

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Qwest Communications Company, LLC,)	
)	
Complainant,)	
)	File No.: EB-10-MD-004
v.)	
)	
Sancom, Inc.,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

Adopted: March 5, 2013

Released: March 5, 2013

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants a formal complaint¹ filed by Qwest Communications Company, LLC (Qwest) against Sancom, Inc. (Sancom) under section 208 of the Communications Act of 1934, as amended (Act).² The Complaint effectuates a primary jurisdiction referral from the United States District Court for the Southern District of South Dakota (Court) in connection with litigation pending before the Court.³ In short, Qwest alleges that Sancom is violating sections 203(c) and 201(b) of the Act⁴ by attempting to obtain payments from Qwest for originating and terminating switched access on calls that do not qualify as switched access under Sancom’s interstate access services tariff (Tariff).⁵ As discussed below, we find that Sancom’s interstate switched access

¹ Formal Complaint of Qwest Communications Company, LLC, File No. EB-10-MD-004 (originally filed Jan. 18, 2011; re-filed June 15, 2012) (Complaint). At the request of Commission staff, made during a June 1, 2012 conference call, the parties re-filed their pleadings with revised confidentiality designations on June 15, 2012.

² 47 U.S.C. § 208.

³ *Sancom, Inc. v. Qwest Communications Corp.*, No. Civ. 07-4147-KES, 2010 WL 960005 (D.S.D. Mar. 12, 2010) (*Sancom v. Qwest Referral Order*). See *infra* discussion in paragraph 10.

⁴ 47 U.S.C. §§ 203(c), 201(b). Count I of the Complaint alleges violation of section 203(c), and Count II alleges violation of section 201(b). Complaint at 53-54.

⁵ Complaint, Litigation Exhibit 6, Sancom Interstate Access Tariff. See also Answer of Sancom, Inc. to Formal Complaint of Qwest Communications Company, LLC, File No. EB-10-MD-004 (originally filed Feb. 22, 2011; re-filed June 15, 2012) (Answer) at Exhibit 1.

charges are unlawful because, with regard to the traffic at issue, Sancom did not have “end users” that were billed or paid for service, as required by the Tariff.

II. BACKGROUND

A. The Parties

2. Qwest provides telecommunications services in South Dakota and throughout the United States, including interexchange (long-distance) services.⁶ In its capacity as an interexchange carrier (IXC), Qwest has received invoices from Sancom stating that Qwest owes Sancom fees for, among other things, interstate access services.⁷ Qwest has paid some of Sancom’s invoices, but has not paid others.⁸

3. Sancom is a competitive local exchange carrier (LEC) serving residential and business customers in South Dakota.⁹ As a LEC, Sancom provides the facilities that allow calls carried by IXCs, such as Qwest, to be originated and terminated with Sancom’s local customers.¹⁰ Beginning in 2005, Sancom assessed fees (described in invoices as switched access charges) on Qwest for calls destined for, or originating from, telephone numbers assigned to two entities, Free Conferencing Corporation and Ocean Bay Marketing (collectively, the Free Calling Companies).¹¹ As described below, Sancom entered into agreements with the Free Calling Companies that resulted in large amounts of originating and terminating interexchange traffic for which Sancom and the Free Calling Companies would split the resulting access charge revenue – a practice referred to as “access stimulation.”¹²

B. The Free Calling Companies

4. Free Conferencing Corporation (Free Conferencing), which is not a common carrier, provides free conference calling services to third parties.¹³ The calls involving Free Conferencing are the terminating calls at issue in this case, i.e., those for which Sancom has charged Qwest for terminating

⁶ Joint Statement, File No. EB-10-MD-004 (originally filed Mar. 22, 2011; re-filed June 15, 2012) (Joint Statement), Stipulated Facts at 1, para. 2. On April 1, 2011, CenturyLink, Inc. acquired 100 percent of the stock of Qwest’s corporate parent, Qwest Communications International Inc.; Qwest is now doing business as CenturyLink. See Letter from David H. Solomon, counsel for Qwest, to Marlene H. Dortch, Secretary, FCC, File No. EB-10-MD-004 (dated Apr. 28, 2011).

⁷ Joint Statement, Stipulated Facts at 1-2, para. 2.

⁸ Joint Statement, Stipulated Facts at 2, para. 3.

⁹ Joint Statement, Stipulated Facts at 2, para. 3. Sancom does business as “Mitchell Telecom.” Joint Statement, Stipulated Facts at 2, para. 3.

¹⁰ Answer, Legal Analysis at 1, 6, 23, 24; Complaint, Litigation Exhibit 18 (Calabro Dep.) at 3 (stating “Sancom provides IXCs with the use of switching, transport, and other carrier common lines, as well as access to databases, as required to complete long distance calls”).

¹¹ Joint Statement, Stipulated Facts at 2, para. 3.

¹² See *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17874, para. 656 (2011) (“Access stimulation occurs when a LEC with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and ‘free’ conference calls. The arrangement inflates or stimulates the access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the ‘free’ service provider, or offers some other benefit to the ‘free’ service provider.”).

