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# BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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10-1093

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FARMERS AND MERCHANTS MUTUAL TELEPHONE
COMPANY OF WAYLAND, IOWA,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA,

Respondents.

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ON PETITION FOR REVIEW OF ORDERS OF
THE FEDERAL COMMUNICATIONS COMMISSION

---

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## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

### A. Parties.

Petitioner: Farmers & Merchants Mutual Telephone Co. of Wayland Iowa

Intervenor for petitioner: Northern Valley Communications LLC

Respondents: Federal Communications Commission and United States of America

Intervenors for respondents: Qwest Communications Corp., Sprint Communications Co., Verizon, AT&T Corp.

### B. Rulings Under Review.

Petitioner seeks review of the following orders:
*Qwest v. Farmers*, 22 FCC Rcd 17973 (2007) (JA );
*Qwest v. Farmers*, 23 FCC Rcd 1615 (2008) (JA );
*Qwest v. Farmers*, 24 FCC Rcd 14801 (2009) (JA );
*Qwest v. Farmers*, 25 FCC Rcd 3422 (2010) (JA ).

### C. Related Cases.

Many of the facts that are before the Court in this case in the context of petitioner's federal tariff have also been before the Iowa Utilities Board in a proceeding entitled *Qwest Communications Corp. v. Superior Telephone Cooperative*, Docket No. FCU-07-2.

In addition, litigation is pending between long distance companies and petitioners involving the operative facts at issue in this case in *Farmers & Merchants Mut. Tel. Co. of Wayland, Iowa v. Qwest Commc'ns Corp.*, Civ. 09-0058-JEG (S.D. Iowa) (consolidated into Civ. 07-78-JEG-RAW); *Sprint Communications Co. v. The Farmers Telephone Company of Riceville et al.*, No. 4:07-cv-00194 (S.D. Iowa).

In addition, we have been informed of more than 25 cases pending in federal district courts and state utility commissions throughout the country that involve "traffic pumping" schemes of the type at issue in this case and on which the decision in this case may have an effect.

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* *Cases and other authorities principally relied upon are marked with asterisks.*

# GLOSSARY

| | |
|---|---|
| IUB | Iowa Utilities Board. The telecommunications regulatory authority in the State of Iowa. |
| IXC | Interexchange carrier. A long-distance telephone company. |
| LEC | Local exchange carrier. A local telephone company. |
| SLC | Subscriber line charge. A fixed charge (also known as the "end user common line charge") imposed under FCC rules on a local telephone subscriber that enables a LEC to recover some of the fixed costs of local exchange facilities. |

UNITED STATES COURT OF APPEALS FOR THE
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FARMERS AND MERCHANTS MUTUAL TELEPHONE
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ON PETITION FOR REVIEW OF ORDERS OF
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# BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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## QUESTIONS PRESENTED

Petitioner, a rural telephone company, engaged in practices that inflated its interstate access charges imposed on long distance carriers that delivered calls to petitioner's facilities. Specifically, petitioner paid conference calling companies to locate their equipment in petitioner's central office, which increased dramatically the number of minutes of incoming traffic and thus the amount of per-minute access charges petitioner billed to long distance carriers. In the orders on review, the Federal Communications Commission determined that long-distance traffic

destined for the conference companies was not subject to interstate access charges under petitioner's FCC tariff. Tariffed access charges applied only to calls delivered to "end users," and, due to the nature of the relationship between petitioner and the conference companies, those companies were not "end users" as defined in the tariff. The questions presented are:

1) Whether substantial evidence supports the FCC's determination that the conference companies were not "end users" under the definitions set forth in petitioner's tariff and thus that calls delivered to those companies were not subject to interstate switched access charges under the tariff;
2) Whether the "filed rate doctrine" requires payment of switched access charges where petitioner's relationship with the conference companies took the service outside the tariff's definition of access service;
3) Whether petitioners' challenge to FCC findings that petitioner and its counsel engaged in misconduct [redacted] whether substantial evidence supports those determinations.

## JURISDICTION

Final orders of the Federal Communications Commission are reviewable pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. §2342(1), provided that the petition for review is filed within 60 days, 28 U.S.C. § 2344. Under 47 U.S.C. § 208(b)(3), an FCC order concluding the agency's resolution of the liability phase of a

complaint proceeding against a common carrier involving the lawfulness of rates is deemed final and appealable. *See Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1105-1106 (D.C. Cir. 2001). Petitioner's challenge to the Commission's reconsideration orders is timely because it was filed within sixty days of the issuance of the final reconsideration order. Petitioner's challenge to the initial order in this matter, however, is out of time. Qwest sought reconsideration of the initial order, but petitioner did not. With respect to petitioner, the order became final for purposes of judicial review in 2007. *See Bellsouth Corp. v. FCC*, 17 F.3d 1487 (D.C. Cir. 1994) (finality is a "party-based concept").

## STATUTES AND REGULATIONS

Pertinent materials are attached.

## COUNTERSTATEMENT

This case involves "traffic pumping," which refers to an "arbitrage scheme" in which a telecommunications carrier "enters into an arrangement with a provider of high volume operations such as chat lines, adult entertainment calls, and 'free' conference calls" in order to generate elevated traffic volumes and maximize access charge revenues. *Connect America Fund*, Notice of Proposed Rulemaking, FCC Order No. 11-13 ¶¶7, 636 (rel. Feb. 9, 2011). Using such a scheme, petitioner Farmers and Merchants Mutual Telephone Company (Farmers) paid such high volume operators (collectively, "conference companies") to use Farmers' facilities

to host their services. Telephone consumers around the country placed long-distance calls to a number located in Farmers' exchange in order to hold conference calls or chat sessions. The conference companies did not charge for the conferencing or chat service itself. Because many callers have unlimited long-distance plans, the calls were essentially free of charge. Callers thus had an incentive to spend considerable time conferencing. Minutes of use terminated on Farmers' facilities skyrocketed, along with the access charges Farmers billed to long-distance providers, known as interexchange carriers (IXCs), that delivered the calls to Farmers' facilities. Farmers' cost of providing service did not increase in proportion to its call volume, however, so its profitability vastly exceeded the amount permitted by the FCC.

In the orders on review, the Commission held that due to the relationship between Farmers and the conference companies, the service provided to them was not covered by Farmers' switched access tariff. Thus, Farmers violated 47 U.S.C. § 203(c), which prohibits the provision of interstate service not set forth in a tariff, and 47 U.S.C. § 201(b), which makes unlawful "unjust or unreasonable" acts in connection with interstate communications service. The four orders are: *Qwest v. Farmers*, 22 FCC Rcd 17973 (2007) (*Initial Order*) (JA ); *Qwest v. Farmers*, 23 FCC Rcd 1615 (2008) (*First Reconsideration Order*) (JA ); *Qwest v. Farmers*, 24

FCC Rcd 14801 (2009) (*Second Reconsideration Order*) (JA ); and *Qwest v. Farmers*, 25 FCC Rcd 3422 (2010) (*Third Reconsideration Order*) (JA ).

*1. Interstate Access Charges and Farmers' Tariffs.*

a. When a telephone user places a long-distance call, the call travels from the facilities of the caller's local telephone company (the "local exchange carrier" or "LEC") to those of an IXC. The IXC then transports the call to the facilities of another LEC, which delivers the call to its recipient. *See NARUC v. FCC*, 737 F.2d 1095, 1103-1104 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). Both LECs are entitled to charge the IXC per-minute "access charges" for originating and terminating the call – *i.e.*, providing access to the LEC's facilities. *See Access Charge Reform*, 12 FCC Rcd 15982, 15991 (1997). Thus, the more minutes of traffic that originate or terminate on a LEC's facilities, the more access fees it may collect. References to "access charges" in this brief will refer to interstate switched access charges governed by federal tariffs filed with the FCC.

Access charges are highly regulated to avert abuse of the LECs' frequent position as a monopoly provider of telephone service, as Farmers is to its customers. The per-minute charge is supposed to reflect only the LEC's costs of providing service, plus a reasonable return. *See MTS and WATS Market Structure*, 93 FCC 2d 241, 251-252 (1983). For rate-of-return carriers like Farmers, the maximum allowable return is no more than 11.65 percent, which consists of a

target rate of 11.25 percent plus a maximum allowance of four-tenths of one percentage point above the target rate. *See Represcribing the Authorized Rate of Return for Interstate Service of Local Exchange Carriers*, 5 FCC Rcd 7507 ¶1 (1990), *reconsidered on other grounds*, 6 FCC Rcd 7193 (1991), *aff'd Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993); 47 C.F.R. § 65.700. As shown below, the rules applicable to small telephone companies have a loophole that enables them to use traffic pumping strategies to exceed the allowable return.

b. All of the rates, terms, and conditions of a LEC's interstate service must be set forth in a tariff filed with the FCC, 47 U.S.C. § 203(a), and the LEC may not provide service or collect fees for service unless it has filed a tariff, 47 U.S.C. § 203(c); 47 C.F.R. § 61.1(c). The terms of the federal tariff govern the relationship between the LEC and the end users of its interstate services. The term "tariff" in this brief will refer to the interstate switched access tariff filed with the FCC, unless specifically noted otherwise.

To reduce the expense and burden of tariff preparation, the Commission allows small LECs to join a collective tariff filed on their behalf by the National Exchange Carrier Association (NECA). *See Regulation of Small Telephone Companies*, 2 FCC Rcd 3811 (1987); 47 C.F.R. §§ 69.3(d), 69.602. The rates established in NECA collective tariffs reflect no specific carrier's costs but the costs and demand of all carriers participating in the group tariff (known as

"average schedule" carriers). 47 C.F.R. § 69.601(a). Importantly, revenues collected under the NECA tariffs are pooled and redistributed among the pool members so that all carriers recoup their costs plus a proportionate share of the permissible profit. *See AT&T Corp. v. FCC*, 317 F.3d 227, 231 (D.C. Cir. 2003); *Connect America Fund* ¶¶643-648. The NECA pooling mechanism makes it difficult for a carrier to exceed substantially the permissible rate of return.

Until 2005, Farmers participated as an average schedule carrier in the NECA tariff pool under the terms of NECA Tariff FCC No. 5. Small carriers may, however, leave the NECA pool and file their own tariffs with respect to interstate access service. 47 C.F.R. § 69.3(e). As applicable here, if an average schedule carrier, such as Farmers, does so, it must base its rates on the most recent NECA rate, 47 C.F.R. § 61.39(b)(2)(i), but it is no longer subject to the NECA revenue pooling and redistribution system. Thus, a LEC that departs the pool and subsequently experiences an increase in traffic without a proportional increase in costs will earn a return greater than it would have had it stayed in the pool. *See Connect America Fund* ¶¶643-648.

Farmers took advantage of that loophole. [redacted] *Initial Order* ¶¶10, 11 (JA ).

