STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: FIBERCOMM, L.C., FOREST CITY TELECOM, INC., HEART OF IOWA COMMUNICATIONS, INC., INDEPENDENT NETWORKS, L.C., AND LOST NATION-ELWOOD TELEPHONE COMPANY, Complainants, vs. AT&T COMMUNICATIONS OF THE MIDWEST, INC., Respondent.	DOCKET NO. FCU-00-3

FINAL DECISION AND ORDER

(Issued October 25, 2001)

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PROCEDURAL HISTORY

On August 16, 2000, FiberComm, L.C. (FiberComm), Forest City Telecom, Inc. (FCTI), Heart of Iowa Communications, Inc. (Heart of Iowa), Independent Networks, L.C. (IN), and Lost Nation-Elwood Telephone Company (Lost Nation) jointly filed a complaint against AT&T Communications of the Midwest, Inc. (AT&T). The complainants requested Utilities Board (Board) action "prohibiting AT&T from withdrawing its interexchange services from the customers of complainants and other similarly situated competitive local exchange carriers (CLECs) serving various portions of rural Iowa." AT&T filed an answer on September 25, 2000. The Board docketed the matter as a formal complaint proceeding identified as Docket No. FCU-00-3.

The complaint alleges AT&T is attempting a selective withdrawal from the interexchange market by instructing complainants to "cease routing all traffic to AT&T's network." According to attachments to the complaint, AT&T has refused to provide payment for billed originating and terminating access services rendered by the complainants, arguing it did not order the services from the complainants and thus was not obligated to pay for them.

The complaint alleges a violation of Iowa Code § 477.11 (2001), which provides that "[L]ong distance companies shall furnish equal facilities to any local exchange within the state desiring same. . .";[1] a violation of § 476.8, which provides that "[E]very public utility is required to furnish reasonably adequate service and facilities";[2] and inconsistency with universal service principles by attempting to single

[1] Complaint, ¶ 16.
[2] Complaint, ¶ 17.

out rural customers of CLECs.[3] The complaint alleges jurisdiction pursuant to § 476.11.[4]

Petitions to intervene were filed by Goldfield Access Network, L.C. (Goldfield), Coon Rapids Municipal Utilities (Coon Rapids), Laurens Municipal Broadband Communications Utility (Laurens), and the Iowa Association of Municipal Utilities (IAMU). No objections to any of the requests for intervention were filed and the Board granted the requests. Each of the complainants, and each of the intervenors other than IAMU, is a competitive local exchange carrier (CLEC). The complainants and CLEC intervenors will hereinafter be collectively referred to as "the CLECs."

Upon receipt of the complaint, the Board ordered a meeting, facilitated by Board staff, among the complainants, AT&T, and the Consumer Advocate Division of the Department of Justice (Consumer Advocate). The meeting, which was intended to clarify the facts and resolve differences, was held on October 10, 2000. In addition to the complainants, AT&T, Consumer Advocate, and some of the intervenors attended the meeting.

The parties were unable to resolve their differences at the meeting, so direct and responsive testimony was prefiled pursuant to the procedural schedule set by the Board. Hearings for the purpose of cross-examination of the prefiled testimony were held on February 21 through 23, 2001, and again on March 21 and 22, 2001. Initial briefs were filed on April 25, 2001. Responsive briefs were filed on May 25, 2001.

On April 23, 2001, Coon Rapids and Laurens filed a motion to reopen the hearing for the purpose of taking additional evidence. On May 2, 2001, AT&T filed a

[3] Complaint, ¶ 18.
[4] Complaint, ¶ 14.

resistance to the motion to reopen. On May 11, 2001, Coon Rapids and Laurens filed a reply to AT&T's resistance to reopen the hearing, and on September 6, 2001, the Board issued an order denying the motion.

The complaint asks that the Board interpret the obligations of the complainants and AT&T pursuant to Iowa law. It also asks that the Board order AT&T to pay complainants, based upon complainants' tariffed rates, for access services that have already been provided to AT&T.

SUMMARY OF FACTS

The complainants and intervenors provide competitive local exchange service in various communities in Iowa, typically in competition with either Qwest Corporation (Qwest) or Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom). (Tr. 51, 95, 171, 216, 241, 341, 402, 480.) These CLECs are generally the only alternative to the incumbent LEC for local exchange service in each community. (Tr. 55, 99, 175.) Most of the CLECs have obtained significant market shares in their respective exchanges, particularly among the facilities-based CLECs serving the smaller exchanges. (Ex. 113; Tr. 443, 533.) However, some of the CLECs (those that rely primarily or exclusively on resale of unbundled network elements in larger exchanges) have smaller market shares. (Ex. 13, 108; Tr. 343, 362, 390.)

The CLECs offer a variety of telecommunications services, sometimes including interexchange service. (Tr. 79, 119, 343.) Many of the CLECs provide access service to interexchange carriers (IXCs) through Iowa Network Services, Inc., (INS), which operates a centralized equal access tandem. (Tr. 265, 276, 279, 359.)

IXCs purchase access services from a LEC in order to originate long distance calls from, and terminate long distance calls to, the LEC's customers in a particular exchange. (Tr. 178-79, 226.) INS coordinates the CLECs' provision of intrastate access services to IXCs such as AT&T. (Tr. 53, 96, 172, 218, 276, 279, 288, 304-05.)

Each of the CLECs adopted and filed with the Board an intrastate access tariff that concurs in the access tariff filed by the Iowa Telecommunications Association (ITA), which in turn is based upon (but does not entirely mirror) the interstate access tariff filed by the National Exchange Carrier Association (NECA) with the Federal Communications Commission (FCC). (Tr. 53, 62, 96, 102, 172, 217-18, 243, 345, 430, 500.) The CLECs' rates for intrastate access service are approximately twice the rates charged by Iowa Telecom, and three to four times the rates charged by Qwest, for similar access services. (Tr. 846, 889, 927.)

