

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>QWEST COMMUNICATIONS CORPORATION,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">vs.</p> <p>SUPERIOR TELEPHONE COOPERATIVE; THE FARMERS TELEPHONE COMPANY OF RICEVILLE, IOWA; THE FARMERS & MERCHANTS MUTUAL TELEPHONE COMPANY OF WAYLAND, IOWA; INTERSTATE 35 TELEPHONE COMPANY, d/b/a INTERSTATE COMMUNICATIONS COMPANY; DIXON TELEPHONE COMPANY; REASNOR TELEPHONE COMPANY, LLC; GREAT LAKES COMMUNICATION CORP.; AND AVENTURE COMMUNICATION TECHNOLOGY, LLC,</p> <p style="text-align:center">Respondents.</p>	<p>DOCKET NO. FCU-07-2</p>
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**ORDER DOCKETING COMPLAINT, SETTING PROCEDURAL SCHEDULE,
DENYING MOTION FOR SUMMARY JUDGMENT, DENYING MOTIONS TO
DISMISS, DENYING MOTION TO DEFER DISCOVERY, AND DENYING CROSS-
MOTION FOR EMERGENCY EVIDENTIARY HEARING**

(Issued May 25, 2007)

BACKGROUND AND PROCEDURAL HISTORY

On February 20, 2007, Qwest Communications Corporation (QCC) filed with the Utilities Board (Board) a complaint pursuant to Iowa Code §§ 476.2, 476.3, and

476.5; 199 IAC Chapters 4 and 7; and 199 IAC 22.14 alleging violations of the terms, conditions, and application of the intrastate tariffs of the following telecommunications carriers: Superior Telephone Cooperative (Superior); The Farmers Telephone Company of Riceville, Iowa (Farmers–Riceville); The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa (Farmers & Merchants); Interstate 35 Telephone Company, d/b/a Interstate Communications Company (Interstate); Dixon Telephone Company (Dixon); Reasnor Telephone Company, LLC (Reasnor); Great Lakes Communications Corp. (Great Lakes); and Aventure Communication Technology, LLC (Aventure) (collectively referred to as Respondents).

In support of its complaint, QCC claims that the Respondents are engaging in a fraudulent practice by creating a scheme that involves free conference calls, chat rooms, adult content calling, podcasts, voice mail, and international calling services. QCC asserts that the Respondents are charging QCC excessive rates for their routing of calls to companies that advertise these free services and then provide kickbacks of a portion of the terminating access revenues to these free calling service companies (FCSCs).

QCC alleges that this scenario is inconsistent with the language and representations in the Iowa Telecommunications Association Tariff No. 1 (ITA Tariff) to which Respondents subscribe. QCC states that Section 1.1 of the ITA Tariff states:

[T]he provision of [switched access service] is specifically intended to provide exchange network access to [interexchange carriers delivering intrastate switched access traffic] for their own use or in furnishing their authorized intrastate services to End Users, and for

operational purposes directly related to the furnishing of their authorized services. Operational purposes include testing and maintenance of circuits, demonstration and experimental services and spare services.

(QCC Complaint, p. 12). QCC claims that the revenue received by the Respondents is not being used for the purposes stated in the ITA Tariff. In addition, QCC states that the Respondents are charging QCC for terminating calls via their intrastate tariffs when the rates are not set forth in the tariffs and are for calls that are actually terminated outside of the Respondents' local calling areas.

QCC also alleges that the Respondents are discriminating against their other customers when they share revenues on a preferential basis with the FCSC customers and that in addition to the alleged tariff violations and discrimination, the arrangements between Respondents and the FCSCs constitute an unfair and unreasonable practice under Iowa Code § 476.3.