[redacted] *Id*. ¶10 (JA ). On July 1, 2005, Farmers left the NECA pool and filed its own tariff, Kiesling Associates Tariff FCC No. 1.[1] Shortly afterwards, Farmers' access minutes rose precipitously. [redacted] *Id*. ¶ 11 (JA ). Farmers' monthly bills to IXCs rose along with its access minutes, [redacted]. *Ibid*. At the same time, because Farmers' costs did not rise in tandem with its fees (by, for example, increasing the number of lines served), *ibid*. (JA - ), Farmers' rate of return [redacted]. *Id*. ¶21 (JA - ).

*2. Qwest Complaint.*

In the wake of the surge in Farmers' access bills, Qwest, an IXC subject to those charges, filed in May 2007 a complaint against Farmers pursuant to 47 U.S.C. § 208. Qwest alleged that during the period from July 2005 to June 2007: (1) Farmers exceeded its permissible rate of return, an unjust and unreasonable practice in violation of 47 U.S.C. § 201(b) (Count I) (JA - ); (2) Farmers assessed charges outside of its tariff in violation of 47 U.S.C. § 203 because calls

[1] The Kiesling tariff incorporates by reference many of the provisions of the NECA tariff, including the definitions of "switched access" and "end user" central to this case.

to conference companies did not terminate on Farmers' facilities within the meaning of the tariff and because the conference companies were not "end users" as defined by the tariff (Count II) (JA - ); and (3) Farmers violated the prohibition on unjust and unreasonable acts set forth in 47 U.S.C. § 201(b) by assessing access charges for traffic not covered by its tariff (Count III) (JA - ).

3. *Initial Order*.

In the *Initial Order* (JA ), the Commission granted Qwest's complaint in part and held that Farmers had violated Section 201(b) by exceeding its authorized rate of return. The Commission also ruled, however, that Qwest was not entitled to damages for the violation because Farmers' access rate was "deemed lawful" pursuant to 47 U.S.C. § 204(a)(3).

The Commission determined that Farmers exceeded the maximum permissible return by [redacted]. *Initial Order* ¶21 (JA ). "Qwest persuasively has demonstrated that Farmers' revenues increased many fold during the period at issue, without a concomitant increase in costs. As a result, the conclusion that Farmers vastly exceeded the prescribed rate of return is inescapable." *Id*. ¶25 (JA ).

The Commission nevertheless held that Qwest had no remedy for the overearnings. Pursuant to 47 U.S.C. § 204(a)(3), Farmers' tariff became effective 15 days after its filing, and in the absence of Commission action to suspend the

tariff, the rates contained in the tariff were thereafter "deemed lawful." *Ibid*. "A carrier charging rates under a lawful tariff … is immunized from refund liability, even if that tariff is found unlawful in a later complaint." *Virgin Islands Tel. Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006). Thus, section 204(a)(3) prohibited any refund to Qwest. *Initial Order* ¶¶26-27 (JA - ).

The Commission denied Counts II and III of Qwest's complaint. As relevant here, those counts alleged that Farmers' assessment of access charges on calls routed to conference companies was unlawful because the tariff did not apply to calls delivered to those companies. Qwest claimed that the tariff applied only to calls delivered to "end users," but as defined in the tariff that term did not apply to the conference call companies. *Initial Order* ¶35 (JA - ). The tariff defined "end user" to mean an entity "which subscribes to the services offered under this tariff." *Id*. ¶36 (JA ).

Qwest had argued that the conference companies did not "subscribe" to Farmers' local exchange service because the net flow of payments was from Farmers to the conference companies rather than vice versa. Complaint ¶¶46-47 (JA - ). Farmers insisted to the contrary that the conference companies were subscribers because Farmers billed them for local telephone service, for the federal subscriber line charge, for rent to house the conference call equipment, and for

utilities. Farmers' Answer at vii (JA ).[2] Thus, Farmers claimed, the relationship between it and the conference companies made those companies subscribers – and thus end users – under the tariff.

The Commission accepted Farmers' argument. Relying on Farmers' representations that the conference companies were billed for the services and the SLC, the agency held that those representations "show[] that the conference calling companies did subscribe … [to] Farmers' tariffed services" despite the net flow of payments from Farmers to the conference companies. *Initial Order* ¶38 & n.39 (JA ).

4. *First Reconsideration Order.*

On November 1, 2007, Qwest sought reconsideration of the Commission's rejection of its claim that the conference companies were not subscribers as defined by the tariff. Petition for Partial Reconsideration (JA ).[3] Qwest brought before the Commission new evidence showing that – contrary to Farmers' representations on which the Commission had relied – the original contracts between Farmers and the conference companies did not require the companies to

[2] The federal subscriber line charge (SLC) is a monthly charge to local telephone subscribers established by the FCC that enables a LEC to recover some or all of the fixed costs of the local loop. *See NASUCA v. FCC*, 372 F.3d 454, 456 (D.C. Cir. 2004).

[3] Farmers did not seek reconsideration of the finding that it had exceeded the permissible rate of return.

pay for service. *Id*. at 9-10 (JA - ). Under those contract terms, Farmers had not billed the conference companies for any services or for the SLC – the very things on which the Commission's previous finding had been based. In those circumstances, Qwest argued, the Commission "simply cannot conclude … that the [conference companies] subscribed to or otherwise took service under a Farmers tariff." *Id*. at 11 (JA ).

Qwest's new evidence showed that Farmers' claims on which the Commission had relied for its findings that the conference companies were subscribers were not true. In fact, the conference companies had not agreed to pay for or been billed for service contemporaneously, but only after-the-fact, as evidenced by backdated contract amendments and invoices. The backdated documents, Qwest showed, had been created after Qwest filed its complaint alleging that the conference companies were not subscribers to Farmers' tariffed service and were prepared for the purpose of defending against the Qwest litigation. The documents made it look as though the bills had been issued at the time service was provided, but in fact they had been sent much later. Petition for Partial Reconsideration at 2, 5-13 (JA , - ).

The Commission granted Qwest's petition for reconsideration and ordered further discovery and briefing. *First Reconsideration Order* (JA ). Although the agency previously had "found that the conference calling companies did subscribe

to services under Farmers' tariff based on Farmers' representation that they purchased interstate End User Access Service and paid the federal subscriber line charge," Qwest's new evidence "calls that representation into question." *Id*. ¶7 (JA ).

5. *Second Reconsideration Order*.

In the *Second Reconsideration Order*, the Commission held Farmers liable for damages to Qwest. Under the terms of its tariff, the agency held, Farmers could not collect access charges for calls delivered to the conference companies. *Id*. ¶10 (JA ).

The "central question," the Commission held, was whether the conference companies were "end users" within the meaning of the tariff. That question turned on the interpretation of three provisions of the tariff: first, the tariff defined "switched access" to mean the provision of a communications path to "end users;" second, "end user" was defined to mean a "customer" of Farmers; and third, "customer" was defined to mean an entity that "subscribes to the services offered under th[e] tariff." *Second Reconsideration Order* ¶10 (citing NECA Tariff §§ 6.1 & 2.6).

The Commission held that its earlier finding that the conference companies were subscribers (and therefore end users, so that Farmers was entitled to access charges for calls completed to them) "was based entirely on Farmers' then-

uncontested averment that the companies 'subscribed to Farmers' interstate service, specifically, interstate End User Access Service, and were billed the federal subscriber line charge.'" *Second Reconsideration Order* ¶11 (JA ). The new record "demonstrates that the conference calling companies did not subscribe, nor did they seek to subscribe, to the services offered under the tariff." *Id*. ¶10 (JA ). Indeed, the companies "expressly structured their … contracts *to avoid* strict adherence to the terms of Farmers' filed tariff." *Ibid*. Specifically:

- The contracts between Farmers and the conference companies stated that Farmers would provide service not at a tariffed rate, but free of charge. *Second Reconsideration Order* ¶12 & nn.48-49 (JA ).
- Farmers "provided connections to the conference calling companies in a manner that differed from those made available to customers of its tariffed service," including different switches and higher capacity trunk lines, as well as special equipment such as backup power generators, *Second Reconsideration Order* ¶13 & n.50 (JA ).
- Farmers' contracts prohibited Farmers from providing service to competitors – a practice "antithetical to the notion of tariffed service" – and "contained unique terms" regarding price, duration, number of minutes to be delivered and other terms that are "contrary to a traditional tariff offering." *Second Reconsideration Order* ¶14 & n.53 (JA ). "Only common carrier services can be tariffed," the Commission found, and Farmers' exclusivity agreements violated the "hallmark[] of a common carrier service" that "the carrier offering the service holds itself out to serve indifferently all potential users." *Id*. n.53 (JA ) (quotation marks and citations omitted)
- Farmers did not enter the conference companies into its customer billing system, did not contemporaneously bill the

companies for service as required under the tariff, *Second Reconsideration Order* ¶16 (JA ), and did not report end-user revenues for purposes of the universal service requirements of 47 C.F.R. § 54.706, *Second Reconsideration Order* n.97 (JA ). [redacted]. *Id*. n.70 (JA ).

- Farmers sent only two sets of bills to the conference companies: one set shortly before the first round of discovery and another set before a second round. The timing of the bills "constitute[s] very strong evidence that Farmers neither believed that it was providing, nor intended to provide, tariffed services." *Second Reconsideration Order* ¶25 (JA ).

- [redacted]. Such conduct "is inconsistent with the provision of tariffed services, and … evidences Farmers' and [the] conference calling companies' apparent intent from the very beginning to operate in a manner that did not comport with Farmers' tariffed services offering." *Second Reconsideration Order* ¶17 (JA ).

Given that course of conduct, the Commission held, "[t]he evidence overwhelmingly demonstrates," *Second Reconsideration Order* ¶17 (JA ), that Farmers "never intended to treat the conference calling companies as customers of any of Farmers' tariffed services," *id*. ¶16 (JA ).

The Commission found further that Farmers' retroactive billing did not rectify the past course of dealings and render the conference companies subscribers under the tariff. For one thing, the timing of the bills – sent immediately before discovery deadlines – suggested that they were sent for

the purpose of defending against Qwest's complaint rather than as part of the companies' actual commercial arrangement. *Second Reconsideration Order* ¶16 ( [redacted] ) (JA ); *id*. ¶15 ("the parties in no way behaved as if they were operating under tariff until *after* Farmers became embroiled in litigation") (JA ).

Moreover, even after Farmers sent bills, it continued to act as though its relationship with the conference companies was not governed by the tariff. [redacted] *Second Reconsideration Order* ¶18 (JA ). Nor did Farmers [redacted] . *Id*. n.65 (JA - ). Indeed, [redacted] . *Id*. ¶20 (JA ). Given the suspicious timing of the bills and [redacted], the Commission concluded that "Farmers generated backdated invoices to create the appearance of compliance with its tariff provisions." *Id*. ¶18 (JA ).