AT&T believes it should not be required to purchase and pay for access services from the CLECs at rates AT&T deems to be non-competitive. (Tr. 1003.) In 1998, AT&T adopted a national policy under which it would refuse to pay for CLEC access services in exchanges where the ILEC access charges are lower than those of the CLEC. (Tr. 698.) Most of the CLECs were notified of this policy some time after they had provided access service to AT&T. The CLECs challenge the legality of AT&T's policy in this proceeding.

To summarize, AT&T has refused the CLECs' access services and charges in a number of Iowa exchanges because each CLEC's access charges are higher than the ILEC's charges in the same exchange. As a result, customers in these

exchanges who wish to purchase interexchange service from AT&T must order their local exchange service from the ILEC. These are the basic facts underlying this complaint proceeding, as shown in the record made before the Board; further facts from the record will be identified and discussed as necessary.

ISSUES

A. Are AT&T's actions in violation of Iowa law?

1. Summary of arguments

Complainants argue that AT&T's actions are in violation of Iowa Code § 477.11, which provides in relevant part that "Long distance companies shall furnish equal facilities to any local exchange within the state desiring same . . . ." This statute was passed in 1933 in response to State v. Northwestern Bell Telephone Co., 240 N.W. 252 (Iowa 1932), and requires long distance companies to furnish equal facilities to any local exchange carrier desiring those facilities. Complainants conclude that § 477.11 "means that AT&T is required to connect with the CLECs serving in exchanges where AT&T connects with the ILEC in that exchange." (Complainants' Init. Br. p. 7.)

The complainants state they provided access service to AT&T's long distance service. (Complainants Init. Br. p. 3.) AT&T refused to pay for the access services provided by complainants and states that access to AT&T long distance services is not to be made available to the complainants' customers. (Id.) The complainants contend that AT&T's actions amount to a unilateral withdrawal of service that violates Iowa law, including § 477.11. (Complainants Init. Br. pp. 6-10.)

AT&T argues it has fully complied with § 477.11. (AT&T Init. Br. pp. 43-47.) AT&T argues the term “local exchange” as used in § 477.11 refers only to facilities owned by franchised facilities-based local exchange carriers, not CLECs. Section 477.10 defines "local exchange" as "a telephone line or lines. . .operating by virtue of a franchise granted by a city furnishing telephonic communication between two or more members of the public within the same city, village, community, locality or neighborhood." (AT&T Init. Br. p. 44.) Similarly, § 476.96(5) defines the term “local exchange carrier" as ". . . any person that was the incumbent and historical rate-regulated wireline provider of local exchange services or any successor to such person that provides local exchange service under an authorized certificate of public convenience and necessity within a specific geographic area described in maps filed with and approved by the Board as of September 30, 1992." (AT&T Reply Br. pp. 39-42.)

Based on the above definitions, AT&T argues § 477.11 only requires it to interconnect with historical rate-regulated ILECs and does not require AT&T to interconnect with every CLEC in Iowa. (Id.)

AT&T also contends it is not singling out rural customers and selectively withdrawing from rural markets and therefore is not violating § 476.101(9), which prohibits any action that disadvantages a customer who takes service from another carrier. (AT&T Reply Br. at pp. 42-45.) AT&T has established physical connections with LECs throughout Iowa and can serve every end user who takes service from a LEC from which AT&T orders access service. AT&T has declined to purchase access service from some local carriers that charge rates higher than those of the

relevant ILEC. Thus, AT&T believes the cause of any disadvantage that may be suffered by a CLEC's customers is the CLEC, not AT&T.

Complainants respond that the municipal franchise language of § 477.10(1) is no longer applicable, since municipal franchises were largely replaced by certificates of public convenience and necessity granted by the Board under § 476.29. (Complainants Init. Br. pp. 8-9.) These certificated CLECs are operating pursuant to legally-granted authority from the appropriate governmental body under current state law, which satisfies the purpose of the "franchise" requirement in § 477.10(1)'s definition of the "local exchange." (Id.)

Complainants also argue the definition of "local exchange carrier" from § 476.96(5) does not apply to § 477.11, as the application of the definitions in § 476.96 is expressly limited to §§ 476.95 through 476.102. (Complainants Init. Br. pp. 9-10.) Complainants also rely upon Northwestern Bell Tel. Co. v. Hawkeye State Tel. Co., 165 N.W.2d 771, 775 (Iowa 1969), which interpreted § 488.11 (predecessor to § 477.11) as requiring that any local telephone exchange that desires connection with a long distance telephone company "shall have such facilities furnished to it on an equal basis in order to avoid discrimination among various exchanges." (Id.)

2. Analysis

The Board's analysis of this issue starts with Iowa Code § 476.101(9), which provides in relevant part as follows:

> A telecommunications carrier, as defined in the federal Telecommunications Act of 1996, shall not do any of the following:
>
> * * *

c. Take any action that disadvantages a customer who has chosen to receive services from another telecommunications carrier.

The language of this statute is clear and its application to the facts of this case is straightforward: By refusing to accept customers who have chosen a CLEC as their local exchange service provider, but accepting other customers in the same exchange who receive local exchange service from the ILEC, AT&T[5] has taken action that disadvantages the first group of customers solely because of the customers' choice of another telecommunications carrier, in violation of the plain language of this statute. The Board finds that AT&T's actions in refusing to serve customers of the complainants and intervenors are in violation of § 476.101(9). The actions that disadvantage the customers are AT&T's, not the CLEC's; AT&T's claim that the CLECs cause any customer disadvantage is rejected.

