tariff. Finally, there is an issue whether Iowa Telecom may disconnect Sprint, a wholesale carrier, for non-payment in these circumstances without the Board's approval.

PROCEDURAL HISTORY

On January 6, 2010, Sprint filed with the Board a complaint against Iowa Telecom alleging that Iowa Telecom was assessing incorrect charges for routing and handling certain telecommunications traffic. Sprint described the traffic at issue as VoIP[2] calls. Sprint stated in its January 6, 2010, "Complaint and Request for Emergency Relief" (Sprint Complaint) that it operates its wholesale operations in Iowa under an "Order in Lieu of Certificate," issued by the Board on March 3, 2006. According to Sprint, that order authorizes Sprint to provide its telecommunications services to wholesale customers and guarantees to Sprint sufficient rights, privileges, and obligations of a competitive local exchange carrier (CLEC) to allow Sprint to provide wholesale services, including the right to interconnection and to obtain numbering resources. (Sprint Complaint, ¶ 5.) Sprint also states that it operates under Board and FCC authority as an interexchange carrier in Iowa. (Sprint Complaint ¶ 5.)

Sprint filed its complaint pursuant to Iowa Code §§ 476.3, 476.100, and 476.101. Sprint alleged it properly disputed the Iowa Telecom charges and withheld the disputed amounts, as permitted by Iowa Telecom's access tariffs. Sprint also alleged that Iowa Telecom was going to cease providing facilities for Sprint traffic

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[2] In *Minnesota Public Utilities Commission v. FCC,* 483 F.3d 570, 574 (8th Cir. 2007), the Eighth Circuit Court of Appeals explained that "VoIP is an internet application utilizing "packet-switching" to transmit a voice communication over a broadband internet connection. In that respect, it is different from the "circuit-switching" application used to route traditional landline telephone calls. In circuit-switched communications, an electrical circuit must be kept clear of other signals for the duration of a telephone call."

beginning on January 8, 2010, effectively blocking calls. Sprint asked the Board for emergency relief.

On January 7, 2010, Iowa Telecom filed a preliminary partial answer stating it would not discontinue access services to Sprint as long as Sprint remained current on newly-billed access charges. On January 19, 2010, Iowa Telecom filed an answer and motion for injunctive relief, stating it had assessed the appropriate intrastate access charges under its tariff. Iowa Telecom denied that its access services tariff allows continued withholding of payment after a dispute has been denied. Citing Iowa Code § 476.5 and Board rules 22.14 and 22.15, Iowa Telecom asserted it is required to disconnect Sprint's intrastate switched access service due to Sprint's nonpayment of carrier common line charges (CCLCs). Iowa Telecom asked the Board to issue an order requiring Sprint to immediately pay to Iowa Telecom all withheld intrastate switched access charges invoiced to date and in the future where Iowa Telecom has denied Sprint's billing dispute, and prohibiting Sprint from offsetting funds payable to Iowa Telecom for access services from other funds payable to Iowa Telecom for other services provided to Sprint or Sprint affiliates. Finally, Iowa Telecom asked that if the Board decides that a Board proceeding is necessary before Iowa Telecom disconnects intrastate switched access service to Sprint under facts similar to those involved in this proceeding, that the Board state that Iowa Telecom may terminate such service to Sprint after following the

procedures in Section 2.1.8 of the Iowa Telecom tariff if Sprint fails to make any payment which may be required by a Board order.

On January 22, 2010, the Board issued an order docketing Sprint's complaint as Docket No. FCU-2010-0001 and setting an expedited procedural schedule.

On January 27, 2010, Sprint filed a motion to withdraw, motion for clarification, and a contingent motion to revise the procedural schedule. With respect to its request to withdraw the complaint, Sprint argued that the only relief it sought was for the Board to prohibit Iowa Telecom from discontinuing service and that the specific claims in its complaint were no longer ripe. In characterizing the posture of the case as "fatally flawed," Sprint asserted that Iowa Telecom had not properly filed any claims to date; Iowa Telecom's filings raised broader issues than those stated in Sprint's complaint; and that Iowa Telecom's claims would not be eligible for expedited resolution under Iowa Code § 476.101(8).

Acknowledging that the parties' potential call blocking dispute is likely to recur, Sprint asked the Board to require Iowa Telecom to clarify whether it is raising counterclaims and, if so, to state those claims more clearly. Sprint suggested the Board could sever the claims eligible for expedited review from non-expedited claims. Sprint asserted that the only issue in dispute in this proceeding is the propriety of call blocking or threats to block calls and argued that this is a legal issue that can be resolved without a hearing. Sprint urged the Board to move directly to briefing rather than requiring testimony and hearing.

On January 28, 2010, Iowa Telecom filed a response resisting Sprint's motions, arguing that the Board must consider the underlying merits of the parties' billing dispute in the context of the expedited proceeding already underway. Iowa Telecom rejected Sprint's assertion that the issues involved in this controversy were not ripe and stated the matter was likely to recur quickly if Sprint were allowed to withdraw its complaint. Iowa Telecom argued it would be unfair to allow complainants to invoke emergency injunctive relief but avoid consideration of the merits of the dispute when temporary relief is granted to the adverse party. Iowa Telecom pointed to Iowa Code § 17A.18A for support, arguing that the General Assembly intended that an agency's order for emergency relief be followed by a full determination of the merits of the dispute. Iowa Telecom asserted it has a right to be heard on all of the merits of Sprint's complaint and that this controversy should be resolved promptly. Iowa Telecom urged the Board to continue the expedited schedule already in place.

On February 1, 2010, the Board issued an order granting Sprint's motion to withdraw its complaint, denying Sprint's motion for clarification, and revising the procedural schedule. The Board explained that both parties acknowledge there is an underlying dispute about their rights and obligations with respect to the application of tariffed charges to certain telecommunications traffic. The Board allowed Sprint to withdraw its complaint but decided to continue this proceeding in order to give full consideration to the underlying dispute that resulted in the threatened disconnection.

The Board explained that the docket would remain open, but not under the expedited procedural schedule established in the Board's docketing order. Instead, the Board explained it would recast the proceeding to consider Iowa Telecom's claims about the propriety of Sprint's withholding of access charge payments for the traffic at issue. The Board did not agree with Sprint's assertion that Iowa Telecom had not identified the issues for the Board's consideration with sufficient clarity. The Board did not require Iowa Telecom to file any additional claims or clarification. The Board observed that the issues as expressed in the parties' filings to date relate generally to the parties' rights and obligations (as provided in federal law, state law, and Iowa Telecom's tariff) regarding intrastate switched access charges, including CCLCs, and particularly as applied to VoIP traffic, including non-nomadic VoIP traffic. Related issues include a party's right to withhold payment for disputed charges and a party's right to disconnect service for non-payment. The Board noted that the issues between the parties relate to what rules apply to the traffic in question, not the amount of traffic subject to charges.

The Board agreed with Sprint that the issues raised in Iowa Telecom's pleadings to date were more appropriate for consideration outside of an expedited proceeding conducted under Iowa Code § 476.101(8). The Board observed that the issues in this case are legal issues and that there are no material factual disputes which would require a hearing. The Board canceled the rounds of testimony included

in the procedural schedule and, instead, required simultaneous briefs and reply briefs from the parties.

On March 1, 2010, the Consumer Advocate, Sprint, and Iowa Telecom filed initial briefs. On March 30, 2010, Sprint and Iowa Telecom filed reply briefs.

STATUTORY FRAMEWORK

Iowa Code § 476.1 provides that the Board "shall regulate the rates and services of public utilities to the extent and in the manner hereinafter provided." Section 476.1 defines "public utility" to include any person or entity owning or operating facilities for "[f]urnishing communications services to the public for compensation." The definition of the term "telephone utility" in the Board's rules mirrors the definition of "public utility" in § 476.1. "Telephone utility" is defined in the Board's rules at 199 IAC 22.1(3) as "any person, partnership, business association, or corporation ... owning or operating any facilities for furnishing communications service to the public for compensation."

The term "interexchange utility" is defined in the Board's rules at 199 IAC 22.1(3) to mean "a utility, a resale carrier or other entity that provides intrastate telecommunications services and facilities between exchanges within Iowa, without regard to how such traffic is carried." Sprint is an interexchange utility. (See Sprint Complaint, ¶ 5.)

The term "local exchange utility" is defined in the Board's rules at 199 IAC 22.1(3) to mean a "telephone utility that provides local exchange service under tariff

filed with the board." Iowa Telecom is a local exchange utility. (Iowa Telecom Initial Brief, p. 20.)

Generally, the Board has jurisdiction over intrastate access charges pursuant to Iowa Code §§ 476.3 and 476.11. Iowa Code § 476.3(1) provides that a "public utility shall furnish reasonably adequate service at rates and charges in accordance with tariffs" filed with the Board. Section 476.3(1) generally gives the Board the authority to review a utility's rates, charges, schedules, service, or regulations and determine whether they are unjust, unreasonable, discriminatory, or otherwise in violation of any provision of law.

Iowa Code § 476.11 gives the Board complaint jurisdiction over arrangements for interconnection of telecommunications services between two providers, specifically whether the terms and conditions of those arrangements are considered to be just, reasonable, and non-discriminatory. The Board has determined that its authority to consider complaints under Iowa Code § 476.11 "necessarily includes the switched access services toll providers must purchase to originate and terminate most interexchange calls."[3] As noted by Consumer Advocate, the Board's jurisdiction under Iowa Code § 476.11 is limited to intrastate access services. (Consumer Advocate Brief, p. 4, n. 2, citing *Qwest Communications Corp. v. Superior Tel. Cooperative et al*., Docket No. FCU-07-2, "Final Order," pp. 12-15, issued September 21, 2009.)

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[3] See *In re: Iowa Telecommunications Association*, Docket Nos. TF-07-125 and TF-07-139 "Order Setting Procedural Schedule and Setting Date for Hearing," p. 10, issued November 15, 2007.

The term "intrastate access services" is defined in the Board's rules at 199 IAC 22.1(3) as "services of telephone utilities which provide the capability to deliver intrastate telecommunications services which originate from end-users to interexchange utilities and the capability to deliver intrastate telecommunications services from interexchange utilities to end-users."

The Board's rule at 199 IAC 22.14 applies to intrastate access charges and governs the application of intrastate access charges and the filing of intrastate access service tariffs. 199 IAC 22.14(1)"a" provides that intrastate access charges apply to all intrastate access services rendered to interexchange utilities. Thus, the rule contemplates that interexchange utilities such as Sprint must pay access charges to local exchange utilities such as Iowa Telecom for the origination and termination of intrastate toll traffic.

Iowa Code § 476.20 applies to disconnection of service and provides that a "utility shall not, except in cases of emergency, discontinue, reduce, or impair service to a community, or part of a community, except for nonpayment of account or violation of rules and regulations, unless and until permission to do so is obtained from the board." The Board's rule at 199 IAC 22.16 provides that no "local exchange utility or interexchange utility may discontinue providing intrastate service to any local exchange or part of a local exchange except in the case of emergency, nonpayment of account, or violation of rules and regulations" except as provided in rule 22.16.

ISSUES

A. Is the VoIP traffic at issue in this dispute subject to intrastate access charges?

Introduction

As explained above, the Board has jurisdiction pursuant to Iowa Code §§ 476.3 and 476.11 to consider disputes involving the application of intrastate access tariffs. In this case, the question before the Board is whether Iowa Telecom's tariffed intrastate access charges apply to Sprint's VoIP traffic. Asked another way, the question is whether Sprint's VoIP traffic is jurisdictionally intrastate (i.e., telecommunications services subject to the Board's authority and state statutes and rules regarding intrastate access charges) or jurisdictionally interstate (subject to the FCC's authority). Resolution of these questions depends on whether the Board's authority in this context has been preempted by the FCC. While the parties express the jurisdictional issue in different ways, all three discuss jurisdiction in connection with the question of whether the FCC has preempted the Board from taking action in this context by determining the traffic is interstate in nature.

Sprint asks whether the underlying issue of compensation for VoIP traffic can be resolved by the Board or whether the issue is a matter of federal jurisdiction. (Sprint Initial Brief, unnumbered p. 2.) Sprint acknowledges that the status of compensation for VoIP traffic is not clear, but contends the issue must be resolved by the FCC, not the Board. Sprint argues that the Board is preempted from deciding this case because it relates to the compensation for VoIP traffic. Sprint contends its VoIP

traffic is jurisdictionally interstate, thus falling under the authority of the FCC. According to Sprint, the Board has no jurisdiction over the traffic and no jurisdiction to resolve the dispute. As will be discussed below, Sprint argues there are two ways of concluding that the Board does not have jurisdiction, the first being preemption through the information services exception, the second being preemption through the impossibility exception. (Sprint Initial Brief, unnumbered pp. 1, 9.)