Similarly, the retroactive amendments to Farmers' contracts with the conference companies did not bring the relationship within the tariff. Like the backdated bills, the contract amendments were written after the litigation began, and the Commission found that Farmers undertook the amendments "as part of its litigation strategy." *Second Reconsideration Order* ¶20 (JA ). Contrary to Farmers' claims, the Commission found that the amendments were not "clarifications of the parties' original intent," *id*. ¶19 (JA ), but an "after-the-fact attempt to document a different business relationship" than the one that actually existed, *id*. ¶20 (JA ). Indeed, the purported amendments "did not change the way in which Farmers conducted business with the conference calling companies," even after they were signed. *Ibid*.

Thus, the Commission found, "the conference calling companies were not 'end users' within the meaning of Farmers' tariff [and] Farmers' transport of traffic to them "did not constitute 'switched access' under the tariff." *Second Reconsideration Order* ¶26 (JA ). The evidence "compel[led] the conclusion that Farmers violated sections 203(c) and 201(b)" of the Communications Act by providing service outside of a tariff and by unjustly and unreasonably billing for such service. *Id*. ¶¶1, 26 (JA , ).

6. *Third Reconsideration Order*.

Farmers sought reconsideration of *Second Reconsideration Order*, which the Commission denied in the *Third Reconsideration Order* (JA ). Farmers' reconsideration petition mostly raised arguments that the Commission had already rejected and as to which "Farmers fail[ed] to present any new evidence that would compel [the agency] to reconsider [its] previous findings." *Id*. ¶8 (JA ).

The Commission addressed and rejected on its merits Farmers' argument that the agency had in the *Second Reconsideration Order* improperly changed its conclusion in the *Initial Order* that the conference companies were end users under the tariff. The first order rested upon Farmers' then-uncontested factual assertions that the conference companies "purchase interstate End User Access Service and pay the federal subscriber line charge." *Third Reconsideration Order* ¶10 (JA ). The evidence on reconsideration showed, however, that "the conference calling companies never paid subscriber line charges or made any other payments to Farmers and that Farmers never expected to be paid" and that the companies "did not structure their relationship in a manner consistent with Farmers' tariff." *Id*. ¶11 (JA ).

The four orders before the Court concluded the liability phase of Qwest's complaint. Qwest requested that the liability and damages phases be bifurcated. *See* 47 C.F.R. § 1.722(d). The Commission now has pending before it Qwest's

supplemental complaint for damages, pursuant to which it will conduct additional proceedings and determine Qwest's damages. That phase of the proceeding is being held in abeyance pending the outcome of this case.

## SUMMARY OF ARGUMENT

1. Farmers' tariff defined "switched access" to mean service provided to an "end user" as defined in the tariff. Undisputed evidence before the Commission showed that the conference companies were not end users under the tariff because they did not subscribe to tariffed service. Quite to the contrary, the arrangements between Farmers and the conference companies had been structured to avoid a tariffed subscriber relationship. Among other things, Farmers did not charge the SLC, did not expect to be paid for service (and did not even enter the conference companies into its customer billing system), engaged in individual negotiations over the terms and conditions of service, and agreed not to provide service to competitors. Those arrangements describe a cooperative business venture, not a tariffed common carrier-end user relationship.

Farmers does not challenge the facts found by the Commission demonstrating that the conference companies were not "end users." Instead, Farmers argues that the Commission misinterpreted the tariff by focusing on the tariff's definition of switched access (which undisputedly turns on whether a customer is an end user) rather than other sections of the tariff that have no express

end user limitation. But the sections on which Farmers relies are controlled by the overarching definition of switched access. Thus, the Commission properly determined that because the conference companies were not end users, the service provided to them was not covered by the tariff.

Farmers is wrong in asserting that the Commission improperly reversed the *Initial Order*. Reversal was justified by new evidence – previously withheld from Qwest and the agency – demonstrating that Farmers did not subscribe to service under the tariff and that the actual relationship between Farmers and the conference companies was inconsistent with the nature of a tariff. Farmers is also wrong in claiming that the Commission lost jurisdiction to review the matter further because it did not timely act on the petition for reconsideration under 47 U.S.C. § 405(b). In fact, the agency acted on the petition within the statutory deadline. But even if it had not, Congress set forth no consequence for missing the deadline, and it is established law that if the statute provides no specific consequence, an agency retains jurisdiction over a matter even if it misses a statutory deadline.

2. The Commission's finding that Qwest was not required to pay access charges is consistent with the filed rate doctrine. That doctrine requires all parties taking service under a tariff to pay the tariffed rate. Here, however, the agency found that no tariff governed the service Farmers supplied to the conference

companies. In the absence of a tariff, the filed rate doctrine does not apply. That is the case even if the service provided to the conference companies was functionally similar to switched access, for the Commission has recognized that similar services are not subject to a tariff if they are not specifically covered by the tariff language. Having voluntarily engaged in business arrangements that removed the conference companies from the scope of its tariff, Farmers can get no relief from a doctrine that requires compliance with a tariff.

Nor does the filed rate doctrine render the conference companies end users as a matter of law by nullifying Farmers' agreements that contravene the tariff. The Commission properly found that for purposes of determining whether Qwest could collect damages, Farmers' business arrangements with the conference companies deviated so substantially from the nature of a tariffed relationship that the parties could not be considered to be covered by a tariff at all.

The [redacted] decisions are irrelevant here. Neither decision addresses whether the filed rate doctrine requires that access charges be paid on calls placed to conference companies. [redacted] assumed that the service provided was covered by the tariff and addressed only the question whether a LEC could serve a conference company on preferential terms. *Jefferson II* likewise addressed no issue presented here.

3. [redacted]

In any event, substantial evidence supports the Commission's determinations of misconduct. The timing of the backdated bills and contract amendments [redacted]. The backdated nature of the documents supports the inference that they were intended to deceive. Farmers proposes a benign alternative explanation, but it does not refute the evidence against it. Farmers also failed to comply with discovery requests that plainly called for documents that Farmers did not produce.

## ARGUMENT

### I. STANDARD OF REVIEW.

The Commission's conclusions in this case turn principally on its interpretation of Farmers' tariff, and the Court's review of that interpretation is deferential. *Diamond Int'l Corp. v. FCC*, 627 F.2d 489, 492 (D.C. Cir. 1980). The Court will reverse the agency's decision "only if its interpretations are not

supported by substantial evidence, or the Commission has made a clear error in judgment." *AT&T Corp. v. FCC*, 394 F.3d 933, 936 (D.C. Cir. 2005) (quotation marks and citation omitted); *see* 5 U.S.C. §706(2)(E). Substantial evidence "mean[s] 'more than a scintilla, but less than a preponderance.'" *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 475 (D.C. Cir.), *cert. denied*, 526 U.S. 1158 (1998), *quoting Burns v. Director, Office of Workers' Comp. Programs*, 41 F.3d 1555, 1562 n.10 (D.C. Cir. 1994) (internal quotations and citation omitted). The agency's conclusion "may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view." *Secretary of Labor, Mine Safety and Health Admin. v. Federal Mine Safety and Health Review Comm'n*, 111 F.3d 913, 918 (D.C. Cir. 1997) (internal quotations and citation omitted).

Agency conclusions that do not turn on the record evidence may be reversed only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under that "necessarily deferential" standard, the Court will "presume the validity of the Commission's action and will not intervene unless the Commission failed to consider relevant factors or made a manifest error in judgment." *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 300 (D.C. Cir. 2003).

Review of the FCC's interpretation of the Communications Act is similarly deferential. Unless the plain language of the statute resolves the "precise question" presented, the Court will "defer to the agency's interpretation" of silent or ambiguous language as long as that interpretation is a "permissible construction of the statute." *Consumer Electronics*, 347 F.3d at 297, quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

## II. THE COMMISSION CORRECTLY CONCLUDED THAT THE CONFERENCE CALL COMPANIES WERE NOT "END USERS" UNDER FARMERS' TARIFF.

The relationship between a carrier and its customer is defined by the terms of the tariff. *Halprin, Temple, Goodman & Sugrue*, 14 FCC Rcd 21092, 21101 (1999). Any ambiguity in those terms must be interpreted in favor of the customer and against the carrier. *Associated Press v. FCC*, 452 F.2d 1290, 1299 (D.C. Cir. 1971). The central question here is whether Farmers provided Qwest interstate "switched access service" as defined in Farmers' federal access tariff. If not, Farmers was not entitled to bill Qwest under the terms of the tariff, and the Commission correctly found that Farmers violated both 47 U.S.C. § 203(c), which prohibits the provision of untariffed services, and § 201(b), which prohibits unjust and unreasonable practices (such as billing for untariffed services).

That question hinges on the tariff's definition of three terms: "switched access," "end user," and "customer." As pertinent here, "switched access" means a

service that allows an IXC customer (in this case Qwest) "to terminate calls from a customer designated premises to an *end user*'s premises." NECA Tariff § 6.1 (JA ) (emphasis added). Under that definition, if a call is not terminated to an "end user," the service provided to the IXC that delivers the call is not switched access. "End user" means "any *customer* … that is not a carrier." NECA Tariff § 2.6 (JA ) (emphasis added). "Customer" means in relevant part an entity that "*subscribes* to the services offered under this tariff." *Ibid*. (emphasis added). Thus, Farmers provides (and may bill for) switched access only when it delivers a call to a person or entity that "subscribes" to Farmers' service under the tariff.

### A. Substantial Evidence Showed That The Conference Companies Were Not End Users As Defined By The Tariff.

The Commission correctly determined that Farmers did not provide switched access to Qwest for calls delivered to the conference companies because those companies did not subscribe to the services offered under the tariff and thus were not "end users." The agency found, and the record amply supports, that – far from establishing a subscriber relationship under Farmers' tariff – the companies "deliberately structured their relationships in a manner that is contrary to a traditional tariff offering." *Second Reconsideration Order* n.53 (JA ).

For example, the contracts prohibited Farmers from providing service to competing conference providers, a practice "antithetical to the notion of tariffed

service." *Id*. ¶14 (JA ). Farmers provided service to the conference companies using different equipment than it used for other customers, *id*. ¶13 (JA ), and each conference company enjoyed individually negotiated terms and conditions, *id*. ¶14 (JA ). Unlike its practice with other customers, Farmers did not send regular bills or enter the conference companies into its billing system, *id*. ¶16 (JA ), and did not pay the federal universal service charges that would have accrued for service provided to a subscriber, *id*. n.97 (JA ). Farmers agreed not to charge for service, or the SLC, or equipment installation, or space in its central office. *Id*. ¶12 & nn.48, 49 (JA ). Indeed, [redacted]. *Id*. ¶20 (JA ).

