

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  IOWA TELECOMMUNICATIONS ASSOCIATION	DOCKET NOS. TF-07-125 TF-07-139
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**ORDER SETTING PROCEDURAL SCHEDULE  
AND SETTING DATE FOR HEARING**

(Issued November 15, 2007)

**BACKGROUND AND PROCEDURAL HISTORY**

On June 29, 2007, the Iowa Telecommunications Association (ITA) filed with the Utilities Board (Board) proposed tariff changes to its Access Service Tariff No. 1, identified as TF-07-125. ITA said that the proposed changes mirror changes made in the National Exchange Carrier Association (NECA) tariff, which is the interstate access service tariff used by Iowa local exchange companies that also concur in the intrastate ITA Access Service Tariff No. 1. One of the changes proposes to increase switched access charges by 16.8 percent.

On July 16, 2007, Sprint Communications Company L.P. (Sprint) and MCImetro Transmission Access Transmission Services LLC, d/b/a Verizon Access Transmission Services, and MCI Communications Services, Inc., d/b/a Verizon Business Services (collectively referred to as "Verizon"), filed separate motions to accept their late-filed resistances to ITA's tariff and a resistance to ITA's proposed tariff changes. In support of their resistances, Sprint and Verizon assert that ITA did

not provide proper service of the proposed tariff pursuant to 199 IAC 22.14(4). They also argue that the Board should not approve a significant increase in access rates without a substantial review of the entire access regime in Iowa.

On July 30, 2007, the Board issued an order granting Sprint's and Verizon's motions to accept their late-filed resistances to ITA's proposed tariff and suspending ITA's proposed tariff changes pending further order of the Board while it investigated the service and notice issues raised by Sprint and Verizon. Also as part of the July 30 order, the Board requested ITA file a response to Sprint's and Verizon's resistances on or before August 3, 2007.

On August 3, 2007, ITA filed its response. ITA states that it followed the requirements of 199 IAC 22.14(4)"b," which provides that an interexchange utility wanting to receive notice of new or changed access service tariffs must register with the Board and that neither Sprint nor Verizon are registered interexchange carriers (IXCs) pursuant to this rule. ITA also states that Sprint's and Verizon's objections do not support suspension or investigation of the proposed tariff. ITA states that the terms of the tariff mirror the provisions of the NECA tariff, identified as Exchange Carrier Association Tariff No. 5 (NECA No. 5) and that when changes are made to NECA No. 5 at the Federal Communications Commission (FCC), the same changes are filed for approval with the Board. ITA states that the FCC approved the proposed revisions to NECA No. 5 on June 28, 2007.

On August 9, 2007, Sprint and Verizon filed replies in support of their objections. Sprint and Verizon assert that they made diligent, good faith efforts to determine proper service pursuant to 199 IAC 22.14(5)"a," and that while the FCC approved NECA No. 5 for purposes of interstate traffic, the Board should take different, local considerations into account when reviewing ITA No. 1 for purposes of intrastate traffic.

On August 30, 2007, the Board issued an order approving ITA's proposed tariff and establishing a briefing schedule. As part of that order, the Board sought briefs from Sprint, Verizon, and ITA regarding the extent of the Board's jurisdiction to approve or deny the proposed increase and the reasons the Board may do so. Sprint and Verizon object to the 16.8 percent increase in the rate for intrastate access services. The Board identified two prior rulings that raise questions regarding the extent of the Board's jurisdiction of the appropriateness of intrastate access charges.

In Fibercomm, L.C., et al., v. AT&T Communications of the Midwest, Inc.<sup>1</sup> (hereafter referred to as *Fibercomm*), the Board determined that it has limited jurisdiction over the access service rates of competitive local exchange carriers (CLECs), to the extent that it finds, after notice and opportunity for hearing, that those CLECs have market power in the relevant markets. This jurisdiction is limited to CLECs, pursuant to the terms of Iowa Code § 476.101(1).

