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

In the Matter of	)	
Qwest Communications Corporation,	)	
Complainant,	)	
v.	)	**File No. EB-07-MD-001**
Farmers and Merchants Mutual Telephone Company,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2007 **Released: October 2, 2007**

By the Commission:

I. INTRODUCTION

1. This Memorandum Opinion and Order grants in part a formal complaint[1] that Qwest Communications Corporation ("Qwest") filed against Farmers and Merchants Mutual Telephone Company ("Farmers") under section 208 of the Communications Act of 1934, as amended ("Act").[2] Qwest alleges that Farmers violated section 201(b) of the Act[3] by earning an excessive rate of return. According to Qwest, this violation resulted from Farmers' deliberate plan to increase dramatically the amount of terminating access traffic delivered to its exchange, via agreements with conference calling companies. Qwest also alleges that Farmers violated sections 203(c) and 201(b) of the Act[4] by assessing switched access charges for services that were not, in fact, switched access.

2. As explained below, we agree with Qwest that Farmers earned an excessive rate of return during the July 2005 to June 2007 period ("Complaint Period"). However, we reject Qwest's contention that the Farmers tariff then in effect should be denied "deemed lawful" status. Accordingly, Qwest may not recover damages from Farmers. In addition, we deny Qwest's claim that Farmers acted unlawfully by

[1] Formal Complaint of Qwest Communications Corp., File No. EB-07-MD-001 (filed May 2, 2007) ("Complaint").

[2] 47 U.S.C. § 208.

[3] 47 U.S.C. § 201(b).

[4] 47 U.S.C. §§ 203(c), 201(b). 47 U.S.C. § 203(c) prohibits carriers from imposing any charge not specified in their tariffs ("no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in the schedule then in effect"). 47 U.S.C. § 201(b) requires that "all charges, practices, classifications, and regulations for and in connection with . . . communication service shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful."

imposing interstate access charges for the services at issue.

II. BACKGROUND

A. The Parties

3. Qwest provides interexchange ("IXC") service, also known as long distance service, to customers throughout the United States.[5] Farmers is the incumbent local exchange carrier ("LEC") in Wayland, Iowa (population 838), serving approximately 800 access lines for local residents.[6] Farmers provides local exchange and exchange access services pursuant to tariffs filed with the Iowa Utilities Board and this Commission.[7] Qwest purchases access service from Farmers, which enables Qwest's long distance customers to terminate calls to customers located in Farmers' exchange.[8]

B. Access Charge Regime for Small Carriers

4. The Commission regulates access charges (which are contained in federal access tariffs) that LECs apply to interstate calls.[9] To reduce the administrative costs and burdens of filing and maintaining tariffs, the Commission provides small carriers the options of utilizing tariffs administered by the National Exchange Carrier Association ("NECA") or filing their own streamlined "small-carrier" tariffs.[10] Qualifying carriers are permitted to participate in the traffic-sensitive cost and revenue pool that NECA administers on behalf of the vast majority of small telephone companies.[11] NECA files tariffed access rates that apply whenever an IXC uses any pool member's NECA-tariffed access services.[12] IXCs making payments pursuant to the NECA tariff remit them directly to the carriers providing the access service, which in turn report receipts to NECA.[13] NECA then computes final settlements due to pool members based upon the members' settlement status with NECA.[14]

5. NECA pool members may submit company-specific monthly cost data to NECA to calculate "settlements."[15] NECA pool members that choose not to file company-specific cost data operate as "average schedule" carriers and receive settlements determined via formulas proposed annually by NECA and approved by the Commission.[16] NECA develops the average schedule formulas to simulate the revenue requirements and authorized rate of return of a sample of cost companies.[17] During the Complaint Period, the prescribed rate of return for interstate switched access rates charged by rate-of-

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[5] Complaint at 4, ¶ 4; Joint Statement, File No. EB-07-MD-001 (filed June 6, 2007) ("Joint Statement") at 1, ¶ 2.

[6] Joint Statement at 1-2, ¶ 4.

[7] Joint Statement at 2, ¶ 5.

[8] Joint Statement at 1-2, ¶ 4.

[9] 47 C.F.R. §§ 69.1-69.2.

[10] Complaint at 6, ¶ 8; Answer of Farmers & Merchants Mutual Telephone Company, File No. EB-07-MD-001 (filed May 29, 2007) ("Answer") at 12, ¶ 8.

[11] *See* 47 C.F.R. §§ 69.601-69.612.

[12] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9; *see* 47 C.F.R. § 69.3(d).

[13] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9; *see* 47 C.F.R. §§ 69.604, 69.605.

[14] *See* 47 C.F.R. §§ 69.605, 69.606.

[15] 47 C.F.R. § 69.605(a).

[16] Complaint at 6-7, ¶ 9; Answer at 12, ¶ 9. *See* 47 C.F.R. § 69.606; *In the Matter of National Exchange Carrier Association, Inc. 2006 Modification of Average Schedules*, Order, 21 FCC Rcd 6220 (Wireline Comp. Bur. 2006).

[17] Joint Statement at 2, ¶ 7; 47 C.F.R. § 69.606(a).

return carriers was 11.25 percent.[18]

6. As an alternative to participating in the NECA pool, the Commission established an exception for carriers that want to file their own rates and are non-Bell Operating Companies with 50,000 or fewer access lines and $40 million or less in annual operating revenues.[19] These small carriers may establish individual tariff rates based on the carriers' own historical costs and demand figures.[20] Under this option, the traffic sensitive rates for average schedule carriers, which do not report monthly cost figures, are based initially on the carriers' most recent annual settlement from the NECA pool.[21] In subsequent tariffs, average schedule carriers' rates are based on the settlements the carriers would have received had they continued to participate in the NECA pool.[22] Small carriers filing tariffs under this provision remain subject to the 11.25 percent rate of return.[23]

C. Farmers' Access Tariffs and the Increase in Traffic

7. During the Complaint Period, Farmers qualified as a "small" carrier.[24] Prior to July 1, 2005, Farmers participated in the traffic-sensitive portion of NECA FCC Tariff No. 5 ("NECA Tariff").[25] Farmers thus received compensation based on the average schedule formulas approved by the Commission, and not on the basis of Farmers' actual costs, actual revenue from end users, or actual rate of return.[26]

8. Effective July 1, 2005, Farmers left the NECA pool and became an issuing carrier for Kiesling Associates LLP Tariff F.C.C. No. 5 ("Kiesling Tariff"), which is governed by Commission rule 61.39(b)(2).[27] The Kiesling Tariff contained separate switched access rates for Farmers.[28] Farmers' interstate switched access service rates were filed on 15 days notice pursuant to section 204(a)(3) of the

[18] *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd 7507, 7507, ¶ 1, 7532, ¶ 216, 7533, ¶ 231 (1990), *recon. granted on other grounds*, 6 FCC Rcd 7193 (1991), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993); *AT&T Corp. and AT&T of the Virgin Islands, Inc. v. Virgin Islands Telephone Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 15978, 15979, ¶ 3 (2004), *rev'd on other grounds*, *Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666 (D.C. Cir. 2006).