Consumer Advocate frames the issue as follows:

> The issue which underlies the conflict between Sprint and Iowa Telecom is a familiar one, in contention before courts and regulatory commissions around the country. To resolve it, the Board must decide whether long distance calls transmitted using technology that is in some part VoIP or Internet Protocol-enabled (IP-enabled) are telecommunications services subject to state-regulated intrastate access charges, or whether state regulation of VoIP or IP-enabled services has been preempted by the Federal Communications Commission (FCC), "regardless of its regulatory classification because it was impossible or impractical to separate the intrastate components of VoIP service from its interstate components." *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 577 (8th Cir. 2007).

(Consumer Advocate Brief, p. 6.)

Iowa Telecom reaches the question of whether the Board's jurisdiction has been preempted and argues it has not, but first analyzes the application of its access tariff to the VoIP traffic in dispute. Iowa Telecom argues that the traffic is subject to access charges because Sprint carries the traffic as a common carrier between two exchanges in Iowa. Iowa Telecom asserts that the Board has already decided that non-nomadic VoIP traffic is not different from traditional telecommunications traffic

and is subject to rules governing intercarrier compensation. (Iowa Telecom Initial Brief, p. 12, citing *In re: Level 3 Communications, LLC v. Qwest Corp*., Docket No. ARB-05-4, "Arbitration Order," issued December 16, 2005; "Order on Reconsideration," issued July 19, 2006 (*Qwest-Level 3 Arbitration Order*). Iowa Telecom emphasizes that the "application of state intrastate access charges to interexchange voice calls is squarely within the jurisdiction of the Iowa Board." (Iowa Telecom Reply Brief, p. 6.)

Summary of the parties' positions

Iowa Telecom

Iowa Telecom states that in the mid-1990s some carriers began to provide voice services formatted in the IP for at least some part of the transmission of the voice traffic. These carriers continued to use LEC networks to originate or terminate telephone calls to and from end users with telephone service from providers whose networks employed the more traditional TDM format.

Iowa Telecom explains that from an end user's perspective, there are two types of VoIP calls, nomadic and non-nomadic. Nomadic VoIP service allows a VoIP customer to use a broadband Internet connection anywhere in the world to place a call. Non-nomadic VoIP traffic closely resembles traditional TDM voice traffic because end-user customers typically hold voice conversations in real time using equipment located at their premises. The only difference between VoIP and TDM traffic is that one or both ends of the VoIP call is sent in packets over a broadband

network. In order to use the broadband network, the VoIP end user's equipment transmits the call in IP format instead of TDM format. The broadband carrier converts the IP-formatted message to TDM in order to hand off the call to the LEC. (Iowa Telecom Initial Brief, pp. 16-17.)

Iowa Telecom states that Sprint and its Iowa cable partner are in the business of providing non-nomadic VoIP-based telecommunications service – a fixed service from which the location of the originating customer can be determined from examining the originating telephone number. In arguing that the traffic at issue in this case is telecommunications traffic subject to Iowa Telecom's intrastate access tariff, Iowa Telecom recalls that when Sprint's cable partner, MCC Telephony of Iowa, Inc. (MCC), applied for its Iowa certificate, it told the Board that it would provide the full range of telecommunications services. (Iowa Telecom Initial Brief, pp. 17-18.)

Both the Board and the Eighth Circuit Court of Appeals have ruled that Sprint, in the role as MCC's carrier partner, may be considered a telecommunications carrier (common carrier) when performing this partnering function with MCC. (Iowa Telecom Initial Brief, p. 18, citing the Board's decision in *Sprint Communications Co. L.P. v. Ace Communications Group, et al.*, Docket No. ARB-05-2, "Order on Rehearing" (November 28, 2005), and the Court's decision in *Iowa Telecommunications Services, Inc. v. Iowa Utilities Board*, 563 F.3d 743, 749 (8th Cir. 2009)). Thus, Sprint had the right to demand an interconnection agreement with Iowa Telecom pursuant to sections 251 and 252 of the Telecommunications of 1996 (the Act). That

interconnection requirement was based on the underlying assumption that the traffic that Sprint would be exchanging with Iowa Telecom, when Sprint was jointly providing service with MCC, was telecommunications traffic. Otherwise, there would be no traffic to which the compensation provisions of an interconnection agreement would apply. Iowa Telecom argues that Sprint cannot have it both ways – either it is a telecommunications carrier when transporting MCC's traffic and must pay access charges or it is not, which would mean that it is no longer entitled to interconnection with Iowa Telecom.

Iowa Telecom argues in its Reply Brief that even if Sprint's retail-carrier customer were transmitting an information service, access charges would still apply. Iowa Telecom's position is that Sprint operates as a common carrier when it delivers voice traffic to Iowa Telecom's network and because the traffic is intrastate and between exchanges, the terms of Iowa Telecom's tariff require Sprint to pay access charges. (Iowa Telecom Reply Brief, p. 6.)

Iowa Telecom notes that its access tariff applies to intrastate, interexchange traffic that Sprint originates or terminates on Iowa Telecom's local exchange network. Iowa Telecom explains that the reciprocal compensation provisions of its interconnection agreement with Sprint do not include information services traffic. Under the tariff, the customer is billed for access services to which it has subscribed and must pay the bill. (Iowa Telecom Initial Brief, p. 20.)

Iowa Telecom argues that by the terms of the tariff Sprint is liable for Iowa Telecom's access charges on VoIP traffic regardless of how VoIP traffic is characterized from a technical perspective. Under the filed rate doctrine, a tariff filed with a regulatory agency forms the exclusive source of the terms and conditions by which the common carrier provides service to its customers. The filed rate doctrine extends to all the terms in the tariff, not just the terms that specifically set rates. Courts and state utility commissions must follow and enforce the terms in a tariff because they form the law and are not mere contracts. (Iowa Telecom Initial Brief, p. 21.)

Sprint asserts that access charges do not apply because VoIP is an information service, Sprint is an information services provider, and the FCC has decided that VoIP traffic is exclusively interstate traffic. Iowa Telecom argues to the contrary that the FCC allows the application of intrastate access charges when the VoIP traffic at issue originates and terminates in different local calling areas (LCAs) in the same state. On this point, Iowa Telecom explains that the traffic at issue in this case is voice traffic initiated by an end user, transmitted by Sprint as a common carrier, terminated to Iowa Telecom's network as a TDM message, and delivered to an end user on Iowa Telecom's network. Iowa Telecom states that the FCC has refused to find that access charges do not apply to VoIP traffic and predicts that FCC policy will require that VoIP traffic be classified as a telecommunications service for

purposes of intercarrier compensation and as such will be subject to access charges. (Iowa Telecom Initial Brief, pp. 22-23.)

Iowa Telecom reviews the history of the FCC's decisions since 2004, noting in particular the following statement in the *IP-Enabled Services Notice of Proposed Rulemaking* (NPRM)[4] where, according to Iowa Telecom, the FCC indicated its opposition to "network free riders and reinforced its stance that all PSTN should pay fair compensation":

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.

(Iowa Telecom Initial Brief, p. 23, citing *IP-Enabled Services NPRM* at ¶ 61.) Iowa Telecom emphasizes the FCC has imposed common carrier obligations on VoIP services. Iowa Telecom observes that the trend of the FCC's decisions is to treat VoIP calls as any other voice calls placed over TDM networks. (Iowa Telecom Initial Brief, pp. 23-24.)

Iowa Telecom also argues that the Board's rules require payment of a CCLC. Iowa Telecom argues that all elements of the Board's rule at 199 IAC 22.14(1)"b" are met with respect to the traffic at issue in this case, as the transmissions in question are communications of the type transmitted by telephone utilities; the transmission is between Iowa exchanges; the facilities carrying the transmission are connected to

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[4] *IP-Enabled Services*, WC Docket No. 04-36, "Notice of Proposed Rulemaking," 19 FCC Rcd. 4863 (rel. March 10, 2004). (IP-Enabled Services NPRM.)

the PSTN pursuant to access services requests and the interconnection agreement between Sprint and Iowa Telecom; and the transmission passes over exchange utility facilities. Iowa Telecom observes that the transmissions at issue in this case are originated by MCC pursuant to its Board certificate, acting as a telephone utility as defined in the Board's rules, and Sprint is treated as a telecommunications carrier under federal law. Iowa Telecom asserts that an entity acting as a telephone utility is providing telecommunications service. Thus, Iowa Telecom argues its assessment of the CCLC is warranted. (Iowa Telecom Initial Brief, pp. 27-28.)

Iowa Telecom argues that the Board already decided in the *Qwest-Level 3 Arbitration Order* that access charges apply to non-nomadic VoIP traffic. As support for the assertion that the Board has decided that non-nomadic VoIP traffic is subject to access charges just as any other interconnected wireline traffic terminating in a LCA other than where it originates, Iowa Telecom relies on the following discussion in that order:

> Traditionally, a voice call between separate LCAs is a toll call and must be treated as such. The Board finds that this rule applies equally to all calls regardless of the technology used, including VoIP. Thus, when a call is originated in IP format on IP-compatible equipment and is handed off to Qwest within a LCA where the ESP is located, but the call is being sent for termination to another LCA, the provider is not entitled to free transport to the terminating LCA under the ESP exemption or on any other basis, nor is it allowed to connect to the terminating LCA as an end user under the ESP exemption if it does not have a physical presence in that LCA.

(Iowa Telecom Initial Brief, p. 29, citing *Qwest-Level 3 Arbitration Order* at 31.)

Iowa Telecom contends that Sprint is wrong in asserting that its VoIP traffic is an information service not subject to access charges. Iowa Telecom notes that the FCC announced its intention to review the overall regulatory scheme to be applied to VoIP traffic in the *IP-Enabled Services NPRM*. In that proceeding, the FCC specifically signaled its opposition to network free riders and reinforced its stance that all PSTN users should pay fair compensation. Similarly, in *In the Matter of Feature Group IP Petition for Forbearance From Section 251(g) of the Communications Act and Sections 51.701(b)(1) and 69.5(b) of the Commission's Rules*, WC Docket No. 07-256, adopted January 21, 2009 (*Feature Group IP Order*), the FCC refused to rule that access charges do not apply to VoIP traffic terminating on ILEC networks.

Iowa Telecom contends that the enhanced services exception (now known as the information services exception) has never applied to VoIP calls transmitted by a common carrier. Instead, the exception applies only to the actual provider of the service, not to an intermediary transmitting a long distance call. Iowa Telecom argues that Sprint is not performing any net protocol conversion itself and thus cannot take advantage of the exception. (Iowa Telecom Initial Brief, p. 31.)

Iowa Telecom states that Sprint cites only one case – *PAETEC Communications, Inc. v. CommPartners, LLC*, Civ. No. 98-0397, Mem. Order (D.D.C. February 18, 2010) (the *PAETEC Decision*) – where the information services exemption has been applied to VoIP traffic. In that case, the federal district court determined that access charges do not apply to information services. Iowa Telecom

asserts there are several factual errors in the *PAETEC Decision* which contradict FCC orders that have applied access charges. Iowa Telecom characterizes the PAETEC Decision as inconsistent with past precedent. (Iowa Telecom Reply Brief, pp. 7-9.)

Iowa Telecom faults the *PAETEC Decision* for its reliance on the decision in *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri v. Missouri Public Service Commission*, 461 F.Supp.2d 1055 (E.D. Mo. 2006), *aff'd on other grounds*, 530 F.3d 676 (8th Cir. 2008), *cert. den*., 125 S.Ct. 971 (2009) (*Southwestern Bell*), a case cited by Sprint in discussing the importance of net protocol conversion. (See Sprint Reply Brief, p. 12.) Iowa Telecom contends the Court in *Southwestern Bell* was considering an appeal from a state regulatory commission about whether an interconnection agreement applied to the facts before the commission. According to Iowa Telecom, the *PAETEC Decision* does not address whether the traffic at issue in *Southwestern Bell* was similar to the traffic at issue in the PAETEC case and does not address the application of state tariff provisions. Further, Iowa Telecom points out that in response to an argument from a cable company that access charges did not apply to its voice traffic, the Court in *Southwestern Bell* ruled that access charges applied to the voice traffic. (Iowa Telecom Reply Brief, p. 8, citing *Southwestern Bell* at 1088.)

According to Iowa Telecom, the FCC has not preempted state regulation of non-nomadic VoIP traffic, the type of calling involved in this dispute. Both the FCC and courts have distinguished between nomadic and non-nomadic VoIP. To date,

the primary instance in which the FCC has asserted exclusive jurisdiction over VoIP involved a request by Vonage to preempt an order of the Minnesota PUC that attempted to regulate Vonage as a telecommunications carrier. The FCC's rationale for preempting Vonage's service was based on the nomadic nature of Vonage's service, i.e., because a VoIP caller could place or receive calls in various locations, Vonage's service was appropriately characterized as interstate. The Eighth Circuit Court of Appeals recognized the distinction between nomadic and non-nomadic VoIP service in *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570, 575 (8th Cir. 2007). (Iowa Telecom Initial Brief, pp. 25-26.)

Iowa Telecom also notes that the FCC later explained in the VoIP USF Contribution Order that the rationale of its Vonage Order applied only to nomadic VoIP, referring to the FCC's statement that "an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation." (Iowa Telecom Initial Brief, p. 26, citing *Universal Service Contribution Methodology*, WC Docket No. 06-122, 21 FCC Rcd 7518, ¶ 56, rel. June 27, 2006.)