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<sup>1</sup> See In re: Fibercomm, L.C., et al., vs. AT&T Communications of the Midwest, Inc., "Final Decision and Order," Docket No. FCU-00-3, pp. 15-17 (issued Oct. 25, 2001).

In Interstate 35 Telephone Company, et al.<sup>2</sup> (hereafter referred to as *Interstate 35*), the Board determined that Iowa Code § 476.1 left the Board without jurisdiction over the access rates of incumbent local exchange carriers (ILECs) that are not subject to rate regulation. Given the Board's determinations in these two dockets and the jurisdictional limitations that they could impose, the Board requested a review by the parties of the jurisdiction issue.

Specifically, the Board asked the parties to brief the following issues:

1. What jurisdiction does the Board have with respect to the proposed change of rates in ITA No. 1? What about the Board's jurisdiction over the services in the tariff?
2. If the Board has rate jurisdiction, how should it be exercised, i.e., through a contested case proceeding, a rule making, or other docket?
3. If the Board has rate jurisdiction, what standards should it apply to the rates?
4. If the Board does not have rate jurisdiction, should access rates be included in ITA No. 1?
5. Should the filed rate doctrine apply to those rates if the Board lacks authority to review and approve them in a meaningful manner?

Because of the jurisdictional questions in this matter, the Board determined that it would be inappropriate to suspend ITA No. 1 pending the completion of this investigation. Therefore, the Board allowed ITA No. 1 to become effective as of

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<sup>2</sup> See Interstate 35 Telephone Company, d/b/a Interstate Communications, and Southwest Telephone Exchange Inc., d/b/a Interstate Communications, "Declaratory Order," Docket No. DRU-02-4, p. 3 (issued Oct. 18, 2002).

September 1, 2007, subject to investigation and to the extent the Board determines it has jurisdiction.

On September 21, 2007, Sprint, Verizon, and ITA filed initial briefs. The Rural Iowa Independent Telephone Association (RIITA) filed a statement with the Board supporting the questions raised in the Board's August 30, 2007, order, but stating that RIITA could not meaningfully participate by filing a brief pursuant to the established briefing schedule.

Sprint, Verizon, and ITA agreed that the Board has the appropriate jurisdiction to review the proposed change of rates in ITA No. 1, although they rely on different theories to reach that conclusion. Sprint asserts that Iowa Code §§ 476.3, 476.8, 476.11, and 476.101, along with 199 IAC 22.14 and 15, all describe the extent of the Board's regulatory jurisdiction in this matter. Verizon states that the Board has jurisdiction over carriers' services and interconnection arrangements. Verizon states that Iowa Code § 476.1 exempts small ILECs from having their rates determined through traditional rate-of-return regulation, but it does not excuse them from service or interconnection regulation. In other words, Verizon asserts that the rate regulation exemption in § 476.1 excuses qualifying ILECs from having their rates established by the Board through traditional rate-base regulation, but not from every provision in Chapter 476 that might pertain in any way to those ILEC charges. Verizon also states that Iowa Code § 476.11 grants the Board expansive authority to regulate carriers' interconnections with respect to toll traffic and that ITA's members are

subject to the Board's § 476.11 authority to enforce just, reasonable, and nondiscriminatory arrangements for toll interconnections, including switched access services.

ITA cites 199 IAC 22.14 and asserts that the Board has jurisdiction over the proposed changes to its intrastate access services tariff. Specifically, ITA states that subparagraph 22.14(2)"b"(2) expressly provides that "[a]ll elements of the filings under rule 22.14(476) including access service rate elements, shall be subject to review and approval by the board."

Sprint also states that the Board's decision in *Interstate 35* incorrectly limited the Board's jurisdiction over access rates in Iowa. Sprint suggests that the Board revisit its decision in *Interstate 35* and, in light of the access disputes currently before the Board, the Board should reverse that decision and exercise the full extent of its jurisdiction over intrastate access rates. Like Sprint, Verizon also suggests that the Board revisit and reverse its decision in *Interstate 35*. Verizon asserts that the developments in the years since the Board's decision in *Interstate 35* merit a new, more thorough consideration of the Legislature's intent with respect to the Board's regulatory authority over small ILEC access services.