AT&T's actions also violate § 477.11. The principle behind this statute is that all legitimate telephone calls should be completed, that is, no customer's interexchange call should be blocked due to a commercial dispute between carriers or the decision of an IXC to refuse to connect with a particular LEC. Thus, the statute requires that long distance companies connect to local exchange carriers upon request. It is apparent that § 477.11 was adopted in response to State v. Northwestern Bell, supra, in which the Court held that in the absence of a contrary statutory provision, long distance companies were free to choose with which local exchange carriers they would connect. The General Assembly clearly found this an unacceptable situation, as it presented the possibility of multiple telephone networks that were not interconnected, meaning calls might not be completed between any two

telephone customers. In order to remedy this situation, the General Assembly adopted the statutory provision the Court found missing, now identified as § 477.11. In the absence of § 477.11, the necessary result would be either: (a) CLECs like the complainants would have to carry AT&T calls for free (giving AT&T a competitive advantage over IXCs that pay for the access services they use) or (b) The LECs would have to block the calls, that is, some local exchange customers would not be able to receive calls from customers of some long distance companies. Neither of these results is in the public interest.

In this case, for example, if the parties were permitted to block calls in the manner they have suggested, an AT&T customer located in Des Moines or Chicago would be unable to call a customer of one of the complainant CLECs simply because AT&T and the CLEC are unable to agree on the reasonableness of the CLEC's terminating access charges. Also, customers of the CLECs would be unable to access toll-free numbers served by AT&T. Each of these results would be contrary to the state's policy of encouraging the availability of communications services from a variety of providers, see § 476.95, and the public interest as expressed in § 477.11.

AT&T's argument that § 477.11 requires that the LEC have a municipal franchise is based on an antiquated interpretation of Iowa law. The municipal franchise language of § 477.11 dates back to 1933, when the statute was adopted. At that time, each telephone utility derived its authority to operate in a community from a city franchise. That situation was changed in 1992 when § 476.29 was enacted. Section 476.29(1) requires that telephone utilities must have a certificate of

[5] AT&T is a "telecommunications carrier" as defined in the Telecommunications Act of 1996, see 47 U.S.C.

public convenience and necessity issued by the Board before furnishing land-line local telephone service in Iowa. Section 476.29(6) specifically provides that the Board-issued certificate (and the tariffs filed with the Board) "are the only authority required for the utility to furnish land-line local telephone service," completely displacing the municipal franchise requirement.[6]

Moreover, AT&T's interpretation of the municipal franchise requirement would defeat the very purpose of § 477.11. The statute was enacted in response to a judicial decision permitting an IXC to serve one local telephone company in Allerton while refusing to connect with the other local telephone company in the same town. Section 477.11 was intended to prohibit that discrimination between local exchange companies by requiring the IXC to connect with both LECs. AT&T's interpretation would defeat the purpose of the statute and therefore must be rejected.

Taken together or separately, §§ 476.101(9) and 477.11 require that AT&T interconnect with all local exchange carriers in any particular exchange, including the complainant and intervenor CLECs, and complete all calls originating or terminating via AT&T's services, regardless of the identity of the LEC. Thus, any interexchange calls originating outside the called user's exchange using AT&T services must be completed to the called user's telephone number and AT&T must pay the tariffed terminating access charges, even if the user's chosen LEC has terminating access charges that are higher than AT&T might like. Similarly, calls originating from

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§ 153(44).

[6] The municipality's power to regulate the use of its highways, streets, rights-of-way, and public grounds is preserved by § 476.29(6), but only "to the extent not inconsistent with this section." It would be inconsistent with § 476.29(6) to make a municipal franchise a requirement to obtaining mandatory interconnection with IXCs, since a CLEC cannot realistically offer local exchange service under its certificate without also offering access to an IXC.

customers of the complainant CLECs must be carried by AT&T, so long as AT&T serves any LEC in the exchange, and AT&T must pay the tariffed originating access charges.

This does not put AT&T at the mercy of an "unconstrained monopoly," as AT&T argues. (AT&T Init. Br. p.51.) If AT&T (or any other interexchange carrier) believes at any time that a particular CLEC's access charges are unreasonable, the interexchange carrier may file a written complaint with the Board pursuant to § 476.11, asking the Board to determine the just and reasonable terms and procedures for exchange of toll traffic with the CLEC, as discussed below.

B. Does the Board have jurisdiction over the terms and procedures for the interchange of toll communications?

1. Summary of arguments

Complainants allege Iowa Code § 476.11 grants the Board authority to determine the terms and procedures for the interchange of toll communication upon receipt of a complaint in writing. (Complaint, paragraph 14.) However, there was some confusion regarding this point at hearing, where some of the complainants' witnesses testified the Board has no jurisdiction over their access rates, even if a timely objection is filed (Tr. 133, 253, 414, 499), while other complainant witnesses were either unsure or thought the Board has the authority to analyze the reasonableness of CLEC access rates. (Tr. 78, 274, 277, 384, 389.)

At least some of the witnesses appear to believe there is tension with regard to the Board's authority over nonrate-regulated telephone companies and the authority of the Board to resolve complaints brought under § 476.11. On brief, however, complainants acknowledge that § 476.1B(3)(a) expressly preserves Board

authority under § 476.11 over municipally owned telecommunications utilities. They also acknowledge that § 476.101(1) provides that CLECs are not subject to chapter 476 ***except*** as expressly provided and then states specifically that CLECs are subject to the Board's authority with respect to "interconnection." (Complainants' Init. Br. p. 7.) Thus, complainants recognize the Board's authority to review and set access charges under § 476.11.

