

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

<p>IN RE:</p> <p>QWEST CORPORATION</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">vs.</p> <p>NORTHWEST IOWA TELEPHONE COMPANY, COMMCHOICE OF IOWA, L.L.C., AND LONG LINES METRO, L.L.C.</p> <p style="text-align:center">Respondents.</p>	<p style="text-align:center">DOCKET NO. FCU-04-57</p>
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**ORDER DISMISSING PROCEEDING**

(Issued June 27, 2005)

**I. PROCEDURAL HISTORY**

**A. Qwest's Complaint and Motion for Default**

On November 19, 2004, Qwest Corporation (Qwest) filed a complaint with the Utilities Board (Board) pursuant to Iowa Code § 476.3(1) (2004) and 199 IAC 6. Qwest alleges that Northwest Iowa Telephone Company (NWIT), CommChoice of Iowa, L.L.C. (CommChoice), and Long Lines Metro, L.L.C. (Long Lines) (collectively, the Respondents), are attempting to collect intrastate access charges from Qwest for telecommunications traffic that is not subject to access charges. The calls in question are alleged to be local and long distance calls placed by subscribers of

third-party carriers that are transited by Qwest to the Respondents (known as transit traffic).

Qwest alleges that NWIT is seeking \$1,124,000 from Qwest, while CommChoice and Long Lines are seeking \$154,000, all exclusive of interest. Further, NWIT is claiming an additional \$85,000 from Qwest pursuant to an access tariff filed by the National Exchange Carrier Association with the Federal Communications Commission (FCC). Qwest states it is not seeking from this Board any ruling as to interstate calls or the interpretation or application of any FCC-filed tariff.

Qwest further alleges that NWIT is an incumbent local exchange carrier (ILEC) while CommChoice is a competitive local exchange carrier (CLEC) in certain exchanges served by Qwest and Long Lines is a CLEC providing service in the Sioux City exchange served by Qwest. NWIT, CommChoice, and Long Lines are all wholly-owned subsidiaries of Long Lines, Inc.

Qwest further alleges that the telecommunications traffic at issue in this proceeding is the same as the traffic considered by the Board in Re: Exchange of Transit Traffic, Docket No. SPU-00-7, "Proposed Decision and Order" (issued November 26, 2001) and "Order Affirming Proposed Decision and Order" (issued March 18, 2002) (hereinafter the Transit Traffic docket). In those orders, the Board held that under federal law, telecommunications traffic that originates with a customer of a wireless carrier and transits Qwest's network to reach a CLEC for termination to a CLEC's customer is "local" if it begins and ends within a single Major Trading Area,

or MTA. Most of Iowa is in a single MTA, so the vast majority of the wireless-originated intrastate calls at issue in the Transit Traffic docket were "local," not interexchange, and access charges did not apply.

Qwest further alleges that it entered into an interconnection agreement with CommChoice in 1998, which was revised on multiple occasions. On March 26, 2002, the agreement was replaced with a new agreement that is similar to the fourth revision to Qwest's Statement of Generally Available Terms, or SGAT. Section 7.2 of that agreement provides that the originating carriers, not Qwest, are responsible for compensating CommChoice and Long Lines for terminating calls originated by third-party carriers. Qwest argues that this confirms that Respondents should be collecting compensation from originating interexchange carriers, not from Qwest, and that as applied to local traffic, the interconnection agreement should control over any tariff.

Qwest further alleges that on June 23, 2004, the Respondents filed a complaint against Qwest in the United States District Court for the Northern District of Iowa, identified as Case No. 04-CV-04053 DEO. Qwest states that it has filed with the court a motion to stay those proceedings pending a decision by this Board on the applicability and reasonableness of the Respondents' tariffs.

Qwest then states three separate causes of action. The first is based on 47 U.S.C. §§ 251 and 252 and the Board's decision in the Transit Traffic docket, claiming that Respondents cannot collect access charges from Qwest associated with transit traffic. The second cause of action is based on §§ 251 and 252 and the

interconnection agreement between Qwest and CommChoice, which (according to Qwest) provides that compensation for termination of local transit traffic is owed to the Respondents by the carriers serving the calling parties, not by Qwest. The third cause of action is based on the Iowa Access Service Tariff No. 1, filed with the Board by the Iowa Telecommunications Association (ITA) and relied upon by each of the Respondents. Qwest asserts that the ITA tariff, by its own terms, does not impose liability on a transit carrier for the payment of switched access charges because it defines the term "Customer" as an entity that subscribes to access services in order to provide services for its own use or for the use of its customers. Qwest says it does not fit within this definition and, even if it did, applying the tariff rates to Qwest as a transit carrier would violate the "calling party's network pays" regime established by the Board in the Transit Traffic docket.