¹³ Joint Statement, Stipulated Facts at 2, para. 4; Complaint at 2.

services. On or about March 1, 2005, Sancom and Free Conferencing entered into an agreement under which Free Conferencing would use conferencing bridges placed in Sancom's central office, and Sancom would assign telephone numbers for use by Free Conferencing.¹⁴ The agreement obligated Sancom to provide Free Conferencing with ISDN-PRI circuits, DS1 to DS3 multiplexing, DS3 channel terminations, and switching functions.¹⁵ In turn, Free Conferencing would provide a minimum minutes of use.¹⁶ Moreover, under the agreement, Sancom would pay Free Conferencing a per-minute fee when IXCs paid Sancom's related switched access bills.¹⁷ With regard to the calls at issue, there is no evidence that Free Conferencing paid Sancom any telecommunications fees or surcharges, federal Universal Service charges, sales taxes, or excise taxes.¹⁸

5. Ocean Bay Marketing (Ocean Bay), which is not a common carrier,¹⁹ provided advertising services to third-parties by automatically dialing 8YY calls and playing automated messages upon the call's inception.²⁰ The calls involving Ocean Bay are the originating calls at issue in this case. On or about August 31, 2005, Sancom entered into an agreement with Ocean Bay under which Sancom would provide a location for Ocean Bay's 8YY dialing equipment.²¹ Like the Sancom-Free Conferencing Agreement, the Sancom-Ocean Bay Agreement obligated Sancom to provide Ocean Bay with ISDN-PRI circuits, DS1 to DS3 multiplexing, DS3 channel terminations, and switching functions.²² It further

¹⁴ Joint Statement, Stipulated Facts at 10, para. 33; Complaint, Litigation Exhibit 26, Wholesale Local Services Agreement for Free Conferencing Corporation, at 2 (Sancom-Free Conferencing Agreement). In this formal complaint proceeding, Sancom designated as confidential the Sancom-Free Conferencing Agreement and continues to assert its claim of confidentiality. Letter from Ross A. Buntrock, counsel for Sancom, to Marlene H. Dortch, Secretary, FCC, File No. EB-10-MD-004, at 2-3 (filed Aug. 20, 2012). During the course of litigation between Sancom and Free Conferencing, however, Sancom publicly filed the agreement with the federal district court. Letter from David H. Solomon and Russell P. Hanser, counsel for Qwest, to Marlene H. Dortch, Secretary, FCC, File No. EB-10-MD-004 (filed Aug. 9, 2012) (attaching *Free Conferencing Corp. v. Sancom, Inc. and MCI Communications Services, Inc.*, No. Civ. 10-4113-KES, Defendant Sancom, Inc.'s Answer to Plaintiff's Complaint; Counterclaim; and Cross-Claim (filed Oct. 22, 2010)). We rely upon and cite to the publicly-filed version of the Sancom-Free Conferencing Agreement in this Order. See also *Free Conferencing Corp. v. Sancom, Inc. and MCI Communications Services, Inc.*, No. Civ. 10-4113-KES, Order Granting Defendant Verizon's Motion to Dismiss, 2011 WL 1486199 (D.S.D. Apr. 19, 2011) (describing in a publicly-available order the key provisions of the Sancom-Free Conferencing Agreement: "Under the Agreement, Free Conferencing agreed to provide at least 2,000,000 minutes of customer service usage in existing business to Sancom. Sancom agreed to pay Free Conferencing a marketing fee of \$0.02 per minute based on revenue collected on minutes used per month.").

¹⁵ Joint Statement, Stipulated Facts at 11, para. 40; Answer at 13, para. 27.

¹⁶ Sancom-Free Conferencing Agreement at 1, para. 3 ("[Free Conferencing] shall provide [sic] minimum of 2,000,000 minutes of customer use in existing business.").

¹⁷ Joint Statement, Stipulated Facts at 10, para. 33; Sancom-Free Conferencing Agreement at 2-3.

¹⁸ See also Joint Statement, Stipulated Facts at 12, para. 41.

¹⁹ Joint Statement, Stipulated Facts at 2, para. 5.

²⁰ Complaint at 2. It is not clear from the record whether Ocean Bay continues to provide services anywhere, as neither party was able to locate Ocean Bay representatives. Complaint at 8, para. 4.

²¹ Complaint, Litigation Exhibit 58, Wholesale Local Services Agreement for Mitchell Telecom, at 2 (Sancom-Ocean Bay Agreement).

²² Joint Statement, Stipulated Facts at 11, para. 40; Answer at 13, para. 27.

required Ocean Bay to provide a minimum minutes of use.²³ In turn, Sancom agreed to pay Ocean Bay a per-minute fee when IXCs paid Sancom's related switched access bills.²⁴ As with Free Conferencing, [redacted confidential information regarding Ocean Bay payments].²⁵

C. Sancom's Interstate Access Service Tariff

6. On January 31, 2005, Sancom filed with the Commission its interstate access service tariff, which became effective the next day, February 1, 2005.²⁶ During the period relevant to this case, the Tariff set forth the "regulations, rates and charges applicable to the provision of End User Access, Switched Access and other miscellaneous services"²⁷ Under the Tariff:

Switched Access Service, which is available to customers for their use in furnishing their services to *end users*, provides a two-point communications path between a customer designated premises and an *end user's* premises, ... provides for the ability to originate calls from an *end user's* premises to a customer designated premises, and to terminate calls from a customer designated premises to an *end user's* premises in the LATA where it is provided²⁸

The Tariff defines "end user," in turn, as "any customer of an interstate or foreign telecommunications service that is not a carrier"²⁹ A "customer" is "any individual, partnership, association, joint-stock company, trust, corporation, or governmental entity or other entity which subscribes to the services offered under this [T]ariff, including both [IXCs] and *End Users*."³⁰

7. With regard to billing, the Tariff provides that Sancom "*shall bill* on a current basis all charges incurred by and credits due to the customer under this tariff" and that Sancom will "establish a bill day *each month* for each customer account or advise the customer in writing of an alternate billing

²³ Sancom-Ocean Bay Agreement at 1, para. 3 ("Ocean Bay Marketing shall provide up to 10,000,000 calls of customer use in existing business.").

