

II. BACKGROUND

2. The October 2 Order found that Farmers had entered into a number of commercial agreements with conference calling companies as a means to increase its interstate switched access traffic and revenues.⁶ These agreements, entered into contemporaneously with Farmers' exit from the traffic-sensitive cost and revenue pool administered by the National Exchange Carrier Association ("NECA"), dramatically increased usage of Farmers' network,⁷ with the result that Farmers vastly exceeded the prescribed rate of return.⁸ The October 2 Order therefore held that Farmers violated section 201(b) of the Act,⁹ but ruled that Qwest could not recover damages because the Farmers tariff at issue was "deemed lawful" pursuant to section 204(a)(3) of the Act.¹⁰

3. The October 2 Order also denied Qwest's claim that Farmers' imposition of interstate access charges was inconsistent with its tariff.¹¹ Specifically, the Complaint alleged that Farmers could not, under its tariff, impose terminating access charges on calls to the conference calling companies.¹² Farmers' tariff provides that terminating access service allows the customer to terminate calls "to an end user's premises."¹³ Qwest asserted that the conference calling companies are not end users, so that delivering calls to them does not constitute terminating access service.¹⁴ The Commission found that the conference calling companies *are* end users, relying on Farmers' representation that the companies purchased interstate End User Access Service and paid the federal subscriber line charge.¹⁵ The Petition argues that Farmers' representation was untrue, and that Farmers backdated contract amendments and invoices to make it appear that the conference calling companies had been purchasing tariffed services.¹⁶

4. On November 1, 2007, Qwest filed the Petition and the Motion to Compel.¹⁷ Both filings allege that Farmers withheld critical facts concerning its relationship with the conference calling providers.¹⁸ Specifically, Qwest points to Farmers' statement, after the October 2 Order was released, that Farmers did not create certain contract amendments and bills contemporaneously with delivery of

⁶ October 2 Order, 22 FCC Rcd at 17976, ¶ 9.

⁷ October 2 Order, 22 FCC Rcd at 17974-76, ¶¶ 4-11.

⁸ October 2 Order, 22 FCC Rcd at 17983, ¶ 25.

⁹ 47 U.S.C. § 201(b); October 2 Order, 22 FCC Rcd at 17983, ¶ 25.

¹⁰ 47 U.S.C. § 204(a)(3); October 2 Order, 22 FCC Rcd at 17983-84, ¶¶ 26-27.

¹¹ October 2 Order, 22 FCC Rcd at 17987-88, ¶¶ 38-39.

¹² Formal Complaint of Qwest Communications Corp., File No. EB-07-MD-001, (filed May 2, 2007) ("Complaint") at 22-26, ¶¶ 42-55.

¹³ 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.

¹⁴ Complaint at 23-25, ¶¶ 46-48.

¹⁵ October 2 Order, 22 FCC Rcd at 17987-88, ¶¶ 35-38.

¹⁶ Petition at 4-9.

¹⁷ *See* n.2 and n.4, *supra*. Qwest subsequently filed a Motion for Leave to File Supplement to Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed Dec. 13, 2007) ("Second Motion for Leave") and a Supplement to Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed Dec. 13, 2007) ("Supplement"). Farmers opposed the Second Motion for Leave. Farmers and Merchants Mutual Telephone Company Opposition to Motion for Leave to Supplement Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed Dec. 20, 2007). Although we express no view in this Order as to the ultimate relevance or weight of the evidence Qwest seeks to introduce in its Supplement, we grant the Second Motion for Leave in order to ensure there is a complete record.

¹⁸ Petition at 1-2; Motion to Compel at 1-2.

traffic to the conference calling companies.¹⁹ Rather, an affidavit by James Troup, Farmers' counsel, dated April 13, 2007, indicated that "Farmers had back-billed the [conference calling companies] to ensure compliance with its tariff."²⁰ Qwest further maintains that Farmers delivered backdated bills and contracts even after this complaint proceeding began.²¹ The Motion to Compel asks that we direct Farmers to produce all documents that it submitted in discovery in the IUB Proceeding.²²

5. Farmers argues that Qwest could have, and should have, raised this evidence sooner, and that we should therefore not consider it now.²³ Farmers also maintains that the evidence that contracts and invoices were backdated is irrelevant.²⁴

III. DISCUSSION

6. We grant the Petition for Reconsideration in part by initiating additional proceedings that will allow us to rule on the merits of Qwest's arguments concerning the newly-identified evidence.²⁵ We take no view at this time as to whether that evidence ultimately will persuade us to change our decision on the merits, but we believe that it is important to consider *all* the facts underlying this case. Accordingly, we therefore grant the Motion for Leave and Motion to Compel,²⁶ and direct Farmers to produce in this proceeding all documents that it submitted in discovery in the IUB Proceeding.