As further support for its position that the FCC has not preempted state jurisdiction over intrastate VoIP calls, Iowa Telecom cites the FCC's 2009 decision in *Petition of UTEX Commun's Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, WC

Docket No. 09-134, 24 FCC Rcd 12573 (Wir. Comp. Bur. 2009) (UTEX Decision). In that proceeding, the FCC ruled that a state public utility commission should resolve a case involving VoIP traffic and access charge issues. Iowa Telecom asserts there is no reason why the Board should avoid deciding this case. (Iowa Telecom Initial Brief, pp. 26-27.)

Iowa Telecom argues that many other state public utility regulatory agencies have reached the same conclusion that intrastate access charges apply to non-nomadic VoIP traffic. Iowa Telecom highlights the Pennsylvania Public Utility Commission's February 11, 2010, decision in *Palmerton Tel. Co. v. Global NAPS South, Inc*., Docket No. C-2009-2093336 (Pa. Pub. Util. Comm.). In that case, the Pennsylvania PUC likened a trucking firm's application of the same charges for transport of different types of cargo on the same truck to a common carrier's use of the LEC network, which is the same for VoIP and TDM voice calls. Iowa Telecom urges the Board to follow this precedent. (Iowa Telecom Initial Brief, pp. 30-31.)

Consumer Advocate

Consumer Advocate states that the Board has described its authority over intrastate access charges as "'complaint based,' arising from its duty under Iowa Code § 476.11 ... to determine the terms and procedures under which toll (or interexchange) communications are interchanged" and that the Board's jurisdiction is invoked only where carriers cannot agree to terms and procedures. (Consumer

Advocate Brief, p. 4, citing *In re: High Volume Access Service*, Docket No. RMU-2009-0009, "Order Initiating Rule Making," p. 3, issued September 18, 2009.)

Consumer Advocate contends the FCC's preemption of state regulation of Vonage's VoIP service applies only to that particular service and services with the same capabilities. (Consumer Advocate Brief, p. 6.) According to Consumer Advocate, the FCC's Vonage Order has not produced regulatory certainty and the FCC has not yet resolved the classification of IP-enabled services. (Consumer Advocate Brief, p. 7.)

Consumer Advocate states that when the Eighth Circuit affirmed the FCC's Vonage Order, it declined to resolve the question of whether preemption applied only to nomadic VoIP service. Consumer Advocate explains, however, that the court noted that in the FCC's subsequent USF Contribution Methodology order, the FCC limited the application of federal preemption, citing the following passage:

> [S]ubsequent to issuing the [Vonage] order we are reviewing, the FCC recognized the potentially limited temporal scope of its preemption of state regulation in this area in the event technology is developed to identify the geographic location of nomadic VoIP communications. In proceedings to address VoIP service providers' responsibility to contribute to the universal service fund, the FCC indicated 'an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our Vonage Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the Vonage Order would no longer be applicable to such an interconnected VoIP provider.'

(Consumer Advocate Brief, pp. 9-10, citing *Minn. Pub. Utils. Comm'n*, 483 F.3d at 579-80, citing *Universal Service Contribution Methodology*, 21 F.C.C.R. 7518 at ¶ 56 (2006), 2006 WL 1765838).

Like Iowa Telecom, Consumer Advocate cites post-Vonage FCC decisions to support its assertion that the jurisdiction of state regulatory agencies over certain VoIP and IP-enabled services has not been preempted. (Consumer Advocate Brief, p. 10, citing *Feature Group IP Order.*) Consumer Advocate also points to the FCC's UTEX Decision to support its position that the Board's jurisdiction in this dispute has not been preempted and that the Board can and should resolve this dispute. Consumer Advocate explains that in UTEX, the FCC decided that a state public utility commission does not need to wait for the FCC to determine the regulatory classification of IP-enabled services before arbitrating a case involving VoIP compensation issues.

Consumer Advocate states that the record indicates that Sprint began withholding payment to Iowa Telecom not because there was a new or definitive ruling from the FCC or courts, but only because Sprint "revisited" its own position on VoIP. Thus, until the summer of 2009, Sprint was paying tariffed intrastate switched access charges to terminate long distance calls to Iowa Telecom's network. (Consumer Advocate Brief, p. 11.)

Consumer Advocate also states that the record indicates that the traffic in dispute consists of calls originated through Sprint's arrangements with cable

television providers. End users place calls, formatted as Internet Protocol, on ordinary customer premise equipment (CPE). The calls are switched by Sprint, routed over the PSTN, and delivered for termination to Iowa Telecom using Feature Group D (FGD) facilities. Based on these facts, Consumer Advocate concludes the VoIP service at issue is "fixed VoIP" rather than "nomadic VoIP" which has been the subject of FCC preemption.

From a technological and functional perspective, there is no practical distinction between POTS and the type of VoIP service provided by Sprint as a wholesale carrier for cable telephony companies. Cable telephony end users can purchase telephone service without also purchasing Internet or broadband service, and are not required to use the Internet to place a call. The location of the end-user customer's service is fixed, so that both end points of a call can be easily determined. (Consumer Advocate Brief, p. 12.)

Consumer Advocate argues that to allow a carrier like Sprint to avoid paying intrastate switched access charges would give Sprint competitive advantage over other IXCs. Consumer Advocate points out that the FCC has expressed concern about prohibiting the use of access charges as intercarrier compensation where no other means of compensation is in place. (Consumer Advocate Brief, p. 13, citing *Re: Feature Group IP Petition*, ¶¶ 3, 8-10.) Consumer Advocate states that Iowa Telecom's intrastate access tariff has been approved by the Board and the rates are correctly applied to the intrastate interexchange calls carried by Sprint and delivered

to Iowa Telecom as long as the calls are not the type of nomadic VoIP service explicitly preempted by the FCC. (Consumer Advocate Brief, p. 13.)

Sprint

Sprint states the underlying dispute is whether it is proper for Iowa Telecom to charge traditional access charges on traffic originated as VoIP. Sprint maintains that because the traffic is jurisdictionally interstate, the precise nature of compensation for the traffic is outside the Board's jurisdiction and the traffic is not subject to Iowa Telecom's intrastate access tariff. Sprint argues there are two independent ways to reach this conclusion. First is preemption under the "information services" exception. Second is preemption under the "impossibility" exception. (Sprint Initial Brief, unnumbered p. 9.)

Sprint discusses the history of the Minnesota PUC's efforts to apply its traditional telephone company regulations (i.e., requirements to obtain a certificate to provide telephone service; submit a 911 service plan and pay 911 fees; and file a tariff) to the "Digital Voice" VoIP service offered by Vonage Holdings Corporation (Vonage). Vonage sought review of the Minnesota PUC's actions before the FCC and in federal district court. In *Vonage Holdings Corp. v. Minnesota PUC*, 290 F.Supp.2d 993 (D. Minn. 2003), the federal district court found that Vonage provided an "information service" as opposed to a "telecommunications service." The Court noted that the FCC's guidelines for identifying a telecommunications service require that to be classified as a telecommunications service, the transmission of customer

information does not change that information in form or content. The Court found this was not true for Vonage's IP-to PSTN calling. Thus, the Minnesota PUC could not regulate an information service provider such as Vonage as if it were a telecommunications provider.

The FCC ruled on the matter in its 2004 "Vonage Declaratory Order," *In the Matter of Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket 03-211, 199 FCC Rcd. 22404, rel. Nov. 12, 2004 (*Vonage Declaratory Order*). Although the FCC did not rule on whether Vonage provided an information service or telecommunications service, it determined that, under the "impossibility exception," the Minnesota PUC was preempted from regulating Vonage. The FCC found it was impossible or impractical to separate Vonage's interstate and intrastate functionality. Anticipating Iowa Telecom's argument that the FCC's *Vonage Declaratory Order* preempting state regulation of VoIP services is limited to nomadic VoIP, Sprint argues to the contrary that the FCC intended the impossibility exception to apply broadly to other VoIP services such as the cable telephony services at issue in this proceeding. Sprint contends that the FCC meant to include cable telephony service, referring to the FCC's statement that "to the extent other entities, such as cable companies, provide VoIP services we would preempt state regulation to an extent comparable to what we have done in this Order." (Sprint Initial Brief, unnumbered page 12, citing *Vonage Declaratory Order*, ¶ 12.)

Sprint points to other rulings issued since the Vonage orders that it claims reaffirm the application of the information services exception and the impossibility exception for VoIP traffic. Most recent of these is a ruling issued by the U.S. District Court for the District of Columbia District in February 2010 in the *PAETEC Decision*. There, the court found that the critical feature which characterizes VoIP traffic as an information service is net protocol conversion, i.e., where a call originates in IP and is converted to TDM for termination on the PSTN. Sprint states that all the disputed traffic in this case undergoes a net protocol conversion, making it an information service. (Sprint Initial Brief, unnumbered pp. 12-13.)

In support of the assertion that IP-PSTN service is an information service which is exempt from state regulation and access charges, Sprint also cites the *Southwestern Bell* decision, where the Court stated that while "the FCC has not yet ruled whether IP-PSTN is [an information] service, the orders it has issued lead to the conclusion that IP-PSTN is an 'information service.'" (Sprint Reply Brief, p. 12, citing *Southwestern Bell*, 461 F.Supp.2d at 1081.)

In its Reply Brief, Sprint provides additional history on the information service exception beginning with the FCC's 1980 Computer II rules, *In re: Amendment of Sect. 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 417-423. At that time, services were classified as either "enhanced" or "basic." Enhanced services meant there was a protocol conversion and the FCC would not apply the Act's Title II common carrier requirements to these

services. Under the 1996 Act, "enhanced services" became "information services" and "basic services" became "telecommunications services." Sprint states that the Act signaled a move in a more deregulatory direction for information services and that access charges were disfavored. (Sprint Reply Brief, pp. 3-6.)

According to Sprint, since passage of the 1996 Act, there have been a number of rulings classifying VoIP services as information services. Sprint cites the FCC's decision in *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) (*Cable Modem Order*) that classified cable modem broadband Internet service as an information service. The Cable Modem Order was upheld by the U.S. Supreme Court in *NCTA v. Brand X Internet Services*, 545 U.S. 967 (2005) (*Brand X Decision*). (Sprint Reply Brief, p. 7.)

Sprint states that it is not asking that Iowa Telecom deliver the traffic at issue without compensation. Citing the FCC's decision in *In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, As Amended, To Provide Wholesale Telecommunications Services to VoIP Providers*, WC 06-55, DA 07-709, 22 FCC Rcd. 3513, Rel. March 1, 2007, (*Time Warner Declaratory Order*), Sprint asks the Board to order a reciprocal compensation arrangement pursuant to section 251 of the Act as opposed to access charges. Sprint states the proper reciprocal compensation arrangement would be bill-and-

keep.[5] (Sprint Reply Brief, pp. 17-18.) Sprint also asserts that the 1996 Act preferred reciprocal compensation and preserved the access charge regime in a limited way, pursuant to which access charges do not apply to IP-PSTN VoIP traffic. (Sprint Reply Brief, p. 16.)

Discussion

Whether Sprint's traffic is subject to Iowa Telecom's intrastate access tariff depends, in this case, on whether the traffic is "interstate" or "intrastate." Sprint argues the VoIP nature of the traffic makes the calls jurisdictionally interstate and, as such, the traffic is not subject to Iowa Telecom's intrastate switched access tariff. Sprint contends there are two independent paths leading to the conclusion that this traffic is jurisdictionally interstate and preempted from intrastate tariffs. (Sprint Initial Brief, unnumbered p. 9.)

The first path, taken by the FCC in *In the Matter of Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a*

[5] The FCC explains on its Web site at www.fcc.gov/wcb/ppd/IntercarrierCompensation that "Intercarrier compensation refers to the charges that one carrier pays to another carrier to originate, transport, and/or terminate telecommunications traffic." Intercarrier compensation rates vary based on several factors, including where a call begins and ends and what type of traffic is involved. The two primary forms of intercarrier compensation are access charges (which apply to calls which begin and end in different local calling areas) and reciprocal compensation (which applies to calls which begin and end in the same local calling area). "Bill-and-keep" is a reciprocal compensation arrangement in which carriers recover all of the costs of originating and terminating traffic from their own customers instead of from other carriers. 47 C.F.R. § 51.713(a) provides that "bill-and-keep arrangements are those in which neither of the two interconnecting carriers charges the other for the termination of telecommunications traffic that originates on the other carrier's network." § 51.713(b) allows a state commission to impose bill-and-keep arrangements if that commission determines that the amount of traffic from one network to the other is roughly balanced with the amount of traffic flowing in the opposite direction. The Board's rule at 199 IAC 38.6(1) contemplates a bill-and-keep arrangement, providing that until the Board "approves monetary compensation and until tariffs for the compensation are in effect, each local utility shall terminate local and extended area service calls on a mutual exchange of traffic basis, at no charge to the originating provider."