The Commission's conclusion that the conference companies were not end users thus easily passes the substantial evidence test. That test requires only that an agency's conclusions be supported by more than a "scintilla" of evidence. *Grand Canyon Air Tour Coalition,* 154 F.3d at 475. The evidence here was overwhelming. As the Commission determined, the record "convincingly demonstrated that Farmers never intended to treat the conference calling companies as customers of any of Farmers' tariffed services." *Second Reconsideration Order* ¶16 (JA ).

### B. Farmers Has Failed To Show That The Conference Companies Were End Users.

Farmers does not dispute any of the evidence showing that it did not establish an end user relationship with the conference companies under the meaning of its access tariff. It provides no countering facts of its own, nor does it suggest that the Commission misinterpreted the facts. Instead, Farmers raises a scattershot series of claims that challenge the Commission's interpretation of the tariff and its authority to adjudicate this case. None of those claims has merit.

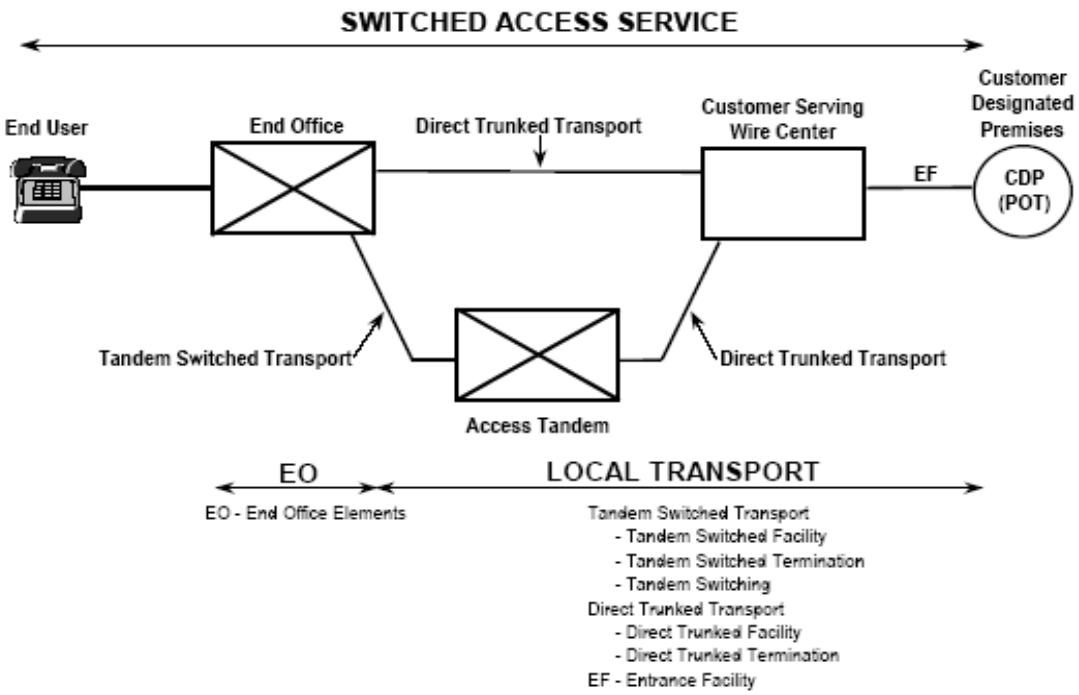
#### 1. The Commission Properly Applied The Tariff's Definition Of Switched Access.

Farmers first argues that the Commission relied on the wrong provisions of the tariff when it found that switched access requires an end user relationship. The Commission based its decision on the definition of "switched access" in section 6.1 of the tariff, but Farmers claims that other sections of the tariff do not limit switched access to calls to end users. Br. 19-23.

Specifically, Farmers asserts that it provides "tandem switched transport," "local switching," and "information service," each of which, it claims, do not require connection of a call to an end user. The tariff itself, however, demonstrates that each of those provisions requires termination to an end user. Each of the sections that Farmers relies on is a numbered subsection of section 6.1 – 6.1.x – which under the rules of construction set forth in the NECA Tariff Users Guide, is

"subordinate to and dependent on" the "next higher level" of the tariff. *See Second Reconsideration Order* ¶23 (JA ). Thus, for example, section 6.1.3(A), which describes "tandem switched transport," necessarily incorporates the definition of switched access set forth in its superior section 6.1. That definition "must be read into the subsections cited by Farmers, even if not repeated" in the subsection. *Ibid*. "[I]f a service does not constitute 'switched access' within the meaning of tariff section 6.1, then it cannot constitute 'switched access' within the meaning of a subordinate section." *Ibid.*[4] Indeed, the NECA tariff includes a pictogram of switched access illustrating that the sub-elements of switched access remain tied to providing service to an end user:

[4] Farmers claims (Br. 20) that the Commission should have used the Kiesling "Users Guide" rather than the NECA Guide, but that is wrong. The pertinent parts of the Kiesling tariff incorporates the NECA tariff language by reference, which makes it appropriate to rely on the NECA user guide. *See, e.g.*, Kiesling Tariff FCC No. 1 User Guide ("This tariff references the National Exchange Carrier Association, Inc. Access Service Tariff FCC No. 5 for its terms and conditions for all issuing carriers.") (JA ).




NECA Tariff p. 6-6 (JA ). The Commission's reading of the tariff was well within its discretion. *Diamond Int'l.*, 627 F.2d at 492.

Farmers also invokes several other tariff provisions (6.4, 6.8, and 17) that it claims define the elements of access service and do not expressly include an end user requirement. Br. 21. Farmers did not rely on those provisions before the Commission and may not do so now. Section 405(a) of the Communications Act makes it a "condition precedent to judicial review" that the Commission first have an "opportunity to pass" on "questions of fact or law." 47 U.S.C. § 405(a). *See American Scholastic TV Programming Found. v. FCC*, 46 F.3d 1173 (D.C. Cir. 1995); *Bartholdi Cable v. FCC*, 114 F.3d 274 (D.C. Cir. 1997).

In any event, the argument lacks merit. As discussed, under the structure of the tariff and the NECA Users Guide, sections 6.4 and 6.8 of the tariff are subordinate to and dependent on section 6 (entitled "switched access"). Thus, the elements of switched access described in sections 6.4 and 6.8 logically rely on the overarching definition of switched access in section 6.1. It would make no sense to divorce tariff provisions that describe particular aspects of switched access from the generally applicable meaning of that term.[5] Nor does section 17 support Farmers' argument. That provision sets forth the rates for service and does not define the services involved.

It also makes no difference whether the service provided to the conference companies was "functionally equivalent" to access service. Br. 23. A service that does not "fall within the plain meaning" of the tariff is not governed by the tariff whether or not it is "functionally similar" to a tariffed service. *Western Union Corp. v. Southern Bell Tel. Co.*, 5 FCC Rcd 4853, 4855 (1990). Indeed, 47 U.S.C. § 203 contemplates that very situation, making it unlawful for a carrier to "fail[] to

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[5] Farmers mistakenly relies (Br. 20-21) on *Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082 (1984), for the proposition that the definition of switched access does not control subordinate tariff sections. Farmers did not rely on that decision before the Commission, but to the degree that the Commission criticized the NECA tariff in 1984, its concerns are no longer live. As is obvious from examination of the original tariff language, *see* 97 FCC 2d at 1229, and as Farmers admits (Br. 21), NECA subsequently changed the tariff language, which now makes clear that Section 6.1 contains the unitary definition of switched access.

file in its tariff any rates, terms, and conditions under which it offered" the service at issue. *New Valley Corp. v. Pacific Bell*, 15 FCC Rcd 5128, 5132-5133 (2000). The Commission did not reach the question of how traffic to the conference companies should be classified, *see Third Reconsideration Order* n.43 (JA ), but in the absence of an end user that traffic did not constitute switched access under the controlling language of the tariff. Farmers' intervenor suggests that it is unfair for the Commission to encourage small LECs to use the NECA tariff and then construe it against them, Int. Br. 24, but neither the tariff nor the Commission compelled Farmers to engage in relationships that were structured deliberately to fall outside the tariff terms.

For the same reason, Farmers is wrong in contending that the Commission's interpretation of the tariff will lead to "arbitrary and inequitable outcomes." Br. 23. Farmers chose to engage in business relationships with the conference companies that removed those companies from the definition of "end user" under the tariff. There is nothing unfair about holding Farmers to the consequences of its own scheme to avoid the FCC's rate-of-return limitations and artificially increase Farmers' income at Qwest's expense.

### 2. The Commission Properly Reconsidered Its Initial Decision.

In the *Initial Order*, the Commission determined that the conference companies were end users. Farmers had represented that the conference

companies "purchase[d] interstate End User Access Service and pa[id] the federal subscriber line charge." *Initial Order* ¶37 (JA ); *see* Farmers' Answer at vii (JA ). On the basis of that representation, the Commission held that the conference companies were "subscribers" within the dictionary definition of that word – persons who "enter their names" for service – and thus end users, even though Farmers made net payments to them rather than vice versa. *Initial Order* ¶38 (JA ).[6]

On reconsideration, Qwest presented new evidence showing that, in fact, the conference companies had not purchased service or paid the SLC. *Second Reconsideration Order* ¶12 & n.49 (JA ). Furthermore, the evidence showed – and Farmers does not now dispute – that the course of dealings between Farmers and the conference companies was inconsistent with a tariffed subscriber relationship. *Id*. ¶¶13-16 (JA - ). The Commission thus properly reversed its initial determination and held that the conference companies were not "subscribers" or end users.

Farmers and its intervenor are wrong when they contend that the change from the *Initial Order* to the *Second Reconsideration Order* was arbitrary because the Commission "retroactively replac[ed] the … [*Initial Order*] legal standard for

[6] The Commission discussed the cash flow between Farmers and the conference companies. JA . It did not hold, as Farmers' Intervenor now claims, that "the details of the financial relationship" between them were irrelevant. Int. Br. 18.

'subscribe' with a new administrative rule." Br. 33; Int. Br. 18-20. The Commission did not "replace" the standard for being a subscriber under a tariff; it found that new evidence showed that the conference companies were not subscribers under any reasonable meaning of that term. That determination was well within the Commission's authority to reconsider its rulings in the course of a proceeding given "sufficient reason" to do so. 47 U.S.C. § 405(a). Farmers challenges none of the evidence that caused the Commission to revise its position.

When the Commission reverses an earlier order in the same proceeding, its decision is not "retroactive" as Farmers charges. Br. 33. Even if it were, "[r]etroactivity is the norm in agency adjudications no less than in judicial adjudications." *Qwest Servs. Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007) (quotation marks and citation omitted).[7]

Farmers' Intervenor suggests that the Commission erred by examining Farmers' relationships with conference companies under Farmers' federal tariff rather than under its state tariff (filed with the Iowa Utilities Board (IUB)). Int. Br. 21-23. That claim is barred on two grounds. It was not raised before the Commission and is barred by 47 U.S.C. § 405(a). It also was not raised by Farmers in its brief. "An intervening party may join issue only on a matter that has been brought before the court by another party." *Illinois Bell Tel. Co. v. FCC*, 911

[7] We address at pages 40-45 below Farmers' claims that the Commission's decision conflicts with the filed rate doctrine.