[19] 47 C.F.R. § 61.39; *Regulation of Small Telephone Companies*, Report and Order, 2 FCC Rcd 3811, 3812, ¶ 11 (1987) ("*Small Carrier Tariff Order*"). *See* Complaint at 8, ¶ 11; Answer at 3, ¶ 11. During the Complaint Period, carriers were required to file access tariffs at least once every two years, although they were permitted to file new tariffs more often. *See generally* 47 C.F.R. § 61.39.

[20] *See* 47 C.F.R. §§ 61.39(a), 69.602(a)(3). A carrier may also establish individual tariff rates based on the carrier's projected costs and demand under section 61.38 of the Commission's rules. 47 C.F.R. § 61.38(b).

[21] 47 C.F.R. § 61.39(b)(2)(i).

[22] 47 C.F.R. § 61.39(b)(2)(ii).

[23] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[24] Complaint at 10-11, ¶ 16; Answer at 15, ¶ 16. In addition, as the independent incumbent LEC in its serving area, Farmers was a "dominant" carrier and therefore required to file tariffs. *See* 47 C.F.R. § 61.31. The Commission has forborne from tariffing requirements for non-dominant carriers. *See In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace Detariffing Order*, Second Report and Order, 11 FCC Rcd 20730 (1996).

[25] Joint Statement at 2, ¶ 6.

[26] Joint Statement at 2, ¶ 6.

[27] 47 C.F.R. § 61.39(b)(2). *See* Joint Statement at 3, ¶ 8. Complaint, Exhibit B, Declaration of Lisa Hensley Eckert at 8, ¶ 18 (referencing Complaint Exhibit 9, Kiesling Tariff).

[28] Complaint at 11, ¶ 18; Answer at 15, ¶ 18. *See* Joint Statement at 3, ¶ 8.

Act.[29]

9. During the time period relevant to the Complaint, Farmers entered into a number of commercial arrangements with conference calling companies as a means to increase its interstate switched access traffic and revenues.[30] Farmers, in turn, paid the companies money or other consideration in certain circumstances.[31]

10. The Complaint alleges that Farmers "pursued a *premeditated plan* to inflate its access-charge revenues by entering into agreements with [conference calling companies] resulting in vastly increased usage of Farmers' network, *at or about the same time that Farmers exited the NECA access pool*."[32] Discovery confirmed this assertion. [Redacted confidential information regarding Farmers' business relationships with conference calling companies.]

11. As a result of these arrangements with conference calling companies, the number of minutes delivered to the Farmers exchange increased dramatically.[33] [Redacted confidential information regarding Farmers' interstate access minutes of use and bills for various months during the Complaint Period.] This sharp increase in the number of MOUs was not attributable to an increase in the number of lines serviced by Farmers, but rather to the significant amount of traffic delivered to the conference calling companies.[34]

12. Section 61.39(a) of the Commission's rules would have required Farmers to revise its tariff in June 2007 if it wanted to continue to file its own access tariff based on traffic for the two prior years (which would necessarily result in lower rates).[35] Rather than updating its individual access tariff rates pursuant to rule 61.39, however, Farmers elected to operate again as an issuing carrier in the traffic-sensitive portion of the NECA Tariff, effective June 30, 2007.[36]

D. The Complaint

13. Faced with soaring monthly access charges, Qwest ceased paying Farmers' invoices in full,[37] and it filed the Complaint with the Commission on May 2, 2007. In Count I, Qwest alleges that, beginning July 1, 2005, Farmers earned a rate of return far in excess of the prescribed maximum, and that

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[29] 47 U.S.C. § 204(a)(3); Joint Statement at 4, ¶ 10.

[30] Joint Statement at 4, ¶ 13.

[31] Joint Statement at 4, ¶ 13.

[32] Complaint at 18, ¶ 33 (emphasis added).

[33] Joint Statement at 4, ¶ 13.

[34] Joint Statement at 4, ¶ 12.

[35] 47 C.F.R. §§ 61.39(a), 61.39(b)(2)(ii); *see also Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 12.

[36] Joint Statement at 5, ¶ 15. Although Farmers' individual access tariff no longer is in effect, a ruling addressing whether Farmers earned an unlawfully high rate of return through its efforts to enhance access charge revenue will provide important guidance to the telecommunications industry. *See Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, Order on Reconsideration, 15 FCC Rcd 5997, 6000, ¶ 8 (2000) (the Commission's "adjudication of cases generates precedents and clarifies the law, providing benefits to the public at large"), *petition for review denied, Global NAPs, Inc. v. FCC*, 347 F.3d 252 (D.C. Cir. 2001). *See also MCI Telecommunications Corp. v. Southern Bell Telephone and Telegraph*, Memorandum Opinion and Order, 4 FCC Rcd 8135, 8136, ¶ 7 (1989) (holding that revision of a contested tariff did not render moot a formal complaint challenging the reasonableness of the tariff).

[37] *See* Joint Statement at 9, ¶ 35; Initial Brief of Farmers and Merchants Mutual Telephone Company, File No. EB-07-MD-001 ("Farmers' Opening Brief") at 13 & Exhibit J, Declaration of Rex McGuire ("McGuire Opening Brief Declaration") at 3, ¶ 7; Qwest Communication Corporation's Reply Brief, File No. EB-07-MD-001 (filed July 24, 2007) ("Qwest's Reply Brief") at 4-5 n.22.

Farmers' access rates were therefore unjust and unreasonable in violation of section 201(b) of the Act.[38] Qwest further contends that Farmers' tariff rates are not entitled to "deemed lawful" protection, because Farmers' actions "smack of a deliberate, bad-faith plan to increase dramatically Farmers' access revenues and to earn a rate of return vastly in excess of the Commission's prescription."[39] According to Qwest, Farmers' rates should be declared void *ab initio*, and Farmers should be held liable for retrospective damages in an amount to be proven during a subsequent proceeding.[40] Alternatively, Qwest contends that the traffic at issue is not "terminating access" traffic as defined in the tariff, and that Farmers violated section 203(c) (Count II) and 201(b) (Count III) of the Act, by applying charges not consistent with its tariff.[41]

III. DISCUSSION

A. Farmers' Access Rates During the Complaint Period Are Subject to Rate of Return Review.

14. Qwest argues that, during the Complaint Period, Farmers' interstate switched access rates resulted in returns exceeding the maximum allowable return for the rate category including rates for Line Termination, Intercept, Local Switching, Transport, and Information, and/or exceeding the maximum allowable return for interstate access charges overall.[42] According to Qwest, the vast increase in demand that Farmers experienced after it left the NECA pool in July 2005 and established its own tariff was not accompanied by an equivalent increase in costs.[43] In Qwest's view, this fact establishes that Farmers' interstate switched access rates exceed the authorized rate of return "many times over."[44] Qwest further contends that rates exceeding the authorized rate of return are *per se* unlawful and violate section 201(b) of the Act.[45]

15. Farmers maintains that it is not required to calculate its interstate access rates on the basis of its own costs or to calculate an individual rate of return, because it is an average schedule company.[46] According to Farmers, subjecting it to individual rate of return review is inconsistent with its average

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[38] Complaint at 20-22, ¶¶ 37-41.