AT&T also acknowledges the Board's authority under § 476.11 to determine the terms of arrangements between IXCs and CLECs. (AT&T Init. Br. pp. 53-54.) AT&T argues that if the Board requires IXCs to order access from CLECs, it should exercise its authority under § 476.11 to cap CLEC rates at a reasonable level. (Id.) Currently, the CLECs all charge access rates that are higher than the ILEC or NECA (federal) rates. At the very least, AT&T believes the Board should follow the FCC's holding in its "Seventh Report And Order And Further Notice Of Proposed Rulemaking" released April 27, 2001, in CC Docket No. 96-262, In the Matter of Access Charge Reform (hereinafter the Seventh Report And Order), and cap CLEC access rates at a more appropriate level. In that order, the FCC held that an IXC is not obligated to order access from a CLEC unless the CLEC's access rates are at or below the benchmark level established by the FCC in that order. CLECs proposing to charge a rate higher than the benchmark have no right to force IXCs to deal with them and must negotiate a contractual agreement. (Id.)

AT&T also argues that limiting the CLEC rates to the ILEC rates would be consistent with action taken in other states, noting that Missouri, Maryland, and Texas cap a new entrant's switched access rates at the ILEC levels. (AT&T Reply

Br. pp. 52-53.) Failure to do this will result in CLECs possessing unconstrained monopoly power and will ultimately increase rates to long distance customers, according to AT&T. (AT&T Init. Br. at 51.)

Consumer Advocate argues the Board has authority under § 476.11 to resolve complaints concerning the CLEC's intrastate access rates. (Consumer Advocate Init. Br. pp. 11-12.) The CLECs argue § 477.11 requires IXCs to interconnect with CLECs and originate and terminate intrastate toll traffic. Consumer Advocate contends this obligation to interconnect and exchange traffic must be subject to the Board's jurisdiction over complaints filed under § 476.11. (Id.) This will ensure the obligation is reasonable and consistent with policy considerations established in § 476.95.

Consumer Advocate argues that CLECs should not be permitted to exercise unrestrained pricing of intrastate access service. However, AT&T's position that CLEC access charges should be reduced would jeopardize the viability of CLECs and delivery of advanced telecommunication services in rural Iowa. (Consumer Advocate Reply Br. p. 6.) Consumer Advocate argues the Board should not adopt a position that presents such risks.

Consumer Advocate contends that if the Board holds that CLECs are subject to access charge regulation under § 476.11, the probability of a negotiated solution is increased. (Consumer Advocate Reply Br. p. 7.) Absent a successful negotiation, a § 476.11 proceeding with proper consideration of cost information and other factors considered by the FCC in its access charge reform decision could be used to resolve the parties' differences. It is possible that multiple and protracted rate cases may not be necessary, as demonstrated by the recent FCC decision. Consumer Advocate

believes the Board could consider the appropriateness of a rural exemption to the access charge cap proposed by AT&T and establish terms for such an exemption. (Id.)

2. Analysis

The Board finds that it has jurisdiction over CLEC access charges pursuant to Iowa Code § 476.101(1), which provides in relevant part that:

> If, after notice and opportunity for hearing, the board determines that a competitive local exchange service provider possesses market power in its local exchange market or markets, the board may apply such other provisions of this chapter to a competitive local exchange service provider, as it deems appropriate.

The record in this docket establishes that the CLECs possess market power in the provision of access services to their end-users.

The FCC recently made similar findings of market power in the provision of interstate access services. In the Seventh Report And Order, the FCC discusses the structure of the access service market and notes that IXCs have "little practical means of affecting the caller's choice of access provider (and even less opportunity to affect the called party's choice of provider) and thus cannot easily avoid the expensive ones."[7] The FCC further notes the requirement of 47 U.S.C. § 254(g) that IXCs average their rates, giving them no ability to pass LEC access charges through to each individual end-user or otherwise create customer incentives to choose access providers with low access rates. (Seventh Report and Order, Para. 31.) The FCC concludes that each customer's LEC has market power with respect to IXC

[7] See also AT&T Corp. v. Business Telecom, Inc., FCC Docket No. EB-01-MD-001, "Memorandum Opinion And Order" at para. 21 (released May 30, 2001, as FCC 00-185).

access to that customer, that competition is currently ineffective to restrain that market power, and that "some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services." (Id., Para. 34.) The FCC adopted its benchmark access rates on the basis of these findings. (Id.)

The record before the Board supports the same finding on an intrastate level. Each IXC has no practical means of affecting an end-user's choice of LEC or otherwise creating a market-based incentive toward reasonable access charges. As discussed in the previous section of this order, Iowa law requires that IXCs such as AT&T connect with every LEC that requests interconnection. Thus, the IXC cannot avoid the LECs with more expensive intrastate access charges. Section 476.101(9) also prohibits an IXC from targeting CLEC customers with higher long distance rates or otherwise passing the CLEC's originating access charges through to the customer who chose the CLEC's service, as this would disadvantage the customer as a result of the customer's choice of LEC.

The IXC's options on the terminating end of the call are no better. Section 477.11 embodies a statutory requirement that interexchange calls cannot be blocked simply because an IXC refuses to interconnect with a LEC, so the IXC has no realistic choice but to terminate calls to a CLEC's customers using the CLEC's terminating access services.

Thus, on both the originating and terminating end of the call, each LEC has market power with respect to IXC access to the LEC's customers. Existing market

forces are inadequate to prevent CLECs from exploiting their market power through unreasonably high access charges.