F.2d 776, 786 (D.C. Cir. 1990), citing *Vinson v. Washington Gas Light Co.*, 321 U.S. 489, 498 (1944) ("an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues").

In any event, the claim is incorrect. The tariff defines "customer" to mean an entity that "subscribes to the services offered under this tariff," NECA Tariff § 2.6 (JA ). It was thus appropriate for the FCC to look to the interstate tariff. Moreover, as Intervenor recognizes (Int. Br. 20-21), the FCC does not regulate Farmers' provision of intrastate telephone service; the IUB does. The FCC also does not dictate Farmers' business arrangements with the conference companies. Those arrangements, however, rendered the companies non-end users for Farmers' provision of interstate service, which the FCC does regulate. Farmers attempted to bill Qwest under its federal tariff and, inasmuch as Farmers never argued that any other tariff was relevant, it was appropriate for the FCC to determine whether Farmers provided interstate switched access service under the tariff's definition of that term.[8]

[8] For reasons similar to those relied on by the Commission, the IUB held that the conference companies were not end users for purposes of Farmers' state-level access tariff. *See Second Reconsideration Order* n.45 (JA ); *Qwest Communications Corp. v. Superior Telephone Cooperative*, Order Denying Requests for Reconsideration, Docket No. FCU-07-2 (Iowa Utilities Board Feb. 4, 2011).

### 3. Section 405(b)(1) Did Not Bar Reconsideration.

With respect to a proceeding (like this one) under 47 U.S.C. § 208(b), section 405(b)(1) of the Communications Act states that within 90 days after the receipt of a petition for reconsideration, the Commission "shall issue an order granting or denying" the petition. 47 U.S.C. § 405(b)(1). Farmers argues (Br. 46-48) that because the *Second Reconsideration Order* was released more than 90 days after briefing concluded on Qwest's petition for reconsideration, the FCC had no authority to issue the *Second Reconsideration Order*. That order, according to Farmers, is thus "void and without legal effect." Br. 47. Farmers' theory is that under Section 405(b)(2), which makes an order "issued under paragraph (1) … a final order [that] may be appealed," the Commission's failure to act within 90 days rendered the *Initial Order* a "final" order and "the FCC no longer had statutory jurisdiction to reconsider and reverse" that order. Br. 48.

Farmers is wrong on multiple grounds. First, the Commission complied with the statute and acted on Qwest's petition for reconsideration within 90 days. Qwest filed its petition for reconsideration on November 1, 2007, and the Commission issued the *First Reconsideration Order* granting reconsideration on January 29, 2008, 88 days later. As the Commission properly determined, "that order satisfied section 405(b)(1) of the Act." *Third Reconsideration Order* ¶6 (JA ). The *First Reconsideration Order* also reopened discovery and called for

additional proceedings, *see* 47 C.F.R. § 1.106(k) (on reconsideration, FCC may "[o]rder such proceedings as may be necessary or appropriate"). To be sure, the Commission did not issue the *Second Reconsideration Order* within 90 days of the completion of those proceedings. As the Commission held, however, the additional proceedings did not constitute "a separate petition for reconsideration," and the 90-day statutory deadline did not apply. *Third Reconsideration Order* ¶6 (JA ).

Second, Farmers misconstrues the statute. Any failure by the Commission to act within the 90-day deadline did not divest the Commission of its power to reconsider the *Initial Order*. Section 405(b)(2) provides that a *reconsideration* order issued pursuant to section 405(b)(1) is a final and appealable order; it says nothing about the Commission losing jurisdiction over the *underlying* order if the Commission does not act within 90 days.

Under a correct reading of the statute, it is clear that section 405(b)(1) provides no consequence for missing the deadline (assuming it has been missed here). It is firmly established that in such circumstances, "the time period is [discretionary] rather than mandatory, and an agency will not lose jurisdiction over the matter upon expiration of that period." *Gottlieb v. Peña*, 41 F.3d 730, 733 (D.C. Cir. 1994), citing *Brock v. Pierce County*, 476 U.S. 253 (1986); *see Third Reconsideration Order* ¶7 (JA ).

Farmers' Intervenor makes the similar (but slightly different) argument that the *Initial Order* was not subject to additional Commission review because section 405(b)(2) rendered the *First Reconsideration Order* (as opposed to the *Initial Order*) a final order. Int. Br. 7-17. That claim is barred because it was not raised before the Commission in violation of 47 U.S.C. § 405(a) and because it goes beyond the issues raised by Farmers in violation of the principle established in *Illinois Bell*, 911 F.2d at 786, that intervenors may not expand the scope of the case. The *Illinois Bell* rule should apply particularly forcefully to an intervenor's challenge to a procedural aspect of a case in which it was not a party and in which its interest extends only to the substance of the Commission's ultimate decision.

The claim is wrong in any event. Even if the *First Reconsideration Order* was appealable under section 405(b)(2), under *Gottlieb v. Peña* the Commission did not lose power after 90 days to conduct further proceedings. At most, section 405(b)(2) gave Farmers the right to pursue a challenge to the *First Reconsideration Order* – a course that Farmers did not pursue.[9]

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[9] Intervenor wrongly claims that the *Initial Order* was not subject to agency reconsideration by virtue of FCC Rule 1.106(n), 47 C.F.R. § 1.106(n). Int. Br. 8, 12-15. That rule provides that regulated entities must comply with an FCC order that is subject to a petition for reconsideration unless the Comission stays the effectiveness of the order, but it has nothing to do with the FCC's authority to conduct proceedings after the 90-day statutory deadline. Intervenor is also incorrect that the Commission was required to stay the *Initial Order*, given that the Commission granted partial reconsideration of that order.

#### 4. The Commission Had Jurisdiction Over Qwest's Complaint Under Section 208.

Farmers argues further that the FCC "lacked subject matter jurisdiction ab initio" under 47 U.S.C. § 208. Br. 49. The claim is that section 208 grants the FCC jurisdiction only over claims involving "common carrier services," Br. 49, but the Commission found that the service provided to the conference companies was not a common carrier service because it did not fall within the access tariff. Farmers thus asserts that "the FCC exceeded its jurisdiction." Br. 49.

That claim is flatly wrong. Section 208 grants the Commission authority to adjudicate complaints "of *anything* done or omitted to be done by *any* common carrier" in violation of the Communications Act. 47 U.S.C. § 208(a) (emphasis added). Farmers held itself out as a common carrier providing access service to IXCs such as Qwest and billed Qwest for that service. Its acts towards Qwest as a common carrier therefore fall squarely within the statute. Moreover, Section 203(c)(3) makes unlawful a common carrier's provision of service outside of its tariff. Farmers violated that law here, and its own illegal conduct does not immunize it from the statutory complaint process.

### C. The Commission Correctly Determined That Farmers Violated Section 201(b).

In the *Initial Order*, the Commission held that Farmers violated section 201(b) by exceeding its allowable rate of return, *see Initial Order* ¶¶2, 24 (JA , ),

but that Qwest had no remedy for the violation, *id*. ¶¶26-27 (JA - ). In the *Second Reconsideration Order* Commission held that the tariff did not apply to the service Farmers rendered to Qwest and held Farmers liable for damages. Farmers sought further reconsideration on the ground that those two holdings were in conflict. *Third Reconsideration Order* ¶14 (JA ). The Commission rejected that argument. The finding of overearning, the Commission explained, was "an independent, alternative basis for finding that Famers violated section 201(b)." *Ibid*. (JA - ). Farmers now alleges that the Commission's finding of a violation of section 201(b) was wrong in light of the deemed lawful provision of 47 U.S.C. § 204(a)(3).

To the degree Farmers challenges the principal holding reached in the *Initial Order*, its challenge is out of time. *See* p.3, *supra*. To the degree it challenges the alternative, independent holding in paragraph 14 of the *Third Reconsideration Order*, Farmers is wrong. The Commission's ruling is consistent with the "deemed lawful" requirement of 47 U.S.C. § 204(a)(3). Under that provision, Farmers' rates were deemed lawful – and therefore not subject to a refund – up to the point the FCC determined otherwise. *See Virgin Islands Telephone*, 444 F.3d at 669; *Initial Order* ¶¶26-27 (JA - ). But nothing in paragraph 14 imposes a retrospective refund; rather, the Commission simply noted that the rates properly could be found to have violated section 201(b) even if they had been properly charged under a

tariff and thus could qualify for prospective relief. The deemed lawful provision of section 204(a)(3) "does not mean that tariff provisions that are deemed lawful when they take effect may not be found unlawful subsequently" in complaint proceedings under section 208 or tariff investigations under 47 U.S.C. § 205. *Initial Order* ¶20 (JA ); *see Virgin Islands Telephone*, 444 F.3d at 671 n.4 (overearnings subject to remedy as long as it is "prospective rather than retrospective"); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 406, 411 (D.C. Cir. 2002) (prospective remedy available in deemed lawful rate if "later examination shows" that the rate is unreasonable).

## III. THE FILED RATE DOCTRINE DOES NOT HELP FARMERS IN THIS CASE.

Farmers devotes much of its brief (Br. 22-24, 25-30, 31-33, 40-44) to the filed rate doctrine, which generally requires that all parties that take service under a tariff must pay the rate set forth in the tariff. *See, e.g., Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 577 (1981). As set forth below, the precise nature of Farmers' argument is not clear, but it fails however it is read. The filed rate doctrine can apply only to a service for which there is a tariff. Farmers purposefully sought to avoid creating such a relationship with the conference call companies, choosing instead to provide service under special contracts. In doing so, it also made the access charge tariff inapplicable to Qwest. Qwest's complaint proceeding properly took the situation as Farmers established it during the period

covered by the complaint. There was no applicable tariff, and in the absence of an applicable tariff, the filed rate doctrine did not apply to this case.

### A. The Filed Rate Doctrine Does Not Require Qwest To Pay Access Charges.

One interpretation of Farmers' argument is that when Qwest delivered calls that were terminated by Farmers to the conference companies, Qwest necessarily used switched access service and therefore must pay the tariffed charges. *E.g.*, Br. 27 ("Qwest utilized Farmers' access service to complete long distance conference calls … and therefore was a customer[] subject to the rates and terms in Farmers' access service tariff."). That claim fails for two reasons. First, the Commission found that Qwest did not use Farmers' tariffed switched access service; switched access under the terms of Farmers' tariff requires delivery of a call to an end user, and the conference companies were not end users.