7. When we ruled on whether Farmers properly charged Qwest terminating access for calls to the conference calling companies, a key issue was whether those companies were "end users."²⁷ That question, in turn, depended on whether the companies were customers that "subscribe[d] to the services offered under [Farmers'] tariff."²⁸ We found that the conference calling companies did subscribe to

¹⁹ Petition at 6-9. *See also* Supplement, Exhibit 1.

²⁰ Petition at 6 (citing Farmers & Merchants Motion to Strike and Resistance to Qwest's Emergency Motion to Compel Redesignation of Documents and to Compel Production of Documents, IUB Docket No. FCU-07-2, at Exhibit B, Affidavit of James Troup ("Troup Affidavit")). *See also* Supplement at 2-3 and Supplement Exhibit 1.

²¹ Petition at 2, 7; Reply, File No. EB-07-MD-001 (filed Nov. 20, 2007) ("Reply") at 2; Supplement at 3 n.5.

²² Motion to Compel at 12. In its Motion to Compel, Qwest also asked the Commission to conduct an *in camera* review of an email message, which was produced by a third party in the IUB Proceeding. Motion to Compel at 12 n.43. The email at issue was sent by James Troup to an attorney representing a free conference calling company. The Troup email also was produced in a Texas court proceeding. Qwest subsequently withdrew its request after the Texas court ruled that Qwest could file the Troup email with the Commission subject to the Commission's and the Texas court's protective orders. Letter from David H. Solomon, Counsel for Qwest, to Marlene H. Dortch, Secretary, FCC, File No. EB-07-MD-001 (dated Dec. 5, 2007).

²³ Farmers and Merchants Mutual Telephone Company Opposition to Petition for Reconsideration, File No. EB-07-MD-001 (filed Nov. 13, 2007) ("Farmers' Opposition") at 13-17; Consolidated Opposition, File No. EB-07-MD-001 (filed Nov. 8, 2007) ("Consolidated Opposition") at 7-11.

²⁴ Farmers Opposition at 4-6.

²⁵ If the Commission grants a petition for reconsideration in whole or in part, it need not rule on the merits immediately, but may "[o]rder such other proceedings as may be necessary or appropriate." 47 C.F.R. § 1.106(k)(iii). If the Commission does initiate further proceedings, "a ruling on the merits of the matter will be deferred pending completion of such proceedings. Following completion of such further proceedings, the Commission . . . may affirm, reverse, or modify its original order . . ." 47 C.F.R. § 1.106(k)(2).

²⁶ We disagree with Farmers' contention that Qwest's Motion to Compel is untimely. Consolidated Opposition at 8. As discussed in this Order, it appears possible that Farmers did not produce relevant evidence in response to discovery requests in this proceeding. Accordingly, we now initiate additional proceedings pursuant to section 1.106(k)(ii) of the Commission's rules to ensure the record here is complete.

²⁷ October 2 Order, 22 FCC Rcd at 17987, ¶¶ 35-36.

²⁸ October 2 Order, 22 FCC Rcd at 17987, ¶ 36.

services under Farmers' tariff based on Farmers' representation that they purchased interstate End User Access Service and paid the federal subscriber line charge.²⁹ Qwest now calls that representation into question, however, by pointing out that Farmers' invoices to, and agreements with, the conference calling companies were backdated.³⁰ In fact, Qwest suggests that this backdating may have occurred after the legality of Farmers' access charges was called into question.³¹ According to Qwest, this backdating indicates that the conference calling companies were *not* Farmers' customers during the relevant time period, but rather were its business partners.³² Farmers does not dispute that documents were backdated, but argues that the backdating was a legitimate business practice, and is not relevant here.³³ Qwest suggests that documents produced in the IUB Proceeding may shed further light on the facts surrounding, and significance of, the backdating of contracts and invoices, and asks that we direct Farmers to make those documents part of this record.³⁴