Sprint suggests the Board review the proposed changes to ITA No. 1 through traditional ratemaking procedures or through a contested case proceeding where objectors are able to present evidence supporting their positions before the Board renders a decision. Sprint states, however, that this docket should be an adequate

vehicle for a careful and thorough review of the proposed changes to ITA No. 1. Verizon asserts that a contested case proceeding would be appropriate in order to address some of the problems that may be associated with access charges in Iowa, but also states that the Board could address access charge issues in this docket. ITA suggests the Board follow the procedures established in 199 IAC 22.14(5) for the review of an association's intrastate access service tariff.

Sprint, Verizon, and ITA also agree that the Board should apply a standard of "just, reasonable, and nondiscriminatory" access rates as suggested by Iowa Code § 476.11. Verizon notes that these are the same standards the Board used to evaluate CLEC access charges in the *Fibercomm* decision. Sprint and Verizon also assert, however, that the Board should consider using a benchmarking approach or market-based mechanisms to constrain access rates.

Sprint and Verizon agree that because the Board has jurisdiction over access rates, ITA's rates should be in its tariff. Sprint and Verizon also agree that the filed rate doctrine should not apply to ITA's access rates if it were determined that the Board lacked the authority to review and approve those rates. ITA does not comment specifically regarding the inclusion of access rates in ITA No. 1 or the applicability of the filed rate doctrine. However, ITA acknowledges the inclusion of access rates in ITA No.1.

On October 5, 2007, Sprint, Verizon, and ITA filed reply briefs generally restating their previous arguments. Also on October 5, 2007, AT&T Communications

of the Midwest, Inc., and TCG Omaha (collectively "AT&T") filed a response to the initial briefs filed by Sprint, Verizon, and ITA. AT&T states that it agrees with the analysis provided by Sprint and Verizon advocating the Board's jurisdiction over the access rates of smaller LECs. AT&T also asserts that the Board's previous ruling in *Interstate 35* (wherein the Board determined it did not have jurisdiction over access rates) seems fundamentally at odds with the Board's obligation to ensure just and reasonable rates.

RIITA did not file a reply to the initial briefs filed by Sprint, Verizon, and ITA.

## **DISCUSSION**

The Board has reviewed the briefs filed by Sprint, Verizon, and ITA and finds that it has the jurisdiction to review the proposed access charges in ITA No. 1, identified as TF-07-125 and TF-07-139, pursuant to Iowa Code §§ 476.1, 476.3, 476.11, and 199 IAC 22.14.

The Board recognizes that in *Interstate 35* it determined that Iowa Code § 476.1 left the Board without jurisdiction over the access rates of an ILEC that is not subject to rate regulation. In *Interstate 35*, the Board determined that § 476.1 exempted small ILECs from having their rates determined through traditional rate-of-return regulation and exempted the application of any other provision of Chapter 476 that pertained to ILEC rates. Unfortunately, the decision in *Interstate 35* has had impractical results. For example, IXCs are forced to pay access rates to LECs, but have no recourse before the Board or elsewhere to challenge those rates. Because

the LECs have market power over access service to their own customers, they may have the ability to charge rates that exceed their costs, and if that were to occur, it would be unfair and potentially anticompetitive to force IXCs to pay the LEC's rates without offering the IXCs a forum for review.

The Board agrees with Verizon, Sprint, and AT&T that § 476.1 exempts many LECs from traditional retail rate regulation, but does not exempt them from the specific provisions of § 476.11, which gives the Board jurisdiction to hear complaints regarding the limited subject matter of the terms and procedures for interchange of toll communications. This interpretation harmonizes these two statutes and gives effect to both, as required by Iowa Code § 4.7; the general exemption of § 476.1 applies to small LEC retail rates, but the specific provisions of the first paragraph of § 476.11, relating only to complaints regarding toll interconnections, operate as an exception to the general provision.