On March 12, 2007, Reasnor filed a motion for summary judgment with the Board and sought dismissal from this case. Reasnor states that it provides legitimate and necessary access service to QCC and that the Board does not have the authority to regulate the rates of small incumbent local exchange carriers (ILECs), such as Reasnor. Reasnor also states that granting the relief sought by QCC would unlawfully interfere with the Federal Communication Commission's (FCC) regulation of interstate conference call services. Reasnor asserts that the overwhelming majority of the traffic at issue is interstate in nature (more than 99 percent for Reasnor) and that the number of intrastate calls are too de minimus to warrant the exercise of Board jurisdiction.

On March 30, 2007, Superior, Great Lakes, and Aventure filed a joint motion to dismiss, requesting that the Board dismiss QCC's complaint against these three Respondents because the Board lacks the jurisdiction to hear QCC's complaint. In support of their motion, Superior, Great Lakes, and Aventure state that the Board does not have jurisdiction over the rates of small local exchange carriers (LECs) and consequently the Board does not have jurisdiction over the intrastate switched access charges at issue in this case.

Also on March 30, 2007, Farmers–Riceville, Farmers & Merchants, Interstate, and Dixon filed a motion to dismiss QCC's complaint against these four Respondents. In support of their motion, these companies state that QCC's complaint is about the rate QCC is being charged for terminating access, which is an issue over which the Board does not have jurisdiction. In addition, these Respondents state that the Board does not have jurisdiction over the FCSCs, over the payments by the Respondents to the FCSCs, or over the international and interstate traffic, all of which are issues raised in QCC's complaint. In addition to their motion to dismiss, these Respondents also request emergency injunctive relief to prevent Qwest from blocking calls and discontinuing service.

Also on March 30, 2007, Reasnor filed a motion to defer discovery or, in the alternative, to extend the period of time for Reasnor to respond to discovery requests propounded by QCC. In support of its motion, Reasnor states that a ruling on its motion for summary judgment may negate the need for Reasnor to respond to QCC's request. As such, Reasnor requests the Board defer Reasnor's responses until after

the Board rules on its summary judgment motion. In the alternative, Reasnor requests an extension of time to respond to the discovery requests.

On April 10, 2007, QCC filed its response to Reasnor's motion to defer its discovery responses until after the Board rules on the motion for summary judgment. In support of its response, QCC states that discovery is necessary to understand the scope of the parties' conduct in this case.

On April 12, 2007, Reasnor filed a notification with the Board that it had responded to the data requests propounded by QCC.

On April 13, 2007, QCC filed responses to Reasnor's motion for summary judgment as well as responses to the motions to dismiss filed by the other Respondents. In its response to Reasnor's motion, QCC states that Reasnor does not meet the standard for summary judgment because there is an issue of material fact before the Board. In its response to the motions to dismiss filed by the remaining Respondents, QCC states that the Board has specific jurisdiction to hear QCC's complaint and as such, the Respondents' motions should be denied.

Also as part of QCC's April 13, 2007, responses, QCC filed a cross-motion requesting an emergency evidentiary hearing before the Board to enjoin all the Respondents from continuing what QCC terms their "admitted discrimination." QCC states that in Reasnor's motion for summary judgment and in the other Respondents' motions to dismiss, all of the Respondents admit to discriminating against QCC by acknowledging compensation to the FCSCs for acting as a local exchange customer, but requiring other local exchange customers to pay tariffed rates to obtain the same

services. QCC seeks an evidentiary hearing to address this alleged discrimination issue.

On April 25, 2007, Superior, Great Lakes, and Aventure filed a reply to QCC's response to their motion to dismiss as well as a resistance to QCC's cross-motion for emergency evidentiary hearing, stating that the Board does not have jurisdiction over the issues raised by QCC and therefore cannot set an evidentiary hearing to review them.

On April 27, 2007, Reasnor filed a reply to QCC's response to Reasnor's motion for summary judgment as well as a resistance to QCC's cross-motion for emergency evidentiary hearing. Reasnor states that QCC is not a Reasnor local exchange customer and therefore QCC lacks standing to bring a complaint on behalf of retail customers based on Reasnor's alleged discrimination in the provision of local exchange service.