The Board's finding, under § 476.101(1), of CLEC market power with respect to interexchange access permits the Board to apply to CLEC access services such other provisions of chapter 476 as the Board deems appropriate. In this case, the Board finds it appropriate to apply its complaint authority under § 476.3 to the complainant and intervenor CLECs and their access tariffs, permitting the Board to "determine just, reasonable, and nondiscriminatory rates, charges, schedules, service, or regulations to be observed and enforced."

The Board could also resolve these complaints under § 476.11, as a dispute over the terms and procedures that will apply to any toll connection between two or more telephone companies. While it is true that AT&T has not brought a § 476.11 complaint in this docket, it is equally true that the complainants did, in paragraph 14 of their complaint. Section 476.11 therefore provides an alternative basis for the Board's jurisdiction to review and set new CLEC access charges, if necessary.

Having found jurisdiction, the Board must now determine the appropriate form of relief. For a variety of reasons, the record in this docket does not include carrier-specific cost information of the type the Board has historically considered when setting rates. This lack of data renders the Board's regular approach to ratemaking unavailable; Consumer Advocate appears to agree when it states that it is unable to make a firm recommendation regarding the precise level of appropriate access rates because of the manner in which the parties have litigated this case. As Consumer Advocate states, "they have held fast to divergent and untenable positions," rather

than submit specific cost and market information that would help the Board to set access charges for each CLEC for the future. (Consumer Advocate Reply Br. at 2, footnote omitted.)

The Board agrees that the record made in this proceeding is not like a typical rate case record. But this is not a typical rate case. For example, the CLECs do not use the Uniform System of Accounts or follow other accounting and separations rules that are applicable to rate-regulated utilities. Instead, the Board has routinely granted CLEC requests for waiver of the accounting rules. As a result, the CLECs do not, and for all practical purposes cannot, conduct traditional, fully-distributed cost of service studies, which are prerequisites for a typical rate case that would set cost-based access charges on a company-specific basis. However, the evidence in this record is sufficient to allow Board review of market data and the general level of the access charges in this proceeding and whether the existing charges are just and reasonable and, if not, what must be done to make them just and reasonable.

The first data the Board will consider are rates for comparable services. The rates at issue in this docket are intrastate rates, but they were set by mirroring interstate access rates filed with the FCC in 1997 and before. Thus, current interstate access rates are relevant to a determination of whether the intrastate rates continue to be just and reasonable. The access rates the CLECs are charging AT&T are substantially higher than the current NECA interstate access rates which are referred to in the recent FCC order. The CLECs' access rates are set by concurring in the access tariff filed with the Board by the ITA. For many years, the ITA tariff set intrastate access charges that mirrored to the average nationwide interstate access

charges set by NECA and filed with the FCC. However, beginning in 1998 the NECA access rates began to fall, rather than increase, and at that time ITA ceased to mirror the NECA tariff and essentially froze its intrastate access rates at the higher level.

The NECA interstate rates today are significantly lower than the NECA rates charged in 1997, and therefore the intrastate state rates in the ITA tariff, as demonstrated in the following tables.

Originating Traffic Access Charges:

	ITA Rates	NECA Rates (1/1/01)	FCC Rural Exemption rate
CCL Charge ($/min.)	.03	.01	0
Local Switching ($/min.)	.0404	.022619	.022619
Transport Charge ($/min./mile)	.01505	.011487	.011487

Terminating Traffic Access charges:

	ITA Rates	NECA Rates (1/1/01)	FCC Rural Exemption rate
CCL Charge ($/min.)	.03	.014	0
Local Switching ($/min.)	.0404	.022619	.022619
Transport Charge ($/min./mile)	.01505	.011487	.011487

Note: The tables above reflect NECA interstate access rates in effect in January of 2001. The ITA rates are taken from Exhibit 1 (TW-1). The NECA and FCC rural exemption rates are from the FCC's Seventh Report and Order. Both the NECA and FCC rural exemption rates reflect the application of the highest rate band for switching and transport.

Another category of market data the Board will consider is the competing ILEC access rate in each exchange. As previously described, the CLEC access rates are significantly higher than the ILEC rates in the same exchanges. The CLEC rates are typically twice the rates charged by Iowa Telecom and three to four times the rates

charged by Qwest. (Tr. 846, 889, 927.) This fact, by itself, does not prove the CLEC rates are unreasonable. The CLECs may have higher costs per customer than Iowa Telecom or Qwest.[8] However, the amount by which the CLECs' rates exceed the ILECs' is significant, particularly when combined with the fact that the CLECs' retail rates are typically lower than the competing rates from Qwest or Iowa Telecom. If the access market were competitive, the CLECs could never charge for access at levels that are multiples of the ILEC rates. The ability to do so, while under pricing the competition in the competitive market, indicates that the CLECs are using their power in the bottleneck access market to improve their position in the competitive retail service market. The Board finds this persuasive evidence that the CLECs' access charges are not fully justified by higher CLEC costs.

The FCC also considered the possibility of higher costs for rural CLECs and the appropriate manner of reflecting those costs in access rates. The FCC's Seventh Report And Order establishes a benchmark level for CLEC access rates. For non-rural CLECs, the FCC benchmark is set at 2.5 cents/minute or the competing ILEC rate, whichever is higher. In exchanges where the 2.5-cent benchmark rate is higher, it will be reduced over a three-year period to match the competing ILEC access rate. This effectively assumes that in non-rural exchanges, the CLEC's access costs are no higher than the ILEC's.

However, the FCC set a higher CLEC access rate for rural exchanges, recognizing that rural CLECs probably have higher per-customer costs than urban CLECs. The rural exemption rate is based on the current NECA access tariff,

[8] Qwest, for example, serves a mix of urban and rural exchanges and its access rates are averaged across that mix. Many of the CLECs lack the lower-cost urban operations to average with, and therefore offset, their

assuming the highest rate band for local switching and transport, minus the carrier common line charge (CCL) if the competing ILEC is subject to the "CALLS" order. (Seventh Report And Order at para. 81.) The FCC stated that the CCL charge for price-cap ILECs has largely been eliminated due to the application of higher subscriber line charges (SLC). In other words, part of the revenue the ILECs used to bill to the IXCs through access charges they now bill to the end-user as the SLC.