On March 14, 2005, Qwest filed a motion for default judgment. Qwest noted that it served its complaint on Respondents' attorney on November 19, 2004, and filed its complaint with the Board on November 22, 2004, and Respondents had failed to answer or otherwise respond to the complaint.

On April 4, 2005, the Board issued an order docketing Qwest's complaint and giving Respondents until April 13, 2005, to file an answer to the complaint and a response to the motion for default judgment.

**B. Respondents' Special Appearance and Request for Dismissal**

On April 13, 2005, the Respondents filed a special appearance responding to the order docketing the complaint and requesting dismissal for lack of subject matter

jurisdiction. In the alternative, Respondents ask that the Board stay its proceedings while they file a petition for a writ of certiorari from an Iowa District Court, seeking a ruling that the Board lacks jurisdiction in this matter.

Respondents also state that on October 6, 2004, Qwest filed a motion to stay Respondents' federal district court action and sought referral of certain tariff issues to the Board. However, in December of 2004 the U.S. District Court denied Qwest's motion for stay and referral. (A copy of the order denying Qwest's motion is attached to the Respondents' special appearance as Exhibit 1.) Respondents argue that Qwest is trying to have a second bite at the apple by raising the same issues with the Board as are already being heard by the Court.

In support of their motion, Respondents first argue that the Board lacks subject matter jurisdiction over Qwest's complaint, pursuant to Iowa Code § 476.1, which exempts certain smaller telephone companies from the Board's rate regulation. Specifically, the statute provides that "telephone companies having less than fifteen thousand customers and less than fifteen thousand access lines . . . are not subject to the rate regulation provided for in this chapter." Respondents assert they have less than 15,000 customers and less than 15,000 access lines and support this assertion by affidavit.

Respondents further argue that the Board has acknowledged its lack of jurisdiction over non-rate-regulated local exchange carriers, in Re: Interstate 35 Telephone Co., Docket No. DRU-02-4, "Declaratory Order" (issued October 18, 2002). In that order, the Board declared it did not have jurisdiction over the access

charges of incumbent local exchange carriers that are exempt from rate regulation pursuant to § 476.1, according to the Respondents. They argue that the Board reached a similar conclusion in Re: Intrastate Access Service Charges, Docket No. RMU-03-11, "Order Adopting Amendments," (issued March 18, 2004) when the Board declined to adopt certain suggested revisions to its access charge rules.

Next, Respondents argue that the Board does not have jurisdiction of this dispute pursuant to 47 U.S.C. § 252. While they admit that CommChoice has an interconnection agreement with Qwest, Respondents assert that CommChoice seeks payment from Qwest pursuant to its tariffs and Qwest's complaint therefore concerns CommChoice's tariffs, not the interconnection agreement. Further, they argue that there is nothing in the federal act that confers rate regulation jurisdiction on the Board with respect to Respondents' access charges.

Respondents also argue that the Board should decline to hear this matter because the same issues are pending before the federal district court. Specifically, they claim that Qwest raised the same arguments in the district court proceedings when it moved the Court for an order staying the judicial proceedings and referring the tariff issues to the Board. The Court denied that motion in December of 2004, and Qwest should not be permitted to re-litigate those issues in a concurrent action before the Board. Such a process would circumvent the District Court's order, waste valuable administrative and judicial resources, and create the possibility of inconsistent results between the Board and the District Court. Respondents conclude that "[o]ne forum is enough, even more so when Qwest has already

advanced and lost on the jurisdictional argument it is raising here." (Special Appearance at page 8.)

In the alternative to the preceding arguments for dismissal, Respondents ask that the Board stay its proceedings while they file a petition for writ of certiorari with an Iowa District Court, seeking a ruling that the Board lacks jurisdiction of this matter.

**C. Qwest's Response to the Special Appearance**

Qwest filed its response to the Respondents' special appearance on April 27, 2005. Qwest asserts that it is not asking the Board to set switched access rates or other rates for the Respondents; instead, Qwest is only asking the Board to determine (a) that the terms and conditions of those tariffs do not obligate Qwest to pay Respondents for calls Qwest and its end users did not originate and (b) that Long Lines and CommChoice violate their interconnection agreements when they attempt to charge Qwest access charges for local traffic.

Qwest asserts that the Board has jurisdiction of this matter pursuant to Iowa Code § 476.11, which provides:

Whenever toll connection between the lines or facilities of two or more telephone companies has been made, or is demanded under the statutes of this state and the companies concerned cannot agree as to the terms and procedures under which toll communications shall be interchanged, the board upon complaint in writing, after hearing had upon reasonable notice, shall determine such terms and procedures.