On May 1, 2007, Farmers–Riceville, Farmers & Merchants, Interstate, and Dixon filed their reply to QCC's response to their motion to dismiss as well as a response to QCC's cross-motion for emergency evidentiary hearing stating that such emergency adjudicative relief pursuant to Iowa Code § 17A.18A is only available to prevent immediate danger to the public health, safety, and welfare and not where the only identified harm is to the economic interest of the parties.

On May 15, 2007, QCC filed a motion to compel answers to discovery requests propounded upon Reasnor.

DISCUSSION

This order will address the motions that appear before the Board in this docket at this time. Reasnor seeks a motion for summary judgment while the remaining Respondents seek dismissal of QCC's complaint. Because the issues underlying each motion are substantially similar, the Board will address all three motions at one time. The Board will then address QCC's cross-motion for emergency evidentiary hearing. With respect to Reasnor's motion to defer discovery, the Board notes that on April 12, 2007, Reasnor filed a notification of responding to QCC's data requests. Therefore, this motion is moot. The Board notes, however, that on May 15, 2007, QCC filed a motion to compel additional discovery responses from Reasnor. This order will not address that motion since Reasnor has not had sufficient time to respond.

MOTION FOR SUMMARY JUDGMENT AND MOTIONS TO DISMISS

Reasnor's position:

On March 12, 2007, Reasnor filed a motion for summary judgment seeking dismissal from this action. In support of its motion, Reasnor states that it provides access service to interexchange carriers (IXCs), such as QCC, to permit the IXCs' customers to originate calls from, and terminate calls to, customers located in the Reasnor exchange. Reasnor also states that it has entered into a business relationship with One Rate Conferencing, LLC (One Rate), which is a conference call service provider that does business in the Reasnor exchange. Reasnor asserts that One Rate provides fee-based conference calling services to enable employees of businesses such as retailers, financial institutions, stockbrokers, and law firms to talk

with each other at the same time. Reasnor states that it is reasonable, lawful, and consistent with its tariffs and the public interest for Reasnor to enter into an arrangement with One Rate. Reasnor asserts that its relationship with One Rate increases the use of its rural telephone plant and allows Reasnor to replace deteriorating facilities because of the access revenues it receives as a result of this relationship.

Reasnor also states that it specifically relied on the FCC's decision in AT&T Corp. v. Jefferson Telephone Co., "Memorandum Opinion and Order," 16 FCC Rcd 16130 (2001), when it agreed to share some of its revenue from access services with One Rate. Reasnor states that in AT&T v. Jefferson Telephone, the FCC considered a complaint filed by AT&T concerning the lawfulness of an access revenue sharing arrangement between Jefferson Telephone and an information provider.¹ Reasnor asserts that in that case, Jefferson Telephone, an ILEC, entered into a revenue sharing arrangement with one of its customers, International Audiotext Network (IAN), an information provider of chat line services. Reasnor states that Jefferson Telephone billed AT&T for terminating access service at the tariffed rate and Jefferson Telephone then made payments to IAN based on the amount of access revenues that Jefferson Telephone received from terminating calls to IAN.² Reasnor asserts that the FCC dismissed AT&T's complaint, which alleged the access revenue

¹ Reasnor's "Motion for Summary Judgment," pp. 11-12, citing AT&T Corp. v. Jefferson Tel. Co., 16 FCC Rcd 16130 at ¶ 2.

² Reasnor's "Motion for Summary Judgment," p. 12, citing id., at ¶¶ 4-5.

sharing arrangement unlawful, ruling that Jefferson Telephone's revenue sharing arrangement with IAN was a permissible arrangement.³

Reasnor also asserts that QCC's complaint should be dismissed with respect to Reasnor because the filed rate doctrine bars both state and federal claims that attempt to challenge the terms of a tariff that a federal agency has allowed to take effect.⁴ Reasnor claims that the filed rate doctrine bars any challenge that, "if successful, would have the effect of changing the filed tariff."⁵ Reasnor contends that QCC's complaint attempts to change Reasnor's federally-approved tariff rate for terminating access charges, which is contrary to the filed rate doctrine.