[39] Complaint at 18, ¶ 33.

[40] Complaint at 22, ¶ 41. Qwest initially argued that the Commission should order Farmers to continue to offer its own tariff relying on "company specific rates reflecting recent volume figures in its new tariff, rather than reentering the NECA pool." Reply at 4. *See* Complaint at 27, ¶ 60 (asking the Commission to "direct[] Farmers to immediately amend its access tariffs to reflect its current demand and costs"). Qwest subsequently withdrew that request. Qwest's Reply Brief at 4 n.21.

[41] Complaint at 22-26, ¶¶ 42-55.

[42] Complaint at 1-2, 6, ¶ 7 & n.3, 15, ¶ 26, 20-21, ¶¶ 38-39; Complaint, Exhibit A (Legal Analysis in Support of Qwest Communications Corp.'s Complaint ["Qwest's Legal Analysis"]) at ii, 3-6, 11-17; Reply of Qwest Communications Corp., File No. EB-07-MD-001 (filed June 1, 2007) ("Reply") at 2; Qwest's Opening Brief at 9.

[43] Complaint at 2, 14-15, ¶¶ 24-26, 21, ¶ 38; Qwest's Legal Analysis at ii, 3, 12-13; Reply at 2; Qwest's Opening Brief at 7.

[44] Complaint at 21, ¶ 38; Qwest's Legal Analysis at 14.

[45] Complaint at 2, 20, ¶ 38; Qwest's Legal Analysis at 5, 7; Reply at 9; Qwest's Opening Brief at 9. *See Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 127 S. Ct. 1513, 1519-20 (2007); *Virgin Islands Telephone v. FCC*, 444 F.3d 666, 669-70 (D.C. Cir. 2006); *MCI Telecommunications Corp. v. FCC*, 59 F.3d 1407, 1414 (D.C. Cir. 2005).

[46] Answer at iii, 2-3, 12, ¶ 7, 23, ¶ 39, 30, ¶ 60, 32. *See also* Answer, Exhibit E (Legal Analysis of Farmers and Merchants Mutual Telephone Company ["Farmers' Legal Analysis"]) at 7-8; Farmers' Opening Brief at 5; Farmers' Reply Brief at 7.

schedule status.[47] Farmers contends that "individual rate of return regulation" applies "to only 'companies electing to use the historical cost approach,'" and that Farmers is not such a company because it uses the "historical average schedule settlement approach set forth in Section 61.39(b)(2) [of the Commission's rules]," rather than the "historical cost approach set forth in Section 61.39(b)(1) [of the Commission's rules]."[48] Farmers also contends that, going forward, the Commission's regulatory regime will cause Farmers' rates to decline in subsequent tariff filings.[49] Thus, Farmers maintains that it has "fully complied with the authorized rate of return by calculating its access service rates on the basis of the average schedule formulas approved by the Commission to earn the authorized rate of return."[50]

16. Farmers' average schedule status does not immunize it from rate of return review. As explained above, the Commission in 1987 adopted rules permitting small carriers to establish their access rates based on the prior year's costs and demand or their NECA settlements. Those rules were designed to "reduce federal regulatory burdens on small telephone companies," while simultaneously eliminating "incentives for small companies to file access tariffs producing excessive returns."[51] To further the latter goal, the Commission clarified that small carriers "remain subject to the [established] rate of return," and that the Commission retains the right to "enforce its rate of return prescription by appropriate action, including the imposition of refunds."[52] Thus, if the use of historical figures proves not to be "rate neutral," the Commission "may request that carrier to submit the data specified by the data filing provisions in the Commission's Rules . . . to monitor that carrier's earnings."[53] This allows the Commission to "assess the need for corrective action."[54] The Commission's rules accordingly require small carriers to adhere to the prescribed rate of return and, upon request, to submit to the Commission information necessary to monitor the carrier's earnings.[55]

17. Farmers' contention that it is not a company that employs the "historical cost approach" (and, therefore, is not subject to rate of return review) is unfounded. The phrase "historical cost approach" that appears in footnote 27 of the *Small Carrier Tariff Order* refers to the Commission's

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[47] Answer at 3, 12, ¶ 7, 22, ¶ 38; Farmers' Legal Analysis at 8; Farmers' Opening Brief at 5.

[48] Farmers' Opening Brief at 5 (quoting *Small Carrier Tariff Order*, 2 FCC Rcd at 3813 n.27).

[49] Answer at 18, ¶ 26.

[50] Answer at 3, 12, ¶ 7, 23, ¶ 39; Farmers' Legal Analysis at 9. *See* Answer at 16, ¶ 20, 18, ¶ 26, 22, ¶ 38. Farmers also disputes Qwest's purported contention that Farmers "should have calculated its access rates based on demand projections." Answer at 4, 24-25, ¶ 41, 32; Farmers' Legal Analysis at 8; Farmers' Opening Brief at 7. In its Reply Brief, however, Qwest clarified its position that Farmers had three choices in the face of its plan to increase traffic volumes: "(1) remain in the NECA pool, (2) rely on projections pursuant to section 61.38, or (3) seek Commission guidance on how best to account in its filing for its knowledge that volumes were about to skyrocket." Qwest's Reply Brief at 3.

[51] *Small Carrier Tariff Order*, 2 FCC Rcd at 3811-12, ¶¶ 1, 7.

[52] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18. In 1987, the Commission could order a carrier that over-earned to pay refunds. Since the passage of section 204(a)(3) of the Act, the Commission cannot award refunds in connection with tariffs that are "deemed lawful." *See* discussion at paragraph 20, below. However, that does not preclude the Commission from awarding prospective relief in a complaint proceeding. *Id. See Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 13 n.23 (noting that rates under a section 61.39 tariff "would, of course, be subject to challenge in a Section 208 complaint proceeding").

[53] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[54] *Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶ 18.

[55] 47 C.F.R. § 61.39(c) ("The Commission may require any carrier to submit . . . information if it deems it necessary to monitor the carrier's earnings. However, rates must be calculated based on the local exchange carrier's prescribed rate of return applicable to the period during which the rates are effective."). *See also* 47 C.F.R. § 61.38(a) (stating that the Commission may require any carrier that has submitted a tariff filing under rule 61.39 "to submit such information as may be necessary for a review of a tariff filing").

decision to allow small carriers to use historical cost figures, rather than projections, to calculate rates.[56] The Commission did not draw a distinction between cost carriers' use of historical cost figures and average schedule carriers' use of historical settlement data. Indeed, rule 61.39 discusses both types of carriers.

18. Farmers correctly notes that carriers participating in the NECA pool do not prepare cost studies and are not subject to individual rate of return scrutiny.[57] That is not the case, however, for carriers that have left the NECA pool. At that point, a carrier's receipts are not calculated pursuant to Commission-approved settlement formulas (although its prior years' settlements are used as a proxy for its costs), and its rates are subject to company-specific review. For that reason, Farmers' repeated reliance on a Commission Order approving NECA-proposed modifications to average schedule formulas is inapposite,[58] because, during the relevant period, Farmers did not participate in the NECA pool.[59]

19. The Commission has investigated and invalidated access rates charged by a carrier pursuant to a section 61.39 tariff. Specifically, in 1998, the Commission invalidated access rate increases proposed by Beehive Telephone Company, Inc. of Nevada ("Beehive"), a LEC, which had filed its own tariff under section 61.39 but had failed to demonstrate increased capital- or business-related costs.[60] The Commission found that Beehive had earned an excessive rate of return, prescribed new rates for prospective application based in part on costs for the services at issue, and ordered Beehive to pay refunds.[61] In 2002, the Commission in a section 208 complaint proceeding determined that Beehive's access rates (set under section 61.39) for a period preceding the rates at issue in the above-described tariff

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[56] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 13 ("We conclude in this Order that permitting small carriers to file access tariffs using *historical cost* and demand data to set rates appropriately reduces the regulatory burdens faced by these companies.") (emphasis added); *id.* at 3815, ¶ 33 ("We have determined in this Order that the reduction of the administrative and regulatory burdens on small telephone companies is warranted . . . The rules adopted herein reduce the frequency of required filings and provide small companies the option of choosing to file interstate access tariffs based on *historical cost* and demand data, or to participate in NECA's pooling arrangements.") (emphasis added).

[57] *See July 1, 2004 Annual Access Charge Tariff Filings*, Memorandum Opinion and Order, 19 FCC Rcd 23877, 23878, ¶ 2 n.4 (2004) ("The pool revenues of average schedule companies are determined on the basis of a series of formulas . . . For qualifying small companies, the average schedule option avoids the expense of preparing cost studies.").

[58] *See* Answer at 3, 12, ¶ 7, 22, ¶ 38; Farmers' Legal Analysis at 8 (citing *National Exchange Carrier Ass'n, Inc. Proposed Modifications to the Interstate Average Schedules*, Memorandum Opinion and Order, 8 FCC Rcd 4861, 4863, ¶ 17 (1993) (rejecting MCI's assertion regarding the possibility of overearnings by individual average schedule companies participating in the NECA pool and noting that requiring individual companies to produce a cost study "would be inconsistent with the purpose of having interstate average schedule formulas")). Farmers' reliance on the Commission's decision in the *Joint Cost Reconsideration Order* similarly is inapposite. Farmers' Legal Analysis at 7-8. *See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities Amendment of Part 31, the Uniform System of Accounts for Class A and Class B Telephone Companies to Provide for Nonregulated Activities and to Provide for Transactions between Telephone Companies and Their Affiliates*, Order on Reconsideration, 2 FCC Rcd 6283 (1987) ("*Joint Cost Reconsideration Order*"). There, the Commission declined to require average schedule carriers to separate their nonregulated costs from their regulated costs because it "would be a meaningless exercise, . . . would create an unnecessary regulatory burden[, and] . . . would have no resulting impact on interstate rates." *Joint Cost Reconsideration Order*, 2 FCC Rcd at 6300, ¶ 155. In that rulemaking proceeding, the Commission was not addressing the scenario contemplated by rule 61.39(c) – promulgated that same year – where a *particular carrier's earnings* are at issue.

[59] Joint Statement at 3, ¶ 8.

[60] *Beehive Telephone Company, Inc., Tariff F.C.C. No. 1*, Memorandum Opinion and Order, 13 FCC Rcd 2736 (1998) ("*Beehive I*"), *modified on recon.*, 13 FCC Rcd 11795 (1998), *aff'd*, *Beehive Telephone Co., Inc. v. FCC*, 180 F.3d 314 (1999).

[61] *Beehive I*, 13 FCC Rcd at 2742-46, ¶¶ 17-26.

investigation were unjust and unreasonable.[62] The Commission found that "Beehive had earned a 15.18 percent rate of return in 1994, a 62.60 percent rate of return in 1996, and a 67.95 percent rate of return in 1996, all well above the prescribed rate of return of 11.25%."[63]

20. In addition, Farmers asserts that section 204(a)(3) of the Act (enacted in 1996) results in its tariffed access rates being "deemed lawful" as a matter of law and, therefore, that no claim for overcharges can be brought against it based on statements in the *Small Carrier Tariff Order* (released in 1987).[64] Farmers is incorrect with respect to prospective relief.[65] "[S]ection 204(a)(3) does not mean that tariff provisions that are deemed lawful when they take effect may not be found unlawful subsequently in section 205 or 208 proceedings."[66] In other words, the Commission retains its ability "to find under section 208 that a rate will be unlawful if charged in the future."[67] And, in such circumstances, the Commission "may prescribe a new rate to be effective prospectively."[68] The D.C. Circuit has upheld these principles in the context of section 208 complaint proceedings.[69] Consequently, the rate of return review discussed by the Commission in the *Small Carrier Tariff Order* is entirely consistent with a prospective review of rates deemed lawful under section 204(a)(3). Indeed, as noted above, rule 61.39(c), which provides for such review, remains intact.

B. Farmers Earned an Unlawful Rate of Return During the Complaint Period.

21. Qwest argues that Farmers earned revenues greatly in excess of the Commission-prescribed rate of return.[70] In this litigation, Farmers chose not to produce its actual cost data or a

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[62] *AT&T Corporation v. Beehive Telephone Company, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 11641 (2002) ("*Beehive II*").

[63] *Beehive II*, 17 FCC Rcd at 11650-51, ¶ 19.

[64] Answer at iii, v, 5-6, 14, ¶ 14, 18, ¶ 26, 22, ¶ 38, 23, ¶ 39, 24, ¶ 41, 30, ¶ 60, 31; Farmers' Legal Analysis at 8-9. *See also* Farmers' Opening Brief at 3-4 (arguing that, because Farmers filed its tariff rates pursuant to section 204(a)(3) of the Act, they "are, as a matter of law, 'just and reasonable' within the meaning of 47 U.S.C. § 201(b)" and that "[e]ven a very high rate of return does not state a cognizable cause of action under Section 201(b) if the rates are just and reasonable"). Farmers disputes the relevance of the *Beehive* decisions, discussed above, on this basis, because the tariffs at issue in those cases were not filed under section 204(a)(3). Reply Brief of Farmers and Merchants Mutual Telephone Company, File No. EB-07-MD-001 (filed July 24, 2007) ("Farmers' Reply Brief") at 5.

[65] *See* discussion at paragraph 27, below, regarding retrospective relief.

[66] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, 12 FCC Rcd 2170, 2183, ¶ 21 (1997) ("*Streamlined Tariff Order*").

[67] *Streamlined Tariff Order*, 12 FCC Rcd at 2183, ¶ 21 (emphasis added). *Id.* at 2182, ¶ 19 ("[W]e do not find, however, that the Commission is precluded from finding, under section 208, that a rate will be unlawful if a carrier continues to charge it during a future period or from prescribing a reasonable rate as to the future under section 205.").

