LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
BRIAN K. BOGARD
DIANA C. FARR
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

May 9, 2002

Secretary
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

Re: Case No. TT-99-428 et al.

Dear Mr. Roberts:

Enclosed for filing in above referenced matter, please find an original and eight copies of the MITG's and STCG's Reply to Staff and the Wireless Carriers' Responses to the MITG's and STCG's Joint Application for Rehearing.

Please see that this filing is brought to the attention of the appropriate Commission personnel. If there are any questions regarding this matter, please direct them to me at the above number. Thank you in advance for your attention to and cooperation in this matter.

Sincerely,

Brian T. McCartney

Brian T. McCartney

BTM/da
Enclosures
cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Mid-Missouri Group's Filing to Revise its Access Services Tariff, P.S.C. Mo. No. 2.	)))	CASE NO. TT-99-428 et al.

THE MITG'S AND STCG'S REPLY TO STAFF AND THE WIRELESS CARRIERS' RESPONSES TO THE MITG'S AND STCG'S JOINT APPLICATION FOR REHEARING

Come now the MITG and the STCG and state to the Commission as follows:

SUMMARY

Staff claims that the Commissioners made "an independent review of the evidence and arguments in the case," and the wireless carriers argue that "there was nothing to indicate that the participating Commissioners did not fulfill their statutory obligations in this matter." However, these claims contradict the comments made by the Commissioners and Law Judges during the Commission's April 9, 2002 Agenda Meeting. For example, one Commissioner was under the impression that the *Amended Report and Order* was just "filling in the blanks," and the Commission's law judges advised the Commission that: (a) "filling in the blanks" was all that was necessary; and (b) the Court of Appeals had already determined the substantive issues. Consequently, it does not appear that the Commission has fulfilled its obligation to fully consider all of the evidence before issuing its decision.

Additionally, the wireless carriers and SWBT's Reponse cites to several cases from other jurisdictions: the *Mid-Rivers*[1] and *Three Rivers*[2] cases from the federal District Court in Montana and a decision by the Iowa Utilities Board.[3] However, the Wireless Carriers and SWBT fail to advise the Commission that the *Mid-Rivers* and *Three Rivers* cases are not final decisions and, more importantly, fail to accurately recite the finding of the Iowa Board which recognized that access charges do apply to intraMTA traffic when that traffic is carried by a "classic" interexchange carrier (IXC) such as AT&T.

Unlawful Procedure

1. Staff fails to cite any authority for its position that the Commission may "put the cart before the horse" by soliciting post-remand findings of fact to support its prior decision, and Staff fails to address longstanding Missouri case law to the contrary.[4] In this case, the Commission simply solicited findings to support its earlier decision and appended those findings at the end of its prior *Report and Order*. The

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[1] *Mid-Rivers Telephone Cooperative Inc. v. Qwest Corp.*, CV 01-163-BLG-RFC, (D. Mont. filed April 3, 2002).

[2] *Three Rivers Telephone Cooperative Inc. v. US West Communications, Inc.*, 125 F. Supp. 2d 417 (D. Mont. 2000).

[3] *In re: Exchange of Transit Traffic*, Iowa Utilities Board Docket No. SPU-00-7, *Order Affirming Proposed Decision and Order,* issued March 18, 2002.

[4] *Stephen and Stephen Properties, Inc. v. State Tax Comm'n*, 499 S.W.2d 798, 804[9] (Mo. 1973); *Meadowbrook Country Club v. State Tax Comm'n*, 538 S.W.2d 310 (Mo. banc 1976); *Brown v. Alberda*, 579 S.W.2d 718, 721[4] (Mo. Ct. App. ED 1979); *Hughes v. Board of Education*, 599 S.W.2d 254 (Mo. Ct. App. SD 1980).

Commission's procedure violated Missouri law which prohibits an agency from putting the cart before the horse by preparing belated findings of fact to support an earlier decision.[5] Likewise, the Commission's procedure violated Missouri law which prohibits the Commission from simply repeating one party's positions and declaring them the winners.[6]

2. Staff claims that the Commission's *Amended Report and Order* is "an entirely new order that considers all relevant facts." But nothing could be further from the truth. A side-by-side comparison of the Commission's initial decision in this case with the *Amended Report and Order* reveals that the Commission has simply appended the wireless carriers' proposed findings of fact to the end of the Commission's prior opinion. For example, the lengthy "Procedural History" that makes up the majority of the Commission's *Amended Report and Order* fails to acknowledge anything that happened in this case after January 4, 2000 (well over two years ago). Indeed, even the wireless carriers and SWBT concede that the Commission has merely made "a simple editorial revision to its prior *Report and Order*."

3. The *Amended Report and Order's* lengthy "procedural history" fails to recognize that the small companies filed proposed findings of fact and conclusions of law. More importantly, the *Amended Report and Order* does not address any of the

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[5] *Stephen and Stephen Properties, Inc. v. State Tax Comm'n*, 499 S.W.2d 798, 804[9] (Mo. 1973); *Meadowbrook Country Club v. State Tax Comm'n*, 538 S.W.2d 310 (Mo. banc 1976); *Brown v. Alberda*, 579 S.W.2d 718, 721[4] (Mo. Ct. App. ED 1979); *Hughes v. Board of Education*, 599 S.W.2d 254 (Mo. Ct. App. SD 1980).

[6] *Noranda Aluminum v. Missouri Public Service Comm'n*, 24 S.W.3d 243, 246 (Mo. App. WD 2000).

MITG's and STCG's proposed findings of fact which demonstrate that access rates are being and can be applied to intra-MTA wireless traffic in Missouri. This does not satisfy Missouri law.

4. The wireless carriers cite *Ruffin v. City of Clinton*[7] for the proposition that an administrative body, acting on remand, may choose to either: (a) reopen the hearing and have additional evidence presented, or (b) formulate findings and conclusions based on the evidence already presented to it. But in this case the Commission did neither of these things. Instead, the Commission solicited proposed findings from the wireless carriers. The Commission's *Amended Report and Order* adopts the wireless carriers' proposed findings wholesale by grafting the wireless carriers' non-unanimous stipulation onto the Commission's prior opinion and then simply reiterating the Commission's prior conclusion. In other words, the Commission did not formulate findings and conclusions at the same time. Rather, the Commission solicited post-remand findings in an attempt to prop up its prior decision. This unlawful procedure violates longstanding Missouri case law. Thus, *Ruffin v. City of Clinton* is not on point.

5. Both the Circuit Court and the Court of Appeals found that the Commission had failed to make proper findings of fact and remanded this case to the Commission. Rather than prepare its own independent findings of fact, however, the Commission simply adopted the wireless carriers' proposed findings of fact. This fails to satisfy Missouri law. In fact, it is no different than the procedure which the Court of Appeals has already rejected in this case and other recent cases. In *Noranda*

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[7] *Ruffin v. City of Clinton*, 849 S.W.2d 108 (Mo. App. WD 1993).

Aluminum v. Missouri Public Service Comm'n, the Court explained:

> The commission did not recite any facts on which it based its conclusory findings that its staff's proposal will allow Associated's transportation customers in Missouri to negotiate the best gathering and transportation rates. It merely noted the debating issues and declared that its staff and Noranda were the winners.[8]

Thus, the Commission cannot simply adopt one party's version of the facts and the law and declare that party the winner. But this is exactly what the Commission has done in this case. Worse yet, the Commission has not even bothered to address the small companies' proposed findings of fact or even acknowledge that they were filed. Rather, the Commission violated Missouri law by simply adopting the wireless carriers' findings of fact and thereby "declaring them the winners."

6. The Commission did not "independently make the determination to reject the tariff." Rather, the Commissioners' comments during the Commission's April 9, 2002 Agenda Meeting indicate that at least one Commissioner believed that he was simply "filling in the blanks" rather than issuing a substantive decision. Another Commissioner declined to vote for the *Amended Report and Order* because he was not present to hear the case. Moreover, the Commission's law judges incorrectly advised that: (a) the Commission's action was only procedural in nature; and (b) the Court of Appeals had already determined the substantive issues.

7. Under Missouri law, new Commissioners must certify that they have either:

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[8] *Noranda Aluminum v. Missouri Public Service Comm'n*, 24 S.W.3d 243, 246 (Mo. App. WD 2000).

(a) "read the full record ***including all of the evidence***," or (b) "***personally consider[ed] the portions of the record cited or referred to in the arguments or briefs***."[9] However, the *Amended Report and Order* fails to cite, discuss, or even address "the portions of the record cited or referred to" in the MITG's and STCG's proposed findings of fact and post-remand pleadings. By ignoring this evidence and the MITG and STCG's proposed findings of fact and post-remand pleadings, the *Amended Report and Order* fails to comply with Missouri law.

8. ***Mid-Rivers* and *Three Rivers***. The wireless carriers appear to have confused the U.S. District Court for the District Court of Montana with the Ninth Circuit, but the Ninth Circuit has not yet spoken on this issue. However, the *Three Rivers* case has now been fully briefed before the Ninth Circuit, and the case will soon be set on the Ninth Circuit's calendar for oral argument. (*See* Ninth Circuit Court of Appeals Docket No. 0935065) Therefore, it would be premature for the Missouri Commission to follow a foreign District Court's opinion that is presently before a foreign Circuit rather than the Commission's own decision in the *Mark Twain Wireless Tariff* case.

9. **The Iowa Utility Board's Decision**. Likewise, it would be illogical for the Commission to favor an Iowa Board's decision over its own decision in the *Mark Twain Wireless Tariff* case. It is ironic that the wireless carriers urge this Commission to

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[9] Section 536.080 RSMo 2000 (emphasis added); *State ex rel. Jackson County v. Missouri Public Service Commission*, 532 S.W.2d 20, 30[8] (Mo. banc 1975)("[W]e do emphasize that it is a basic and fundamental rule of law that one making a decision be aware by some means of what he is deciding.") In *Jackson County*, the Missouri Supreme Court gave a new Commissioner ten days to certify that he had complied with the statute.

follow the decision of the Iowa Board because when the Iowa Board proceeding was pending, those same wireless carriers urged the Iowa Board to disregard and reject the Missouri Public Service Commission's decision in the *Mark Twain* wireless tariff case. More important, however, is the wireless carriers' failure to fully advise the Commission of the Iowa Board's decision. In the *Proposed Decision and Order,*[10] the Iowa Board recognized that access charges do apply to intraMTA wireless-originated traffic when that traffic is carried by a "classic" interexchange carrier (IXC) such as AT&T. The Iowa Board quoted paragraph 1043 of the *First Interconnection Order* and then explained:

> The INS [Iowa Network Services] and PTC [Participating Telephone Companies or small telephone companies] interpretation depends on Qwest being defined as an IXC as meant by the FCC in Paragraph 1043. However, it appears the FCC was referring to traditional "long-distance" traffic delivered to the LEC by a classic IXC, such as AT&T, which has a billing relationship with the customer who initiates the call.

(See Attachment A, *Proposed Decision and Order*, issued Nov. 26, 2001) Thus, it is abundantly clear from the foregoing that the Iowa Board recognized that intraMTA traffic delivered by classic IXCs, such as AT&T and MCI/Worldcom, is subject to access charges.

10. The issue which the Iowa Board resolved (over the objection of the small Iowa LECs) was that, after April, 1999, Qwest (the Regional Bell Operating Company in Iowa) was not a classic IXC and, therefore, the small Iowa LECs were not entitled to receive access compensation on intraMTA wireless-originated traffic which Qwest

[10] Which is not attached to the wireless carrier's response, but which is attached hereto.

transited to them for termination. Significantly, the Iowa Board found that until April of 1999 (over three years after implementation of the Telecommunications Act of 1996) Qwest (the Regional Bell Operating Company in Iowa) was responsible for payment of access charges on intraMTA wireless traffic delivered by it to Iowa Network Services (the Centralized Equal Access facility providing equal access to the small telephone companies in Iowa). The Iowa Board explained:

> Prior to April of 1999, Qwest paid INS and the independent telephone companies for carrying and terminating this traffic. Qwest paid INS for access services, pursuant to INS's Iowa Tariff No. 1 Access Service, and paid access charges to the independent telephone companies pursuant to their tariffs, which concur in ITA Tariff No. 1.

(Attachment A, page 40) Thus, the Iowa Board found that the small companies were entitled to access compensation for intraMTA wireless originated traffic for the period up until April of 1999 (over three years after enactment of the Telecommunications Act of 1996). This is clearly an exception to the general rule, as enunciated by the FCC, that intraMTA wireless traffic is local for intercompany compensation purposes. Specifically, the Iowa Board recognized that when wireless originated traffic is carried by a classic IXC, such traffic is subject to access compensation regardless of whether it is intraMTA.

WHEREFORE, the MITG and the STCG respectfully request that the Commission issue an *Order* granting rehearing in this case and for such other orders as are reasonable in the circumstances.

RESPECTFULLY SUBMITTED,

Craig Johnson by BTM

Craig S. Johnson Mo. Bar 28179
Lisa Chase Mo. Bar 51502
ANDERECK, EVANS, MILNE,
PEACE, & JOHNSON, L.L.C.
700 E. Capitol Avenue
Jefferson City, MO 65102

Counsel for the MITG

Brian T. McCartney

W.R. England, III Mo. Bar 23975
Brian T. McCartney Mo. Bar 47788
BRYDON, SWEARENGEN & ENGLAND P.C.
312 E. Capitol Avenue
Jefferson City, MO 65102

Counsel for the STCG

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was mailed or hand-delivered, this 9th day of May, 2002, to:

Mike Dandino
Office of Public Counsel
P.O. Box 7800
Jefferson City, MO 65102

Marc Poston
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Leo Bub
Southwestern Bell Telephone Company
One Bell Center, Room 3518
St. Louis, MO 63101

Paul S. DeFord
Lathrop and Gage
2345 Grand Blvd
Kansas City, MO 64108

Larry Dority
Fischer and Dority P.C.
101 Madison Street, Suite 400
Jefferson City, MO 65101

Joseph Murphy
Meyer Capel P.C.
306 W. Church Street
Champaign, Illinois 61820

Thomas Pulliam
Ottsen, Mauze, Leggat & Belz, L.C.
112 S. Hanley
St. Louis, MO 63105

Lisa Creighton-Hendricks
Sprint Missouri, Inc.
5454 W. 110th Street
Overland Park, KS 66211

Charles McKee
Sprint Spectrum L.P.
6160 Sprint Parkway, 4th Floor
Overland Park, KS 66251

Brian T. McCartney

W.R. England, III/Brian T. McCartney

STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: EXCHANGE OF TRANSIT TRAFFIC	DOCKET NO. SPU-00-7 TF-00-275 (DRU-00-2)

PROPOSED DECISION AND ORDER

(Issued November 26, 2001)

SYNOPSIS[1]

This case concerns telephone traffic between a wireless customer and a wireline customer served by an independent telephone company. Currently, if the wireless customer places such a call, the wireless companies deliver the call to Qwest, which transports the traffic to Iowa Network Systems, a centralized equal access service provider. INS then carries the call to the independent telephone companies for connection to the called customer. Qwest charges the wireless companies a transit fee for carrying the traffic. INS charges an access services fee to Qwest for carrying the traffic. The independent telephone companies assess access charges to Qwest for terminating the wireless traffic to their customers.

In this proposed decision and order, the Presiding Officer finds that the wireless traffic at issue is local, so access charges do not apply to such traffic. The wireless carriers are entitled to interconnect directly with the PTCs on a bill-and-keep basis, pursuant to Board and FCC rules. Qwest is entitled to compensation for carrying this traffic but has no obligation to pay access or other terminating fees. If the wireless carriers seek to use INS facilities for an indirect connection, they may do so, but INS is entitled to compensation for providing those services. The appropriate rate for INS's services cannot be determined on this record. The parties are encouraged to negotiate an agreement regarding these matters under the federal Act, with Board arbitration available to resolve any issues the parties are unable to resolve by negotiation.

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[1] The purpose of this synopsis is to provide readers a brief summary of the proposed decision. While the synopsis reflects the proposed order, it shall not be considered to limit, define, amend, or otherwise affect in any manner the body of the order, the conclusions of law, the findings of fact, or the ordering clauses.

Attachment A

Table of Contents

Summary

This case concerns telephone traffic between wireless customers and wireline customers served by independent telephone companies, that is, Iowa local exchange carrier other than Qwest Corporation (Qwest), Iowa Telecommunications Service, Inc., or Frontier Communications of Iowa, Inc. Currently, if a wireless customer places a call to a customer of an independent telephone company, the wireless company (a commercial mobile radio service, or CMRS, provider) delivers the call to Qwest, which transports the call to Iowa Network Systems (INS), a centralized equal access service provider. INS then carries the call to the appropriate independent telephone company, called the INS Participating Telephone Company (PTC) for purposes of this docket, for connection to the called customer. Many, but not all, of the PTCs are shareholders of INS.

The wireless traffic at issue consists primarily of intraMTA ("Major Trading Area") wireless calls, carried on Qwest's tandem trunks to INS's Centralized Equal Access (CEA) tandem trunks. (MTAs are wireless service territories, as defined by the Federal Communications Commission (FCC).) Up until September 20, 1999, Qwest paid INS for carrying this wireless-originated traffic as "access services" in accordance with INS's Iowa Tariff No.1 Access Service for intrastate calls and INS FCC tariff No.1 for interstate calls. Additionally, Qwest paid intrastate access charges to the PTCs for this wireless-originated traffic, pursuant to ITA tariff No. 1.

Starting with the September 20, 1999, billing, Qwest began making partial payments (reaching back to services provided since April, 1999) based on Qwest's

belief that the FCC had determined that traffic originated or terminated to a wireless user within an MTA is "local" traffic, so access and termination charges do not apply.

INS's position is that INS provides a centralized equal access service for toll calls, traffic delivered over toll trunks is toll, and the issue should be decided based on the type of trunking ordered by Qwest. Under this interpretation, Qwest continues to owe INS for CEA services and the PTCs for access services.

In addition to seeking a declaration that access charges are not applicable in the future, Qwest seeks a refund of access and termination charges it paid to INS and the PTCs for services rendered in the 24 months prior to April, 1999. INS and the PTCs are seeking access and termination charges withheld since that time.

Procedural Background

On May 19, 2000, Qwest filed a petition for declaratory order regarding the exchange of local traffic by wireless and other local calling entities transiting Qwest's facilities. Qwest's petition, identified as Docket No. DRU-00-2, requested the Board find that the originating and terminating companies must reach their own agreements regarding the terms and technical conditions for the exchange of local traffic, even though Qwest's facilities are used to transit this local traffic. Due to the complexity and number of issues involved, the Board docketed this matter as a contested case on June 23, 2000, as Docket No. SPU-00-7 and established a procedural schedule.

Intervention was granted to AT&T Wireless Service, Inc. (AT&T), Iowa Network Services, Inc. (INS), Iowa Telecommunications Association (ITA), Rural

Iowa Independent Telephone Association (RIITA), Verizon Wireless (Verizon), Sprint PCS (Sprint), Central Scott Telephone Company (Central Scott), South Slope Cooperative Telephone Company (South Slope), and U.S. Cellular Corporation (U S Cellular).

A technical workshop was conducted by Board staff on August 7, 2000, to discuss issues filed with the Board on or before July 10, 2000. Following the technical workshop, motions to revise the procedural schedule were granted by the Board on August 18 and September 29, 2000, based on negotiations that were taking place among the parties. ITA then filed its proposed "Tariff No. 2 – Commercial Mobile Radio Service Transport and Terminating Service" with the Board on October 31, 2000. The tariff, identified as TF-00-275, was suspended for investigation in this docket.

On November 16, 2000, the procedural schedule was revised in order to make additional days available for hearing. Direct testimony was due on or before December 13, 2000, with responsive testimony on or before January 10, 2001. Hearing was scheduled to begin on February 13, 2001.

On January 5, 2001 the Board granted a joint motion of Verizon and U S Cellular for additional time to file responsive testimony. The date for responsive testimony was extended to January 24, 2001.

Hearing commenced on February 13, 2001. On February 16, 2001, following discussions between the Board and the parties, additional hearings were scheduled for March 7, 8, and 9, 2001. Subsequent to that round of hearings, and following further discussions between the Board and the parties, additional hearings were scheduled for April 17, 18, 19, and 20, 2001. After ten full days spread across several weeks, the hearings were concluded on April 19, 2001. Parties filed initial briefs on May 9, 2001, and reply briefs on May 18, 2001.

After the close of the hearings, two of the three Board members who presided at the hearing left the agency, so on October 24, 2001, the Board issued an order designating the undersigned (the remaining Board member who presided at the hearing) as the presiding officer in this matter with authority to issue a proposed decision and order, pursuant to Iowa Code § 17A.11(1)"b" (2001).

Issue No. 1: Do access charges apply to IntraMTA CMRS traffic?

A. *Summary of arguments*

Qwest

Qwest contends the FCC addressed this issue in its "First Report and Order" in its Local Competition and Interconnection docket (Docket No. 96-325) when the FCC ruled intraMTA traffic is local:

> Different types of wireless carriers have different FCC-authorized licensed territories, the largest of which is the "Major Trading Area" (MTA). Because wireless licensed territories are federally authorized, and vary in size, we conclude that the largest FCC-authorized wireless license territory (i.e., MTA) serves as the most appropriate definition for local service area for CMRS traffic for the purposes of reciprocal compensation under section 251(b)(5) as it avoids creating artificial distinctions between CMRS providers. <u>Accordingly, traffic to or from a CMRS network that originates and terminates within the same MTA is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.</u>

(Tr. 91; Ex. 26, *FCC First Report and Order*, Docket No. 36-325, ¶ 1036, emphasis added.)

Thus, the FCC determined that intraMTA wireless-originated calls, which are the focus of this proceeding, are local calls. As such, neither the INS CEA charges nor the PTCs' switched access charges are appropriate for the wireless-originated traffic that Qwest transits and delivers to INS and the PTCs. (Tr. 91, 2240-2241, 2250-2251, 2402-2403.) (Qwest In. Br. 5-6.)

Qwest summarizes the situation as follows: Qwest is not liable to INS or any of the PTCs for CEA or access charges because the wireless-originated traffic at issue is not Qwest's traffic, and even it if were, the FCC has expressly determined that intraMTA wireless-originate calls are local, and thus are not subject to access charges.

According to Qwest, the FCC stressed the point as follows:

> 1043. As noted above, CMRS providers' license areas are established under federal rules, and in many cases are larger than the local exchange service areas that state commissions have established for an incumbent LEC's local service areas. <u>We reiterate that traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5), rather than interstate and intrastate access charges.</u> Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming " traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges. Based on our authority under section 251(g) to preserve the current interstate access charges regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to access charges and are assigned such charges for traffic that is currently subject interstate access charges.

(Ex. 25, FCC First Report and Order, emphasis added.) (Qwest In. Br. 14-15.)

The FCC codified this interpretation in its rules prohibiting access charges on intraMTA wireless calls. For example, 47 C.F.R. § 51.702(b)(20) defines local CMRS traffic as "traffic between a LEC and a CMRS provider that at the beginning of the call, originates and terminates within the same Major Trading Area."

Qwest notes that a federal district court in Montana granted summary judgment in Qwest's favor on this issue, citing <u>3 Rivers Telephone Cooperative v.</u>

U S West Communications, Inc., United States District Court in The District of Montana, Great Falls Division, Civil Case No. CV-99-080-GF-RFC (December 13, 2000). Specifically, the Court in 3 Rivers concluded that for wireless-originated traffic, the company which should be liable for terminating charges is the same company which is liable for the originating charge (i.e., the company entitled to bill the end user customer), rather than the company which merely transits the traffic (Qwest). (Ex. 2, p. 5.) Thus, Qwest argues it is only liable for terminating charges when Qwest has the benefit of billing the end user.

The 3 Rivers Court also reiterated that the FCC does not permit access charges for intraMTA wireless traffic. Said the Court:

> As previously mentioned, there has been a decided increase in intraMTA communication by cellular phone. Significantly, no local exchange carrier, including [Qwest] or the plaintiffs [independent companies], may levy access charges against wireless carriers by Order of the Federal Communication Provision in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, FCC Docket 96-12, ¶ 1036.

(Ex. 2, p. 3; Qwest In. Br. 16-17.)

INS and the PTCs

INS and the PTCs argue that Qwest and the CMRS carriers are mistaken in focusing their analysis on whether the traffic at issue in this case is "local". By focusing on whether calls are local, they overlook the interplay between two related provisions of Section 251—Subsections (b) and (g). The proper analysis, according to these parties, must focus on the universe of traffic that falls within Section 251(g) and not the universe of traffic that is "local." (In. Br. 12.)

In this proceeding, Qwest and the CMRS carriers are asking the Board to subject tariffed exchange access services to local reciprocal compensation arrangements, a course that Congress and the FCC rejected. Qwest erroneously contends the FCC eliminated much of the access charge regime when it implemented the Telecommunications Act of 1996 and prescribed rules for local reciprocal compensation arrangements. But the FCC did the opposite; it expressly preserved the access charge regime. It clearly stated that carriers like INS and the PTCs must continue to apply their tariffed access charges to traffic to which those rates applied prior to the Telecommunications Act of 1996. (INS In. Br. 12-13.)

The pivotal question, according to these parties, is whether access charges applied to Qwest prior to the enactment of the Telecommunication Act when it carried intraMTA calls between CMRS carrier and INS. Because these parties answer that question in the affirmative, they assert this access traffic should be excluded from reciprocal compensation requirements. (INS In. Br. 13.)

A LEC and a CMRS carrier must reach an agreement as to the location of the interconnection point where they will exchange their traffic. (Tr. 1912, 2029, 2036.) Because the interconnection obligations of small LECs (like the PTCs) only arise with respect to the limited service area in which they operate, the interconnection point for the exchange of traffic directly between a LEC and a CMRS carrier is normally located within the LEC's local exchange service area. (Tr. 2020, 2021, 2031.) There is no requirement that such LECs build facilities to a point of interconnection with a CMRS carrier which may be located many miles away, far beyond the LEC's own network. However, the LEC and the CMRS carrier could reach an agreement to connect their networks with direct circuits purchased from INS, and then pay each other reciprocal compensation. (Tr. 1874, 1912, 1914; INS In. Br. 31.)

