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FILED 10/12/2011 09:40AM
CLERK DISTRICT COURT
POLK COUNTY IOWA

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<table>
<tr><td>FARMERS TELEPHONE COMPANY OF RICEVILLE, IOWA; FARMERS & MERCHANTS MUTUAL TELEPHONE COMPANY OF WAYLAND, IOWA; INTERSTATE 35 TELEPHONE COMPANY D/B/A INTERSTATE COMMUNICATIONS COMPANY; and DIXON TELEPHONE COMPANY,
Petitioners,

v.

IOWA UTILITIES BOARD,
Respondent.</td><td rowspan="3">CASE NO. 05771 CVCV 008561
(Consolidated with CVCV 007993 and CVCV 007988)

ORDER</td></tr>
<tr><td>FARMERS TELEPHONE COMPANY OF RICEVILLE, IOWA,
Petitioner,

v.

IOWA UTILITIES BOARD,
Respondent.</td></tr>
<tr><td>REASNOR TELEPHONE COMPANY, LLC,
Petitioner,

v.

IOWA UTILITIES BOARD,
Respondent.</td></tr>
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On July 15, 2011, this matter came on for oral argument on Petitioners' Petition for Judicial Review. The parties appeared through counsel of record. After reviewing the record and hearing the arguments of counsel, the Court enters the following ruling:

BACKGROUND FACTS

On or about February 20, 2007, Qwest Communications Corporation filed a complaint with the Iowa Utilities Board alleging violations of the terms and conditions of intrastate tariffs by several telecommunications carriers. Qwest alleged that Superior Telephone Cooperative; The

Farmers Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; Dixon Telephone Company; Reasnor Telephone Company, LLC; Great Lakes Communications Corp.; and Aventure Communication Technology, LLC (collectively, the local exchange carriers or "LECs") engaged in activities involving free conference calls, chat rooms, podcasts, voice mail, pornographic calls, and international services to dramatically increase call traffic in the local exchange. This practice is referred to as "traffic pumping."

The LECs are members of the National Exchange Carrier Association's ("NECA") traffic sensitive pool. The NECA pool generally ensures a minimum amount of access revenue, with excess revenue shared among the entire pool. The NECA interstate access tariff applies to interstate traffic, while the Iowa Telecommunications Association ("ITA") tariffs apply to intrastate traffic. The ITA tariff generally mirrors the NECA tariff and incorporates many of the same terms and conditions of the NECA tariff. (Final Order at 17); *see also* (Final Order at 9, 18)(quoting Section 1.1 of the ITA Tariff and Section 6.1 of the NECA tariff). The LECs may opt out of the NECA pool for a two-year period while maintaining the same rates, keeping all access revenue in the process. After two years, the LEC must re-enter the pool or else provide evidentiary support for its rate.

"Traffic pumping" occurs when an LEC partners with, or otherwise enters into an arrangement with, a free calling service company ("FCSC") providing one or more of the types of services described above. The FCSC sends its equipment, such as conference bridges, routers, or chat line computers to the LEC. The LEC then connects the equipment to its network and assigns telephone numbers to the FCSC, often in large blocks. The FCSC then advertises its free

calling services to customers. As a result, long distance traffic increases on the LECs' systems, sometimes by a factor of 100.

Interchange carriers such as Qwest; AT&T Communications of the Midwest, Inc. and TCG Omaha (together, "AT&T"); and Sprint Communications Company, L.P. (collectively the interexchange carriers, or "IXCs") deliver these long distance calls to the LECs, paying interstate or intrastate switched access rates of between five and thirteen cents per minute. These rates are generally higher than average because the LECs in questions are rural and traditionally receive low traffic volumes, making switched access service more expensive than an urban carrier with a more geographically dense end-user base. By opting out of the NECA pool, the LECs are able to maintain the higher tariffed rates and keep the excess revenue for themselves for two years rather than sharing it with the rest of the pool. At the end of the two-year opt out period, the LECs must then either rejoin the pool or accept a switched access rate that would be significantly lower based upon the traffic generated by the FCSC.

The upside for an FCSC in this type of an arrangement is a marketing fee from the LEC. Primarily, this marketing fee is a percentage of the switched access fees generated by the increased long distance traffic which are paid by the IXCs.

Other facts may be discussed below as necessary.

PROCEDURAL HISTORY

Qwest initiated three lawsuits in 2007 after discovering that long distance traffic into several rural Iowa exchanges had increased dramatically. The alleged traffic pumping, Qwest asserted, was inconsistent with the switched access services language of the Iowa Telecommunications Association Tariff No. 1 (the "ITA Tariff"). On or about February 20, 2007, it initiated the underlying action before the Iowa Utilities Board against the LECs

regarding the increased intrastate traffic. It also initiated a federal lawsuit and a formal complaint proceeding before the FCC with regards to the interstate long distance issues. The LECs moved to dismiss the action and for summary judgment, which the Board denied. During the discovery phase several issues arose, including disputes over late filed testimony and an attempt by several LECs to create backdated invoices and contracts for services.

The Board held an evidentiary hearing from February 5, 2009 through February 13, 2009. At the hearing, the pre-filed testimony was accepted on the record, cross examination occurred, and redirect was allowed within the scope of cross. Initial briefs were due and filed by March 31, 2009, with reply briefs filed on or about April 30, 2009. The Board issued its final order on September 21, 2009, granting relief to the IXCs and denying most counterclaims filed by Reasnor. All of the LECs sought reconsideration, but several LECs filed a petition to review before the Court. The Court stayed those petitions and remanded to the Board for its reconsideration decision. On February 4, 2011, the Board issued that decision, and all of the Petitions for Judicial Review filed by the LECs were consolidated into the present action.