Telecommunications Service, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd. 3307 (2004) (*Pulver Ruling*), and more recently by the federal district court for the D.C. District in the *PAETEC Decision* is the "information services exception." The second path, taken by the FCC in the *Vonage Declaratory Order*, is the "impossibility exception."

Iowa Telecom and Consumer Advocate argue the traffic is jurisdictionally intrastate, has not been preempted, and remains subject to Iowa Telecom's intrastate access tariff. (Consumer Advocate Initial Brief, p. 13; Iowa Telecom Initial Brief, p. 32; Iowa Telecom Reply Brief, p. 6.) Iowa Telecom and Consumer Advocate distinguish between nomadic and non-nomadic VoIP services. They acknowledge that the FCC preempted states from regulating nomadic VoIP services, but both assert that states have retained the right to regulate non-nomadic VoIP services. Iowa Telecom and Consumer Advocate note that Sprint paid Iowa Telecom's intrastate access charges on this traffic until the summer of 2009.

Before reaching the question of whether the Board's jurisdiction has been preempted, the Board will discuss how the VoIP traffic in question is treated under state statutes and Board rules. The Board agrees with Iowa Telecom's assertion that when Sprint delivers the VoIP traffic to Iowa Telecom's network, Sprint is acting as a telecommunications carrier and is thus subject to Iowa Telecom's intrastate access tariff and the Board's authority regarding the application of intrastate access charges. Sprint's role in delivering the VoIP traffic to Iowa Telecom's network makes it a

"telephone utility," defined in the Board's rule at 199 IAC 22.1(3) as "any person, partnership, business association, or corporation ... owning or operating any facilities for furnishing communications service to the public for compensation." Sprint acknowledges it functions as an interexchange utility.

The Board agrees with Iowa Telecom's rationale for why intrastate access charges properly apply to the VoIP traffic: Iowa Telecom explains that Sprint operates as a common carrier when it delivers voice traffic to Iowa Telecom's network. Iowa Telecom recounts how Sprint and its cable partner MCC have held themselves out as providers of telecommunications services and have been recognized as such by the Board and the Eighth Circuit Court of Appeals. Because the traffic is intrastate and between exchanges in Iowa, the Board's rule at 199 IAC 22.14(1)"a" (which provides that intrastate access charges shall apply to all intrastate access services rendered to interexchange utilities) and the terms of Iowa Telecom's tariff require the payment of access charges, unless the traffic is non-jurisdictional.

Iowa Telecom relies on the Board's previous conclusion in the *Qwest-Level 3 Arbitration Order* that a voice call between separate LCAs is a toll call and should be treated as such regardless of the technology used for the call, including VoIP. At the time the Board's orders in Docket No. ARB-05-4 were written, the Board was aware of the issues surrounding the regulatory classification of VoIP. In the arbitration order, the Board stated that the "proper classification of VoIP for purposes of intercarrier compensation is an evolving question" but agreed with Qwest that access

charges applied. The Board knew in 2005 and 2006 that the FCC's IP-Enabled Services rule making might change the status quo. But the FCC has not yet completed its work and the Board's decision in ARB-05-4 to treat non-nomadic VoIP like any other voice call is still relevant. Ultimately, the FCC may decide in the IP-Enabled Services rule making that the type of VoIP calling involved in this case is an information service subject to exclusive federal regulation, but it could classify such VoIP calling as a telecommunications service. Either way, the FCC has not yet made this classification and Sprint's decision to stop paying the intrastate access charges under Iowa Telecom's tariff was premature. It would be premature for the Board to try to anticipate any conclusions the FCC might make in the IP-Enabled Services NPRM.

Sprint argues that "it would be bad policy for the Board to penalize carriers for having certificates (or orders in lieu of certificates) by forcing them to bear substantial costs that non-certificated carriers engaged in the same types of service have to bear. Doing so would not only send the wrong regulatory signals, it would distort the competitive marketplace." (Sprint Initial Brief, unnumbered pp. 13-14.)

Contrary to Sprint's policy arguments, Iowa Telecom argues that allowing a carrier using a particular technology to avoid access charges other carriers must pay would be anti-competitive and suggests that it "would not be 'bad policy' to enforce the law just because others are managing to break it." (Iowa Telecom Reply Brief, pp. 9, 16.) Similarly, Consumer Advocate suggests that allowing carriers like Sprint

(i.e., those providing non-nomadic VoIP service) to escape intrastate access charges would give them an advantage over their IXC competitors. (Consumer Advocate Brief, p. 13.)

Iowa Telecom and Consumer Advocate's arguments on this point are more persuasive than Sprint's. The Board concludes that any policy concerns raised by Sprint should be resolved in favor of maintaining the present access charge system, which the FCC has not revised at this time (and may not revise in a way that affects this traffic in any special manner). Support for this conclusion can also be found in the FCC's statements opposing network free riders. (See Iowa Telecom's Initial Brief, p. 23, citing *IP-Enabled Services NPRM* at ¶ 61.)

Further, Sprint's assertion that other carriers are not paying access charges on VoIP traffic raises only a hypothetical concern, and one that is not substantiated in this record. As noted by Consumer Advocate, it is not clear whether Sprint's assertions that other VoIP providers are not paying access charges or are paying charges at lower rates

> refer specifically to Iowa Telecom's interconnections with other VoIP providers, or more generally to the telecommunications industry as a whole, and Sprint has not identified any carriers it believes receive preferential treatment from Iowa Telecom.

(Consumer Advocate Brief, p. 11, referring to the Sprint Complaint at ¶ 3.) On this point, the Board observes that it has not received complaints from other carriers objecting to payment of intrastate access charges on VoIP traffic or seeking payment

of unpaid charges on that traffic, as one might expect if large amounts of access services are not being paid for.

Finally, as will be explained below in the discussion of the information services exception, the Board concludes that Iowa Telecom's intrastate access tariff applies because the VoIP traffic in question has not been classified as an information service and thus is properly considered to be a telecommunications service.

The next question to consider is whether the Board's authority to apply its rules regarding intrastate access charges and to consider the present dispute has been preempted. As recently explained by the Maine Public Utilities Commission (MPUC) in a case considering intercarrier compensation for interconnected VoIP services, Congress has the power to preempt state law and preemption occurs

> when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, *e.g., Free v. Bland,* 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc*. v. *Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc*., 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz,* 312 U.S. 52 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its

> congressionally delegated authority may pre-empt state regulation. *Fidelity Federal Savings & Loan Assn*. v. *De la Cuesta,* 458 U.S. 141 (1982); *Capital Cities Cable, Inc*. v. *Crisp,* 467 U.S. 691 (1984).[6]

Sprint contends there are two ways to conclude that the Board's jurisdiction has been preempted: (1) the VoIP services in dispute are information services subject to exclusive FCC jurisdiction or (2) the Board's authority has been preempted under the impossibility exception.

Does the information services exception apply?

There are two classes of services defined by the Act, "telecommunications services" and "information services." Depending upon how a particular service is classified, it will be subject to different regulatory treatments. As discussed above, Iowa Telecom argues the disputed traffic is a telecommunications service. The Act defines telecommunications service in 47 U.S.C. § 153(46) to mean "the offering of telecommunications for a fee directly to the public … regardless of facilities used."

Sprint argues the disputed traffic is an information service. The Act defines "information service" in 47 U.S.C. § 153(20) to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications … ." In the *Pulver Ruling*, the

[6] State of Maine Public Utilities Commission Investigation into Whether Providers of Time Warner "Digital Phone" Service and Comcast "Digital Phone" Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service, Docket No. 2008-421, "Order," October 27, 2010, (Maine Order), pp. 11-12, citing La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n, 476 U.S. 355, 369-9 (1986).

FCC classified the service at issue known as Free World Dial-Up, or FWD, as an information service, stating that

> FWD is an unregulated information service and any state regulations that seek to treat FWD as a telecommunications service or otherwise subject it to public-utility type regulation would almost certainly pose a conflict with our policy of nonregulation.[7]

Thus, an information service classification means the traffic is "interstate," preempted from state regulation, and exempt from intrastate access charges. This is the basis of Sprint's claim of preemption under the information services exception. In its briefs, Sprint traces a 30-year history of rulings to make its case that the disputed traffic is an information service, starting with the FCC's 1980 rulings in the Computer II decision and concluding with the *PAETEC Decision*. Other earlier rulings cited by Sprint are generally cited by the FCC in the 2004 *IP-Enabled Services NPRM*. On the same day the FCC issued the *IP-Enabled Services NPRM*, it also adopted an order classifying Pulver's FWD service as an information service.[8]

Sprint acknowledges that the *Pulver Ruling* dealt specifically with IP-to-IP voice service. (Sprint Reply Brief, footnote 40.) The subject of this complaint is IP-PSTN traffic, which is equivalent to IP-TDM. Sprint paints the *Pulver Ruling* broadly, however, stating "there is no indication from the FCC that it would expect any different benefits from IP-PSTN VoIP." (Id.) The Board disagrees with Sprint for two

[7] Pulver Ruling, ¶ 15.
[8] Pulver Ruling, ¶ 8.

reasons. First, the FCC emphasized that its ruling was based on the specific nature of the service at issue:

> We reach our holdings in this Order based on FWD as described by Pulver in its petition and subsequent ex partes. We thus limit the determinations in this Order to Pulver's present FWD offering (only to the extent expressly described below), without regard to any possible future plans Pulver may have.[9]

Second, the FCC indicated that the broader jurisdictional questions about VoIP services would be examined in the *IP-Enabled Services NPRM* issued concurrently with the *Pulver Ruling*.[10] To date, the FCC has not issued rules in that proceeding.

Sprint's principal argument that the disputed traffic in this case is an information service is tied to the concept of "net protocol conversion." Sprint contends that if a service undergoes a net protocol conversion (by originating in IP format and terminating in TDM format) it is an information service subject to exclusive federal jurisdiction. (Sprint Reply Brief, p. 2.)

The FCC discussed the concept of net protocol conversion in the *IP-Enabled Services NPRM*. The FCC notes that it provided the "Stevens Report" to Congress in 1998; that report considered the proper classification of IP telephony services under the 1996 Act. The FCC observed, however, that in the case of "computer-to-computer" IP telephony, where "individuals use software and hardware at their premises to place calls between two computers connected to the Internet," the

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[9] Pulver Ruling, footnote 3.
[10] *Pulver Ruling*, ¶ 15.

Internet service provider did not appear to be "providing" telecommunications. The Stevens Report stated that a service has the characteristics of telecommunications service so long as four criteria are met:

> (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touchtone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and **(4) it transmits customer information without net change in form or content.**[11]

At the time of the Stevens Report, the FCC declined to render any conclusions regarding the proper legal and regulatory framework for addressing such services, stating that "definitive pronouncements" would be inappropriate "in the absence of a more complete record focused on individual service offerings."[12]

Thus, the *IP-Enabled Services NPRM* became the vehicle the FCC used to determine "whether there is a compelling rationale for applying traditional economic regulation to providers of IP-enabled services." Specifically, in that rule making the FCC announced its intent to "examine issues relating to services and applications making use of Internet Protocol (IP), including but not limited to voice over IP (VoIP) services (collectively, "IP-enabled services")."[13] In other words, whether a particular IP voice service would be considered to be an information service or telecommunications service, and to what extent net protocol conversion is part of that

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[11] *IP-Enabled Services NPRM*. ¶ 29 (emphasis added).
[12] Id.
[13] Id., ¶ 1.

consideration, would presumably be determined through the *IP-Enabled Services NPRM*. The rule making asked numerous questions key to the FCC's determination. As noted above, that rule making has not been completed.

However, in the 2010 *PAETEC Decision*, the federal district court for the D.C. District decided a case based on net protocol conversion alone. The Court said that the FCC, "which has had the (information services vs. telecommunications services) controversy on its docket for a decade, has been unable to decide it."[14] The *PAETEC* Court found net protocol conversion to be the determinative indicator of whether a service is an information service. Sprint relies heavily on the *PAETEC Decision* in arguing that the net protocol conversion associated with the disputed traffic makes it an information service subject to FCC jurisdiction. Iowa Telecom characterizes the *PAETEC Decision* as unpublished, non-final, and partial. (Iowa Telecom Reply Brief, p. 7.) The Board agrees with Iowa Telecom's assessment of the *PAETEC Decision*.

Although the FCC has not completed its work in the *IP-Enabled Services NPRM*, it indicated there were numerous issues to be considered in classifying VoIP services as either information services or telecommunications services. The *PAETEC Decision* reduces that multitude of considerations identified by the FCC to a single-pronged test. Under the *PAETEC Decision*, all that needs to happen for a service to be classified as an information service (and thus be subject to federal jurisdiction) is a net protocol conversion. However, in 1998, the FCC declined to

[14] PAETEC Decision, p. 6.

render such a broad and definitive conclusion about net protocol conversion in its Stevens Report to Congress.[15] The 12-page *PAETEC Decision* does what the FCC never completed in the IP-Enabled Services docket, and does so without acknowledging any distinction between various types of IP-Enabled services previously identified by the FCC.