²⁴ Joint Statement, Stipulated Facts at 11, para. 37; Sancom-Ocean Bay Agreement at 3.

²⁵ Joint Statement, Stipulated Facts at 12, para. 42.

²⁶ Complaint at 12, para. 13 (citing Tariff at 1).

²⁷ Tariff § 1.1; Joint Statement, Stipulated Facts at 3, para. 7.

²⁸ Tariff § 6.1 (emphasis added). The Tariff's definition of "Access Minutes," in relevant part, also implicates the presence of an "end user": "On the originating end of an interstate or foreign call, usage is measured from the time the originating *end user's* call is delivered by the Telephone Company to and acknowledged as received by the customer's facilities connected with the originating exchange. On the terminating end of an interstate or foreign call, usage is measured from the time the call is received by the *end user* in the terminating exchange." Tariff § 2.6 (emphasis added).

²⁹ Tariff § 2.6.

³⁰ Tariff § 2.6 (emphasis added).

schedule.”³¹ The Tariff also requires Sancom to apply the federal Universal Service charge “each month to the billed charges for interstate access services provided to end users from this Tariff.”³²

8. Neither of the Free Calling Companies’ agreements with Sancom describes charges that Free Conferencing and Ocean Bay would pay monthly (or otherwise) to Sancom for telecommunications services. The only rates set forth in these agreements are fees that Sancom would pay to the Free Calling Companies.³³

D. The District Court Litigation

9. On October 9, 2007, Sancom sued Qwest, seeking to recover the access charges Qwest refused to pay. Sancom’s complaint against Qwest alleged breach of contract (Count I), breach of implied contract resulting from violation of tariffs (Count II), unjust enrichment (Count III), tortious interference with business relations (Count IV), violation of the South Dakota Deceptive Trade Practices and Consumer Protection Act (Count V), violation of section 201(b) of the Act (Count VI), and civil conspiracy (Count VII).³⁴ On November 6, 2007, Qwest filed counterclaims with the Court.³⁵ The counterclaims alleged violations of section 201(b) of the Act (Counts I and II), section 203 of the Act (Count III), common law unfair competition (Count IV), breach of contract (Count V), tortious interference with contract (Count VI), civil conspiracy (Count VII), and unjust enrichment (Count VIII).³⁶ The counterclaims also included a request for declaratory judgment (Count IX).³⁷

10. On June 19, 2009, the Court granted Qwest’s motion to dismiss Counts III, IV, V, and VII (the non-tariff claims), holding that these claims were barred by the filed-rate doctrine.³⁸ On June 26, 2009, Sancom moved for summary judgment on its breach of tariff claim.³⁹ Sancom subsequently moved to stay the court proceeding and for the Court to refer three issues to the Commission under the doctrine of primary jurisdiction.⁴⁰ On March 12, 2010, the Court granted Sancom’s request, asking the Commission to resolve: (1) whether the traffic billed to Qwest falls within the terms of Sancom’s Tariff; (2) if not, whether Sancom nonetheless is entitled to obtain compensation for these services; and (3) if so,

³¹ Tariff § 2.4.1 (emphasis added).

³² Tariff § 3.1.1 (emphasis added).

³³ Sancom-Free Conferencing Agreement at 2-3; Sancom-Ocean Bay Agreement at 3.

³⁴ Complaint, FCC Exhibit 3, *Sancom, Inc. v. Qwest Communications Corp.*, No. Civ. 07-4147-KES, Complaint (D.S.D. filed Oct. 9, 2007) (*Sancom v. Qwest* Court Complaint). Sancom amended the Complaint on September 11, 2008. Complaint, FCC Exhibit 4, *Sancom, Inc. v. Qwest Communications Corp.*, No. Civ. 07-4147-KES, First Amended Complaint (D.S.D. filed Sept. 11, 2008).

³⁵ Complaint, FCC Exhibit 1, *Sancom, Inc. v. Qwest Communications Corp.*, No. Civ. 07-4147-KES, Defendant’s Answer and Counterclaim (D.S.D. filed Nov. 6, 2007). Qwest amended its counterclaims on September 20, 2008. Complaint, FCC Exhibit 6, *Sancom, Inc. v. Qwest Communications Corp.*, No. Civ. 07-4147-KES, Qwest Communications Corporation’s First Amended Counterclaims (D.S.D. filed Sept. 10, 2008) (Qwest’s Counterclaims).

³⁶ Qwest’s Counterclaims at 15-23.

³⁷ Qwest’s Counterclaims at 23-24.

³⁸ *Sancom, Inc. v. Qwest Communications Corp.*, 643 F.Supp.2d 1117, 1132 (D.S.D. 2009).

³⁹ Joint Statement, Stipulated Facts at 2, para. 6.