[68] *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Order on Reconsideration, 17 FCC Rcd 17040, 17043, ¶ 6 (2002) ("*2002 Deemed Lawful Order*").

[69] *See Virgin Islands Telephone Corp. v. FCC*, 444 F.3d 666, 669 (D.C. Cir. 2006) (holding that, under the "deemed lawful" regime, "[r]emedies against carriers charging lawful rates later found unreasonable must be prospective only"); *id.* at 671 n.4 ("The Commission may still impose its own remedy for overearnings during 1998; this remedy, if any, must be prospective rather than retrospective."); *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 406, 411 (D.C. Cir. 2002) ("*ACS of Anchorage*") (holding that, even with respect to a rate deemed lawful under section 204(a)(3), prospective remedies are available if "later examination shows" the rate "to be unreasonable"). *See also 2002 Deemed Lawful Order*, 17 FCC Rcd at 17042, ¶ 6 ("The [*ACS of Anchorage*] court's holding was limited to the question of refund liability for rates that were 'deemed lawful'; it in fact acknowledged that the Commission might order prospective relief 'if a later reexamination shows them to be unreasonable.'").

[70] Qwest's Opening Brief at 11-12.

calculation of its rate of return as established by Commission rules. Instead, Farmers provided NECA settlement figures in lieu of actual cost data.[71] Consequently, to estimate Farmers' rate of return, Qwest argues that we should compare Farmers' interstate switched access bills during the Complaint Period (which represent its revenues) and Farmers' revenue requirements had it remained in the NECA pool (which Qwest argues serves as a useful surrogate for Farmers' costs plus a reasonable rate of return.)[72] [Redacted confidential information comparing Farmers' total interstate switched access bills for the Complaint Period with Farmers' aggregate traffic-sensitive revenue requirement had it remained in the NECA pool for the same period.]

22. Farmers disputes the propriety of relying on the NECA average schedule formula in assessing its rate of return.[73] According to Farmers, although average schedule carriers participating in the NECA tariff are compensated and regulated on the basis of NECA's formula,[74] these companies do not calculate a rate of return and are not required to perform the cost studies that would be necessary to calculate a rate of return.[75] As shown above, Farmers did not produce actual cost data that could be used to calculate a rate of return, but instead provided NECA settlement figures.[76] In adopting rule 61.39, the Commission recognized that average schedule formula settlements could be used by average schedule companies instead of actual costs in setting rates.[77] As such, although it might not be appropriate to compare Farmers' earnings with the results of the settlement formula when determining refund liability,[78]

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[71] As noted above, under rule 61.39(c), a carrier may be required to submit information the Commission deems necessary to monitor the carrier's earnings. 47 C.F.R. § 61.39(c). Farmers objected to providing actual cost data in response to Qwest's discovery requests. *See* Farmers & Merchants Mutual Telephone Company's Objections to Complainant's Interrogatories and Document Requests, File No. EB-07-MD-001 (filed May 14, 2007) at 7-9. Consequently, Farmers was given the option of responding to Qwest's discovery requests targeted at Farmers' costs by providing: (1) the amount that Farmers' NECA settlement would have been had Farmers participated in the NECA traffic-sensitive switched access pool for the month at issue; or (2) its actual cost and demand figures for the month at issue as a surrogate for its expenses. *See* Letter from Lisa B. Griffin, Deputy Division Chief, EB, MDRD, FCC, to David H. Solomon, Counsel for Qwest, and James U. Troup, Counsel for Farmers, File No. EB-07-MD-001 (dated June 14, 2007). Farmers chose option 1. *See* Farmers' Discovery Response at 3-4, Exhibit B.

[72] Qwest's Opening Brief at 14.

[73] Farmers' Reply Brief at 7-9.

[74] *See National Exchange Carrier Association, Inc. (NECA) Proposed Modifications to the 1997 Interstate Average Schedule Formulas and Proposed Further Modifications to the 1997-98 Interstate Average Schedule Formulas*, Order on Reconsideration and Order, 13 FCC Rcd 10116, 10118, ¶ 4 (Com. Car. Bur. 1997) ("'Cost companies' settle with NECA on the basis of their actual interstate costs of service. 'Average schedule companies' use formulas to estimate the average costs of service and settle with NECA on the basis of those estimated costs. The average schedule formulas are designed to simulate the disbursements that would be received by cost companies that are representative of average schedule companies."). *See also* 47 C.F.R. § 69.606 ("Payments [to average schedule companies] shall be made in accordance with a formula approved or modified by the Commission. Such formula shall be designed to produce disbursements to an average schedule company that simulate the disbursements that would be received pursuant to § 69.607 by a [cost] company that is representative of average schedule companies.").

[75] Farmers' Reply Brief at 7-8.

[76] *See* paragraph 21 *supra*.

[77] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3814, ¶ 25 (directing cost companies to base rates on a cost study but permitting average schedule companies to rely on previous years' NECA settlements as a surrogate for cost studies).

[78] We also note that the average schedule formulas never contemplated the extraordinary increases in demand brought about by arrangements such as those Farmers entered into with conference calling companies. *See In the Matter of Investigation of Certain 2007 Annual Access Tariffs*, Order Designating Issues for Investigation, 2007 WL 3416323 at 6, ¶ 9, 11, ¶¶ 24-25 (Wireline Comp. Bur. 2007) ("*2007 Access Tariff Designation Order*"). When a carrier such as Farmers experiences significant increases in its MOUs, the NECA average schedule formula likely overstates such carrier's revenue requirement and therefore understates its rate of return. *Cf. In the Matter of*

(continued …)

such a comparison is appropriate for the limited purpose of determining whether Farmers overearned during the Complaint Period. Thus, we do not use the average schedule formula to establish a specific rate of return for Farmers.

23. Farmers does not deny that its demand during the Complaint Period far exceeded its historical demand used to calculate its individual tariff rates at the time it left the NECA pool.[79] According to Farmers, however, its revenues predictably rose as a result of increases in traffic volume. In addition, Farmers maintains that its costs also increased, to some unspecified extent.[80] Further, Farmers contends that: (1) Qwest has not properly calculated Farmers' revenue requirement (because Qwest excluded settlement amounts for common line and SS7 services);[81] (2) Qwest improperly commingled information for two different monitoring periods (*i.e.*, that any analysis of the 2005-2006 and 2007-2008 monitoring periods would have to take into account any under-earnings in 2005 and 2008, respectively);[82] and (3) Farmers' access rates are reasonable "when compared to the rates that the large price cap carriers charge for conferencing services."[83]

24. We reject Farmers' assertions. First, Qwest presented persuasive expert testimony demonstrating that Farmers' costs did not rise by nearly the same proportion as its access revenues.[84] Although Farmers submitted with its Reply Brief a declaration of its General Manager attesting that Farmers incurred greater costs as its traffic volume expanded, the declaration is not sufficiently detailed or probative to counter the specific testimony and supporting analysis presented by Qwest's expert.[85] Second, contrary to Farmers' contention, Qwest properly excluded common line and SS7-related costs from the revenue requirement, because such costs are recovered via a rate element not at issue here. In any event, excluding the costs works in Farmers' favor, because they are excluded from the total revenue figure as well. Third, Farmers gets little mileage from its contention that Qwest's calculations ought to include potential under-earnings that Farmers allegedly experienced while in the NECA pool. Farmers' earnings during the Complaint Period are subject to company-specific review. Because section 61.39

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Establishing Just and Reasonable Rates for Local Exchange Carriers, Notice of Proposed Rulemaking, FCC 07-176 at 12, ¶ 25 (rel. Oct. 2, 2007) (*"Access Stimulation NPRM"*) ("We tentatively conclude that the average schedule formulas can only yield reasonable estimates of an average schedule carrier's costs when the demand is within the range used to develop the formulas. When an average schedule carrier experiences a significant growth in demand that takes it outside the observed range of demand used to establish the average schedule formulas, the process of running the increased demand data through the formulas produces what appear to be extreme increases in costs for the carrier. This increase appears to be inconsistent with the efficiencies carriers would be expected to realize as access demand increases.")