Other considerations must guide the Board's determination of how to treat the traffic at issue in this case. Iowa Telecom notes that the FCC expressed the following when it initiated the *IP-Enabled Services NPRM*:

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.[16]

The FCC seems to have anticipated that some carriers might attempt to discontinue paying access charges based on the issuance of the IP-Enabled Services NPRM. The FCC appears to expect that, absent specific rulings on IP-enabled services, traditional traffic compensation obligations should remain in place.

Sprint argues it is not seeking to deliver traffic without providing compensation. Sprint states that it is asking for the section 251 compensation arrangement ordered by the FCC in the *Time Warner Declaratory Order*.[17] Citing 199 IAC 38.6, Sprint states that the proper compensation corresponding to a section 251 arrangement is

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[15] IP-Enabled Services NPRM, ¶ 29.
[16] Iowa Telecom Initial Brief, p. 23, quoting IP-Enabled Services NPRM, ¶ 61.
[17] Time Warner Declaratory Order, ¶ 17.

"bill-and-keep." (Sprint Reply Brief, pp. 17-18.) What Sprint omits from its discussion, however, is that in the *Time Warner Declaratory Order*, the FCC simply clarified that wholesale carriers associated with Time Warner Cable (a provider of VoIP services) were entitled to interconnect and exchange traffic with incumbent local exchange carriers (ILECs).[18] The Time Warner section 251 compensation arrangement referenced by Sprint would have related only to the exchange of local traffic between wholesale carriers and ILECs, not to the exchange of long distance traffic, the subject of this proceeding. In the *Time Warner Declaratory Order*, the FCC declined to determine whether the VoIP traffic at issue in that proceeding was an information service or a telecommunications service, stating this determination would be made in the IP-Enabled Services docket.[19] It is not reasonable to read the order as requiring a reciprocal compensation arrangement for interexchange interconnected VoIP traffic, or as supporting Sprint's suggestion that reciprocal compensation should apply to the VoIP traffic in this case.

Iowa Telecom acknowledges that the 1996 Act introduced a reciprocal compensation mechanism and that the FCC has eliminated the term "local" in its rules under § 251(b)(5) of the Act, but states that reciprocal compensation has only been applied to local traffic and certain interstate calling, while all other interexchange calling is still subject to mechanisms predating the Act. (Iowa Telecom Initial Brief, p. 14, citing *Compensation for ISP-Bound Traffic*, Order on Remand and

[18] Time Warner Declaratory Order, ¶ 1.
[19] Time Warner Declaratory Order, ¶ 15.

Report and Order, 16 FCC Rcd 9151, ¶ 32 (2001) (subsequent history omitted). Further, Iowa Telecom notes that the parties' interconnection agreement excludes traffic subject to access charges from reciprocal compensation. (Iowa Telecom Initial Brief, p. 20, note 44.)

A conclusion that a reciprocal compensation arrangement is not appropriate for the traffic that is the subject of this proceeding is supported by the Board's rule at 199 IAC 38.6(1), which prescribes bill-and-keep for "local and extended area service calls" and by 199 IAC 38.6(4) which specifically prohibits bill-and-keep for long distance traffic where access charges are payable.

In this proceeding, no one contends the disputed traffic is local traffic. The Board is not persuaded by any of Sprint's arguments that reciprocal compensation is the appropriate form of compensation for interexchange VoIP traffic or that the access charge regime no longer applies to the traffic at issue in this proceeding. In light of the FCC's recent acknowledgement in the National Broadband Plan[20] that the state of the law regarding intercarrier compensation is not settled, the Board disagrees with Sprint's assertions that a bill-and-keep arrangement should be applied to this traffic. In the National Broadband Plan, the FCC recognizes that it has not completed its work on VoIP compensation, stating in Recommendation 8.7 that it should address the treatment of VoIP for purposes of intercarrier compensation.

[20] Federal Communications Commission, *Connecting America: The National Broadband Plan* (released March 16, 2010).

That is inconsistent with Sprint's view that VoIP compensation has already been changed.

In arguing that the traffic at issue in this case is subject to the information services exception, Sprint also cites the *Cable Modem Order*, in which the FCC classified cable modem service as an information service.[21] The FCC's ruling that cable modem service is an information service was later upheld by the U.S. Supreme Court in its *Brand X Decision*. What is important to note about these two cable modem decisions is that they addressed access to the Internet via cable modem service.[22] The decisions were silent as to whether cable telephony is an information service. The FCC's Cable Modem Order predated the IP-Enabled Services NPRM by nearly two years. Because the regulatory classification of cable telephony was not addressed in the *Cable Modem Order*, the FCC's statement two years later in the *IP-Enabled Services NPRM* is understandable:

> As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.[23]

Sprint's actions were consistent with this 2004 statement from the FCC until the summer of 2009. Apparently, prior to 2009, Sprint was willing to accept that cable telephony was still considered a telecommunications service because its

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[21] Sprint Reply Brief, p. 7, citing *Cable Modem Order*.
[22] See *Cable Modem Order*, ¶ 31 and *Brand X Decision*, section I.
[23] *IP-Enabled Services NPRM*, ¶¶ 33, 61.

regulatory classification had not been changed by the FCC. In mid-2009, prior to the 2010 *PAETEC Decision*, and without any explicit guidance from the FCC, Sprint seems to have decided that cable telephony is an information service, and stopped paying Iowa Telecom's access charges.

The Board finds that Sprint's traffic is jurisdictionally intrastate because the FCC has not ruled that cable telephony is an interstate information service, and, in the end, may not make that classification. The disputed traffic is a telecommunications service subject to Iowa Telecom's intrastate switched access tariff.

Does the impossibility exception apply?

As noted above, the FCC's decision in its *Vonage Declaratory Order* to preempt state regulation was based on the impossibility exception.[24] The impossibility exception comports with the concept of nomadic VoIP discussed in the briefs of Iowa Telecom and Consumer Advocate, although the specific term "nomadic VoIP" is not used by the FCC in its Vonage ruling.[25] Nomadic VoIP and fixed (or non-nomadic) VoIP are distinguished by the Eighth Circuit's Order affirming the FCC's *Vonage Declaratory Order*.[26] Although the Eighth Circuit affirmed the

[24] The FCC preempted Vonage's DigitalVoice service under the impossibility exception without determining whether DigitalVoice was an information service. See Vonage Declaratory Order, ¶ 14.
[25] In the Vonage Declaratory Order, the term "nomadic VoIP" is not used. However, the Statement of Chairman Michael K. Powell at the conclusion of the order states that "VoIP services are nomadic and presence-oriented, making identification of the end points of any given communications session completely impractical and, frankly, unwise."
[26] *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

impossibility exception for nomadic VoIP, it declined to resolve whether that preemption applies to non-nomadic VoIP services.[27]

The FCC applied the impossibility exception to Vonage because the physical locations of end users could not be known for certain. As the FCC explains below, this makes it impossible to apply the traditional end-to-end analysis necessary to distinguish interstate from intrastate communications:

> (Vonage's) DigitalVoice harnesses the power of the Internet to enable its users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they may find a broadband connection, and to manage their communications needs from any broadband connection. The Internet's inherently global and open architecture obviates the need for any correlation between Vonage's DigitalVoice service and its end users' geographic locations. As we noted above, however, the Commission has historically applied the geographic "end-to-end" analysis to distinguish interstate from intrastate communications. As networks have changed and the services provided over them have evolved, the Commission has increasingly acknowledged the difficulty of using an end-to-end analysis when the services at issue involve the Internet. DigitalVoice shares many of the same characteristics as these other services involving the Internet, thus making jurisdictional determinations about particular DigitalVoice communications based on an end-point approach difficult, if not impossible.[28]

Iowa Telecom and Consumer Advocate argue that Sprint is delivering non-nomadic VoIP traffic from its cable telephone partners. From a technological and functional perspective, there is no practical distinction between POTS and the type of VoIP service delivered by Sprint as a wholesale carrier for cable telephone

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[27] Id., at 583.
[28] *Vonage Declaratory Order*, ¶ 24, footnotes removed.

companies. (Consumer Advocate Brief, p. 12.) Sprint's willingness to pay access charges on this traffic until 2009 is evidence that an end-to-end analysis for this traffic is possible, i.e., that Sprint is able to identify the geographic endpoint of a call with adequate reliability. The Board concludes that the impossibility exception does not apply to this non-nomadic VoIP traffic because "the interstate and intrastate portions of the service can be … distinguished."[29]

The Board reaches that conclusion having considered Sprint's suggestion that support for both the information services exception and impossibility exception has increased since 2004. Sprint refers to a federal district court case in which the New Mexico Public Regulatory Commission (NM PRC) argued that the impossibility exception no longer applied to nomadic VoIP because new technology makes it possible to distinguish between intrastate and interstate VoIP traffic. (Sprint Initial Brief, p. 12, citing *New Mexico Pub. Reg. Comm'n v. Vonage Holdings Corp*., 640 F.Supp.2d 1359 (D.N.M. 2009). The NM PRC sought a declaratory judgment requiring Vonage to pay into the New Mexico USF. The agency also argued that the FCC Vonage Order should be read to apply narrowly, preempting only state entry regulations and tariff requirements, not USF contribution requirements. Vonage filed a motion to dismiss, which was referred to a federal magistrate judge. The federal Court that reviewed the magistrate's proposed findings rejected the agency's argument that technological improvements made the nomadic VoIP service in question comparable to non-nomadic service. The Court noted that the magistrate

[29] *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 575.

judge rejected the argument that the new ability to distinguish between interstate and intrastate VoIP calls rendered the Vonage Order obsolete. The magistrate judge had observed that it is difficult, if not impossible, to determine the exact geographic endpoints of a call and that the question of whether the Vonage Preemption Order was incorrect needed to be decided by the FCC, not the Court. The Court quoted the magistrate's statement that the proper way to determine whether the Vonage Preemption Order was obsolete would be a return to the FCC for review of the order or a direct court challenge to the FCC regarding the order. The Court agreed with the magistrate judge and with the Eighth Circuit's decision that the impossibility exception applies to nomadic VoIP.

However, reading the district court decision in light of the FCC's recent decision regarding state USF contribution requirements imposed on nomadic VoIP providers casts doubt on whether Sprint's reliance on the case is warranted. On November 5, 2010, the FCC released a Declaratory Ruling responding to the petitions from the Nebraska Public Service Commission (NPSC) and Kansas Corporation Commission for a declaratory ruling that state USF funds may assess nomadic VoIP revenues.[30]

A discussion of the background of the Declaratory Ruling may be helpful. In 2006 the FCC adopted rules requiring interconnected VoIP providers to contribute to

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[30] See *In the Matter of Universal Service Contribution Methodology, Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues,* "Declaratory Ruling," FCC 10-185, WC Docket No. 06-122, Rel. November 5, 2010 (Declaratory Ruling).

the federal USF, concluding that interconnected VoIP providers benefit, as do other contributors, from universal service because the appeal of their services comes from customers being able to place calls to and receive calls from the PSTN. In the 2006 order,[31] the FCC also concluded that requiring interconnected VoIP providers to contribute to the USF promotes the principal of competitive neutrality by reducing the possibility that carriers who had to pay into USF would have to compete with carriers that did not have to pay.

In 2007 the NPSC issued an order requiring interconnected VoIP service providers to contribute to Nebraska's state USF based on intrastate revenues. Vonage challenged the NPSC order in federal district court, which granted Vonage's request for a preliminary injunction against enforcement of the NPSC Order. NPSC appealed to the U.S. Court of Appeals for the Eighth Circuit, which affirmed the district court's preliminary injunction, concluding that because the nomadic VoIP service at issue cannot be separated into interstate and intrastate usage, the impossibility exception established Vonage's likely success on the merits of a preemption claim. The court recalled that in the FCC's Vonage Preemption Order, the FCC emphasized that it, not state regulatory agencies, must decide whether certain regulations apply to Vonage's service and other IP-enabled services with the same capabilities. The court said that a reasonable interpretation of that language was that in light of the impossibility of distinguishing between interstate and intrastate

[31] *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, "Report and Order and Notice of Proposed Rulemaking," 21 FCC Rcd 7518 (2006) (Interim Contribution Methodology Order).

nomadic VoIP service, the FCC must have sole regulatory control; while a state could assess a USF surcharge for intrastate VoIP service, the FCC must decide if such a regulation could be applied. The Nebraska and Kansas commissions filed a petition for declaratory ruling from the FCC, asking for a ruling with prospective effect that states are not preempted from assessing universal service contribution requirements on future intrastate revenues of providers of nomadic interconnected VoIP service.