Second, the claim relies on the assumption that switched access is the only service Farmers could provide with respect to calls delivered by an IXC to Farmers' facilities. As discussed at pages 30-31 above, however, where a provided service is "functionally similar" to a tariffed service, if the service does not "fall within the plain meaning" of the tariff it is not governed by the tariff. *Western Union Corp.*, 5 FCC Rcd at 4855. In such a case, the carrier violates 47 U.S.C. § 203 (as Farmers did here) "because it failed to file in its tariff any rates, terms, and conditions under which it offered" the service at issue. *New Valley Corp.*, 15

FCC Rcd at 5132-5133. Although the function performed by Farmers – delivery of an incoming long distance call to a dialed party – may resemble switched access in certain respects (in others, such as the cost of providing service, it does not), Farmers is bound by the terms of its tariff. By choosing to structure its relationships with the conference companies to place them outside of the tariff's definition of "end user," Farmers provided a service that was not subject to its tariff.

The Commission's decision does not, as Farmers incorrectly claims, result in discriminatory rates, which are prohibited by the filed rate doctrine. *See* Br. 29 ("The FCC has made Qwest the beneficiary of the very discrimination that … the file rate doctrine [was] intended to prohibit."); *see Towns of Concord, Norwood, and Wellesley v. FERC,* 955 F.2d 67, 71 (D.C. Cir. 1992). Under the Commission's ruling, no IXC would be responsible for Farmers' tariffed access charges for calls delivered by Farmers to the conference companies, but all IXCs would be responsible for access charges delivered to end users within the meaning of the tariff.

Farmers' brief might also be read to claim that the filed rate doctrine nullifies the contracts and other dealings between Farmers and the conference companies that deviated from the tariff. *See Arkansas Louisiana*, 453 U.S. at 582 (doctrine prohibits enforcement of contracts between a common carrier and a

customer that deviate from the terms of a tariff). In the absence of those contractual deviations from the tariff, the argument might go, the conference companies were subscribers, and therefore end users, under Farmers' tariff as a matter of law. Br. 28 ("no act or omission by Farmers, including Farmers' business arrangements with conference calling companies … precludes enforcement of Farmers' access service tariff.").

That claim fails on several grounds. First, the filed rate doctrine can apply only to a relationship governed by a tariff. But the Commission found that the arrangements between Farmers and the conference companies were never intended to be covered by the tariff, *Second Reconsideration Order* ¶16 (JA ), and in fact deviated so thoroughly from any understanding of a tariffed relationship that the parties "never established – and in fact purposefully avoided" a tariffed relationship, *id*. ¶21 (JA ). Among other things, Farmers did not collect the SLC, did not expect to be paid for service, negotiated individual terms with each conference company, used different equipment to serve the conference companies than to serve other customers, did not enter the conference companies into its billing system, and agreed not to provide service to competitors – all terms and conditions that are "antithetical to the notion of tariffed service" and "contrary to a traditional tariff offering." *Id*. ¶14 & n.53 (JA ). Such conduct – none of which Farmers disputes – "is inconsistent with the provision of tariffed services, and …

evidences Farmers' and [the] conference calling companies' apparent intent from the very beginning to operate in a manner that did not comport with Farmers' tariffed services offering." *Id*. ¶17 (JA ). The nature of Farmers' service to the conference companies, in other words, demonstrated not simply a deviation from the tariff – such as a preferential rate or a more favorable term of service – but an intent to provide service outside any tariff at all. In that situation, the Commission found, "the filed rate doctrine offers Farmers no refuge in its dispute with Qwest and cannot rescue Farmers from its decision to circumvent the tariff." *Id*. ¶22 (JA ).

Furthermore, the filed rate doctrine historically has been applied exclusively to govern the relationship between a carrier and the customer with which the carrier had entered into a contract that deviated from a tariff. Farmers and Qwest did not sign such a contract. As the Commission found, "binding a third party such as Qwest by the application of the filed rate doctrine between Farmers and the conference calling providers would in no way advance the purpose of the filed rate doctrine." *Second Reconsideration Order* n.80 (JA ). Indeed, Farmers has cited no case, and we are aware of none, in which a court has applied the filed rate doctrine not to the relationship between the contracting parties (here, Farmers and the conference companies), but to a *different*, third-party, relationship (here, Farmers and Qwest). Nothing in the filed rate doctrine forbade the Commission

from enforcing Farmers' access tariff as written and holding Farmers to the consequences of its voluntary dealings with the conference companies.

Farmers charges the Commission with having failed to address the filed rate doctrine in its orders. Br. 29. As discussed above, the Commission held expressly that the doctrine did not apply in this case. The Commission found it unnecessary to decide whether the doctrine would apply to a dispute between Farmers and the conference companies. *Second Reconsideration Order* n.80 (JA ).

### B. The [redacted] Decisions Have No Bearing On This Case.

The [redacted] cases, on which Farmers relies heavily (Br. 26-27, 31-38, 39-40, 42, 44), do not compel a different conclusion. *See* [redacted], FCC Order No. 96-430 (1996) ([redacted]); *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd 16130 (2001) (*Jefferson II*).

As a threshold matter, Farmers should be precluded from relying on [redacted] on the equitable ground that reliance on that decision would be unfair to the Commission and to Qwest. [redacted], a notice of apparent liability, was never published and never released beyond its delivery to the single party to the proceeding (who coincidentally was represented by Farmers' counsel). Thus, until this Court directed that Qwest be provided with [redacted] in this subsequent litigation, *see* Order of Sept. 2, 2010, Qwest lacked any access to the decision. Moreover, [redacted] was, and remains, under judicial seal. In those

circumstances, the Commission in the proceeding below was both without the benefit of an adversary process with respect to [redacted] and unable to discuss the order in any detail. Avoiding that situation is precisely why FCC Rule 0.445(e) prohibits unpublished orders from being "relied upon, used or cited as precedent." 47 C.F.R. § 0.445(e). On equitable grounds, the Court should preclude Farmers from relying on [redacted] now.[10]

[redacted] does not help Farmers in any event. [redacted] did not hold that the filed rate doctrine either requires an IXC to pay switched access rates for calls delivered to conference companies or renders a conference call company an end user under an access tariff. Nor did [redacted] adopt a "subscriber" test to determine whether a conference company was an end user. To the contrary, [redacted].

[redacted] also does not address whether the arrangements between the LEC and the conference companies took them outside the relevant tariff. Rather, as the Commission's Enforcement Bureau recently determined in the damages phase of

[10] Furthermore, to the degree that Farmers relies on particular documents from the underlying [redacted] proceedings, *see* Br. 34 nn.26, 28, 32; Br. 36 nn.51, 53, those documents were not part of the record below, were never supplied to or discussed before the Commission, and may not be relied on now. The Commission has no duty to "sift pleadings and documents" in the record of a case before it to identify arguments, *see Bartholdi*, 114 F.3d at 279, and it surely is not required to sift through the pleadings in the record of an unrelated case.

the administrative proceeding, "the NAL [in [redacted]] assumed – without discussion – that a tariffed service was involved. There appears to have been no argument … otherwise, and the NAL does not discuss or analyze the language of the tariff at issue. In short, [[redacted]] simply did not address the issue." Letter Ruling of November 10, 2010, by Deputy Chief, Market Disputes Resolution Division, Enforcement Bureau (copy attached).

*Jefferson II* is irrelevant here for similar reasons. That decision denied a complaint filed by an IXC about Jefferson's provision of service to a conference company. The IXC argued that the LEC violated the Communications Act in two specific ways: First, that inducing conference call traffic was inconsistent with a common carrier's duty to carry traffic indifferently, *Jefferson II*, 16 FCC Rcd at 16133-16136; and second, that revenue sharing between the LEC and the conference company violated the restriction in 47 U.S.C. § 202(a) on "undue or unreasonable preference[s] or advantage[s]," *id*. at 16136 n.38. The agency rejected those two arguments and determined that the IXC had to pay access charges, but the Commission "emphasize[d] the narrowness of [its] holding," noting that the case decided only that, "on the specific facts and arguments presented," the arrangement between the LEC and the conference company did not violate the Communications Act. *Id*. at 16137. Moreover, *Jefferson II* does not even mention the filed rate doctrine, let alone hold that it applied to the dispute.

For the same reasons, Farmers is wrong in claiming that the FCC departed from the holdings of the [redacted] cases without an adequate explanation (Br. 25-28, 31-33, 41-43) and that the Commission violated principles of due process by acting in conflict with law that was "settled" in those decisions. Br. 39-40. As explained, those decisions did not establish that conference companies are end users under the NECA tariff. The Commission thus properly applied the principles of tariff interpretation to find that the conference companies doing business with Farmers were not end users under Farmers' tariff. That approach is consistent with principles of due process.

### C. Farmers' Other Arguments Are Incorrect.

Farmers' remaining arguments also lack merit. It claims (Br. 43-45) that the Commission improperly "exempt[ed] Qwest from the mandatory obligation established" in various FCC rules (47 C.F.R. §§ 69.1(b), 69.4(b), 69.5(b), 69.106, 69.109, and 69.111) "to pay the tariff rates" for access service. Br. 44; *see* Int. Br. 24-25. But those rules impose requirements governing what LECs must include in their tariffs; they apply neither to customers such as IXCs nor to the Commission itself. If Farmers' tariff did not apply to the services it was providing, Farmers has violated the rules, not the Commission.[11] Given its self-created relationship with

[11] The same is true of 47 U.S.C. § 202(a), on which Intervenors rely. That statute makes unlawful "unjust or unreasonable discrimination in charges, practices,

the conference companies, Farmers' tariff may have defined switched access more narrowly than was permissible under the Commission's rules, but Farmers is nonetheless bound by the tariff's definition of end user "for purposes of determining whether its charges are in compliance with its tariff." *Second Reconsideration Order* ¶24 (JA ).

Farmers argues that the Commission acted unlawfully by leaving "several important questions unaddressed," such as "the precise scope of its new tariff exemption for conference calls." Br. 45. As explained, the Commission did not exempt Qwest from the terms of Farmers' tariff. Rather, the Commission applied the terms of that tariff to the business arrangements Farmers crafted with the conference companies and determined that the relationship did not fall within the terms of the tariff. Indeed, the Commission found that Farmers violated Section 203(c) by providing untariffed services.

Farmers also asserts repeatedly that the Commission was obligated to require Qwest to pay access charges that it withheld from Farmers prior to filing the complaint and asks the Court to direct such payment. Br. 3, 18, 24, 30, 38-39, 40-41, 42, 46. If the Commission was correct that the tariff does not apply, the point is moot. In any event, Farmers has not properly raised the issue, so the Court need not address it. Farmers has simply stated a conclusion repeatedly, but has

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classifications, regulations, facilities, or services" that gives "any undue or unreasonable preference or advantage to any particular person."

provided no legal argument, including the reasoning and citation to authority and to the record to support its contention. *See* F.R.A.P. 28(a)(9), *United States v. Baugham*, 449 F.3d 167, 178 n.3 (D.C. Cir. 2006). Indeed, Farmers omits entirely any mention of the Commission's denial of relief in the *Initial Order*, where the agency explained that the proper forum to enforce payment under the tariff was a court. *Initial Order* ¶29 & n.116 (JA - ). Farmers offers no argument that the holding was wrong. Moreover, even if it did, for the reasons discussed at page 3 above, the *Initial Order* is no longer subject to review and is not properly before the Court.

The Commission properly disposed of the claim. FCC rules expressly bar cross-complaints, which Farmers' request amounted to. *Initial Order* ¶29 (JA - ); 47 C.F.R. § 1.725. Farmers may pursue affirmative relief in court, as we understand it is currently doing. *Farmers & Merchants v. Qwest*, Civ. 09-0058-JEG (S.D. Iowa). Moreover, the Commission does not hear collection actions. *Initial Order* ¶29 (JA - ). With one minor exception, the Commission has declined to do so for at least twenty years.[12] *See All Amer. Tel. Co. v. AT&T Corp*., 26 FCC Rcd 723, 728 n.32 (2011) (reconsideration pending) (collecting cases). As

[12] The only exception involves payments for calls placed from payphones, which involve special rules based in a statute that expressly places a payment burden on carriers handling payphone calls. *See All American Telephone* ¶¶16-18. Farmers' reliance (Br. 45) on a payphone case, *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007), is misplaced.

the agency explained, the Communications Act "governs a carrier's obligations to its customers, and not vice versa." *Id*. ¶10. Thus, a claim against Qwest in its capacity as a customer of switched access service does not state a cause of action within the scope of Section 208.

## IV. QUESTIONS CONCERNING FARMERS' MISCONDUCT [redacted], BUT THE COMMISSION'S FINDINGS WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Commission found that during the proceeding below, Farmers [redacted] had created backdated bills and retrospective contract amendments [redacted] to counter Qwest's argument that the conference companies were not end users under the tariff. *Second Reconsideration Order* ¶¶16, 18, 19, 20 (JA , - , , - ). The Commission also found that Farmers withheld documents improperly during discovery. *Id*. ¶¶8 & n.36, 11 (JA , - ); *Third Reconsideration Order* ¶12 (JA - ); *see Second Reconsideration Order* ¶¶16-20 (JA - ). Farmers now argues that the findings regarding backdated bills and contract amendments were "manifestly erroneous," Br. 50, and that Farmers "produced all of the discovery that Qwest requested," Br. 59. [redacted], which are wrong in any event.

### A. [redacted].

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

### B. Substantial Evidence Supports The Commission's Conclusions.

#### 1. Backdated Bills And Contract Amendments Were Part of Farmers' Litigation Strategy.

Substantial evidence supports the Commission's finding that Farmers' backdated bills and retroactive contract amendments were created not to rectify inadvertent lapses in billing or to document the actual terms of an existing relationship, but to make it appear for litigation purposes that the conference companies had an end user relationship with Farmers under the tariff, when they did not.

First, the timing of the bills and the contract amendments supports the Commission's view. [redacted] *First Reconsideration Order*. *Second Reconsideration Order* ¶¶16, 18 (JA ). *Cf. Vico Prods. Co., Inc. v. NLRB***,** 333 F.3d 198, 210 (D.C. Cir. 2003) (timing of employment decision rendered it suspicious and thus supported a charge of retaliation). [redacted]

[redacted]

Second, the evidence shows that the backdated bills and contract amendments lacked any genuine business purpose and did not document an existing relationship. Farmers did not enter the conference companies into its billing system or send regular bills, as required by the tariff. *Second Reconsideration Order* ¶16 (JA ). [redacted] *id*. ¶20 & n.78 (JA ), and Farmers admits that it has neither received nor pursued any payment, Br. 10-11.

Third, the nature of the bills and contract amendments strongly suggests that they were created for purposes of the litigation to mislead the FCC and Qwest. The bills were backdated to make it look as though they had been issued

contemporaneously with the provision of service – which supported Farmers' initially successful claim that the conference companies subscribed to Farmers' service – when in fact they were created after the complaint was filed. *First Reconsideration Order* ¶7 (JA ). The contract amendments were dated to take effect two years before they were signed, without any indication that they had not been signed at the time of their purported effectiveness.[14] Yet Farmers represented that the contract amendments described the parties' relationship at the time service was provided. *See* Qwest Petition for Partial Reconsideration 10-11 (JA - ).

Substantial evidence thus supports the Commission's conclusions that Farmers misleadingly engaged in an "after-the-fact attempt to document a different business relationship" than the one it actually had with the conference companies. *Second Reconsideration Order* ¶20 (JA ).

Farmers fails to confront that evidence in any meaningful way. Farmers provides what it believes to be a benign alternative explanation for what it terms its "corrective measures," Br. 54, but the substantial evidence test requires not that the Commission's finding be the only possible one, but that it have more than a "scintilla" of support, which it clearly did. *Secretary of Labor*, 111 F.3d at 918.

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[14] [redacted] *Second Reconsideration Order* n.77 (JA ).

On the record presented, moreover, Farmers' version of events is implausible. Farmers claims that under the filed rate doctrine and the [redacted] order, it issued retrospective bills and tried to modify its contracts in order to comply with its tariff. Br. 50-52. That claim does not come to grips with considerable evidence, detailed above, showing otherwise. In weighing that evidence, the question is not, as Farmers would have it (Br. 51-53), whether retrospective billing or contract amendments can be permissible, but whether Farmers [redacted] practices *in this case* were misleading.

Farmers is also wrong that its actions were not improper because "[t]hey were not designed to counter Qwest's complaint or to mislead the FCC." Br. 54. In fact, in response to Qwest's charge that the conference companies were not end users under the tariff, Farmers falsely represented to the FCC that the companies were end users because the were billed for service and the SLC – a representation based directly on the sham bills and contract amendments. *Second Reconsideration Order* ¶9 (JA ). The agency relied on that representation. *Id.* ¶11 (JA ).

Finally, Farmers relies on a number of other allegations (Br. 56-58) in support of its view that it was attempting to "achieve compliance with its tariff" and not to "mislead Qwest and the FCC." Br. 56. But even if those claims are true, under the substantial evidence test they make no difference in light of

Farmers' failure to refute the facts that support the Commission's findings. "The question ... is not whether record evidence supports [petitioners'] version of events, but whether it supports" the FCC's. The FCC's decision "does not lack substantial evidence simply because petitioner[] offered some contradictory evidence." *Arizona Corp. Comm'n v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2003) (quotation marks and citation omitted).

### 2. Farmers Failed To Comply With Its Discovery Obligations.

The Commission determined that, in the initial round of discovery, Farmers withheld evidence that it should have produced in response to Qwest's interrogatories. *First Reconsideration Order* ¶8 & n.36 (JA ). Qwest Document Request No. 7 called for "[a]ny [d]ocuments or communications relating to Farmers' agreements and commercial relationships with any [conference company] during the Complaint Period." The term "complaint period" was defined to mean January 2005 through April 2007. *First Reconsideration Order* n.36 (JA ). Qwest Interrogatory No. 9 called upon Farmers to "identify and describe any agreement or communication, written or oral, between Farmers and any [conference company] addressing the delivery of traffic by Farmers …." *First Reconsideration Order* n.36 (JA ). In response to those requests for information, Farmers initially produced (among other things) the backdated invoices and the retroactive contract amendments that supported its case – *but not the emails and*

*other evidence that described the origin of those materials and cast doubt on their genuineness*. The Commission learned about that material only later, after Qwest later gained access to it in a parallel state-level proceeding being conducted by the IUB. On those facts, the Commission properly concluded that "Farmers ought to have produced" that evidence in discovery. *Id*. ¶11 (JA ); *see Third Reconsideration Order* ¶12 ("Farmers withheld critical evidence during the earlier stages of this proceeding") (JA ).

Farmers' principal defense is that Qwest's discovery requests were limited to documents *created* during the "Complaint Period." Farmers produced all such documents, it claims, but it withheld the emails and contract amendments because those were created after the Complaint Period (Farmers did not contend that they were protected by attorney-client privilege). Br. 59-60. That claim is simply wrong. As the Commission explained, the requested discovery "included all documents and communications *relating to* Farmers' commercial relationships with the conference calling companies. The requests were not limited to the Complaint Period and were sufficient to capture all documents relating to the decision to backdate the agreements and invoices in questions, not just the agreements and invoices themselves." *First Reconsideration Order* ¶8 (JA ). Moreover, under the applicable discovery rules, Farmers was required to produce

"all documents" in its possession "that are likely to bear significantly on any claim or defense," even in the absence of a document request. 47 C.F.R. § 1.729(h)(i).

Farmers' failure in the FCC proceeding is not excused by its having produced the documents in a proceeding before the IUB. If anything, Farmers' production of the documents in the state-level proceeding makes its withholding of them in the FCC proceeding more egregious. Furthermore, before the FCC, Farmers argued strenuously that Qwest was not entitled to and could not use the IUB documents because they were subject to a protective order. *First Reconsideration Order* ¶10 (JA ). That effort to suppress the evidence supports the inference that Farmers believed that the Commission would not have access to the IUB documents and therefore would not learn that Farmers had withheld them in the FCC proceeding.

## CONCLUSION

For the foregoing reasons, the Court should dismiss the petition insofar as it challenges the *Initial Order* and deny it in all other respects.

Respectfully submitted,

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March 28, 2011

UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

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|---|---|---|
| FARMERS AND MERCHANTS MUTUAL Telephone Company of Wayland, Iowa,<br><br>PETITIONER,<br><br>v.<br><br>FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,<br><br>Respondents. | ) | 10-1093 |

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the foregoing Brief for The Federal Communications Commission contains 13,905 words.

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March 28, 2011

# STATUTORY APPENDIX

47 U.S.C. § 201(b)
47 U.S.C. § 203
47 U.S.C. § 208
47 U.S.C. § 405

47 U.S.C. § 201(b)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

## § 201. Service and charges

* * * * * *

**(b)** All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 203

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

## § 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

**(1)** No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be

published in such form and contain such information as the Commission may by regulations prescribe.

