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.	)	

SECOND ORDER ON RECONSIDERATION

Adopted: November 24, 2009 **Released: November 25, 2009**

By the Commission:

I. INTRODUCTION

1. In this Order, we reconsider our October 2, 2007 Order in this case,[1] and grant Counts II and III of the formal complaint 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] We find that the evidence brought to light by Qwest's Petition for Reconsideration[3] warrants a change of our earlier ruling and compels the conclusion that Farmers violated sections 203(c) and 201(b) of the Act.[4] Farmers, accordingly, is liable to Qwest for damages suffered as a result of Farmers' violations. Qwest elected in its Complaint to have the amount of any damages determined in a separate proceeding;[5] Qwest may file a supplemental complaint for damages within sixty days of the release of this

[1] *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co*., Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) ("October 2 Order").

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

[3] Qwest Communication Corp.'s Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed Nov. 1, 2007) ("Petition for Reconsideration").

[4] 47 U.S.C. §§ 203(c), 201(b). Section 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. § 203(c). Section 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." 47 U.S.C. § 201(b).

[5] Complaint at 27, ¶ 59.

order.[6]

II. BACKGROUND[7]

2. Qwest is an interexchange carrier, serving customers throughout the United States.[8] Farmers is the incumbent local exchange carrier in Wayland, Iowa, serving approximately 800 access lines for local residents.[9] Farmers provides local exchange and exchange access services.[10] Qwest purchases tariffed access service from Farmers, which enables Qwest's long distance customers to terminate calls to customers located in Farmers' exchange.[11]

3. In 2005 and 2006, Farmers entered into a number of commercial arrangements with conference calling companies for the purpose of increasing its interstate switched access traffic and revenues.[12] Under the agreements, conference calling companies sent their traffic to numbers located in Farmers' exchange and, in return, Farmers paid the companies money or other consideration.[13] The agreements resulted in a substantial increase in the number of calls bound for Farmers' exchange.[14] As a result, the amounts of Farmers' monthly bills to Qwest for terminating access charges rose precipitously.[15]

4. Qwest filed a Complaint with the Commission on May 2, 2007, alleging that Farmers had violated section 201(b) of the Act by earning an excessive rate of return on switched access services (Count I).[16] In the October 2 Order, we found that Farmers' agreements with the conference calling companies, which were entered into contemporaneously with Farmers' exit from the traffic-sensitive cost and revenue pool administered by the National Exchange Carrier Association ("NECA"), resulted in Farmers vastly exceeding the prescribed rate of return in violation of section 201(b) of the Act.[17] The October 2 Order further found that Farmers' tariff had "deemed lawful" status,[18] however, and accordingly held that Qwest could not recover damages from Farmers.[19]

5. The Complaint also alleged that Farmers' imposition of interstate access charges

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[6] *See* 47 C.F.R. § 1.722(e).

[7] This Order contains an abbreviated background section. A full recitation of the facts appears in paragraphs 3 through 13 of the October 2 Order, which we incorporate by reference. October 2 Order, 22 FCC Rcd at 17974-77, ¶¶ 3-13.

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

[9] Joint Statement at 1-2, ¶ 4.

[10] Joint Statement at 2, ¶ 5.

[11] Joint Statement at 1-2, ¶ 4.

[12] Joint Statement at 4, ¶ 13.

[13] Joint Statement at 4, ¶ 13.

[14] Joint Statement at 4, ¶¶ 12-13.

[15] Complaint at 13-14, ¶ 22.

[16] Complaint at 20-22, ¶¶ 37-41.

[17] October 2 Order, 22 FCC Rcd at 17974-76, ¶¶ 4-11, 25. *See* October 2 Order, 22 FCC Rcd at 17974-75, ¶¶ 4-6 for a more detailed discussion of the relevant rate of return regulations.

[18] *See* 47 U.S.C. § 204(a)(3).

[19] October 2 Order, 22 FCC Rcd at 17983-84, ¶¶ 26-27.

was inconsistent with its tariff (Counts II and III).[20] Specifically, Qwest argued that the tariff did not allow Farmers to assess terminating access charges on calls to the conference calling companies because the service provided did not constitute switched access as defined in Farmers' tariff.[21] The tariff then in effect provided that switched access service allows the customer "to originate calls from an end user's premises to a customer designated premises" and "to terminate calls from a customer designated premises to an end user's premises."[22] The tariff defined an "end user" as "any customer of an interstate or foreign telecommunications service that is not a carrier," and a "customer" as any entity that "subscribes to the services offered under this tariff."[23] Qwest asserted that the conference calling companies were not Farmers' customers, because they did not pay Farmers for any services offered under Farmers' tariff.[24] Thus, Qwest argued, delivering calls to the conference calling companies did not constitute terminating access service for which Qwest could be billed.[25] Farmers responded that the conference calling companies were end users because they purchased interstate End User Access Service from Farmers' tariff and paid the federal subscriber line charge ("SLC").[26]

6. The October 2 Order denied Counts II and III of the Complaint. Citing Farmers' representations that the conference calling companies purchased tariffed access service and paid the SLC,[27] the October 2 Order found that the conference calling companies were Farmers' customers and, therefore, "end users," as defined in the tariff.[28] Accordingly, because the conference calling companies were determined to be end users based upon these facts, the October 2 Order further concluded that Farmers had imposed access charges on Qwest in accordance with Farmers' tariff.[29]

7. On November 1, 2007, Qwest filed the Petition for Reconsideration and a Motion to Compel Production of Documents,[30] arguing that newly-available information called into question the veracity of Farmers' evidence that the conference calling companies were customers of its tariffed service.[31] In particular, Qwest argued that Farmers had back-dated contracts and invoices to make it *appear* that the conference calling companies had been purchasing tariffed

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[20] October 2 Order, 22 FCC Rcd at 17987-88, ¶¶ 38-39.