In an opinion dated October 28, 2010, and released on November 5, 2010, the FCC concluded that it should not preempt the imposition of state universal service contribution requirements on future intrastate revenues of nomadic interconnected VoIP providers as long as (1) the state contribution rules are consistent with FCC universal service contribution rules and (2) the state does not apply its contribution rules to intrastate interconnected VoIP revenues that can be attributed to services provided in another state. The FCC explained that since the 2004 Vonage Preemption Order, it established a mechanism that allows providers of interconnected VoIP service to separate their interstate and intrastate revenues for purposes of calculating federal USF contributions. The FCC's 2006 Interim Contribution Methodology Order established a mechanism for separating interstate and intrastate revenues in the USF context.[32] In the October 28, 2010, order, the

[32] The 2006 Interim Contribution Methodology Order established three ways of determining a VoIP provider's federal USF contribution amount: 1) a safe harbor provision by which a VoIP provider could presume that 64.9 percent of its revenues come from interstate operations; (2) a VoIP provider could conduct a traffic study to estimate percentage of revenues that can be attributed to interstate traffic and use that percentage to calculate its contribution amount; or (3) providers able to determine the jurisdictional nature of their calls can calculate their federal contribution amounts using actual revenue allocations.

FCC states that while the 2006 order did not address preemption, it had implications for the FCC's analysis of the preemption question. The FCC concluded that now that the agency

> has shown that it is possible to separate the interstate and intrastate revenues of interconnected VoIP providers for purposes of calculating universal service obligations, we find no basis at this time to preempt states from imposing universal service contribution obligations on providers of nomadic interconnected VoIP service that have entered the market, so long as state contribution requirements are not inconsistent with the federal contribution rules and policies governing interconnected VoIP service.

(Declaratory Ruling, ¶ 15.) The FCC concluded that requiring state USF contributions from interconnected VoIP providers does not conflict with federal policies and may actually promote them. The FCC explained that the providers benefit from state universal service because their customers value being able to place calls to and receive calls from users of the PSTN. The FCC declined to consider the limits of state enforcement authority in this context and stated that nothing in the declaratory ruling affects the agency's conclusions in the Vonage Preemption Order about preemption of rate regulation, tariffing, or other requirements that amount to conditions to market entrance.

In light of the FCC's decision not to preempt states from imposing USF contribution requirements on nomadic VoIP service providers because end points of VoIP calls can be determined, Sprint's suggestion that with the "[d]istinctions diminished [between nomadic and non-nomadic VoIP], there is even less of an

argument that the Vonage line of decisions does not apply to all forms of VoIP" is not persuasive. (Sprint Initial Brief, p. 12.) If anything, the FCC's Declaratory Ruling suggests that the FCC recognizes an intrastate jurisdictional element even in nomadic VoIP, making it less likely the Vonage decision applies to all forms of VoIP, not more.

The Board concludes that neither the information services exception nor the impossibility exception prevents the Board from exercising its jurisdiction in this case, i.e, the Board's jurisdiction has not been preempted. Thus, the disputed traffic remains subject to Iowa Telecom's switched access tariff.

Sprint suggested that if the Board has any doubt about the status of the VoIP traffic at issue in this case, it should stay its action pending further FCC action and cites instances where public utility commissions in other states have deferred ruling on this issue pending further action by the FCC. (Sprint Initial Brief, unnumbered page 14.)

Iowa Telecom and Consumer Advocate point to the FCC's UTEX Decision from late 2009 in support of their assertion that the Board can and should resolve this dispute. That case centered on whether the PUC of Texas (PUCT) was preempted from deciding issues involving the compensation for VoIP traffic. UTEX Communications and Southwestern Bell Telephone Company were parties in an arbitration proceeding before the PUCT. The PUCT had abated its arbitration proceeding pending a decision from the FCC regarding the appropriate regulatory

classification of VoIP services and the corresponding intercarrier compensation requirements, prompting UTEX to ask the FCC to preempt the jurisdiction of the PUCT and arbitrate the interconnection dispute. UTEX alleged the PUCT had failed to carry out its responsibilities under § 252 of the Telecommunications Act of 1996 (the Act).[33]

In its decision denying UTEX's petition for preemption, the FCC noted that the PUCT had filed a notice stating "[i]f the FCC indicates that the PUCT need not wait for the FCC to make [nationwide determinations on the appropriate regulatory treatment of VoIP services], then the PUCT will complete the arbitration." (UTEX Decision, ¶ 5.) The FCC stated that the PUCT is "best-suited to resolve such matters" and "emphasize[d] that the PUCT should not wait for Commission action to move forward." (Id., ¶ 10.) The Board agrees with Iowa Telecom and Consumer Advocate that the UTEX Decision supports a conclusion that the Board does not need to defer deciding this case.

Utility regulatory commissions in other states are reaching similar conclusions as they resolve disputes involving intercarrier compensation for VoIP traffic in the absence of final conclusive guidance from the FCC. For example, in 2010, the Pennsylvania Public Utility Commission (PPUC) issued a decision in a case

[33] The Act identifies a state role in the arbitration of interconnection agreements. 47 U.S.C. § 252(b) allows the incumbent local exchange carrier or any other party negotiating an interconnection agreement to petition a state commission to arbitrate any open issues. Section 252(e)(5) provides that if a state commission fails to act to carry out its responsibilities under § 252, the FCC will issue an order preempting the state commission's jurisdiction after being notified of the state commission's failure to act.

presenting similar issues to those being considered by the Board in this proceeding.[34] The PPUC considered a dispute over intercarrier compensation involving the termination of VoIP calls. The complaint alleged that Global NAPs (GNAPs), a CLEC, refused to pay tariffed access charges for interexchange services provided by Palmerton Telephone Company (Palmerton). The PPUC concluded it had subject matter jurisdiction to resolve the dispute. The PPUC found that the function performed by GNAPs of transmitting and indirectly accessing and terminating traffic at Palmerton's network facilities is a common carrier telecommunications service over which the PPUC has jurisdiction.

In considering the question of jurisdiction, the PPUC referred to a 2009 decision of the New Hampshire Public Utilities Commission (NH PUC)[35] in which the agency considered an intercarrier compensation dispute. The NH PUC acknowledged that the FCC explained in its Vonage Order that state regulation violates the Commerce Clause where the burden imposed on interstate commerce by such regulation is clearly excessive compared to the local benefits. But the NH PUC emphasized that "[p]ayment for services rendered, however, cannot be construed as an excessive regulatory burden." The NH PUC explained that the company seeking payment of access charges was not proposing new regulations that could pose a

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[34] *Palmerton Telephone Company v. Global NAPs South, Global NAPs Pennsylvania, Inc., Global NAPs, Inc., and Other affiliates*, Pennsylvania Public Utility Commission, "Opinion and Order," Docket C-2009-2093336, issued February 11, 2010 (Pennsylvania Order). On July 29, 2010, the PPUC denied Global NAPs' petition for reconsideration.

[35] *Hollis Telephone, Inc., Kearsarge Telephone Co., Merrimack County Tel. Co., and Wilton Telephone Co.*, DT 08-28, Order No. 25,043 (NH PUC November 10, 2009) (NH PUC Order).

barrier to market entry. Rather, the company was seeking enforcement of an existing intrastate tariff. The NH PUC explained that

> Timely payment for services rendered under valid tariffs should be a uniform policy across all states. Non-payment is an unjust burden for New Hampshire's local exchange carriers, and can create unfair market competition where other carriers are paying for those same services."

(Pennsylvania Order, p. 20, citing NH PUC Order at 18-19.)

The PPUC discussed the FCC's Vonage decision and determined it did not address the issue of whether intercarrier compensation applies for the use of Palmerton's PSTN facilities to terminate VoIP calls. The PPUC agreed with the conclusion of the NH PUC that the Vonage Order "primarily affects the potential state role on market entry and regulation of nomadic VoIP providers." (Pennsylvania Order, p. 25.) The PPUC noted that there are costs involved in the termination of any type of traffic Palmerton receives and such costs do not disappear when the traffic includes VoIP calls, whether fixed or nomadic, and Palmerton is entitled to compensation for the traffic.

The PPUC concluded that the indirect transmission of VoIP traffic by GNAPs to Palmerton constitutes a common carrier telecommunications services which falls within the PPUC's jurisdiction under state and federal law. The PPUC also noted that it has

> adjudicated a number of intercarrier compensation disputes under the premises of applicable Pennsylvania and federal law whether such cases involved the interpretation and enforcement of intrastate carrier access tariffs and/or interconnection agreements. In a similar vein, we do not need and cannot afford to wait and speculate whether the FCC will reach some sort of coherent and sustainable conclusion to its IP-enabled services and intercarrier compensation reform proceedings, when this might happen, and what the FCC's conclusions might be.

(Pennsylvania Order, p. 26.)

The PPUC found support for the idea that it can decide cases involving intercarrier compensation for VoIP calls in the FCC's UTEX Decision, citing that case and explaining that though "the FCC has not yet formally proceeded with any jurisdictional classification of interconnected VoIP calls, it still expects state utility regulatory commissions to deal with and resolve intercarrier compensation disputes that may implicate interconnected VoIP." (Pennsylvania Order, pp. 42-43.) Further, the PPUC cited another FCC decision, *North County Communications Corp. v. MetroPCS California, LLC*, File No. EB-06-MD-007 (FCC March 30, 2009), Memorandum Opinion and Order, DA 09-719, for the proposition that the "FCC fully expects state utility regulatory commissions to address intercarrier compensation issues that involve intrastate traffic and access matters." (Pennsylvania Order, p. 23.)

Another example of a state regulatory agency exercising authority over VoIP traffic is found in a decision issued on October 27, 2010, by the Maine Public Utilities

Commission (MPUC).[36] The MPUC decided that non-nomadic VoIP services offered by two companies are "telephone services" under Maine law[37] and subject to state regulation. The MPUC also found that the services in question were telecommunications services, not information services, under federal law and that the FCC had not preempted the MPUC's regulatory authority to regulate the services.

The MPUC had initiated an investigation into the regulatory status of the non-nomadic VoIP services offered by Time Warner Cable Digital Phone L.L.C. (TWC) and Comcast IP Phone, L.L.C. (Comcast). Maine's Office of Public Advocate (OPA) argued that the FCC had not preempted the authority of the MPUC to regulate the VoIP service. According to the OPA, there has been no express statement by either Congress or the FCC of an intent to preempt state regulation of the service; state regulation of the service would not conflict with federal policy because there is no federal licensing or consumer protection requirements that apply to the service; and

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[36] *State of Maine Public Utilities Commission Investigation into Whether Providers of Time Warner "Digital Phone" Service and Comcast "Digital Phone" Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service*, Docket No. 2008-421, "Order," October 27, 2010 (Maine Order). It appears that Time Warner Cable, one of the service providers involved in the proceeding, has complied with the Maine Order. In an order issued in Docket No. 2008-421 on January 12, 2011, the MPUC indicated that Time Warner Cable's proposal to provide telephone service through its CLEC affiliate constitutes substantial compliance with the MPUC's October 27, 2010, order. Comcast has appealed the October 27, 2010, order to the Maine Supreme Judicial Court.

[37] Maine's statute at 35-A M.R.S.A. §102 defines "telephone service" as the "offering of a service that transmits communications by telephone, whether the communications are accomplished with or without the use of transmission wires." "Telephone utility" is defined as "every person ... that provides telephone service for compensation" within the state. Another statute, 35-A M.R.S.A. § 8301, provides that cable television companies, "to the extent they offer services like those of telephone utilities subject to regulation by the commission, shall be subject to the commission's jurisdiction over rates, charges and practices ... ."

neither Congress nor the FCC has occupied the field of regulation of IP-based services. (Maine Order, p. 6.)

The companies argued that even if the service is properly included in the state's definition of "telephone services," federal law preempts application by the MPUC of the state statutes to the VoIP services. Comcast argued that its VoIP service is an information service in that involves a net protocol conversion and that the calling features of its services are intertwined with other computing and information service functions as part of an integrated service offering. TWC argued that the preemptive effect of the FCC's Vonage Order is not limited to nomadic VoIP services but applies to any state PUC attempt to regulate any VoIP service which requires a broadband connection and use of IP-compatible equipment at the user's location and that offers a suite of integrated capabilities.

The MPUC concluded that the VoIP service offered by the companies falls within Maine's statutory definition of "telephone service" and that federal law does not preempt the authority of the MPUC to enforce the state's regulatory scheme as applied to the VoIP service. The MPUC interpreted the phrase, "transmits communications by telephone," to be "agnostic with respect to how a call is transmitted or processed." The MPUC also found that the public policy purposes behind Maine's statutes were advanced by applying the regulatory requirements to VoIP service, especially since VoIP is promoted as a substitute for traditional telephone service.

The Maine PUC discussed the Eighth Circuit's decision affirming the FCC's Vonage Order.[38] The MPUC acknowledged that the court found that the FCC's conclusion that state regulation of VoIP service would interfere with valid federal rules or policies was entitled to "weight," and was not arbitrary or capricious. The MPUC emphasized, though, that the court limited the scope of its decision to "to the issue [of] whether the FCC's determination was reasonable based on the record existing before it at the time," and further noted that "[i]f, in the future, advances in technology undermine the central rationale of the FCC's decision, its preemptive effect may be reexamined." *Id.* at 580. The MPUC referred to the Court's observation that subsequent to the Vonage Order, the FCC noted in a case involving VoIP service providers' responsibility to contribute to the universal service fund, the FCC indicated:

> An interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer quality for the preemptive effects of our Vonage Order and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the Vonage Order would no longer be applicable to such an interconnected VoIP provider.

