No. 12-815

In the
Supreme Court of the United States

SPRINT COMMUNICATIONS COMPANY, L.P.,
Petitioner,

v.

ELIZABETH S. JACOBS, et al.,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for the Eighth Circuit

JOINT SUPPLEMENTAL BRIEF

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Under Supreme Court Rule 25.6, the parties submit this supplemental brief to address the Iowa District Court for Polk County's September 16, 2013 ruling in the parallel state lawsuit related to this case. *See* Addendum. The state-court ruling addresses the merits of Sprint's federal-law claims. Sprint has sought reconsideration from the Polk County court and, if its motion for reconsideration is unsuccessful, it intends to appeal the ruling to the Iowa appellate courts.

The parties agree that the state-court ruling on the merits does not affect this Court's jurisdiction to decide the abstention issue here. At the same time, however, the parties recognize their duty to notify this Court of intervening developments that could raise questions about the Court's jurisdiction. *Board of License Comm'rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985). Therefore, out of an abundance of caution, the parties jointly submit this supplemental brief to address the effect of the Iowa District Court's decision on this case under this Court's precedents.

This Court's decision in *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 291 n.7, 293 (2005), is most directly on point. In *Exxon Mobil*, this Court explained that when there is "parallel state and federal litigation," a federal court's "properly invoked concurrent jurisdiction" does not "vanish[] if a state court reaches judgment on the same or related question while the case remains *sub judice* in [the] federal court." *Id.* at 292. Rather, "[d]isposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law." *Id.* at 293.

In its Memorandum in Opposition to Application for a Stay or Writ of Injunction responding to Sprint's request that this Court stay the state-court proceeding prior to judgment, the IUB stated that "any decision by the Polk County District Court will not have *res judicata* effect until it is final," which, because "an appeal is a near certainty, … will not be … for a year or more." IUB Memorandum at 1. *Exxon Mobil* similarly indicates that so long as the losing party in the state-court proceeding "continues to oppose the [state-court] judgment" through the appellate process, then "[t]he controversy … remains live"—regardless of whether the state-court decision may or may not eventually be claim or issue preclusive in the federal case. *Id.* at 291 n.7. Thus, while the parties likely will disagree regarding any possible *res judicata* effect of the state-court decision once the state appellate process is over, they agree that there is no such effect now. Because Sprint continues to oppose the state-court decision in the Iowa courts, there remains a live issue between the parties.

Respectfully submitted,

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ADDENDUM

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

SPRINT COMMUNICATIONS, COMPANY, L.P., Petitioner, vs. IOWA UTILITES BOARD, Respondent, And WINDSTREAM IOWA COMMUNICATIONS, INC., f/k/a IOWA TELECOMMUNICATIONS SERVICES, INC., Intervenor.	Case No. CVCV008638 RULING ON PETITION FOR JUDICIAL REVIEW

The above captioned matter came before the Court for oral argument on the record on April 19, 2013 on Petition for Judicial Review filed on April 25, 2011. The Petitioner was represented by attorney Bret A. Dublinske. Mary Whitman, Assistant General Counsel, appeared for the Respondent, Iowa Utilities Board ("IUB"). Attorneys Robert Holz, Jodie McDougal, Edward Krachmer, and Greg Vogt appeared for Intervenor, Windstream of Iowa Communications, Inc.[1] Consumer Advocate of Iowa Mark Schuling and attorney Alice Hyde of the Consumer Advocate Division of the Iowa Department of Justice appeared. After hearing the arguments of counsel and reviewing the court file, including the extensive and thorough briefs filed by all parties, and the certified administrative record, the Court now enters the following Ruling.

RULING

I. BACKGROUND FACTS AND PROCEEINGS.

As pertinent to the case at bar, Sprint Communications Company, L.P. (Sprint) serves as an intermediate carrier partner to cable companies and Windstream Iowa Communications, Inc., f/k/a Iowa Telecommunications Services, Inc., (Iowa Telecom) serves as a local telephone company also known as a "local exchange carrier" or LEC. In

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[1] Windstream of Iowa Communications, Inc. is the successor corporation of Iowa Telecommunication Services, Inc. (Iowa Telecom). During the original proceedings before the IUB this party was referred to as Iowa Telecom, the Court will do likewise here.

relevant part, the networks of Sprint and Iowa Telecom connect through intrastate and interstate "toll trunks." When an Iowa Telecom local customer places a long distance call on Sprint's network or Sprint seeks to deliver a long distance call to such a customer, such traffic is carried over the "toll trunks." In such cases, Iowa Telecom then assesses Sprint what are known as "access charges" compensating Iowa Telecom for Sprint's use of its network to connect to Iowa Telecom's local customer. The provisions of these "trunk" connections are governed by publicly–filed tariffs approved and generally subject to the jurisdiction of the Iowa Utilities Board (IUB).

The dispute here relates to voice traffic that when originated is formatted in Internet Protocol (IP) and is commonly known as Voice over Internet Protocol (VoIP). This is in contrast to the traditional "public switched telephone network" (PSTN) which uses a protocol known as "time division multiplexing" or TDM. Thus, at issue are voice calls that are transmitted in IP rather than TDM. The calls placed by the end user are originated using special customer premises equipment, the cable modem, and a broadband connection from the customer premises. During the call the traffic undergoes a "net protocol conversion," originating at the cable modem IP and being delivered from Sprint to Iowa Telecom on the PSTN in TDM format.

Until mid-2009 Sprint paid access charges to Iowa Telecom pursuant to the Iowa Telecom tariff approved by the IUB for the traffic in question. At that time, Sprint "revisited" its position on the status of the access charges it paid on VoIP traffic

and ceased paying such charges to Iowa Telecom. Sprint claimed VoIP calls were to be treated differently under regulatory regimes than traditional non-IP communications, and thus it should be charged for such usage in a different manner and at a different rate. Sprint not only withheld payment from Iowa Telecom on the disputed VoIP charges, but also withheld undisputed amounts in an attempt to "catch up" for what it believed was overpayment to Iowa Telecom of VoIP charges in the past.

