

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>QWEST CORPORATION and U.S. CELLULAR CORPORATION,</p> <p style="text-align:center">Complainants,</p> <p style="text-align:center">v.</p> <p>EAST BUCHANAN TELEPHONE COOPERATIVE,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DOCKET NOS. FCU-04-42, FCU-04-43</p>
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ORDER GRANTING INJUNCTIVE RELIEF

(Issued December 23, 2004)

On August 13, 2004, Qwest Corporation (Qwest) filed with the Utilities Board (Board) a "Complaint for Emergency Injunctive Relief" (the Complaint) naming East Buchanan Telephone Cooperative (EBTC) as respondent. Qwest alleged that EBTC had "threatened to begin blocking any traffic received from Qwest that is not properly identified as Qwest toll traffic on August 16, 2004."¹ The affected traffic would include calls that Qwest describes as "wireless transit traffic," that is, calls that originate with a wireless service provider and are delivered to Qwest for transport to other carriers and their end users.² Qwest alleged that EBTC's threat to block the

¹ Complaint, ¶ 5.

² Complaint, ¶ 1.

disputed traffic, if completed, would violate Iowa Code §§ 476.20, 476.100(1), 476.100(3), 476.100(5), 476.101(9)"c," 477.5, 477.6, 477.14, and 477.13 (2003), along with 199 IAC 22.5(13).

Qwest argued that EBTC's demand and threat to block traffic contravened the Board's ruling in the "Proposed Decision and Order" issued in *Re: Transit Traffic*, Docket No. SPU-00-7, on November 26, 2001. Qwest also argued that the threat to block calls was a threat to the public interest. Qwest asserted that wireless service customers whose carrier uses Qwest's transit service to complete calls would be unable to call family, friends, police, or a doctor in EBTC's exchange in an emergency.³

On August 13, 2004, based solely on the allegations of the Complaint filed by Qwest, the Board issued a temporary injunction pursuant to Iowa Code § 17A.18A (2003), prohibiting EBTC from blocking the calls. Because the Board's findings were based solely on the allegations of Qwest's Complaint, the Board also found that its emergency adjudication should be temporary in nature and should be reconsidered by the Board after EBTC had an opportunity to respond to the Complaint and Qwest and any other interested persons had an opportunity to reply.

Also on August 13, 2004, U.S. Cellular Corporation (USCC) filed a complaint and request for emergency ruling complaining of the same EBTC actions. USCC

³ Complaint, ¶ 9. Calls to 911 emergency services would be unaffected because they are routed differently, but calls directly to emergency services like police, fire departments, or medical professionals in the EBTC service area would be blocked. Complaint, fn. 1, p. 4.

also sought consolidation of its complaint (identified as Docket No. FCU-04-43) with the Qwest complaint (identified as Docket No. FCU-04-42).

On August 18, 2004, EBTC filed a response to the Board's temporary injunction and an answer to Qwest's complaint. EBTC provided additional background information and asserted that the temporary injunction should be lifted. In particular, EBTC alleged that its proposed blocking will pose no hazard to the public safety because 911 calls will be unaffected and EBTC will identify and complete calls to local police and fire departments and medical facilities.⁴

EBTC then asked that the Board hold an immediate hearing on its decision to issue a temporary injunction and "dissolve the injunction because no immediate danger to the public exists as a result of East Buchanan's actions."⁵

On August 20, 2004, EBTC filed an answer to the USCC complaint, arguing (among other things) that if EBTC were permitted to block the disputed traffic, USCC's customers would only be unable to complete calls if USCC refused to re-route its traffic. EBTC also resisted consolidation of the two complaints, arguing the two cases are different. According to EBTC, Qwest-originated traffic would not be blocked, so Qwest's complaint should be summarily dismissed, while USCC could experience actual blocking or be forced to re-route its calls, making for a different case.

⁴ Corrected Response, p. 4.

⁵ Corrected Response at p. 5.