*(*Maine Order, p. 16*,* citing *Minn. Pub. Utils Comm'n v. FCC, 483 F.3d 570, 581 (8th Cir. 2007), citing Universal Serv. Contribution Methodology,* 21 F.C.C.R. 7518 at 7546 ¶ 56(2006)).

The MPUC concluded its statutory authority to regulate the VoIP services at issue had not been preempted. The MPUC stated that it was obligated to fulfill its role in regulating telecommunications to ensure safe, reasonable, and adequate

[38] *Minn. Pub. Utils Comm'n v. FCC*, 483 F.3d 570 (8th Cir.)

service at just and reasonable rates and that to refrain from performing that role "in anticipation of a possible future order by the FCC that may, or may not, have the effect of validly preempting our authority would be to engage in 'preemptive preemption' – a path that we have in the past found inconsistent with our responsibilities." (Maine Order, p. 17.)

B. Did Sprint properly dispute Iowa Telecom's switched access charges as permitted by Iowa Telecom's tariff?

Summary of the parties' positions

Iowa Telecom

Iowa Telecom argues that if the Board agrees with Sprint, it would effectively be rewriting Iowa Telecom's tariff to sanction customer nonpayment whenever a customer states there is a dispute and refuses to pay. According to its tariff, once Iowa Telecom denies a dispute, any withheld amounts relating to the dispute become past due and payable. If Sprint disagrees with Iowa Telecom's position, it must pay but would be entitled to bring the issue to the Board in a complaint filing. (Iowa Telecom Initial Brief, pp. 7-8.)

Iowa Telecom states that federal and state policies disfavor self-help of the type in which Sprint has engaged and Board precedent holds that Sprint must directly challenge the tariff, not withhold access charge payments after Iowa Telecom denies a dispute. The common carrier obligation creates a balance which obligates the carrier to provide service according to its tariff and obligates the customer to pay the charges in the tariff. Because significant private investment dollars are spent on the

network by the company, allowing the customer to skew this careful balance by allowing it to decide whether to pay undermines the carrier's opportunity to recover its investment and the carrier's willingness to be exposed to the risks created by the investment. (Iowa Telecom Initial Brief, pp. 8-9.)

According to Iowa Telecom, Sprint admits to withholding undisputed access charge payments in addition to disputed ones. Iowa Telecom argues Sprint's actions are unreasonable, violate Iowa Telecom's tariff, and serve as legitimate grounds for disconnection of services for nonpayment.

Iowa Telecom explains that its tariff grants customers a period of time in which to dispute past bills, but does not permit such customers to withhold payment for undisputed billings in order to "make up" for past payments that were never originally disputed. Its tariff creates a balance where undisputed amounts must be paid on time, while permitting a customer to temporarily withhold disputed amounts until Iowa Telecom can review the legitimacy of the dispute. Sprint provides no support for its supposed right to violate the tariff in this way. And given federal and state policy against self-help, withholding undisputed amounts is especially offensive. The careful balance created by the common carrier relationship is further undermined if customers are allowed to reverse a previously paid amount for months past. Sprint's retroactive practice distorts accounting procedures, where books could already be closed for the retroactive period raised. (Iowa Telecom Initial Brief, p. 10.)

Iowa Telecom suggests that Sprint's justification of its unlawful practice of using an "Accounts Payable (AP) Debit Balance" account, withholding current undisputed amounts due in order to repay itself for previously made payments, is merely a smoke screen to cover its violation of Iowa Telecom's tariff. According to Iowa Telecom, its tariff does not permit maintaining a self-help AP Debit Balance account. If the tariff allowed reversing previously paid amounts, there would have to be language permitting it such as there is with temporarily withholding payment on unpaid disputed amounts. Iowa Telecom argues that Sprint's practice violates the filed rate doctrine and policies against self-help and preservation of telephone company financial expectations.

Iowa Telecom suggests that the essence of the filed rate doctrine is that the tariff terms dictate the proper recourse of the customer and the customer is not free to devise its own procedures that contradict the terms of the tariff. Further, proper economic incentives dictate that all customers with good faith billing disputes be allowed only to withhold payment temporarily. Allowing customers to unilaterally take revenue would undermine the financial structure that was established to permit Iowa Telecom to build a reliable network to benefit its customers, including Sprint. Iowa Telecom argues that because its tariff only contemplates temporary withholding of unpaid disputed amounts, the Board should rule that a customer cannot create retroactive withholdings through an AP Debit Balance account. (Iowa Telecom Reply Brief, p. 4.)

Consumer Advocate

According to Consumer Advocate, end-user customers are the ones most affected by a carrier dispute which carries a potential for disconnection of service. Consumer Advocate submits that carriers involved in economic disputes with other carriers should not be permitted to resort to either protracted withholding of payment or call blocking except as a last resort and only after obtaining Board permission.

In response to Sprint's claims it was entitled to withhold and offset access payments under the provisions of the tariff regarding disputed payments and Iowa Telecom's position that it was entitled to demand payment since it denied Sprint's dispute, Consumer Advocate states that it should have been clear to both carriers that their commercial dispute would need to be resolved by the Board or some other authority. Consumer Advocate states that the Board has clearly disfavored self-help actions by carriers, including both withholding payment and call blocking. Sprint's invocation of the disputed billing procedure under Iowa Telecom's tariff provision was denied by Iowa Telecom. If Sprint believed that either Iowa Telecom's denial was not correct or that Iowa Telecom was not entitled to resolve the billing dispute, Consumer Advocate argues that Sprint should have brought the matter to the Board rather than continue to withhold payment without the Board's permission. (Consumer Advocate Brief, pp. 14-17.)

Sprint

Sprint asserts that disputing Iowa Telecom's VoIP charges was appropriate as Sprint properly withheld disputed amounts as expressly permitted by the Iowa Telecom tariff. Sprint admits it had been paying Iowa Telecom for traffic that included VoIP traffic but explains that competitive pressures and further developments in the law prompted it to reevaluate its practice. Sprint claims that when it decided to challenge the traffic, it properly disputed the access charges for VoIP traffic under the terms of Iowa Telecom's tariff at Section 2.4.1(D)(2). According to Sprint, the tariff anticipates that disputed amounts may be withheld, with the consequence of doing so being the potential to pay late fees should Iowa Telecom prevail. The tariff also has provisions for disputes raised more than six months after the billing in question. (Sprint Initial Brief, unnumbered pp. 2 -4.)

Sprint denies not paying undisputed amounts as alleged by Iowa Telecom. Sprint explains that it has established an AP Debit Balance account, which occurs when Sprint disputes inappropriate amounts that it has overpaid for a past period. Sprint places the value of those amounts on its books as an amount owed from Iowa Telecom as amounts wrongfully paid. If overpayment amounts are substantial, they may be larger than the "undisputed" charges in the current period. In that case, Sprint enters the current undisputed charges in the Accounts Payable system to reduce the overpayment amounts and if overpayment amounts still remain, there is

no current account payable amount owed to Iowa Telecom. (Sprint Initial Brief, unnumbered pp. 4-5.)

Sprint contends that its use of the debit balance account is consistent with Iowa Telecom's own tariffs, makes accounting sense, and benefits Iowa Telecom in that Iowa Telecom has had the use of Sprint's overpayments and thus any revenues from the time-value of that money. Further, as a policy matter, the Board should not preclude the use of debit balance accounts. Sprint cites the complaint case in Board Docket No. FCU-07-2, *Qwest v. Superior*, *et al*., stating that no refunds have been made in that case because the money had already been invested in plant and other illiquid assets. Sprint suggests that the best way to assure a prevailing carrier receives a proper refund to make it whole is to remove control over that money from the receiving party so that it cannot be spent. (Sprint Initial Brief, unnumbered pp. 6-7; Sprint Reply Brief, pp. 34-35.)

Sprint argues that in this circumstance, withholding is permitted as part of the approved dispute resolution process in the tariff, and is not an act of unilateral withholding as is Consumer Advocate's apparent concern. Sprint suggests that by having unilateral authority to both assess charges and then determine whether those charges are legitimate, Iowa Telecom would serve as both prosecutor and judge. According to Sprint, this leaves the right to dispute resolution meaningless and results in situations where Sprint paid improperly assessed charges and now cannot recover those overpayments, as is the case in Docket No. FCU-07-2. Sprint

contends that when an ILEC has unilateral control over the payment stream, there is no protection for the competitors' ability to recover overpaid amounts. Sprint seeks a better balance of financial protection. Sprint argues that it appropriately withheld under the tariff and Iowa Telecom inappropriately responded with a threat to block traffic.

Discussion

According to the Sprint Complaint, in July 2009, Sprint determined that Iowa Telecom had been assessing traditional terminating access charges on VoIP traffic. Sprint claims it properly disputed those charges by withholding the disputed amounts. As described above, Sprint also established an AP Debit Balance account by placing on its books the value of the amounts Sprint determined it had overpaid for a past period as if they were amounts *owed* to Sprint from Iowa Telecom. Apparently the "overpayment" amounts were larger than the undisputed charges owed to Iowa Telecom, which, according to Sprint, resulted in no current account payable amount owed to Iowa Telecom.

Iowa Telecom claims that by using its AP Debit Balance account, Sprint was unlawfully withholding undisputed amounts. However, it appears from e-mail correspondence that was attached to the complaint (Sprint Complaint, Attachment B) that Sprint agreed to return to paying current charges not in dispute on December 23, 2009.

Iowa Telecom claims that as of January 15, 2010, Sprint had withheld $793,000 of both intrastate and interstate switched access charges. (Iowa Telecom Answer and Motion for Injunctive Relief, paragraph 1, filed January 19, 2010.) It is not clear how much of the $793,000 is allocated to the intrastate jurisdiction, but this proceeding was not intended to determine the precise amounts in dispute. It is also unclear whether Sprint still maintains its AP Debit Balance account even after agreeing to pay current charges not in dispute, as noted above.

Iowa Telecom's tariff implies that only disputed amounts can be withheld, but does not directly state that undisputed amounts must be paid. In a section describing late payment charges, the tariff describes several scenarios which involve disputed, withheld amounts. For example, the tariff states at Section 2.4.1(D)(1): "A late payment charge will apply to disputed amounts withheld pending settlement of the dispute if it is determined in the Telephone Company's favor." Further, the tariff does not appear to give a specific time frame in which disputes must be filed with Iowa Telecom, although it contemplates as much as a six month timeframe for submitting "a documented claim for the disputed amount." (Iowa Telecom tariff, Section 2.4.1(D)(2).)[39]

Because the tariff includes language regarding the treatment of disputed amounts, it contemplates the payment of undisputed amounts. Further, the timely payment of undisputed amounts is a common practice for all types of business

[39]Iowa Telecom attached selected provisions of its tariff as Attachment A to its January 19, 2010, "Answer and Motion for Injunctive Relief." Those provisions are attached to this Order, identified as Appendix A.

transactions. Therefore, Sprint acted inappropriately by establishing its AP Debit Balance account which, in effect, withheld amounts Sprint had not disputed.

Sprint complains that Iowa Telecom's "unilateral authority" in its tariff to both assess charges and then determine whether those charges are proper creates a situation whereby Iowa Telecom is both prosecutor and judge, providing no protection for the competitor's ability to recover overpaid amounts. (Sprint Reply Brief, p. 34.) If Sprint disagrees with this or any other language in Iowa Telecom's tariff, Sprint should have objected to the tariff.

The Board agrees with Consumer Advocate's suggestion that neither party is without blame. It should have been obvious to the parties that their dispute would need to be resolved by either the Board or some other authority. Both parties resorted to self-help actions, which the Board does not favor. As Consumer Advocate emphasizes, the Board "has made clear its disfavor of self-help actions by carriers, including both withholding payment and call blocking." Consumer Advocate cites the Board's statement in Docket No. FCU-07-2 that "unilaterally withholding payment is not a preferred form of dispute resolution in economic disputes between carriers unless it its clearly contemplated under the applicable dispute resolution provisions ... ."[40] The tariff at issue in this case contemplated withholding of disputed balances but did not contemplate Sprint's use of an AP Debit Balance account. Sprint's use of the debit balance account amounted to unilateral withholding of

[40] Consumer Advocate Brief, p. 15, citing *Qwest Communications Corp. v. Superior Tel. Cooperative et al*., Docket No. FCU-07-2, "Final Order," p. 70, issued September 21, 2009.

undisputed payments. The Board concludes that by using an AP Debit Balance account, Sprint did not properly dispute Iowa Telecom's switched access charges as permitted by Iowa Telecom's tariff.

C. Can a local exchange carrier (Iowa Telecom) disconnect a wholesale customer (Sprint) without Board approval?

Summary of Parties' Positions

Iowa Telecom

Iowa Telecom argues it is entitled to disconnect wholesale customers for nonpayment, without Board approval, after it has rejected a dispute, contrary to Sprint's underlying premise that Iowa Telecom must seek Board approval prior to disconnecting Sprint access service. (Iowa Telecom Initial Brief, pp. 3-7; Iowa Telecom Reply Brief, pp. 2-3.)