The board may resolve complaints, upon notice and hearing, that a utility, operating under section 476.29, has failed to provide just, reasonable, and nondiscriminatory arrangements for interconnection of its telecommunications services with another telecommunications provider.

Qwest claims that by seeking to impose access charges on the disputed traffic, Respondents are demanding "toll connection" with Qwest for that traffic. By its Complaint, Qwest establishes that it does not agree to the terms and procedures under which Respondents make that demand. Thus, the Board has jurisdiction to determine the terms and procedures that should apply, according to Qwest.

The second paragraph of § 476.11 also provides jurisdiction, according to Qwest. All of the Respondents are certificated carriers operating under § 476.29. Qwest's complaint asserts that they have failed to provide just, reasonable, and nondiscriminatory arrangements for interconnection. Qwest claims this paragraph also gives the Board jurisdiction over the Respondents' access and interconnection rates (although Qwest apparently is not invoking that jurisdiction at this time). (Response, p. 4, n. 5.) Qwest cites AT&T Communications of the Midwest, Inc. v. Iowa Utilities Board, 687 N.W.2d 554 (Iowa 2004), for the proposition that § 476.11 grants the Board "broad authority to determine the reasonableness of the rates." In Qwest's view, this confirms the broad jurisdictional reach of § 476.11 first announced in Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co., 165 N.W.2d 771 (Iowa 1969).

Qwest relies upon the AT&T decision to distinguish the Board's decisions in the Interstate 35 declaratory order and the Access Service Charge rule making; both of those Board orders were issued before the decision of the AT&T Court. Qwest further distinguishes the Interstate 35 declaratory order because it dealt specifically with rate regulation, not "term and procedure" regulation. Similarly, in the Access

Service Charge rule making, the issue was whether the Board could *require* small CLECs to reduce their access charges and did not touch upon § 476.11 jurisdiction over terms and procedures.

Qwest also points out that the Access Service Charge rule making made it clear that the Board has jurisdiction over the access charges of CommChoice and Long Lines pursuant to § 476.101(1), which provides that if the Board determines a CLEC has market power in a local exchange market, the Board can apply to that CLEC whatever provisions of chapter 476 the Board deems appropriate, including rate regulation pursuant to § 476.3.

Next, Qwest argues that the Board has jurisdiction to interpret and enforce the interconnection agreements between Qwest and CommChoice and Qwest and Long Lines. Qwest claims these two Respondents are violating the interconnection agreements by attempting to charge tariff rates for traffic that should be exchanged pursuant to the agreements. Qwest cites several cases holding that state commissions have jurisdiction to interpret and enforce arbitration agreements under the federal act, see Response at p. 7, n. 9.

Qwest then argues that the Board's decision in the Transit Traffic docket, SPU-00-7, confirms its jurisdiction here. Qwest interprets that Board decision as holding that terminating carriers cannot collect access charges for the transport and termination of local traffic.

Finally, Qwest argues that the Board should reject the Respondents' motion for a stay. Qwest cites the same case that the Federal District Court relied on in

denying Qwest's motion for a stay of the Federal court proceedings. That case holds that a stay should be granted only in rare circumstances, where there is a clear case of hardship or inequity in going forward if there is even a fair possibility that the stay will damage any other person's interests. Landis v. North American Co., 299 U.S. 248 (1936). Qwest asserts that the requested stay would work a hardship on its interests, as it seeks a Board ruling on a matter within the agency's expertise. Qwest says that when the Federal District Court was considering whether to grant Qwest's motion for a stay, the Respondents argued to the Court that other cases could proceed without the federal court proceedings being stayed. Qwest says that Respondents should not now be heard to argue that this case should be stayed after telling the Court that this case could proceed.

## II. ANALYSIS

### A. Does the Board have jurisdiction of the complaint?

The first question to be decided is whether the Board has jurisdiction of all or part of the complaint. The Board does not agree entirely with either party's analysis of this issue, but it is admittedly complex. The best way to approach the question is in stages, starting with state law (relating to the access charge issues) and then turning to federal law (relating to interconnection agreement issues).

#### 1. State law gives the Board jurisdiction over some access charge disputes

Any state law jurisdiction in this matter must have its basis in the access charge dispute, and the Board's jurisdiction over such disputes is subject to certain

limitations. First, if a complaint involves access rates being charged by one of the large, rate-regulated local exchange carriers (i.e., Qwest, Iowa Telecom, or Frontier), then the Board would have jurisdiction of the complaint pursuant to its rate regulation authority (although even that jurisdiction might be affected by statutes such as § 476.95, providing for price regulation in place of traditional rate-of-return regulation).