[21] October 2 Order, 22 FCC Rcd at 17985-87, ¶¶ 30, 35.

[22] Farmers' tariff incorporates National Exchange Carrier Association Tariff F.C.C. No. 5 ("NECA Tariff" or "Farmers' FCC Tariff") terms with respect to switched access services. *See* Complaint, Exhibit 9, Kiesling Associates LLP Tariff F.C.C. No. 1 ("Kiesling Tariff") at § 6. The quoted language appears in the NECA Tariff. *See* Complaint, Exhibit 7, NECA Tariff at § 6.1.

[23] Response to Enforcement Bureau Request for Additional Briefing, File No. EB-07-MD-001 (Aug. 1, 2008) ("Qwest Additional Briefing Response"), Appendix, NECA Tariff at 2.6 (pp. 2-65.1, 2-68).

[24] October 2 Order, 22 FCC Rcd at 17985, ¶ 37.

[25] *See* October 2 Order, 22 FCC Rcd at 17987-88, ¶¶ 35-38.

[26] *See* October 2 Order, 22 FCC Rcd at 17987, ¶ 37.

[27] October 2 Order, 22 FCC Rcd at 17987, ¶ 37.

[28] October 2 Order, 22 FCC Rcd at 17987-88, ¶ 38.

[29] October 2 Order, 22 FCC Rcd at 17987-88, ¶ 38. The October 2 Order also rejected Qwest's argument that Farmers had improperly imposed terminating access charges for traffic that it did not terminate. *See* October 2 Order, 22 FCC Rcd at 17985-86, ¶¶ 31-34. Qwest does not challenge that determination in its Petition for Reconsideration.

[30] Motion to Compel Production of Documents, File No. EB-07-MD-001 (filed Nov. 1, 2007) ("Motion to Compel").

[31] Petition for Reconsideration at 9.

services.[32] Qwest asked the Commission to reconsider the October 2 Order and find that the conference calling companies were not customers under Farmers' tariff, but rather were "business partners working together with Farmers in its deliberate scheme to manipulate the Commission's rules and exceed the authorized rate of return."[33]

8. On January 29, 2008, we granted the Petition for Reconsideration in part by initiating additional proceedings that would allow us to rule on the merits of Qwest's arguments concerning the newly-identified evidence.[34] We found that the questions raised about the integrity of our process, and about the reliability of Farmers' representations, warranted additional discovery.[35] We therefore granted Qwest's Motion to Compel, and directed Farmers to produce certain documents that had been submitted in a proceeding before the Iowa Utilities Board.[36] We also permitted Qwest to supplement its Petition for Reconsideration at the conclusion of the additional discovery.[37]

9. Qwest filed its Second Supplement to Petition for Partial Reconsideration on May 29, 2008.[38] In that filing, Qwest offered evidence that the conference calling companies had never, in fact, taken tariffed services from Farmers.[39] According to Qwest, once Farmers' activities came under legal scrutiny:

> Farmers realized that it would not be entitled to the access revenues that its plan was designed to generate unless it could persuade the Commission that the [conference calling companies] were its customers under tariff. It thus undertook to fabricate evidence of a tariffed customer-carrier relationship that did not in fact exist, sending back-dated bills to the [conference calling companies] and executing contract "addenda" purporting to have taken effect months or years earlier. Farmers then selectively submitted some of these documents into the record in this proceeding without any indication that they had not been issued contemporaneously with the provision of service, while withholding other contemporaneous documents that showed the nature of the fabrication.[40]

The new evidence produced in this proceeding substantiates Qwest's allegations.

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[32] Petition for Reconsideration at 9-13.

[33] Petition for Reconsideration at 2, 9, 13-14.

[34] *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co*., Order on Reconsideration, 23 FCC Rcd at 1617, ¶ 6 ("Order on Reconsideration").

[35] Order on Reconsideration, 23 FCC Rcd at 1619-20, ¶ 11.

[36] Order on Reconsideration, 23 FCC Rcd at 1618-20, ¶¶ 8, 11. A related case was initiated before the Iowa Utilities Board. *See Qwest v. Superior Telephone Cooperative, et al.*, Docket No. FCU-07-2 (Complaint filed Feb. 20, 2007).

[37] Order on Reconsideration, 23 FCC Rcd at 1619-20, ¶ 11. Additional discovery was ordered by letter ruling dated March 7, 2008. Letter from Lisa B. Griffin, Deputy Chief, MDRD, EB, FCC, to David H. Solomon, Counsel for Qwest, and James U. Troup, Counsel for Farmers, File No. EB-07-MD-001 (rel. Mar. 7, 2008).