**(2)** The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 208

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

## § 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation

**(a)** Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

**(b)(1)** Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.

**(2)** The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.

47 U.S.C. § 405

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

## § 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

**(a)** After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated

authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

**(b)(1)** Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

**(2)** Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

# Letter Ruling Of November 10, 2010

**FEDERAL COMMUNICATIONS COMMISSION**
**ENFORCEMENT BUREAU**
**MARKET DISPUTES RESOLUTION DIVISION**
**445 12th STREET, S.W.**
**WASHINGTON, DC 20554**

**Via Email and U.S. Mail**

November 10, 2010

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**Re:** ***Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, File No. EB-07-MD-001**

Dear Counsel:

## I. Introduction

This letter ruling grants Qwest Communications Corp.'s ("Qwest") Motion to Strike portions of the Legal Analysis filed by Farmers and Merchants Mutual Telephone Company ("Farmers") in the damages phase of this complaint proceeding.[1] By November 19, 2010, Farmers must file a revised Answer containing a new Legal Analysis that does not cite or in any way rely upon unpublished materials, including FCC 96-430, an unpublished, unreleased Commission Notice of Apparent Liability and Order to Show Cause ("NAL"). Qwest must file its Reply to Farmers' revised Answer by November 30, 2010. Commission staff will set the remainder of the schedule for this case at a later date.

[1] *See* Motion to Strike, File No. EB-07-MD-001 (filed Sept. 1, 2010) ("Motion to Strike").

## II. Background

### A. FCC 96-430

FCC 96-430 stemmed from a 1994 investigation of a local exchange carrier ("LEC") other than Farmers. As a result of the investigation, the Commission adopted the NAL, which was delivered to the LEC, but not publicly released.[2]

When the Commission announced its intention to release FCC 96-430, the LEC filed a "reverse FOIA" request in the United States District Court for the District of Columbia ("District Court"), arguing that the NAL contained confidential information about the LEC that should not be released publicly. The District Court ordered that the matter be sealed during the course of the litigation,[3] which precluded the Commission from releasing the NAL. The District Court subsequently transferred the case, under seal, to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit").[4]

The litigation concerning whether the Commission could release FCC 96-430 was never fully resolved. As a result, the District Court's order sealing the case has remained in place for the past 14 years. Because of the seal, the Commission never released the NAL to the general public. Farmers' counsel knows of FCC 96-430 only because he happened to have been one of the attorneys representing the LEC that was the subject of the Commission's investigation.

### B. The Instant Formal Complaint Proceeding

Following liability determinations by the Commission,[5] Qwest filed a Supplemental Complaint for Damages on July 22, 2010.[6] On August 31, 2010, Farmers filed its Answer, including a Legal Analysis, to Qwest's Supplemental Complaint.[7] There are three versions of Farmers' Legal Analysis: one redacting all confidential material subject to the Protective Order in this matter, as well as information relating to FCC 96-430 ("Redacted Public Version"); one redacting only material relating to FCC 96-430 ("Redacted Confidential Version"); and one containing no redactions ("FCC Eyes Only Version"). Although Farmers served Qwest with the Redacted Public Version and the Redacted Confidential Version, Qwest has no access to the FCC Eyes Only Version. Consequently, Qwest cannot review the entirety of Farmers' Legal Analysis because of redactions on pages 3, 8, 10, 11, 13, 14, and 41 of the Legal Analysis.

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[2] *See generally* 47 U.S.C. § 503; 47 C.F.R. § 1.80.

[3] Order, Civil Action No. 96-2580 (D.D.C. Nov. 13, 1996).

[4] Memorandum and Order, Civil Action No. 96-2580 (D.D.C. Dec. 12, 1997).

[5] *See Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, Second Order on Reconsideration, 24 FCC Rcd 14801 (2009) ("*Second Reconsideration Order*"), *aff'd*, 25 FCC Rcd 3422, Third Order on Reconsideration (2010) ("*Third Reconsideration Order*").

[6] *See* Supplemental Complaint for Damages, File No. EB-07-MD-001 (filed July 22, 2010) ("Supplemental Complaint"). *See generally* 47 C.F.R. § 1.722.

[7] *See* Answer of Farmers and Merchants Mutual Telephone Company to Supplemental Damages Complaint, File No. EB-07-MD-001 (filed Aug. 31, 2010) ("Answer"). Farmers' Legal Analysis is attached as Exhibit A to its Answer.

## III. Analysis

In the Motion to Strike, Qwest argues that its inability to review an unredacted Legal Analysis violates its due process rights and is fundamentally unfair.[8] Qwest also contends that Farmers' reliance on FCC 96-430 violates Commission rule 0.445(e) because Qwest lacks "actual notice" of the decision.[9] Qwest asks the Commission to (1) strike Farmers' Legal Analysis; (2) require Farmers to file a new Legal Analysis that neither quotes nor relies upon any unpublished Commission decision; and (3) establish a new date by which Qwest must file its Reply.[10] Farmers asserts three arguments in response to the Motion to Strike. None of them is persuasive. Accordingly, we find that Farmers shall be precluded from relying on FCC 96-430 in its Legal Analysis.

Rule 0.445(e) provides that adjudicatory opinions and orders of the Commission that are not publicly released (*i.e.*, "unpublished") "may not be relied upon, used or cited as precedent, except against persons who have actual notice of the document in question or by such persons against the Commission."[11] There is no dispute that FCC 96-430 is unpublished. Indeed, it is a sealed NAL that Qwest has not been permitted to see in this section 208 complaint proceeding. Nonetheless, Farmers contends that it may rely upon FCC 96-430 because it asserts the NAL as "precedent against the Commission," not as "precedent against Qwest."[12] Farmers' argument is misplaced. This is an adjudicatory proceeding stemming from a formal complaint filed by Qwest against Farmers.[13] In this phase of the case, Qwest seeks millions of dollars in damages from Farmers. It is Qwest that is Farmers' adversary, not the Commission. Consequently, Farmers is using FCC 96-430 against Qwest, which does not have actual notice of the document in this proceeding.[14]

Farmers further argues that Qwest's situation is of its own making because Qwest "can file a motion with the D.C. Circuit at any time to request that it be permitted access to [FCC 96-430] for use in this proceeding."[15] Qwest bears no burden, however, to take such action. Rule 0.445(e) precludes

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[8] Motion to Strike at 2.

[9] Motion to Strike at 2. *See* 47 C.F.R. § 0.445(e).

[10] Motion to Strike at 2. On September 2, 2010, Commission staff advised the parties in an email that the procedural schedule in the case, including the deadline for filing the Reply, is suspended until the Commission rules on the Motion to Strike.

[11] 47 C.F.R. § 0.445(e).

[12] Farmers' Opposition to Qwest's Motion to Strike, File No. EB-07-MD-001 (filed Sept. 2, 2010) ("Opposition") at 1-2.

[13] *See* Complaint of Qwest Communications Corp., File No. EB-07-MD-001 (filed May 2, 2007).

[14] The liability determinations made previously in this proceeding (*i.e.*, the *Second Reconsideration Order* and *Third Reconsideration Order*) are on appeal in the D.C. Circuit. *See Farmers and Merchants Mutual Telephone Co. of Wayland, Iowa v. Federal Communications Commission*, Case No. 10-1093, Petition for Review (filed May 7, 2010). On September 2, 2010, the D.C. Circuit issued an order that allows Qwest to view FCC 96-430 and to use it only for purposes of the appeal. The Court did not "unseal" FCC 96-40, and it took "no position" on the merits of "Farmers' use of the sealed material or the FCC's consideration of the material." *Farmers and Merchants Mutual Telephone Co. of Wayland, Iowa v. Federal Communications Commission*, Case No. 10-1093, Order (filed Sept. 2, 2010). Thus, although Qwest now has access to FCC 96-40 for purposes of the Court appeal, given the limited nature of the Court's ruling, we believe reliance on FCC 96-430 by either party in this proceeding remains impermissible.

[15] Opposition at 3.

use of unpublished documents. If Farmers wishes to use FCC 96-430, then Farmers – not Qwest – should endeavor to have the seal lifted.

In addition, Farmers maintains that it would be unfair and a violation of its due process rights if it were precluded from relying on FCC 96-430.[16] Specifically, Farmers argues that the Commission "reviewed the record in [FCC] 96-430 before rendering its decisions in the liability phase and cited to the record in [FCC] 96-430."[17] In the liability phase of the proceeding, the Commission made one passing statement about FCC 96-430 in a footnote. It noted that Farmers' reliance on a "sealed, unreleased Commission order does not justify its efforts to backbill the conference calling companies."[18] The Commission made no reference to a "review of the record" of FCC 96-430 (which was *not* part of the record in the liability proceeding), nor did it discuss the substance of that case.[19]

We note that Farmers' due process claim is particularly weak because, even were consideration of FCC 96-430 permissible, we fail to see how it would help Farmers. Although we are not at liberty to discuss any of the details of FCC 96-430 due to the seal, it is clear that the NAL has no bearing on this case. Here, Qwest has argued, and we have found, that the services at issue were not covered by Farmers' tariff.[20] That finding was based on an extensive record and lengthy submissions by the parties debating in detail the question of whether the tariff covered the services at issue. FCC 96-430, by sharp contrast, contains no analysis whatsoever of whether the services at issue were provided under the tariff. Rather, the NAL assumed – without discussion – that a tariffed service was involved. There appears to have been no argument or evidence otherwise, and the NAL does not discuss or analyze the language of the tariff at issue. In short, FCC 96-430 simply did not address the issue presented here and thus is irrelevant to this case. Given the inapplicability of FCC 96-430, we do not find it to be unfair to Farmers to strike discussion of the FCC 96-40 from the record.

## IV. CONCLUSION

For the foregoing reasons, we grant Qwest's Motion to Strike. By November 19, 2010, Farmers must file a revised Answer containing a new Legal Analysis that does not cite or in any way rely upon unpublished materials, including FCC 96-430. Qwest must file its Reply to Farmers' Answer by November 30, 2010. After submission of those pleadings, we will contact the parties regarding the schedule for the remainder of the case.

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[16] Opposition at 2, 4.

[17] Opposition at 2.

[18] *Second Reconsideration Order*, 24 FCC Rcd at 14808 n.66.

[19] Farmers also complains that, if it is not permitted to rely on FCC 96-430 in the damages phase of this proceeding, it likely will be precluded from doing so on appeal to the D. C. Circuit. That may well be true. Nevertheless, that argument has no bearing on whether rule 0.445(e) applies in the first place, and we conclude that it does.

[20] *See, e.g.,* Complaint at 22-25, ¶¶ 42-43, 46-48; Second Reconsideration Order, 24 FCC Rcd at 14805 ¶10.

This letter ruling is issued pursuant to sections 4(i), 4(j), and 208 of the Act, 47 U.S.C. §§ 154(i), 154(j), 208, sections 0.445(e) and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 0.445(e), 1.720-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311.

FEDERAL COMMUNICATIONS COMMISSION

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**10-1093**

## IN THE UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

**Farmers and Merchants Mutual Telephone Company of Wayland, Iowa, Petitioner,**

**v.**

**Federal Communications Commission and United States of America, Respondents.**

## CERTIFICATE OF SERVICE

I, Joel Marcus, hereby certify that on March 28, 2011, I electronically filed the foregoing public brief for the Federal Communications Commission with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

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/s/ Joel Marcus