In reaching this conclusion, the Board also relies upon the arguments advanced by the ITA. The Board notes that in the *Interstate 35* docket, ITA was on record that the Board did not have jurisdiction over access rates. ITA has now changed its position and indicates that the Board has the authority to review such rates pursuant to 199 IAC 22.14. Much like the ITA, the Board has reconsidered its earlier conclusions in *Interstate 35* and finds those conclusions were incorrect. The Board will no longer follow the declaratory order issued in *Interstate 35*. Declaratory orders have the force and binding effect of a final order issued in a contested case

proceeding. Iowa Code § 17A.19(8). Those decisions are of limited precedential value. See Iowa Planners Network v. Iowa State Commerce Comm'n., 373 N.W.2d 106, 112 (Iowa 1985). The Board can therefore depart from the *Interstate 35* declaratory order so long as it explains its reasons for doing so, as the Board is doing in this order.

Thus, the Board agrees with Verizon, Sprint, and AT&T that the rate regulation exemption in Iowa Code § 476.1 excuses qualifying ILECs from having their retail rates established by the Board through traditional regulation, but does not exempt ILECs from every provision in Chapter 476 that might pertain to specific rates. The Board finds that § 476.1 does not exempt ILECs from complying with § 476.11, which grants the Board authority, upon complaint, to regulate carriers' interconnections with respect to toll traffic and necessarily includes the switched access services toll providers must purchase to originate and terminate most interexchange calls.

Because all of the parties that commented on the issues are in agreement that the Board has jurisdiction to review the proposed changes to ITA No. 1, the Board finds that this docket will be an adequate vehicle to assess whether the revised access rates proposed by ITA are just, reasonable, and non-discriminatory and will set this case for hearing pursuant to 199 IAC 22.14 and Iowa Code § 476.11 and establish a corresponding procedural schedule. The Board will follow the procedures established for the resistance to an intrastate access service tariff set forth in 199 IAC 22.14(5). Pursuant to 199 IAC 22.14(5)"c," Sprint and Verizon have the burden to

support their resistances to ITA's proposed tariff changes, but a better record will be developed if ITA first files testimony in support of its proposed changes. Therefore, the procedural schedule has been extended to allow Sprint and Verizon the final opportunity to file direct testimony prior to the hearing.

Finally, the Board agrees with the parties and will apply a standard of "just, reasonable, and nondiscriminatory" to the proposed tariff revisions.

### **ORDERING CLAUSES**

#### **IT IS THEREFORE ORDERED:**

1. The following procedural schedule is established in this proceeding:
  - a. Iowa Telecommunications Association and any other parties aligned with it shall file prepared direct testimony, with supporting exhibits and workpapers, on or before December 21, 2007.
  - b. Sprint Communications Company L.P., MCImetro Transmission Access Transmission Services LLC, d/b/a Verizon Access Transmission Services, and MCI Communications Services, Inc., d/b/a Verizon Business Services (collectively referred to as "Verizon"), and any other parties aligned with them shall file prepared testimony, with supporting exhibits and workpapers, on or before January 28, 2008.
  - c. Iowa Telecommunications Association and any other parties aligned with it shall file prepared reply testimony on or before February 18, 2008.

d. Sprint Communications Company L.P., Verizon, and any other parties aligned with them shall file prepared rebuttal testimony on or before March 10, 2008.

e. A hearing for the purpose of receiving all pre-filed testimony and cross-examination of all testimony will commence at 9 a.m. on Tuesday, April 1, 2008, in the Board's hearing room at 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.

f. Any party desiring to file a brief may do so on or before April 14, 2008.

2. 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.

3. 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.

4. 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.

5. The parties are directed to electronically submit prepared testimony and exhibits to Board staff when technically feasible.

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

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Dated at Des Moines, Iowa, this 15<sup>th</sup> day of November, 2007.