[38] Second Supplement to Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed May 29, 2008) ("Second Supplement").

[39] Second Supplement at 4-15.

[40] Second Supplement at 2.

III. DISCUSSION

New Evidence Demonstrates that the Conference Calling Companies Were Not End Users Under Farmers' Switched Access Service Tariff, and thus Farmers Was Not Entitled to Charge Qwest Tariffed Switched Access Rates.

10. The central question in this reconsideration proceeding is whether the conference calling companies were "end users" within the meaning of the switched access provisions of Farmers' tariff. The answer to that inquiry is key because it, in turn, determines whether the service that Farmers provided to Qwest was tariffed switched access service for which Farmers could charge tariffed rates. Under Farmers' tariff:

- Switched access service allows a customer "to originate calls from an *end user's* premises to a customer designated premises" and "to terminate calls from a customer designated premises to an *end user's* premises."[41]
- An "*end user*" is "any *customer* of an interstate or foreign telecommunications service that is not a carrier."[42]
- A "*customer*" is any entity that "subscribes to the *services offered under this tariff*."[43]

The tariff's definition of the term "customer" is critical to our analysis because a person or entity is not an "end user" unless the person or entity is also a "customer." The tariff requires that to be a customer, the person or entity must subscribe to the services offered under the tariff. In this case, the record demonstrates that the conference calling companies did not subscribe, nor did they seek to subscribe, to the services offered under the tariff. To the contrary, the evidence demonstrates that the conference call companies and Farmers expressly structured their telecommunications service contracts ***to avoid*** strict adherence to the terms of Farmers' filed tariff. Therefore, we conclude that these companies were neither "customers" nor "end users" within the meaning of the tariff.[44] Thus, Farmers was not entitled to charge Qwest switched access charges under the terms of Farmers' tariff.[45]

11. The October 2 Order's finding that the conference calling companies were "end users" 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."[46] However, new evidence that Farmers previously withheld contradicts that claim and demonstrates that the conference calling companies and Farmers

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[41] NECA Tariff at § 6.1 (emphasis added).

[42] NECA Tariff at § 2.6 (emphasis added).

[43] *Id.* (emphasis added).

[44] Consequently, Farmers' reliance on the October 2 Order's description of "free subscriptions," October 2 Order, 22 FCC Rcd at 17987, ¶ 38, is unavailing, because we find that the conference calling companies did not subscribe to a service offered under Farmers' interstate tariff.

[45] *Cf. Qwest Commc'n Corp. v. Superior Tel. Coop.*, Final Order, Docket No. FCU-07-2 (Iowa Util. Bd. issued Sept. 21, 2009) at 34 (finding that "free calling service companies" ("FCSCs") were not end users of rural LECs for purposes of intrastate access tariffs, because the FCSCs "did not subscribe to the [LECs'] access or local service tariffs and the FCSCs did not expect to pay for and did not pay for any of the [LECs'] local exchange service offerings").

[46] Answer at vii; *see* October 2 Order, 22 FCC Rcd at 17987, ¶ 37.

structured their business arrangements pursuant to contracts and not the terms and conditions set forth in the tariff. As a result, the parties failed to establish a carrier/customer relationship under the terms of the tariff.

12. Nothing in the contracts between the conference calling companies and Farmers, or in the parties' business dealings, suggests that the conference calling companies were customers as defined under Farmers' tariff. Under the contracts, the conference calling companies established a free service accessed via toll calls placed over long-distance networks and delivered to the conference calling companies over Farmers' network.[47] In return, Farmers agreed to provide a host of services to support the conference calling companies' business venture, and significantly, to pay the conference calling companies a per-minute fee for the traffic generated through their mutual relationship.[48] Further, nothing in the contracts suggests that the conference calling companies would subscribe to any tariffed Farmers' service or pay Farmers for their connections to the interexchange network, as would ordinary end-user customers under the tariff.[49]

13. Moreover, Farmers provided connections to the conference calling companies in a manner that differed from those made available to customers of its tariffed service. For example, Farmers provided the conference calling companies with high-capacity DS3 trunks that fed into trunk-side connections, to a brand new "soft switch" that Farmers purchased specifically to handle traffic bound for the conference calling companies rather than the Nortel DMS-10 circuit switch used to serve all of Farmer's other customers.[50] That soft-switch was connected directly to the conference calling companies' conference bridges, which were located in Farmers' end office.[51]

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[47] *See* Deposition of Rex McGuire in Iowa Utilities Board Docket No. FCU-07-2 (Jan. 11, 2008) (submitted into EB-07-MD-001 record on Apr. 10, 2008) ("McGuire Deposition") at 27.