STANDARD OF REVIEW

On judicial review of agency action, the district court functions in an appellate capacity to apply the standards set forth in Iowa Code § 17A.19. *Iowa Planners Network v. Iowa State Commerce Comm'n*, 373 N.W.2d 106, 108 (Iowa 1985). The district court's review is limited to corrections of errors of law and is not de novo. *Harlan v. Iowa Dep't of Job Serv.*, 350 N.W.2d 192, 193 (Iowa 1984).

The Court may affirm the agency decision or remand to the agency for further proceedings. Iowa Code § 17A.19(10). The Court "shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it

determines that substantial rights of the person seeking judicial relief have been prejudiced" for any of the grounds listed under Iowa Code § 17A.19(10). *Id*.

The Court must reverse, modify or grant other appropriate relief from the challenged action if it was "[b]ased upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f). Substantial evidence is defined as "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1).

> Evidence is substantial when a reasonable person could accept it as adequate to reach the same findings. Conversely, evidence is not insubstantial merely because it would have supported contrary inferences. Nor is evidence insubstantial because of the possibility of drawing two inconsistent conclusions from it. The ultimate question is not whether the evidence supports a different finding but whether the evidence supports the findings actually made.

Reed v. Iowa Dep't of Transp., 478 N.W.2d 844, 846 (Iowa 1991)(citations omitted).

In viewing the record as a whole, the Court must consider any determination of veracity made by the agency fact finder who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. Iowa Code § 17A.19(10)(f)(3). Viewing the record as a whole requires the court to judge a finding of fact in light of all relevant evidence both supporting such a finding as well as all relevant evidence that detracts from that finding. Iowa Code § 17A.19(10)(f)(3). It is the role of the agency, as fact finder, to determine the credibility of the witnesses and the weight to be given to any evidence. *Arndt v. City of Le Claire*, 728 N.W.2d 389, 394-95 (Iowa 2007)(citation

omitted). The agency is free to accept or reject any expert opinion in whole or in part. *Sherman v. Pella Corp.*, 576 N.W.2d 312, 321 (Iowa 1998)(citation omitted).

Where factual determinations are by law clearly vested in the agency, it follows that the application of law to such facts is likewise vested in the discretion of the agency. *Tremel v. Iowa Dept. of Revenue*, 785 N.W.2d 690, 693 (Iowa 2010)(citing *Iowa AG Constr. Co. v. Iowa State Bd. of Tax Review*, 723 N.W.2d 167, 174 (Iowa 2006)).

Where the petitioner does not challenge the agency's findings of fact but rather claims the error lies with the agency's interpretation of the law, the question on review is whether the agency's interpretation was erroneous and the Court may substitute its interpretation for that of the agency. *Meyer v. I.B.P.*, 710 N.W.2d 213, 219 (Iowa 2006)(citations omitted). The Court shall reverse, modify, or grant appropriate relief if the agency action is "based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(10)(c).

However, the Court shall reverse, modify, or grant appropriate relief to the petitioner if the agency's decision was based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has been clearly vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(10)(m). A decision is "irrational" when it is not governed by or according to reason. *The Sherwin-Williams Co. v. Iowa Dept. of Revenue*, 789 N.W.2d 417, 432 (Iowa 2010)(citations omitted). A decision is "illogical" when it is contrary to, or devoid of, logic. *Id*. A decision is "unjustifiable" when it has no foundation in fact or reason. *Id.*

In making determinations as required by subsection 10, the court shall give appropriate deference to the view of the agency with respect to particular matters that have been clearly vested by a provision of law in the discretion of the agency. *Iowa Code* § 17A.19(11)(c).

However, the court shall not give deference to the agency with respect to any matters that have not been vested by a provision of law in the discretion of the agency. Iowa Code § 17A.19(11)(b). By applying the "substantial evidence" and "irrational, illogical, or wholly unjustifiable" tests to the findings of fact and applications of fact to law, courts give appropriate deference to the views of the agency with respect to matters vested by law in the discretion of the agency. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 465 (Iowa 2004).

ANALYSIS

This petition presents numerous issues for judicial review. Preliminarily, the degree of deference this Court should afford the legal conclusions and interpretations of the Board is placed at issue by the parties and will be discussed. Thereafter, each substantive issue raised on this appeal will be discussed in turn.

I. Applicable Deference to the Agency

The first issue is whether the interpretation of Chapter 476 of the Iowa Code, the filed rate doctrine, and the interpretation of intrastate tariffs has been clearly vested by a provision of law in the discretion of the agency. More specifically, the question is whether the Board is vested with the authority to interpret what constitutes an "end user," "customer," "end user's premises," and "terminate calls in the [local exchange area]" in the ITA and NECA tariffs. *See, e.g.,* (Board's Brief at 22), (Aventure's Brief at 27), (Qwest's Brief at 62). The Board argues that it has been clearly vested with the authority to interpret issues of law concerning issues involving public utilities. (Board's Brief at 20). The LECs argue that law issues are determinable by the judiciary alone and that the Court should only give limited deference to the agency on matters of law and statutory interpretation. *See, e.g.,* (Aventure's Brief at 8).