On August 23, 2004, USCC filed a reply to EBTC's response, supporting continuation of the temporary injunction.⁶ USCC argued that the maximum relief available to EBTC was recognition that the authorization for this traffic is disputed and an appropriate proceeding should be conducted to resolve the dispute.⁷

On August 24, 2004, Qwest filed a reply to EBTC's response. Qwest supported continuation of the temporary injunction, arguing no injury, irreparable or otherwise, would result if the Board refused to permit EBTC to unilaterally block the disputed traffic.⁸ Qwest argued it has standing to protect its business relationships with the carriers that originate this traffic. Qwest further pointed out that EBTC has demanded that Qwest pay terminating access charges for the traffic in question, giving Qwest a direct financial interest in the matter.⁹

On September 3, 2004, EBTC filed a withdrawal of its request for an immediate hearing on the temporary injunction and a motion to dissolve the injunction, arguing that the complaints filed by Qwest and USCC relate to monetary issues, not emergencies or dangers to the public safety.¹⁰ EBTC also withdrew its resistance to consolidation of the two separate complaints.

On September 14, 2004, the Board denied EBTC's request to dissolve the temporary injunction and established a procedural schedule.

⁶ The reply was filed in both dockets.

⁷ USCC Reply, p. 5.

⁸ Qwest Reply, p. 2.

⁹ Qwest Reply, p. 3.

¹⁰ *Id.*

Pursuant to that schedule, direct testimony was filed by Qwest and USCC on September 24, 2004. EBTC filed responsive testimony on October 6, 2004. Qwest filed reply testimony on October 13, 2004, and USCC filed on October 14, 2004.

On October 25, 2004, USCC filed a "Motion to Grant Summary Disposition for Failure to Respond to Discovery or for Motion to Compel and Continuance of Hearing." According to the motion, USCC served a number of data requests on EBTC that required responses on October 18, 2004, pursuant to the Board's September 14, 2004, order. Responses had not been received as of the close of business on October 22, 2004, so USCC counsel sent an electronic mail message to EBTC counsel on Saturday, October 23, 2004. No response had been received when USCC filed its motion with the Board on October 25, 2004. USCC argued that even if the responses were received before the scheduled hearing on October 27, 2004, USCC would not have a fair opportunity to review and utilize the documents for the hearing. The Board issued an "Order Rescheduling Hearing and Compelling Responses to Data Requests" on October 27, 2004. The hearing was rescheduled to begin on November 1, 2004, and EBTC was directed to provide responses or objections to the data requests submitted by USCC by October 27, 2004.

Hearing was held on November 1, 2004. Initial briefs were filed on November 15, 2004, and reply briefs on November 22, 2004.

The issue in this proceeding can be simply stated: Is it lawful for EBTC to block all telephone traffic received from Qwest that is not properly identified as Qwest

toll traffic? If permitted, EBTC would block calls that originate with customers of a wireless carrier but are delivered to EBTC using Qwest's facilities, among other calls.

In considering the response to the issue, the Board will look first at the relevant Iowa statutes, Iowa Code §§ 476.20 and 476.101(9). Section 476.20 prohibits any utility in Iowa from discontinuing or impairing service unless the utility first receives permission from the Board. EBTC's proposed blocking would constitute discontinuance of or impairment of service and EBTC has not requested, let alone received, the Board's permission. Accordingly, the Board concludes EBTC's proposed call blocking would be a violation of § 476.20.

Section 476.20 includes an exception that allows carriers to discontinue service without prior Board approval for failure to pay an account. At first glance, this exception might appear to apply here, where EBTC is having to terminate calls for US Cellular but is not being compensated for doing so. However, the record is clear that EBTC has never billed USCC for the services EBTC is providing.¹¹ USCC (and its customers) cannot be disconnected for failure to pay a non-existent account.

Section 476.101(9) provides that a telecommunications carrier shall not take any action that disadvantages a customer who has chosen to receive service from another carrier. This was the same statute the Board interpreted in the *FiberComm*¹²

¹¹ Transcript pp. 214-215.