8. We order Farmers to produce all the documents it produced in the IUB Proceeding. Documents relating to the decision to backdate contract amendments and invoices may be relevant to our decision in this case. In order to protect the integrity of our process, we must have access to a full record, including these newly-identified documents. Moreover, it appears that Farmers should have produced the documents during discovery in this case. Although Farmers argues that Qwest's document requests in the IUB proceeding were broader than its requests here,³⁵ it fails to show that the requests here did not encompass the documents now at issue. The discovery ordered in our proceeding included all documents and communications *relating to* Farmers' commercial relationships with the conferencing calling companies.³⁶ These requests were sufficient to capture all documents relating to the decision to backdate the agreements and invoices in question, not just the agreements and invoices themselves. Farmers produced nothing in our proceeding, however, that indicated that the agreements or invoices were created

²⁹ October 2 Order, 22 FCC Rcd at 17987, ¶ 37.

³⁰ Petition at 5-14.

³¹ Petition at 2, 7; Reply at 2; Supplement at 3 n.5 (Farmers back-dating took place on "the same day that Farmers filed its Answer in this proceeding").

³² Petition at 4.

³³ Farmers Opposition at 4-6, 19; Consolidated Opposition at 10.

³⁴ Motion to Compel at 11; Petition at 5-7, 13-14.

³⁵ Consolidated Opposition at 3-5, 89.

³⁶ 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) ("Discovery Order"). Specifically, Document Request 7 called for "[a]ny Documents or communications relating to Farmers's agreements and commercial relationships with any FSP during the Complaint Period." Document Request 8 called for "[a]ny Documents or communications relating to payments made by any FSP to Farmers during the Complaint Period, including any agreement addressing compensation by the FSP to Farmers, including but not limited to any Document identified in response to Interrogatory No. 9." Document Request 9 called for "[a]ny Documents or communications relating to payments made by Farmers to any FSP during the Complaint Period, including any agreement addressing compensation by Farmers to the FSP, including but not limited to any Document identified in response to Interrogatory No. 9." In addition, it appears that Farmers should have disclosed information regarding the backdating in response to Interrogatory 9, which called upon Farmers to "identify and describe any agreement or communication, written or oral, between Farmers and any FSP addressing the delivery of traffic by Farmers to the FSP, including but not limited to agreements relating to any compensation or other consideration paid by either party for provision of such traffic." Qwest's First Set of Interrogatories and Document Production, File No. EB-07-MD-001 (filed May 2, 2007) ("Qwest's Discovery Requests") at 11, 13-14. For purposes of the discovery requests, the term "relate to" or "relating to" or "relating thereto" in the interrogatory and document requests meant "constitutes, comprises, contains, consists of, sets forth, proposes, shows, discloses, describes, discusses, addresses, explains, evidences, summarizes, concerns, reflects, implies or authorizes directly or indirectly." Qwest's Discovery Requests at 6.

long after the dates shown on the documents.³⁷

9. Farmers raises two additional objections to Qwest's Petition and Motion. First, Farmers argues that there is no "new" evidence because Qwest knew, or should have known long before the reconsideration stage of this proceeding that Farmers backdated contracts and invoices.³⁸ We disagree. The contracts and invoices that Farmers produced bear no indication that they were backdated. [Redacted confidential information regarding the dates of the contracts and invoices produced in discovery.]

10. Farmers also asserts that the protective order in the IUB Proceeding, combined with the IUB's decision interpreting that protective order,³⁹ insulates the documents produced there from discovery here.⁴⁰ We find this objection to be unfounded. Farmers asserts that the IUB has already refused to allow Qwest to use the discovery responses from the IUB proceeding here, and that the Motion to Compel essentially asks us to overrule the IUB.⁴¹ That is not the case at all. First, the IUB Order says nothing about whether the same documents produced in that case could be subject to discovery in another proceeding. The IUB ruled only that it would not reclassify the documents at issue as non-confidential.⁴² Qwest does not propose that we reclassify the documents ourselves, or that we permit Qwest to produce them here.⁴³ Rather, Qwest asks that we order *Farmers* to produce documents in *Farmers*' possession, which we have full authority to do.⁴⁴ The fact that those documents have been produced subject to a protective order in another case does not preclude them from being produced here.⁴⁵

11. In sum, we find that Qwest has identified documents that are potentially relevant to this case, and that Farmers ought to have produced.⁴⁶ The questions raised about the integrity of our process,

³⁷ If Farmers believed that any of this information was privileged, it should have prepared an appropriate privilege log as we directed. Discovery Order at 3-4.