Iowa Code § 476.20(1) and the Board's rules at 199 IAC 22.16 generally require a carrier to get permission from the Board to "discontinue, reduce, or impair service to a community, or part of a community." Iowa Telecom points out, though, that the subsection and rule make an exception for "nonpayment of account or violation of rules and regulations." Iowa Telecom's position is that state law and the Board's rules specifically permit disconnection in this instance. (Iowa Telecom Initial Brief, pp. 3-4; Reply Brief, pp. 2-3.)

According to Iowa Telecom, the Board's analysis in *Qwest Corp. and U.S. Cellular Corp. v. East Buchanan Tel. Coop.*, Docket Nos. FCU-04-42, FCU-04-43, "Order Granting Injunctive Relief," (December 23, 2004) (*East Buchanan*), confirms

that a carrier may disconnect a wholesale customer without prior Board approval in appropriate circumstances. In *East Buchanan*, Iowa Telecom argues, the Board recognized that if bills were sent to the carrier and not paid, then disconnections without Board approval would have been permitted under the statutory exception. Iowa Telecom argues that none of the reasons why East Buchanan was not permitted to disconnect apply to the present case. (Iowa Telecom Initial Brief, p. 4; Iowa Telecom Reply Brief, p. 3.)

Iowa Telecom also argues that like all other carriers' tariffs, its tariff allows disconnection of a customer's services for nonpayment after written demand has been given and the customer does not comply. Section 2.1.8(A) of Iowa Telecom Tariff No. 2 clearly permits Iowa Telecom to disconnect intrastate access customers upon 15 days written notice for, among other reasons, failure to comply with the timely payment provisions of Section 2.4.1(D).

Iowa Telecom also argues that carriers have the obligation to comply with 199 IAC 22.14(1)"b," which requires carriers to discontinue service to IXCs that do not pay the CCLC. The rule states that if communication is made without compliance with the rule, the telephone utility shall terminate service after notice is given. There is no statutory or regulatory requirement that the carrier obtain prior approval. Iowa Telecom suggests that it makes no sense for a Board rule to require carriers to take a particular action in response to a customer's failure to pay the CCLC if, at the same

time, the Board was requiring such carriers to seek prior Board approval for disconnection.

Iowa Telecom contends that Sprint has misused the emergency injunctive relief provision of Iowa Code § 17A.18A. A customer that waits long enough to seek relief from the Board under this subsection will always be able to manufacture an apparent emergency and force Board intervention until the Board can consider the merits of the dispute. By Sprint's own admission, it knew of the potential disconnection date two weeks prior to seeking any clarification from Iowa Telecom. Sprint then waited and came to the Board with an emergency complaint to prevent disconnection that would occur on the following day.

According to Iowa Telecom, it is illogical to implement Iowa Code § 17A.18A as a "trump" to customer service disconnection found in Iowa Code § 476.20(1) in every instance, because any customer could make a superficial showing that there is an "immediate danger to the public health, safety, or welfare requiring immediate agency action." All customers rely, to some extent, on their telephone service for contacting hospitals, doctors, and the police. However, this reliance is relatively limited in the case of toll service, the subject of this case.

Iowa Telecom acknowledges that it would be less disruptive to end-user customers to seek Board approval prior to disconnecting a wholesale customer, as suggested by Consumer Advocate. But Iowa Telecom emphasizes that neither Iowa

law nor Board rules or precedent unconditionally prohibit disconnection of a wholesale customer for nonpayment.

Iowa Telecom argues that unlike the *East Buchanan* case, where U.S. Cellular had not been billed by East Buchanan, Iowa Telecom has a long-standing account relationship with Sprint, has sent bills to Sprint, and Sprint is unlawfully refusing to pay the bills under this account. Sprint also claims that it has a commercial dispute like that in *East Buchanan*. However, Iowa Telecom asserts that, under the facts now before the Board, *East Buchanan* would have been decided differently if there had been proper billing and an account relationship. (Iowa Telecom Reply Brief, p. 3.) Iowa Telecom suggests that Sprint is not situated similarly to the affected carriers in *East Buchanan*, and cannot avoid the plain language of Iowa Code § 476.20(1).

Consumer Advocate

Consumer Advocate explains that the Board has found carrier actions that amount to call-blocking to be improper, referring to the Board's finding in Docket No. FCU-07-2 that a carrier's actions amounted to call blocking, thus warranting notice that subsequent findings of call blocking would result in civil penalties. Consumer Advocate also refers to the Board's decision in *East Buchanan*, in which the Board stated that "it appears that blocking telephone calls on a carrier basis will almost always present an immediate danger to the public health, safety, or welfare, because the blocking carrier cannot promise, let alone guarantee, that it will block only non-

emergency calls." The Board also stated in that decision that "blocking should not be used as a means of forcing action in a commercial dispute."[41] If Iowa Telecom believed its discussions with Sprint were not productive, it could have brought the matter to the Board for permission to disconnect, as other carriers have done. Consumer Advocate's position is that the carriers' delay in seeking resolution of the dispute and their use of self-help remedies of withholding payment and threatening disconnection puts the service of direct and indirect end-user customers of both carriers at risk.

Sprint

Sprint argues that Iowa Telecom's attempt to block live traffic as a means to negotiate a compensation dispute is clearly contrary to established Board precedent. Sprint refers to the Board's statement in *East Buchanan* that because a carrier cannot guarantee that it will block only non-emergency calls, "blocking should not be used as a means of forcing action in a commercial dispute," because "blocking telephone calls on a carrier basis will almost always present an immediate danger to the public health, safety, or welfare." Sprint anticipated Iowa Telecom's argument that, unlike *East Buchanan*, its tariff permitted disconnection for non-payment. But Sprint asserts it did not violate Iowa Telecom's tariff by withholding disputed amounts. Further, Sprint argues that Iowa Telecom did not avail itself of any of the options outlined by the Board in the *East Buchanan* order for resolution of a

[41] In *Re: Qwest Corporation and U.S. Cellular Corporation v. East Buchanan Telephone Cooperative*, Docket Nos. FCU-04-42, FCU-04-43, "Order Continuing Temporary Injunction, Docketing and Consolidating Cases, and Setting Procedural Schedule," p. 8, issued September 14, 2004.

commercial dispute, whether through negotiations, complaint proceedings before the Board, arbitration and court cases. Sprint asks the Board to reiterate that it is unreasonable to block or threaten to block to obtain leverage in a commercial dispute.

Sprint argues that although Iowa Telecom goes to great lengths to distinguish this case from the *East Buchanan* case, there is nothing Iowa Telecom can do to avoid its central premise that blocking calls will almost always present an immediate danger to the public health, safety, or welfare. Nor can Iowa Telecom legitimately deny that it threatened to block traffic for the inappropriate reason of forcing action in a commercial dispute.

Sprint asserts that Iowa Telecom has not presented any plausible argument or evidence showing that Sprint was trying to delay the dispute resolution process in order to create an "emergency." The conditions for the emergency adjudicative proceedings in Iowa Code § 17A.18A were created solely by Iowa Telecom's decision to block traffic.

Sprint argues that, as suggested by Iowa Telecom, the applicability of Iowa Code § 476.20 may be limited by the Board's reasoning in *East Buchanan*. However, Sprint argues that should not trouble the Board because the Iowa Supreme Court upheld the Board's use of § 17A.18A in *East Buchanan* to protect the health and welfare of Iowans when call blocking is threatened. And although the Board's use of § 17A.18A limits Iowa Telecom's ability to exercise its alleged rights under Iowa Code

§ 476.20 against other carriers, it protects the rights of Sprint and its joint providers' end-user retail customers.

Sprint notes that the provisions of § 476.20 and § 17A.18A can be harmonized. The key is that there has to be reasonable notice given prior to blocking so that § 17A.18A need not be used. Blocking should remain difficult and highly disfavored. Because blocking inflicts pain on the innocent end users of Iowa Telecom, Sprint, or Sprint's VoIP partners, the issues should be resolved between the disputing parties without impacting those innocent end users, as the Board has consistently held.

Discussion

The Board's decision in Docket No. SPU-02-09, *Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom*,[42] is relevant to the call blocking issue in this case. In that case, Iowa Telecom filed a request for approval to disconnect access services being provided to WorldCom, Inc. (WorldCom). In its order issued July 2, 2002, the Board stated at page 2:

> Iowa Telecom does not allege those customers [end-user customers who have chosen WorldCom as their primary interexchange carrier] have failed to pay their accounts or violated any rules or regulations, so it appears Iowa Telecom cannot discontinue access services to WorldCom unless and until permission to do so is obtained from the Board, because of the inevitable impairment of service that would be suffered by other customers.

[42] In Docket No. SPU-02-9, Iowa Telecom alleged it had the right, pursuant to its intrastate access tariff, to demand a deposit and, upon WorldCom's failure to provide a deposit, to discontinue providing intrastate access services to WorldCom, based upon WorldCom's payment history and "precarious financial health."

Further, in its order in the same case issued July 12, 2002, the Board stated at page 3:

> [T]he Board is concerned about the potential impact of any disconnection on the Iowa Telecom local exchange customers who have chosen WorldCom to provide their intrastate interexchange services. The Board notes that Iowa Code § 476.96 includes access to switched exchange services as a part of the basic local telephone service that Iowa Telecom is obligated to provide to its customers. If Iowa Telecom discontinues providing intrastate access services to WorldCom, then those customers will not have access to switched interexchange, intrastate services, at least on a "1+" basis. Thus, Iowa Telecom's proposal to discontinue service to WorldCom is also a proposal to reduce the level of local exchange service provided by Iowa Telecom to its customers who have presubscribed to WorldCom's intrastate interexchange service. The Board will not approve that change without first considering the potential impact on the public interest.

Those same public interest concerns apply in the current case. Iowa Telecom's argument is that because bills were sent to Sprint (unlike the *East Buchanan* case), it is entitled under its tariff to disconnect Sprint without prior Board approval. The Board disagrees with Iowa Telecom's position on this point. As pointed out by Consumer Advocate, end-user customers are most affected by a carrier dispute which carries a potential for disconnection of service. Iowa Code § 476.101(9) provides that a telecommunications carrier shall not take any action that disadvantages a customer who has chosen to receive service from another carrier. Iowa Telecom's proposed blocking would disadvantage customers who choose to take intrastate interexchange service from Sprint in order to make calls terminating in

Iowa Telecom's service territory. The Board also agrees with Consumer Advocate's assertion that carriers involved in economic disputes with other carriers should not be permitted to resort to call blocking except as a last resort and then only after obtaining Board permission.

The *East Buchanan* case is helpful when evaluating the blocking issue in the current case, but not in the light presented by Iowa Telecom. In *East Buchanan*, the Board concluded that blocking almost always presents an immediate danger to the public health, safety, or welfare, since the carrier cannot guarantee that it will block only non-emergency calls. The *East Buchanan* decision provides some insight as to when blocking without prior Board approval may be appropriate. In footnote 2 of the Board's order issued September 14, 2004, the Board listed two examples: (1) when the actions of one carrier are causing significant and serious safety problems on another carrier's network and (2) when one carrier has been properly billed for services rendered by a second carrier, but the first carrier refuses to pay the bills resulting in a serious and immediate danger to the second carrier's financial health. The facts of the present case before the Board do not fit within either of these examples. Consistent with prior Board statements disapproving call blocking as an option in a commercial dispute, the Board concludes that Iowa Telecom cannot disconnect a wholesale customer on these facts without prior Board approval.

SUMMARY OF BOARD CONCLUSIONS

As explained in the discussion above, the Board finds that Sprint's VoIP traffic discussed in this case is jurisdictionally intrastate and subject to state regulation and Iowa Telecom's intrastate switched access tariff. The Board concludes its jurisdiction has not been preempted because the FCC has not ruled that cable telephony is an interstate information service and because the impossibility exception does not apply to the traffic at issue in this proceeding.

Further, the Board concludes that by using an AP Debit Balance account, Sprint did not properly dispute Iowa Telecom's switched access charges as contemplated by Iowa Telecom's tariff. The Board also concludes that Iowa Telecom cannot disconnect a wholesale customer such as Sprint, in circumstances as described in the present case, without prior Board approval. The potential harm to end user customers of the wholesale carrier warrants requiring the carriers to bring this type of dispute to the Board or pursue other appropriate action before blocking calls. The Board will direct Sprint to repay amounts owed to Iowa Telecom in compliance with Iowa Telecom's switched access tariff and will direct the parties to file a joint status report when the payment is received by Iowa Telecom.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Within 30 days of the date of this order, Sprint Communications Company L.P. shall pay Iowa Telecommunications Services, Inc., d/b/a Iowa

Telecom, now known as Windstream Iowa Communications, Inc., amounts owed for unpaid intrastate access charges in compliance with Iowa Telecom's switched access tariff.

2. Within ten days of payment made pursuant to this order, the parties shall file a status report with the Board.

UTILITIES BOARD

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ATTEST:

_____ _____

Executive Secretary, Deputy

Dated at Des Moines, Iowa, this day of February 2011.