[79] Farmers' Discovery Response, Exhibit A. When Farmers left the NECA pool, its individual tariff rates were calculated based upon its historical demand as calculated by the NECA settlement formula. Joint Statement at 3, ¶¶ 7-8.

[80] Farmers' Reply Brief at 8. Farmers argues, for instance, that it made "substantial investments in additional facilities," and incurred the cost of marketing fees. Farmers' Reply Brief, Exhibit A, Declaration of Rex McGuire ("McGuire Reply Brief Declaration") at 2, ¶ 4.

[81] Farmers' Reply Brief at 8 n.25.

[82] Farmers' Reply Brief at 8-9.

[83] Farmers' Opening Brief at 6-7.

[84] *See* Complaint, Exhibit C, Declaration of Peter Copeland ("Copeland Declaration"). Mr. Copeland's testimony shows that the tremendous expansion in Farmers' traffic was not accompanied by a similar increase in access lines. Copeland Declaration at 4, ¶ 7. According to Mr. Copeland, under the NECA settlement formulas, when a carrier such as Farmers experiences a substantial increase in access traffic volumes, but that increase is not accompanied by a similar rise in access line counts, its costs rise at a much slower pace than its receipts. Copeland Declaration at 13, ¶ 24.

[85] *Compare* Copeland Declaration *with* McGuire Reply Brief Declaration.

carriers are exempt from the monitoring period requirements of section 65.701 of the Commission's rules,[86] we find that the two year period that Farmers was out of the NECA traffic-sensitive pool is a reasonable time frame over which to measure and evaluate Farmers' earnings. Finally, the rates that Qwest charges for its conference calling services simply are not relevant to determinations of whether rates for Farmers' access service – an entirely different service – are just and reasonable and whether Farmers exceeded the permissible rate of return.

25. In sum, given Farmers' failure to produce actual data regarding its costs, we agree with Qwest that it is appropriate to use the results of applying the NECA average schedule formula for the purpose of determining whether Farmers overearned. Moreover, we find that 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.

C. Although Farmers Earned an Unlawful Rate of Return During the Complaint Period, Qwest Is Not Entitled to Damages.

26. Qwest asks the Commission to depart from the prohibition against awarding retrospective relief in conjunction with "deemed lawful" tariffs, because Farmers engaged in a "deliberate, bad-faith plan" to vastly increase its access revenues and earn an unlawfully high rate of return.[87] Specifically, Qwest maintains that, at the time Farmers filed new rates to be effective July 1, 2005, Farmers already had entered into a contract with a conference calling company [Redacted confidential information regarding the terms of Farmers' contract with a conference calling company]. Qwest argues that Farmers nonetheless based its new rates on much lower historical volume figures.[88] Qwest contends that section 204(a)(3)'s "deemed lawful" provision does not apply in such circumstances, and it seeks a declaration that Farmers' tariffed rates are "void *ab initio*," thereby entitling Qwest to a damages award.[89]

27. We decline to rule as Qwest requests. As an initial matter, Qwest contends that factual statements Farmers made to the Commission in support of its tariff filing were "incorrect" and/or "misleading," in violation of Commission rule 1.17(a)(1) and (2),[90] because Farmers failed to disclose its purported plan to increase interstate access volumes.[91] Under the Commission's rules, Farmers was required to report its *historical* cost and demand figures, which the Commission determined are "likely to be a close and unbiased substitute for prospective data."[92] In fact, the Commission specifically declined to include a requirement that carriers provide *any* projected demand data or combine such future projections with historical data.[93] In this case, Farmers reported its historical data accurately. Farmers was not required to opine on whether its historical volume figures were an accurate proxy for future

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[86] 47 C.F.R. § 61.39(c).

[87] Complaint at 18, ¶ 33. *See also* Complaint at 2, 18-20, ¶¶ 33-36; Qwest's Legal Analysis at ii, 4, 17-21; Qwest's Opening Brief at 16 ("Farmers achieved these grossly excessive revenues through implementation of a pre-planned, intentional scheme to abuse a perceived loophole in the Commission's rules.").

[88] Qwest's Opening Brief at 16.

[89] Complaint at 2, 22, ¶ 41, 27, ¶ 60; Qwest's Legal Analysis at ii, 4, 17-21; Qwest's Opening Brief at 16-18; Qwest's Reply Brief at 2-3.

[90] 47 C.F.R. § 1.17(a)(1), (2).

[91] Qwest's Opening Brief at 17.

[92] *Small Carrier Tariff Order*, 2 FCC Rcd at 3812, ¶ 12 n.22. *See* Farmers' Reply Brief at 7 ("Section 61.39(b) of the Commission's rules does not require supporting data to be filed with the tariff, and Section 61.39(b)(2) prohibits the use of projected demand in lieu of historical demand. Farmers therefore believed that the Commission would not have been interested in the contracts that Farmers had with conferencing companies.").

[93] *See Small Carrier Tariff Order*, 2 FCC Rcd at 3813, ¶¶ 15-16.

volume figures. As it turns out, the historical data was not a good substitute for prospective data, and Farmers overearned. Under the existing rules, however, Farmers' statements are not unlawful.[94] Nor do we consider Farmers' failure to disclose its future plans to be a "case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations."[95] Although Qwest characterizes Farmers' actions as "underhanded,"[96] and we agree that Farmers manipulated the Commission's rules to achieve a result unintended by the rules, Qwest does not identify any "improper accounting techniques" employed by Farmers.[97] Finally, Qwest has not alleged that revenue-sharing arrangements between Farmers and the conference calling companies violate section 201(b) *per se*. Consequently, the prior Commission decision relied on by Qwest (finding that certain conduct by an IXC toward a competitive access provider ("CAP") was permissible when the CAP was established as a sham entity) is not dispositive.[98]

D. We Deny Farmers' Request for a Ruling Regarding Qwest's Alleged Self-Help.

28. Farmers asserts that Qwest has only made partial payments for the terminating access services Farmers provided.[99] According to Farmers, "[e]ach time that Qwest has withheld payment of Farmers's tariffed charges, it has violated Farmers's tariff and engaged in unlawful self-help."[100] Farmers asks the Commission to find that "Qwest's self-help is unlawful and a continuing violation of Sections 201(b) and 203(c) of the Act and Farmers's federal tariff."[101]

29. We decline to rule as Farmers requests. To begin, Farmers' request is tantamount to a "cross-complaint," which the Commission's formal complaint rules expressly prohibit.[102] Moreover, any complaint instituted by Farmers to recover fees allegedly owed by Qwest would constitute a "collection

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[94] We similarly see no grounds to rely on general equitable principles such as "unclean hands" to award Qwest damages. *See* Qwest's Legal Analysis at 21 ("A decision to declare Farmers's access rates void *ab initio* would also be consistent with other legal principles designed to prevent wrongdoers from relying on deception to retain ill-gotten gains."); Qwest's Opening Brief at 18 n.66 (same).