⁴⁰ *See id.* at 2-3.

at what rate.⁴¹ Because the parties took extensive discovery in the Court litigation and requested no discovery in this proceeding, Commission staff determined that a status conference was unnecessary.⁴²

E. *Qwest v. Farmers*

11. This case is materially similar to and controlled by another access stimulation proceeding – *Qwest v. Farmers*.⁴³ Indeed, the Tariff’s definitions of “end user” and “customer” are identical to the definitions at issue in *Qwest v. Farmers*.⁴⁴

12. In *Qwest v. Farmers*, the Commission granted a section 208 complaint against Farmers and Merchants Mutual Telephone Company of Wayland, Iowa (Farmers), a rural LEC engaged in access stimulation. In short, the Commission examined the relationship between Farmers and various conference calling companies to determine whether the conference calling companies were “end users” under Farmers’ federal switched access tariff. If they were “end users,” then the service Farmers provided to Qwest was switched access service for which the tariffed rate applied.

13. The Commission concluded that the conference calling companies did *not* purchase tariffed services from Farmers and, consequently, they were not “end users” within the meaning of Farmers’ tariff.⁴⁵ In making this determination, the Commission considered the following factors:

- The parties’ contracts did not contemplate that the conference calling companies would pay for service,⁴⁶ and, in fact, they did not pay for service.⁴⁷
- Farmers never treated the conference calling companies like its other customers because (1) it did not enter the conference calling companies into its billing systems in accordance with its standard billing practices; (2) its regular business records did not indicate that the conference calling companies were purchasing the tariff’s End User Access Service; and

⁴¹ See *Sancom v. Qwest Referral Order* at *13. Joint Statement, Stipulated Facts at 2-3, para. 6. This Order addresses issue 1. We will decide issues 2 and 3, if necessary, in a damages proceeding. See Letter from Lisa B. Griffin, Deputy Chief, MDRD, to Ross A. Buntrock, counsel for Sancom, Inc.; James F. Bendernagel, Jr., counsel for AT&T Corp.; David H. Solomon, counsel for Qwest Communications Co.; and Michael B. Fingerhut, counsel for Sprint Corp., at 2 (dated May 5, 2010).

⁴² Letter from Lisa B. Griffin, Deputy Chief, MDRD, to Ross A. Buntrock, counsel for Sancom, and David H. Solomon, counsel for Qwest (dated Mar. 25, 2011).

⁴³ See *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) (*October 2007 Order*), modified on recon. Second Order on Reconsideration, 24 FCC Rcd 14801 (2009) (*Second Recon. Order*), aff’d, Third Order on Reconsideration, 25 FCC Rcd 3422 (2010) (*Third Recon. Order*), pet. for rev. denied, *Farmers and Merchants Mutual Telephone Company of Wayland, Iowa v. FCC*, 668 F.3d 714 (D.C. Cir. 2011) (*Farmers v. FCC*).

⁴⁴ See *Second Recon. Order*, 24 FCC Rcd at 14805, para. 10; see also *October 2007 Order*, 22 FCC Rcd at 17987, para. 35 & n.116.

⁴⁵ As with Sancom’s tariff, Farmers’ tariff imposed charges for transporting calls to or from an “end user’s premises,” and defined “end user” as “any customer of an interstate or foreign telecommunications service that is not a carrier.” *Second Recon. Order*, 24 FCC Rcd at 14805, para. 10.

⁴⁶ *Second Recon. Order*, 24 FCC Rcd at 14806, para. 12. One contract expressly stated there would be no charges for services. See *id.* at n.49.

⁴⁷ *Second Recon. Order*, 24 FCC Rcd at 14806, 14812, paras. 12, 25.

(3) it did not contemporaneously bill the conference calling companies, or otherwise try to collect payment – despite the tariff’s requirement that Farmers bill and collect on a monthly basis.⁴⁸

- Farmers’ agreements with the conference calling companies contained an exclusivity clause, and Farmers refused to offer the deals it gave the conference calling companies to other similar parties.⁴⁹
- Farmers handled the conference calling companies’ traffic differently (i.e., with a different switch) than traffic to customers of its tariffed services.⁵⁰
- Farmers’ agreements with the conference calling companies contained unique terms that did not resemble traditional agreements for its tariffed service, including: (1) Farmers agreed to pay the conference calling companies (differing amounts) for traffic it terminated to them; (2) Farmers’ deals with the conference calling companies included (also differing) minimum-usage commitments; (3) the duration of the conference calling companies’ agreements varied; (4) the notice periods for cancellation of service during the agreements’ terms varied; (5) Farmers’ board of directors had to approve each of the conference calling companies’ agreements; (6) the agreements’ provisions were kept confidential.⁵¹
- Farmers did not (1) timely report revenues from those services, or (2) submit Universal Service contributions.⁵²

14. In short, the Commission found that neither Farmers nor the conference calling companies intended to operate in accordance with Farmers’ tariff; indeed, they had “purposefully avoided” a customer relationship under Farmers’ tariff.⁵³ Because the conference calling companies “were neither ‘customers’ nor ‘end users’ within the meaning of [Farmers’] tariff,” the Commission found that Farmers “was not entitled to charge Qwest switched access charges under the terms of Farmers’ tariff” and that Farmers had violated sections 201(b) and 203(c) of the Act.⁵⁴

15. On December 30, 2011, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission’s orders, stating in relevant part that “[t]he Commission’s reading of [Farmers’] tariff was well within its discretion,”⁵⁵ and that “the Commission, upon considering factors within its expertise, could reasonably conclude that Farmers’ relationships with the conference calling

⁴⁸ *Second Recon. Order*, 24 FCC Rcd at 14808, para. 16.