But this case does not involve Qwest's access charges. Instead, it involves the access charges of smaller local exchange carriers that are exempt from rate regulation under chapter 476, pursuant to § 476.1, unnumbered paragraph 4. Even these carriers have to be divided into two separate groups; with respect to competitive local exchange service providers, the Board may be able to assert jurisdiction over their access charges pursuant to Iowa Code § 476.101(1). Under this statute, if the Board concludes, after notice and an opportunity for a hearing, that a carrier has market power with respect to the service at issue, then the Board can apply any appropriate parts of chapter 476 to the carrier in question, including regulation of the carrier's rates for access services.

With respect to the non-rate-regulated incumbent local exchange carriers, in contrast, the Board has no statutory mechanism for exerting jurisdiction over their access charges, pursuant to the Board's decision in the Interstate 35 declaratory order.<sup>1</sup> Presumably, the Board has jurisdiction over the other terms and procedures

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<sup>1</sup> The Board recognizes that the statutes underlying the Interstate 35 decision are subject to multiple interpretations. One Board member has invited the Iowa General Assembly to visit the issue and provide additional guidance regarding the legislative intent in this area. (See concurring opinions in Interstate 35 and the

relating to these carriers' access services, pursuant to § 476.11, but the line between rate regulation and service regulation is not always a bright one.<sup>2</sup> This case is potentially an example of the difficulty of drawing that line; Qwest says that it is not asking the Board to determine what access charges NWIT, CommChoice, and Long Lines should be allowed to charge, but instead to declare that those carriers' access charges, whatever they may be, do not apply to this traffic. If applied carefully and with restraint, this approach could have merit, but it is also possible that the process of determining what charges do, or do not, apply to a service could very easily become a *de facto* rate-setting procedure. Thus, carefully defining the issue is very important.

Applying this analysis to the instant case, the ultimate issue appears to be whether the traffic in question is properly handled pursuant to the Respondents' access tariffs or under interconnection agreements. This analysis of the nature of the traffic and the facts and circumstances surrounding the exchange of the traffic appears to be within the Board's § 476.11 jurisdiction over the "terms and procedures" for interchanging toll traffic and its jurisdiction under the same statute over interconnections between telecommunications providers.

Further, CommChoice and Long Lines are competitive local exchange service providers for purposes of § 476.101(1). Thus, the Board could give them notice and

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Access Service Charge rulemaking.) As access charges seem to present recurring issues, it appears that guidance may be more appropriate than ever.

<sup>2</sup> This line is further complicated by the Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co. decision, which indicates that when § 476.11 gives the Board jurisdiction over the "terms and procedures" of a connection between a long distance company and a local exchange carrier, it includes jurisdiction over the financial aspects of the connection.

opportunity for a hearing to determine whether other parts of chapter 476 should be applied to them, including regulation of their rates for access services. However, this approach cannot be applied to NWIT, which is an incumbent local exchange carrier.

In conclusion, the Board has the authority to exercise jurisdiction over at least some parts of this complaint pursuant to Iowa Code § 476.11, but that jurisdiction would have to be applied with caution to avoid slipping over the line into areas where the Board does not have jurisdiction.

**2. Federal law gives the Board jurisdiction over disputes involving interconnection agreements**

Qwest asserts that this case involves interpretation of certain interconnection agreements. The Respondents argue that the issue is one of tariff interpretation and application. If this is an interconnection agreement case, then the Board has jurisdiction under Federal law to interpret and enforce the provisions contained in that agreement.<sup>3</sup> If it is a tariff case, then the Board has no Federal jurisdiction, but has state jurisdiction to the extent described in the preceding section. Thus, to some extent the answer to the question of whether the Board has jurisdiction under Federal law is the same as the answer to the merits of the dispute, that is, which document governs this exchange of traffic.

But even if the Board has jurisdiction of this complaint under Federal law in order to interpret the interconnection agreements, that jurisdiction apparently extends only to CommChoice and Long Lines, and not to NWIT (where the majority of the

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<sup>3</sup> Southwestern Bell Tel. Co. v. Brooks Fiber Comm. Of Oklahoma, Inc., 235 F.3d 493, 497 (10<sup>th</sup> Cir. 2000); Southwestern Bell Tel. Co. v. Public Util. Comm'n, 208 F.3d 475, 479 (5<sup>th</sup> Cir. 2000).

money is at issue), because only CommChoice and Long Lines have interconnection agreements with Qwest. Any jurisdiction claimed under Federal law, therefore, would not reach the majority of the dispute.