[95] Complaint at 22, ¶ 41 (citing *ACS of Anchorage*, 290 F.3d at 413); Qwest's Legal Analysis at 20 (same); Qwest's Opening Brief at 17-18 (same).

[96] Qwest's Opening Brief at 18.

[97] Although we do not grant the retrospective relief Qwest requests in his complaint proceeding, the Commission in the future will examine closely conduct that manipulates the historical volume and pricing rules and may well find that such conduct violates section 201(b) of the Act. Indeed, we currently are considering the lawfulness of such arrangements in other proceedings. *Access Stimulation NPRM*. In addition, we are considering whether payments made to the provider of a stimulating activity under such agreements may be included in a carrier's revenue requirement for purposes of setting rates. *2007 Access Tariff Designation Order* at 7, ¶¶ 13-14.

[98] Qwest's Legal Analysis at 20 (citing *Total Telecommunications Serv., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726 (2001) ("*Total v. AT&T*")). We express no view on whether a different record could have demonstrated that the deemed lawful provision does not apply or that the conduct at issue ran afoul of any other statutory provisions.

[99] Joint Statement at 9, ¶ 35; McGuire Opening Brief Declaration at 3, ¶ 7.

[100] Farmers' Opening Brief at 13. *See also* Answer at 10; Farmers' Legal Analysis at 1, 11-12.

[101] Farmers' Opening Brief at 2, 14.

[102] 47 C.F.R. § 1.725 ("Cross-complaints seeking any relief within the jurisdiction of the Commission against any carrier that is a party (complainant or defendant) to that proceeding are expressly prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§ 1.720 through 1.736. For purposes of this subpart, the term 'cross-complaint' shall include counterclaims.").

action," which the Commission repeatedly has declined to entertain.[103]

E. Farmers Did Not Violate Sections 203 or 201(b) of the Act by Imposing Terminating Access Charges on Traffic Bound for Conference Calling Companies.

30. Qwest alleges that Farmers violated sections 203 and 201(b) of the Act by imposing terminating access charges on traffic that Farmers does not, in fact, terminate.[104] Qwest argues that traffic delivered to the conference calling companies does not terminate in Farmers' exchange, but merely passes through it to terminate elsewhere.[105] We find, however, that Farmers does terminate the traffic at issue, and therefore we deny Counts II and III of the Complaint.

31. Qwest correctly notes that only a carrier whose facilities are used to originate or terminate a call may impose access charges.[106] The Commission has generally used an "end-to-end" analysis in determining where a call terminates.[107] As Qwest points out, the Commission has focused on the end points of the communications, "and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers."[108]

32. Qwest argues that calls to the conference calling companies are ultimately connected to – and terminate with – users in disparate locations.[109] According to Qwest, when a caller dials one of the conference calling companies' telephone numbers, the communication that he or she initiates is not with the conference calling company, but with other people who have also dialed in to the conference calling company's number.[110] Qwest argues that such calls terminate at the locations of those other callers, and that Farmers is providing a transiting service, not termination. Farmers' view of the calls, however, is that users of the conference calling services make calls that terminate at the conference bridge, and are connected together at that point.[111] We find Farmers' characterization of the conference calling services

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[103] *See U.S. Telepacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555-56, ¶ 8 (2004) (citing "long-standing Commission precedent" holding that the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges, and that such claims should be filed in the appropriate state or federal courts).

[104] *See* Complaint at 22-26, Counts II and III.

[105] *See* Complaint at 22-23 (arguing that imposition of terminating access charges violates sections 201(b) and 203 of the Act); Qwest's Legal Analysis at 21-30 (same); Reply at 14-19 (same). *See also* Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7.

[106] Qwest's Legal Analysis at 21 (noting that section 3(16) of the Act defines exchange access as "the offering of access to telephone exchange services or facilities for the purpose of *origination or termination* of telephone toll services") (emphasis added).

[107] *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) ("*Bell Atlantic v. FCC*").

[108] *Bell Atlantic v. FCC*, 206 F.3d at 4.

[109] Complaint at 23; Qwest's Legal Analysis at 24; Reply at 14-15; Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7. Qwest initially asserted that calls bound for the conference calling companies do not terminate at Farmers' exchange because at least some of the traffic "appears to be" transported to equipment owned by the conference calling companies and located outside the exchange. Qwest's Legal Analysis at 24; Reply at 14. Farmers, however, stated that the traffic at issue is all routed to conference bridges located in Farmers' exchange. McGuire Opening Brief Declaration at 3. In its Opening Brief, Qwest indicated that it was no longer relying on this point. Qwest's Opening Brief at 23 n.90.

[110] Qwest's Legal Analysis at 22; Qwest's Opening Brief at 23-24; Qwest's Reply Brief at 6-7.

[111] Answer at 26. Farmers' Opening Brief at 9-10.

to be more persuasive than Qwest's.[112]

33. Qwest's view of how to treat a conference call leads to anomalous results. For instance, suppose parties A, B, C, and D dial in to a conference bridge. According to Qwest, A has made three calls, one terminating with B, one with C, and one with D. But in fact, B, C, and D have actually initiated calls of their own in order to communicate with A. What Qwest calls the *termination* points are actually *call initiation* points. Moreover, under Qwest's theory, the exchange carriers serving B, C, and D would all be entitled to charge terminating access. In fact, each of those carriers would be entitled to charge terminating access three times – B's carrier could charge for terminating calls from A, C, and D, and so forth. This conference call with four participants would incur terminating access charges twelve times. Qwest has not addressed this logical consequence of its theory, nor has it offered any evidence that conference calls are treated as terminating with the individual callers for any purpose beyond the circumstances of this case.[113]

34. Qwest tries to analogize this case to calling card platform cases in which the Commission applied an end-to-end analysis and found that calls dialed in to a calling card platform and then routed on to another party terminated with the ultimate called party, not at the platform.[114] In other words, the Commission found that there was one call (from A to B via the calling card platform), not two (A to the platform plus platform to B). This argument is circular, however. It assumes that the calls at issue are routed on to another party, when the very issue to be decided here is whether that is the case. The calling card cases merely address the issue of whether the call terminates at the platform if, in fact, it is routed on to another party beyond the platform.[115]