In determining this issue, courts must first look to the agency's enabling statute to determine if the statute explicitly addresses the issue. *Owego Dairy, LLC v. Iowa Utilities Board*, 2011 WL 441503, *1 (Iowa Ct. App. 2011)(citing *Renda v. Iowa Civil Rights Commission*, 784 N.W.2d 8, 11 (Iowa 2010)). If the statute does not explicitly vest such interpretive powers with the agency, courts must then examine the "statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations" to determine whether or not the agency has been vested with the authority to interpret the statute. *Id.* (citing *Renda*, 784 N.W.2d at 11-12). Such an analysis is not conductive to bright-line rules. *Renda*, 784 N.W.2d at 12.

Additionally, even where administration and implementation powers may have been vested in the agency, statutory interpretation powers might remain with the courts. *State v. Public Employment Relations Bd.*, 744 N.W.2d 357, 360 (Iowa 2008). However, where terms are not defined by the statute but are necessary for the agency to carry out its duties, the power to interpret such terms is clearly vested in the agency. *Renda*, 784 N.W.2d at 12. Additionally, in the area of public utility regulation, deference to agency expertise is particularly appropriate if it is within the zone of reasonableness, since it is a highly technical area. *Equal Access Corp. v. Iowa Utilities Board*, 510 N.W.2d 147, 151-52 (Iowa 1993). While each case requires a careful examination of the specific language being interpreted as well as the authority given to the agency, it is possible for an agency to have authority to interpret some portions of specialized language but not the authority to interpret other parts of the same statute. *Id.* at 13-14. Thus, the Court need not determine if the Board has been vested with the authority to interpret the entirety of Code sections and applicable tariffs, but instead must determine if the Board was vested with the authority to interpret "end user," "customer," "end user's premises," and "terminate calls in the [local exchange area]" as used in the NECA and ITA tariffs.

Here, the Board has not been explicitly vested with any interpretative powers by the Legislature. However, the Legislature did give the Board broad powers and rulemaking authority in its enacting statute. Iowa Code § 476.2(1). The Board also has powers to make factual findings in contested cases. *See, e.g.,* Iowa Code § 476.3(1) (stating that "*when the board, after a hearing…, finds*" a violation of any provision of law)(emphasis added). The terms "end user," "customer," "end user's premises," and "terminate calls in the [local exchange area]" in the NECA and ITA tariffs are terms that are not defined by statute yet necessary for the Board to carry out its duties.

Taken altogether, the terms "end user," "customer," "end user's premises," and "terminate calls in the [local exchange area]" are substantive terms within the special expertise of the agency, and consequently the interpretation of these specific terms is clearly vested in the discretion of the agency. Accordingly, the Court must afford proper deference to the Board's interpretation under Section 17A.19(11)(c), and the Court may only overturn the Board if its decision was based on an "irrational, illogical, or wholly unjustifiable" interpretation. Iowa Code § 17A.19(10)(l); *see also Owego Dairy*, 2011 WL 441503 at *3.

II. Jurisdiction of the Board

Two of the LECs in this case, Reasnor Telephone Company, L.L.C. and Aventure Communication Technology, L.L.C., raise the issue of whether the Board had jurisdiction to hear the case.

Reasnor argues that the Board engaged in impermissible rate regulation and that the FCC's authority preempts that of the Board in this case. (Reasnor's Brief at 5-12). The Board did not directly address this issue in its own Brief, but Qwest argues that there is no federal preemption because the Board is discussing only the intrastate traffic in this case, not the

interstate traffic which is the subject of the Federal suit in this matter. (Qwest's Brief at 127-132).

Reasnor is correct that the majority of the Board's ruling interprets terms and provisions of the applicable tariffs. However, these interpretations and findings were not made for purposes of regulating the rates imposed under the tariffs. The findings were made to determine if the tariffs actually applied to situation at hand. The Board's primary conclusion was that the tariffs did not apply for a multitude of reasons, including that the FCSCs were not customers or end users of the LECs. The Board spent a lengthy discussion on the tariffs, but concluded that the tariffs did not apply and thus the filed rate doctrine likewise did not apply. Furthermore, it seems likely from the Board's discussion in its order that had the Board found to the contrary and decided that the FCSCs were in fact end users and customers, then it likely would have found that the filed rate doctrine would have applied. *See, e.g.*, (Final Order at 18) (discussing the requirements to be met in order for charges to be applied to traffic). While the Board alternates on labeling the issue a tariff violation and an application under the tariff, the end result is such that any such violation of the tariff was in fact the improper application of the tariff to traffic that should not have been covered by the tariff. In either case, the Board's action was not one of rate regulation but whether or not the rate even applied to the given situation.

Likewise, the Board clearly delineated that its findings covered only the intrastate portions of the traffic. (Final Order at 18, 77-79). In doing so, it made reference to many interstate regulations, decisions of the FCC, and proffered evidence discussing the interstate portions of the case. However, the decision itself was limited solely to those claims involving intrastate tolled traffic. The Iowa Legislature vested the Board with the powers to regulate the rates and services of the public utilities. Iowa Code § 476.1. The FCC would preempt the

Board's actions for interstate issues, but not purely intrastate issues. Consequently, the Board properly exercised jurisdiction over this case, as it was not involved in either improper rate regulation or an action which would be preempted by federal action.