Due to Sprint's not paying its access charges for several months, Iowa Telecom informed Sprint that pursuant to the terms of its tariff it would disconnect Sprint's service unless Sprint paid its outstanding account balance by January 8, 2010. This prompted Sprint to file a Complaint and Request for Emergency Relief with the IUB on January 6, 2010, asking the IUB to intervene and prevent Iowa Telecom from discontinuing services. The Complaint was filed pursuant to the expedited complaint procedures established under Iowa Code section 476.101(8) (2009) for resolution of complaints involving violations, which include violations of section 476.101(9). Sprint specifically asked the Board to require "Iowa Telecom to withdraw its threat of disconnection and provide assurance of continued service, and require Iowa Telecom to resolve the underlying dispute either at the negotiating table with Sprint, or through formal dispute resolution before an appropriate agency or court." (Jt. App. 6).

Iowa Telecom communicated to Sprint and to the Board on January 7, 2010, the following:

> *Solely in the interest of cooperatively resolving its dispute with Sprint* and without making any admission regarding the potential relevance or persuasiveness of your letter of arguments and observations made in your letter of January 5, 2010, *for the time being* and until Iowa Telecom provides at least 30 days written notice, Iowa Telecom *will not discontinue provision of access service to Sprint so long as Sprint remains current on newly-billed access charges,* regardless of the extent to which Sprint has resolved its currently past due amounts.

(Emphasis added). (Jt. App. 19).

Iowa Telecom then filed an Answer and Motion for Injunctive Relief on January 19, 2010. (Jt. App. 23-38). In its Answer Iowa Telecomm noted it had twice denied Sprint's dispute over payment of VoIP. It also recognized the IUP lacks jurisdiction over the provisions of *inter*state access service to Sprint pursuant to Sections 1 and 2 of the Federal Communications Act of 1934. Instead, the Federal Communications Commission (FCC) has jurisdiction over *inter*state communications under 47 U.S.C. sections 151-52. As such, the FCC has occupied the field of *inter*state communications and the IUB had no authority to regulate in that area. However, Iowa Telecom argued all of the traffic at issue here is categorized as *intra*state and thus properly within the jurisdiction of the IUB. In its Motion for Injunctive Relief, Iowa Telecom asked the IUB to order Sprint to pay all withheld *intra*state switched access charge invoices and prohibit it

from setting off funds owing to Iowa Telecom for any other services provided Sprint either now or in the future. It also specifically stated it was willing to withhold its right to enforce its tariff, as long as Sprint continued to pay access invoices, "so that the Board can consider the merits of Sprint's denied dispute on the expedited basis provided by Iowa Code section 476.101(8) for Sprint's complaint." (Jt. App. 32)

On January 22, 2010, the IUB issued an Order Setting Expedited Procedural Schedule. Based on Sprint's request for expedited proceedings under Iowa Code section 476.101, the IUB set a procedural schedule calculated to produce an IUB decision by April 6, 2010. On January 27, 2010, Sprint filed a Motion to Withdraw, Motion for Clarification, and Contingent Motion to Revise Procedural Schedule. Sprint asserted the only issue it raised in its Complaint was that Iowa Telecom was improperly threatening to discontinue service and the only relief it requested was for the IUB to prohibit it from doing so. It argued, therefore, because the threat of Iowa Telecom disconnecting service was no longer pending the IUB should permit Sprint to withdraw its complaint. In the alternative, Sprint requested: (1) suspension of all deadlines until the procedural issues were resolved; (2) to sever Iowa Telecom's non-expedited claims from the proceedings; (3) move forward with the briefing only of the issues of blocking/threatening to block service and of when, how, and to what extent Sprint can withhold disputed amounts because such are "purely legal matters"; and (4) to require Iowa Telecom to clarify whether it is stating counterclaims and issue an order clarifying the scope

of the proceedings and issues to be developed, adjusting the timeline as feasible. (Jt. App. 62-63). More specifically, Sprint conceded the issues of the propriety of Iowa Telecom's blocking or threatening to block service, what the tariff says about the ability of Sprint to withhold disputed amounts, and the jurisdiction of VoIP traffic all presented threshold issues which were purely legal. Sprint stated the outcome on these issues could make it unnecessary to reach the "facts necessary to apply the tariff or VoIP rules to determine what (if any) access charges are appropriate." (Jt. App. 62). Finally, Sprint stated: "Either way, Sprint respectfully requests that the procedural issues in this case be resolved before Sprint is required to file testimony." (Jt. App. 63).

Iowa Telecom resisted, arguing Sprint should not be allowed to withdraw because Iowa Telecom's disconnection forbearance was contingent on the IUB adjudicating the substantive issues underlying the Complaint on an accelerated basis, the controversy was ripe for consideration and likely to arise again quickly, and the issues were already sufficiently clear because its Answer and Motion for Injunctive relief were clear and/or could be considered a counterclaim. (Jt. App. 65-73).

On February 1, 2010, the IUB granted Sprint's Motion to Withdraw its Complaint, but retained the proceeding "in order to give full consideration to the underlying dispute that resulted in the threatened disconnection . . . but not under the expedited procedure established in the Board's docketing order." (Jt. App. 80). In doing so the IUB recognized there was an underlying dispute about the parties'

rights and obligation with respect to the application of tariffed charges to certain telecommunications traffic and that such issues were likely to recur. Thus, 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." (Jt. App. 81). The IUB did not agree with Sprint that Iowa Telecom had not identified the issues with sufficient clarity, and did not require Iowa Telecom to file any additional claims (counterclaim) or clarification. Without limiting consideration of other issues, the IUB stated the issues related 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, and particularly as applied to Voice over Internet Protocol (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 recognizes the beginning of a discovery dispute between the parties regarding the amount of traffic involved. At this stage, however, the Board believes the issues between the parties related to what rules apply to the traffic in question, not the amount of traffic subject to charges. (Emphasis added).

(Jt. App. 81). Finally, the IUB determined these identified issues were purely legal issues and there

were no material factual disputes that required a hearing. Thus, it canceled the rounds of testimony and instead simply required simultaneous briefs and reply briefs from the parties. The Board canceled the hearing that was scheduled and stated it would "not conduct a hearing under the revised procedural schedule unless either party can identify a material factual dispute that makes a hearing necessary." (Jt. App. 82)(emphasis added). None of the parties identified or attempted to identify any issues of fact to the IUB or requested a hearing to present evidence.

Sprint, Iowa Telecom, and the Consumer Advocate Division of the Department of Justice filed initial briefs with the IUB on March 1, 2010, and Sprint and Iowa Telecom filed reply briefs on March 30, 2010. The IUB issued its Final Order resolving all matters on February 4, 2011. The IUB concluded it had jurisdiction over the traffic at issue, which it classified as intrastate non-nomadic VoIP, and its jurisdiction was not preempted by the FCC. The IUB went on further to conclude Iowa Telecom's tariff did require Sprint to pay intrastate access charges to Iowa Telecom for the traffic, that Sprint's practice of withholding undisputed amounts to reimburse itself for amounts it believed it wrongly paid prior to mid-2009 (i.e. by using an "AP Debit Balance account") was not consistent with the tariff, and that Iowa Telecom could not disconnect a wholesale customer such as Sprint without IUB approval due to the potential harm to the end use customers. Sprint filed an Application for Reconsideration and Motion to Stay the payment pending reconsideration both of which were denied buy the IUB on March 25, 2011.

Sprint filed the pending Petition for Judicial Review with this Court on April 25, 2011. On the same date Sprint also filed a complaint for declaratory and injunctive relief with the United States District Court for the Southern District of Iowa, asserting that the IUB's orders are contrary to federal law and only the FCC has the authority to determine whether access charge tariffs apply to VoIP calls. On May 9, 2011, Sprint filed a Motion to Stay in this case arguing it should be stayed until the federal action was resolved. The IUB resisted the Motion to Stay and attached a copy of its Motion for Abstention and Request for Expedited Relief it filed with the federal district court pursuant to *Younger v. Harris,* 404 U.S. 37 (1971) and *Cedar Rapids Cellular Telephone, L.P. v. Miller,* 208 F.3d 874 (8th Cir. 2004). The IUB then filed an Uncontested Motion to Continue Hearing on Motion for Stay to allow the federal court to make its determination. This Court granted the Motion on June 24, 2011.[2]

On August 1, 2011, the federal district court issued a decision granting the IUB's Motion for Abstention and dismissing Sprint's federal Complaint. Sprint appealed and on September 4, 2012, the Eighth Circuit Court of Appeals issued its decision affirming the federal district court's abstention, but vacating the dismissal of Sprint's federal complaint and remanding the case back with instruction for the federal district court to enter a

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[2] This stay is the reason for the significant time that has passed from when Sprint first filed its Petition for Judicial Review.

stay of the federal action. On January 2, 2013, Sprint filed a Petition for Writ of Certiorari with the United States Supreme Court. The Supreme Court granted Sprint's Writ of Certiorari on April 15, 2013.[3] Based on this grant, Sprint filed an Emergency Motion to Stay Proceedings in this Court on April 15, 2013. The IUB, Iowa Telecom, and the Office of Consumer Advocate filed a Joint Resistance on April 16, 2013. This Court denied the Emergency Motion to Stay on April 18, 2013.

In its Petition for Judicial Review Sprint set forth the "Particular Agency Action Appealed From" as: "IUB's determination that Sprint must pay [Iowa Telecom][4] certain fees known as "intrastate access charges" for connecting certain phone calls known as Voice over Internet protocol ("VoIP") calls from Sprint's customers to [Iowa Telecom] customers"; and "Sprint also seeks review of IUB's determination that Sprint violated [Iowa Telecom's] tariff when it withheld payment for certain disputed charges."[5]

Next, Sprint set forth "Grounds on Which Relief is Sought" and stated in summary: (a) that IUB's Order is unconstitutional under the Supremacy Clause and beyond the IUB's authority in that it determined that Sprint is required to pay

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[3] The matter is still pending before the United States Supreme Court.

[4] In the Petitioner, Sprint refers to "Windstream Iowa Communications, Inc."

[5] Section III, paragraphs 4 and 5 of Petition for Judicial Review.

intrastate access charges for the termination of VoIP traffic, which is a question of federal law solely vested in the Federal Communication Commission ("FCC"); (b) the IUB's Order is based on an erroneous interpretation of law which has not been clearly vested in the IUB. Specifically, (1) that the IUB erroneously determined it had authority to decide this issue, (2) the IUB erroneously interpreted the law in finding that VoIP traffic is not an "information service" as defined in 47 U.S.C. §153(24) as interpreted by the FCC, and (3) the IUB erroneously interpreted federal law in concluding that VoIP traffic is not subject to the "impossibility exception" to IUB jurisdiction, which holds that when it is impossible to determine if traffic is interstate or intrastate, the FCC has exclusive jurisdiction; (c) even if the IUB had jurisdiction to determine whether intrastate access charges apply to VoIP traffic, the IUB further erred as a matter of law and otherwise acted irrationally, illogically, or wholly unjustifiably in determining that such tariffed charges may be imposed on Sprint for VoIP traffic; and (d) that the IUB acted arbitrarily, capriciously, and otherwise abused its discretion when it interpreted Iowa Telecom's tariff to prohibit Sprint from withholding disputed charges.

Accordingly, Sprint argues the IUB's actions violate several provisions of Iowa Code section 17A.19(10) (2011) and the decision must be vacated and should either be reversed on the jurisdictional issue or remanded to the IUB for full hearing. The IUB, Iowa Telecom, and the Office of Consumer Advocate all filed Briefs generally contending the IUB did have jurisdiction to decide the issue in

this case and properly decided Sprint's VoIP traffic was subject to the intrastate tariff, as well as appropriately decided the tariff and Sprint withholding issue.

II. SCOPE AND STANDARD OF REVIEW.

A. General. Judicial review of administrative agency decisions is governed by Iowa Code section 17A.19(10). *NextEra Energy Res. LLC v. Iowa Utils. Bd.,* 815 N.W.2d 30, 36 (Iowa 2012). A party challenging agency action bears the burden of demonstrating the action's invalidity and resulting prejudice. Iowa Code § 17A.19(8)(a). This can be shown in a number of ways, including proof the action was ultra vires; legally erroneous; unsupported by substantial evidence in the record when that record is viewed as a whole; or otherwise unreasonable, arbitrary, capricious, or an abuse of discretion. *See id.* § 17A.19(10). The district court acts in an appellate capacity to correct errors of law on the part of the agency. *Grundmeyer v. Weyerhaeuser Co.*, 649 N.W.2d 744, 748 (Iowa 2002). Agency action is considered to be arbitrary or capricious when its decision was made with no regard to the law or facts. *Doe v. Iowa Bd. of Med. Exam'rs,* 733 N.W.2d 705, 707 (Iowa 2007).

The Court grants considerable deference to an agency's expertise, especially when its decision involves "the highly technical area of public utility regulation." *Office of Consumer Advocate v. Iowa Utils. Bd.,* 663 N.W.2d 873, 876 (Iowa 2003). Because of its highly technical subject matter, we typically defer to the IUB's informed decision so long as it falls within a "zone of reasonableness." *Equal Access Corp. v. Utils. Bd., Iowa Dep't of*

Commerce, 510 N.W.2d 147, 151–52 (Iowa 1993). Therefore, "the majority of disputes are won or lost at the agency level." *S.E. Iowa Coop. Elec. v. Iowa Utils. Bd.,* 633 N.W.2d 814, 818 (Iowa 2001) (internal quotations omitted).

B. **Specific as to this case.** Iowa Telecom asserts that Sprint was not entitled to an evidentiary hearing because this was "other agency action," and not a "contested case."[6] Iowa Code §17A.2(5) defines contested case as "a proceeding including but not restricted to ratemaking, price fixing, and licensing in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Telecom cites to *Brummer v. Iowa Dept. of Corrections*, 661 N.W.2d 167, 171 (Iowa 2003)(citing to *Greenwood Manor,* 641 N.W.2d at 834 ("A contested case entitles [a party] to an adversarial hearing with the presentation of evidence and arguments and the opportunity to cross-examine witnesses and introduce rebuttal evidence.")). Iowa Telecom argues that if this Court determines that the IUB proceedings were other agency action, not a contested case, then no evidentiary hearing was necessary.

However, the legislature anticipated there may be contested cases where no evidence was necessary, when it enacted Iowa Code §17A.10A – Contested cases – no factual dispute, which provides:

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[6] Page 17-18, Intervenor's Brief.

> Upon petition by a party in a matter that would be a contested case if there was a dispute over the existence of material facts, all of the provisions of this chapter applicable to contested cases, except those relating to the presentation of evidence, shall be applicable even though there is no factual dispute in the particular case.

As noted elsewhere in this ruling, although the parties both indicated the particular issue before the IUB[7]was purely legal, the IUB indicated that a party could "identify a material factual dispute that makes a hearing necessary." Thus, it is clear that the IUB considered this to be a contested case where evidence could be received. For this reason, contrary to Iowa Telecom's suggestion, the Court determines this to have been a contested case proceeding. The judicial review will be of a contested case.

III. MERITS.

A. Procedural Issues.

Sprint first contends the IUB erred by improperly continuing a "moot case" and litigating "counterclaims" that never existed.[8] As set forth above, Sprint filed a Complaint with the IUB seeking emergency relief on the issue of whether

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[7] The issue specifically was whether intrastate access charges apply to VoIP traffic.

[8] Sprint's contention is argued in its brief but, as set out above, it was not specifically alleged in its Petition for Judicial Review.

Iowa Telecom could block or threaten to block its calls under the present circumstances. Iowa Telecom filed a "Partial Answer" agreeing to temporarily not disconnect service while the case was pending. It then filed an Answer and Motion for Injunctive Relief, asserting, in part, it had assessed the appropriate charges under its tariff for the VoIP traffic. The Motion for Injunctive Relief sought, in part, an IUB order directing Sprint to pay Iowa Telecom all withheld intrastate switched access charges. At that point Sprint filed a Motion to Withdraw its Complaint. Iowa Telecom opposed Sprint's Motion.

The IUB granted Sprint's Motion to Withdraw its Complaint. In doing so, the IUB stated the parties both agreed there is an underlying dispute on this issue, and that the pattern is likely to recur. Sprint argues at that point the case should have ended as there was nothing left to proceed on, because the only claim before the IUB was expressly dismissed. (Jt. App. 80). However, the IUB at that point recast the proceeding to consider not only the contested issue of whether Sprint owed Iowa Telecom for intrastate access charges on VoIP traffic, but also Iowa Telecom's claims about the propriety of Sprint's withholding or offsetting access charge payments. Sprint argues it was error for the IUB to proceed with the case, but should have closed the case at that point instead of considering Iowa Telecom's Answer as a "de facto counterclaim."

The Court disagrees with Sprint. First, contrary to Sprint's assertion, the Iowa Administrative Rules do allow for a party to file a "counter-complaint." *See* Iowa Admin. Code r. 199-2.2(9).

Iowa Telecom's Motion for Injunctive Relief provided all the information that is required under the rules for a counter-complaint, although it was not entitled as such. "It is well established . . . '[t]he designation given a pleading is not of vital importance. Its character is to be determined largely by its allegations and legal effect, not solely from the name given it.'" *Schulte v. Mauer,* 219 N.W.2d 496, 502 (Iowa 1974) (quoting *Rouse v. Rouse,* 174 N.W.2d 660, 664 (Iowa 1970)). A review of Iowa Telecom's Motion for Injunctive Relief shows it set forth a clear, concise, and complete statement of the facts forming the basis for its claims, its requested relief, and the issues remaining for the IUB's consideration. *See* Iowa Admin. Code r. 199-2.2(9). Accordingly, the IUB did not modify the character of Iowa Telecom's Motion but simply treated it as what it was, which was a counter-complaint. *See Neill v. Western Inns, Inc.,* 595 N.W.2d 121, 126 (Iowa 1999); *Kelly v. Nix*, 329 N.W.2d 287, 290 (Iowa 1983). Thus, the IUB did not err in recasting the proceeding to address what was in essence a counter-complaint by Iowa Telecom.

Second, assuming without deciding the case did become "moot" after the IUB granted Sprint's Motion to Withdraw as Sprint argues, the Court believes an exception to the mootness doctrine would apply here. Courts (or agencies) do not decide cases where there is no longer any actual controversy, unless they exercise their discretion and decide the case under an exception to the mootness doctrine. *Rhiner v. State,* 703 N.W.2d 174, 176–77 (Iowa 2005). "An exception to the mootness doctrine exists 'where matters of public importance are presented and the problem is

likely to recur.'" *In re T.S.,* 705 N.W.2d 498, 501-02 (Iowa 2005) (quoting *Iowa Freedom of Info. Council v. Wifvat,* 328 N.W.2d 920, 922 (Iowa 1983)). The factors the Court considers to determine whether it will review a moot action are: (1) the private or public nature of the issue; (2) the desirability of an authoritative adjudication to guide public officials in their future conduct; (3) the likelihood of the recurrence of the issue; and (4) the likelihood the issue will recur yet evade appellate review. *Id.* (quoting *State v. Hernandez–Lopez,* 639 N.W.2d 226, 234 (Iowa 2002)). The parties agree the issue is likely to recur; it is undisputedly a pubic matter as it involves telecommunications services provided to the public at large, and because such issues are very likely to recur as technology continues to advance an authoritative adjudication of the issue is very desirable. Thus, this exception to the mootness doctrine is applicable here.

The second procedural argument Sprint makes is, even if the IUB did not err in proceeding with the case after it allowed Sprint to withdraw its Complaint, which the Court has now determined was in fact not erroneous, the IUB should not have ruled on the merits of the "AP Debit Balance" dispute without further hearing and opportunity to present evidence. Throughout the proceedings Sprint has agreed the jurisdictional question is purely a question of law that did not require a hearing. However, it argues both here and in its January 27, 2010 combined Motion to the IUB that the issues of requiring refunds and disallowing its "AP Debit Balance" accounting practices are issues of fact that require an evidentiary hearing before determination. Sprint now argues here that it

believed that the reason it did not request an evidentiary hearing was its belief that IUB would only rule on the jurisdictional issue.

The IUB made it clear in its February 1, 2010 Order on Sprint's combined Motion it disagreed with Sprint that there were any factual issues, and specifically found the issues in the case were all legal issues with no material factual disputes requiring hearing. Additionally, Sprint's right to withhold payments for disputed charges was included in the issues listed by the IUB it would be considering. The IUB specifically stated there would not be a hearing "unless either party can identify a material factual dispute that makes a hearing necessary."

The IUB put Sprint on notice of its determination there were no fact issues but gave Sprint the chance to identify *any* factual issues it believed required a hearing. Thus, it was at that point in the agency proceeding Sprint should have specifically requested a hearing on the refund and AP Debit Balance issues. Even though, as Sprint argues, it was not certain the IUB was going to reach such issues at that point it was definitely a possibility the IUB would find it had jurisdiction and thus decide these issues. Sprint never asked for a hearing or identified to the IUB any material factual dispute. If Sprint believed there were any issues of fact that needed further evidentiary hearing on any issue it should have raised such issue before the agency once it was aware the IUB disagreed with that position.

Accordingly, the Court concludes Sprint has both waived and failed to preserve any challenge

to the lack of a hearing by failing to identify any material facts for the IUB and request a hearing on such issues, especially when it was specifically provided a chance to do so by the IUB. *See Interstate Power Co. v. Iowa State Commerce Comm'n*, 463 N.W.2d 699, 701 (Iowa 1990) ("A party is precluded from raising issues in the district court that were not raised and litigated before the agency."). Sprint has failed to establish that the IUB failed to comply with or follow any procedural requirements in the handling of this contested case.

B. Jurisdictional Issue.

The primary issue raised by the parties was whether the IUB has jurisdiction to approve and enforce an Iowa Telecom tariff that permitted it to charge Sprint for *intra*state access charges on non-nomadic VoIP traffic.[9] Sprint claims the IUB does not have such jurisdiction because (1) Sprint's traffic constitutes "information services" which the FCC has determined is under its exclusive jurisdiction[10], and (2) once the communication is internet protocol (IP), it is impossible to determine if it is interstate or intrastate and due to this the FCC and not state regulatory agencies has jurisdiction.[11] Iowa Telecom argues that where the end users can be

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[9] The significance of nomadic versus non-nomadic will be discussed later.

[10] "Information services" are not subject to access charge regimes. *In re A T & T Access Charge Petition*, 19 F.C.C.R. 7457, 7459-61, ¶¶ 4-7 (2004).

[11] This is referred to as the "impossibility" rule.

determined and the communication is non-nomadic and remains *intra*state, regardless if it is converted to VoIP, the traffic constitutes "telecommunications services" over which the FCC has determined state regulatory agencies retain jurisdiction and thus the IUB may properly exercise jurisdiction.

The parties' arguments to this Court mirror those argued before the IUB. Sprint's arguments are premised on its assertion that a reading of court cases and FCC orders[12] leads to the conclusion that the information, including voice communication which travels over the internet (VoIP), has been particularly carved out as within the exclusive jurisdiction of the FCC and has preempted jurisdiction by state utility boards, including the IUB. Specifically, Sprint argues that since the traffic in question undergoes a "net protocol change," in other words, is transposed from the old voice-over-line transmission and is converted to packets for transmission over the internet under "Internet Protocol," even though converted back to land–line equipment for reception by the end user, this is sufficient to make such traffic "information services" and trigger FCC jurisdiction pursuant to the 1996 Telecommunication Act.[13]

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[12] Upon this Court's review of the various FCC Orders Sprint relies upon, that the FCC has in these rulings walked a tight rope on a case by case basis, determined on the specific facts and disputes of each case, without stating an overall jurisdiction policy.

[13] The Act defines "information services" in 47 U.S.C. §153(20) to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available

Sprint argues a second reason for FCC jurisdiction is that once there is a "net protocol change," the communication ("packets") flows through the internet where it is not bound to travel intrastate, even if the call end users (initiator and receiver) are within the same state. The argument is that the packets will flow through the internet in an infinite number of available paths that are not restricted or known to be solely within a state's borders and are therefore interstate in nature. Thus, even though the phone call may be between two end users within the same state, if VoIP is being used, it is not necessarily intrastate; there is no way to know ("an impossibility") and therefore the FCC rather than the state regulatory agency appropriately assumes jurisdiction and preempts state-agency jurisdiction.[14] In addition, Sprint contends that an end user may initiate a VoIP call using a computer while not within the state, even though the identifying telephone area code may indicate an intrastate call, again creating an "impossibility" to determine whether the call is truly interstate or intrastate.[15] These arguments are despite the fact, which Sprint acknowledges, the FCC has not definitively set out a bright or clear line adopting

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information via telecommunications . . . ." See Jt. App. 325.

[14] Thus, this is known as the "impossibility" exception.

[15] The IUB identifies these as the "preemption through information services exception" and the "preemption through impossibility exception." (Jt. App. 301).

this approach. (Jt. App. 300).[16] This lack of a bright line is due to the evolving technology.

Iowa Telecom argues that the FCC allows the application of intrastate access charges when the VoIP traffic originates and terminates in different local calling areas (LCA's) in the same state (intrastate). It contends that in this case, 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 constitutes "intrastate access services,"[17] is therefore within the IUB's jurisdiction and permits Iowa Telecom to enforce its tariff. In particular, Iowa Telecom distinguishes this fact pattern as being non-nomadic as compared to nomadic VoIP based telecommunication.[18]

In its Order, the IUB set out the arguments and authorities submitted by Sprint, Iowa Telecom and the Consumer Advocate on each issue and then in a discussion, thoroughly analyzed these arguments and the legal authority put forth in

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[16] See *Southwestern Bell Telephone, L.P. v. Missouri Public Service Comm'n*, 461 F.Supp.2d 1055, 1081 (E.D. Mo. 2006)("Although the FCC has not yet ruled whether IP–PSTN is such a service, the orders it has issued *lead to the conclusion* that IP–PSTN is an 'information service.'"(emphasis added)).

[17] See Jt. App. 299 and IUB Rule 199 IAC 22.1(3).

[18] The Act defines "telecommunications" in 47 U.S.C. §153(46) to mean "the offering of telecommunications for a fee directly to the public . . . regardless of facilities used." Jt. App. 325.

support of those arguments. The Court will not set out each and every argument, but will discuss below the significant points that lead this Court to conclude that the IUB's Order is proper and should stand. After a careful and exhaustive analysis, the IUB agreed with Iowa Telecom's position in its Final Order.[19]

> 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 authority regarding the application of intrastate access charges.[20]

The IUB went on to find: "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 the traffic in any manner)."[21] As stated in its "Summary" the IUB found "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

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[19] Jt. App. 288-368.

[20] Jt. App. 320

[21] Jt. App. 323.

apply to the traffic at issue in this proceeding."[22] Understandably, Sprint now contends on this appeal that the IUB's legal analysis does not support this conclusion and its decision was wrong.

The IUB specifically rejected Sprint's proffer and declined to adopt the single prong "net protocol conversion" test advanced by Sprint as determinative of jurisdiction. The IUB in its Final Order made a specific fact finding that:

> 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 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.[23]

Sprint first contends that interpreting the FCC *Pulver Ruling* broadly, the FCC intended for it to apply to IP-PTSN/VoIP. Sprint even acknowledges that *Pulver* dealt with IP-IP voice service, while the subject in the current dispute involved IP-PSTN, which is equivalent to IP- TDM. It is

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[22] Jt. App. 367.

[23] Jt. App. 321.

important to note, as the IUB pointed out, that this case deals with IP to PSTN traffic, not IP to IP traffic.[24] The IUB rightfully rejected application of *Pulver* for the two reasons in it Order.[25] Significantly, in *Pulver*, the FCC indicated that broader jurisdictional questions would be addressed in the *IP-Enabled Services NPRM* Ruling issued the same day as *Pulver*. However, the FCC never followed through with rules in that proceeding.

As noted above, Sprint relies heavily on the "net protocol conversion" concept, i.e. by originating in IP format and terminating in TDM format, which was discussed in the FCC's *IP- Enabled Services NPRM* ruling, which referenced the *Stevens Report*[26] to Congress. The report stated that service has the characteristics of "telecommunications" if it met four criteria:

> (1) it holds itself out as providing voice telephone he or facsimile transmission service; (2) it does not require the customer to use CPE[27] 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

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[24] Jt. App. 326.

[25] Jt. App. 327.

[26] This is also referred to by Sprint as the "Joint Board Report." Petitioner's Brief, pg. 11.

[27] CPE is consumer premise equipment.

> associated international agreements; and (4) it transmits customer information without net change in form or content.[28]

Sprint argues before the Court that the IUB made a finding that Iowa Telecom's traffic in this case meets this definition for "telecommunication," but that this was error because it fails to meet prongs 2 and 4, or at the very least, fact questions exist that would necessitate a hearing. However, the IUB did not make this specific finding. The IUB pointed out that this was discussed, but the FCC has never completed the rule making under *IP-Enabled Services NPRM*. The IUP stated:

> Specifically, in that rulemaking 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.")" In other words, whether a particular IP voice service would be considered to be an information service or telecommunication 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 rulemaking has not been completed.

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[28] See 47 U.S.C. §153 (43).

As the IUB found, and this Court finds substantiated, the FCC only referenced the characteristics set out in the *Stevens Report* and did not complete the rule making that might have adopted it. The Court finds no error in this regard.

Sprint relies on *PAETEC Communications, Inc. v. Commpartners, LLC*, 2010 WL 1767193 (D.D.C. 2010), a United States district court case. In that case, *PAETEC* sought compensation for telephone calls made to individuals on its network (TDM) that originated on the network of CommPartners (VoIP). The federal Minnesota district court noted that the information services versus telecommunication services debate has "been raging for years."[29] Further, "The FCC, which has had the controversy on its docket for a decade, has been unable to decide it." There is no question, upon reading *PAETEC*, that after a comprehensive analysis of the issue, that court stated:

> There are two types of calls at issue, to which different compensation regimes may apply: (1) calls that began on CommPartners' network in VoIP before being converted by CommPartners to TDM for transfer to PAETEC (the "VoIP-originated calls"); and (2) calls that both began and were transferred in TDM (the "TDM-originated calls").

The facts here are the same as set out under (1) in the quote – VoIP to TDM traffic. The *PAETEC*

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[29] *PAETEC*, at p.3.

court, relying on two other federal district court cases[30], found

> Both have decided that transmissions which include net format conversion from VoIP to TDM are information services exempt from access charges. *See Sw. Bell,* 461 F.Supp.2d at 1081–83; *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n,* 290 F.Supp.2d 993, 999–1001 (D.Minn.2003). Their reasoning is persuasive. As the *Sw. Bell* court observed, "[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service."

Following these two precedents, the *PAETEC* adopted the "net protocol conversion" test and held such traffic is information service and under exclusive FCC jurisdiction. The IUB acknowledged this holding, but rejected that court's determination or that it was binding precedent and had to be followed, agreeing with Iowa Telecom that the *PAETEC Decision* is "unpublished, non-final, and partial."[31] The IUB did so, stating:

> The *PAETEC Decision* reduces that multitude of considerations identified by the FCC to a single pronged test. Under

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[30] *Southwestern Bell Tel., L.P. v. Mo. Pub. Serv. Comm.,* 461 F.Supp.2d 1055, 1074 (E.D.Mo.2006) and *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n,* 290 F.Supp.2d 993, 999–1001 (D.Minn.2003).

[31] Jt. App. 329.

> 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. . . . 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.

More important, this Court finds the IUB's argument in this appeal that those two federal district court decisions relied upon by the *PAETEC* court did not address a distinction between nomadic and non-nomadic of "fixed VoIP" traffic. This is especially true considering the more recent Eighth Circuit Court of Appeals decision in *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).[32] After describing generally the various

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[32] This circuit opinion also involved Vonage, but is to be distinguished from the *Vonage Order*, *In re Vonage Holdings Corp., Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket 03-211, 199 FCC Rec. 22404, rel. Nov. 12, 2004 and *Vonage Holding Corp. v. Minnesota PUC*, 290 F.Supp.2d 993 (D.Minn.2003)(relied on in *PAETEC).* It should be noted that the FCC determined in the *Vonage Order* that because the physical location of end users could not be known for certain, the impossibility reasoning applied which dictated the traffic to be information service and required FCC jurisdiction. Under the Eighth Circuit analysis, the result would be different if the location of end users can be determined as

technologies, including VoIP versus tradition landline to landline communications, the circuit court noted:

> A distinction can be drawn, however, between what is referred to as "nomadic" VoIP service and "fixed" VoIP service. Nomadic service is the type described above, where a VoIP customer can use the service "nomadically" by connecting with a broadband internet connection anywhere in the universe to place a call. Fixed VoIP service describes the use of the same technology, that is, converting a voice communication into digital packets before transmitting it to another location, but in a way where the service is used from a fixed location. For example, cable television companies offer VoIP service to their customers, but when they do so the ensuing transmissions use the cable running to and from the customer's residence. As a result, the geographic originating point of the communications can be determined. Thus, when VoIP is offered as a fixed service rather than a nomadic service, the interstate and intrastate portions of the service can be more easily distinguished.

Later, in its opinion, the circuit court cited to an FCC ruling on whether the impossibility of

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acknowledged by the FCC in *Universal Serv. Contribution Methodology*.

identifying the originating location of a VoIP call would always trigger FCC jurisdiction:

> Moreover, subsequent to issuing the 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.
>
> *Universal Serv. Contribution Methodology,* 21 F.C.C.R. 7518 at 7546 ¶ 56 (2006), 2006 WL 1765838.
>
> Similarly, we emphasize the limited scope of our review of the FCC's decision. Our review is limited to the issue whether the FCC's determination was reasonable based on the record existing before it at the time. If, in the future, advances in technology undermine the central rationale

> of the FCC's decision, its preemptive effect may be reexamined.

It is clear that the Eighth Circuit, as does the FCC, recognizes the distinction between nomadic and non-nomadic traffic.[33] The Eighth Circuit case was then acknowledged in the FCC Maine Order filed on October 27, 2010.[34] The FCC stated:

> 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

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[33] In *Universal Serv. Contribution Methodology*, the FCC concluded that the agency

> has shown that it is possible to separate the interstate and intrastate revenues of interconnected VoIP providers for purposes of calculating universal service obligations, we find no basis at this time to preempt states from imposing universal service contribution obligations on providers of nomadic interconnected VoIP service that have entered the market, so long as state contribution requirements are not inconsistent with the federal contribution rules and policies governing interconnected VoIP service. Declaratory Ruling , ¶ 15.

[34] See Jt. App. 346, footnote 36.

> interconnected VoIP provider. (Emphasis added).

The question then becomes, under the facts of the case before the IUB, could and did the IUB determine that the present case involved non-nomadic traffic. The IUB noted that from 2004 - 2009 Sprint had accepted that its service was telecommunication and not information service. Nothing had changed, neither factually nor in any specific legal guidance in 2009 to cause Sprint to suddenly determine it was not obligated to pay its access charges to Iowa Telecom under the tariff.[35] The IUB determined that the traffic in this case in non-nomadic. It stated:

> Sprint's willingness to pay access charged 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.[36]

As noted by Iowa Telecom, and found by the IUB, both the IUB and the Eighth Circuit had previously addressed Sprint's earlier representations that it provided telecommunication service. The IUB had ruled, and the Eighth Circuit affirmed, that Sprint, in the role as MCC Telephony of Iowa, Inc.'s carrier partner, may be considered a telecommunications carrier (common carrier) when

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[35] It is noted that the *PAETEC* Decision came down in 2010, a full year after Sprint's challenge.

[36] Jt. App. 336.

performing this partnering function with MCC.[37] This representation was made by MCC when it applied to the IUB for its Iowa certificate.[38]

Finally, Sprint contends that since the jurisdiction appears to be "in doubt," the IUB should withhold its determination until the FCC decides definitively that it does or does not have jurisdiction over this issue. However, as the IUB pointed out, under the FCC *UTEX Decision*, it need not defer its decision until the FCC has acted. In light of the case law that has found the FCC has had such issues before it for a lengthy time and has not resolved the jurisdictional controversy, it is appropriate that the IUB did not defer.

This Court finds that it was appropriate for the IUB to determine that *PAETEC* and the two federal district court cases it relied upon did not correctly address the nomadic/non-nomadic distinction and thus were not precedent that the IUB was obligated to follow. The more recent Eighth Circuit case set forth the status of the law and identified this distinction. The IUB had sufficient facts before it to determine that Sprint, under the facts in this case, was providing non-nomadic traffic and could be determined to be intrastate so that the IUB retained jurisdiction to decide the matter. The IUB was not required by

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[37] Citing to *Sprint Communication Co. L.P. v. Ace Communications Group, et al.,* Docket No. ARB-05-2, "Order on Rehearing" (November 28, 2005), and *Iowa Telecommunications Services, Inc. v. Iowa Utilities Board*, 563 F.3d 743, 749 (8th Cir. 2009).

[38] Jt. App. 303 and 321.

either the "information service exception" or the "impossibility exception" to refrain from exercising its jurisdiction. Further the IUB was correct in determining that the FCC in its own rulings has not carved out jurisdiction for itself so as to preempt state agency jurisdiction. The Court finds that the IUB did not incorrectly apply the law.

C. The "Accounts Payable (AP) Debit Balance" Issue

Sprint's final contention is that the IUB erred further, after making its decision that it had jurisdiction, it ruled on the merits of the dispute between Sprint and Iowa Telecom without affording Sprint a hearing. The Board did rule on two related matters. First, the IUB found that Sprint's use of offsetting what it determined it had paid Iowa Telecom the interconnected VoIP that it did not owe and applying an "accounts payable debit balance" method was improper under Iowa Telecom's tariff. Second, Iowa Telecom improperly threatened to terminate Sprint's access to Iowa Telecom's network due the non-payment of tariff access charges without first seeking the IUB authorization for such termination.[39]

Sprint claims that the IUB violated its own rules[40], the statute (Iowa Administrative Procedure Act)[41] and the constitutional right to due process[42]

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[39] This part of the IUB Final Order has not been appealed by Iowa Telecom.

[40] 199 I.A.C. 7.23; cited at Sprint's Brief, pg. 19.

[41] Iowa Code §17A.12(1); cited at Sprint's Brief, pgs. 18-19.

in failing to provide Sprint a hearing on these issues. Sprint further points out that such a hearing is to be live, with the opportunity to cross-examine witnesses.[43] Sprint argues there are places in the IUB's ruling where it made a finding that Sprint's position was not supported in the record or unclear from the record. The implication is that the IUB needed to hold a hearing in order to receive evidence to rule on Sprint's "AP Debit Balance" position.

As noted in Sprint's Reply Brief, neither the IUB, the Consumer Advocate, or Iowa Telecom argue in their Briefs to this Court this issue of lack of hearing.[44] At the oral arguments before this Court, these parties contend that Sprint raised and addressed this issue in its Brief submitted to the IUB; that Sprint was the party that initiated this matter and asked the IUB to resolve. A review of Sprint's initial brief to the IUB[45] shows that the very first issue Sprint set out concerned its

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[42] Citing to *War Eagle Village Apts. v. Plummer*, 775 N.W.2d 714, 719 (Iowa 2009)(deciding a violation of Article 1, Sect. 9 of the Iowa Constitution – based on lack of adequate notice; not denial of a hearing), and *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)(evidentiary hearing not required before termination of social security disability benefits by agency); at pg. 18 of Sprint's Brief.

[43] Iowa Code §17A.12(7) and 199 I.A.C. 7.23; cited at Sprint's Brief, pg. 19.

[44] Petitioner's Reply Brief filed February 27, 2013, at pg. 6.

[45] Jt. App. Pg. 102, filed on March 1, 2010.

withholding of disputed amounts under Iowa Telecom's tariff.[46] Sprint proceeded to argue its position, challenging the tariff language, and that it appropriately used the "AP Debit Balance." Finally, Sprint concluded: "The Board should 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." Despite Sprint being well aware of the IUB's earlier Order regarding briefs and the need for any party to request a hearing to present evidence, there is nothing in the record that Sprint ever requested a hearing. Only after the IUB decided this issue does Sprint now claim surprise and that its rights have been violated by no hearing being provided by the IUB.

As noted in *PAETEC Communications, Inc. v. Commpartners, LLC*, 2010 WL 1767193 (D.D.C. 2010) "tariffs once approved are the law, and not mere contracts," citing *Bryan v. Bellsouth Comm'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004)." The IUB found regarding the tariff:

> The tariff at issue in this case contemplated withholding of disputed balanced but did not contemplate Sprint's use of an AP Debit Balance account. Sprint's use of the debit balance account

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[46] Jt. App. Pg. 103 ("SPRINT'S CONDUCT IN DISPUTING IOWA TELECOM'S VOIP CHARGES WAS APPROPRIATE AS SPRINT PROPERLY WITHHELD DISPUTED AMOUNTS AS EXPRESSLY PERMITTED BY THE IOWA TELECOM TARIFF.")

> 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.[47]

Thus, the IUB made a legal determination. Sprint has not pointed to any issue of fact that it needed to present to the IUB for the IUB to make the legal determination of law as established by the tariff.

As this Court pointed out above, the Iowa legislature, in establishing the IAPA, contemplated and anticipated just such a situation when it adopted Iowa Code §17A.10A. This section applies here when there is no dispute of fact. The IUB was applying Iowa Telecom's tariff to the undisputed facts. Sprint does not dispute, as the IUB found, as alleged in the Sprint Complaint filed in July 2009,

> 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

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[47] Jt. App. 357-358.

> the disputed charges owed to Iowa Telecom, which according to Sprint, resulted in no current account payable amount owed to Iowa Telecom.[48]

These are all the facts the IUB needed to apply the tariff – the law. As the IUB noted later, "this proceeding was not intended to determine the precise amounts in dispute." A hearing was not required because (1) there was no dispute of fact; (2) the IUB made a legal application regarding the tariff in determining the invalidity of Sprint's use of AP Debit Balance; and (3) Sprint failed to request an evidentiary hearing. The IUB did not violate its own rules, the Iowa Administrative Procedure Act or Sprint's due process rights under the Fifth Amendment to the United States Constitution or Art. 1, section 9 of the Iowa Constitution.

IV. CONCLUSION AND DISPOSITION.

Under the specific facts of this case, the Court finds that (1) the issues determined by the IUB were procedurally properly before it; (2) the IUB properly determined it had jurisdiction and properly exercised it in ruling on the issues; and (3) the IUB did not improperly deny Sprint an evidentiary hearing or violate its own rule, a statute or Sprint's constitutional due process rights. The IUB did not violate Iowa Code §17A.19(10) in either the procedural handling of this agency proceeding, or in its substantive rulings.

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[48] Jt. App. 355.

V. ORDER

IT IS ORDERED that the Final Order of the Iowa Utilities Board issued on February 4, 2011 is AFFIRMED. Costs of this appeal are assessed to the Petitioner.

State of Iowa Courts

Type: OTHER ORDER

CASE NUMBER	CASE TITLE
CVCV008638	SPRINT COMMUNICATIONS COMPANY VS IA UTILITIES BOARD

So Ordered

Richard G. Blane II,
District Court Judge, Fifth
Judicial District of Iowa