¹² *In Re: Fibercomm, L.C., Forest City Telecom, Inc., Heart of Iowa Communications, Inc., Independent Networks, L.C., and Lost Nation-Elwood Telephone Company v. AT&T Communications of the Midwest, Inc.*, Docket No. FCU-00-3, Final Decision and Order (Issued October 25, 2001) (FiberComm).

case, finding that AT&T violated the statute by refusing to accept customers who chose a competitive local exchange carrier as their service provider rather than the incumbent local exchange carrier. The same analysis applies in this case. EBTC's proposed blocking would disadvantage customers who choose to take service from wireless carriers in order to make calls terminating in EBTC's service territory, and the proposed blocking would therefore violate § 476.101(9).

The Board concludes, after reviewing the evidence and statutes, that EBTC should be enjoined from blocking this transit traffic.

The Board recognizes that transit traffic has presented difficult issues for a number of years and in many jurisdictions. In this docket, the Board reviewed cases from Montana, Oklahoma, and Missouri, along with the decision in the *Transit Traffic* case.¹³ With time, the transit traffic issues are being resolved. We have concluded that in cases involving transit traffic, the terminating carriers, like EBTC, are entitled to be compensated for the services they are providing. The FCC has ruled that compensation should not be at access-based rates. That leads to the conclusion that the traffic could be exchanged pursuant to an interconnection agreement. However, the arbitration provisions of the Federal Telecommunications Act of 1996 (the 1996 Act) do not apply to wireless carriers, and the wireless carriers have sometimes been reluctant to engage in that process (especially when the alternative is that they are receiving termination services for free).

¹³ *3 Rivers Telephone Cooperative, Inc., et al. v. US West Communications, Inc.* 2003 U.S. Dist. LEXIS 24871 (D. M. 2003), *Atlas Telephone Company, et al. v. Corp. Comm'n of Oklahoma*, 309 F. Supp. 2d 1299, (D.O. 2004), footnote 15.

The Board recognized all of these difficulties in the *Transit Traffic* decision and encouraged the parties to negotiate. That process has been successful for over 70 independent carriers, which have negotiated a standardized or "template" agreement with many of the wireless carriers.¹⁴ Clearly, that is one option available to EBTC to begin to collect compensation for the services it is providing to USCC and other similarly-situated carriers.

Another possible option is a proposed tariff recently filed by the Rural Iowa Independent Telecommunications Association (RIITA), specifying the terms and conditions that would apply to termination of transit traffic in the absence of an interconnection agreement. The Board rejected a similar tariff in the *Transit Traffic* case, but that tariff was rejected because it would have imposed access charges on calls that the FCC has defined as local.¹⁵ RIITA's proposed tariff, to the extent it states charges calculated on another basis, may be an acceptable alternative. That issue is currently pending before the Board, so it is not known at this time whether the tariff option is available, but the Board notes that the Missouri courts have approved a tariff solution in similar circumstances, subject to certain limitations.¹⁶

A third alternative available to EBTC, at least with respect to USCC, is to request negotiation and, if necessary, arbitration under the 1996 Act. During the hearing in this docket, the USCC witness testified that if USCC received a formal request for negotiations, the company would negotiate and, if negotiations reached

¹⁴ Transcript p. 142.

¹⁵ *Transit Traffic*, "Proposed Decision and Order, pp. 14-21.

¹⁶ *State of Missouri, ex rel. Alma Telephone Company, et al. v. Public Service Commission of the State of Missouri*, Case No. WD62961, Opinion issued October 5, 2004. (W.D. Ct. App. 2004).

an impasse, the company would follow the policy of the 1996 Act.¹⁷ The Board has considered that commitment and interprets it as an agreement to participate in arbitration under the Act, if necessary, even if the process is initiated by EBTC.

IT IS THEREFORE ORDERED:

East Buchanan Telephone Company is permanently enjoined from blocking the traffic at issue in this docket without prior approval of the Board.

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 23rd day of December, 2004.

¹⁷ Transcript pp. 144-149.