Finally, Reasnor asserts that QCC's complaint should be dismissed with respect to Reasnor because the Board lacks the authority to regulate the intrastate rates of small ILECs under Iowa law and because the FCC has exclusive jurisdiction over 99 percent of all the calls terminated by Reasnor to One Rate's conference call platform because they are interstate in nature. Reasnor argues that even though the Board has limited jurisdiction over less than one percent of the intrastate calls terminated by Reasnor to One Rate, if the federal regulation dictates one result and the state regulation another, the state regulation is preempted to the extent that it directly conflicts with federal law.

³ Reasnor's "Motion for Summary Judgment," p. 12, citing Id.

⁴ Reasnor's "Motion for Summary Judgment," p. 14, citing Evanns v. AT&T, 229 F.3d 837, 840-41 (9th Cir. 2000).

⁵ Reasnor's "Motion for Summary Judgment," p. 16, citing Brown v. MCI WorldCom Network Services, Inc., 277 F.3d 1166, 1170 (9th Cir. 2002).

Respondents' positions:

The remaining Respondents offer arguments similar to Reasnor's when supporting their motions to dismiss QCC's complaint. The remaining Respondents assert that the Board lacks the jurisdiction to hear QCC's complaint. They argue that the issue before the Board is one of economics, not one of law or regulatory policy, and economics is not within the jurisdiction of the Board. Farmers–Riceville, Farmers & Merchants, Interstate, and Dixon also cite to AT&T v. Jefferson Telephone to rebut QCC's argument that the sharing of access revenue with a customer is unlawful and that QCC's assertion of discrimination and unfair and unreasonable practices are unfounded.

QCC's position:

QCC responds to Reasnor by stating that it believes it has evidence indicating that Reasnor has an access revenue sharing relationship with an FCSC other than One Rate and that Jefferson is not controlling in this case because Jefferson never addressed the issue of discrimination in the provision of local exchange service. In addition, QCC responds to all Respondents by asserting that the Board has jurisdiction to hear QCC's complaint against all of the Respondents because the Board has the authority to hear complaints regarding intrastate local exchange service provided pursuant to the Respondents' local exchange tariffs on file with the Board. Finally, QCC asserts that the Board has the authority to hear its complaint against all of the Respondents because the issue before the Board involves discrimination in the provision of local services and the Board has express jurisdiction to hear such complaints.

Discussion:

Summary judgment is appropriate if the entire record, including pleadings and affidavits on file, demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). A motion to dismiss should be granted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Dible v. Scholl, 410 F. Supp. 2d 807, 810-11 (N.D. Iowa 2006). After reviewing the motions and responses filed by the parties in light of these standards, the Board will deny Reasnor's motion for summary judgment and deny the other Respondents' motions to dismiss.

Reasnor claims that its business relationship with One Rate is consistent with its filed local exchange tariff and that the FCC has approved similar access revenue sharing arrangements. QCC argues, however, that Reasnor has access revenue sharing arrangements with other FCSCs in addition to One Rate and the question remains before the Board as to whether those relationships are also consistent with Reasnor's local exchange tariff.

Reasnor and the other Respondents argue that the Board lacks the authority to regulate the rates of small LECs and that because intrastate traffic makes up such a small percentage of the total traffic terminated by Reasnor and the Respondents, any decision by the Board may be contrary to any decision by the FCC regarding interstate and international traffic and therefore may be preempted to the extent that it directly conflicts with federal law. QCC argues that despite the small percentage of traffic that is intrastate, the Board has jurisdiction to hear the complaint regarding that

traffic. In addition, QCC argues that this case raises the issue of discrimination among the Respondents' local exchange customers and that a claim of discrimination is within the Board's jurisdiction.