Aventure argues that the Board did not have the jurisdiction to award the relief it granted the IXCs because it was acting ultra vires. (Aventure's Brief at 22-26). Essentially, Aventure argues that the Board enabling statute does not give it authority over a company of its size. (Aventure's Brief at 23); Iowa Code § 476.1. The Board does not directly address this issue; however, Qwest notes that Aventure did not raise this issue in either of its petitions before this Court and thus is untimely (Qwest's Brief at 46-49). This Court agrees that Aventure's argument was not timely raised and therefore is improperly before this Court. Furthermore, even if Aventure timely raised the issue, the Board was not regulating the rates themselves, it was making a determination as to whether or not the rates were applicable at all given the situation. The Board properly exercised jurisdiction on this issue.

III. Res Judicata and Collateral Estoppel

Reasnor also argues that the Board should be precluded from hearing this case because the FCC's previous rulings are binding and collateral estoppel prevents the IXCs from raising the issues again before the Board. (Reasnor's Brief at 22-27). The Board asserts that the issue was not properly raised at the administrative level, and therefore is improperly brought before this court. (Board's Brief at 45). Additionally, the Board argues that even if the issue were properly before the Court, res judicata and collateral estoppel do not apply to this case. (Board's Brief at 45-46). The Board argues that the FCC only dealt with the propriety of Reasnor's interstate tariffed rates while the arguments before the Board depended on the applicability of the intrastate rates. (Board's Brief at 46).

One condition required for collateral estoppel to apply is that the issues raised in each proceeding must be identical. *City of Coralville v. Iowa Utilities Bd.*, 750 N.W.2d 523, 528 (Iowa 2008)(quotation omitted). Reasnor states in its Brief that the issue before the FCC was "whether Reasnor Telephone's access service tariff rates were just and reasonable…" (Reasnor's Brief at 23). The issue before the Board is whether the access service tariff rates are even applicable at all. The issues are not identical, and collateral estoppel does not apply in this case.

IV. Are FCSC's "End Users"?

Substantively, the Board found that the tariff did not apply to calls to the FCSCs at issue here. In making its ruling, the Board found that three conditions must apply before the switched access service tariff would apply: 1) Calls must be delivered to an end user; 2) Calls must terminate at the end user's premises; and 3) Calls must terminate in the certificated local exchange area. (Final Order at 18).

Regarding the first of the three conditions, the Board determined that the FCSCs were not end users of the LECs local exchange services. In doing so, the Board made factual findings regarding net billing, backdated bills, and whether these arrangements were more like a partnership than a customer-provider relationship. When taken together and as a whole, the Board found that the FCSCs were not end users of the LECs local exchange services.

a. Definition of "End User"

The LECs state that an "end user" is defined within the tariff to mean a customer who subscribes to the local exchange services, including switched access service. (Petitioners' Brief at 27). They also argue that the Board incorrectly applied the wrong definition for "end user" by quoting Section 4 of the NECA tariff instead of Sections 6.1 and 2.6. (Petitioners' Brief at 28-29). The Board does not specifically state what definition of "end user" it used in its final order;

however, its final order analyzes in detail its findings as to whether or not the FCSCs subscribed to the service and whether or not the companies were business partners with the LECs instead of customers of the LECs. (Final Order at 24-34). Additionally, the Board uses the same definitions as the LECs in its Brief to this Court. (Board's Brief at 30). Given the above, the Board presumably used the same definition for what constituted an "end user" in its order that is argued by the LECs and the Board in their respective briefs even though it may have also quoted other sections of the tariff in its order. Such an interpretation of the term is not irrational, illogical, or wholly unjustifiable, thus this Court agrees with all parties that an end user must be a customer who subscribes to the local exchange services in order for the tariff to be applicable.

b. Subscription to Services

The Board found that the FCSCs were not subscribers to the services of the LECs. The Board noted a lack of timely, legitimate billing for tariffed services, a record that showed a lack of intent to ever bill the FCSCs, and a failure to comply with the billing requirements of the tariffs, including the apparent failure to bill or collect other fees, taxes, and federal charges. (Final Order at 24-25). Against this, the LECs contend that they provided services to the FCSCs, thus the FCSCs must have subscribed to the services. (Petitioners' Brief at 32-33). They essentially argue that because the filed rate doctrine requires the payment of the tariffed rate for applicable services, the FCSCs were required to pay that rate and thus were subscribers. *Id.* They also contend that though the FCSCs were not sent a regular invoice like a standard residential customer, they still paid the required fees through net billing, and that their attempts to send back bills the FCSCs were not attempts to deceive the Board, but instead were made to alleviate the Board's previous concerns.

i. Net Billing and/or Offsetting Fees

The Court agrees that tariffed fees need not be paid in cash. Proper net billing, offsetting of fees, or barter would be acceptable forms of payment in the abstract. However, the Board found that the evidence did not support a finding that net billing or offsetting actually took place. The Board noted a lack of any written or documentary evidence in the record supporting the LECs positions. The LECs contend that the contracts themselves are evidence that net billing took place; as examples, one contract stated that the required payments were made in consideration of the associated marketing fee, while a different LEC varied its marketing fee based upon whether it or the FCSC provided certain equipment. (Petitioners' Brief at 34-35). Additionally, Aventure argues that in billed the FCSCs $5 per month per line, and provided bills to support this assertion. (Aventure's Brief at 11). Aventure sent these bills to an intermediate broker rather than to the FCSC directly. (Aventure's Brief at 15).