⁴⁹ *Id.* at 14807, para. 14.

⁵⁰ *Id.* at 14806, para. 13.

⁵¹ *Id.* at 14807, para. 14.

⁵² *Id.* at 14813, n.97.

⁵³ *Id.* at 14810, para. 21.

⁵⁴ *Id.* at 14805, para. 10.

⁵⁵ *Farmers v. FCC*, 668 F.3d at 720 (citations omitted).

companies had been deliberately structured to fall outside the terms of Farmers' tariff and therefore reasonably reject such services as tariffed services."⁵⁶

III. DISCUSSION

A. Sancom Could Not Lawfully Bill Qwest for Tariffed Switched Access Service Because the Free Calling Companies Were Not "End Users" Under Sancom's Tariff.

16. Section 203(c) of the Act requires a carrier to provide communications services in strict accordance with the terms and conditions of its tariff.⁵⁷ As explained above, in order for Sancom to provide Switched Access Service under the Tariff, calls must originate or terminate with an "end user" (i.e., a "customer" that "subscribes to the services offered" under the Tariff).⁵⁸

17. As in *Qwest v. Farmers*, we find that the Free Calling Companies were not "end users" under Sancom's Tariff, because Sancom did not bill the Free Calling Companies for, and they did not pay for, switched access service. Moreover, in several other respects, Sancom and the Free Calling Companies behaved in a manner inconsistent with a tariffed carrier/customer relationship. Accordingly, we find that Sancom violated sections 203(c) and 201(b) of the Act.

1. Sancom Did Not Bill the Free Calling Companies for, and the Free Calling Companies Did Not Pay for, Tariffed Switched Access Service.

18. As noted above, the Tariff requires Sancom to bill its customers on a monthly basis for "all charges incurred by and credits due to the customer."⁵⁹ Sancom provided connectivity to the Free Calling Companies through ISDN-PRI circuits.⁶⁰ The Tariff contains a monthly rate for such circuits, as well as a monthly rate for related ISDN line ports.⁶¹ Moreover, the Tariff provides that Sancom shall apply a federal Universal Service charge each month to the tariffed interstate access services provided to end users.⁶²

19. Despite these requirements, Sancom did not establish any sort of genuine billing relationship with the Free Calling Companies, failing to adhere to established practices regarding its transmission of monthly bills, billing system, and collection efforts. Specifically, Sancom did not send

⁵⁶ *Farmers v. FCC*, 668 F.3d at 723.

⁵⁷ 47 U.S.C. § 203(c); see *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 222 (1988) ("Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule [the filed rate doctrine] is undeniably strict and it obviously may work hardship in some cases"); see also *id.* at 223-25 (stating that the filed rate doctrine not only addresses ratesetting, but also applies to a tariff's other terms such as provisioning and billing).

⁵⁸ See *supra* paragraph 6. See also *Second Recon. Order*, 24 FCC Rcd at 14805, para. 10; *AT&T v. YMax*, Memorandum Opinion and Order, 26 FCC Rcd 5742, 5749-50, para. 16 (2011).

⁵⁹ Tariff § 2.4.1; Complaint Legal Analysis at 23. Sancom's Local Exchange Tariff similarly states that "[b]illing to customers shall be scheduled monthly." Complaint, Litigation Exhibit 8, Local Exchange Tariff (Local Exchange Tariff) at Part II, Original Sheet 16; Complaint Legal Analysis at 23; Joint Statement at 8.

⁶⁰ Joint Statement at 11; Answer at 13, para. 27.

⁶¹ Tariff §§ 3.2, 17.1.4.

⁶² Tariff § 3.1.1.

monthly bills to the Free Calling Companies,⁶³ [redacted confidential information regarding Sancom's billing system],⁶⁴ and [redacted confidential information regarding Sancom's collection efforts with the Free Calling Companies.]⁶⁵ Sancom argues that it "invoiced Free Conferencing and Ocean Bay for services."⁶⁶ The record, however, contains only a handful of invoices, none of which are for monthly tariffed connectivity charges (i.e., the ISDN charges described above).⁶⁷ Indeed, Sancom concedes that [redacted confidential information regarding Sancom's unique billing arrangements with the Free Calling Companies.]⁶⁸

20. [Redacted confidential information regarding the Free Calling Companies not paying for service.]⁶⁹ Sancom argues that a "netting" process took place, whereby the Free Calling Companies generated revenue for Sancom sufficient to pay for Sancom's access charges.⁷⁰ The record, however, flatly contradicts this assertion and shows that no netting or offsetting process took place.⁷¹ Sancom further argues that access charge revenues received from IXCs justified not charging the Free Calling Companies any tariffed monthly rates.⁷² This argument also fails, because it is plainly inconsistent with the Tariff's monthly rates and billing provisions. In any event, there is no evidence that the parties established any alternative payment arrangement.

⁶³ Joint Statement at 16, para. 56; Complaint at 28-29, paras. 36-37 (citing Complaint, Litigation Exhibit 11 (Bortnem Dep.) at 58:4-5) [Redacted confidential information regarding Sancom's unique billing arrangements with the Free Calling Companies.]; Reply at 18-19.

