

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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<p>IN RE ARBITRATION OF:</p> <p>SPRINT COMMUNICATIONS COMPANY L.P.,</p> <p style="text-align:center">Petitioning Party,</p> <p style="text-align:center">v.</p> <p>IOWA NETWORK SERVICES, INC.,</p> <p style="text-align:center">Responding Party.</p>	<p style="text-align:center">DOCKET NOS. ARB-06-2 SPU-06-12</p>
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**ORDER REDOCKETING PROCEEDING,  
DENYING MOTION TO DISMISS, AND SCHEDULING CONFERENCE CALL**

(Issued August 28, 2006)

On May 31, 2006, the Utilities Board (Board) issued an "Order Docketing Petition for Arbitration and Scheduling Telephone Conference" to consider a petition filed by Sprint Communications Company L.P. (Sprint) requesting the Board arbitrate certain terms and conditions of a proposed Interconnection Agreement between Sprint and Iowa Network Services, Inc. (INS). In the May 31, 2006, order, the Board stated that Sprint's petition was filed pursuant to the provisions of Board rules 199 IAC 38.4(3) and 38.7(3) and federal statute 47 U.S.C. § 252(b). Subsequently, the Board determined that the petition was not filed pursuant to federal law but was filed pursuant to Iowa Code § 476.3. On June 19, 2006, the Board issued an errata

order in which the Board stated that it was correcting the misstatement in the May 31, 2006, order.

On June 5, 2006, INS filed a motion to dismiss the petition, arguing the Board lacks jurisdiction of the matter under federal or state law and requesting a stay of the telephone conference scheduled in the May 31, 2006, order. In a June 19, 2006, order the Board stated that the telephone conference call with the parties would be held as scheduled but the time deadlines for arbitration under the federal statute would not apply. In addition, the Board stated that Sprint's petition might raise a new issue regarding the Board's authority to arbitrate interconnection issues pursuant to state law and the Board asked the parties to brief the jurisdictional issue.

On June 14, 2006, Sprint filed a response to the motion to dismiss filed by INS. Sprint argued that its petition does not implicate 47 USC § 252, so INS's arguments regarding federal law are irrelevant. Sprint argued that the Board has jurisdiction of the matter pursuant to state law because INS is a "public utility" under Iowa Code § 476.1, as the Board found In Re: Iowa Network Access Division, Division of Iowa Network Services, Docket No. RPU-88-2, "Final Decision and Order" issued October 18, 1988, 1988 Iowa PUC LEXIS 1 at page 5. In fact, in that order the Board found that INS is subject to the Board's authority to regulate rates, as well as services. This gives the Board jurisdiction pursuant to Iowa Code § 476.3 to hear and resolve a written complaint regarding "anything done or omitted to be done" by INS in contravention of any part of chapter 476, according to Sprint.

Sprint also argues that INS has market power because it is the only available transit provider to the rural local exchange carriers (LECs), as defined in Iowa Code § 476.101(1), allowing the Board to apply any provisions of chapter 476 to INS that the Board determines to be appropriate. Among those provisions would be § 476.11, which authorizes the Board to hear and resolve complaints whenever two or more telephone companies are unable to agree on the terms and conditions under which toll communications should be exchanged.

Further, Sprint argues that INS has voluntarily submitted to the Board's jurisdiction in the past, citing Docket No. SPU-03-11 (a carrier disconnection proceeding) and an agreement between INS and Sprint's wireless service affiliate, Sprint PCS. Sprint appears to be arguing that INS should be estopped from seeking the benefits of the Board's jurisdiction in certain situations but denying the Board's jurisdiction in other situations.

Finally, Sprint argues that in Docket No. SPU-00-7, In Re: Transit Traffic, the Board stated that INS has an obligation to carry transit traffic to the rural LECs and that if INS wants to be compensated for providing that service, it will have to negotiate and, if necessary, arbitrate interconnection agreements for that purpose. Sprint says that the Board's order in that docket has been reviewed and upheld by the federal district court in Rural Iowa Independent Telephone Association v. Iowa Utilities Board, 385 F. Supp. 2d 797 at 820-21 (S.D. Iowa 2005).

On June 21, 2006, INS filed a reply to Sprint's response and a response to the Board's errata order. INS argues that Sprint is attempting to re-cast its petition,

which clearly sought arbitration of an interconnection agreement, into a request for more general dispute resolution. INS argues that the Board's general state law authority over public utilities does not give the Board authority to arbitrate an interconnection agreement. According to INS, that subject is covered by federal law, which preempts any state law purporting to address the same subject matter.