After reviewing the record, the Court finds substantial evidence to support the Board's findings that there was not sufficient proof that net billing or offsetting occurred. There are no accounting records showing how much the marketing fee to a given FCSC was offset by the charges incurred by the FCSC. There is no evidence that any taxes or fees which were presumably offset along with the tariffed charges were ever forwarded on to the applicable agency or government. The contracts themselves might indicate that the companies intended to use net billing methods to save on the paperwork, but they do not provide evidence that the net billing ever took place. The Board rightly acknowledges that had net billing taken place, the offset would have varied by traffic volume, but there is no indication that took place. (Board's Brief at 32). As to Aventure's claims, the Court agrees with the Board that there is no evidence

the invoices were ever paid, or that Aventure ever expected the invoiced amount to be paid. Consequently, the substantial evidence of the record supports the finding of the Board.

ii. Backdated Bills & Contract Amendments

Qwest argued that the LECs attempted to create backdated invoices and contractual amendments following the filing of the complaints with this Court, the Federal court system, and the FCC. (Final Order at 26). The LEC's contend that the backdated invoices were created to prove to the Board that the FCSCs were end users. (Petitioners' Brief at 36). The LECs also argue that the backdated contract amendments were simply the companies agreeing to make the contract effective as of a prior date. (Petitioners' Brief at 43). The Board found that the invoices were "unpersuasive and disturbing," and that the evidence supported a finding that the backdated amendments altered contracts years after the relationship had ended and the invoices were created to try to hide "the deficiencies of the previous arrangements." (Final Order at 27).

The Court finds substantial evidence to support the Board's findings that the backdated documents were not created as a legitimate means of correcting the past record. The Board discussed how the backdating of invoices and contracts generally worked, and why the present situation differed greatly from the normal scenario. (Final Order at 29). At the least, the backdating is not persuasive enough to override the factual findings of the Board on this issue given the remainder of the evidence in the record. Instead, the Court agrees that the effort more accurately resembled "a negotiation than simply the documentation of a pre-existing understanding." (Board's Brief at 33) (quoting (FCC's Second Reconsideration Order, ¶20)).

iii. FCSCs as Subscribers

Given the support for the findings above, the Court likewise concludes that substantial evidence supports the Board's decision that the FCSCs did not subscribe to the local exchange

services of the LECs. The lack of evidence that net billing ever took place provides substantial evidence supporting the Board's finding that the FCSCs were not subscribers. The backdated invoices and amendments, even were they to be taken at face value, are not enough to overcome the remainder of the record. Additionally, since the Court finds the Board's findings regarding the backdated material to be supported by substantial evidence, they merely provide further support for the ultimate conclusion that the FCSCs did not subscribe to the LECs local exchange services.

c. Customers or Business Partners

In addition to finding that the FCSCs were not subscribers, the Board also determined that the FCSCs were not customers but instead treated more like business partners. (Final Order at 32-33, 34). The Board made this finding based upon the profit sharing between the LECs and the FCSCs in the form of the sharing of switched access fees. (Final Order at 33). The Board also noted that at least some of the agreements called for the marketing fee or revenue sharing to be reduced or halted if the IXCs did not pay the LECs the tariffed rates for the calls. *Id.* The LECs argue that such a finding is not supported by substantial evidence and is the result of an irrational, illogical, or wholly unjustifiable determination by the Board. (Petitioners' Brief at 45-47). Aventure argues further that there is no rule prohibiting an LEC and a customer from being business partners. (Aventure's Brief at 20).

The record is unclear as to whether the Board ultimately concluded that the relationship was a business partnership, or if it merely found that the LECs merely acted as though the relationship was more like that of a partnership or business association rather than a customer-service provider relationship. Such a distinction is irrelevant, however, as the Board's factual findings regarding the profit sharing and the reduction of any such payments in the absence of

profits are the truly relevant points. Specifically, the Board made a finding that the LECs must have been retaining revenue to cover their costs plus some amount of profit, or else there would have been no reason for them to undertake the ventures. (Final Order at 33). Thus, any money transferred from the LECs to the FCSCs must have logically been part of the profits from the arrangement.

Regardless of whether the relationship between the LECs and the FCSCs was a true business partnership, the financial incentives still provide evidence that would support a finding that whether or not they were true business partners, the FCSCs were not customers. Consequently, substantial evidence supports the finding of the Board that the FCSCs were not customers, and therefore not end users as required by the tariff.

d. Conclusion regarding FCSCs as End Users

Because the Board did not reach an irrational, illogical, or wholly unjustifiable conclusion, and because substantial evidence supports the Board's findings of fact that the FCSCs are not end users subscribing to local exchange services, the order of the Board must be upheld on this issue. The FCSCs were not end users for purposes of the tariff, and thus the tariffed rate did not apply to the intrastate calls to the FCSCs.

V. Did Calls Terminate at "End User's Premises"

The LECs also challenge the Board's findings and conclusion that the calls did not terminate at an end user's premises. The LECs assert that the Board erred by failing to consider the applicable clarifying language of the local exchange tariffs. (Petitioners' Brief at 47-48); (Aventure's Brief at 16).

The NECA Tariff generally defines "premises" as "a building or buildings on contiguous property … not separated by a public highway." (Board's Brief at 34)(quoting Section 2.6 of the

NECA Tariff). The ITA Tariff, which covers the intrastate calls at issue here, incorporates the NECA Tariff. (Final Order at 17). The Board held that since the complaint from Qwest specifically dealt with the switched access charges, then the local exchange tariffs were not directly applicable and that only the switched access tariffs governed. (Final Order at 37). The Board noted that an end user's premises could also be a collocation arrangement where the end user pays for exclusive control or access to floor space in the central office of an LEC. (Final Order at 38).