[48] Farmers provided all inbound and outbound telephone lines and services, collocation space, rack space, digital subscriber line services and other dedicated Internet access, electrical power, fire protection, generator and/or battery backup, switch technician labor, switch programming, and dedicated DS3 trunks to its switches. Farmers also incurred the costs associated with installation charges, monthly recurring charges, and referral message fees. *See* Farmers Documents 0654, 0660, 0662, 0666-67, and 0673; McGuire Deposition at 239-40. Farmers agreed to pay the companies a fee for both inbound as well as outbound traffic. *See* McGuire Deposition at 196-98; Farmers' Documents 0650, 0654, 0656, 0661-62, 0668, and 0674.

[49] *See* discussion *infra* at paragraph 19. In fact, one agreement expressly states that there would be no charge for *any* of the services that Farmers provided the conference calling company. [Redacted confidential information regarding the terms of Farmers' contract with a conference calling company.] The newly presented evidence of back-dated documents, including invoices and contract "addenda," has changed our understanding of the dealings between the parties and causes us to revise the Commission's earlier conclusion that "The question of whether the conference calling companies paid Farmers more than Farmers paid them is thus irrelevant to their status as end users." October 2 Order, 22 FCC Rcd at 17988, ¶ 38. To the contrary, the flow of money between these parties is essential to analyzing their relationship because the tariff expressly contemplates and requires payments to Farmers, not payments that flow in the reverse direction.

[50] McGuire Deposition at 99-107. Farmers also purchased a new stand-by generator to accommodate the increased traffic Farmers handled as a result of its business relationships with the conference calling companies. McGuire Deposition at 102. The total cost for all of the additional equipment provided by Farmers to support this business relationship was approximately $430,000. McGuire Deposition at 107. Prior to this litigation, Farmers did not bill the conference calling companies for any of this equipment, facilities, power, or services that it provided. McGuire Deposition at 124, 171, 206, 219-20.

[51] McGuire Deposition at 30-33, 49-50.

14. Additionally, Farmers' agreements with the conference calling companies did not resemble traditional agreements for the provision of its tariffed switched access services. For example, the first agreement between Farmers and a conference calling company expressly stated that Farmers was *prohibited* from providing the services involved to any competitor.[52] Such an exclusivity clause is antithetical to the notion of tariffed service.[53] Although Farmers later entered into contracts with three conference calling companies that it considered not to be competitors of the first conference calling company,[54] Farmers nonetheless turned away other companies with which it could have entered into service arrangements.[55] Moreover, each of the contracts that Farmers did sign contained unique terms not available under its tariff, further supporting our conclusion that the parties never established a carrier/customer relationship under the terms of the filed tariff. For example, while each agreement required Farmers to pay the conference calling companies a given sum per minute of traffic that Farmers delivered, that figure differed among the companies.[56] Further, the contracts obligated each conference calling company to generate different amounts of traffic.[57] In addition, the duration of the contracts varied, as did the notice periods for cancellation of service during the contracts' terms.[58] Before each of the contracts was signed, the Farmers board of directors had to approve its particular terms,[59] and the provisions of the agreements were kept confidential.[60]

15. The conclusion that the conference calling companies were not customers within the meaning of the tariff language at issue here is further bolstered by the parties' actions in implementing their agreements. Stated simply, the parties in no way behaved as if they were operating under tariff until *after* Farmers became embroiled in litigation over the traffic stimulation plan. Even then, the parties' conduct belies the conclusion that Farmers was providing the services offered under its tariff to the conference calling companies.

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[52] Farmers Document No. F0666. Farmers subsequently attempted to renegotiate the exclusivity clause, but the company involved refused to do so. [Redacted confidential information regarding communications between Farmers and a conference calling company regarding the exclusivity terms in the parties' agreement.]

[53] "Only common carrier services can be tariffed." *MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241, 313-14, ¶ 244 (1982). One of the hallmarks of a common carrier service is that the carrier offering the service "holds [itself] out to serve indifferently all potential users." *U.S. Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002) (citing *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 640-41 (D.C. Cir. 1976) ("*NARUC I*"), *cert. denied*, 96 S. Ct. 2203 (1976)); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976). In other words, the carrier does not make individualized decisions regarding "whether and on what terms to deal." *NARUC I*, 525 F.2d at 641. *See also Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9177-78 ¶¶ 785-86 (1997) (subsequent history omitted). We note that Farmers and the conference calling providers appear to have deliberately structured their relationships in a manner that is contrary to a traditional tariff offering.

[54] McGuire Deposition at 139.

[55] [Redacted confidential information regarding Farmers' decision not to implement agreements with certain conference calling companies.]

[56] [Redacted confidential information regarding the volume commitments agreed to by conference calling companies and the amounts Farmers agreed to pay each for their volume commitments.]

[57] [Redacted confidential information regarding the volume commitments made by conference calling companies.]

[58] [Redacted confidential information regarding the cancellation notice terms in Farmers' contracts with various conference calling companies.]

[59] *See* Second Supplement at 20 (citing McGuire Deposition at 191-92). *See* McGuire Deposition at 59.

[60] Farmers Document Nos. 0649, 0661, 0667, and 0674.