The Board finds that there are genuine issues of material fact regarding the revenue sharing arrangements and the Respondents' local and intrastate access service tariffs. The Board also finds that it has the authority to hear QCC's complaint as it relates to intrastate traffic. The Board is aware of its jurisdictional limits with respect to interstate and international traffic, which is at issue in various proceedings before both the FCC and federal courts. However, the Board finds that it is appropriate for the issue as it relates to intrastate traffic to be before the Board at this time.

In its complaint, QCC raises the issue of whether there is unlawful discrimination by the Respondents against their other customers when they share access revenues on a preferential basis with selected customers. The Respondents assert that there is no discrimination at issue in this case because the FCC has determined in AT&T v. Jefferson Telephone that access revenue sharing arrangements are acceptable. QCC distinguishes Jefferson Telephone from the present case by stating that in Jefferson Telephone, the FCC did not address the issue of discrimination, an issue that QCC specifically raised in its initial complaint. Moreover, the Respondents assert that QCC does not have the proper standing to bring this issue before the Board, but QCC contends that the Respondents' alleged discrimination is violative of fair competition and the public interest.

It is clear from the filings submitted by the parties that there is a genuine issue of material fact regarding the issues raised by QCC in its petition. Moreover, given the controversy surrounding the issues raised by QCC, the Respondents have not met the standard for dismissal of QCC's petition. Therefore, the Board will deny Reasnor's motion for summary judgment and deny the other Respondents' motions to dismiss. The Board will docket QCC's complaint pursuant to the statutes and rules cited therein and establish a procedural schedule for an investigation of these issues and any others that may develop during the course of this proceeding.

The Board notes that there were many arguments made by the parties in support of their respective motions and responses. The Board has considered all of the issues raised by the parties, but some of these arguments are not mentioned in this analysis because, at this point of the proceedings, those arguments are not persuasive. If any of these issues develop into more substantive arguments throughout this proceeding, the Board will address them at the appropriate time.

QCC'S CROSS-MOTION FOR EMERGENCY EVIDENTIARY HEARING

Parties' positions:

QCC seeks an emergency evidentiary hearing to discern the scope of the alleged discriminatory conduct of all of the Respondents. Reasnor responds by stating that no emergency hearing is required because QCC is not a local exchange customer of Reasnor and therefore lacks the proper standing to bring such a complaint. Superior, Great Lakes, and Aventure respond by stating that the conduct alleged by QCC relates solely to access rates and the Board has no jurisdiction over access charges, which are exempt from rate regulation under Iowa Code § 476.1.

Finally, Farmers–Riceville, Farmers & Merchants, Interstate, and Dixon respond by stating that Iowa Code § 17A.18A suggests that QCC can only obtain the type of emergency relief requested if it can establish that it is necessary to prevent an immediate danger to the public health, safety, or welfare and that QCC has failed to meet that burden.

Discussion:

The Board agrees with the position asserted by Farmers–Riceville, Farmers & Merchants, Interstate, and Dixon and finds that QCC has not alleged facts sufficient, if proven, to meet its burden under Iowa Code § 17A.18A. That section provides that "an agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action." QCC's motion for emergency adjudicative proceeding does not allege or demonstrate an immediate danger to the public health, safety, and welfare. QCC identified only a potential economic harm to itself and to other carriers. The Board believes that as a general proposition and in the absence of unique circumstances not alleged here, economic disputes between carriers do not rise to the level of an immediate danger to public health, safety, and welfare so long as no party is threatening to block emergency calls as a response to the economic dispute. Therefore, the Board will deny QCC's request for emergency adjudicative relief.

DOCKETING COMPLAINT

QCC filed its initial complaint pursuant to 199 IAC chapters 4 and 7, and 199 IAC 22.14, and Iowa Code §§ 476.2, 476.3, and 476.5. QCC's complains about the

terms, conditions, and application of the intrastate access services tariff of the named Respondents. The Board has reviewed the complaint and responses filed by the named Respondents and will docket the complaint for further investigation pursuant to Iowa Code §§ 476.2, 476.3, and 476.5, and 199 IAC chapters 4 and 7, and 199 IAC 22.14.