⁶⁴ Complaint at 27-28, para. 35; Reply at 15-18.

⁶⁵ Complaint at 27-29, paras. 35-37; Reply at 18-19. [Redacted confidential information regarding Sancom's unique billing arrangements with the Free Calling Companies.] Complaint Exhibit 14 (Thompson Dep.) at 107:18-19 [Redacted confidential information regarding Sancom's unique billing arrangements with the Free Calling Companies.]; Bortnem Dep. at 119:1-10 [Redacted confidential information regarding Sancom's unique billing arrangements with the Free Calling Companies.]; *see also* Calabro Dep. at 127 [Redacted confidential information regarding Sancom's unique billing arrangements with the Free Calling Companies.] Joint Statement at 16.

⁶⁶ Answer, Legal Analysis at 30.

⁶⁷ *See infra* note 69.

⁶⁸ Complaint, Litigation Exhibit 12 (Buckley Dep.) at 91:11-91:22; *see also* Reply at 16. Notably, Sancom's South Dakota Local Exchange Tariff also sets forth several rates and charges that apply to Sancom's "customers," including the "Local Number Portability Fee, 911 Service Surcharge, Universal Service Fee, Network Connectivity Fee, Telecom Relay Service Fee, Federal Excise Tax, State Sales Tax, City Sales Tax, City Franchise Fee." Joint Statement at 9; Local Exchange Tariff at Part II, Original Sheet 17. [Redacted confidential information regarding Sancom's unique billing arrangements with the Free Calling Companies.] Joint Statement at 16.

⁶⁹ Joint Statement at 11-12, 15-16; Bortnem Dep. at 75:6-19, 118:21-119:4; Thompson Dep. at 95:13-96:24, 177:3-18. [Redacted confidential information regarding Sancom's unique business relationships with the Free Calling Companies.]

⁷⁰ Answer at 14-15, para. 30; Answer, Legal Analysis at 26-27; Joint Statement, Facts Proffered by Sancom and Disputed by Qwest at 30-31.

⁷¹ Reply at 12-13; Thompson Dep. at 54:25-55:22 [Redacted confidential information regarding Sancom's unique business relationships with the Free Calling Companies.]; *see also id.* at 35:19-36:5, 136:13-137:3; Complaint, Litigation Exhibit 10 (Rohead Dep.) at 87:19-90:7.

⁷² Answer, Legal Analysis at 25-29.

2. In Other Respects, Sancom Did Not Treat the Free Calling Companies As End Users Under Its Tariff.

21. Sancom itself did not consider the Free Calling Companies to be end users under the Tariff. The deposition testimony of Sancom representatives reveals that Sancom viewed the Free Calling Companies more as business partners than local exchange customers. For example, Sancom's General Manager [redacted confidential information regarding Sancom's unique business relationship with Free Conferencing.]⁷³ Sancom's Customer Service Manager stated [redacted confidential information regarding Sancom's unique business relationships with the Free Calling Companies.]⁷⁴ [Redacted confidential information regarding Sancom's unique business relationships with the Free Calling Companies.]⁷⁵ Indeed, even Sancom's expert witness acknowledged that [redacted confidential information regarding Sancom's unique business relationship with Free Conferencing.]⁷⁶

22. In fact, Sancom did not treat the Free Calling Companies like its typical customers. Although Sancom's general practice is to require new customers to complete standardized forms, including Sancom's "Service Application" and "Master Service Agreement Terms and Conditions,"⁷⁷ Sancom did not require the Free Calling Companies to complete them.⁷⁸ [Redacted confidential information regarding Sancom's tracking of traffic generated by the Free Calling Companies.]⁷⁹

23. Moreover, despite the requirement that a common carrier "[hold itself] out to serve indifferently all potential users,"⁸⁰ Sancom eschewed similar arrangements with other entities.⁸¹ In fact,

⁷³ Thompson Dep. at 209.

⁷⁴ Bortnem Dep. at 44:5-44:11.

⁷⁵ Bortnem Dep. at 119:5-10.

⁷⁶ Calabro Dep. at 135-37. *See also id.* at 129 [Redacted confidential information regarding Sancom's unique business relationship with Free Conferencing.]; *Id.* at 139:11-12 [Redacted confidential information regarding Sancom's unique business relationship with Free Conferencing.]

⁷⁷ Joint Statement at 18; Complaint at 41-42, paras. 62-63; Reply at 34-35.

⁷⁸ Joint Statement at 18, para. 63.

⁷⁹ Joint Statement at 18. The record further suggests that Sancom may have handled traffic relating to the Free Calling Companies differently from traffic relating to customers using Sancom's tariffed services. *See Second Recon. Order*, 24 FCC Rcd at 14806, para. 13 (as part of its conclusion that the conference calling companies were not "end users" under Farmers' tariff, the Commission found that Farmers provided a unique routing arrangement to the conference calling companies). Sancom's agreements with the Free Calling Companies provide that the Free Calling Companies' equipment will be placed in Sancom's central office (*see* Sancom-Free Conferencing Agreement at 1; Sancom-Ocean Bay Agreement at 1), and Sancom apparently furnished such collocations to the Free Calling Companies at no cost (Complaint, Litigation Exhibit 53, Plaintiff Sancom, Inc.'s First Supplemental Answers to Defendant's Second Set of Interrogatories, at 7 (Answer to Interrogatory 16.1) ("[S]ancom cannot identify the precise amount of money Free Conferencing pays or Ocean Bay Marketing paid to Sancom for collocation.")). Sancom did not respond directly to Qwest's assertion that the Free Calling Companies were the only entities served by placing their equipment in Sancom's central office, as opposed to being served by a facility "extending from the Sancom central office to the customer's location . . ." Complaint at 33-34, para. 47 (emphasis added). [Redacted confidential information regarding Sancom's relationships with its customers.] Answer at 24, para. 47.