16. Qwest has convincingly demonstrated that Farmers never intended to treat the conference calling companies as customers of any of Farmers' tariffed services. When it began conducting business with the conference calling companies, Farmers did not enter their account information into its customer billing systems in accordance with its standard business practices for tariffed services.[61] Thus, contrary to Farmers' representation in the underlying proceeding, its regular business records did not indicate that the companies were purchasing the End User Access Service offered in Farmer's tariff.[62] And, despite the tariff requirement that Farmers bill and collect on a monthly basis for tariffed services,[63] Farmers did not contemporaneously bill the conference calling companies for any services that it provided them, including the outbound traffic generated by them.[64] Indeed, Farmers took no steps to bill the conference calling companies until shortly before discovery was due in the underlying proceeding in this case. [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.][65]

17. Faced with this (previously undisclosed) proof that it issued backdated bills on the eve of submitting its answer and supporting documents in this case, Farmers asserts that such backdating is merely standard practice and that it issued backdated invoices at that point "in order to comply with [its] interstate End User Access Service tariff, section 69.104 of the Commission's rules, and the filed rate doctrine."[66] But this assertion is unpersuasive given Farmers' conduct throughout its business relationships with the conference calling companies. [Redacted confidential information regarding Farmers' business dealings with a conference calling company.][67] This conduct is inconsistent with the provision of tariffed services, and further evidences Farmers' and conference calling companies' apparent intent from the very beginning to operate in a manner that did not comport with Farmers' tariffed services offering.[68]

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[61] [Redacted confidential deposition citations.]

[62] Answer at vii, 27; Answer Exhibit B, Declaration of Rex McGuire at 3, ¶ 6.

[63] Farmers' Iowa Tariff, Part II, Section K.1.b (Mar. 17, 2006). *See also* Farmers' FCC Tariff at § 2.4.1 (B)(1).

[64] [Redacted confidential deposition citations.] There is no evidence in the record that Farmers provided free outbound calling services to anyone other than the free conferencing companies who purportedly received the same tariffed services from Farmers.

[65] [Redacted confidential deposition citations.] Regarding late charges, [Redacted confidential information. *See* accompanying text.] Regarding collection efforts, *see* Second Supplement Opposition at 18; Responses to Qwest's Interrogatories, File No. EB-07-MD-001 (filed Apr. 7, 2008) ("Farmers' Interrogatory Responses") at 3, 4, 6, and 8 ("Farmers has not attempted to collect unpaid revenues owed to Farmers by any of the conference calling companies").

[66] Farmers' Interrogatory Responses at 2-8. Farmers' reliance upon FCC 96-430, a sealed, unreleased Commission order does not justify its efforts to backbill the conference calling companies. *See* Second Supplement Opposition at 21-22. Contrary to Farmers' contention, moreover, the Commission has not established specific standards regarding the justness and reasonableness of carrier backbilling practices. *See* Opposition to Petition for Reconsideration at 18-19; Second Supplement Opposition at 17. Rather, the Commission determines the justness and reasonableness of a carrier's backbilling practices based upon a review of the specific circumstances on a case-by-case basis. *Kenneth E. Brooten vs. AT&T*, Memorandum Opinion and Order, 12 FCC Rcd 13343, 13350, ¶ 13 (Com. Car. Bur. 1997); *American Network, Inc., Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, Memorandum Opinion and Order, 4 FCC Rcd 550, 552, ¶ 19 (Com. Car. Bur. 1989). There is no question that the facts relating to Farmers' back billing are very different from the facts that gave rise to the Commission orders relied upon by Farmers.

[67] [Redacted confidential information. *See* accompanying text.]

[68] [Redacted confidential information regarding Farmers' expectations from its business arrangements with the conference calling companies.]

The evidence overwhelmingly demonstrates that Farmers willingly incurred all of the expenses associated with providing the underlying services to the conference calling companies, including the payment of a fee to these companies, in exchange for these companies directing the "free service" they offered to the public to Farmers' exchange.

18. In addition, [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.][69] [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.],[70] [Redacted confidential information regarding Farmers' billing practices with the conference calling companies.][71] These actions persuade us that Farmers had no intention of operating in accordance with its tariff, at tariffed rates, in its dealings with the conference calling companies. In the midst of litigation, Farmers generated backdated invoices to create the appearance of compliance with its tariff provisions.

19. Similarly, after litigation commenced, [Redacted confidential information regarding Farmers' efforts to backdate and amend its agreements with the conference calling companies.][72] [Redacted confidential information regarding Farmers' efforts to backdate and amends its agreements with the conference calling companies.][73] Again, however, we are unconvinced that these contract amendments were mere clarifications of the parties' original intent.[74]

20. Instead, it appears that Farmers undertook to persuade the conference calling companies to sign the contract amendments as part of its litigation strategy. [Redacted confidential information regarding Farmers' efforts to backdate and amend its agreements with the conference calling companies after Qwest initiated litigation.][75] [Redacted confidential information regarding Farmers' efforts to backdate and amend its agreements with the conference calling companies after Qwest initiated litigation.][76] Moreover, the manner in which Farmers unsuccessfully attempted to clarify its agreement with [Redacted confidential information regarding the identity of a conference calling company.] resembled more of a negotiation than simply the documentation of a pre-existing understanding between them.[77] Perhaps most telling, even the contract amendments did not change the way in which Farmers conducted business with the conference calling companies – [Redacted confidential information regarding Farmers' communications with the conference calling companies.][78] Farmers' after-the-fact attempt to document a different business relationship with the conference calling companies is not sufficient

[69] Second Supplement at 13.