³⁸ Opposition at 13-17; Consolidated Opposition at 7-11.

³⁹ On October 10, 2007, Qwest filed with the IUB an emergency motion to compel the redesignation of purportedly confidential documents produced by Farmers to Qwest during the IUB Proceeding. Qwest sought to have the documents redesignated as non-confidential so that it could present the documents to the FCC as part of the Petition. On October 26, 2007, the IUB denied Qwest's motion, holding that the parties' protective order in that case precluded redesignating confidential documents for use in another regulatory proceeding. Consolidated Opposition, Exhibit 1 (Order Denying Motion to Compel Designation, Denying Motion to Compel Production of Documents, and Granting Limited Confidential Treatment ("IUB Order")).

⁴⁰ Consolidated Opposition at 13-14.

⁴¹ *Id.*

⁴² IUB Order at 8. Farmers claims that "Qwest is barred by the doctrine of *res judicata* from resurrecting before this Commission the claims that the IUB denied," arguing that the IUB has already interpreted the protective order and ruled on what documents can be used outside the IUB Proceeding. Consolidated Opposition at 14. The IUB Order, however, did not address the issues raised by the Petition for Reconsideration and Motion to Compel and is not a final judgment on the merits. See *Comsat Corporation v. Stratos Mobile Networks (USA), LLC*, 15 FCC Rcd 22338, 22343 (Enf. Bur. 2000) at ¶ 14, *application for review denied*, 16 FCC Rcd 5030 (2001). Farmers has not demonstrated that these elements are satisfied.

⁴³ Motion to Compel at 11.

⁴⁴ Motion to Compel at 11-12.

⁴⁵ Indeed, the documents in question are Farmers' documents and it is free, as it has done in this proceeding, to classify documents it previously designated as confidential subject to a protective order as non-confidential. See Opposition, Exhibits 1 and 2 (attaching previously produced confidential documents as public documents).

⁴⁶ We disagree with Farmers' contention that allowing additional discovery would violate the letter and spirit of the Commission's formal complaint rules. Consolidated Opposition at 12-13. Those rules provide for discovery where necessary to ensure the development of a complete record. *Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497,

(continued ...)

and about the reliability of Farmers' representations, warrant granting the Petition, the Motion for Leave, and the Motion to Compel. Ordering Farmers to produce the IUB documents here, subject to the protective order in this proceeding,⁴⁷ will impose little burden. Farmers already has identified and compiled the documents, and need only produce a duplicate set. Accordingly, we order Farmers to produce all documents that it produced in discovery in the IUB Proceeding within ten business days of the release of this Order.⁴⁸ If Qwest wishes to make any additional discovery requests relating to the contents of those documents, it must do so within five business days of Farmers' production. Qwest shall supplement its Petition for Reconsideration to reflect any new evidence within ten business days after the production of all the documents called for by this Order, unless we extend that deadline in order to allow additional discovery to be taken. Farmers shall file its Opposition to the supplemented Petition within ten business days after Qwest's filing.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), and 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 208, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Qwest's Petition for Partial Reconsideration IS GRANTED IN PART to the extent indicated herein.

13. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, that Qwest's Motion for Leave to Compel Production of Documents and Motion for Leave to File Supplement to Petition for Partial Reconsideration ARE GRANTED.

14. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, that Qwest's Motion to Compel Production IS GRANTED IN PART to the extent indicated herein.

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22549, ¶ 117 (1997). The rules further give Commission staff the discretion to order additional discovery where appropriate. *Id.* at 22548-49, ¶ 116.

⁴⁷ 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 July 3, 2007) (adopting the parties' protective order).

⁴⁸ In addition, to the extent there are documents that Farmers did not produce in the IUB Proceeding or the instant proceeding, but that nonetheless are responsive to discovery requests in either proceeding, Farmers must produce them now.

15. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 208, that Farmers and Merchants Mutual Telephone Company and Qwest Communications Corporation shall comply with the schedule set forth in paragraph 11 herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary