**No.**

In the
# Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
*Petitioner,*

v.

ELIZABETH S. JACOBS, et al.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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# APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Submitted March 13, 2012 Filed September 4, 2012

No. 11-2984

SPRINT COMMUNICATIONS COMPANY, L.P.,
PLAINTIFF-APPELLANT

v.

ELIZABETH S. JACOBS; SWATI A. DANDEKAR; DARRELL HANSON, IN THEIR CAPACITIES AS MEMBERS OF THE IOWA UTILITIES BOARD,
DEFENDANTS-APPELLEES[1]

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Appeal from United States District Court
for the Southern District of Iowa – Des Moines

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BEFORE: Wollman, Colloton, and Benton, *Circuit Judges*.

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[1] Board members Jacobs and Dandekar are substituted for their predecessors pursuant to Federal Rule of Appellate Procedure 43(c)(2).

WOLLMAN, Circuit Judge.

Sprint Communications Company, L.P. (Sprint) contests the Iowa Utilities Board's (IUB) order compelling it to pay intrastate access charges to Windstream, an Iowa communications company, for Voice over Internet Protocol (VoIP) calls. Sprint filed a complaint in federal district court seeking declaratory and injunctive relief. The same day, Sprint also filed a petition for review in Iowa state court, asserting, among other claims, that the IUB's order was preempted under federal law. The federal district court abstained pursuant to *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and dismissed the action. Sprint appeals, arguing that abstention is inappropriate in this case, and that even if appropriate, the district court should have stayed the case rather than dismissing it. We affirm the district court's decision to abstain, but we vacate the judgment of dismissal and remand the case with instruction to stay the proceedings.

## I.

Windstream charges Sprint intrastate access charges to connect certain VoIP calls to Windstream customers. Sprint initially paid the charges, but later concluded that it was not required to pay intrastate access charges for the VoIP traffic. Sprint determined that the calls at issue are an "information service" and, as such, "not subject to access charges, whether those charges are interstate or intrastate." Appellant Br. 10. After Sprint discontinued payment, it filed a complaint with the

IUB seeking a declaration that its decision to withhold the access charges claimed by Windstream was appropriate. Sprint argued that because only the Federal Communications Commission (FCC) has authority to classify the VoIP traffic, the IUB lacked jurisdiction to decide the issue. The IUB determined that it had jurisdiction and that Sprint was required to pay the access charges. Following the IUB's denial of Sprint's motion for reconsideration, Sprint filed this action in federal district court and, on the same day, a petition for review of the IUB's decision in Iowa state court. The IUB filed a motion to dismiss the federal litigation on abstention grounds. The district court granted the motion and dismissed the case, concluding that the state of Iowa has a substantial interest in the regulation of utilities within the state.

Because we decide only whether abstention was appropriate in this case, we do not reach the merits of Sprint's claim that Windstream's intrastate access charges do not apply to Sprint's VoIP traffic. The determination of that issue will turn on whether Sprint's VoIP traffic is an intrastate "telecommunications service" subject to IUB regulation, *see* 47 U.S.C. § 152(b),[1] or whether, as Sprint suggests, the calls at issue are included

[1] Section 152(b) provides that, with certain exceptions, "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service...." Section 152(b) thus reserves a role for state regulation of intrastate communications.

within the definition of "information service," *see* 47 U.S.C. § 153(24), which classification remains largely unregulated and exempt from access charges. For our discussion of the FCC's preemption of state regulation of the VoIP service at issue in that case, see *Minnesota Public Utilities Commission v. Federal Communications Commission,* 483 F.3d 570 (8th Cir. 2007).

**II.**

We review a district court's decision to abstain for abuse of discretion. *Plouffe v. Ligon,* 606 F.3d 890, 893 (8th Cir.2010); *but see id.* at 894–95 (Colloton, J., concurring).

Sprint first argues that it had the right to challenge the IUB's order in federal court. We do not disagree. But Sprint goes on to argue that its decision to file a state court petition for review should not affect our *Younger* abstention analysis. Sprint cites *Alleghany Corp. v. McCartney*, for the proposition that "a party cannot avoid *Younger* by choosing not to pursue available state appellate remedies." 896 F.2d 1138, 1144 (8th Cir.1990). Sprint argues that *McCartney* teaches "that a federal plaintiff cannot trigger or avoid *Younger* abstention simply by filing or choosing not to file state-court proceedings." Appellant Br. 24. More accurately, *McCartney* holds that once a party initiates state "judicial" proceedings in which the state has an important interest, the party must follow the proceedings through to the end. The parallel state

court proceeding thus has a bearing on our abstention analysis.[2]

Next, Sprint argues that abstention is inappropriate in this case because this case does not implicate the concerns the *Younger* abstention doctrine addresses. Whether *Younger* abstention is appropriate is determined by the factors outlined in *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982). *Middlesex* held that federal courts should exercise *Younger* abstention when (1) there is an ongoing state judicial proceeding, which (2) implicates important state interests, and (3) the state proceedings provide an adequate opportunity to raise constitutional challenges. *Id.* at 432, 102 S.Ct. 2515; *see also Fuller v. Ulland,* 76 F.3d 957, 959 (8th Cir.1996). Sprint argues that neither the first factor nor the second was met in this case. The third factor is not in dispute.

**A.**

Sprint contends that the first *Middlesex* factor is not met because the remedy it seeks would not interfere with any ongoing state proceeding. Sprint seeks a declaration that the IUB's order violates federal law and an order enjoining the IUB from enforcing its order requiring Sprint to pay intrastate

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[2] Contrary to Sprint's contention, we conclude that *Verizon Maryland, Inc. v. Public Service Commission of Maryland,* 535 U.S. 635, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002), a case in which there was no ongoing state judicial proceeding, has no bearing on this case.

access charges for the VoIP traffic at issue. Sprint argues that the only interference that could result from these remedies is the possible effect of collateral estoppel on the state court proceeding, an effect that is not the type of interference that *Younger* abstention seeks to prevent. We conclude that interference beyond simple collateral estoppel would result from a federal court's declaration of how a state utilities board should interpret its state's laws and regulations governing intrastate access charges and the entry of an order enjoining enforcement thereof. *See Cedar Rapids Cellular Tel., L.P. v. Miller,* 280 F.3d 874, 882 (8th Cir. 2002) (concluding that the serious possibility of interference resulting from the use of a federal court injunction to preclude a state court remedy warranted *Younger* abstention). Interests of comity and federalism support federal abstention where state judicial review of the IUB's order has not yet been completed. *See New Orleans Pub. Serv., Inc. v. Council of New Orleans (NOPSI),* 491 U.S. 350, 367–69, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).

**B.**

Sprint also contends that the important state interest prong of *Middlesex* is also not met. Sprint first suggests that Iowa lacks a sufficiently important interest in the proceeding at issue because the proceedings are remedial, rather than coercive, arguing that *Younger* applies only to coercive proceedings. Following our holding in *McCartney*, we held otherwise in *Hudson v. Campbell,* 663 F.3d 985, 987–88 (8th Cir.2011). "Although we have recognized

the existence of the coercive-remedial distinction in other of our abstention cases, we have not considered the distinction to be outcome determinative." *Id.* at 987 (internal citations omitted). The same analysis applies in the present case.

Sprint continues by arguing that the state proceedings do not implicate an important state interest because telecommunications issues are not solely within the ambit of state regulatory authority. Sprint points to *McCartney*, in which we stated that cases in the public utility area involve "a pervasive federal regulatory scheme which indicate[s] a strong federal interest." 896 F.2d at 1145. True enough, but as the Supreme Court observed in *NOPSI,* states have "a substantial, legitimate interest in regulating intrastate retail rates." 491 U.S. at 365, 109 S.Ct. 2506. "[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Id.* (alteration in original) (quoting *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n,* 461 U.S. 375, 377, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983)).

The Supreme Court also noted in *NOPSI* that:

> [W]hen we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case—which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the State.

*Id.* at 365, 109 S.Ct. 2506. In this case, as in *NOPSI,* the generic proceedings involve the state's regulation of intrastate utility rates. Sprint attempts to avoid the conclusion that Iowa has an important interest in the proceedings by contesting the IUB's authority even to decide whether intrastate access charges apply to VoIP traffic. This argument impermissibly narrows the focus to the outcome of the case, rather than the importance of the generic proceedings to the state. *See id.* at 366, 109 S.Ct. 2506 (rejecting a similar argument challenging "the very right of the Council to conduct ... deliberations"). Just as it had in enforcing its consumer protection statutes, *see Cedar Rapids Cellular,* 280 F.3d at 879–80, Iowa has an important state interest in regulating and enforcing its intrastate utility rates.

The Supreme Court went on in *NOPSI* to determine "whether the [state] court action is the type of proceeding to which *Younger* applies." 491 U.S. at 367, 109 S.Ct. 2506. The Court distinguished between state judicial inquiries and legislation, noting that only judicial proceedings are entitled to *Younger* abstention. *Id.* at 368, 109 S.Ct. 2506. In discussing the difference between judicial and legislative proceedings, the Court quoted *Prentis v. Atlantic Coast Line Company,* 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908):

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes

> existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind....

*Id.* at 226, 29 S.Ct. 67. The IUB is not attempting to establish a rate for the future, but rather is seeking to enforce the status quo that existed before Sprint ceased paying the intrastate access charges. The IUB's order attempts to enforce liabilities based on present facts and existing laws, and thus it constitutes a judicial proceeding that is entitled to *Younger* abstention.

## III.

Finally, Sprint contends that, if abstention is appropriate, the district court should have stayed rather than dismissed the case. We agree, for we have held that district courts should stay the case when there is a possibility that the parties will return to federal court. *Cedar Rapids Cellular,* 280 F.3d at 882–83; *Fuller,* 76 F.3d at 960–61. That being the case here, we conclude that the district court should have stayed rather than dismissed the case.

## IV.

We affirm the district court's decision to abstain from exercising jurisdiction over Sprint's claims. We vacate the judgment of dismissal and remand the case to the district court for the entry of a stay of this action.

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | |
|---|---|
| Sprint Communications Company, L.P., Plaintiff | Filed On: August 1, 2011 |
| v. | No. 4:11-cv-00183-JAJ |
| Robert B. Berntsen, Krista Tanner, and Darrell Hanson, in their Official Capacity as Members of the Iowa Utilities Board Defendants. | |

**ORDER**

This matter comes before the Court pursuant to Defendants' May 16, 2011 Motion for Abstention and Request for Expedited Relief. (Dkt. No. 5). Defendants are Robert B. Berntsen, Krista Tanner, and Darrell Hanson, all in their official capacity as members of the Iowa Utilities Board (collectively, "IUB"). Plaintiff Sprint Communications Company filed an Opposition to IUB's motion on June 3, 2011. (Dkt. No. 12).

Windstream Iowa Communications, Inc. filed a Motion to Intervene on June 13, 2011, to which it attached its own Motion to Dismiss and a Joinder in

the IUB's Motion for Abstention. (Dkt. No. 16). Sprint filed a separate Response to Windstream's motion, in which it did not oppose the Motion to Intervene but further resisted dismissal and abstention. (Dkt. No. 17). Magistrate Judge Walters granted Windstream's Motion to Intervene on July 14, 2011. (Dkt. No. 21).

For the following reasons, Defendants' Motion for Abstention is granted.

## I. BACKGROUND

This case arises from a dispute between Sprint and Iowa Telecom (now Windstream[1]) over the fees that telephone companies pay each other when the customer of one telephone company places a call to the customer of another telephone company. Specifically, this dispute concerns a type of call known as Voice over Internet Protocol ("VoIP") calls, which differ from ordinary telephone calls because they are initially carried by Internet Protocol over a packet-switched network, as opposed to the Time Division Multiplexing protocol of ordinary telephone traffic. In other words, VoIP calls are transported via the Internet, rather than the conventional phone system.

Sprint frequently routes VoIP calls through Windstream for delivery to Windstream's customers.

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[1] Not knowing when Iowa Telecom became Windstream, the Court will simply refer to the entity as Windstream for the purpose of this order.

To connect those calls with its customers, Windstream has billed Sprint for a type of intercarrier compensation known as "intrastate access charges." Initially, Sprint paid these charges without dispute but later decided it was not required to pay them for VoIP calls. Sprint disputed the charges and withheld further payments. In response, Windstream threatened to block calls to and from Sprint customers.

Sprint filed a complaint with the IUB, seeking declaratory relief stating that Sprint was entitled to withhold payment of the disputed charges and that Windstream could not block customer calls because of Sprint's refusal to pay the disputed amounts. Sprint notes in its Complaint (Dkt. No. 1) that it did not ask IUB to determine whether VoIP calls are actually subject to intrastate access charges, a determination that can only be made by the Federal Communications Commission ("FCC"), according to Sprint.

Before the hearing, Windstream informed the IUB that it would not block the calls of Sprint's customers, and Sprint responded by withdrawing its complaint. The IUB allowed Sprint to withdraw its complaint but nevertheless decided to "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." *Sprint Commc'ns Co. v. Iowa Telecommc'ns Services*, Order Granting Motion to Withdraw, Denying Motion for Clarification, Canceling Hearing, and Revising Procedural Schedule, IUB Dkt. No. FCU-2010-0001, 2010 WL 421105 at *7 (Feb 1, 2010). In a February 4,

2011 order, the IUB ruled that Sprint had to pay intrastate access charges for VoIP calls, and it later denied Sprint's motion for reconsideration in a March 25, 2011 order.

On March 25, 2011, Sprint filed complaints in both Polk County District Court and this Court, arguing that the IUB's order is preempted by federal law and seeking declaratory and injunctive relief from that order. The IUB then filed the Motion for Abstention at issue here.

## II. DISCUSSION

### i. The Law of *Younger* Abstention

The IUB seeks to have the Court abstain from this case under a doctrine first developed in *Younger v. Harris*, 401 U.S. 37 (1971). Generally, Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). However, the Supreme Court has articulated a limited number of abstention doctrines as exceptions to this rule – one being *Younger* abstention. "*Younger v. Harris* . . . and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). The Eighth Circuit has noted that "[t]he moving force behind *Younger* abstention is the promotion of comity between state and federal judicial bodies." *Cedar Rapid Cellular Telephone, L.P. v. Miller*, 280 F.3d 874, 881 (8th Cir. 2002). And

this notion of comity requires a system in which the "National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* (quoting *Younger*, 401 U.S. at 44).

*Younger* itself involved abstention from a request to enjoin a state criminal prosecution, but the Supreme Court has "expand[ed] the protection of *Younger* beyond state criminal prosecutions, to civil enforcement proceedings . . . and even to civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *New Orleans Public Service, Inc. v. Council of the City of New Orleans, et al*, 491 U.S. 350, 368 (1989); *see also Middlesex*, 457 U.S. at 432 ("The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved . . . .").

As evolved, the *Younger* doctrine provides that a federal court should abstain from exercising jurisdiction when (1) there is an ongoing state judicial proceeding; (2) that state proceeding implicates important state interests; and (3) there is an adequate opportunity to raise any relevant federal questions in the state proceeding. *Cedar Rapids Cellular*, 280 F.3d at 880 (citing *Fuller v. Ulland,* 76 F.3d 957 (8th Cir. 1996)); *see also Middlesex*, 457 U.S. at 432 (1982). And even if these requirements are met, a federal court should not abstain if there is a showing of "bad faith, harassment, or some other extraordinary circumstance that would make abstention

inappropriate." *Younger*, 401 U.S. at 54. Further, abstention may not be appropriate if the state is seeking to enforce a statute that is "flagrantly and patently violative of express constitutional provisions."[2] *Id.* at 53.

The parties agree that a state court proceeding, *Sprint Commcations Co. L.P. v. Iowa Utilities Board*, Polk Country District Court No. CVCV008638 (filed April 25, 2011), is ongoing and that it affords Sprint an adequate opportunity to raise its federal questions. The parties dispute whether the remaining requirements of *Younger* abstention are satisfied. First, Sprint argues that the IUB not only must show that there is an ongoing state judicial proceeding but also that the requested federal relief would interfere with that proceeding. Sprint argues that no interference would result from this case. Second, Sprint contends that the state proceeding does not "implicate[] important state interests" because the ongoing state action is not the type of judicial proceeding that triggers the *Younger* doctrine. Each is discussed below.

**ii. Interference With the State Proceeding Is Required**

By its plain language, the modern test for *Younger* abstention, as stated in *Middlesex* by the Supreme Court and applied in *Cedar Rapids Cellular* by the Eighth Circuit, does not require that the relief sought in federal court interfere with the ongoing

[2] The parties agree that neither of these "extraordinary circumstances" exceptions apply to this case.

state action. *See Cedar Rapids Cellular*, 280 F.3d at 880 (citing *Fuller v. Ulland,* 76 F.3d 957 (8th Cir. 1996)); *Middlesex*, 457 U.S. at 432 (1982). Rather, the test – simply read – requires only the existence of an ongoing state proceeding that implicates important state interests and affords adequate opportunity to raise federal questions. *Id.*

Sprint, however, points to *Younger* itself, in which the Supreme Court explained that interference with state action is the touchstone of a federal court's duty to abstain in certain cases. *Younger*, 401 U.S. 44. Moreover, Sprint notes, a careful reading of *Cedar Rapids Cellular* reveals that the Eighth Circuit also requires that the federal action interfere with the state proceeding. Sprint is correct. The Eighth Circuit in *Cedar Rapids Cellular* – having determined that the three *Middlesex* criteria were satisfied but noting that "we must still decide whether it requires abstention in this case" – stated that "[w]e must therefore decide whether the relief sought by the appellants would unduly interfere with ongoing state judicial proceedings." 280 F.3d at 881. Additionally, the Eighth Circuit has stated that, [i]n general, the *Younger* abstention doctrine directs federal courts to abstain from granting injunctive or declaratory relief that would interfere with pending judicial proceedings." *Night Clubs, Inc. v. City of Fort Smith, Ark.*, 163 F.3d 475, 481 (citation, internal quotations, and emphasis omitted); *see also Cormack v. Settle-Beshears*, 474 F.3d 528, 532 (8th Cir. 2007) (noting that the *Middlesex* test requires abstention when "the federal action would disrupt an ongoing state judicial proceeding"); *Silverman v. Silverman*, 267 F.3d 788, 792 (8th Cir. 2001) ("*Younger*

abstention prohibits a federal court from interfering in pending state civil cases where [the *Middlesex* test is satisfied].").

Further, Sprint notes that multiple other circuits have explicitly held that interference is required under the first *Middlesex* criterion. *See e.g. Foster Children v. Bush*, 329 F.3d 1255, 1276 (11th Cir. 2003); *FOCUS v. Allegheny County Court of Common Pleas*, 75 F.3d 834, 843 (3d Cir. 1996); *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1291 (10th Cir. 1999). The Supreme Court has also stated that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ." *Colorado River*, 424 U.S. at 817 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)). Thus, some degree of interference with an ongoing state proceeding is necessary to require abstention pursuant to the *Younger* doctrine. Accordingly, the Court must determine whether "the relief sought by [Sprint] would unduly interfere with [the] ongoing state judicial proceeding[]." *Cedar Rapids Cellular*, 280 F.3d at 881.

**iii. The Relief Sought Would Interfere With Ongoing State Judicial Proceedings**

In this action, Sprint seeks a declaratory judgment stating that the "IUB's Order violates federal law and thus is invalid to the extent that it purports to determine whether Sprint has an obligation to pay intrastate access charges for VoIP traffic." (Dkt. No. 1, at 7). Sprint also seeks "preliminary and permanent injunctive relief

enjoining all defendants from enforcing the IUB's Order to the extent contrary to federal or Iowa law." *Id.* The IUB claims that "[t]he injunctive and declaratory relief Sprint seeks would prematurely halt the ongoing state proceedings for no good reason." (Dkt. No. 5, at 3). Sprint counters that interference with the state proceeding would result only from the collateral estoppel effects of a federal order and urges this Court to adopt the Third Circuit's conclusion that collateral estoppel does not qualify as interference for *Younger* abstention purposes.[3] *See Marks v. Stinson*, 19 F.3d 873, 885 (3d. Cir. 1994).