Further, INS argues that general state law cannot be used to subject INS to obligations from which it is exempted by federal law. It appears INS believes that the obligations from which it is exempt include the obligation to negotiate and, if necessary, arbitrate an interconnection agreement. INS also cites the Board's order in Docket No. RPU-88-2, saying the Board found in that docket that INS is not a local exchange carrier. INS relies on this finding, and the definitions in federal law, to conclude that it is exempt from the provisions of § 252.

Next, INS argues that Sprint is asking the Board to take action that is expressly prohibited by § 51.223 of the Federal Communication Commission's (FCC) rules. Sprint has asked the Board to determine whether any agreement between INS and Sprint should be a commercial agreement or an interconnection agreement; what traffic should be included in any such agreement; what rate should apply to that traffic; and other miscellaneous issues associated with any such agreement. INS does not explain how § 51.223 is implicated by these requests.

From the policy standpoint, INS argues that the Board should not be concerned about any competitive harm that might be alleged because INS does not

compete with Sprint and Sprint does not have to use INS's facilities to reach the rural LECs; it can directly interconnect with them, instead. Finally, INS argues that the cases in which INS has invoked the Board's jurisdiction are not relevant. The carrier disconnection case did not involve an interconnection agreement or commercial agreement, but was instead concerned with tariff issues. Further, INS argues that its agreement with Sprint PCS was supposed to be held confidential, as a settlement of a dispute, and asks that all references to the agreement be stricken from the record.

On June 26, 2006, Sprint filed a reply to INS's June 21, 2006, response, asserting that the Switching and Transportation Agreement between Sprint PCS and INS is not confidential. Instead, only a separate settlement agreement, not revealed or relied upon by Sprint, is entitled to confidential treatment.

On June 29, INS filed a supplemental response, repeating and expanding upon its earlier arguments and emphasizing its claim that any alleged state law authority to order the terms and conditions of an interconnection agreement between Sprint and INS is preempted by federal law. Moreover, INS notes that even if the Board acts under state law, INS can still challenge the Board's action in federal court, because of the preemption claim.

On June 30, 2006, INS filed an application for a hearing on its motion to dismiss. On July 13, 2006, Sprint filed a response to the application for hearing and a brief on the jurisdictional issue.

Based upon a review of the pleadings and legal argument, the Board does not consider it necessary to schedule a hearing for oral argument on the motion to

dismiss. The Board has considered the arguments and finds that it has jurisdiction over the issues raised by Sprint in the petition pursuant to Iowa Code § 476.3.

INS argues the Board cannot hear the parties dispute under either federal or state law. First, INS argues that another court has jurisdiction of this matter.

However, the Board is informed that the Federal District Court in Kansas City has dismissed that case, so it is no longer a factor.

Second, INS argues the Board does not have authority under federal law to arbitrate an interconnection agreement between the parties because neither INS nor Sprint is an incumbent local exchange carrier (ILEC), which INS claims is a prerequisite for any arbitration to be conducted under the 1996 Telecommunications Act. However, Sprint filed its petition pursuant to state law, not federal, so this argument is irrelevant.

Third, INS argues that state law does not provide authority to the Board to arbitrate an interconnection agreement because INS is not a LEC as defined by Iowa Code § 476.96(5). However, INS is a public utility as defined in Iowa Code § 476.1 and has been since at least 1988. Section 476.3 gives the Board authority to hear and decide a written complaint regarding anything done by a public utility that is alleged to be in violation of any provision of chapter 476. Sprint has alleged a number of such violations.

The Board recognizes the possibility that the alleged violations are insufficient to support jurisdiction in this matter because the statutes may not apply to INS. For example, Sprint claims INS has market power with respect to providing transit service

to the rural LECs, justifying relief pursuant to § 476.101(1). However, that statute only applies to competitive local exchange service providers, and it is not clear that INS fits within that class (as defined in § 476.96(3)). Similarly, Sprint invokes Board jurisdiction pursuant to § 476.11, but that statute is addressed to toll connections and to utilities that are operating pursuant to a certificate of public convenience and necessity pursuant to § 476.29. It is not clear that this dispute fits in either category.

The fact is that many of Iowa's telecommunication regulation statutes were written during times of regulated monopoly service and before INS even existed, so the precise language of the statutes sometimes does not fit well with modern developments. However, adoption of INS's arguments concerning jurisdiction would leave the Board without any regulatory recourse to ensure that INS is meeting the requirements of Iowa Code chapter 476 and the policies expressed in § 476.95, including, but not limited to, the Board's obligation to further the development of competition in all telecommunications markets in Iowa (§ 476.95(2)). This is one reason that § 476.95(4) authorizes the Board to be flexible in its regulatory activities: So that the Board can adapt existing statutes to new circumstances in order to further the legislative policies underlying the statutes.

With respect to INS's argument that unspecified state laws are preempted by the negotiation and arbitration provisions of 47 U.S.C. § 252, the Board finds that INS overstates its case when it claims that "a general dispute resolution proceeding pursuant to state law cannot be used to subject INS to ILEC obligations from which it

is exempt by operation of federal law." ("Reply to Sprint's Response to Motion to Dismiss" filed June 21, 2006, at p. 3.) It is not at all clear that federal law "exempts" INS from any obligations; it is more likely that an unusual entity like INS simply was not contemplated at the time the federal law was drafted, so that it is more accurately described as "inadvertently overlooked" than as "exempted." If this is the case, as the Board believes it is, then the Board has the authority pursuant to state law to investigate this matter and, if necessary, to order appropriate remedial actions without being preempted by federal law.

The Board's decision to assert jurisdiction over the issues raised by Sprint, despite INS's preemption claims, is also supported by a recent federal court decision involving INS and Qwest Corporation (Qwest).<sup>1</sup> In that case, INS was attempting to require Qwest to pay access charges for transmitting traffic from wireless carriers to INS and the local exchange companies that own INS. The Board had issued an order that found transmitting the traffic within the major trading area made the traffic local and subject to reciprocal compensation, rather than access charges.

Consistent with the Board's assertion of jurisdiction under state law in this proceeding, the federal court stated that the Board has jurisdiction over telecommunications services provided inside the state of Iowa, as long as the Board does not act in a manner inconsistent with the Telecommunications Act of 1996, 47 U.S.C. § 151 et. seq., or FCC regulations.

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<sup>1</sup> *Iowa Network Services, Inc. v. Qwest Corporation*, 385 F. Supp. 2d 850 (S.D. Iowa 2005).

The federal court found that INS is a common carrier of telephone services subject to regulatory authority of the FCC for interstate services and, for services provided in Iowa, it is subject to regulation by the Board.<sup>2</sup> The court also held that INS was a public utility subject to Board regulation for intrastate services.<sup>3</sup>

In the *INS v. Qwest* case, as in the matter presented by Sprint's petition, where federal law and FCC regulations do not preclude state jurisdiction, the Board has jurisdiction to resolve a dispute between telecommunications carriers. The federal court also addressed INS's argument that the Board does not have jurisdiction over it pursuant to 47 U.S.C. § 251(c)(1) since INS is not an ILEC. INS had argued that because it was not an ILEC, the § 251(c)(1) duty to negotiate and the § 252 negotiation/arbitration process did not apply. The court found that the regulatory classification of INS was not pertinent given the court's essential determination of the validity of the Board decision. In other words, the court found it need not resolve whether INS was acting as a local exchange company for purposes of INS engaging in negotiations pursuant to the Board's lawful orders.<sup>4</sup>

The court went on to find that the Board acted within its authority in promoting negotiation and arbitration to reach reciprocal compensation agreements and that such determination does not violate federal law.<sup>5</sup> Negotiation and arbitration are

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<sup>2</sup> *Id.*, at 860.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*, at 872.

<sup>5</sup> *Id.*, at 894.

clearly appropriate in disputes between carriers with complicating factors such as the proper level of compensation for all parties.<sup>6</sup>

If the Board were to hold that it did not have jurisdiction over the issues raised by Sprint, then Sprint would be without regulatory remedy and INS would be effectively beyond regulatory control of its operations. Such a result would be contrary to the stated policy of the Iowa Legislature and the provisions of Iowa Code chapter 476. The Board has the authority and responsibility to ensure that telecommunications services are provided in Iowa in a fair and non-discriminatory manner and can exercise jurisdiction where its actions do not violate federal law. As discussed above, consideration of the petition does not violate federal statutes.

Based upon the preceding analysis, the Board will deny INS's motion to dismiss this proceeding. Since the Board has found it has jurisdiction over the issues in this matter under state law, it will re-docket the matter as Docket No SPU-06-12 to consider the Sprint petition and will establish a procedural schedule and an evidentiary hearing. Toward that end, the Board directs the parties to participate in a telephone conference with its staff to discuss an appropriate schedule.

**IT IS THEREFORE ORDERED:**

1. The motion to dismiss filed June 5, 2006, by Iowa Network Services, Inc., is denied.
2. Docket No. ARB-06-2 is re-docketed as Docket No. SPU-06-12. All future filings related to this matter should refer to Docket No. SPU-06-12 and be

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<sup>6</sup> *Id.* at 899.

captioned as "Sprint Communications Company, L.P. v. Iowa Network Services, Inc."

Pleadings already filed in the ARB docket will remain in that file.

3. A telephone conference is scheduled for August 31, 2006, at 10 a.m.

Parties will be notified with a call-in number to participate.

**UTILITIES BOARD**

/s/ John R. Norris

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 28<sup>th</sup> day of August, 2006.