⁸⁰ *See, e.g., U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002).

Sancom refused overtures from other entities that sought to enter access stimulation arrangements similar to those with the Free Conferencing, for fear that those potential business partners would compete with Free Conferencing.⁸² What's more, Sancom's agreements with the Free Calling Companies contained confidentiality clauses that prohibited the parties from revealing the agreements' terms.⁸³ [Redacted confidential information regarding Sancom's exclusive relationships with the Free Calling Companies.]⁸⁴ Thus, despite Sancom's contention that it undertook a reasonable case-by-case evaluation of potential customers,⁸⁵ it appears that Sancom evaluated whether potential customers would compete with its business partners, the Free Calling Companies.⁸⁶ In this manner, Sancom's relationships with the Free Calling Companies were exclusive and demonstrate an intention for Sancom not to provide service as a common carrier.⁸⁷

24. We reject Sancom's argument that its agreements with the Free Calling Companies were Individual Case Basis (ICB) arrangements.⁸⁸ The term "Individual Case Basis," as used in the Tariff, "denotes a condition in which the regulations, if applicable, rates and charges for an offering under the provisions of this tariff are developed based on the circumstances in each case."⁸⁹ To begin, the

(Continued from previous page) _____

⁸¹ Compare Joint Statement at 14, para. 46 ("Sancom never entered into an arrangement with any other service provider similar to its agreements with Free Conferencing and Ocean Bay.") with Reply, FCC Exhibit 19 (email from Don Robertson, Sancom Operations Manager, to Ryan Thompson, Sancom General Manager (dated June 30, 2006) [Redacted confidential information regarding Sancom's exclusive relationships with the Free Calling Companies.]; Reply at 21; Joint Statement at 12.

⁸² [Redacted confidential information regarding Sancom's exclusive relationships with the Free Calling Companies.] Complaint, Litigation Exhibit 57, at 2 (email from Don Robertson, Sancom Operations Manager to Dave Erickson, President, Free Conferencing (dated Sept. 20, 2005)); Reply at 21; Joint Statement at 12. Later, in April 2007, when an entity that competes with Free Conferencing contacted Sancom about service, Sancom replied that it was out of capacity, even though no one at Sancom actually checked whether there was available capacity. Answer at 20-21, para. 38 (admitting that Sancom did not check whether it had capacity); Reply at 19-20; Joint Statement at 12. [Redacted confidential information regarding Sancom's exclusive relationships with the Free Calling Companies.] Complaint at 30, para. 40 (citing Rohead Dep. at 91:4-16); Answer at 22, para. 40.

⁸³ The Sancom-Free Conferencing Agreement confidentiality provision states that "[d]uring the term of this Agreement and for a period of three (3) years thereafter, neither [Free Conferencing] nor SANCOM shall disclose any terms of this Agreement, including pricing, or any other confidential information of the other Party." Sancom-Free Conferencing Agreement at 2. Similarly, the Sancom-Ocean Bay Agreement states that "[d]uring the term of this Agreement and for a period of three (3) years thereafter, neither Ocean Bay Marketing nor [Sancom] shall disclose any terms of this Agreement, including pricing or any other confidential information of the other Party." Sancom-Ocean Bay Agreement at 2.

⁸⁴ Rohead Dep. at 91:4-12 [Redacted confidential information regarding Sancom's exclusive relationships with the Free Calling Companies.]

⁸⁵ Answer at 31-33.

⁸⁶ See Complaint at 30, para. 40 (citing Rohead Dep. at 91:4-16) [Redacted confidential information regarding Sancom's exclusive relationships with the Free Calling Companies.]; Answer at 22, para. 40.

⁸⁷ See *Qwest v. Farmers*, 24 FCC Rcd at 14807, para. 14 (finding that the exclusivity clauses in the parties' agreements were "antithetical to the notion of tariffed service" and that, by turning away customers seeking similar arrangements, the arrangements between Farmers and the conference calling companies were, in practice, exclusive).

⁸⁸ Answer, Legal Analysis at 43-44.

⁸⁹ Tariff § 2.6.

agreements with the Free Calling Companies bear no indications that they pertain in any way to the services offered under the Tariff. To the contrary, the agreements contain provisions that not only are inconsistent with the Tariff, but that appear to be purposefully structured to avoid a traditional tariffed offering. For example, the agreements contain minimum usage requirements, provide that the Free Calling Companies would be required to renegotiate the agreements if Sancom is unable to collect access stimulation revenues from IXC's, and establish that the agreements must be "interpreted, construed and enforced in accordance with the laws of the State of South Dakota."⁹⁰ None of these provisions is found in the Tariff.