While CLECs may not use a SLC, per se, they have the ability to build a component into their end-user rates that is approximately equal to the ILECs' SLC. The FCC concluded this potential end-user revenue source makes the CCL charge unnecessary and inappropriate for many CLECs, as continued collection of the CCL by CLECs would give them a competitive advantage over the ILEC (which cannot bill the same access charge element). (Id.) Thus, the FCC ordered that CLEC access charges cannot include the CCL if the competing ILEC is using a SLC.

The evidence in this case establishes that the intrastate access rates currently charged by the CLECs are unreasonably high. The tables show that the CLEC rates are nearly twice as high as the current NECA interstate rates. At the same time, these CLECs offer local exchange service at a price comparable to or below the ILEC price, indicating the difference between the CLECs and ILECs in cost per customer is not the only reason the CLEC access charges are so high. Instead, it appears a portion of the CLEC build-out cost is being recovered through access rates, where the CLEC's market power allows it to charge above-market rates.

The Board finds that the access rates of the complainant and intervenor CLECs are not just, reasonable, and nondiscriminatory. They are based on an ITA

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higher-cost rural service areas.

tariff that is, in turn, based on outdated NECA interstate rates that are no longer cost-justified and include a 3-cent per minute CCL charge. The evidence in this docket is clear and compels the Board to the same conclusion that the FCC reached: The CCL charge is no longer a supportable element of access charges and is unreasonable. Permitting CLECs to continue to collect access charges that include the CCL would be discriminatory and would violate the principles of competitive neutrality, see § 476.95, because the ILEC does not have the opportunity to obtain the same revenues through access charges. Instead, the ILEC must use the SLC and collect directly from the end-user, making the ILEC's customer bill higher, putting the ILEC at a competitive disadvantage.

Therefore, the Board will order the CLECs in this case to file new access tariffs with charges that reflect removal of the CCL, but are otherwise the same as their existing access tariffs. These new charges will apply from the date of this order. Each CLEC is free to propose higher access charges, if it believes it can support them, and each IXC will be free to challenge the CLEC access charges if it believes the appropriate level is even lower, but the new access charge tariffs filed as a result of this order must be based on the current ITA tariff access rates minus the CCL.

C. Did AT&T order intrastate access service from any of the CLECs and does it owe payment to the CLECs for past access services rendered?

1. Summary of arguments

This issue concerns the amounts the CLECs claim AT&T owes them for access services provided in the past. The CLECs argue AT&T is required to pay their tariffed access charges, while AT&T says it did not order access services pursuant to the terms of the tariff and therefore is not required to pay the tariffed rates.

According to AT&T, the undisputed facts show that AT&T did not order access service pursuant to the terms of the CLECs' tariffs. (AT&T Init. Br. p. 8.) AT&T contends that under the filed rate doctrine, a customer that has not ordered service under a carrier's tariff is under no obligation to pay that carrier. (Id.)

AT&T argues that 199 IAC 22.15(2) provides that an IXC does not become an access service customer of a LEC unless and until it orders service pursuant to the terms of the local carrier's tariff. (Id.) The tariff at issue is the ITA Tariff No. 1, which all of the CLECs have adopted,[9] and which concurs with the NECA interstate Tariff No. 5 with respect to ordering access service.[10] (AT&T Init. Br. p. 9.) Both of these tariffs contain specific provisions governing the circumstances under which a party orders service and thereby triggers the application of the tariff. AT&T contends the record shows that AT&T contacted most, if not all, of the CLECs to inform them it did not order or agree to purchase access services from them. (AT&T Init. Br. pp. 20-21.)

[9] Tr. 62, 104, 183, 250, 366, 470, 498-99, 574-75.
[10] Tr. 62, 104, 183.

AT&T summarizes the complainants' arguments as follows: The complainants argue AT&T constructively ordered access service by sending and receiving traffic from them. In addition, they argue AT&T constructively order access service through:

- Requesting customer information from the CLECs;
- Various other documents sent to INS or the CLEC, such as Preferred Interexchange Carrier (PIC) change requests or requests for CARE records;
- Direct marketing of CLEC customers;
- Billing AT&T customers for calls originated or terminated using CLEC networks; and
- AT& T's advertising in the CLECS' territories.

(AT&T Init. Br. pp. 20-33.) AT&T disagrees with these arguments.

AT&T contends it never filed an Access Service Request (ASR) with the CLECs. (AT&T Init. Br. pp. 10-12.) AT&T admits it billed the CLECs' customers for calls routed against AT&T's wishes over its network, but only because it was required to do so under its tariff and in order to mitigate damages and deter potential fraudulent uses of the network. (AT&T Init. Br. pp. 40-41.) AT&T admits it requested billing information from the CLECs via "CARE" documents, but AT&T argues this does not constitute an order for access services because a CARE package is not an ASR and each one was accompanied by a cover letter stating AT&T's position. (AT&T Init. Br. pp. 22-24.)

AT&T disagrees with the argument that advertising in a CLEC's service area constitutes a constructive order for access service. The exchanges served by the complainants are also served by ILECs and other CLECs with which AT&T does

business and it is impossible for AT&T to target its advertising so as to avoid the complainants' customers. (AT&T Init. Br. 28-33.)