[70] [Redacted confidential information. *See* accompanying text.]

[71] *See* Second Supplement at 13.

[72] Second Supplement Opposition at 22.

[73] *See* Petition for Reconsideration Opposition at 19; Second Supplement Opposition at 17, 22-23. [Redacted confidential information. *See* accompanying text.]

[74] [Redacted confidential information. *See* accompanying text.] Nor has Farmers provided any evidence that the contract addenda reflected the actual understanding of the conference calling companies' relationship with Farmers.

[75] Second Supplement Opposition at 17. *See* McGuire Deposition at 266-71 (acknowledging Farmers' efforts to obtain signed addendum prior to its attorney's meeting with the FCC).

[76] [Redacted confidential information. *See* accompanying text.]

[77] [Redacted confidential information. *See* accompanying text.]

[78] McGuire Deposition at 133.

to counter the evidence of how they actually conducted business.

21. Despite this extensive evidence, Farmers argues that the application of the "filed rate doctrine" to the relationship between itself and the conference calling providers compels a finding that the service it provided to the conference calling companies was pursuant to its tariff and, as a result, we should impute the status of tariffed "customers" to the conference calling companies even if they were taking services under terms that were wholly outside the scope of the tariff.[79] We disagree. The purpose of the filed rate doctrine is to prevent unreasonable and unjust discrimination among similarly-situated customers of a particular common carrier's service, and to ensure that carriers impose like charges for like services.[80] But here, the facts developed on reconsideration show a purposeful deviation from the tariff's terms that allowed the conference calling companies to reap benefits from a free service offered only to them, which thereby enabled Farmers to dramatically increase its access charge billing to Qwest. These facts make apparent that Farmers and the conference calling companies never established - - and in fact purposefully avoided - - a "customer" relationship cognizable under the tariff.

22. Therefore the filed rate doctrine offers Farmers no refuge in its dispute with Qwest and cannot rescue Farmers from its decision to circumvent the tariff.[81] The record demonstrates that the service that the conferencing companies received under their unique arrangement with Farmers bore little resemblance to the services described in the tariff.[82] Because the conference calling companies did not subscribe to the services offered under Farmers' filed tariff, they were not "customers" or "end users."[83] In turn, the service Farmers

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[79] Farmers and Merchants Mutual Telephone Company Opposition to Petition for Reconsideration, File No. EB-07-MD-001 (filed Nov. 13, 2007) at 16-17 ("Petition for Reconsideration Opposition"); Second Supplement Opposition at 16.

[80] For a general description of the filed rate doctrine *see, e.g.*, *AT&T Co. v. Central Office Tel., Inc*., 524 U.S. 214 (1998); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc*., 497 U.S. 116 (1990); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981); *Petition for Declaratory Ruling on Issues Contained in Thorpe v. GTE*, Memorandum Opinion and Order, 23 FCC Rcd 6371, 6388, ¶ 31 (2008). We decline to formally resolve the issue of the application of the filed rate doctrine between Farmers and the conference calling providers because it does not affect the outcome of this case, for the reasons described below. Moreover, 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.

[81] The facts on reconsideration, as noted, show that the service Farmers provided to the conference calling companies did not conform to Farmers' filed tariff and thus did not create a "customer" relationship under that tariff. Therefore, even if the filed rate doctrine applies between those companies (a question we do not resolve today), the doctrine would not retroactively render the conference calling companies "customers" within the meaning of the tariff because the parties operated outside the tariff's purview. *See Nordlicht v. New York Telephone Co.*, 617 F. Supp. 200, 227-28 (S.D.N.Y. 1985) *aff'd*, 799 F.2d 859 (2d Cir. 1986) *cert. denied*, 479 U.S. 1055 (1987) (observing, in dicta, that "[t]he filed tariff doctrine is designed to protect utilities charging filed rates for lawfully provided service. It is of no help to a defendant which fraudulently induces a plaintiff to pay a filed rate [that he should not have had to pay] or which otherwise exacts payment by fraud. There is nothing in the policy underpinnings of the doctrine which would cause it to protect a defendant which unlawfully exacts payment, even at a lawful rate.").

[82] *See supra* paras. 12-14.

[83] Farmers' tariff defines "customer" as any entity that "subscribes to the *services offered under this tariff*." NECA Tariff §2.6; see also supra, §[10] (providing relevant tariff definitions). Farmers conveniently ignores this critical definition when arguing for an overbroad definition of "end user." *See* Farmers and Merchants Mutual Tel. Co. Opposition to Second Supplement to Qwest's Petition for Partial Reconsideration, File No. EB-07-MD-001 (filed June 12, 2008), at 18. Moreover, although we find the definitions of "customer" and "end user" as used in the filed tariff to be unambiguous, we note that "it is well established that any ambiguity in a tariff is interpreted against the party filing the tariff." *Halprin, Temple, Goodman & Sugrue v. MCI*, Order on Reconsideration, 14 FCC Rcd 21092, 21100, ¶ 19 n. 50

(continued …)

provided to Qwest for calls of the conference calling companies was not "switched access service" as defined in the tariff. We therefore find that the filed rate doctrine does not require Farmers to charge Qwest its tariffed switched access charges, nor does it require Qwest to pay Farmers such charges, for terminating the conference calling companies' calls.

23. Farmers also argues that it *could* properly charge Qwest for switched access under its tariff even if the conference calling companies were not end users.[84] We disagree. As explained above, section 6.1 of Farmers' tariff establishes that Switched Access Service is used to terminate traffic to end users:

> Switched Access Service, which is available to customers for their use in furnishing their services to end users, provides a two-point communications path *between a customer designated premises and an end user's premises*.[85]

Farmers argues that, notwithstanding this provision, "[t]here are hundreds of pages in the Kiesling and NECA tariffs that must be construed as a whole to determine the terms and conditions that apply to the provision of 'exchange access.'"[86] Farmers, however, identifies "only a few examples."[87] In particular, Farmers points to NECA tariff sections 6.1.1(A) (Terminating Calling), 6.1.3(A) (Tandem Switched Transport and Local Transport), and 6.1.3(B)(1) (Local Switching), as describing particular access services without specific reference to "end users." Each of these provisions, however, is a subsection of section 6.1, which limits the scope of the tariff to traffic transmitted to end users. It is a well settled rule that "[t]ariffs are to be interpreted according to the reasonable construction of their language."[88] Under such a rule of construction, if 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 subsection. The tariff itself confirms that this is the proper reading. In describing the tariff section numbering system, the "Tariff Users Guide" section[89] of NECA Tariff FCC No. 5 states that "[a]n alpha-numeric numbering plan is used to number tariff regulations and rates. Each level is subordinate to and

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(1999) (citing *The Associated Press Request for Declaratory Ruling*, File No. TS-11-74, Memorandum Opinion and Order, 72 FCC 2d 760, 764-65, ¶ 11 (1979) (quoting *Commodity News Services v. Western Union*, 29 FCC 1208, 1213, *aff'd*, 29 FCC 1205 (1960)). Thus, construing the language in the filed tariff against Farmers, we find that Farmers has not demonstrated that the conference calling companies, in this instance, constitute customers or end users under its filed tariff.

[84] Second Supplement Opposition at 4-10. Because Farmers raised new arguments in this filing, Commission staff permitted Qwest to file a response. Email from Suzanne Tetreault, Special Counsel, EB, MDRD, FCC, to David Solomon, Russell Hanser, Counsel for Qwest, and James U. Troup, Tony S. Lee, Counsel for Farmers, File No. EB-07-MD-001 (dated July 23, 2008). *See* Qwest Additional Briefing Response. On August 7, 2008, Farmers filed a Motion for Leave to File a Surreply, with a copy of its Surreply attached. Motion for Leave to File Surreply, File No. EB-07-MD-001 (filed Aug. 7, 2008). That motion is granted.

[85] NECA Tariff, § 6.1 (emphasis added).

[86] Second Supplement Opposition at 6.

[87] Second Supplement Opposition at 6-10.

[88] *See Commodity News Services, Inc. v. Western Union Telegraph Co.*, Initial Decision, 29 FCC 1208, 1213, *aff'd*, 29 FCC 1205 (1960).

[89] Under Commission rules, a carrier may include a tariff user's guide explaining how to use its tariff. 47 C.F.R. § 61.54(e).

dependent on its next higher level."[90] Thus, section 6.1's limitations on the scope of "switched access" must be read into the subsections cited by Farmers, even if not repeated in each of those subsections.

24. Farmers also turns to the Act and Commission rules to bolster its theory of what constitutes switched access under its tariff.[91] Farmers argues that the service it provided Qwest constitutes "switched access" within the meaning of the Act and Commission rules, even if the conference calling companies are not end users.[92] Farmers then asserts that the scope of its tariff "should be construed consistently with the definition of 'exchange access' under federal law."[93] The fact remains, however, that the relevant tariff defines switched access service as providing a communications path *to an end user*.[94] Whether or not this definition is narrower than that used for purposes of the Act and Commission rules, it is nonetheless the definition to which Farmers is bound for purposes of determining whether its charges are in compliance with its tariff.[95] We will not expand the term "switched access" as used in the tariff before us to encompass more than the tariff itself delineates. The unusual facts of this case (*i.e.*, the relationship between Farmers and the conference calling companies) do not alter the fact that Farmers is bound by the terms of its tariff.[96]

25. In sum, Farmers sought to organize its business relationship with the conference calling companies through individualized contracts that involved an exchange of services and business relationship quite distinct from Farmers' tariffed switched access service. And Farmers did not offer the same terms of service to others that requested it. Notwithstanding the back-dated contract amendments that Farmers cites as evidence of the parties' intent that the conference calling companies would purchase service under Farmers' tariff, we find that the evidence of the parties' actual course of dealing demonstrates that there was no purchase of tariffed services. Farmers has not offered any explanation as to why it failed to enter the

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[90] NECA Tariff at 30 (emphasis added).

[91] Second Supplement Opposition at 6-10.

[92] Second Supplement Opposition at 10.