The Court need not resolve this issue because the requested injunctive relief would do more than collaterally estop the litigation of issues in the state proceeding. The requested relief in this case is exactly the kind declaratory and injunctive interference with state proceedings warned against in *Night Clubs*. 163 F.3d at 481. Relief here for Sprint would enjoin the IUB from "enforcing" its order, which would include litigating the issue in the

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[3] Sprint also cites to *Verizon Maryland Inc. v. Public Service*, 535 U.S. 635 (2002), noting that the Supreme Court "held in that case that 28 U.S.C. § 1331 provides jurisdiction for district courts to grant declaratory and equitable relief to a telecommunications carrier challenging a decision by a state utility commission." (Dkt. No. 17, at 13). However, there was no ongoing state judicial proceeding in *Verizon Maryland*. Verizon filed suit only after it received an unfavorable decision from the Maryland Public Service Commission, and it did not subsequently file a state action in addition to its federal one. *Id.* at 640. Thus, the rationale of *Younger* was inapplicable to that case.

state proceeding. (Dkt. No. 1, at 7). Under these facts, the requested injunctive relief against the IUB is tantamount to an injunction against the state court proceeding. Accordingly, the Court finds that maintenance of this federal action would interfere with an ongoing state judicial proceeding. The first *Middlesex* criterion is satisfied.

**iv. The State Proceeding Implicates Important State Interests**

Finally, the Court must determine whether the state proceeding implicates interests important to the state of Iowa.

In *NOPSI*, the Supreme Court explained how it evaluates a state's interest:

> [W]hen we inquire into the substantiality of the State's interest in its proceedings we do not look narrowly to its interest in the *outcome* of the particular case – which could arguably be offset by a substantial federal interest in the opposite outcome. Rather, what we look to is the importance of the generic proceedings to the state. In *Younger*, for example, we did not consult California's interest in prohibiting John Harris from distributing handbills, but rather its interest in 'carrying out the important and necessary task' of enforcing its criminal laws.

*Id.* at 365 (quoting *Younger*, 401 U.S. at 51-52). The Court went on to note that NOPSI clearly had a "substantial, legitimate interest in regulating intrastate retail rates" because "[t]he regulation of utilities is one of the most important of the functions

traditionally associated with the police power of the States." *Id.* (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)).

Thus, the state of Iowa has a substantial and legitimate interest in regulating its utilities. At issue, however, is whether that interest is sufficiently implicated by the parallel state court proceeding. Sprint argues that the state proceeding cannot trigger *Younger* abstention because Sprint is the plaintiff in both the state and federal proceedings and because *Younger* applies only when a state defendant seeks equitable relief in federal court as a shield against the state proceeding. Sprint cites to the Sixth Circuit:

> In the typical *Younger* case, the federal plaintiff is a defendant in ongoing or threatened state court proceedings seeking to enjoin continuation of those state proceedings. Moreover, the basis for the federal relief claimed is generally available to the would-be federal plaintiff as a defense in the state proceedings.

*Devlin v. Kalm*, 594 F.3d 893, 894-95 (6th Cir. 2010) (quoting *Crawley v. Hamilton County Comm'rs*, 744 F.2d 28, 30 (6th. Cir. 1984)). The Sixth Circuit in *Devlin* concluded that "*Younger* does not apply when the federal plaintiffs are also *plaintiffs* in the state court action and the plaintiffs are not attempting to use the federal courts to shield them from state court enforcement efforts." *Id.* The Third and Eleventh Circuits have reached similar conclusions. *See e.g. Harris v. Pernsley*, 755 F.2d 338, 344 (3d Cir. 1985) (noting the "consistent holdings of

this court that where the pending state proceeding is a privately-initiated one, the state's interest in that proceeding is not strong enough to merit *Younger* abstention, for it is no greater than its interest in any other litigation that takes place in its courts") (citation and internal quotations omitted); *Wexler v. Lepore*, 385 F.3d 1336, 1340-41 (11th Cir. 2004) ("The *Younger* doctrine does not require abstention merely because a federal plaintiff, alleging a constitutional violation in federal court, filed a claim under state law, in state court, on the same underlying facts.").[4]

However, Sprint's state court action is best characterized as an appeal from the IUB order, and the *Younger* doctrine prohibits a federal court from interfering with the state appellate process. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975); *NOPSI*, 491 U.S. at 368-69 ("When, in a proceeding to which *Younger* applies, a state trial court has entered judgment, the losing party cannot, of course, pursue equitable remedies in federal district court while concurrently challenging the trial court's judgment on appeal.").

In reaching this conclusion, the Court looks to the Supreme Court's reasoning in *NOPSI*, a case in which an electric utility sought injunctive and declaratory relief in federal district court with respect to the City Council's denial of its request for

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[4] Here, unlike in *Wexler*, Sprint alleges claims based on non-constitutional, federal law, but that does not make the Eleventh Circuit's determination regarding the applicability of *Younger* less persuasive.

a rate adjustment. *Id.* at 352-54. In addition to filing suit in federal district court, NOPSI also filed a petition for review of the City Council's order in Louisiana state court, and the City Council moved for abstention in the federal court action. *Id.* at 357-58.

The City Council argued that the state court action was "a mere continuation of the Council proceeding," akin to an appellate court's review of a lower court decision, which the *Younger* doctrine treats as a unitary and uninterruptible process. *Id.* at 369. The Court assumed, without deciding, that the City Council was correct on this point, noting that prior Supreme Court precedent "suggests, perhaps, that an administrative proceeding to which *Younger* applies cannot be challenged in federal court even after the administrative action has become final," provided that it is subject to state judicial review. *Id.* at 370 n.4 (citing *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 629 (1986)). However, the Court noted that "it has never been suggested that *Younger* requires abstention in deference to a state judicial proceeding reviewing legislative or executive action." *Id.* at 368. Thus, *Younger* only required abstention in *NOPSI* if the City Council's action was properly considered judicial, rather than legislative or executive. Ultimately, the Court determined that the City Council proceeding was not judicial in nature. *Id.* at 373. The state court proceeding was therefore not akin to the appellate process because it was "no more than a state-court challenge to a completed legislative action." *Id.* In making this determination, the Court noted that the proper characterization of

an agency's action depends "upon the character of the proceedings," *Id.* at 371 (quoting *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908)), and that "ratemaking is an essentially legislative act." *Id.* (citing *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945)).

Although the *NOPSI* Court merely assumed that a state court's review of administrative judicial action is an uninterruptible process under the *Younger* doctrine, this Court finds that assumption to be correct in this case. The Iowa Code mandates a procedure for the judicial review of an Iowa agency order. *See* § 17A.19 ("Except as expressly provided otherwise by another statute referring to this chapter by name, the judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action."); § 17A.19(2) ("Proceedings for judicial review shall be instituted by filing a petition either in Polk county district court or in the district court for the county in which the petitioner resides or has its principal place of business."). Sprint's state court action, therefore, is properly characterized as an appeal from the IUB orders.

And unlike the city council proceeding in *NOPSI*, the IUB orders constitute judicial action. "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist." *NOPSI*, 491 U.S. at 370 (quoting *Prentis*, 29 S.Ct. at 69). Iowa Code § 476.11 provides that the IUB "may resolve complaints, upon notice and hearing, that a utility…

has failed to provide just, reasonable, and nondiscriminatory arrangements for interconnection of its telecommunications services with another telecommunications provider." In its February 4, 2011 order, the IUB invoked § 476.11 to exercise jurisdiction over the dispute between Sprint and Windstream. (Dkt. No. 1-1, at 11).

The parties submitted briefs on the merits of their claims, which set out both the facts and applicable law. (Dkt. No. 1-1, at 10). The IUB's orders provide a section of background facts, noting that "there are no material factual disputes which would require a hearing," and made conclusions of law based upon the Iowa statutory framework. (Dkt. No. 1-1, at 9). This is judicial activity.[5] Accordingly, the fact that Sprint is the named plaintiff in both the federal and state action does not preclude the state from having substantial interest in the state proceeding.

The Eighth Circuit reached a similar conclusion in *Night Clubs*. 13 F.3d at 478. There, the plaintiff

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[5] The Court notes the somewhat odd procedural posture of the IUB's orders. It granted Sprint's motion 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." (Dkt. No. 1-1, at 8). The IUB "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." (Dkt. No. 1-1, at 9). However, the Court does not judge the wisdom of the IUB's procedure, nor does it find that procedure to undermine the judicial nature of the IUB proceeding. Notably, both parties submitted briefs on the merits after the proceeding was "recast."

appealed an administrative zoning decision first to the state circuit court and then to the Supreme Court of Arkansas. *Id.* While that state appeal was pending, the plaintiff filed a civil rights action pursuant to 42 U.S.C. § 1983 in federal district court, naming the city, the members of the city's Planning Commission, and the Planning Commission itself as defendants.

*Id.* The Eighth Circuit held that the district court correctly determined that all three *Middlesex* criteria were satisfied and that *Younger* abstention was appropriate. *Id.* at 481. Accordingly, the Court does not find the above-cited reasoning of the Third, Sixth, and Eleventh Circuits to be applicable to this case. The state of Iowa has a substantial interest in the regulation of utilities within the state and in the integrity of its procedure for the appeal of IUB orders.

## V. CONCLUSION

The Court abstains from this case pursuant to the *Younger* doctrine. This action for declaratory and injunctive relief against the IUB interferes with an ongoing state judicial proceeding. The state proceeding implicates interests important to the state of Iowa, and it affords Sprint an adequate opportunity to raise any relevant federal questions. And because Sprint seeks only declaratory and injunctive relief, the appropriate result is dismissal. *Id.* at 481 (citing *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973)). Having concluded that abstention is required, the Court need not resolve Windstream's additional arguments for dismissal.