Both the Board and the LECs note that the definition of premises lacks clarity. (Petitioners' Brief at 47); (Final Order at 38). Given the lack of a precise definition, the Court will give deference to the Board's interpretation. Interpreting "premises" to mean either "a building or buildings on contiguous property" or a leased or rented space within the central office of an LEC is a rational and logical determination. The LECs state that their local exchange tariffs focus on "space occupied by an individual customer." (Final Order at 36); (Petitioners' Brief at 49)(citing Sheet 27, a local exchange tariff). Even if that language were applicable here, the Board would be justified in interpreting "occupied space" to mean an area where the end user has some type of property interest, even if only a lease or rental of floor space within another's building. Consequently, the Board's interpretation of what constitutes a "premises" is affirmed as such an interpretation is not irrational, illogical, or wholly unjustifiable.

Given such a definition, the record provides substantial evidence to support the Board's factual findings that the calls did not terminate at an end user's premises. In addition to the fact that the Board correctly found that the FCSCs are not end users, the calls did not terminate at their premises even were they to be considered end users. In some cases the FCSC provided the equipment which was housed in the LECs offices, but in other instances the LEC provided both

the space and the equipment. However, there is no documentary evidence that the spaces were leased or otherwise placed in the control of the FCSCs. Aventure argues that there was an agreement to locate the FCSC's conference bridge in its central office. (Aventure's Brief at 18). That may be so, but an agreement to use equipment at a central office does not by itself make such an arrangement an end user's premises. There must be some evidence of control on the part of the FCSC, otherwise it is just Aventure terminating calls on equipment it controls in its own offices. Taken altogether, there is substantial evidence in the record supporting the Board's findings that the calls did not terminate at an end user's premises.

VI. Did Calls Terminate in Certificated Local Exchange Areas

The third condition that the Board determined must be met before the tariff would apply was that the calls must terminate in the certificated local exchange areas of the LECs. (Final Order at 40). The LECs contend that the Board erred by implying the wrong standard into the tariff, which refers to calls terminating within the local access and transport area (LATA) rather than the certificated local exchange area. (Petitioners' Brief at 50)(quoting Section 6.1 of the NECA tariff). This distinction is not directly addressed by the Board; however, AT&T argues that the LATA is essentially the area in which a phone company may offer service; in other words, it is the company's service area. (AT&T's Brief at 15). Sprint likewise refers generically to the LECs "authorized territory." (Sprint's Brief at 21). Given that even the LECs do not clarify the significance of the difference in terminology and the fact that the Board's interpretation of the statute is not irrational or illogical, the Court will provide appropriate deference to the Board's conclusion.

The Board also found that some, but not all, of the LECs tried to bill for calls that terminated outside of their respective local exchange areas. Specifically, the Board determined

that the LECs were claiming that international, calling card, and prerecorded playback calls terminated at the FCSC's equipment, even though the FCSC then continued the call on to the actual destination in another state or country. (Final Order at 40-43). In doing so, the Board used an "end-to-end" analysis, a long-adopted procedure in the field of telecommunications law. (Board's Brief at 36-37); (Petitioners' Brief at 50-52). An end-to-end analysis requires a comparison of the communications' beginning and ending points. *AT&T Communications of Cal., Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980 (9th Cir. 2011). For example, courts and regulatory agencies historically look at the origination and termination point of the call to determine whether it comprises an intrastate or interstate telephone service. See *Qwest Corp. v. State ex rel. Wyoming Dept. of Revenue,* 130 P.3d 507, 515 (Wyo. 2006)(cited with approval in *AOL LLC v. Iowa Dept. of Revenue*, 771 N.W.2d 404, 410 (Iowa 2009)).

The LECs argue that the Board's analysis was improper, as the act should instead be viewed as two separate calls. One call is from the FCSC's customer to the FCSC's equipment where it terminates, and another from the equipment to the interstate or international destination. (Petitioners' Brief at 51). The FCC has consistently rejected the dividing up of communications at intermediate points between carriers. *See, e.g., Bell Atlantic Telephone Companies v. F.C.C.,* 206 F.3d 1, 4 (D.C. Cir. 2000); *BellSouth Telecommunications, Inc. v. Finley,* 2010 WL 5173214 at *9 (E.D.N.C. December 13, 2010)(unpublished). The Board found that while the origination of these calls was from a local consumer in Iowa, the end point of the call was the international or interstate number ultimately reached by the consumer. Thus the calls did not terminate within the local exchange area under the end-to-end analysis. The Board applied the correct analysis.

Because the calls at issue are interstate or international in nature, the distinction between a LATA and a local exchange area, to the extent there is any, is rendered moot. The calls either

terminated at the FCSC's equipment, which would meet either definition, or they terminated at the international or interstate end-point, in which case they terminated outside either the LATA or the local exchange area. The Board's factual finding under the "end-to-end" analysis that there was just one call, and not multiple ones, is likewise supported by substantial evidence in the record.

The Board also argued that three LECs, Farmers-Riceville, Superior, and Reasnor, were claiming access charges for calls that actually terminated in another exchange, often that of an affiliate. (Final Order at 43-49). Farmers-Riceville asserts that it was unfairly grouped in with the other two LECs, as it used a different configuration or method. (Petitioners' Brief at 52-53). Reasnor claims that the calls terminated on an FX line between the exchange and the FCSC's conference bridge. (Reasnor's Brief at 45-46). Neither argument is persuasive. Substantial evidence supports the Board's findings that these specific calls terminated not with these LECs, but with others elsewhere in the state. Consequently, the Board's finding that the calls did not terminate within the certificated local exchange areas is affirmed.

VII. Filed Rate Doctrine

The filed rate doctrine specifies that the terms of a filed tariff govern over any contrary agreements. The filed rate doctrine provides that the legal rights of the utility in the customer are measured exclusively by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate as between the utility and its customer. *AT&T Communications of The Midwest, Inc. v. Iowa Utilities Bd.,* 687 N.W.2d 554, 562 (Iowa 2004). The filed rate doctrine is codified in Iowa Code § 476.5. The terms of the tariff cannot be varied or enlarged by contract or tort. *AT&T Corp. v. Central Office Tel., Inc.,* 524 U.S. 214, 227 (1998). A regulated utility may not charge, or be forced to charge by a regulatory agency, rates

that vary from the filed tariff. *Archer Daniels Midland Co. v. State of Iowa*, 485 N.W.2d 465, 467 (Iowa 1992). The tariff is essentially a binding contract between the utility and its customers. *Estate of Pearson v. Interstate Power & Light Co.,* 700 N.W.2d 333, 342 (Iowa 2005). Any contract or agreement to provide a tariffed service on terms other than those contained within the tariff is void. *Teleconnect Co. v. US West Communications, Inc.*, 508 N.W.2d 644, 647 (Iowa 1993).

However, given the findings above that the FCSCs were not end users, that the calls did not terminate at an end user's premises, and that the calls did not always terminate within the certificated local exchange area, the switched access tariffs did not apply to these calls. Because the tariffs did not apply, the Board's order does not violate the filed rate doctrine because the doctrine is not applicable. The doctrine prevents variances or preferential treatment in applying the tariffs from one customer to another. But in order to vary a tariff, the tariff must first be applied to a given call. Because the switched access tariff does not apply to the calls at issue here, the filed rate doctrine cannot be violated by failing to impose an inapplicable tariff. The Board's ruling is therefore affirmed on this issue.

VIII. Refunds of Intrastate Access Charges

The LECs argue that the Board improperly awarded refunds and/or credits to the IXCs for the intrastate access charges associated with the calls to the FCSCs. The LECs argue that the Board found that they did not follow their tariffs, and thus the remedy should be compliance with the tariff, not a refund or credit. (Petitioners' Brief at 56). The LECs argument is seemingly premised on them having provided tariffed services and that their billing practices amounted to a violation of that tariff. *Id.* However, as discussed above, the Board found that the LECs did not provide tariffed services, and therefore incorrectly charged a tariff when none was due. The

failure to bill the FCSCs was strong evidence that the services provided were not tariffed services, but the Board never stated that the failure to bill was in and of itself a violation of the tariff. The Board stated that offsetting, net billing, and similar arrangements would have been fine, if such actions had actually taken place because the services were tariffed services.

Reasnor likewise makes the argument that all communications meeting the definition of access service must be charged the tariffed rate. (Reasnor's Brief at 27-28). The Court agrees with this principle, but again notes that the Board found, and the Court agrees, that the services provided did not meet the definition of an access service for the reasons set forth above. The challenge is not to a "duly filed tariff." (Reasnor's Brief at 29). The challenge is the applicability of the tariff to the situation at hand. The Board did not retroactively change the tariffed rate; it said that the tariff never should have been applied because the services provided were not covered by the tariff.

Consequently, the Board's decision to award refunds and/or credits was correct. The issue was that the services provided were not covered by the tariff, but the LECs incorrectly billed the IXCs the tariffed rate anyway. The proper remedy for improperly assessed charges is a refund or credit of those charges. Therefore, the Board is affirmed on this issue.

IX. IXC's Self-Help

Reasnor argues that the Board improperly found that Qwest's and Sprint's illegal acts in undertaking self-help remedies were not compensatory. The Board determined that Qwest and Sprint had engaged in illegal actions by unilaterally withholding payments in this situation. (Final Order at 70). However, the Board also determined that, within the confines of the Board's jurisdiction, the two IXCs owed no money to Reasnor or any other LEC given the rulings on the

overarching tariff issues. *Id.* Consequently, the Board essentially stated no relief could be granted on the claim since the withheld tariffs were ultimately never applicable.

While the Court agrees with Reasnor and the Board that Qwest and Sprint acted wrongfully in withholding payments, given that the Board's findings were such that the payments would be returned to the IXCs anyway, the Court cannot answer Reasnor's prayer for relief in the affirmative. Reasnor asks this Court to order the two IXCs to pay the money they withheld. (Reasnor's Brief at 73-74). That money would simply be returned to the IXCs as part of the refunds and credits they are owed for Reasnor incorrectly applying the tariff to the services. It would be a waste of everyone's resources to award such remedies.

The Board also found that Sprint, but not Qwest, engaged in call blocking by routing FCSC traffic through inadequate facilities, effectively choking the traffic. (Final Order at 71). The Board noted Reasnor's request that it assess civil penalties against Sprint, but found that it could not because Sprint had not been previously given written notice of the type of violation which occurred here. Iowa Code § 476.51(1). These violations may have been willful, as Reasnor suggests, but even willful violations cannot have civil penalties assessed unless they are committed after written notice by the Board of a specific violation. (Reasnor's Brief at 47); Iowa Code §476.51(2). Consequently, the Board could not assess civil penalties for call blocking upon Sprint since it had not previously given Sprint written notice of the violations.