[93] Second Supplement Opposition at 6-7.

[94] *See* n.85 *supra*.

[95] Farmers also asserts that the tariff cannot be read to limit the definition of "end users" to purchasers of tariffed services because it has purportedly used that term in a contrary manner in other parts of the tariff. Second Supplement Opposition at 11. This does not, however, overcome the explicit tariff definition of "end user" as an entity that subscribes to services under Farmers' tariff.

[96] This is not to say that Farmers is precluded from receiving any compensation at all for the services it has provided to Qwest. *See, e.g.*, *New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5133, ¶ 12 (2000) (fact that a carrier's tariff did not include rates or terms governing the service provided did not mean that the customer was entitled to damages equal to the full amount billed; rather "where, as here, the carrier had no other reasonable opportunity to obtain compensation for services rendered . . . a proper measure of the damages suffered by a customer as a consequence of a carrier's unjust and unreasonable rate is the difference between the unlawful rate the customer paid and a just and reasonable rate"), *aff'g New Valley Corp. v. Pacific Bell*, Memorandum Opinion and Order, 8 FCC Rcd 8126, 8127, ¶ 8 (Com. Car. Bur. 1993) (finding no basis in the Supreme Court's "*Maislin* [decision] or any other court or Commission decision for the conclusion that a customer may be exempt from paying for services provided by a carrier if those services were not properly encompassed by the carrier's tariff"). *See also America's Choice, Inc. v. LCI Internat'l Telecom Corp*., Memorandum Opinion and Order, 11 FCC Rcd 22494, 22504, ¶ 24 (Com. Car. Bur. 1996) (holding that "a purchaser of telecommunications services is not absolved from paying for services rendered solely because the services furnished were not properly tariffed"). Qwest has bifurcated its claim for damages in this case, and thus the precise amount of any damages due will be calculated in a separate proceeding.

conference calling companies into its customer systems in the normal course of its business. Nor does it offer any persuasive explanation as to why it failed to bill the conference calling companies and collect payment as required under its tariff over its two year relationship with them. The facts that Farmers sent no bills until shortly before the first round of discovery in this case, and then sent no further bills until the Commission ordered additional discovery, constitute very strong evidence that Farmers neither believed that it was providing, nor intended to provide, tariffed services to the conference calling companies. Accordingly, based upon the totality of the circumstances and facts of this case, we conclude that the conference calling companies do not constitute "end users" within the meaning of the tariff provisions at issue.[97]

26. Because we find that the conference calling companies were not "end users" within the meaning of Farmers' tariff, Farmers' transport of traffic to them did not constitute "switched access" under the tariff. We therefore conclude that Farmers' practice of charging Qwest tariffed switched access rates for its termination of traffic from the conference calling companies is unjust and unreasonable in violation of section 201(b) of the Act.[98]

IV. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 203, 206, 207, 208, 209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, 209, 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.

28. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 203, 206, 207, 208, 209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, 209, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Counts II and III of the Complaint ARE GRANTED to the extent indicated herein.

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[97] We note, moreover, that if Farmers had been providing interstate end-user telecommunications services to Qwest or the conference calling companies, then Farmers should have timely reported revenues from those end-user services and paid universal service contributions based on them. 47 C.F.R. § 54.706. [Redacted confidential information regarding Farmers' Form 499 filings.]

[98] As Qwest points out, in a factually similar case involving calls to a chat line, the Commission held that a sham arrangement "designed solely to extract inflated access charges from IXC's" constituted an unreasonable practice in connection with access service that violated section 201(b) of the Act. *Total Telecomms. Servs., Inc., and Atlas Tel. Co. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726, 5733, ¶ 16 (2001), *aff'd in relevant part*, 317 F.3d 227 (D.C. Cir. 2003). Here it also appears that Farmers sought to inflate the access charges to Qwest by paying the conference calling companies for their traffic, rather than charging them for those minutes as the tariff requires. We also uphold the Commission's previous finding that Farmers earned an excessive rate of return. *See* October 2 Order, 22 FCC Rcd at 17980-83. Although the October 2 Order held that Farmers had violated section 201(b) of the Act by virtue of its overearnings, the Commission nevertheless 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. 47 U.S.C. § 204(a)(3); October 2 Order, 22 FCC Rcd at 17983-84, ¶¶ 25-27. In its Petition for Reconsideration, Qwest also asked the Commission to rule that Farmers' tariff was not deemed lawful in light of what Qwest refers to as "Farmers' furtive manipulation designed to conceal its rate of return violation." We note that our earlier finding that Farmers' tariff was deemed lawful does not preclude Qwest from collecting damages based on the conclusions in this Order. The tariffed rates are deemed lawful only to the extent that the tariff actually applies, and we have now determined that the tariff *does not apply* to the services that Farmers provided to Qwest with respect to traffic destined for the conference calling providers. Accordingly, it is not necessary to resolve that portion of Qwest's Petition for Reconsideration that asks us to reconsider whether the tariff was deemed lawful.

29. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 201, 203, 206, 207, 208, 209, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 203, 206, 207, 208, 209, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that Farmers' Motion for Leave to File Surreply is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary