

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>IOWA TELECOMMUNICATIONS ASSOCIATION, DUMONT TELEPHONE COMPANY, FOREST CITY TELECOM, INC., GRAND RIVER MUTUAL TELEPHONE CORPORATION, MUTUAL TELEPHONE COMPANY, NORTHERN IOWA TELEPHONE COMPANY, SOUTH CENTRAL COMMUNICATIONS, INC., UNIVERSAL COMMUNICATIONS OF ALLISON, WEBB-DICKENS TELEPHONE CORPORATION, AND WINNEBAGO COOPERATIVE TELEPHONE ASSOCIATION,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">vs.</p> <p>VERIZON WIRELESS, SPRINT PCS, and U.S. CELLULAR CORPORATION,</p> <p style="text-align: center;">Respondents.</p>	<p>DOCKET NO. ARB-04-3 (SPU-00-7)</p>
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ORDER GRANTING MOTIONS TO DISMISS

(Issued November 19, 2004)

On September 1, 2004, the Iowa Telecommunications Association, Dumont Telephone Company, Forest City Telecom, Inc., Grand River Mutual Telephone Corporation, Mutual Telephone Company, Northern Iowa Telephone Company, South Central Communications, Inc., Universal Communications of Allison, Webb-Dickens Telephone Corporation, and Winnebago Cooperative Telephone Association

(collectively, Petitioners) filed a "Petition for Enforcement of Board Order, for Arbitration, and for Complaint" (the Petition) with the Utilities Board (Board). The Petition was amended on September 2, 2004.

One or more of the Petitioners were parties to an earlier Board docket, Re: Exchange of Transit Traffic, Docket No. SPU-00-7 (the Transit Traffic docket), which generally involved issues relating to the exchange of telecommunications traffic between wireless and wireline carriers in Iowa. In that docket, Petitioners state, the Board (among other things) directed the parties to negotiate one or more interconnection agreements for the exchange of the traffic at issue. Petitioners state that they have negotiated interconnection agreements with Verizon Wireless, Sprint PCS, and U.S. Cellular Corporation (the Respondents).

In their negotiations the parties "agreed to reserve the issue of past compensation until after an agreement on interconnection and transfer of traffic had been reached." (Petition, ¶7.) The parties have now negotiated all interconnection issues except the compensation for the termination of wireless traffic from April 1999 to May 1, 2004. (Petition, ¶8.)

Petitioners asserted a variety of possible jurisdictional bases for their claim, including arbitration pursuant to 47 U.S.C. § 252 and 199 IAC 38.7(3), a standard complaint proceeding (presumably pursuant to Iowa Code § 476.3 (2003), although that statute is not specified), and a petition for enforcement of the Board's prior orders in the Transit Traffic docket, along with theories of quantum meruit and implied contract.

The Board ordered Respondents to file their answers to the Petition on or before September 15, 2004. In addition, the Board directed the Respondents to indicate whether they believed the proceeding to be an arbitration proceeding pursuant to section 252 and, if so, when the requests for negotiation were made and to discuss whether they contend the issue was already resolved by the Board in the Transit Traffic docket. The Board also directed the Petitioners to file a reply to the answers on or before September 22, 2004.

On September 15, 2004, Sprint Spectrum L.P. d/b/a Sprint PCS (Sprint), Verizon Wireless (Verizon), and United States Cellular Corporation (USCC) each filed separate answers to the Petition and responded to the Board's questions regarding this proceeding. In addition, each of the three respondents urged the Board to dismiss the Petition.

Sprint argues that the Board has no jurisdiction over this action, noting that the parties have already executed interconnection agreements that have been filed and approved by the Board. Because the parties have executed an interconnection agreement, there is no open issue in the negotiation of the interconnection agreement that would be subject to an arbitration proceeding pursuant to section 252 of the Communications Act.¹

Sprint asserts that the Petitioners have not met their burden of validating the rate applicable to the traffic, noting that Congress specified in section 252(d)(2) that in establishing the rate for reciprocal compensation, costs shall be determined on the

¹ Sprint's Answer to Petition of Iowa LECs for Enforcement of Board Order, p. 3. (Sprint's Answer).

basis of "a reasonable approximation of the additional cost of termination of such calls."² Sprint also suggested that the Petitioners have not demonstrated that bill and keep is not the appropriate mechanism for the bilateral exchange of telecommunications traffic and have not provided a cost study to substantiate a rate other than bill and keep.³

Verizon responded to the Petition with the following statements: "Contrary to ITA's claims, the issues presented by ITA were not decided as part of In re Transit Traffic; ITA has substantially misconstrued those decisions. This dispute is also not properly before the Board as an arbitration or complaint."⁴ The USCC filing is substantially the same as Verizon's.

Verizon and USCC request the Board dismiss the Petition for lack of jurisdiction, reasoning that Docket No. SPU-00-7 is closed following a final, dispositive order and there is no holding in that docket that is dispositive of the present issue. Further, Verizon and USCC argue that the Petition provides no basis for the Board to resolve the dispute pursuant to its complaint jurisdiction other than alleged "longstanding equitable principles," which Verizon and USCC consider to be inadequate to invoke the jurisdiction of the Board. Lastly, Verizon and USCC suggest that the only remaining issue in dispute between the parties, which was not submitted as part of the filed negotiated agreements, is a retrospective dispute over intercarrier compensation and that because it is not a forward-looking term or

² Sprint's Answer, p. 4.

³ Sprint's Answer, pp. 1-2.

⁴ Verizon's Wireless's Response to Petition of ITA and LECs and to Board Order, and Motion to Dismiss, p. 2.

condition of traffic exchange, and was not part of the filed agreements, it is not a proper subject for arbitration under section 252.

In responding to the answers filed by Sprint, Verizon, and USCC, the Petitioners argue that the Board was clear in its previous orders that the terms and conditions of any interconnection agreement negotiated for the exchange of wireless and wireline traffic would apply to traffic exchanged from and after April 19, 1999.⁵

Petitioners claim that because they have met the conditions for a valid arbitration pursuant to 47 U.S.C. § 252(b), the Board should deny the motion to dismiss and grant the petition for arbitration.⁶

Petitioners indicate that the wireless carriers raised a similar issue in Minnesota by means of a motion to dismiss. In that instance, the wireline carriers sought to have certain interconnection agreements apply to a past period. The wireless carriers alleged that the wireline carriers were seeking to collect debts arising in and after 1997 and arbitration was an inappropriate vehicle for resolution of such disputes. The Minnesota Public Utilities Commission denied the motion to dismiss arbitration of the issue of application of the agreement to past periods.⁷

⁵ "Reply to Verizon and U.S. Cellular Responses to Petition of ITA and LECs and to Board Order and Motion to Dismiss," pp. 2-3 (ITA Reply).

⁶ ITA Reply, p. 4.

⁷ See, *In the Matter of the Request for Arbitration of Interconnection Agreements by Certain Minnesota Independent Telephone Companies with Qwest Wireless LLC and TW Wireless LLC*, Docket No. P-401, et al./IC-03-1893, "Order Denying Motion to Dismiss, Granting Arbitration and Assigning Arbitrator" (Minn. PUC, issued Dec. 23, 2003) (Minnesota Order).

The Board will first address the issue of the Minnesota Order. There is one distinct difference between the factual situation that existed in Minnesota and the one presented here. The Minnesota Order states:

The Wireless Carriers claim that the parties already agree to all the terms of their interconnection agreement. But the Petitioners refuse to sign the agreement, according to the Wireless Carriers, because they seek to use the compulsory arbitration clause found in the Federal Telecommunications Act of 1996 (the Act) (footnote omitted) as a means to collect on debts arising in 1997 and thereafter.⁸

That is a different situation from the one presented to the Board. The Petitioners have not refused to sign the agreements in Iowa. Rather, the interconnection agreements have been signed, filed with, and approved by the Board. What the Petitioners have brought to the Board is, in effect, a request that either the agreement be amended to include a term that was not agreed to, or that the Board arbitrate a separate agreement that includes only one term, that of past compensation. This is clearly a dispute based on a previous, rather than an ongoing, obligation.

The Federal Communications Commission (FCC) has given guidance on what should be considered an interconnection agreement pursuant to section 252 (and thus subject to arbitration under that section) of the Act, stating:

[W]e find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).⁹

⁸ *Id.* at p. 2.

⁹ *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope and the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, ¶8.

The FCC declined to require that all agreements entered into as "settlements of disputes" be filed.¹⁰ The only issue that has been brought to the Board is clearly related to the settlement of the dispute surrounding compensation for previous services and, therefore, is not part of the interconnection agreements that have already been filed and approved that define an ongoing obligation. What the Petitioners have asked the Board to do is to require that the terms of that interconnection agreement be applied retrospectively to all similar traffic exchanged between the parties from and after April 19, 1999.

Sprint contends that the Petition inaccurately portrays the Board's decision in Transit Traffic as requiring that wireless carriers pay compensation for the bilateral exchange of telecommunications traffic prior to the date of the interconnection agreements. In contrast, the Petitioners point to language from the Board's rehearing order, at page 4, which states:

On the one hand, the orders require the parties to negotiate an interconnection agreement for the exchange of wireless and wireline traffic, with the resulting terms and conditions to apply to traffic exchanged from and after April 19, 1999.

The Petitioners fail to include the very next sentence in the order, which continues:

On the other hand, the orders also state that if the wireless service providers were to connect directly with each of the independent LECs, they would be entitled to exchange traffic with the LECs on a bill-and-keep basis pursuant to 199 IAC 38.6, at least until such time as a continuing and significant traffic imbalance has been shown.

¹⁰ *Id.* at footnote 26 and ¶12.

The Board also notes that these quotations from its rehearing order are taken from a section that is clearly depicted as a summary of the arguments made to the Board.

To clarify, the Board stated:

In summary, the Board will clarify its earlier discussion of bill-and-keep in this way: By its own terms, the bill-and-keep requirement of 199 IAC 38.6 is not directly applicable to the wireless-to-wireline traffic at issue. However, it is likely that the principles that made the bill-and-keep requirement appropriate for wireline interconnection agreements will apply with equal force to wireless-to-wireline arrangements if the traffic exchange is reasonably balanced. If the traffic is not balanced, then bill-and-keep may not be appropriate. If the traffic was significantly imbalanced in the past, then the Board recognizes the possibility that the wireless service providers may owe termination charges to the independent LECs back to April 19, 1999.¹¹

Clearly, the Board was not making a specific determination concerning facts that were then before it. Instead, the Board was providing interested persons with some insight into what it might determine, given the right set of facts. The Board also noted that any determination that it made would have to be based on a record that is focused on issues such as the appropriate rates, terms, and conditions for interconnection in the circumstances. The Petitioners are not asking the Board to determine an appropriate rate, term, or condition. Rather, they have requested the Board to simply apply the rate negotiated to services provided outside the time covered by the contract. This was clearly not what was anticipated in the Board's orders.

¹¹ *In re: Transit Traffic*, "Order Denying Application for Rehearing," Docket Nos. SPU-00-7, TF-00-275 (DRU-00-2) issued May 3, 2002, p. 9.

The Petitioners are not without other recourse in this matter. For example, it may be that a claim concerning the compensation of prior services can be taken to federal court for disposition.¹² Alternatively, the Petitioners may be able to seek relief by filing a complaint with the FCC under Section 208 of the Act,¹³ or Section 415 of the Act.¹⁴

IT IS THEREFORE ORDERED:

The motions to dismiss filed by Sprint Spectrum L.P. d/b/a Sprint PCS, Verizon Wireless, and U.S. Cellular Corporation are granted for the reasons discussed in this order.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 19th day of November, 2004.

¹² USCC Answer, p. 11, Verizon Answer, p. 10.

¹³ Sprint Answer, p. 3.

¹⁴ USCC Answer, pp. 8 and 11, Verizon Answer, pp. 7 and 10.