Verizon

Verizon argues that the basic issue in this case is the jurisdictional nature of the traffic being exchanged. The FCC could not be more clear: Wireless calls originating and terminating in a single MTA are local calls. See 47 C.F.R. § 51.701(b)(2); First Report and Order at ¶ 1036. This means that access charges are not applicable, including centralized equal access charges. The "MTA Rule," which defines intraMTA calls as local in conjunction with the FCC's recently released ISP Remand Order, also conclusively establishes that reciprocal compensation, including bill and keep, is the appropriate form of compensation for the CMRS-LEC traffic at issue.

The FCC's rules for "Reciprocal Compensation for Transport and Termination of Local Telecommunications Traffic" provide:

> § 51.701 Scope of transport and termination pricing rules
>
> ....
>
> (b) Local Telecommunications Traffic.
>
> For purposes of this subpart, local telecommunications traffic means:
>
> ....
>
> (2) Telecommunications traffic between a LEC and CMRS provider that at the beginning of the call originates

> and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(Verizon In. Br. 3-4.) Thus, intraMTA traffic is local traffic and reciprocal compensation applies, rather than access charges. Further, the FCC's ISP Remand Order goes further, holding that all telecommunication traffic is subject to reciprocal compensation unless that traffic is specifically exempted by 47 U.S.C. § 251(g). Not only is CMRS traffic not exempted, the ISP Remand Order expressly notes that the MTA rule for CMRS traffic continues to apply. (Verizon In. Br. 4.)

B. Analysis and proposed decision

Most of the parties base at least part of their arguments on their different interpretations of the FCC First Report and Order, paragraph 1043. The thrust of that paragraph is that intraMTA traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined by the locations of the parties to the call at the beginning of the call) is subject to transport and termination rates under § 251(b)(5), rather than interstate and intrastate access charges.

INS and the PTCs base their interpretation on the section of Paragraph 1043 that states:

> Under our existing practice, most traffic between LECs and CMRS providers is not subject to interstate access charges unless it is carried by an IXC, with the exception of certain interstate interexchange service provided by CMRS carriers, such as some "roaming " traffic that transits incumbent LECs' switching facilities, which is subject to interstate access charges. Based on our authority under section 251(g) to preserve the current interstate access charges regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not

> subject to access charges and are assigned such charges for traffic that is currently subject interstate access charges.

The INS and PTC interpretation depends on Qwest being defined as an IXC as meant by the FCC in Paragraph 1043. However, it appears the FCC was referring to traditional "long-distance" traffic delivered to the LEC by a classic IXC, such as AT&T, which has a billing relationship with the customer who initiates the call. The FCC's analysis is not applicable to a carrier in the position that Qwest occupies in this case, where it has no end-user customer in the transaction who can be billed for the costs Qwest incurs to complete these calls.

Additionally, Paragraph 1043 refers to CMRS providers and not intermediate carriers such as Qwest when it states that "CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to access charges. . . ." The traffic at issue in this docket is not Qwest's toll traffic and the function that Qwest performs in its transit function is to provide an indirect connection for local traffic. The FCC has deemed intraMTA traffic local, therefore access charges do not apply.

This finding does not relieve the transiting parties from their obligations to carry this traffic. Both Qwest and INS are "telecommunications carriers" as defined in 47 U.S.C. § 153(44). As such, they each have an obligation to interconnect, either directly or indirectly, with other carriers, pursuant to 47 U.S.C. § 251(a). Inherent in the duty to interconnect is the duty to carry calls; the interconnection obligation would be meaningless without traffic. At the same time, these carriers have a right to reasonable compensation for carrying such traffic. Qwest has a transit traffic tariff that establishes the rates for this service. INS apparently intends to rely upon the proposed tariff filed by ITA on October 31, 20001, identified as TF-00-275 and suspended for investigation in this docket. Thus, the next question is whether TF-00-275 is an appropriate mechanism for this purpose.

Issue No. 2: Should the ITA's proposed tariff be approved?

A. Summary of arguments

ITA

The ITA argues the answer in this case is to implement a new arrangement for the termination of local or intraMTA wireless traffic transiting Qwest and INS facilities. In that regard, the ITA has developed a wireless transport and termination tariff which addresses intraMTA wireless traffic transiting Qwest facilities and terminating to INS for ultimate delivery to the PTCs. The tariff also permits a network connectivity alternative for CMRS carriers to deliver traffic to the end offices of the ITA member companies in lieu of a direct connection to those end-offices. (ITA In. Br. 34.)

ITA argues a tariff represents the most efficient approach to solving this problem. There are over 150 non-rate regulated local exchange carriers that may concur in this tariff. When taken into consideration with the number of CMRS carriers that have licenses to provide service in Iowa, the logistics of negotiating, executing, and filing with the Board all of the necessary separate agreements would be burdensome for small carriers. The ITA asserts its member companies do not have the internal staffing to handle these issues and would require outside resources and additional expenditures to achieve equitable treatment in negotiated agreements. (ITA In. Br. 34.)

ITA argues that CMRS carriers are neither LECs nor ILECs and are therefore not required to establish arrangements for reciprocal agreements, or negotiate interconnection agreements. (Tr. 2263.) Accordingly, if CMRS carriers choose to do nothing but deliver traffic to Qwest for transiting to a third party LEC network, the third party LECs cannot compel negotiation of an interconnection agreement and reciprocal compensation. Proposed ITA tariff No. 2 gives the LECs the ability to charge for this traffic in the absence of an agreement. If the CMRS carriers are not satisfied with the terms and conditions of the tariff, they still have the right to pursue interconnection and reciprocal compensation negotiations directly with the LECs. (ITA In. Br. 34-35.)

ITA Tariff No. 2 proposes a termination rate for intraMTA wireless traffic of 6.8¢ per minute of use. This rate element is based upon the sum of the traffic sensitive access rate elements contained in ITA Tariff No. 1. (ITA Ex. 106.) The rate does not include recovery of the carrier common line rate element (non-traffic-sensitive costs). The rate also assumes fifty miles of transport, which attempts to reflect, on average, the length of transport of facilities between the end office of a typical PTC and the INS CEA facilities. (ITA In. Br. 38.)

The CMRS carriers object to the proposed ITA tariff rate because it is not based on forward-looking costs as required by the Telecommunications Act of 1996 and FCC rules. ITA asserts that the CMRS carriers' criticism is not well taken. The forward-looking cost requirements of the Act only apply in the case of a request to establish reciprocal compensation arrangements pursuant to § 251(b)(5) of the Act; and then, only if the parties are unable to agree upon a rate for the reciprocal exchange of traffic. At that point, the state commission is authorized to arbitrate a rate. For purposes of such arbitration, the Act and the FCC rules direct that the forward-looking cost guidelines should apply. However, reciprocal compensation pursuant to § 251(b)(5) requires a direct interconnection between the facilities of the CMRS and the terminating LEC. (ITA In. Br. 39.)

The ITA believes that its member companies have no obligation to pay reciprocal compensation on traffic they exchange with CMRS carriers unless there is a direct connection with those CMRS carriers. Even if the ITA member companies had a reciprocal compensation obligation for local (intraMTA) traffic terminating through indirect interconnection to CMRS carrier, such obligation would be limited to calls which the ITA member companies are responsible for carrying (i.e., for which they have the tariff authority). Many, if not all, of the calls originating from ITA member companies subscribers and terminating to CMRS carriers are 1+ interexchange (toll) calls which are carried and terminated to the CMRS carriers by an IXC. Therefore, it is the IXC that has the responsibility for carrying the call and that receives compensation for carrying the call from the end user customer, pursuant to the IXC's toll tariffs. (ITA In. Br. 41.)

South Slope Cooperative

South Slope argues bill and keep is not an option for the traffic at issue in this proceeding. By its own terms, the Board's rule 38.6(1), which establishes a presumption in favor of bill and keep interconnection, applies only to "each local utility." Section 38.1(2) of the same regulation defines a "local utility " to be a "wireline" local exchange provider. Thus, Sprint, Verizon, and other CMRS carriers do not qualify under this rule and their reliance upon it points again to the need for ITA's Tariff No. 2. (South Slope In. Br. 13-14.)

South Slope also argues that due to the independent ILECs' lack of negotiating leverage, a tariff is the only way the independent LECs can ensure that free use of their facilities by the wireless carriers will cease. The fact that the wireless carriers have demonstrated a reluctance to request negotiations strongly supports this conclusion. And since any negotiations that might occur likely will encounter the same issues present in this proceeding (e.g., whether the 1996 Act prohibits landline customers from using interexchange carriers to call wireless customers in the same MTA), the Board's approval of a tariff will serve as a useful policy guide. (South Slope In. Br. 14.)

Sprint

Sprint argues that the proposed tariff only serves the interests of ITA and its member companies. If the tariff were to be approved, the ITA members would have even less incentive to negotiate interconnection agreements with the CMRS providers. Development of a generic agreement, such as the agreement negotiated between the wireless companies and LECs in Minnesota, would be consistent with the FCC Rules and Iowa law and would better serve the interests of all parties. (Sprint In. Br. 12.)

The ITA's proposed tariff also ignores the clear direction of the FCC's First Report and Order, which specifies reciprocal compensation arrangements as the proper compensation method:

> 1008. Under section 251(b)(5), LECs have a duty to establish reciprocal compensation arrangements for the transport and termination of "telecommunications." Under section 3(34), "[t]he term 'telecommunications' means the transmission, ***between or among points*** specified by the user, of information of the user's choosing, without change in the form or content of the information as sent received." All CMRS providers offer telecommunications. Accordingly, LECs are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)) to enter into reciprocal compensation arrangements with all CMRS providers, including paging providers, for the transport and termination of traffic on each other's networks pursuant to the rules governing reciprocal compensation set forth in Section XI.B., below.

First Report and Order, para. 1008 (emphasis added). Note that the FCC quoted a provision of the Act that refers to transmission "between or among points specified by the users." It is impossible to square the arguments of INS, the ITA, and the PTCs with this wording. (Sprint In. Br. 12-13.)

Sprint maintains that the Board has discretion to fashion policy in a contested case and can, therefore, require bill and keep interconnection even if Rule 38.6(1) does not apply. Sprint also argues that South Slope cannot rely upon the fact that wireless providers are not expressly included in the Board's bill and keep rule to support its argument because the only legitimate conclusion to be drawn from wireless providers not being included in the rule is that Iowa was aware of 47 U.S.C. § 332, which prohibits Iowa from statutorily imposing any rate structure upon a wireless provider. As indicated in Sprint's initial brief at page 26, 47 C.F.R. § 51.705(a)(3) authorizes the Board to impose bill and keep as the appropriate compensation regime in this case, if Iowa Rule 38.6(1) does not.

Sprint also asks that the Board require the Iowa LECs to treat their customers' originating calls to Sprint's NPA/NXXs as local calls and remove the 1+ dialing obligation, just as many of the Iowa LECs have done for those wireless companies that are owned by those same wireline LECs. The Iowa LECs should modify the translations in their switches so that their end-user customers may make local calls to wireless NPA/NXXs on a 7-digit nondiscriminatory basis. In this scenario, Sprint will bill its end users (just as the LECs bill their end users) and the parties would pay each other reciprocal compensation as required by law. (Sprint In. Br. 14.)

Sprint asserts that no party refuted the CMRS carriers' proposal for using a model agreement in Iowa, similar to the agreement adopted in Minnesota. Sprint is willing to enter into these reciprocal agreements and the Board should create an incentive for the parties to engage in meaningful negotiations. If the ITA tariff is approved, the ITA members would have no incentive to engage in good faith negotiations, almost assuring further action would be required of the Board in arbitration proceedings. (Sprint In. Br. 15.)

Qwest

The ITA's new proposed tariff purports to place certain obligations on Qwest, such as providing billing records that are satisfactory to INS and the PTCs (in their sole discretion) and making Qwest "secondarily liable" for certain access charges. Qwest objects to these provisions, but also argues that these tariffs have little or no application to the traffic at issue, for jurisdictional reasons.

The traffic at issue is limited to intraMTA wireless-originated traffic, primarily within Iowa. Qwest is currently prohibited from carrying interLATA traffic, even if such interLATA traffic is also intraMTA, and the LEC intervenors do not dispute that fact. Thus, interLATA wireless traffic (whether intraMTA or interMTA) is not at issue.

Since Qwest can only transit intraLATA traffic, this proceeding is limited to intraLATA, intraMTA local traffic. Further, only a small portion of the Des Moines MTA is in a different state. (Tr. 214-215.) As such, there is very little traffic that would be interstate, intraLATA, intraMTA to which any FCC tariff would apply. (Qwest In. Br. 34.)

Finally, neither Qwest nor the wireless carriers dispute that access charges might be appropriate on any interMTA, intraLATA wireless traffic that Qwest transits. (Tr. 214-215, 2282, 2437-38.) However, both Qwest and the wireless carriers agree that such charges should be billed to and paid by the wireless carriers, not Qwest. (Qwest In. Br. 35.)

B. Analysis and proposed decision

The vast majority of the wireless traffic at issue is intraMTA and, as stated earlier in this proposed decision, the FCC has defined intraMTA wireless-originated traffic as local traffic. As local traffic, fees for access services (as contemplated by the ITA tariff) are not applicable. The ITA tariff was intended to address the traffic at issue in this case, and only this traffic, but it attempts to impose access charges on traffic that is not subject to such charges. Thus, the ITA tariff, identified as TF-00-275, has no application and is rejected as unjust, unreasonable, and unlawful.

The INS tariff filed with the FCC (identified as INS FCC tariff No. 1) has similar jurisdictional limitations, such that it will apply to very little traffic. The majority of the traffic in this case originates and terminates within a single MTA. The Des Moines MTA (the largest in Iowa) is almost entirely contained within the borders of Iowa. Thus, there is very little traffic that is both intraMTA and interstate and therefore covered under the INS FCC tariff. (The Executive Secretary of the Board will be directed to send a copy of this proposed decision to the FCC so that agency will be aware of the relationship between this dispute and INS FCC Tariff No. 1.)

Given that these proposed tariffs do not offer an appropriate mechanism for determining the manner in which the vast majority of this traffic should be exchanged, the next question is how the parties should determine the rates, terms, and conditions applicable to this traffic.

Issue 3: If intraMTA CMRS traffic is local, then how should this traffic be exchanged?

A. Summary of arguments

Sprint

Sprint argues that a number of statutes and regulations require that this traffic be exchanged pursuant to interconnection agreements, citing the Telecommunications Act of 1996 generally and § 251(a) specifically, along with 47 C.F.R. § 51.100(a)(i), 47 C.F.R. § 20.11(a) (which requires LECs to interconnect as reasonably requested by a CMRS provider, unless the request is not technically feasible or economically reasonable), and Iowa Code §476.101 (which Sprint says is not directly applicable to CMRS carriers, but expresses the appropriate policy). (Sprint In. Br. 8.) Sprint notes that some Iowa LECs have already entered into NIAs, especially in Minnesota, using ONVOI (the Minnesota counterpart to INS) and the Qwest 11-50-21 reports, see Ex. 501, along with at least three other agreements involving ITA members (see Ex. 116) and Verizon's agreements in Minnesota and North Dakota. (Sprint In. Br. 15-18.)

In its reply brief, Sprint argues that INS continues to act like a LEC and should bear LEC responsibilities, including the obligation to function as a point of interconnection for this traffic. (Sprint Reply Br. 17.) Sprint notes that it recently requested interconnection negotiations with INS and INS responded by denying it is subject to § 251 and refusing to negotiate. (The INS letter was late-filed as Ex. 508, filed with Sprint's reply brief.)

Finally, Sprint claims that it is subject to a § 251(a) duty to interconnect, so any claims by the ILECs that they were unable to ask Sprint to come to the table are incorrect. (Sprint Reply Br. 18.)

Verizon/U S Cellular

Verizon and U S Cellular also argue that interconnection is required pursuant to 47 U.S.C. §§ 251 and 332 and Iowa Code ch. 476 and that any such interconnection should take place pursuant to an NIA. (Verizon In. Br. 8-10.) They further argue that any such interconnection should be directly between the CMRS and INS, arguing that INS is effectively a LEC for these purposes. They argue INS once called itself a LEC and that it has telephone numbers assigned to it, indicating it is, in fact, a LEC. (Verizon In. Br. 11.) Further, they argue this would be the most efficient form of interconnection and no purpose would be served by requiring that the CMRS carriers establish direct connection with each of these LECs when the INS network already exists and can handle the traffic. (Verizon In. Br. 12.) Finally, they argue the PTCs cannot be permitted to favor Iowa Wireless, which is an affiliated entity of INS and is permitted to use the INS network to carry traffic to the PTCs. (Verizon In. Br. 13.) (The Iowa Wireless interconnection agreement is included in the record as Ex. 651.)

In their reply brief, Verizon and U S Cellular note the ITA's statement that if the CMRS carriers are not satisfied with the terms and conditions of the ITA tariff, the proposed tariff permits negotiations, citing the ITA initial brief at pages 6 and 35. Verizon and U S Cellular argue this is effectively a concession that negotiations can and will occur. (Verizon Reply Br. 12.) Thus, these CMRS carriers argue, the Board should save time and simply order negotiations now.

AT&T Wireless

AT&T Wireless argues that connection through the facilities of INS is clearly the best way to carry this traffic and that the terms and conditions of that connection should be the subject of an NIA, rather than the ITA's proposed tariff. (AT&T In. Br. 6-7.) To the extent the ITA members argue it would be burdensome to negotiate the necessary number of agreements, AT&T Wireless proposed that the parties develop a template agreement that could be adopted for nearly all situations, with separate negotiations only for special circumstances.

Qwest

Qwest argues that the Board can order the other LECs and the CMRS carriers to enter into negotiated interconnection agreements (Qwest In. Br. 23), noting that the Board has ordered parties to negotiate interconnection arrangements in the past (citing the McLeod and Goldfield orders). Qwest also argues that INS is required to participate in the negotiations under § 251(b) and Paragraph 1008 of the FCC's First Report and Order[2]; Qwest finds nothing in the statute or order to indicate indirect connections are exempt from the duty to negotiate.

Qwest also argues that if the ITA members try to claim the rural exemption of § 251(f), the fact that they are already receiving CMRS traffic through INS is sufficient

[2] Re: Local Competition And Interconnection, "First Report and Order, Docket No. 96-325 (released August 8, 1996).

to prove this form of interconnection is technically feasible and not unduly burdensome. (Qwest In. Br. 27.) Qwest also points to the model interconnection agreement used in Minnesota as evidence that the burdens of negotiating interconnection with numerous LECs are not insurmountable. (Qwest In. Br. 29.)

On reply brief, Qwest argues that bill and keep is not limited to direct connections and that it would be absurd to require the CMRS carriers to directly trunk to over 150 ILECs. (Qwest Reply Br. 22.) Qwest relies upon language from the FCC's Notice of Proposed Rule Making in Developing A Unified Intercarrier Compensation Regime, FCC 01-132 (released April 27, 2001), at footnote 148, where the FCC says:

> Alternatively, in rural settings, wireless carriers can elect to deliver CMRS-originated calls to a large ILEC (typically a Regional Bell Operating Company [RBOC]) for routing to the rural LEC carrier. The large ILEC and the rural LEC are interconnected on a bill-and-keep basis for the exchange of wireline calls.

(Qwest Reply Br. 25.[3]) Qwest concludes from this that INS can be required to participate in negotiations and interconnect with Qwest and the PTCs and carry traffic.

Iowa Telephone Association

The ITA agrees that if this is not access traffic, then ITA's proposed tariff or an NIA is required. (ITA In. Br. 8.) ITA argues that § 251(a) imposes a duty on LECs to

[3] It should be noted that South Slope quoted the other part of the same footnote in its initial brief at p. 7:

... Once the CMRS-originated traffic is switched by the ILEC tandem, CMRS-originated traffic travels on the same trunk as a wireline call to the ILEC. The CMRS carrier pays the ILEC for switching and transport, and the rural LEC can seek recovery of its termination costs (if it can segregate the traffic) by asking the ILEC to charge negotiate, but not on CMRS carriers, so any past failure of negotiations is the fault of the CMRS carriers, not ITA's members. Further, ITA argues § 251 interconnection is limited to *direct* connection and therefore an NIA based upon reciprocal compensation is not available if the CMRS carriers want to use INS's facilities to deliver the traffic (an indirect connection). However, the ITA members are willing to accept an indirect connection so long as it is done pursuant to the proposed tariff. (ITA In. Br. 15-17.)

In its reply, ITA argues that its proposed tariff should govern this exchange of traffic until such time as other agreements are in place. (ITA Reply Br. 1.) ITA argues the tariff represents an economical arrangement for the CMRS carriers, as it is priced about 30% below the LEC access rates and lets the CMRS carriers have the option of direct connection and an NIA if they prefer. (ITA Reply Br. 2.) However, ITA submits that the traffic level between any CMRS carrier and any particular ITA member is likely to be so low (from the CMRS carriers' point of view) that the CMRS carrier is unlikely to be interested in negotiating an individual agreement with each ITA member. (ITA Reply Br. 9.) This ease of administration is one reason the tariff approach is superior to multiple NIAs. ITA also argues that any negotiations that may occur are likely to be inequitable, due to the resource mis-match between a large CMRS carrier and a typical ITA member. (ITA Reply Br. 9-10.) For all of these reasons, ITA urges approval of the ITA tariff, thereby providing reasonable terms and

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the CMRS carrier. Increasingly, the large ILEC is unwilling to bill for the rural carrier, so the rural LECs have begun to insist that the CMRS carrier deliver the calls directly to the rural LEC's switch.

conditions for most situations and encouraging the CMRS carriers to negotiate in any unusual situations where an NIA is appropriate. (ITA Reply Br. 22.)

ITA argues that the Minnesota agreement is not appropriate for Iowa because in Minnesota the CMRS carriers have the choice of sending traffic through ENVOI or through Qwest directly to the ILECs; the latter option, which ITA says is not used in Iowa, is the only traffic addressed in the Minnesota agreement. (ITA Reply Br. 35-36.)

ITA argues bill and keep is inappropriate and unavailable for this traffic because the Board's bill and keep rule (rule 38.6(1)) applies only to "local utilities," which are defined in rule 38.1(2) as "wireline" carriers. Further, the CMRS carriers deliver a mixture of long distance and local traffic over the same facilities, which is prohibited by rule 38.6(4). Finally, ITA argues bill and keep would not be fair, since the small ILECs send relatively little traffic to the CMRS carriers (about 20-25% of the total traffic between the ILECs and the CMRS carriers).

INS

In its initial brief, INS does not offer direct argument regarding interconnection agreements, instead arguing the proposed ITA tariff should control because this is exchange access, which is exempt from interconnection agreements, pursuant to § 251.

On reply, INS argues that the "exchange access" services covered by the ITA tariff, which are based on the presence of an interexchange carrier such as Qwest, are exempt from § 251(b)(5) reciprocal compensation requirements, pursuant to

§ 251(g)[4]. If, however, the CMRS carriers opt for a direct connection with the ILECs, then the reciprocal compensation provisions of § 251 apply. (INS Reply Br. 1-4, 15-16.) Thus, so long as the CMRS carriers choose to deliver their traffic through INS, they are not entitled to an interconnection agreement but are instead subject to the ITA tariff. The choice of indirect connection (pursuant to tariff) or direct connection (pursuant to NIA) is therefore left to the CMRS carriers. (INS Reply Br. 24.)

INS also argues that the Iowa Wireless agreement (Ex. 651) is not an interconnection agreement. Instead, it is merely an agreement to give Iowa Wireless an expanded local calling area. (INS Reply Br. 22.) INS says it bills its CEA tariff rate to the PTCs that have decided to offer expanded local calling areas. (Id.)

If the Board requires interconnection agreements for traffic that goes through INS facilities, INS argues bill and keep is not an appropriate approach; according to INS, the CMRS carriers are trying to use INS's facilities and services for free. (INS Reply Br. 23.) This is especially inappropriate because bill and keep is based on the idea that each carrier has end-user customers to bill for the services provided by that carrier, and INS has no such customers. (INS Reply Br. 25.) This also shows that INS is not a LEC. (Id.)

Central Scott

Central Scott argues that it is not required to negotiate an interconnection agreement "at any technically feasible location" because it is entitled to the rural

[4] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, "Order On Remand And Report And Order," CC Docket Nos. 96-98, 99-68, FCC 01-131 (released April 27,

exemption under § 251(f) and therefore can choose to connect only indirectly, that is, through INS and pursuant to tariff. (Central Scott In. Br. 17.)

South Slope

South Slope argues that either a tariff or an NIA is necessary to specify the terms and conditions for the exchange of this traffic, and a tariff is the appropriate approach when negotiations have been unsuccessful. (South Slope In. Br. 12.) South Slope claims that Sprint agrees that the ILECs cannot initiate negotiations under the federal Act (citing Tr. 2356-59) (but see Sprint's reply brief at page 18, claiming Sprint PCS is subject to the requirements of § 251(a)); lacking the leverage to force negotiations, the ILECs have been forced to rely on the proposed tariff.

RIITA

RIITA makes two points: First, while the CMRS carriers say they want to negotiate, the fact is that they have not made many bona fide requests for negotiation. RIITA believes these actions speak louder than the CMRS carriers' words. Second, RIITA argues it is no surprise the CMRS carriers prefer bill and keep, since the traffic flow is not balanced; as much as 80% of the interconnection traffic flows from the CMRS carrier to the ILEC. (RIITA Reply Br. 4.)

B. Analysis and proposed decision

It appears all of the parties agree that the CMRS carriers have the right to direct interconnection with the rural LECs, using NIAs under § 252 of the Telecommunications Act of 1996. This could be on bill and keep terms, although the

2001) (the "ISP Order").

parties disagree regarding the application of the Board's bill and keep rule to the traffic at issue. However, most see direct connection as an undesirable alternative; the CMRS carriers do want the expense of building the network that would be required, while the rural LECs do not want multiple direct connections and INS does not want to lose the revenues it receives for switching and transporting this traffic. (It further appears it does not make any difference in this analysis if Qwest is involved in the transaction, so long as Qwest is paid for any services it provides and is not required to pay charges or fees for traffic that is not Qwest traffic.)

As stated previously, 47 U.S.C. § 251 requires that INS interconnect with Qwest, the PTCs, and other telecommunications carriers. Implicit in that obligation is that INS must carry traffic delivered to it using those interconnections. INS is entitled to compensation for carrying that traffic. So, the question is on what terms this traffic can continue to use the INS network to reach the rural LECs.

This is a question that can best be resolved by negotiations among the parties, with Board arbitration pursuant to 47 U.S.C. § 252 if the parties are unable to reach agreement regarding all of the interconnection issues[5]. In order to give the parties some guidance and therefore improve the chances of a negotiated agreement,

[5] It is also possible that INS could file its own proposed tariff for transit traffic for the Board's review. The Board has previously determined that INS is a rate-regulated public utility subject to the jurisdiction of the Board pursuant to Iowa Code § 476.1. See RE: Iowa Network Access Division, Division of Iowa Network Services, Docket No. RPU-88-2, "Final Decision And Order" at pp. 2-4 (issued October 18, 1998). That order also recognized the Board's alternative jurisdiction pursuant to Iowa Code § 476.11. Id. However, it is likely to be most efficient for all concerned if the parties negotiate before resorting to the Board, since the issues may be limited and focused through negotiation and the time limits applicable to that process will help to ensure continued progress. Thus, a negotiated interconnection agreement is the first recommended option.

however, it may be appropriate to outline some of the general principles that would apply in a future arbitration proceeding, if one is necessary.

Overall, it appears on this record that this traffic should be treated in a manner similar, but not identical, to the treatment outlined in the FCC's footnote 148 (quoted in the Qwest and South Slope argument summaries, above). The footnote clearly contemplates indirect connection between CMRS carriers and rural LECs. While the FCC assumes the intermediate carrier is an ILEC/RBOC, INS is an intermediate carrier and also has an obligation to interconnect and carry this traffic.[6] If INS wants to be compensated for the services it provides, it should participate in the negotiations, with the option of seeking Board arbitration if negotiations are not entirely successful.

It should be clear, however, that if the parties are unable to agree upon such rates and request arbitration, the Board will not necessarily limit its consideration to historical costs, forward-looking costs, or similar rate-setting mechanisms, but may also consider "market-based" rates and other relevant data, to the extent other transactions can be identified that are reasonably similar to the ones at issue. Thus, the Minnesota and South Dakota agreements, the Iowa Wireless agreement, and interstate rates set by the FCC for similar services may all be relevant to a determination of the appropriate rate for INS's services, if arbitration is necessary.

[6] This obligation to interconnect does not extend to a requirement that INS do so using bill and keep arrangements. INS is an intermediate or transiting carrier with respect to the traffic at issue, like Qwest. Bill and keep arrangements are appropriate only between carriers that have end-user customers involved and therefore have the ability to bill the parties to the call.

The FCC's notion that the rural LEC should be permitted to seek recovery of its termination costs from the CMRS carrier, at least in the first instance, does not appear to be applicable to Iowa. The FCC's statement is made in the context of reciprocal compensation rules that contemplate a rate applying to the exchange of traffic, while the Board's rules reflect a policy favoring bill and keep until such time as a traffic imbalance is shown. Thus, in Iowa the traffic should be delivered to and from the rural LEC on a bill and keep basis, at least initially, as permitted by 47 C.F.R. § 51.705(a)(3).

The rural LECs argue that their traffic with the CMRS carriers is already imbalanced, with as much as 75 or 80 percent of the traffic flowing from the CMRS carrier to the LEC. However, it is not clear whether or how this figure is affected by the fact that many rural LECs treat calls to CMRS customers as interexchange toll calls, rather than local calls, forcing the traffic to be dialed as a 0+ or 1+ call. If this traffic is being excluded from the rural LEC calculations regarding the alleged traffic imbalance, then it is possible that any imbalance is being exaggerated. The record is not entirely clear on this point, so the parties should attempt to negotiate their differences on this point before the Board orders any particular arrangements.

There may be other options available to the parties as a part of negotiations, as well. For example, if the Iowa Wireless agreement is an NIA (a question not being decided here), then the other CMRS carriers have the right to opt into that agreement, at least for the remaining term of the agreement. Also, while the Minnesota and South Dakota agreements may not be directly applicable to Iowa, they could provide an initial template for negotiations. Finally, the price INS can charge for transport and switching is ultimately limited by the other options available to the CMRS carriers, including "building" their own network (perhaps with lines leased from interexchange carriers) or using Qwest facilities, if and where available.

In summary, if the CMRS carriers wish to exchange traffic with the PTCs, there must be an agreement or other arrangement to specify the terms and conditions applicable to the exchange. In order to initiate those negotiations, it appears the CMRS carriers must make a bona fide request of each PTC. If the CMRS carriers seek to use intermediate carriers (like Qwest or INS) and there is no rate established for that transiting service, then the intermediate carrier becomes a necessary party to the overall negotiations (if it intends to be compensated for providing transit services).

The PTCs may raise rural exemption claims with respect to this traffic. If so, the Board can establish procedures for making the necessary determinations under 47 U.S.C. § 251(f). Those determinations can be made within the time frames provided for negotiations and arbitrations under § 252.

Several parties raised concerns regarding the administrative burdens associated with negotiating multiple interconnection agreements. However, carriers committed to reaching a solution have several options available to them to reduce the administrative burdens, including negotiating a master agreement that most or all PTCs can opt into, or consolidation of cases with designation of an agent to negotiate on behalf of multiple parties.[7] The Board will assist any consolidation efforts by using flexible procedures to encourage administrative efficiency.

Issue No. 4: Is Qwest entitled to a refund for the 24-month period prior to April, 1999?

A. Summary of arguments

Qwest

Qwest asks that the Board grant it a refund of the access charges it paid to the PTCs and the CEA charges it paid to INS during the 24 months prior to April, 1999. The requested refund amounts are shown in Confidential Late-Filed Exhibit 36. Qwest argues its refund request is fair and based upon the "general standard in the telecommunications industry when there is a billing error between carriers" the error should be corrected for 24 months prior to notice of the error. (Qwest In. Br. 45.) Qwest claims no party has disputed the existence of this general standard.

On reply, Qwest argues that the intrastate access tariffs do not apply to this local traffic, so the filed rate doctrine does not apply to this situation. (Qwest Reply Br. 32.) Qwest disputes the ITA argument that § 476.3(3) prohibits a refund, noting that the Iowa Supreme Court's decision in Mid-Iowa Community Action, Inc., v. Iowa State Commerce Comm'n, 421 N.W.2d 899 (Iowa 1988) rejected the argument that the Board cannot order refunds for fees unlawfully challenged as "untenable," despite the language of § 476.3. (Qwest Reply Br. 35.).

[7] See 47 U.S.C. § 252(g).

Finally, Qwest argues that denying a refund would reward INS and the PTCs for their delaying tactics. (Qwest Reply Br. 36.)

ITA

The ITA argues that the only billing and business arrangement between Qwest and the ITA members during the time in question (April 1997 to April 1999) was the access tariff; therefore Qwest should be required to pay the access tariff rates for the services Qwest ordered and used. (ITA In. Br. 30.) ITA argues that Qwest would not waive its tariff provisions if the situation were reversed, so the ITA members should not be required to waive their tariffs for Qwest.

ITA also argues a refund is inappropriate because Qwest cannot prove the amount of the claimed refund with any accuracy. (ITA In. Br. 31.) Qwest's unilateral adjustments are based on switch recordings, rather than Qwest's 11-50-21 reports, and Qwest refuses to provide ITA with sufficient records to verify the calculations. Moreover, Qwest edited the switch recordings with various adjustments that could not be explained by the Qwest witness. This adds to the difficulty of verifying the refund calculation and, according to ITA, reflects Qwest's lack of faith in its own numbers. (Id.)

On reply, ITA argues that until new business arrangements are established, Qwest must pay for services used pursuant to the only available arrangement, the access tariffs. (ITA Reply Br. 19.) If Qwest did not believe the tariffs were acceptable during the past time period, the burden was on Qwest to seek new arrangements.

ITA also argues that the industry-standard 24-month refund period only applies to billing errors or incorrect rates; here, the access tariffs were properly applied, so no refund is required. (ITA Reply Br. 20.) Finally, Qwest's payment for services through April, 1999, without a formal protest represents a failure to properly preserve the issue. (Id.)

INS

INS argues that CEA services were ordered by Qwest, were provided to Qwest, and should be paid for by Qwest. (INS In. Br. 34-36.) Permitting Qwest to pay less that the tariffed rate would violate the filed rate doctrine. (INS In. Br. 37.) Instead of giving Qwest a refund, the Board should order Qwest to pay $771,229.09 to INS, the amount that Qwest has wrongfully withheld as of February 6, 2001 (with interest and late payment penalties). (INS In. Br. 38.)

INS also argues a refund would violate Iowa Code § 476.3(3), which provides that a determination of rates based upon a departure from previously-established regulatory principles should apply prospectively. INS argues that the application of the CEA tariff to this traffic is a previously-established regulatory principle. (INS In. Br. 53.)

In the alternative, INS argues that it has an implied contract with Qwest for CEA services at CEA tariffed rates because Qwest ordered the service, INS furnished the service, and Qwest knew INS expected to be paid at the tariffed rates at least until September, 1999, when Qwest first provided formal notice of its position. (INS In. Br. 54.)

INS also argues Qwest's self-help (in the form of withholding payments after April, 1999) was unlawful and should not be rewarded. (INS In. Br. 55.)

South Slope

South Slope argues that Qwest's self-help was illegal (South Slope In. Br. 5) and that Qwest's calculations based on the 11-50-21 records are flawed and should be rejected. (South Slope In. Br. 9.)

B. Analysis and proposed decision

Qwest's request for refunds for the 24-month period preceding April 1999 will be denied. Prior to April, 1999, Qwest ordered access and CEA services for this traffic, received those services, and paid for those services. There is no reason to try to change that history now. The industry may have a standard practice of making refunds for the 24-month period prior to discovery of an intercarrier billing mistake (at least, no other party has disputed the practice), but this is not a "mistake" in the sense of an inadvertent miscalculation or other unintentional error, easily identified and corrected. Instead, this case involves a good faith dispute regarding the correct classification of certain telecommunications traffic in a set of very complex circumstances. Ordering refunds back to April of 1997 would be tantamount to punishing INS and the PTCs for billing Qwest in good faith and would not be in the public interest.

The period from April 1999 to the present, however, requires different treatment. Qwest started adjusting its payments in September of 1999, for the period reaching back to April 1999. By doing so, Qwest put INS and the PTCs on notice that Qwest no longer believed it was ordering (and therefore would no longer pay for) access and CEA services. At that point, the rules applicable to this transaction changed and all of the parties knew or should have known of the dispute.

This is not an endorsement of Qwest's decision to engage in self-help. It should have been clear to Qwest at that time, or very shortly thereafter, that negotiations were not going to be productive and the Board would ultimately have to resolve many of the issues. At the same time, however, this should also have been clear to INS, the PTCs, and the CMRS carriers. Any of the parties could and should have made an appropriate filing with the Board once it was clear that Board action was necessary. The Board will not condone Qwest's self-help as a means of resolution of intercarrier disputes, as it is all too likely to lead to blocking of calls in some future dispute, but at the same time the Board does not condone the other parties' willingness to let time pass while this problem continued.

In this case, however, it is not too late to effect a repair. Given the earlier findings that this traffic is "local" and that the parties should negotiate one or more interconnection agreements for the exchange of this traffic, then it is appropriate to require that the terms and conditions of the new NIA (or arbitrated interconnection agreement, if that is the result) apply to traffic delivered between April, 1999, and the effective date of the new arrangement. This approach is not without its disadvantages; it puts even more pressure on the negotiations, as the results will not only apply in the future but also to an historical period. Ultimately, however, it will result in proper payment being made for the services rendered.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Iowa Code §§ 476.2, 476.3, 476.4, 476.7, 476.11, and 476.15 and the Board rules adopted pursuant to Iowa Code ch. 476.

2. All telecommunications carriers have a duty to interconnect under 47 U.S.C. § 251(a). Inherent in that duty is an obligation to carry traffic delivered over the interconnection.

3. All telecommunications carriers have a right to just and reasonable compensation for carrying other carriers' traffic delivered over an interconnection. 47 U.S.C. § 252.

4. The FCC has ruled that traffic to or from a CMRS network that originates and terminates within the same MTA as of the beginning of the call is local and is subject to transport and termination rates under 47 U.S.C. § 251(b)(5), rather than access charges. Thus, the traffic at issue in this docket is local and is not subject to access charges.

5. INS and Qwest are telecommunications carriers as that term is defined in 47 U.S.C. § 153(44).

6. As a telecommunications carrier, INS is obligated to interconnect with other telecommunications carriers and to carry traffic delivered to INS through such interconnections and has a right to just and reasonable compensation for carrying such traffic.

7. CMRS carriers have the right to direct interconnection with the independent telephone companies, pursuant to 47 U.S.C. § 252.

FINDINGS OF FACT

1. When customers of CMRS carriers in Iowa place calls to customers of independent wireline telephone companies, the calls are often delivered by the CMRS carrier to Qwest, which delivers the calls to INS, which in turn delivers the calls to the independent telephone company for completion to the called customer. This is the traffic at issue in this docket.

2. Prior to April of 1999, Qwest paid INS and the independent telephone companies for carrying and terminating this traffic. Qwest paid INS for access services, pursuant to INS's Iowa Tariff No. 1 Access Service, and paid access charges to the independent telephone companies pursuant to their tariffs, which concur in ITA Tariff No. 1.

3. Beginning with billings dated September 20, 1999, Qwest refused to pay INS or the independent telephone companies for CEA services or access charges associated with the traffic at issue in this docket. Qwest stated reason for refusing payment was because Qwest believed the FCC had determined the traffic at issue in this docket and originated and terminated within a single Major Trading Area (MTA) is local traffic.

4. The ITA's proposed tariff identified as TF-00-275 would apply only to access services and purports to apply to the intraMTA traffic at issue in this docket.

6. Because the intraMTA traffic at issue in this docket is local, access charges do not apply to that traffic.

7. Because the ITA's proposed tariff identified as TF-00-275 proposes to apply access charges to local traffic, it is unjust, unreasonable, and unlawful.

8. The most efficient mechanism for determining just and reasonable compensation for INS's services in carrying the traffic at issue in this docket is for all interested parties to negotiate one or more interconnection agreements, with Board arbitration available pursuant to 47 U.S.C. § 252, if necessary.

9. Qwest is not entitled to refunds for CEA and access charges paid prior to April, 1999, associated with CMRS traffic because the services were ordered and received by Qwest without protest.

10. INS and the independent telephone companies are not entitled to CEA and access charges from Qwest for CMRS traffic from April, 1999, to the present.

11. INS is entitled to just and reasonable compensation from the CMRS carriers that indirectly transited traffic across INS's facilities from April, 1999, at rates that should be negotiated by the parties, subject to arbitration by the Board.

12. The independent telephone companies and the CMRS carriers should exchange calls on a mutual exchange of traffic basis, at no charge to the originating provider, until such time as the Board approves monetary compensation for the exchange of calls between these parties.

13. Qwest is not required to pay for CEA or access services for CMRS carrier-originated traffic that is not Qwest-originated traffic.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Qwest is not obligated to pay for CEA services provided by INS or access services provided by the independent telephone companies back to April, 1999, for delivering traffic to INS that originates with a CMRS carrier and originates and terminates within the same MTA as of the beginning of the call.

2. Qwest's request for a refund of access charges and payments for access services provided by INS and the independent telephone companies for the 24 months preceding April, 1999, is denied.

3. INS must interconnect with Qwest, the independent telephone companies, and any other telecommunications carriers and carry traffic delivered over those interconnections.

4. The proposed tariff filed by the ITA on October 31, 2000, and identified as TF-00-275, is rejected because it is unjust, unreasonable, and unlawful.

5. CMRS carriers are entitled to direct connection with independent telephone companies on a bill-and-keep basis until such time as the Board may approve a schedule of rates and charges for exchange of traffic between CMRS carriers and an independent telephone companies. CMRS carriers are entitled to indirect connection with independent telephone companies using the facilities of INS and INS is entitled to reasonable compensation for the CMRS carriers' use of INS facilities.

5. The Executive Secretary is directed to forward a copy of this proposed decision and order to the Federal Communications Commission.

6. This proposed decision and order will become the final decision of the Utilities Board unless appealed to the Board within 15 days of its issuance, pursuant to Iowa Code § 17A.15(3) and 199 IAC 7.8(2).

/s/ Diane Munns
Diane Munns, Presiding Officer

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 26th day of November, 2001.