AT&T also argues that mistaken PIC change requests do not constitute orders for access service under the CLECs' tariffs. AT&T argues the occasional mistaken PIC change request can best be corrected by the CLEC informing its end user that the CLEC cannot process a PIC change to AT&T service. (AT&T Init. Br. pp. 24-25.)

AT&T contends the ASR documents offered by Laurens (Exs. 222, 223, and 224) are not orders for switched access service. AT&T argues that the documents did not include CIC codes or any of the other information normally included in an ASR for switched access services. Moreover, these were sent to INS, but not to Laurens, so they fail to meet the tariff requirement that ASRs be sent to both. Finally, AT&T argues Laurens was unaware of the ASRs at the time it billed AT&T and therefore could not have relied upon them. (AT&T Init. Br. 27-28.)

Complainants argue that AT&T constructively ordered access services from them, based upon a variety of arguments. Complainants claim that AT&T ordered their access services through INS as an agent for the complainants. (Complainants Init. Br. pp. 16-17.) INS is a fiber optic network and switching system, which concentrates long distance traffic to and from numerous independent rural telephone companies, including the complainants. INS provides centralized equal access (CEA) for companies it has traffic agreements with, referred to as participating telephone companies (PTC). INS also coordinates the administrative functions and ordering process for exchange access on behalf of the PTC's.

INS entered into a blanket letter of agency (LOA) with AT&T to provide CEA to each PTC. This agreement was entered into on February 28, 1989, and authorizes INS to connect the interexchange services of AT&T with the access services of all PTC's. (Ex. 11.) Initially, AT&T provided only interLATA service. (Complainants' Init. Br. at p. 16.) On February 10, 1995, AT&T submitted an LOA to INS indicating it would offer both interLATA and intraLATA service. (Ex. 12.) In that letter, AT&T recognized that INS coordinates CEA for the PTCs. Under the LOA process, INS does not receive a new order for each customer change or an ASR for every new PTC because INS already has all the necessary information. (Tr. 308.) Instead, when AT&T needed to change a customer's choice of IXC, AT&T would electronically send information to INS regarding the LOA and direct INS to designate AT&T as the preferred carrier for a specific customer.

Based on this course of dealing, the complainants argue that by entering into agency relationships with INS, both AT&T and the CLECs have established and used a process by which AT&T has ordered, and the CLECs have provided, access services. (Complainant Init. Br. p. 17.)

With respect to ASRs, complainants argue there is no requirement that an ASR first be issued as an authorization for service. (Id.) Complainants argue that ASRs are commonly used to provide necessary information to effect connections between most LECs and IXCs, but not when INS is involved. (Id.)

In response to AT&T's arguments regarding the tariffs and the filed rate doctrine, complainants argue the ordering provisions of the tariff are administrative only, relying on Advamtel LLC v. AT&T Corp., 118 F. Supp.2d 680 (E.D. Va. 2000).

The Advamtel Court held that the filed rate doctrine does not preclude deviations from the tariff that do not affect the charged rate or implicate the anti-discrimination provisions of the doctrine. (Complainants' Init. Br. at pp.18-19.) Because the ordering provisions of the access tariffs do not affect the access rates, they do not implicate the filed rate doctrine's antidiscrimination policy. (118 F. Supp.2d at 686-87.) Thus, the filed rate doctrine does not apply to this matter.

Finally, complainants point to the following acts of AT&T as evidence that AT&T constructively ordered access services:

- AT&T submitted Letters of Agency asking that particular end users be assigned to AT&T (Tr. 306);
- AT&T used the LEC services for originating and terminating traffic, which meant including the CLEC NXXs in AT&T's switch identification and obtaining information from the CLECs necessary to permit AT&T to bill its own customers (Tr. 713-17, 1184); and
- AT&T conducted marketing efforts in the CLEC's service territory, including national advertising, direct marketing, and personal calls by sales representatives, leaving customers with the expectation they can connect with AT&T through their chosen LEC. (Tr. 60, 175-78, 246, 760-67, 907-15, 1237-40.)

(Complainants' Init. Br. at 21-22.) In each of these ways, AT&T expressed its intent to use the CLECs' access services, amounting to a constructive order for those services.

In its reply brief, AT&T summarizes its earlier arguments regarding the lack of an order for access services and responds to the CLEC argument that AT&T constructively ordered CLEC access services. AT&T argues the constructive ordering doctrine is inapplicable where the tariff contains express ordering provisions,

citing United Artists Payphone Corp. v. New York Tel. Co., 8 FCC Rcd 5563 (1993). (AT&T Reply Br. pp. 14-17.)

AT&T also argues that even if the constructive ordering doctrine is applied, the CLECs failed to establish that AT&T constructively ordered their services because AT&T has not engaged in any affirmative act to establish a relationship with and receive services from the CLECs. Instead, AT&T argues, it took affirmative steps to inform all CLECs it would not order access services from CLECs with rates higher than ILECs in the same area. (AT&T Reply Br. pp. 18-27.) AT&T argues that its CARE packages are unrelated to access services; isolated PIC change requests do not apply to all end users; the 1989 and 1995 letters from AT&T to INS did not order access; the Laurens ASRs were not for switched access services; AT&T's billing of its own end users (when served by CLECs) is required by tariff; and AT&T marketing to CLEC customers does not amount to a request for access services. (Id.)