Upon the foregoing,

**IT IS ORDERED** that Defendants' Motion for Abstention is granted and that the Plaintiff's Complaint is dismissed. The Clerk shall enter judgment for the Defendants.

**DATED** this 1st day of August, 2011.

John A. Jarvey
United States District Judge
Southern District of Iowa

## APPENDIX C

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

Sprint Communications Company, L.P.,
Complainant

Docket No. FCU-2010-0001

v.

Iowa Telecommunications Services, Inc., d/b/a/ Iowa Telecom,
Respondent.

## ORDER DENYING APPLICATION FOR RECONSIDERATION AND MOTION FOR STAY

(Issued March 25, 2011)

### BACKGROUND

On February 4, 2011, the Utilities Board (Board) issued an "Order" in this proceeding determining that certain intrastate 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 (Iowa Telecom, now known as Windstream Iowa Communications, Inc., or Windstream[1]), is

[1] Pursuant to a reorganization proceeding identified as Docket No. SPU-2009-0010, Iowa Telecom merged with Windstream

subject to the Board's jurisdiction and Iowa Telecom's intrastate access charges. The Board ordered Sprint to pay Windstream amounts owed for unpaid access charges by March 6. The Board issued its Order after considering briefs filed by the parties and the Consumer Advocate Division of the Department of Justice (Consumer Advocate).

A detailed procedural history of the proceeding is provided in the Order. Briefly, the proceeding began on January 6, 2010, when Sprint filed a complaint against Iowa Telecom alleging that Iowa Telecom was assessing incorrect charges for routing and handling Sprint's VoIP calls. Sprint alleged it had properly disputed the charges and withheld the disputed amounts, as permitted by Iowa Telecom's access tariffs. Sprint asked the Board for emergency relief, alleging that Iowa Telecom was going to cease providing facilities for Sprint's traffic beginning on January 8, 2010, effectively blocking calls.

Iowa Telecom filed a preliminary answer to the Complaint on January 7, 2010, stating it would not discontinue access service 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

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Corporation and was renamed Windstream Iowa Communications, Inc. Throughout the February 4, 2011, Order, the Board referred to Iowa Telecom, the name of the company before the merger went into effect.

a dispute has been denied. 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 setting off funds payable to Iowa Telecom for other services provided to Sprint or Sprint affiliates.

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 its complaint, a 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 requested was for the Board to prohibit Iowa Telecom from discontinuing service and that the specific claims in its complaint were no longer ripe. 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 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. Iowa Telecom argued 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. Pointing to Iowa Code § 17A.18A for support, Iowa Telecom argued 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 had 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 acknowledged there was an underlying dispute about the parties' 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 an expedited procedural schedule, and that the Board 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. (February 1, 2010, order, p. 7.) 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 and did not require Iowa Telecom to file any additional claims or clarification. The Board stated 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 carrier common line charges (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. (*Id*.) 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, and that the issues in this case were legal issues with no material factual disputes which would require a hearing. (Id.) The Board required simultaneous briefs and reply briefs from the parties. No party objected to this procedure. On March 1, 2010, Consumer Advocate, Sprint, and Iowa Telecom filed initial briefs. On March 30, 2010, Sprint and Iowa Telecom filed reply briefs.

As noted above, the Board issued its decision in this docket on February 4, 2011, determining (among other things) that intrastate interexchange VoIP calls are subject to the Board's jurisdiction and to intrastate access charges. The Board also decided that Sprint acted inappropriately when it effectively withheld amounts that were not disputed (Order, pp.

68-71) and that Iowa Telecom was not justified in planning to disconnect Sprint without Board approval under the unusual circumstances of this case. (Order, pp. 77-79.)

**Sprint's Application for Reconsideration and Motion to Stay**

On February 23, 2011, Sprint filed with the Board an "Application for Reconsideration" and a "Motion to Stay Pending Reconsideration." In part, Sprint asked the Board to stay the payment obligations under the February 4, 2011, Order until the Board makes a determination on Sprint's request for reconsideration. On February 28, 2011, Windstream objected to the application for reconsideration and the motion for a stay. In an order issued on March 4, 2011, the Board denied Sprint's motion to stay the payment obligations.

Sprint's application for reconsideration focuses primarily on the "Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking" issued by the Federal Communications Commission (FCC) on February 9, 2011, *In re: Connect America Fund*, WC Docket No. 10-90, FCC-11-13 (FCC NPRM). According to Sprint, the FCC proposes in the NPRM to determine the appropriate obligations and compensation for interconnected VoIP traffic and to move away from the traditional tariffed access charge method of compensation for such traffic. Sprint contends it will be harmed if it is required to pay the traditional intrastate access rates for the traffic at issue in this proceeding.

Sprint characterizes the FCC NPRM as a "significant new development." (Application, p. 1.) Sprint notes that the FCC has classified resolution of the VoIP compensation issue as a "Near Term" or "Immediate" action. (Application, p. 2.) According to Sprint, the FCC suggests that the near term provisions will be ready and effective in 2012. Sprint argues it would be prudent for the Board to wait to assign a jurisdiction to the VoIP traffic at issue in this proceeding until the FCC makes its decision. Sprint argues that the proper solution for disputes involving compensation for VoIP traffic will come from the FCC.

Sprint also argues the Board's conclusion regarding compensation for VoIP does not necessarily follow from the Board's determination that the traffic at issue was jurisdictionally intrastate. According to Sprint, because VoIP uses different technology than traditional circuit switched traffic, it uses network resources more efficiently. Sprint contends that the Board did not address the cases in Sprint's briefs that discussed the issue of an appropriate intercarrier compensation structure separately from the jurisdictional issue. Sprint emphasizes that most of the FCC's proposals for immediate application involve compensation methods other than traditional tariffed intrastate access. Sprint suggests that the FCC's stated intent to move away from the current intercarrier compensation system is consistent with Iowa Code § 476.95(3), which provides that the rates for incumbent local exchange carriers (including access rates) should be moved toward costs, with implicit subsidies removed, and § 476.95(4), which allows the

Board to respond with flexibility to changes in the industry. Sprint states that the Board should either reopen the issue of compensation for VoIP traffic and stay its decision until the FCC rules on its choice of compensation regimes for VoIP or reopen the issue for further evidence on a reasonable rate for VoIP.

Sprint suggests there is precedent for the Board's consideration of a different rate for VoIP traffic, noting that in the High Volume Access Services rule making proceeding, Docket No. RMU-2009-0009, the Board recognized that the nature of the traffic at issue in that proceeding was different from traffic that had historically been subject to access tariffs and established a procedure for setting different rates for that traffic.

On the question of taking evidence, Sprint states that the determination of the jurisdictional nature of the VoIP traffic was a threshold legal issue in this proceeding and that the Board's determination of jurisdiction was made only on the basis of legal briefs. (Application, p. 3.) Sprint argues that the Board should have resolved only that issue in its order. According to Sprint, the other issues decided by the Board in the February 4 Order were not "threshold legal issues" and require the presentation of evidence and specific arguments directed at those issues.

Sprint contends that the Board erred both in reaching and resolving the Accounts Payable Debit Balance (AP Debit Balance) issue. Sprint asserts there is no language in Iowa Telecom's tariffs that answers whether future undisputed amounts can be applied against an outstanding balance of disputed

amounts or whether the undisputed amounts must be paid. Further, Sprint asserts that because the Board ruled that all outstanding amounts must be paid, the AP Debit Balance issue was moot and need not have been addressed. Sprint also states that the issue was moot because Sprint had agreed to pay current undisputed amounts to eliminate the emergency aspect of the case and did not resume the practice of retaining undisputed amounts to apply against the disputed amounts. Sprint argues that the use of the AP Debit Balance tool, its accounting legitimacy, and its importance in dispute resolution are all issues which require a factual record that was not present at the time of the Board's Order. Sprint asserts that for these reasons the Board should reconsider its Order and delete decisions on issues that are not related to the legal questions about VoIP jurisdiction.

Sprint also asks the Board to grant reconsideration of its Order to allow a reasonable time for the parties to brief the issue of the impact of the FCC NPRM and other decisions that post-date the briefs filed in this case. Sprint suggests additional briefing would update the arguments on the jurisdiction and compensation issues.

**Windstream's Objection**

On February 28, 2011, Windstream filed an objection to Sprint's application for reconsideration and the motion for a stay. Windstream states that the Board need not reopen the proceeding to hear evidence, that the Board's ruling on the validity of Sprint's payment withholding practices was not improper, and that the Board should not stay its

decision. Windstream suggests that Sprint is welcome to advocate for changes to the intercarrier compensation regime on a prospective basis but cannot justify not paying for services already provided under current law based on expected or hoped for changes to the compensation regime which have not yet been enacted.

More specifically, Windstream asserts that the Board's conclusion that Windstream's tariff applies to the VoIP traffic at issue in this proceeding was correct. Windstream points out that Sprint's only specific argument about the Board's legal reasoning on the issue about whether the tariff applies to the VoIP traffic is that the Board did not address certain cases cited by Sprint which discussed compensation separately from jurisdiction. To refute Sprint's assertions about the Board's consideration of the compensation issue, Windstream refers to the Board's discussion of its rules at 199 IAC 22.14 and 38.6 (such as Order, pp. 12, 43-45), confirming that the Board separately addressed the compensation issue. Windstream reviews the Board's discussion about the application of access charges to intrastate traffic and the Board's explanation about why reciprocal compensation would not be an appropriate compensation mechanism for the traffic involved in this proceeding. (Windstream Objection, pp. 3-4, citing Order, pp. 12, 45.) Windstream also notes that the Board considered the *Time Warner Declaratory Order*[2] and concluded it would not be reasonable to

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[2] *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*

read that decision as requiring a reciprocal compensation arrangement for the VoIP traffic at issue, specifically rejecting Sprint's suggestion to do so. Windstream agrees with the Board's conclusion on that point.

Windstream does not agree that further briefing is necessary or would be useful, noting there will always be new developments in the law. Windstream also points out that while this case was pending, Sprint could have asked for the opportunity to brief any new developments in the law, but did not do so.

In response to Sprint's arguments that the Board should reopen the proceeding to receive evidence, Windstream argues that Sprint's call for an evidentiary hearing comes too late. Windstream points out that Sprint has been on notice for a year that the Board's order responding to the briefs could result in Sprint having to repay the withheld funds. Windstream recounts that in its answer and motion for injunctive relief filed on January 19, 2010, Windstream asked the Board to order Sprint to immediately pay all withheld intrastate switched access charge invoices. Sprint's subsequent motion to dismiss Windstream's motion was rejected by the Board in its February 1, 2010, "Order Granting Motion to Withdraw, Denying Motion for Clarification, Canceling Hearing, and Revising Procedural Schedule," in which the Board stated it would "recast the proceeding to consider

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*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.

[Windstream's] claims about the propriety of Sprint's withholding of access charge payments for the traffic at issue."

Windstream also refers to the Board's statement in that order that the issues in the case appeared to be legal issues and there were no material factual disputes that would require a hearing. Again, Windstream argues that Sprint could have objected to the scope of the issues the Board explained it would consider in the briefs, but it failed to make that objection. Further, once Sprint saw Windstream's briefs, there could have been no doubt that there was a possibility that the Board could order Sprint to pay Windstream based on the briefs. Windstream argues that because Sprint permitted the Board to decide the case on briefs, failed to object to an order based on those briefs alone, never raised a claim of uncertainty as to which facts the briefs would apply, and has not offered a hint as to what relevant evidence it would submit if the proceeding is reopened, the Board, Consumer Advocate, and Windstream should not be required to expend additional resources in this case.

Windstream disputes Sprint's objection to the Board's conclusion regarding Sprint's AP Debit Balance practices as moot and Sprint's request that the Board rescind its conclusions regarding the AP Debit Balance. Windstream states that in recasting the proceeding in its February 1, 2010, order, it was clear the Board would consider a number of issues raised by the parties.

Finally, Windstream contends the FCC NPRM does not justify staying the effectiveness of the Board's Order. Windstream argues that the FCC has in the past invited state regulatory commissions to make their own conclusions regarding the application of intrastate access charges to VoIP traffic, as the Board recognized in its Order. According to Windstream, it is clear that the FCC is seeking comments in the NPRM about what compensation should apply to VoIP traffic, but has not made any tentative conclusions about the issue. Thus, the only relevant development with respect to VoIP compensation signified by the NPRM is that the FCC may issue an order on the matter sooner than it issues an order on other intercarrier compensation issues it is considering. Windstream suggests this development has procedural significance, but does not relate to the validity of the Board's Order. Windstream's position is that the FCC would be correct to decide that intrastate access rates apply to the traffic at issue in this proceeding and to apply that decision retroactively, but observes there is no guarantee that the FCC will apply whatever decision it reaches retroactively. Windstream notes that the FCC seeks comment regarding whether any particular proposals to reform compensation for VoIP traffic would be applied retroactively. (Windstream Objection, p. 7, citing FCC NPRM at ¶ 614.)

**Consumer Advocate's Answer**

On March 9, 2011, Consumer Advocate filed an answer to Sprint's application for reconsideration. Noting that Sprint seeks reconsideration of the

Board's Order in light of the FCC NPRM, Consumer Advocate states that in the NPRM, the FCC acknowledges that while it has sought comment about the appropriate compensation for VoIP, it has not reached a decision, thereby creating uncertainty and leading to billing disputes and litigation. (Consumer Advocate Answer, p. 2, citing FCC NPRM ¶¶ 604, 610.) Consumer Advocate's position is that the release of the FCC NPRM is not reason to stay or vacate the Board's Order. Consumer Advocate observes that disputes over VoIP compensation will likely continue until the FCC provides a definitive answer and that answer is tested in the courts. Consumer Advocate suggests it may be some time before there is certainty on this issue, despite the FCC's stated intent to move quickly. Consumer Advocate emphasizes that the FCC has cautioned the industry that in the interim, nothing in the NPRM "should be read to encourage, during the pendency of this proceeding, unilateral action to disrupt existing commercial arrangements regarding compensation for interconnected VoIP traffic." (Consumer Advocate Answer, p. 3, citing NPRM ¶ 614.) According to Consumer Advocate, the Board's Order corrected Sprint's unilateral decision in 2009 to stop paying intrastate access charges to Iowa Telecom and the Order should not be stayed pending final action by the FCC in its NPRM.

Further, Consumer Advocate suggests that quick action by the FCC does not guarantee that any decision will apply to intrastate VoIP intercarrier compensation. Consumer Advocate notes that the Board's Order is limited to intrastate access charges. It appears to Consumer Advocate that Sprint

anticipates that the FCC will preempt state action regarding intrastate VoIP intercarrier compensation, based on Sprint's assertion that the FCC intends to take control of the issue and offer a "global" resolution. (Consumer Advocate Answer, p. 3, citing Sprint's Application, p. 2.) Consumer Advocate argues that Sprint's interpretation of the FCC's intentions is not supported by the FCC's language in the NPRM. For example, Consumer Advocate points out that the FCC asks for comment on possible compensation systems which recognize the jurisdiction of the states over intrastate access charges, the reach of the FCC's own authority over VoIP intercarrier compensation mechanisms, and whether any final decision should be applied retroactively. (Consumer Advocate Answer, pp. 3-4, citing FCC NPRM, ¶¶ 614-619.)

Consumer Advocate recalls that in the Order, the Board discussed the decision by another state regulatory commission not to refrain from acting on the issue of VoIP compensation while it waited for a possible future order from the FCC which may or may not preempt the state's authority. (Consumer Advocate Answer, p. 4, citing Maine PUC Order, which is cited in the Order, pp. 59-62 and elsewhere.) Consumer Advocate urges the Board not to "preemptively preempt" its Order in this case in anticipation of some future FCC order which may or may not preempt the Board's authority over intrastate VoIP traffic.

Consumer Advocate addresses Sprint's request to reopen the proceeding for further evidence on a reasonable rate for VoIP traffic in the event the

Board decides not to stay or vacate its Order. Consumer Advocate's position is that the issue of whether the intrastate access charges in Windstream's tariff are reasonable or consistent with the FCC's policy statements on the matter, or with Iowa Code § 476.95, is not properly before the Board. According to Consumer Advocate, if Sprint raised these issues in its original complaint filed on January 6, 2010, Sprint withdrew its complaint on January 27, 2010. Consumer Advocate notes that the Board continued the proceeding to allow consideration of Windstream's claims about Sprint's withholding of payments for access charges for VoIP traffic. Consumer Advocate notes that in Sprint's briefs, Sprint argued that the Board's jurisdiction over intrastate VoIP traffic had been preempted and that access charges should not apply to VoIP traffic, but did not argue that the access charges in Windstream's access tariff were unreasonably high. Consumer Advocate refers to *MCImetro Access Transmission Serv., LLC, d/b/a Verizon Access Transmission Serv., et al., v. Iowa Tel. Serv., Inc., d/b/a Iowa Telecom, et al.*, Docket No. FCU-08-6, the proceeding in which Windstream's access tariffs were revised pursuant to a settlement of a complaint filed by Verizon. Consumer Advocate suggests Sprint is free to file a complaint under Iowa Code § 476.11 about the reasonableness of the terms of interconnection with Windstream. Consumer Advocate emphasizes, however, that the issues raised by Sprint in this case focused on whether Windstream could lawfully charge intrastate switched access rates for Sprint's intrastate VoIP traffic, and the Board ruled that the switched access

tariff rate applied to the traffic. Consumer Advocate urges the Board to deny Sprint's application for reconsideration.

**Discussion**

In an order issued on March 4, 2011, the Board denied Sprint's request to stay the deadline by which it was to pay Windstream amounts as directed in the February 4 Order. The Board will now address the rest of the requests in Sprint's application for reconsideration. Sprint's application focuses on the recent FCC NPRM, which Sprint characterizes as a "significant new development" that warrants both reconsideration and stay of the Board's Order. In light of the FCC NPRM, Sprint asks the Board to (1) refrain from assigning a jurisdiction to the traffic at issue; (2) to reopen the proceeding for consideration of the issue of how VoIP traffic is to be compensated and to stay its decision until the FCC specifies a compensation regime for VoIP; and (3) alternatively, Sprint asks the Board to reopen the issue for further evidence on a reasonable rate for VoIP traffic. If the Board is not willing to stay its Order, Sprint asks the Board to accept reconsideration to allow additional briefing to update the arguments on the threshold question of jurisdiction and compensation for VoIP traffic. Sprint also asks the Board to reconsider its Order and delete issues unrelated to the legal question of VoIP jurisdiction.

The Board has reviewed Sprint's requests and the responses filed by Windstream and Consumer Advocate. The Board will first consider Sprint's requests relating to the FCC NPRM. The FCC discusses intercarrier compensation obligations for

VoIP in Section XV of the NPRM, titled "Reducing Inefficiencies and Waste by Curbing Arbitrage Opportunities." In that section, the FCC seeks comment on how to reduce three specific arbitrage opportunities. One arbitrage opportunity has resulted from the fact that the FCC "has never addressed whether interconnected VoIP is subject to intercarrier compensation rules and, if so, the applicable rate for such traffic"; the FCC acknowledges that the resulting uncertainty has led to billing disputes and litigation. (FCC NPRM, ¶ 604.) The other two arbitrage opportunities discussed in Section XV relate to "phantom traffic" and "access stimulation." (FCC NPRM, ¶¶ 605, 606.) The FCC proposes rules to address phantom traffic and access stimulation, but does not propose rules on the subject of intercarrier compensation for VoIP. Instead, the FCC seeks comment on five possible options for the treatment of VoIP traffic: (1) immediate adoption of Bill-and-Keep for VoIP; (2) immediate obligation to pay VoIP-specific intercarrier compensation rates; (3) obligation to pay intercarrier compensation as part of future glide path; (4) immediate obligation to pay existing intercarrier compensation rates; and (5) alternative approaches. (FCC NPRM, ¶¶ 615-619.)

The Board agrees with Sprint that the NPRM is a significant development. The Board reads the NPRM as marking the starting point of perhaps the FCC's most focused consideration to date of the issues relating to compensation for VoIP traffic. However, the Board does not expect that the results of the FCC's consideration will come quickly enough to warrant staying the Board's order; thus, the Board

does not find that the NPRM, in and of itself, justifies reconsideration or stay of the Board's order. It appears that Consumer Advocate and Windstream are more realistic in their assessment of how soon the FCC will specify a compensation regime for VoIP traffic. Consumer Advocate notes that it will take some time to reach a conclusive answer, recognizing that the FCC's decision will likely be tested in the courts, and Windstream suggests the only relevant development is procedural, i.e., that the FCC's answer on intercarrier compensation for VoIP may come sooner than its decision on other compensation issues.

Moreover, as noted by Consumer Advocate, the FCC gives explicit guidance on the question of what should happen while awaiting the FCC's decision on intercarrier compensation for VoIP. At ¶ 614 of the NPRM, the FCC emphasizes that nothing in the NPRM

> should be read to encourage, during the pendency of this proceeding, unilateral action to disrupt existing commercial arrangements regarding compensation for interconnected VoIP traffic.

In its Order, the Board determined that the disputed VoIP traffic was subject to the existing commercial arrangements between Iowa Telecom and Sprint as expressed in Iowa Telecom's lawful intrastate access tariffs. The Board will not disrupt those arrangements on the basis of speculation about what the FCC's final decision might be. The FCC has included both the Board's chosen compensation mechanism (Sprint was obligated to pay existing intercarrier compensation rates, i.e., intrastate

access charges) and the one proposed by Sprint (a reciprocal compensation arrangement) in its list of options. It is not yet clear which option the FCC will select and whether the chosen mechanism will apply retroactively or prospectively. The Board will not reconsider or stay its Order on the basis of the FCC NPRM.

Sprint also asks the Board to either reopen the issue of compensation for VoIP and stay its Order until the FCC specifies a compensation regime for the traffic or to reopen the issue for further evidence on a reasonable rate for VoIP traffic. As the Board has already discussed, a stay is not appropriate because the FCC has indicated only that it is considering the issues and alternative treatments for VoIP traffic; it has not yet made any changes and may adopt any of several alternatives. As noted by Consumer Advocate, the Board's Order corrected the unilateral action Sprint took when it decided to stop paying intrastate access charges for the VoIP traffic in question. And as recognized by Windstream, the Board's order restored the arrangements between the parties to what is permitted and required by current law. Staying the Order until the FCC specifies a compensation regime would renew the dispute over whether the intrastate access charges apply to the traffic in question and would be based on speculation, not on current law.

As the Board stated in its recent order denying Sprint's request to stay its payment obligations in this proceeding, applying the traditional test for whether to stay an order involves consideration of four factors. The first involves consideration of the

movant's likelihood of success on the merits of its position. The second is whether the movant will suffer irreparable harm if a stay is not granted. The third is whether the opposing party will be harmed by granting a stay. Finally, the fourth factor requires consideration of the public interest. *Teleconnect Co. v. Iowa State Commerce Commission*, 366 N.W.2d 511, 513 (Iowa 1985).

The first factor does not support granting a stay. Sprint attempts to predict the outcome of the FCC NPRM, but the NPRM is a preliminary document and contains no tentative conclusions to indicate the FCC's determination of the compensation mechanism for VoIP traffic. Thus the NPRM does not establish a likelihood that Sprint's position will prevail, i.e., that the FCC will rule as Sprint expects. Even if it did, there is no indication in the NPRM that the FCC ruling will have retroactive effect. It is more likely that it will be effective prospectively only, which does not support a stay at this time. The first factor, then, is neutral at best.

Second, the Board finds that Sprint will not suffer irreparable harm if the motion for a stay is denied. If Sprint prevails in the end, any alleged burdens associated with the current access charge regime will be removed, and the FCC will either relieve Sprint from current obligations prospectively or retroactively. If the FCC's action has retroactive effect, Sprint may be entitled to refunds from Windstream. Sprint has not shown that refunds would not be an adequate remedy. The second factor does not support granting a stay.

Third, Windstream could suffer some degree of harm if a stay is granted. Granting a stay could otentially renew the debate about Sprint's obligations under current law. The Board's Order resolved questions about Sprint's obligations under Windstream's tariffs and granting a stay could disrupt the certainty that the Order brought to the commercial arrangements between the parties. The third factor does not support granting the motion for stay.

Finally, the public interest would be harmed by granting a stay. The Board has determined that the disputed telephone traffic is subject to access charges under current law. As the Board noted in its March 4 order denying Sprint's motion to stay its payment obligations, the public interest is advanced by the existence of an interconnected and functional system for the exchange of long distance calls between interexchange carriers and local exchange carriers, and that system requires that carriers compensate one another according to the applicable statutes, rules, and tariffs. Again, the fourth factor does not support granting the motion to stay pending the FCC's decision.

Based upon this analysis of the four-factor test, and for the reasons discussed above, the Board will deny the motion for stay. The Board will not stay its Order to await a final decision from the FCC.

With respect to Sprint's request for reconsideration of certain aspects of the Board's Order or to reopen the proceeding to receive certain evidence, the Board notes that Sprint did not cite the Board to any explicit standards in Iowa law which

would guide the Board's decision whether to grant or deny such reconsideration or rehearing. Iowa Code § 17A.16(2) generally provides for applications for rehearing in contested case proceedings, but does not specify when rehearing should be granted. Instead, it provides that a party seeking rehearing must state "the specific grounds for the rehearing and the relief sought ... ." Iowa Code § 476.12 gives the Board specific authority to grant or refuse an application for rehearing, but does not specify the standards the Board should apply. The Board's rules at 199 IAC 7.27 also do not specify a standard.

Rehearing can be appropriate in order to hear new or additional evidence, if there is good reason for the failure to present the evidence at the regular hearing.[3] Rehearing is also appropriate in order to consider new or additional legal argument or to correct legal error.[4] However, rehearing is not required when the new or additional evidence or argument supports the original decision.[5] The Board will apply those standards as it considers Sprint's application for reconsideration and Sprint's request that the Board reopen this proceeding to receive certain evidence.

Sprint asks the Board to reopen the issue for to receive evidence regarding a reasonable rate for VoIP

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[3] *Shaaf v. Iowa Board of Medicine*, 2009 WL 5126252 (Iowa App. 2009).

[4] *Windway Technology, Inc. v. Midland Power Coop.*, 696 N.W.2d 303 (Iowa 2005).

[5] *S.E. Iowa Coop. Elec. Assoc. v. Iowa Utilities Board*, 633 N.W.2d 814, 822 (Iowa 2001).

traffic. Sprint appears to fault the Board's Order for failing to consider cases cited by Sprint in its briefs which Sprint contends discussed the issue of compensation for VoIP traffic separately from the jurisdictional question. Because Sprint did not name the cases it believes the Board overlooked, the Board cannot address the point in detail. However, the Board rejects any implication that the Order does not contain sufficient discussion of the compensation issue. As Windstream explains in its objection, the Board specifically discussed Sprint's proposal that the VoIP traffic at issue in this proceeding be subject to a reciprocal compensation arrangement instead of access charges. Sprint asked the Board to order a reciprocal compensation arrangement for the traffic (as opposed to access charges) as ordered by the FCC in the *Time Warner Declaratory Order*. The Board rejected that request and, in doing so, provided ample discussion of the compensation issues raised by Sprint. The Board distinguished the *Time Warner Order*, a source for support of Sprint's assertion that reciprocal compensation would be appropriate for the traffic at issue, and discussed whether reciprocal compensation was appropriate for the traffic at issue under the Board's rules.

In its application for reconsideration, Sprint suggests there is precedent for the Board to set a separate rate that would account for what Sprint contends are the characteristics of VoIP traffic, a rate other than traditional access charge rates. Sprint refers to the Board's proceeding in Docket No. RMU-2009-0009, *In re: High Volume Access Services* (the HVAS proceeding). That comparison is not appropriate. In the HVAS proceeding, the Board

expressly sought to determine the appropriate rate for a particular type of traffic. In the present case, the Board made it clear that it would focus on whether the rates in Iowa Telecom's intrastate access tariff applied to the traffic in question. Because the reasonableness of those rates was not raised by Sprint and was never in consideration, the issue is not appropriate for rehearing.

The Board finds that Sprint has failed to present any argument that would justify reopening this proceeding for purposes of determining a separate rate to be applied to the VoIP traffic in question. The Board will not reconsider its Order on the subject of compensation for the VoIP traffic involved in the proceeding or reopen the record to receive evidence relating to the issue of a reasonable rate for VoIP traffic. It would not be appropriate to grant rehearing for the purpose of receiving evidence about a specific rate for the traffic in question when the proceeding was never intended to consider that issue. Nor does the Board find that Sprint has identified any legal error in the Board's Order which must be corrected by rehearing.

Sprint is not without recourse, but its option is not in this proceeding. As suggested by Consumer Advocate, if Sprint wants to object to the rates included in Windstream's tariffs, it can file a complaint with the Board under Iowa Code § 476.11. Or, Sprint could request the Board to initiate a separate rule making proceeding in which the Board could consider an appropriate rate for the traffic at issue here.

Nor will the Board reconsider its Order to allow briefing on the arguments on the legal questions about the Board's jurisdiction and issues relating to compensation for VoIP traffic. The FCC has confirmed in the NPRM what the Board concluded in the Order – that the FCC had not yet classified VoIP as an information service subject to exclusive federal jurisdiction, and may never do so. In discussing the option of determining that interconnected VoIP traffic is subject to the same intercarrier compensation charges (including intrastate access charges) as other voice traffic, the FCC explains that this outcome could result if the FCC classifies interconnected VoIP as telecommunications services. The FCC acknowledges that "the Commission thus far has not addressed the classification of interconnected VoIP services" and seeks comment on whether it could reach this outcome without making such a classification. (FCC NPRM, ¶ 618.) In light of this statement from the FCC that it has not yet made a decision as to whether interconnected VoIP traffic is an information service or a telecommunications service, the Board does not believe that further briefing on questions about the Board's jurisdiction to determine the status of the VoIP traffic at issue or about compensation for that traffic would be instructive. The relevant analysis of the jurisdictional and compensation issues will come from the FCC as it considers the comments received in the NPRM and when it decides the issue. The Board will deny Sprint's request to reconsider its Order to allow additional briefing.

Next, the Board will address Sprint's request that the Board reconsider its Order and delete issues

unrelated to the question of jurisdiction and Sprint's allegation that the Board erred by reaching the AP Debit Balance issue[6] and in its resolution of that issue. The Board does not agree with Sprint's assertions.

Sprint appears to claim to be surprised by the reach of the Board's decision. Sprint's current understanding of what issues were to be considered by the Board in this proceeding (and thus which issues were likely subjects of any Board order) does not appear to match the understanding of the Board, Consumer Advocate, or Windstream. The Board's orders in this proceeding clearly identified the scope of the issues and the briefs of all participants demonstrate an understanding of what issues were involved, and Sprint's AP Debit Balance accounting practice was one of those issues.

In its February 1, 2010, order, the Board decided to continue the proceeding that had started with Sprint's complaint even after the complaint was

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[6] In its Initial Brief, at unnumbered pages 4-5, Sprint explained that an AP Debit Balance "may occur when Sprint disputes inappropriate/unlawful amounts that it has overpaid for a past period. Sprint puts the value of those amounts for which Sprint was overcharged and was entitled to withhold on its books as an amount owed from Iowa Telecom as amounts wrongfully paid. If the overpayment amounts are substantial, they may be larger than the charges characterized by Iowa Telecom as undisputed charges in the current period. In that circumstance, Sprint enters the current undisputed charges in the Accounts Payable system to reduce the overpayment amounts, but the overpayment amounts may still remain, meaning that there is no current account payable amount owed to Iowa Telecom."

withdrawn because the parties acknowledged there is an underlying dispute about their rights and obligations regarding the application of tariffed charges to the VoIP traffic at issue. The Board stated it would give full consideration to that underlying dispute, including Iowa Telecom's claims about the propriety of Sprint's withholding of access charge payments for the disputed traffic. The Board explained that the issues appeared to relate to the parties' rights and obligations with respect to the disputed traffic established in state and federal law and in Iowa Telecom's tariffs. The Board specifically stated that a related issue was a party's right to withhold payment for disputed charges. For the Board to be able to consider whether a party was properly withholding payment for disputed charges, it would necessarily have to reach the issue of whether Sprint's AP Debit Balance practice was permissible under the tariff. Further, Sprint specifically asked the Board to address the issue, making its assertion that the Board erred in reaching the issue hard to accept. In its Initial Brief, Sprint asked the Board to "find that Sprint acted appropriately, and that its use of an AP Debit Balance did not provide justification for Iowa Telecom to threaten unilateral blocking of live traffic." (Sprint Initial Brief, unnumbered page 7.) Sprint also argued in its briefs that the AP Debit Balance was permitted by Iowa Telecom's tariff. Having raised the issue and having asked the Board for a resolution of the issue, Sprint cannot now claim that the Board improperly reached the issue.

With respect to Sprint's objection to how the Board decided the issue, the Board finds that

Sprint's application does not raise any new arguments about the legitimacy of the AP Debit Balance practice. The Board will not reconsider its Order to delete or otherwise modify any of its conclusions relating to Sprint's use of the AP Debit Balance. The Board found that because Iowa Telecom's tariff includes language regarding the treatment of disputed amounts, it contemplates the payment of undisputed amounts. The Board also observed that timely payment of undisputed amounts is a common practice in the industry. The Board concluded that Sprint acted inappropriately by using the AP Debit Balance account which, in effect, amounted to withholding of amounts Sprint had not disputed.

The Board considered the AP Debit Balance issue because it related to the underlying dispute between the parties which prompted Sprint's complaint about Iowa Telecom's threat to discontinue providing facilities for the VoIP traffic in question. The issue was clearly identified by the Board in its orders and the parties recognized the issue as one to be decided because they discussed it at length in their briefs. The Board finds that Sprint has failed to identify any new argument that would justify reconsideration of the Board's Order on this issue.

Finally, there is Sprint's claim that it is entitled to rehearing to present evidence on "the use of, the accounting legitimacy of, and the importance of [the AP Debit Balance] tool in dispute resolution ... ." (Application, p. 4.) The short answer to that claim is that Sprint had the opportunity to present that evidence and chose not to use it. Having made its

choice, Sprint must accept the consequences. Sprint is not entitled to a second bite at the evidentiary apple.

The procedural history of this case is relevant here. On January 22, 2010, the Board issued an order docketing Sprint's complaint and setting a procedural schedule that contemplated prefiled direct testimony and evidentiary hearing at which Sprint could have offered any and all relevant evidence, pursuant to Iowa Code § 17A.14. On January 27, 2010, Sprint filed a motion to, among other things, withdraw its complaint, cancel the hearing, and proceed to briefing of issues Sprint described as "purely legal." (January 27, 2010, Motion, p. 4.) Sprint described these issues as "the propriety of call blocking or threats to block calls," along with "what the tariff says about withholding" and "the jurisdiction and treatment of VoIP traffic." (Id., pp. 3-4.) Those are the issues that the Board decided; Sprint cannot claim that these "purely legal" issues now require an evidentiary hearing apparently because the Board decided the issues in Windstream's favor.

In its Application, Sprint appears to argue that the AP Debit Balance issue is not within the scope of the "purely legal" issues." (Application, p. 4.) However, Sprint's use of the AP Debit Balance tool was part of the reason that Iowa Telecom notified Sprint of potential call blocking, because Iowa Telecom believed that Sprint was improperly withholding undisputed amounts in contravention of the tariff provisions. Even Sprint says that "[t]here is no language on the face of Iowa Telecom's tariffs

addressing whether, when there is a legitimate disputed amount that has been paid, future undisputed amounts can be 'paid' against an outstanding balance ... ." (Id.) With this statement, Sprint admits it was withholding undisputed amounts and that the issue is tied to what the tariff says. Thus, the AP Debit Balance is tied to two of the issues Sprint itself identified as "purely legal."

Further, as noted above, Sprint's Initial Brief expressly asked the Board to find that Sprint's "use of an AP Debit Balance did not provide justification for Iowa Telecom to threaten unilateral blocking of live traffic." (Sprint Initial Brief, unnumbered p. 7.) Deciding that issue requires an evaluation of whether the AP Debit Balance is permitted under the tariff or otherwise a reasonable practice. If Sprint thought evidence was necessary to make that determination, it should have used the opportunity to present evidence contemplated in the Board's original schedule, or it should have asked the Board to re-schedule the hearing after it was canceled. Instead, Sprint asked that the hearing be canceled, asked the Board to decide the AP Debit Balance issue, and only when the decision was adverse to Sprint's interest did Sprint assert that evidence somehow is necessary. The Board finds that Sprint has failed to show good reason for why it did not present the evidence earlier in the proceeding. The Board will not give Sprint two tries on this issue.

**IT IS THEREFORE ORDERED:**

The "Application for Reconsideration" and "Motion for Stay" filed by Sprint Communications Company L.P. in this docket on February 23, 2011, are denied as discussed in this order.

**UTILITIES BOARD**

/s/ Robert B. Berntsen

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper /s/ Darrell Hanson

Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 25th day of March 2011.

## APPENDIX D

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

| | |
|---|---|
| Sprint Communications Company, L.P., Complainant | Docket No. FCU-2010-0001 |
| v. | |
| Iowa Telecommunications Services, Inc., d/b/a/ Iowa Telecom, Respondent. | |

## ORDER

(Issued February 4, 2011)

## 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.

[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

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 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.)

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initiated before Iowa Telecom was renamed, the Board will refer to the company as Iowa Telecom throughout this order.

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 nondiscriminatory 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

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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."

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 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

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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.

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.)

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

[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.)

> 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 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 nonnomadic 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

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[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."

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 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,

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[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).

transforming, processing, retrieving, utilizing, or making available information via telecommunications … ." In the *Pulver Ruling*, the 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 IPPSTN traffic, which is equivalent to IP-TDM.

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

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 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

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

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-tocomputer" IP telephony, where "individuals use software and hardware at their premises to place calls between two computers connected to the Internet," the 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

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[11] *IP-Enabled Services NPRM*. ¶ 29 (emphasis added).

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 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*

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[12] Id.
[13] Id., ¶ 1.
[14] PAETEC Decision, p. 6.

*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 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*:

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[15] IP-Enabled Services NPRM, ¶ 29.

> 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 "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]

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[16] Iowa Telecom Initial Brief, p. 23, quoting IP-Enabled Services NPRM, ¶ 61.
[17] Time Warner Declaratory Order, ¶ 17.
[18] Time Warner Declaratory Order, ¶ 1.

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 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 14.)

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[19] Time Warner Declaratory Order, ¶ 15.

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. 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

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

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 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

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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.

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

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[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).

affirmed the 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

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[27] Id., at 583.

on an end-point approach difficult, if not impossible.[28]

Iowa Telecom and Consumer Advocate argue that Sprint is delivering nonnomadic 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 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

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[28] *Vonage Declaratory Order*, ¶ 24, footnotes removed.
[29] *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 575.

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 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 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

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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).

[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).

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 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 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

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[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.

> 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 presenting similar issues to those being

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[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.

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

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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).

"[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 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

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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 ... ."

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 nonnomadic 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 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.

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

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 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 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

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[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.

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 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.

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[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.

### 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

[41] In *Re: Qwest Corporation and U.S. Cellular Corporation v. East Buchanan Telephone Cooperative*, Docket Nos. FCU-04-42,

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 commercial dispute, whether through

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FCU-04-43, "Order Continuing Temporary Injunction, Docketing and Consolidating Cases, and Setting Procedural Schedule," p. 8, issued September 14, 2004.

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

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[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."

> 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.

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**

/s/ Robert B. Berntsen

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper /s/ Darrell Hanson

Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 4th day of February 2011.

**FILED WITH**
**Executive Secretary**
**January 19, 2010**
**IOWA UTILITIES BOARD**

# ATTACHMENT A
# Selected Provisions of Iowa Telecom Tariff
# Iowa No. 2

**IOWA No. 2**
**FACILITIES FOR INTRASTATE ACCESS**
**Iowa Telecommunications Services, Inc.**
**d/b/a Iowa Telecom** **2nd Revised Sheet 30**
**Telephone Tariff** **Cancels 1st Revised Sheet 30**
**Filed with Board**

2. GENERAL REGULATIONS (Cont'd)

2.1 Undertaking of the Telephone Company (Cont'd)

2.1.8 Discontinuance and Refusal of FIA

(A) Unless the provisions of 2.2.2(B) following apply, if the customer fails to comply with the provisions of 2.1.6 preceding or 2.3.1 following, and 2.4.1 (A) and (D) following, including any payments to be made by it on the dates or at the times herein specified, and fails within fifteen (15) days after written notice, by Certified U.S. mail, from the Telephone Company to a person designated by the customer to correct such noncompliance, the Telephone Company may discontinue the provision of the FIA to the noncomplying customer. In case of such discontinuance, all applicable charges shall become due.

(B) If the customer repeatedly fails to comply with the provisions of this tariff in connection with the provision of a FIA or group of FIA, and fails to correct such course of action after notice as set forth in (A) preceding, the Telephone Company may

refuse applications for additional FIA to the noncomplying customer until the course of action is corrected.

2.1.9 Preemption of FIA

In certain instances, (i.e., when spare facilities and/or equipment are not available), it may be necessary to preempt existing services to provision or restore National Security Emergency Preparedness (NSEP) Services. If, in its best judgement, the Telephone Company deems it necessary to preempt, then the Telephone Company will ensure that:

(A) A sufficient number of public switched services are available for public use if preemption of such services is necessary to provision or restore NSEP service.

(B) The service(s) preempted have a lower or do not contain NSEP assigned priority levels.

(C) A reasonable effort is made to notify the preempted service customer of the action to be taken.

(D) A credit allowance for any preempted service shall be made in accordance with the provisions set forth in Section 2.4.4(A).

**IOWA No. 2**
**FACILITIES FOR INTRASTATE ACCESS**
**Iowa Telecommunications Services, Inc.**
**d/b/a Iowa Telecom** **2nd Revised Sheet 34**
**Telephone Tariff** **Cancels 1st Revised Sheet 34**
**Filed with Board**

2. GENERAL REGULATIONS (Cont'd)

2.3 Obligation of the Customer (Cont'd)

2.3.9 Coordination With Respect to Network Contingencies

The customer shall, in cooperation with the Telephone Company, coordinate in planning the actions to be taken to maintain maximum network capability following natural or man-made disasters which affect telecommunications services.

2.4 Payment Arrangements and Credit Allowances

2.4.1 Payment of Charges and Deposits

(A) The Telephone Company may, in order to safeguard its interests, require a customer which has a proven history of late payments to the Telephone Company or does not have established credit, to make a deposit prior to or at any time after the provision of the FIA to the customer to be held by the Telephone Company as a guarantee of the payment of rates and charges. Furthermore, if the Telephone Company shall at any time have sufficient information to reasonably believe that the prospect of due and punctual payment of

the service is impaired, then in such event, the Telephone Company may, at its option, require payment of deposit. A deposit may not exceed the actual or estimated rates and charges for the FIA for a two month period. The fact that a deposit has been made in no way relieves the customer from complying with the Telephone Company's regulations as to the prompt payment of bills. At such time as the provision of the FIA to the customer is terminated, the amount of the deposit will be credited to the customer's account and any credit balance which may remain will be refunded. After the customer has established a one year prompt payment record, such a deposit will be refunded or credited to the customer account at any time prior to the termination of the provision of the FIA to the customer. In case of a cash deposit, for the period the deposit is held by the Telephone Company, the customer will receive simple annual interest at the percentage rate specified in the Telephone Company General and/or Local Tariff.

(B) Where the provision of FIA requires facilities that meet any of the conditions specified in 10.1.1 following, Special Construction charges as set forth in Section 10 will apply.

(C) The Telephone Company shall bill FIA services on a current basis for (a) all charges incurred, (b) applicable taxes, and (c) credits due the customer.

(1) Switched Access (except for the Entrance Facility, Direct-Trunked Transport and Multiplexing elements), Ancillary and Miscellaneous services shall be billed in arrears.

(2) Switched Access Entrance Facility, Direct-Trunked Transport and Multiplexing elements shall be billed in advance except for the charges and credits associated with the initial or final bills. The initial bill will also include charges for the actual period of service up to, but not including, the bill date. The unused portion of the FIA already billed will be credited on the final bill.

The customer will receive its bill in; 1) a paper format or 2) a paper format bill summary with a magnetic tape to provide the detailed information of the bill. Such bills are due when rendered. Adjustments for the quantities of FIA established or discontinued in any billing period beyond the minimum period set forth in 2.4.2 following will be prorated to the number of days based on a 30 day month. The Telephone Company will, upon request and if available, furnish such detailed

information as may reasonably be required for verification of any bill.

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**External Affairs**

**IOWA No. 2**
**FACILITIES FOR INTRASTATE ACCESS**
**Iowa Telecommunications Services, Inc.**
**d/b/a Iowa Telecom** **1st Revised Sheet 35**
**Telephone Tariff** **Cancels Original Sheet 35**
**Filed with Board**

2. GENERAL REGULATIONS (Cont'd)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.1 Payment of Charges and Deposits (Cont'd)

(D) All bills to the customer are due when rendered and are considered past due thirty-one (31) days after the bill date. In the event the customer does not remit payment in immediately available funds within the 30 day period, the FIA may be discontinued as specified in 2.1.8 preceding.

(1) If the entire amount billed is not received by the Telephone Company in immediately available funds within thirty (30) days after the bill date, an additional charge (late payment charge) equal to 1/12th of the percentage rate for deposit interest as that set forth in 2.4.1(A) of the unpaid balance will be applied for each month or portion thereof that an outstanding balance remains.

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. The Telephone Company will credit or assess late payment charges for disputed amounts as set forth in 2.4.1(D)(2).

Each customer will be given a waiver of the late payment charge once per each calendar year.

If such payment date would cause payment to be due on a Saturday, Sunday or Holiday (i.e., New Year's Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, the second Tuesday in November and a day when Washington's Birthday, Memorial Day or Columbus Day is legally observed), payment for such bills will be due from the customer as follows:

If such payment date falls on a Sunday or on a Holiday which is observed on a Monday, the payment date shall be the first non-Holiday day following such Sunday or Holiday. If such payment date falls on a Saturday or on a Holiday which is observed on Tuesday, Wednesday, Thursday or Friday, the payment date shall be the last non-Holiday day preceding such Saturday or Holiday.

(2) In the event of a billing dispute, the customer must submit a documented claim for the disputed amount. If the claim is received within 6 months of the payment due date, (i.e. bill date plus 31 days) and the customer has paid the total billed amount, any interest credits due the customer upon resolution of the dispute shall be calculated from the date of overpayment. If the claim for the disputed amount is received more than 6 months from the payment due date, any interest credits due the customer upon resolution of the dispute shall be calculated from the later for the date the claim was received or the date of overpayment. A credit will be granted to the customer for both the disputed amount paid and an amount equal to the percentage rate as set for in 2.4.1(D)(1) one Company will assess or credit late payment charges on disputed amounts to the customer as follows:

- If the dispute is resolve in favor of the Telephone Company and the customer has paid the disputed amount on or before the payment due date, no late payment charges will apply.

- If the dispute is resolved in favor of the Telephone Company and the customer has withheld the disputed amount, any payments withheld pending settlement of the dispute shall

be subject to the late payment charge as set forth in 2.4.1(D)(1).

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**Iowa Telecommunications Services, Inc.**
**d/b/a Iowa Telecom** **Original Sheet 36**
**Telephone Tariff**
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2. GENERAL REGULATIONS (Cont'd)

2.4 Payment Arrangements and Credit Allowances (Cont'd)

2.4.1 Payment of Charges and Deposits (Cont'd)

(D) (Cont'd)

(2) (Cont'd)

- If the dispute is resolved in favor of the customer and the customer has withheld the disputed amount, the customer shall be credited for each month or portion thereof that the late payment charge as set forth in 2.4.1(D)(1) may have been applied. In the event the customer has paid the late payment charge, a credit will be granted to the customer for both the late payment charge paid on disputed amount and an amount equal to the percentage rate as set forth in 2.4.1(D)(1).

2.4.2 Minimum Periods

(A) The minimum periods for which FIA are provided and for which rates and

charges are applicable are set forth in 3.2.4 following.

(B) The minimum periods for which FIA are provided and for which rates and charges are applicable for Specialized FIA or Arrangements provided on an Individual Case Basis, as set forth in Section 7 following are established with the individual case filing.

(C) For discontinuances of FIA with a one month minimum period, all applicable charges for the one month period will apply. In instances where the minimum period is greater than one month, however, the charge will be the lesser of the Telephone Company's non-recoverable costs less the net salvage value for the discontinued service of the minimum period charges.

2.4.3 Cancellation of an ASR

Provisions for the cancellation of an ASR are set forth in 3.2.6 following for an ASR.

# APPENDIX E

RELEVANT PORTIONS OF THE
UNITED STATES CODE

47 U.S.C.A. § 152

§ 152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V-A.

(b) Exceptions to Federal Communications Commission jurisdiction

Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title

and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C.A. § 153

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

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(24) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

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(53) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 C.F.R. § 64.702

§ 64.702 Furnishing of enhanced services and customer-premises equipment.

(a) For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.