For this reason, the Board concludes that any Federal jurisdiction the Board may have over this complaint is too limited to be significant.

### **3. Conclusion**

The Board has limited state law jurisdiction over this matter, jurisdiction that appears to be sufficient to resolve the issues that are known at this time. The remaining question is whether the Board should exercise that jurisdiction.

#### **B. Should the Board exercise its jurisdiction over this complaint?**

The Respondents have requested that the Board stay this proceeding while they petition a court for a determination of the Board's jurisdiction.<sup>4</sup> Instead of merely staying this docket, however, the Board will dismiss it, without prejudice to re-filing when the other proceedings have been concluded, if anything remains at that time for the Board to decide, or at any time that the Federal Court may decide to refer the matter to the Board.

It appears that the Board and the U.S. District Court have a form of concurrent jurisdiction over at least parts of this dispute. Traditional "concurrent jurisdiction" means jurisdiction exercised by different courts at the same time, over the same subject matter, and within the same territory, and "wherein litigants may, in the first

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<sup>4</sup> From this standpoint, Qwest's complaint that the Respondents are taking inconsistent positions in the Federal Court and before the Board is not quite correct. The Respondents apparently told the Court that it was not necessary to stay the judicial proceedings, that other actions (including any agency proceedings) could proceed

instance, resort to either court indifferently." Mallory v. Paradise, 173 N.W.2d 264, 267 (Iowa 1969). "This requires that someone make a choice of forums." Id. While this is traditionally a principle of judicial concern, there is no reason to believe it should not apply to a court and an administrative agency, as well.

The choice of a single forum is generally necessary "to prevent scandal from unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice." 21 C.J.S. Courts, § 210. This is particularly important to prevent the two forums from trying to enforce overlapping, or even conflicting, decisions. Id.

As a general principle, when two courts both have jurisdiction of a dispute, "[o]rdinarily the court first obtaining jurisdiction in a case is entitled to proceed with it to conclusion." In re: In The Interest of Warren, 178 N.W.2d 293, 297 (Iowa 1970) (citations omitted). Stated differently, where two courts have concurrent jurisdiction, the plaintiff is generally entitled to elect the forum (in the absence of any statutory prohibition), but having done so is bound thereby. 21 C.J.S. § 209. Again, these principles have been developed in settings involving two judicial bodies, but it appears they should apply with equal force when a quasi-judicial body is involved.

It could be argued that an exception to this general principle should be applied for situations in which one of the potential decision-making bodies has particular expertise relevant to the subject matter. In this case, an argument could be made that the Board has that expertise, as the agency was created for the express purpose of resolving public utility regulatory issues and has a staff of engineers, accountants,

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even if the Court did not stay its own proceedings. That is not directly inconsistent with the position

and other specialists to advise it. The Board believes that it could resolve this dispute efficiently and properly and stands ready to do so.

In this matter, however, it is clear that the U.S. District Court intends to proceed with the case before it. The Court's order of December 17, 2004, denying Qwest's motion for stay and request for remand to the Board makes that clear. The Court already had a request (from Qwest) to obtain the Board's input on these issues and declined the invitation.

Moreover, the Court's final decision is likely to resolve any and all of the issues that the Board would resolve, such as identifying the nature of the telecommunications traffic involved and deciding what compensation regime applies to the traffic. No purpose would be served by hearing and deciding this matter at the agency level when the Court is already going to hear and decide the same issues. In fact, if both cases were to go forward, the best outcome that could be expected is that the Court and the Board would reach the same result, and that would involve a substantial waste of resources. Further, it is possible that the Court and the Board would arrive at different, and even conflicting, outcomes, resulting in the "scandal from unseemly conflicts of jurisdiction" referred to above.

In the end, there is no point in trying this case twice, once before the Court and once before the Board, and the Court has already decided not to stay its proceedings and let the Board decide the matter. While it could be argued that dismissing this proceeding denies Qwest a hearing in its desired forum, that happens

every time two parties have a dispute that could be heard in multiple fora but is, instead, heard only once.

The Board will dismiss this proceeding, without prejudice. Qwest may re-file its complaint after the Federal District Court proceedings are concluded, if any issues within the Board's jurisdiction remain to be decided, or at any earlier date if the Court decides the matter should be heard by the Board.

**ORDERING CLAUSE**

**IT IS THEREFORE ORDERED:**

The formal complaint filed by Qwest Corporation on November 19, 2004, against Northwest Iowa Telephone Company, CommChoice of Iowa, L.L.C., and Long Lines Metro, L.L.C., is dismissed, without prejudice, for the reasons described in the body of this order.

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 27<sup>th</sup> day of June, 2005.