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[112] The parties argue about whether Qwest would assess terminating access charges in this situation, but the record does not answer the question. According to Farmers, Qwest has admitted that it also bills terminating access for calls to a conference bridge. Farmers' Opening Brief at 2 (citing Response of Qwest Communications Corporation to Interrogatories, File No. EB-07-MD-001 (filed July 10, 2007)). Qwest, however, indicates that conference call providers generally use a different service configuration, relying on special access and 800 service, and states that Qwest has no knowledge of any end user providing a conference bridge service in the same manner as the conference calling companies that entered agreements with Farmers. Qwest Response to Interrogatory No. 1. Qwest does state that in the rare case that a conference call provider did interconnect in the same manner as the conference calling companies in this case, Qwest would assess terminating access charges. In its Reply Brief, however, Qwest says that it would do so only to the extent that it had no reason to know that its customer was a conference calling company. Qwest's Reply Brief at 7. Qwest gives no indication of what it would do if it knew that the customer was a conference calling company. Because the parties have not identified any specific instance in which Qwest actually did charge – or chose not to charge – terminating access for calls to a conference bridge, we find the record inconclusive on this point. In any event, what Qwest would hypothetically charge under similar circumstances is not dispositive here.

[113] Newton's Telecom Dictionary's definition of a "conference bridge" also seems consistent with Farmers' view, speaking of the callers being connected by the bridge, rather than describing the bridge as routing the calls on from one caller to another. Newton's describes a conference bridge as "[a] telecommunications facility or service which permits callers from several diverse locations to be connected together for a conference call." H. Newton, Newton's Telecom Dictionary, at 260 (2006).

[114] Qwest's Legal Analysis at 25-26 (citing *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826 (2005), and *Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006)).

[115] We also find inapposite a number of cases cited by Farmers to suggest that the Commission has already found that it is lawful to impose access charges for the type of service at issue here. *See* Farmers' Legal Analysis at 10 (citing *AT&T Corp. v. Jefferson Telephone Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001); *AT&T v. Frontier Communications of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 4041 (2001); *Beehive II*, 17 FCC Rcd at 11641). In those cases, the issue of whether access charges were appropriate was never addressed. The parties and the Commission simply assumed that the LECs involved were providing access service, and the dispute was about the lawfulness of their rates.

35. In addition to its argument about where the calls at issue terminate, Qwest also argues that Farmers' tariff does not allow Farmers to assess terminating access charges on calls to the conference calling companies. Farmers' tariff provides that terminating access service allows the customer "to terminate calls from a customer designated premises to an end user's premises."[116] Qwest asserts that the conference calling companies are not end users, and that therefore delivering calls to them does not constitute terminating access service. The record indicates, however, that the conference calling companies *are* end users as defined in the tariff, and we therefore find that Farmers' access charges have been imposed in accordance with its tariff.

36. Farmers' tariff defines "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier," and in turn defines "customer" as any entity "which subscribes to the services offered under this tariff."[117] Qwest asserts that the conference calling companies do not subscribe to services offered under Farmers' tariff, and are therefore neither customers nor end users. Thus, Qwest concludes, delivery of traffic to the conference calling companies cannot constitute terminating access under the tariff.

37. Farmers asserts that the conference calling companies are customers because they purchase interstate End User Access Service and pay the federal subscriber line charge.[118] Qwest, however, argues that the conference calling companies nevertheless do not "subscribe" to Farmers' services "under any meaningful definition of that term."[119] Qwest asserts that "subscription" requires the payment of money,[120] but that the conference calling companies effectively pay nothing for Farmers' service because all of their payments are refunded to them in another form – the marketing fees.

38. We find that Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff.[121] Qwest offers scant support for its assertion that one cannot subscribe to a service without making a net payment to the service provider.[122] For this pivotal proposition, Qwest cites nothing in the tariff itself, but only Black's Law Dictionary's definition of "subscription" as a "written contract by which one engages to . . . contribute a sum of money for a designated purpose . . . in consideration of an equivalent to be rendered, as a subscription to a periodical, a forthcoming book, a series of entertainments, or the like."[123] Another dictionary, however, defines "subscribe" as merely "to enter one's name for a publication or service,"[124] and we note that offers of "free subscriptions" are quite common. We reject Qwest's premise that the conference calling companies can be end users under the tariff only if they made net payments to

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[116] Farmers' tariff incorporates the NECA tariff's terms with respect to switched access services. *See* Complaint, Exhibit 9 (Kiesling Tariff) at § 6. The quoted language appears in the NECA Tariff. *See* Complaint, Exhibit 8 (NECA Tariff) at § 6.1.

[117] Complaint Exhibit 8 (NECA Tariff) at § 2.6.

[118] Complaint at vii, 27.

[119] Qwest's Legal Analysis at 27.

[120] Qwest cites only to the Black's Law Dictionary definition of "subscription" for this proposition. Qwest's Legal Analysis at 27.

[121] We express no view on whether the conduct at issue ran afoul of any other statutory provisions not raised by Qwest.

[122] Qwest complains that Farmers has not offered authority to support the alternative view, Qwest's Reply Brief at 5, but Qwest bears the burden of proof here.

[123] Qwest's Legal Analysis at 27.

[124] Webster's New Collegiate Dictionary, G. & C. Merriam Co., 1981, p. 1152.

Farmers.[125] The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users. The record shows that the conference calling companies did subscribe, *i.e.,* enter their names for, Farmers' tariffed services.[126] Thus, the conference calling companies are both customers and end users, and Farmers' tariff therefore allows Farmers to charge terminating access charges for calls terminated to the conference calling companies.

39. Qwest has failed to prove that the conference calling company-bound calls do not terminate in Farmers' exchange, and has failed to prove that Farmers' imposition of terminating access charges is inconsistent with its tariff. We therefore deny Counts II and III of the Complaint.

IV. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 201, 203, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, and 209, that Count I of the Complaint IS GRANTED IN PART and IS OTHERWISE DENIED, as discussed above.

41. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 201, 203, 206, 207, 208, and 209 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, and 209, that Counts II and III of the Complaint ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[125] We also note that Qwest has failed to prove that the conference calling companies do not pay Farmers for service because the marketing fees cancel out the tariff payments. Qwest cites a District Court decision concerning the filed rate doctrine to argue that the Commission must consider related transactions in analyzing the amount paid for tariffed services. *Qwest Corp. v. Public Service Comm'n of Utah*, 2006 WL 842891 (D. Utah Mar. 28, 2006) (in determining whether AT&T was paying Qwest the full tariffed rate for a private line, court considered payments from Qwest to AT&T for Qwest's occasional use of the line). As the judge in that case recognized, however, another district court reached the opposite result on the same issue. *See Qwest Corp. v. Minnesota Public Service Comm'n*, 2005 WL 1431652 (D. Minn. Mar. 31, 2005) (once AT&T leased the private line, the transaction was complete, and the tariff was no longer relevant to what price was paid for the tariffed service). Qwest offers no argument as to why we should find the Utah decision more persuasive than the Minnesota ruling.

[126] *See* Answer at vii.