X. Improper Discrimination by Qwest

Reasnor argues that the Board's finding that Qwest did not engage in unlawful discrimination was not supported by substantial evidence. (Reasnor's Brief at 65-72). The Board correctly notes that Reasnor is essentially arguing that when Qwest engaged in activities similar

to what Reasnor and the LECs were engaged in here, they were acting illegally. (Board's Brief at 52). If Reasnor prevailed on this argument, it would not help its overall case. *Id.*

As the Board noted throughout its order, however, the marketing fees by themselves do not create the problems which arise in this case. Instead it is the overarching series of issues which led the Board to determine that the dealings between the FCSCs and the LECs were not covered under the tariff for all of the reasons set forth above. With regards to Qwest's marketing fees and sales commission programs, the record does not contain enough information to support a finding that Qwest went beyond mere marketing fees. Consequently, the Board correctly determined that Qwest did not engage in improper discrimination simply by sharing marketing fees and sales commissions.

Reasnor also raised an argument that Qwest unlawfully discriminated against its wholesale carrier-customers in violation of Section 476.5 of the Iowa Code, which is the codified version of the filed rate doctrine. The filed rate doctrine requires utilities subject to rate regulation to charge the tariffed rate. Iowa Code § 476.5. However, as the Board noted, when Qwest is dealing with the wholesale market, it is in a deregulated and detariffed competitive market. (Final Order at 75). Since the filed rate doctrine specifically applies to utilities subject to regulation, and Qwest is taking part in a deregulated market when it participates in the wholesale market, the filed rate doctrine does not preclude Qwest's actions in that market. The Board's ruling is therefore affirmed on this issue.

XI. Reasnor's Presentation of Evidence / Discovery Issues

Reasnor alleges that the Board violated its due process rights by preventing it from presenting a live witness at the hearing before the Board. Reasnor's expert witness could not be present at the original hearing date due to a medical emergency. (Reasnor's Brief at 27). The

hearing was then continued until March 5, 2009, at which time either the expert or a named substitute could appear live before the Board. *Id.* Reasnor named Jeffrey Binder as its substitute witness on or about February 6, 2009. (Reasnor's Brief at 28). The IXCs then moved to cancel the hearing, stating that they would forego their cross-examination of Mr. Binder, and the Board sustained the motion. *Id.*

Direct testimony before the Board is normally pre-filed in a contested case proceeding. 199 Iowa Admin. Code § 7.10(1). A witness who pre-filed testimony does not ordinarily repeat the pre-filed testimony or present new testimony, but instead is cross-examined by others concerning the statements already made. 199 Iowa Admin. Code § 7.10(2). Reasnor's original expert, Gary Zingaretti, had pre-filed his direct testimony, reply testimony, and exhibits before his medical emergency. When the IXCs stated they no longer wished to cross-examine Mr. Zingaretti or Mr. Binder, there could likewise be no re-direct of those witnesses. Additionally, as the Board notes, Reasnor made no offer of proof or any other attempt to show what supplemental or amended direct testimony it would have submitted had the witness been allowed to appear in person at the continued hearing. (Board's brief at 50).

Reasnor's argument, therefore, is essentially that the inability of the Board members to view the demeanor of its witness violated its due process rights. While the Court agrees that live testimony is often preferred, it is unable to find that it is required in administrative contested cases such as this. *See, e.g., Harter v.* Paige, 2005 WL 1027362 at *1 (8th Cir. 2005)(unpublished)(stating that the department's written records hearing satisfied due process). Along with the Board's own rules which ordinarily require pre-filed testimony, the Iowa Code not only contemplates pre-filed written testimony but explicitly allows it without requiring redirect or rebuttal. Iowa Code § 17A.14(3)(requiring only the cross-examination of witnesses as

necessary). Consequently, the Court cannot find that Reasnor's due process rights were violated by not allowing the substitute witness to present live testimony when the opposing parties were willing to waive cross-examination.

XII. Conclusion

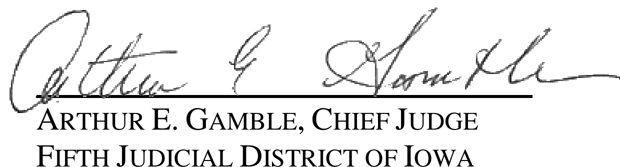
The Court finds that the Board properly exercised its jurisdiction in this case, that res judicata and collateral estoppel do not preclude the Board from ruling on this matter, and that Reasnor's due process rights were not violated by the Board's decision to cancel the continued hearing. The Court also finds that substantial evidence supports the findings of the Board regarding the issues surrounding the applicability of the switched access tariffs and the associated remedies to the IXCs. The Board's application of the law to the facts was not irrational, illogical, or wholly unjustifiable. The Court also affirms the Board's order regarding the counterclaims by the LECs against the IXCs, including the finding of violations by Qwest and Sprint which were nevertheless non-compensable. Taken altogether then, the Final Order of the Board is affirmed.

ORDER

IT IS THEREFORE THE ORDER OF THIS COURT that the Final Order of the Iowa Utilities Board is hereby AFFIRMED.

IT IS FURTHER ORDERED that the Petitioners' Petitions for Judicial Review are dismissed and that Petitioners shall pay the court costs.

IT IS SO ORDERED this 11th day of October, 2011.



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