In its complaint, QCC also requested emergency injunctive relief to prohibit the Respondents from directly or indirectly sharing any switched access revenue with any of its customers, to prohibit the Respondents from billing QCC for switched access revenues in excess of the amounts billed during the first six months of 2005, and to permit QCC to block retail and wholesale traffic bound for any of the Respondents' exchanges. As discussed above, the Board finds that QCC has not demonstrated that it will suffer irreparable harm if the injunction is not granted or that there is an immediate danger to the public health, safety, or welfare. Therefore, the Board will deny the request for injunctive relief. However, the Board will set an appropriate procedural schedule to get to the merits of this dispute in a timely manner.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The complaint filed by Qwest Communications Corporation on February 20, 2007, against the following named Respondents: Superior Telephone Cooperative; The Farmers Telephone Company of Riceville, Iowa; the Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone

Company, d/b/a Interstate Communications Company; Dixon Telephone Company; Reasnor Telephone Company, LLC; Great Lakes Communication Corp.; and Aventure Communication Technology, LLC, is docketed for investigation as Docket No. FCU-07-2, pursuant to the statutes and rules identified in the complaint. The complaint is docketed for investigation of the matters asserted in the complaint and such other issues as may develop during the course of the proceedings.

2. The following procedural schedule is established for this proceeding:
 - a. Qwest Communications Corporation and any intervenors aligned with QCC shall file prepared direct testimony, with supporting exhibits and workpapers, on or before July 9, 2007.
 - b. Respondents and any intervenors aligned with them shall file rebuttal testimony, with supporting exhibits and workpapers, on or before July 30, 2007.
 - c. Qwest Communications Corporation and any intervenors aligned with QCC shall file reply testimony, with supporting exhibits and workpapers, on or before August 20, 2007.
 - d. A hearing for the purpose of receiving testimony and cross-examination of all testimony will commence at 9 a.m. on Wednesday, September 19, 2007, in the Board's hearing room, 350 Maple Street, Des Moines, Iowa. Parties shall appear at the hearing one-half hour prior to the time of hearing to mark exhibits. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at 515-281-5256 to request appropriate arrangements.

e. Any party desiring to file a brief may do so on or before October 8, 2007.

3. In the absence of objection, all workpapers shall become a part of the evidentiary record at the time the related testimony and exhibits are entered in the record.

4. In the absence of objection, all data requests and responses referred to in oral testimony or cross-examination, which have not previously been filed with the Board, shall become a part of the evidentiary record. The party making reference to the data request or response shall file an original and six copies at the earliest possible time.

5. In the absence of objection, if the Board calls for further evidence on any issue and that evidence is filed after the close of hearing, the evidentiary record shall be reopened and the evidence will become a part of the evidentiary record three days after filing. All evidence filed pursuant to this paragraph shall be filed no later than five days after the close of hearing.

6. Pursuant to 199 IAC 7.7(2) and (11), the time for filing responses or objections to data requests and motions will be shortened to five days from the date the motion is filed or the data request is served. All data requests and motions should be served by facsimile transfer or by electronic mail, in addition to United States mail.

7. The "Motion for Summary Judgment" filed by Reasnor Telephone Company, LLC, on March 12, 2007, is denied.

8. The "Motion to Dismiss" filed by Superior Telephone Cooperative; Great Lakes Communication Corp.; and Aventure Communication Technology, LLC, on March 30, 2007, is denied.

9. The "Motion to Dismiss" filed by The Farmer Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland, Iowa; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; and Dixon Telephone Company on March 30, 2007, is denied.

10. The motion to defer discovery filed by Reasnor Telephone Company, LLC, on March 30, 2007, is denied for mootness.

11. The cross-motions requesting emergency evidentiary hearing filed by Qwest Communications Corporation on April 13, 2007, are denied.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Krista K. Tanner

Dated at Des Moines, Iowa, this 25th day of May, 2007.