The complainants' reply brief summarizes their earlier arguments and adds a reference to a recent decision by a Texas PUC Administrative Law Judge (ALJ), subsequently adopted by the Public Utilities Commission of Texas in Complaint of XIT Telecommunications and Technology, Inc., Against AT&T Corp., PUC Docket No. 22385, SOAH Docket No. 473-00-2224. In that case, the ALJ considered arguments similar to those advanced by AT&T in this case and concluded AT&T is legally obligated to pay for the switched access services it used. The ALJ applied the Advamtel analysis to conclude AT&T's actions amounted to a constructive order, pointing out that adopting AT&T's position would mean AT&T could make a written request for the CLEC's service (by means of letters, for example), use the access

services, receive value for the services when it bills its own customers, and then refuse to pay the CLEC because of the filed rate doctrine (which is intended to prohibit rate discrimination). The ALJ recognizes the policy behind the filed rate doctrine as one of avoiding unreasonable price discrimination and concludes that "a far greater risk of price discrimination occurs if AT&T receives access services for free." (Complainants' Reply Br. pp. 2-3.)

2. Board discussion

The Board finds that AT&T ordered access services from the CLECs and is legally obligated to pay for the services it used. In making this determination, the Board finds that the constructive ordering doctrine outlined by the complainants applies to the facts of this dispute.

The constructive ordering doctrine provides that a party has ordered a carrier's services, even if the order does not fully comply with the specific ordering provisions of the carrier's tariff, if the party is interconnected in a manner such that it can expect to receive access services, fails to take reasonable steps to prevent receipt of such services, and then received the services. Advamtel, LLC, v. AT&T Corp., 118 F.Supp.2d 680, 685 (E.D. Va. 2000). AT&T's network is interconnected in such a manner that it must have expected to receive access services from the CLECs; in fact, AT&T subsequently sought billing information from the CLECs to permit it to bill its own customers. It is also beyond dispute that AT&T failed to prevent receipt of, and actually received, access services from the CLECs. These facts establish a constructive order for access services from the CLECs.

This finding is not in conflict with the filed rate doctrine. It appears that AT&T did not comply with the administrative requirements of the CLEC access tariffs with respect to ordering service (except, perhaps, with respect to the Laurens ASRs), but as applied here the constructive ordering doctrine acts as an exception to the filed rate doctrine. On this point, the Board finds the analysis of the Texas ALJ is persuasive. The purpose of the filed rate doctrine is to prevent unreasonable price discrimination. That purpose will be better served by requiring that AT&T pay the same-filed access charges that all other IXCs must pay than by permitting AT&T to use these tariffed access services for free as a result of its refusal to comply with the administrative requirements of the tariff.

AT&T ordered and used the CLECs' access services and must pay for the services used, at the CLEC's tariffed rates in effect at the time the services were used. The Board will direct the CLECs to re-submit outstanding bills to AT&T or to submit new bills to AT&T, current through the date of this order (or the CLEC's normal billing date closest to the date of this order), and AT&T will be directed to pay those bills in a timely manner.

D. Do AT&T's actions warrant civil penalties?

1. Summary of arguments

Complainants argue the Board should put AT&T on notice under § 476.51 that AT&T will be subject to civil penalties for any repeat violation of the § 477.11 requirement to connect its toll service to local exchange carriers in Iowa. Complainants repeat the request in the conclusion of their reply brief, adding that the

Board should also find, pursuant to 199 IAC 22.15(3), that AT&T has willfully failed to pay the intrastate carrier common line charge.

AT&T generally denies that it has engaged in any conduct warranting civil penalties.

2. Analysis

Pursuant to § 476.51, when the Board determines a carrier's actions are in violation of any provision of chapter 476, a Board rule, or an order of the Board, the Board can give the carrier written notice that it may be subject to civil penalties if it commits a second violation of the same provision of chapter 476, the same rule, or the same provision of the Board order. In a previous section of this order, the Board found AT&T's actions as shown in this record violated Iowa Code § 476.101(1) by disadvantaging customers who have chosen to receive services from another telecommunications carrier. Accordingly, the Board will put AT&T on notice of the potential for civil penalties for any future violation. If, after notice and an opportunity for hearing, the Board finds that AT&T has committed any future violation of Iowa Code § 476.101(9), the subsequent violation may lead to civil penalties.

Complainants also ask that the Board find AT&T's violation to be "willful," which (if this were the second violation) would allow the Board to assess higher civil penalties. As this is AT&T's first violation, a finding of willfulness would have no relevance and the Board will not further address the request.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The Board finds that the actions of AT&T Communications of the Midwest, Inc., in refusing to accept interexchange customers in Iowa because of the access charges set by the customers' chosen local exchange carrier and refusing to pay the local exchange carrier for access services provided to AT&T are in violation of Iowa Code §§ 476.101(9) and 477.11. The Board hereby gives AT&T written notice that any future violation of § 476.101(9) or this order may be subject to civil penalties, pursuant to Iowa Code § 476.51. AT&T shall bring its actions into compliance with the requirements of §§ 476.101(9) and 477.11, as stated in this order, within 45 days of the date of this order.

2. The Board finds that the access charges of the complainant and intervenor CLECs are not just, reasonable, and nondiscriminatory, pursuant to Iowa Code § 476.3, and orders the CLECs to file new access tariffs with charges that reflect removal of the Carrier Common Line charge but are otherwise the same as their existing access tariffs. These new charges will apply from the date of this order. After filing a tariff in compliance with this order, each CLEC is free to propose higher access charges if it believes it can support them, and each interexchange carrier will be free to challenge those CLEC access charges if it believes the appropriate level is even lower, but the new access charge tariffs filed as a result of this order must be based on the current ITA tariff access rates minus the CCL.

3. The Board finds that AT&T ordered and used the CLECs' access services and must pay for the services used prior to the date of this order at each CLEC's tariffed rates in effect at the time the services were used. The Board directs the CLECs to re-submit outstanding bills to AT&T or to submit new bills to AT&T, current through the date of this order (or the CLEC's normal billing date closest to the date of this order), and AT&T is directed to pay those bills in a timely manner.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 25th day of October, 2001.