25. Sancom contends that it has no federal law obligation to post or otherwise make public its purported ICB arrangements with Free Conferencing and Ocean Bay, and that South Dakota law "makes clear that such disclosure is not required for a host of reasons."⁹¹ Although Sancom is correct that, to date, the Commission has not imposed such a requirement,⁹² in this case we review Sancom's compliance with its *filed* Tariff. The fact that Sancom had confidential, exclusive agreements with the Free Calling Companies bolsters our conclusion that Sancom was not acting as a common carrier indiscriminately serving End Users as defined in the Tariff.⁹³ As discussed above, based on our interpretation of Sancom's filed Tariff, and Sancom's relationship with the Free Calling Companies, we find that Sancom's interstate access charges are unlawful because Sancom was not providing service under the Tariff.

B. Sancom's Affirmative Defenses Lack Merit

26. Because Qwest elected to bifurcate its claims for damages pursuant to section 1.722(d) of the Commission's rules,⁹⁴ we do not address in this order Sancom's defenses regarding the extent of any damages Qwest allegedly incurred. We reject Sancom's unsupported claim that, as an affirmative defense, South Dakota State law somehow divests the Commission of authority to consider the lawfulness of Sancom's interstate access charges. Sections 201, 203, and 208 of the Act (and the rules promulgated thereunder) provide the Commission with the authority to interpret and enforce the Tariff Sancom filed with the Commission, and Sancom provides no support to conclude otherwise.⁹⁵

27. We also are unpersuaded by Sancom's argument that Qwest has "unclean hands," in that Qwest did not first pay Sancom amounts owing under the Tariff.⁹⁶ Even if this defense were available in

⁹⁰ Sancom-Free Conferencing Agreement at 1-4; Sancom-Ocean Bay Agreement at 1-4. Complaint at 40, para. 59; Reply at 33-34.

⁹¹ Answer, Legal Analysis at 33-34.

⁹² In 1997, the Commission examined whether to "require any non-ILEC providers of interstate exchange access services subject to any degree of tariff forbearance to make rates available to the Commission and to interested persons upon request." *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8613, para. 33 (1997) (granting "permissive detariffing for provision of interstate exchange access services by providers other than the incumbent local exchange carrier").

⁹³ Sancom cites no precedent (nor are we aware of any) to support its argument that, because it complies with South Dakota's legal requirements for *intrastate* tariff filing, Sancom's *interstate* access billings are lawful. Answer at 34-35. We also find Sancom's argument regarding the reasonableness of its tariffed rates, which are not at issue in this proceeding, to be misplaced. See Answer at 12-20.

⁹⁴ 47 C.F.R. § 1.722(d). Complaint at 11.

⁹⁵ 47 U.S.C. §§ 201, 203, 208.

⁹⁶ See Answer at 41 (Affirmative Defenses). Sancom also argues, without support, that the "vast majority" of

a section 208 formal complaint proceeding,⁹⁷ it would fail in this case. As discussed above, Sancom unlawfully charged Qwest for tariffed switched access services. Accordingly, Qwest cannot have violated any alleged equitable principle by failing to pay the charges before disputing them.⁹⁸

28. For the foregoing reasons, we find that the Free Calling Companies were not “end users” under the Tariff and, therefore, that Sancom was not entitled to charge Qwest for switched access under the Tariff. By charging Qwest nonetheless, Sancom violated sections 201(b) and 203(c) of the Act.⁹⁹

IV. ORDERING CLAUSES

29. Accordingly, **IT IS ORDERED**, pursuant to sections 4(i), 4(j), 201, 203, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, and 208, and sections 1.720-1.736 of the Commission’s rules, 47 C.F.R. §§ 1.720-1.736, and the authority delegated by sections 0.111 and 0.311 of the Commission’s rules, 47 C.F.R. §§ 0.111, 0.311, that Counts I and II of the Complaint are hereby **GRANTED** as to liability.

FEDERAL COMMUNICATIONS COMMISSION

P. Michele Ellison
Chief, Enforcement Bureau

(Continued from previous page) _____

Qwest’s facts are irrelevant to the complaint and should be stricken from the record. Answer, Legal Analysis at 10-11. Namely, Sancom argues that any facts about the nature of its customers (including the fact that [redacted confidential information regarding Sancom’s agreements with the Free Calling Companies]) are irrelevant. We disagree and find that the facts raised by Qwest are relevant to developing an understanding of the parties’ access stimulation arrangements.

⁹⁷ See *Marzec v. Power*, Order, 15 FCC Rcd 4475, 4480 n.35 (2000) (stating that “the Commission has expressed doubt that the unclean hands defense is available in section 208 proceedings”) (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, Memorandum Opinion and Order, 14 FCC Rcd 556, 598 & n.233 (1998)).

⁹⁸ See, e.g., *Marzec v. Power*, 15 FCC Rcd at 4480 (rejecting unclean hands defense because the complainant’s alleged misconduct was “irrelevant” to the defendant’s violations); *Wolff v. Westwood Management, LLC*, 558 F.3d 517, 521 (D.C. Cir. 2009) (assertion of unclean hands as defense against claim that dispute is subject to arbitration cannot succeed where “[t]here is no allegation that appellees have unclean hands with respect to the agreement to arbitrate itself”); *Sellar Agency Council, Inc. v. Kennedy Center for Real Estate Education, Inc.*, 621 F.3d 981, 986 (9th Cir. 2010) (“It is fundamental to the operation of the [unclean hands] doctrine that the alleged misconduct by the party relate directly to the transaction concerning which the complaint is made.”) (citations and brackets omitted).

⁹⁹ 47 U.S.C. §§ 201(b), 203(c).