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

In the Matter of	)	
	)	
AT&T Corp.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No.: EB-12-MD-003
	)	
Alpine Communications, LLC, Clear Lake Independent Telephone Co., Mutual Telephone Co. of Sioux Center, Iowa, Preston Telephone Co., and Winnebago Cooperative Telephone Association,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 11, 2012 **Released: September 12, 2012**

By the Commission:

I. INTRODUCTION

1. In this complaint proceeding, AT&T Corp. (AT&T) asks the Commission to find that five Iowa local exchange carriers—Alpine Communications, LLC (Alpine), Clear Lake Independent Telephone Company (Clear Lake), Mutual Telephone Company of Sioux Center, Iowa (Mutual), Preston Telephone Company (Preston), and Winnebago Cooperative Telecom Association (Winnebago) (collectively, the Iowa LECs)—have violated Sections 201(b) and 203 of the Communications Act of 1934, as amended (Act).[1] AT&T alleges that the Iowa LECs have engaged in an unlawful "mileage-pumping" scheme that has allowed them to impose over one hundred miles of distance-sensitive charges for the transport of traffic that the Centralized Equal Access (CEA) provider in Iowa, Iowa Network Services (INS), is required to provide at a flat, distance-insensitive rate. For the reasons explained below, we grant Counts I and II of the Complaint.[2]

[1] 47 U.S.C. §§ 201(b), 203; Formal Complaint of AT&T Corp., File No. EB-12-MD-003 (filed Apr. 13, 2012) (Complaint).

[2] In accordance with Section 1.722(d) of the Commission's rules, AT&T requests that the Commission determine damages in a separate proceeding. Complaint at 29, para. 75, 31, para. 83 (citing 47 C.F.R. § 1.722(d) (setting forth the requirements a complainant must satisfy if it "wishes a determination of damages to be made in a proceeding that is separate from and subsequent to the proceeding in which the determinations of liability and prospective relief are made"). Because this Order finds in AT&T's favor on liability, AT&T may file with the Commission a supplemental complaint for damages in accordance with 47 C.F.R. § 1.722(e) ("If a complainant proceeds pursuant to paragraph (d) of this section . . . the complainant may initiate a separate proceeding to obtain a determination of (continued…)

II. BACKGROUND

A. The Parties

2. AT&T is a New York corporation with its principal place of business in Bedminster, New Jersey.[3] Among other things, AT&T is an interexchange carrier (IXC) providing telecommunications services that enable customers from one local exchange area to call customers in other local exchange areas.[4]

3. Alpine, Clear Lake, Mutual, and Preston are Iowa corporations, with principal places of business in Elkader, Clear Lake, Sioux Center, and Preston, Iowa, respectively.[5] Winnebago is a cooperative association incorporated under Iowa law, with its principal place of business in Lake Mills, Iowa.[6] These five entities—the Iowa LECs—are incumbent local exchange carriers (ILECs) that provide local exchange telecommunications services in rural areas of Iowa.[7]

4. Like other IXCs, AT&T does not have facilities extending to end user customers.[8] As a result, AT&T relies upon local exchange carriers (LECs), which have such facilities, to provide "switched access service" for the origination, transport, or termination of calls to or from customers in a local exchange area.[9] Generally speaking, IXCs pay originating access charges to LECs that serve customers who initiate long-distance calls within their local calling area and terminating access charges to LECs that serve customers who receive long-distance calls within their local calling area.[10]

B. Iowa Network Services

5. In states in which there are multiple rural LECs each serving a separate rural area, the Commission sometimes has approved and ordered centralized equal access (CEA) arrangements.[11] CEA service provides presubscription and equal access capabilities through a centralized switching system rather than through each end office switch.[12] The Commission first approved such a CEA arrangement in

(Continued from previous page)

damages by filing a supplemental complaint . . . . ").

[3] Complaint, Ex. 3 (Stipulations with Regard to Referred Matters in *Alpine et al. v. AT&T* (Stipulations)) at 2, para. 6.

[4] Stipulations at 2, para. 9.

[5] Stipulations at 1-2, paras. 1-4.

[6] Stipulations at 2, para. 5.

[7] Stipulations at 2, para. 8.

[8] Stipulations at 2, para. 10.

[9] Stipulations at 2-3, paras. 11-13.

[10] Stipulations at 3, para. 15, 18, para. 114.

[11] Stipulations at 4, para. 21.

[12] *See Coon Valley Telephone Company, et al.*, *Petitions for Waiver of the Four Digit Carrier Identification Code (CIC) Implementation Schedule*, Order, 13 FCC Rcd 17490, 17494, para. 8 (Com. Car. Bur., Network Services Div. 1998).

1986, for the state of Indiana.[13]

6. In order to implement a CEA arrangement to carry long-distance traffic efficiently to remote local exchanges in Iowa, about 135 rural Iowa carriers formed a CEA provider called Iowa Network Services (INS) that would own and operate a centralized switch in Des Moines and a fiber "ring" that connects the centralized switch to points of interconnection (POIs) located throughout Iowa.[14] They developed this arrangement in part because the costs of hauling long-distance traffic to and from each of the many small rural carriers were high, and competing IXCs found it too "expensive . . . to provide their own facilities to each of these small exchanges, given the relatively low amount of [long-distance] traffic they generate."[15] The Commission approved the CEA arrangement for Iowa in 1988.[16] With the exception of Alpine, the Iowa LECs in this case were among the carriers that formed INS, and they remain INS shareholders.[17]

7. Today, INS is a statewide fiber-optic network and switching system that "offers and provides" CEA telecommunication services used to facilitate the delivery of interstate (and intrastate)[18] calls in Iowa.[19] Its central access tandem switching system is in Des Moines.[20] Under the INS CEA arrangement, IXCs must deliver their traffic to INS, and IXCs generally do so by interconnecting with the INS access tandem in Des Moines.[21] INS then delivers the long-distance traffic received from IXCs over its fiber ring to one of sixteen POIs located across the state.[22] At the POIs, the Iowa LECs connect with the INS network and transport interstate switched access traffic between their POIs and their end office switches.[23] In short, IXCs and the Iowa LECs are indirectly connected to each other through the facilities of INS.[24]

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[13] Stipulations at 4, para. 22. *See Application of Indiana Switch Access Div.*, Memorandum Opinion & Order, 1 FCC Rcd 634 (1986) (*Indiana Switch*).

[14] Stipulations at 4, para. 25.

[15] Stipulations at 5, para. 34 (citing *Application of Iowa Network Access Division*, Memorandum Opinion, Order, and Certificate, 3 FCC Rcd 1468, 1468, para. 3 (Com. Car. Bur. 1988) (*INAD Application Order*)).

[16] Stipulations at 4, para. 22. *See INAD Application Order*.

[17] Stipulations at 4, paras. 23-24.

[18] No intrastate calls – i.e., calls originated and terminated in the same state—are at issue in this proceeding. Stipulations at 4, para. 20.

[19] Stipulations at 5, paras. 27-28. INS is a single legal entity with three divisions: netINS, which provides internet access services; the Interexchange Carrier Division (INICD), which owns the INS facilities; and the Access Division (INAD), which leases digital switching, fiber optic transmission capacity, and certain related services from INICD to provide CEA service. Stipulations at 6, para. 37.

[20] Stipulations at 5, para. 29.

[21] Stipulations at 6, para. 38.

[22] Stipulations at 5, para. 33, 6, para. 39, 25, para. 156. INS will deliver traffic to any of the sixteen POIs, which include Cedar Rapids, Clarinda, Creston, Davenport, Des Moines, Fort Dodge, Grinnell, Knoxville, Mason City, Mount Ayr, Mount Pleasant, Newton, Osceola, Omaha, Sioux City, and Spencer. Stipulations at 7, paras. 44-45.

[23] Stipulations at 5, para. 32, 6, para. 41, 25, para. 157.

[24] Stipulations at 6, para. 41.

C. The Relevant Tariffs and Traffic Agreements

8. This case concerns two tariffs.[25] The first tariff is NECA Tariff F.C.C. No. 5 (NECA Tariff), under which the Iowa LECs provide switched access service to IXCs (such as AT&T) and bill the IXCs for such service.[26] In the NECA Tariff, "Switched Access Service" consists of three rate categories: "End Office," "Local Transport," and "Chargeable Optional Features."[27] The type of Local Transport at issue in this litigation is "Tandem Switched Transport."[28]

9. The second tariff is the Iowa Network Access Division Tariff F.C.C. No. 1 (INAD Tariff), under which INS provides CEA services to IXCs and bills IXCs for such service.[29] The terms of the INAD Tariff require IXCs to pay INS a flat, non-distance-sensitive charge for every minute of traffic transported on the INS fiber ring to the sixteen POIs throughout Iowa.[30] "Point of Interconnection" under the INAD Tariff "denotes the demarcation point or network interface, on an Iowa Network premises at which Iowa Network's responsibility for the provision of [CEA] ends."[31] The INAD Tariff imposes no charges on the Iowa LECs.

10. All five of the Iowa LECs participate in the INS CEA arrangement.[32] Individual Traffic Agreements govern the services INS provides to them in connection with originating and terminating long distance traffic.[33] The Traffic Agreements obligate the Iowa LECs to use INS's CEA service for all

[25] As explained below in section III.A.1, the parties disagree about whether and how the tariffs interrelate regarding the right of the Iowa LECs to determine the POI.

[26] Stipulations at 3-4, paras. 14, 19. The Iowa LECs do not file individual tariffs. Rather, they utilize tariffs administered by the National Exchange Carrier Association (NECA). 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. *See* 47 C.F.R. §§ 69.601-69.610. NECA files tariffed access rates that apply whenever an IXC uses any pool member's NECA-tariffed access services. *See* 47 C.F.R. § 69.3(d).

[27] Complaint, Ex. 6 (NECA Tariff § 6.1.3, 4th Rev. Page 6-5).

[28] Stipulations at 3, para. 14. *See* Complaint, Ex. 6 (NECA Tariff § 6.1.3, 4th Rev. Page 6-5). AT&T originally challenged the Iowa LECs' practices and charges relating to an additional element of Local Transport called "Tandem Switched Termination." Complaint at 20-22, paras. 51-54 & n.58. However, AT&T subsequently moved to sever these claims and convert them into an informal complaint, which it requested be stayed. *See* Motion of AT&T Corp. to Sever Claims Relating to Multiple Termination Charges, File No. EB-12-MD-003 (filed May 31, 2012). Defendants did not oppose AT&T's motion, and we granted it. *See* Defendants' Response to Motion of AT&T Corp. to Sever Claims Relating to Multiple Termination Charges, File No. EB-12-MD-003 (filed June 7, 2012); *see also* Letter from Rosemary McEnery, FCC, to Counsel for the Parties, File No. EB-12-MD-003 (filed June 11, 2012).

[29] Stipulations at 5, para. 26.

[30] Complaint at 2-3, paras. 4-5; Defendants' Answer to Formal Complaint of AT&T Corp., File No. EB-12-MD-003 (filed May 3, 2012) (Answer) at 4, paras. 4-5. *See Iowa Network Access Div. Tariff F.C.C. No. 1.*, Order, 4 FCC Rcd. 3947, paras. 2, 5 (1989).

[31] Reply, Legal Analysis at 7 (citing INAD Tariff § 2.5, 1st Rev. Page 62).

[32] Stipulations at 7, para. 48.

[33] Stipulations at 7, paras. 47-48. Because Alpine is not an INS shareholder, its agreement with INS is titled "Traffic Agreement." Stipulations at 8, para. 49. *See* Complaint Conf. Ex. 19 (Alpine agreement). The other Iowa LECs' agreements with INS are titled "Shareholder Traffic Agreements." Stipulations at 7, para. 47. *See* Complaint Conf. Exs. 20, 21, 22, and 23 (agreements of Clear Lake, Mutual, Preston, and Winnebago). The Traffic Agreement does not differ in any material way from the Shareholder Traffic Agreements. Stipulations at (continued…)

interexchange traffic bound to or from the Iowa LECs' customers.[34] The Traffic Agreements do not limit the amount of interexchange traffic that INS will carry for the Iowa LECs under the CEA arrangement,[35] nor do they impose any charge on the Iowa LECs for traffic carried to their POI on the INS ring, regardless of the distance INS carries the traffic.[36] The Traffic Agreements define "Point of Interconnection" in an identical manner to the INAD Tariff.[37]

D. The Iowa LECs' Effort to Increase Transport Charges

11. The Iowa LECs initially established POIs with the INS network at toll centers in close physical proximity to their operating territories.[38] Then, between 2001 and 2005, each of the Iowa LECs changed its POI with INS from the original location to Des Moines where the INS access tandem is located.[39] The Iowa LECs began billing AT&T mileage-based transport charges for carrying the traffic between their local exchanges and Des Moines.[40] This created a significant increase in the transport mileage used to calculate the Iowa LECs' switched access charges. In particular, before the POI changes, none of the Iowa LECs billed more than 65 miles of transport, and one billed only 9 miles of transport; after the POI changes, each Iowa LEC billed over 100 miles of transport charges.[41] The additional transport mileage that the Iowa LECs billed AT&T varied from a low of 79 additional miles to a high of 135 additional miles, as depicted in the following chart:[42]

Iowa LEC	Principal Place of Business	Closest POI In LATA	Miles To Closest POI In LATA	Miles To Des Moines
Alpine	Elkader	Cedar Rapids	65	144
Clear Lake	Clear Lake	Mason City	9	107
Mutual	Sioux Center	Sioux City	42	166
Preston	Preston	Davenport	38	173
Winnebago	Lake Mills	Mason City	25	126

12. The Iowa LECs did not build or deploy their own transport facilities to Des Moines.[43] Rather, they entered into what they characterize as "leases" of virtual capacity on the INS fiber ring

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8, paras. 49-50.

[34] Stipulations at 8, para. 51.

[35] Stipulations at 8, paras. 54-55.

[36] Stipulations at 8, para. 55.

[37] Stipulations at 8, para. 56 (citing Traffic Agreements, § 1(D) and INAD Tariff F.C.C. No. 1 § 2.6). The NECA Tariff does not define the term POI.

[38] Stipulations at 9, para. 57. Specifically, the initial POIs were as follows: Alpine – Cedar Rapids – established in 1997; Clear Lake – Mason City – established in 1989; Mutual – Sioux City – established in 1989; Preston – Davenport – established in 1989; Winnebago – Mason City – established in 1987. Stipulations at 9, para. 58.

[39] Stipulations at 9, paras. 60-61.

[40] Stipulations at 9, para. 60.

[41] Stipulations at 9, para. 61, 19, para. 120.

[42] Stipulations at 9, para. 61, 19, para. 120.

[43] Stipulations at 14, para. 84, 15-17, paras. 92, 94-96, 98-99.

facilities.[44] Two of the Iowa LECs (Alpine and Preston) maintain that their leases with INS are oral.[45] The other three Iowa LECs (Clear Lake, Mutual, and Winnebago) have written agreements with INS titled "Agreement for Services," which list services and corresponding prices.[46] The Iowa LECs and INS did not negotiate terms in any of the five purported leases, including with respect to price. Rather, they derived the price for the capacity leases from a pricing schedule established by INS for participating telephone companies.[47] INS sent bills to the Iowa LECs for the virtual fiber capacity, and the Iowa LECs paid them.[48]

13. The leases did not alter the functionality of INS's or the Iowa LECs' networks.[49] The traffic has continued to flow over precisely the same facilities and routes as it did prior to the Iowa LECs' purported POI changes, and INS has remained responsible for the maintenance and operation of the leased facilities.[50] In fact, the Iowa LECs have no knowledge about what happened to the traffic while it was on the INS leased facilities other than that it reached the desired destinations, and they depended on INS to ensure that the traffic was delivered between Des Moines and their local exchanges.[51]

14. The Iowa LECs entered into the lease arrangements and purported to change their POIs with INS because, in part, they determined that doing so would increase their net revenues and profits.[52] And, in fact, the leases have resulted in significant net increases in the access charges that the Iowa LECs billed.[53] The leases brought about no benefits for the Iowa LECs' end user customers and no benefits for IXCs.[54]

E. The Parties' Dispute and the Primary Jurisdiction Referral

15. The Iowa LECs billed AT&T for, among other things, transport service charges between Des Moines and their local exchanges.[55] Beginning in April 2007, AT&T contacted each of the Iowa LECs objecting to the increased mileage charges and, pursuant to the provisions in the NECA Tariff,

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44 *See* Stipulations at 55, para. 91.

45 Stipulations at 12, para. 74.

46 Stipulations at 11, para. 73.

47 Stipulations at 12, para. 77.

48 Stipulations at 12, para. 77, 15, para. 88. The one exception is that INS did not bill Preston for its purported lease from its inception in November 2005 until April 2009, and has never charged Preston for those prior months. Stipulations at 12, paras. 75-76, 15, para. 88.

49 Stipulations at 14, para. 84.

50 Stipulations at 16, paras. 94-95.

51 Stipulations at 16-17, paras. 98-99.

52 Stipulations at 11, para. 71.

53 Stipulations at 19, para. 120.

54 Stipulations at 17, para. 100. Indeed, INS continues to bill AT&T its flat, distance-insensitive charge, which covers transport to any point on the INS ring, regardless of distance. Stipulations at 17, para. 101. Although INS stated that, after entering into the lease arrangements with the Iowa LECs, it excluded from the costs used by the Commission to determine INS's CEA rate the internal costs associated with the leases, INS has not quantified any resulting actual reduction in the rates paid by IXCs. Stipulations at 18, para. 109.

55 Stipulations at 22, para. 142.

notified the Iowa LECs that it was withholding amounts that it claimed had been improperly billed as a result of the purported move of the POIs to Des Moines.[56] Until about April 2008, AT&T paid these invoices in full.[57] AT&T subsequently began withholding payment for transport services,[58] and it continues to do so.[59]

16. On December 5, 2008, the Iowa LECs filed a complaint against AT&T in the United States District Court for the Northern District of Iowa, seeking recovery of the access charges AT&T refused to pay.[60] AT&T subsequently filed counterclaims, alleging, among other things, that the Iowa LECs have violated Sections 201(b) and 203 of the Act.[61] The parties engaged in discovery and filed cross-motions for summary judgment.[62] In response to these motions, the District Court issued an order referring "this matter . . . to the FCC for resolution of the issues herein to the full extent of the FCC's jurisdiction."[63] At the Commission's instruction, the parties prepared an agreed List of Issues that they believe the Court's referral encompasses.[64] They also submitted an extensive statement of Stipulations.[65]

17. As the Commission requested, AT&T filed the Complaint in response to the Court's referral.[66] In Count I of the Complaint, AT&T alleges that the Iowa LECs have violated Sections 203 and 201(b) of the Act by billing AT&T mileage charges not authorized under the NECA Tariff. In Count II of the Complaint, AT&T alleges that Iowa LECs have violated Section 201(b) of the Act because the NECA Tariff, if construed as they propose, is unreasonable and because they operate under "sham" arrangements.

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[56] Stipulations at 22, para. 143.

[57] Stipulations at 22, para. 144.

[58] Stipulations at 22-23, paras. 144-46.

[59] Stipulations at 23, para. 147.

[60] Complaint, Ex. 10 (Complaint, *Alpine Commc'ns, LLC, et al.* v. *AT&T Corp.*, No. 08-1042 (N.D. Iowa filed Dec. 5, 2008)).

[61] Complaint, Ex. 2 (AT&T Counterclaims, *Alpine Commc'ns, LLC, et al.* v. *AT&T Corp.*, No. 08-1042 (filed Jan. 15, 2009)).

[62] *See* Complaint at 9, paras. 21-22; Answer at 10-11, paras. 21-22; Order, *Alpine Commc'ns, LLC, et al.* v. *AT&T Corp.*, No. 08-1042 (N.D. Iowa Dec. 16, 2010) (Alpine Primary Jurisdiction Order) at 4.

[63] Alpine Primary Jurisdiction Order at 5.

[64] Complaint Ex. 5, Alpine v. AT&T – Issues List Re FCC Referral (Joint List of Issues). The Joint List of Issues identifies three issues (the first of which contains seven subparts) that the parties agree were the subject of the Court's referral. The first two issues ask whether the Iowa LECs violated the terms of the NECA Tariff and/or Section 203 of the Act. The third issue inquires whether the Iowa LECs engaged in unjust and unreasonable practices in violation of Section 201(b) of the Act.

[65] Complaint Ex. 3, Stipulations.

[66] Complaint at 4, para. 8. *See* Reply and Reply Legal Analysis of AT&T Corp., File No. EB-12-MD-003 (filed May 10, 2012), Ex. 1 (Letter from Lisa B. Griffin, FCC, to Counsel for the Parties, File No. EB-12-MD-003 (Jan. 17, 2012) (January 17th Letter Ruling)).

III. DISCUSSION

A. The Iowa LECS Have Violated Sections 203 and 201(b) of the Act.

18. In this section, we address the tariff violations alleged by AT&T. First, AT&T claims that the Iowa LECs violated the NECA Tariff by billing for mileage charges not authorized by the tariff.[67] Second, AT&T alleges that the defendants Mutual, Alpine, and Preston violated the NECA Tariff by charging AT&T for transport outside their LATAs.[68] And third, AT&T contends that the Iowa LECs violated the NECA Tariff by failing to give AT&T reasonable notice of the POI change.[69]

1. The Iowa LECs Billed AT&T Mileage Charges That Are Not Authorized Under the NECA Tariff.

19. According to AT&T, the Iowa LECs do not have unfettered discretion under the NECA Tariff to select a POI.[70] Rather, the NECA Tariff expressly incorporates the INAD Tariff's provisions regarding location of the POI.[71] In AT&T's view, under the INAD Tariff, the location of the POI turns on where "responsibility" for the traffic shifts from INS to the Iowa LECs, and AT&T asserts that the Iowa LECs never assumed responsibility for the traffic at Des Moines.[72] AT&T argues that INS was responsible for providing transport between Des Moines and the original POIs,[73] and that the Iowa LECs thus violated Sections 203 and 201(b) of the Act by billing AT&T mileage charges associated with the changed POIs.[74] Alternatively, AT&T argues that, even if the tariff provisions are ambiguous, the Commission should construe them in AT&T's favor.[75]

20. As discussed below, we find that the NECA Tariff does not provide the Iowa LECs an unqualified right to select a POI, but rather incorporates the INAD Tariff's terms regarding POI selection. We further find that the term "responsibility" in the INAD Tariff is ambiguous, thereby rendering the NECA Tariff ambiguous as well.[76] Accordingly, we construe the tariff language against the Iowa LECs.

a. The NECA Tariff Provides that the INAD Tariff Establishes the POI.

21. AT&T argues that Section 6.1.3(A) of the NECA Tariff "specifies the POI[s] by referencing the INAD Tariff,"[77] and that no other provision of the NECA Tariff addresses the Iowa LECs'

[67] Complaint at 4-5, paras. 10-11, 27-28, paras. 67-72; Reply at 6-7.

[68] Complaint at 5, para. 12, 27-28, paras. 67-71, 73; Reply at 22-23.

[69] Complaint at 5-6, para. 13, 27-28, paras. 67-71, 74; Reply at 23-24.

[70] Complaint at 5, para. 10, 6, para. 15, 45, para. 111, 47, para. 114, 53, para. 128, 54-5, paras. 130-31.

[71] Complaint at 41-42, para. 106.

[72] Complaint at 36-40, paras. 93-103

[73] Complaint 38, para. 98, 40, para. 102.

[74] Complaint at 32-49, paras. 86-118; Reply, Legal Analysis at 6.

[75] Complaint at 5, para. 11, 45-49, paras. 112-18.

[76] *See* footnote 101 below.

[77] Complaint, Legal Analysis at 33, para. 88, 41-42, para. 106 (citing NECA Tariff § 6.1.3(A), Original Page 6-7.3); Reply, Legal Analysis at 7. In its entirety, the relevant paragraph of Section 6.1.3(A) of the NECA Tariff states:

(continued…)

POIs with INS or otherwise authorizes the Iowa LECs to bill for transport provided over INS's fiber ring.[78] According to AT&T, the third sentence of the relevant paragraph in Section 6.1.3(A) applies and states that:

> [w]hen service is provided in cooperation with a non telephone company provider of Centralized Equal Access, the SWC will be that wire center which would normally provide dial tone to the telephone company point of interconnection with the non telephone company provider of Centralized Equal Access *specified in the tariff of the Centralized Equal Access provider*.[79]

22. The Iowa LECs argue that AT&T improperly ignores the first sentence of the relevant paragraph of Section 6.1.3(A), which states that "where the Telephone Company elects to provide equal access through a Centralized Equal Access arrangement, *the Telephone Company will designate the serving wire center*."[80] This sentence, the Iowa LECs maintain, gives them the right to designate the POI, because the SWC and the POI "will be at the same place."[81] We agree with AT&T that the first sentence of this Section is not applicable, however, given the parties' stipulation that INS is a "non telephone company" provider of CEA.[82] Thus, we find that, in order to determine the location of the POI under the NECA tariff, we must look to the language of the INAD Tariff.

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> Unless otherwise ordered by the F.C.C., where the Telephone Company elects to provide equal access through a Centralized Equal Access arrangement, the Telephone Company will designate the serving wire center. The designated SWC will normally be that wire center which provides dial tone to the telephone company Centralized Equal Access tandem office identified in NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. TARIFF F.C.C. NO. 4. When service is provided in cooperation with a non telephone company provider of Centralized Equal Access, the SWC will be that wire center which would normally provide dial tone to the telephone company point of interconnection with the non telephone company provider of Centralized Equal Access specified in the tariff of the Centralized Equal Access provider. Those Telephone Company offices providing equal access through centralized arrangements are identified in NATIONAL EXCHANGE CARRIER ASSOCIATION, INC. TARIFF F.C.C. NO. 4.

[78] Complaint, Legal Analysis at 33, para. 88, 41-42, paras. 105-06; Reply, Legal Analysis at 9.

[79] Complaint, Legal Analysis at 33, para. 88, 41-42, para. 106 (citing NECA Tariff § 6.1.3(A), Original Page 6-7.3 (emphasis added)).

[80] Answer, Legal Analysis at 35, paras. 106-07 (citing NECA Tariff § 6.1.3(A), Original Page 6-7.3 (emphasis added)), 36, para. 108.

[81] Answer, Legal Analysis at 36, para. 108.

[82] Stipulations at 21, para. 129. The Iowa LECs further maintain that sections 6.4.7 and 6.8.3 of the NECA Tariff, which state that the "Telephone Company will designate the . . . routing to be used where equal access traffic is provided through a centralized equal access arrangement," give them discretion to select any POI. Answer, Legal Analysis at 34, para. 105. Routing of calls referenced in those sections describes only the call path and not the designation of the POI. Indeed, the Iowa LECs appear to have conceded as much by stipulating that, regardless of whether the POIs were the original POIs or Des Moines, the traffic "has continued to flow over precisely the same . . . route." Stipulations at 16, para. 94.

b. We Construe the INAD Tariff's Definition of POI Against the Iowa LECs.

23. The INAD Tariff does not describe how the POI should be selected, but rather provides, by way of definition, that "Point of Interconnection" denotes:

> the demarcation point or network interface, on an Iowa Network premises at which Iowa Network's responsibility for the provision of [CEA] ends.[83]

Thus, under the INAD Tariff, the POI is where "responsibility" for handling traffic shifts between INS and the Iowa LECs. According to AT&T, the "most natural and straightforward reading of the INS Tariff's definition of POI is that INS's responsibility ends when the traffic is handed off by INS from its fiber ring to the facilities of another carrier.[84] For the Iowa LECs, AT&T says, that is not at Des Moines but at the Iowa LECs' "traditional" POIs (which were located close to their operating territories).[85]

24. Although they repeatedly note in their Answer that the INAD Tariff lists sixteen potential POIs (including Des Moines),[86] the Iowa LECs accept AT&T's proposition that ascertaining which carrier has responsibility for handling traffic is key to determining the actual POI.[87] In other words, they acknowledge that if the Commission finds that INS retained responsibility for the traffic between Des Moines and the former POIs, the Iowa LECs' POIs cannot be in Des Moines.[88] Where the Iowa LECs differ with AT&T is in their interpretation of the term "responsibility."

25. Relying upon the leases they entered into with INS, the Iowa LECs contend that "responsibility" means "accountability" for CEA service.[89] The Iowa LECs maintain that, by virtue of the leases, they had "exclusive" use of fiber and therefore acquired the means to transport the traffic.[90] Leased facilities, the Iowa LECs say, are a telecommunication carrier's facilities for purposes of imposing charges under a tariff.[91] They further note that AT&T itself does not own all the facilities it uses to conduct its business and that AT&T leases facilities and recovers a portion of its leased costs in its pricing to its customers.[92] Thus, the Iowa LECs argue that they assumed "responsibility" when they entered into

[83] Reply, Legal Analysis at 7 (citing INAD Tariff § 2.5, 1st Rev. Page 62).

[84] Complaint, Legal Analysis at 35, para. 91.

[85] Complaint, Legal Analysis at 35, para. 91.

[86] Answer, Legal Analysis at 27, para. 90, 28, para. 91, 35, para. 106, 43-44, para. 129, 45, para. 132.

[87] Answer, Legal Analysis at 27-33, paras. 90-101, 36, para. 108. In light of this acknowledgement, we find other evidence regarding LECs' POI selections and the views of third party "experts" to be irrelevant. *See* Answer, Legal Analysis at 34, para. 105; Answer Ex. H, Affidavit of Burnie E. Snoddy at 2, paras. 3-4.

[88] *See* Answer, Legal Analysis at 25, para. 86 & n.24, 27-28, para. 90.

[89] Answer, Legal Analysis at 25, para. 86, 28, para. 91, 29-33, paras. 93, 96-98, 100. In other words, "if AT&T [had] an issue with the traffic," it would contact the Iowa LECs. Answer, Legal Analysis at 29-30, paras. 93, 94. *See* Stipulations at 16-17, paras. 94-99.

[90] Answer at 6, para. 10, 21, para. 72, 25, para. 86, 27, para. 90, 29-30, para. 93-94, 31, para. 97, 33-34, paras. 103-04

[91] Answer, Legal Analysis at 25, para. 86.

[92] Answer, Legal Analysis at 25, para. 86 & n.24.

the leases within INS, and they are entitled to impose access charges.[93] In their view, whether they physically maintained the network facilities is irrelevant.[94]

26. In contrast, AT&T argues that construing the term "responsibility" to mean strictly legal "accountability" is too narrow.[95] According to AT&T, it would be an "unnatural reading of the tariff provision to contend that INS has 'end[ed]' its responsibility for the provision of CEA services even though INS . . . continues to own, control, operate, and maintain the facilities that are used to provide the CEA service."[96] AT&T asserts that the leases between INS and the Iowa LECs neither ended INS's "responsibility" for the provision of CEA service nor provided the Iowa LECs with responsibility and control of INS's network.[97] The oral leases, AT&T argues, were merely "paper changes" supported by only vague evidence that the Commission should discount,[98] and the written leases expressly provided that ownership and control of the INS network remained with INS.[99]

27. We find that both the Iowa LECs and AT&T have presented reasonable constructions of the term "responsibility." On the one hand, the Iowa LECs make a valid point that it is not uncommon for carriers to use leased facilities and impose charges for traffic sent over them.[100] On the other hand, AT&T plausibly asserts that, notwithstanding the leases, INS retained control of its facilities, and INS handled the traffic in the same manner.[101] Thus, we find the term "responsibility" to be ambiguous in this context. In such circumstances, it is "well-established . . . that any ambiguity in a tariff is construed

[93] Answer, Legal Analysis at 27-30, paras. 90, 93-94, 33-34, para. 103.

[94] Answer, Legal Analysis at 30-33, paras. 96-98, 100, 101.

[95] Reply, Legal Analysis at 17.

[96] Reply, Legal Analysis at 17. *See also* Reply, Legal Analysis at 16-17 (the INS Tariff's reference to "responsibility" is "most naturally and sensibly read to mean that [INS] has 'responsibility' for the provision of CEA service whenever the underlying facilities used to provide the service are owned, controlled, operated, and maintained by any part of INS."). The Iowa LECs spend considerable time in the Answer making distinctions between two divisions of INS—INICD and INAD. Specifically, they argue that INAD "removed the facilities leased by the Iowa LECs from their facilities leased from" INICD, and thus that INAD no longer has responsibility for the services provided between Des Moines and the "traditional" POIs. *See* Answer at 3, para. 2, 6-7, para. 10, 17-19, paras. 59-62, 21, para. 72, 25-31, paras. 86, 89-96, 33-34, paras. 103-04, 47-49, para. 43. The Iowa LECs further claim that their leases with INICD provide them with "responsibility" over the INS facilities and the authority to bill for transport. *See* Answer at 5-7, paras. 7, 10, 10, para. 18, 16-18, paras. 57-58, 60, 61, 24, para. 83, 25, para. 86, 26-27, paras. 89-90, 30-31, para. 96, 33-34, para. 103, 38, para. 113, 51-52, paras. 154-55. Because this Order analyzes whether the Iowa LECs, as opposed to *any* part of INS, exercised "responsibility" (as used in the INAD Tariff), we agree with AT&T that there is no need to focus extensively on the relationship between INICD and INAD. *See* Reply, Legal Analysis at 13 ("the Iowa LECs place far too much weight on the existence of INS' internal divisions and the use of leases between those divisions").

[97] Reply, Legal Analysis at 13.

[98] Complaint, Legal Analysis at 37, para. 85; Reply, Legal Analysis at 20-21, n.28.

[99] Reply, Legal Analysis at 18-20. AT&T claims that the leases actually were "agreements for services." Reply, Legal Analysis at 20.

[100] Answer at 18 & Answer Ex. F., Supplement Expert Witness Report of Burnie Snoddy at 2 (noting that the leasing of network capacity and facilities is a standard industry practice). *See also* Joint Statement at 14-15, Stipulations 85-87, Reply at 21 (noting the use of leases to provide "wholesale transport service").

[101] Complaint, Legal Analysis at 36-40; Reply at 5, 18-22.

against the party who filed the tariff."[102] Consequently, we construe the language in the INAD Tariff and, in turn, the NECA Tariff, against the Iowa LECs.

28. In this instance, then, the POI is the point at which the Iowa LECs connect with INS. The parties stipulated that the "leases" did not alter the functionality of INS's or the Iowa LECs' networks,[103] and traffic continued to flow over precisely the same facilities as it did prior to the Iowa LECs purported POI changes.[104] INS remained responsible for the maintenance and operation of the lease facilities[105] and, indeed, the Iowa LECs have no knowledge about what happened to the traffic while it was on the leased facilities.[106] Just as before the purported POI change, the Iowa LECs relied entirely upon INS to deliver traffic between Des Moines and their local exchanges.[107] Any notion that the Iowa LECs validly changed their POIs by virtue of these "leases" is further belied by the fact that INS continued to charge AT&T a flat rate that covers switching and transport.[108]

29. Moreover, tariffs should be construed to avoid "unfair, unusual, absurd or improbable results"[109] and should be interpreted to "advance the purpose for which the tariff was imposed."[110] We find that this principle has applicability here. As explained in more detail below, the Iowa LECs stipulate that moving their POIs to Des Moines had no benefits for their end user customers or IXCs, yet substantially increased access charges billed to IXCs.[111] This outcome is directly contrary to the purpose of the Iowa CEA arrangement. That is, the Commission approved the creation of INS in order to *lower* the cost of transporting traffic from Des Moines to the various remote rural exchanges, and thus encourage more IXCs to compete in those areas.[112] Accordingly, the ambiguous tariff provisions should be construed against the Iowa LECs.

30. For all of the foregoing reasons, we grant Count I of the Complaint because the Iowa

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[102] *AT&T Corp. v. Ymax Communications Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 5742, 5755, para. 33 (2011) (citing *Associated Press v. FCC*, 452 F.2d 1290, 1299 (D.C. Cir. 1971); *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, 24 FCC Rcd 14801, 14810, n.83 (2009), *recon. denied*, 25 FCC Rcd 3422 (2010), *pet. for review denied, Farmers & Merchants Mut. Tel. Co. v. FCC*, 668 F.3d 714 (D.C. Cir. 2011); *American Satellite Corp. v. MCI Telecommunications Corp.*, Memorandum Opinion and Order, 57 FCC2d 1165, 1167, para. 6 (1976)).

[103] Stipulations at 14, para. 84.

[104] Stipulations at 16, para. 94.

[105] Stipulations at 16, para. 95.

[106] Stipulations at 16, para. 98.

[107] Stipulations at 17, para. 99.

[108] Stipulations at 17, para. 101. As a result, AT&T is being billed twice for transport—once under the INAD Tariff (via the CEA flat, non-distance-sensitive charge) and once under the NECA Tariff (via the mileage-based transport charges). *See also* discussion below in paragraph 48.

[109] *See Penn. Cent. Co. v. General Mills*, 439 F.2d 1338, 1341 (8th Cir. 1986); *Carrier Serv., Inc. v. Boise Cascade*, 795 F.2d 640, 642 (8th Cir. 1986); *see also* Complaint at 45-49; Reply at 10-12.

[110] *See Consol. Gas Trans. Corp. v. FERC*, 771 F.2d 1536, 1545 (D.C. Cir. 1985); *Nat'l Van Lines, Inc. v. U.S.*, 355 F.2d 326, 333 (7th Cir. 1966) ("[A]n interpretation which is reasonable and consistent with the purposes of the tariff should be preferred to a construction which is impractical or which leads to absurd consequences").

[111] *See* discussion *supra* Section II.B.2; Stipulations at 17, para. 100, and 19, para. 120.

[112] *See Application of Iowa Network Access Division,* 3 FCC Rcd 1468 (C.C.B. 1989) at para. 3.

LECs' billed mileage charges are not authorized under the NECA Tariff.

2. Mutual, Alpine, and Preston Violated the NECA Tariff by Charging AT&T for Transport Service Outside Their LATAs.

31. AT&T contends that defendants Mutual, Alpine, and Preston violated the NECA Tariff by charging for transport service outside their local access and transport areas (LATA).[113] AT&T maintains that two independently dispositive clauses of the NECA Tariff support its contention that the billing of transport services outside a LEC's LATA falls outside the scope of the tariff. According to AT&T, the NECA Tariff authorizes charges only for access "within a LATA," yet these three defendants have billed AT&T for transport to and from Des Moines, which is outside the LATAs in which they serve their local customers (and have local exchanges).[114]

32. First, AT&T argues that the title page of the NECA Tariff expressly circumscribes the area in which the access service (including transport) may be provided, stating that the tariff governs "the provision of Access Services *within a Local Access and Transport Area (LATA) or equivalent Market Area*."[115] AT&T maintains that, by its plain terms, the NECA Tariff does not apply to services like the transport services provided by Mutual, Alpine, and Preston, that extend beyond their LATA boundaries.[116] Mutual, Alpine, and Preston have stipulated that Des Moines is outside the LATAs in which they serve their local customers.[117] Although they disagree with AT&T's interpretation of this tariff language, the Iowa LECs have offered nothing to counter its argument.[118]

33. Second, AT&T relies upon Section 6.1 of the tariff, which states:

> Switched Access Service provides for the ability to originate calls from an end user's premises to a customer designated premises, and to terminate calls from a customer designated premises to an end user's premises *in the LATA where it is provided*.[119]

34. AT&T argues that this provision requires switched access services to be provided in the same LATA as the end user's premises where the calls originate or terminate.[120] The Iowa LECs contend that this sentence does not require them to provide access facilities in a single LATA.[121] Rather, according to the Iowa LECs, the LATA reference in Section 6.1 is limited to the location of the LECs'

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[113] Complaint at 28-29, para. 73; Complaint, Legal Analysis at 49-50, paras. 119-21; Reply, Legal Analysis at 22-23.

[114] Complaint, Legal Analysis at 49, para. 119; Stipulations at 22, para. 137.

[115] Complaint at 9, para. 12; Complaint Legal Analysis at 19, para. 49; Reply at 23; Complaint Ex. 6, Tariff FCC No. 5, Original Title Page 1, Access Service (emphasis added).

[116] Complaint Legal Analysis at 49-50; Reply at 22-23.

[117] Stipulations at 22, para. 137.

[118] *See* Answer at 7, para. 12, 15, para. 49; Answer Legal Analysis at 39-40, paras 119-21.

[119] Complaint Ex. 6, NECA Tariff No. 5, § 6.1, Original Page 6-1 (emphasis added); Reply Legal Analysis at 22-23.

[120] Complaint Legal Analysis at 50; Reply at 22-23.

[121] Answer at 15, para. 49, 7, para. 12, 39, para. 119.

local exchange customers.[122] On its face, however, Section 6.1 provides that Switched Access Service (which includes transport) entails the ability to originate and terminate calls "to an end user's premises in the LATA where it is provided."[123] "It" refers to the switched access service, which must be provided in the same LATA as the end user's premises where the calls originate or terminate. As noted above, the parties stipulate that Des Moines is outside the LATAs in which Mutual, Alpine, and Preston service their end users.[124] Thus, they are charging AT&T for access services (transport) that they provide, in part, outside the LATA of their end users. Therefore, we agree with AT&T that the disputed mileage charges for transport outside the LATA by these three LECs are not authorized by the language in the NECA Tariff and thus are unlawful.

3. The Iowa LECs Also Violated the NECA Tariff by Failing to Provide AT&T with Reasonable Notice of Any Purported POI Changes.

35. AT&T also argues that the Iowa LECs failed to abide by the NECA Tariff's requirements that they provide reasonable notice to AT&T of POI changes.[125] Section 2.1.9, entitled "Notification of Service-Affecting Activities," states:

> The Telephone Company will provide the customer reasonable notification of service-affecting activities that may occur in the normal operation of its business. Such activities may include, but are not limited to the following:
>
> - equipment or facilities additions,
> - removals or rearrangements,
> - routine preventative maintenance, and
> - major switching machine change-out.
>
> Generally, such activities are not individual customer service specific, but may affect many customer services. No specific advance notification period is applicable to all service activities. The Telephone Company will work cooperatively with the customer to determine reasonable notification requirements.[126]

36. AT&T claims that the change of POIs is necessarily a "service-affecting activity" under the NECA Tariff.[127] We agree. The NECA Tariff provides examples of service-affecting activities. Although "change of POI" is not one of them, the list includes "rearrangements," which we believe applies.[128] The Iowa LECs characterize the POI as the "location where the facilities of INAD meet the

[122] Answer at 15, para. 49 & Ex. C, Affidavit of Norman St. Laurent (St. Laurent Affidavit) at 7-8, para. 35.

[123] Complaint Ex. 6, NECA Tariff No. 5, § 6.1.

[124] Stipulations at 22, para. 137.

[125] Complaint at 29, para. 74; Complaint Legal Analysis at 50-52, paras. 122-25 n.130; Reply at 23-24.

[126] Complaint Ex. 6, NECA Tariff No. 5, § 2.1.9.

[127] Reply at 23.

[128] Complaint Ex. 6, NECA Tariff No. 5, § 2.1.9.

facilities of the LEC."[129] A change in that location—especially when accompanied by a significant increase in mileage charges—is tantamount to a "rearrangement" affecting service.[130] Consequently, the NECA Tariff obligated the Iowa LECs to provide reasonable notice to AT&T when they changed their POIs.

37. AT&T argues that it did not receive actual notice of the POI changes.[131] However, two of the Iowa LECs contend that they in fact gave actual notice of the changes to AT&T in the form of correspondence.[132] Specifically, Winnebago asserts that it notified AT&T by including a letter with its October 2, 2001, bill that stated: "Winnebago Cooperative Telephone Association will be changing its POP location from Mason City, Iowa to Des Moines, Iowa. This will become effective on October 11, 2001 and the carrier access bills for usage after that date starting with the December 1, 2001 CABS bill will reflect the change in the transport facility."[133] Although the letter was not signed, addressed, or accompanied by proof of delivery, AT&T does not deny receiving it,[134] and we find that it adequately alerted AT&T to the POI change. Preston asserts that it sent a letter to AT&T apprising AT&T of the POI change, but Preston could not produce a copy of the purported letter or any specific information about the letter.[135] Rather, Preston relied exclusively upon the deposition testimony of Roger Kilburg[136] who, without the benefit of any documentary evidence, claimed to have detailed recollection about mailing the letter more than eight years earlier.[137] Given the lack of documentary evidence supporting Mr. Kilburg's assertion, we decline to credit his testimony, and we find no basis to conclude that there was a letter providing notice to AT&T.

38. Further, we find that the adjustments that the Iowa LECs made to the Local Exchange Routing Guide (LERG)[138] and to another NECA tariff[139] did not provide constructive notice to AT&T. The Commission's formal complaint rules require parties to plead all facts in support of their claims and

[129] Answer, Legal Analysis at 30, para. 93.

[130] *Cf.* Reply at 23 (characterizing as a "remarkable admission" the Iowa LECs' contention that the POI changes did not affect service because the traffic continued to flow over the same routes and facilities as before (citing Answer at 8, para. 13, 19-20, para. 63).

[131] Complaint at 50-51, para. 122; Reply at 23-24.

[132] Answer at 7, para. 13, 40-42, paras. 122-25. *See* Complaint Ex. 26, Deposition of Terry Wegener (Wegener Deposition) at page 89, Answer Ex. D (sample notice setter), Answer Ex. U, Deposition of Roger Kilburg (Kilburg Deposition) at pages 42-43.

[133] Complaint Ex. 25, Wegener Deposition at 89, Answer Ex. D (sample notice letter).

[134] *See* Reply, Legal Analysis at 24, n.35.

[135] Answer Ex. U, Kilburg Deposition at pages 42-43.

[136] Answer at 8, para. 13.

[137] Answer Ex. U, Kilburg Deposition at pages 42-43.

[138] The LERG is an industry guide generally used by carriers in their network planning and engineering and numbering administration. It contains information regarding all North American central offices and end offices. *See* Answer, Ex. C, St. Laurent Affidavit at 7.

[139] Answer at 19-20, para. 63 & n.15. Specifically, the Iowa LECs contend that NECA F.C.C. Tariff No. 4 (Tariff 4), which describes, among other things, the location and technical capabilities of wire centers providing interstate access telecommunications service, was modified via some unspecified adjustments. Answer at 19-20, n.15.

defenses fully and with specificity.[140] The Iowa LECs, however, did not specify the language in the LERG or the tariff that they claim satisfies their notice obligations.[141] In the absence of any specific evidence/explanation by the Iowa LECs, we cannot find that updates to the LERG and revisions to NECA Tariff No. 4 constitute "reasonable" notice. Thus, even if the Iowa LECs changed their POIs, those changes were done in violation of the NECA Tariff because, with the exception of Winnebago, the Iowa LECs failed to provide AT&T with reasonable notice of the changes as required by the Tariff.

B. Alternatively, The Iowa LECs Have Violated Section 201(b) of the Act Because the NECA Tariff is Unreasonable to the Extent It Allows the Iowa LECs to Change Their POIs for the Sole Purpose of Inflating Mileage Charges Paid by IXCs.

39. In Count II of the Complaint, AT&T alleges that if the NECA Tariff is interpreted to grant the Iowa LECs an "unqualified" right to change POIs, and thereby authorize billing vastly increased mileage charges without corresponding benefit to customers, the Iowa LECs have violated Section 201(b) of the Act because the Tariff is unreasonable.[142] AT&T further alleges that the Iowa LECs have violated Section 201(b) by engaging in "sham arrangements" designed to inflate mileage charges.[143] We agree that, if the NECA Tariff were to be interpreted (contrary to our findings in part III.A) to allow the Iowa LECs to change their POIs as proposed, the NECA Tariff would be unreasonable in the respect AT&T identifies. Because this determination affords AT&T all the relief it seeks in Count II, we do not reach the "sham arrangements" allegations.

1. The Section 201(b) Claims Are Properly Before the Commission.

40. Before reaching the merits of Count II, we address the Iowa LECs' contention that the Section 201(b) claims that are the subject of Count II of the Complaint are not properly before the Commission.[144] Specifically, the Iowa LECs maintain that the federal courts do not have authority to determine the reasonableness of a tariff that has been approved by the Commission, as have both the NECA Tariff and the INAD Tariff.[145] The tariff of a telecommunications carrier, they assert, becomes "legal" when it is filed with an agency and becomes effective,[146] and a carrier cannot be said to have engaged in unjust and unreasonable practices if it was exercising rights afforded to it under a legal tariff.[147] In the Iowa LECs' view, the Court on referral accordingly has not sought guidance on the

[140] *See* 47 C.F.R. §§ 1.720(a), (c), (h), 1.721(a)(5), (a)(11), 1.724(b), (g), 1.726(e) (noting, among other things, that a party must attach copies of all documents it intends to rely upon to support facts alleged and legal arguments made by it). *See also Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497, 22534-37, paras. 81-88 (1997).

[141] Answer at 7-8, para. 13, 19-20, para. 63 & n.15. The Iowa LECs did not include a copy of the relevant pages from NECA Tariff No. 4 or the LERG with their Answer.

[142] Complaint, Legal Analysis at 52-57.

[143] Complaint, Legal Analysis at 61-67.

[144] Answer at 10, para. 20, 22-23, paras. 78-79; Answer, Legal Analysis at 42-43, paras. 126, 128, 44-45, para. 132, 47, para. 138.

[145] Answer, Legal Analysis at 42, para. 125, 45, para. 132, 46, para. 135.

[146] Answer, Legal Analysis at 42, para. 126.

[147] Answer, Legal Analysis at 42, para. 126.

reasonableness of the tariffs,[148] and the scope of this proceeding is limited to issues of tariff interpretation.[149]

41. This argument fails in several respects. To begin, under Section 206 of the Act, the federal courts have subject matter jurisdiction over claims that common carriers have committed any "act, matter or thing in this Act prohibited or declared to be unlawful."[150] Thus, AT&T properly brought its Section 201 claims in federal court, and the court was within its discretion to refer them to the Commission under the primary jurisdiction doctrine.[151] The Commission, too, has authority under Section 208 of the Act to resolve formal complaints alleging violations of Section 201(b).[152]

42. Moreover, the scope of the issues referred included AT&T's Section 201(b) claims. Although it denied summary judgment, the district court noted that AT&T had sought referral of its counterclaims, "*including*" (i.e., not limited to) "interpretation of a number of technical terms within tariffs."[153] The court stayed the case and stated that the "matter is referred to the FCC for resolution of the issue herein to the full extent of the FCC's jurisdiction."[154] The parties' Joint List of Issues included Issue 3, which broadly asked whether the LECs are "engaged in unjust and unreasonable practices in violation of Section 201(b) of the Act in connection with the furnishing of interstate communication services."[155] The parties did not limit Issue 3 to Section 201(b) violations arising from billing in violation of the NECA Tariff, and the Commission instructed AT&T simply to "file a formal complaint against the LECs that raises issues 1 and 3 above."[156]

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[148] Answer, Legal Analysis at 42, para. 125.

[149] Answer, Legal Analysis at 42, para. 125, 43, para. 128, 44, para. 132, 46, para. 135, 47, para. 138, 53, para. 157, 53 (Prayer for Relief), 54 (Second Affirmative Defense).

[150] 47 U.S.C. § 206. *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998), cited by the Iowa LECs, is inapposite. That case held that the Act extinguishes the right of a party to bring suit for breach of contract *under state law* when the effect of the suit would be to challenge a federal tariff. Similarly, the filed-rate cases cited by the Iowa LECs—*see* Answer at 43, n.52—are inapplicable because they do not concern a challenge to the justness or reasonableness of the tariffs at issue in those cases.

[151] *See Reiter v. Cooper*, 506 U.S. 258, 268 (1993) (the primary jurisdiction doctrine is "specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency").

[152] 47 U.S.C. § 208.

[153] *Alpine Primary Jurisdiction Order* at 4.

[154] *Alpine Primary Jurisdiction Order* at 5.

[155] January 17th Letter Ruling at 3.

[156] January 17th Letter Ruling at 3. The Iowa LECs read too much into a statement in the January 17th Letter Ruling that AT&T's "motion to refer the matter to the FCC was limited to 'issues of tariff interpretation.'" January 17th Letter Ruling at 4. That statement, which drew a distinction between the preemption question and the other matters that had been referred to the Commission, was merely quoting from the heading of AT&T's argument beginning on page 18 of its brief in support of its summary judgment motion. *See* Defendant's Brief in Support of Motion for Summary Judgment (AT&T's Summary Judgment Brief) at 18. The statement cited to the entirety of AT&T's argument at pages 18-20 of that brief, however, which clearly encompassed all of AT&T's section 201(b) claims. *See* AT&T's Summary Judgment Brief at 19-20 ("Fina1ly, if the Court does decide to refer issues of tariff interpretation to the FCC, then the referral should also include AT&T's counterclaims arising under Section 201. In Count II of its counterclaims, AT&T alleges that Plaintiffs have committed an unreasonable practice . . .
(continued…)

43. Finally, in asserting that the NECA tariff is immune from review for reasonableness because it is "legal," the Iowa LECs confuse "legality" and "lawfulness":

> "Legality" mainly addresses procedural validity. . . . A particular rate . . . becomes "legal" when it is filed with an agency and becomes effective. But a rate's legality is not enough to establish its substantive reasonableness or "lawfulness." . . . A carrier charging a merely *legal* rate may be subject to refund liability if customers can later show that the rate was unreasonable. . . . Should an agency declare a rate to be *lawful,* however, refunds are thereafter impermissible as a form of retroactive ratemaking.[157]

What's more, although tariffs that are "deemed" lawful are not subject to refunds, if a "later reexamination shows them to be unreasonable," the Commission may afford prospective relief.[158]

2. The Uncontroverted Evidence Demonstrates that the Iowa LECs' Purported POI Changes Significantly Increased AT&T's Operating Costs Without Providing Any Enhanced Service Choices or Benefits to Customers.

44. Should the Commission interpret the NECA Tariff to permit the Iowa LECs to change their POIs to Des Moines, AT&T argues that "a tariff that provides a LEC with an 'unqualified' or 'absolute' right to select a POI with a CEA provider directly contravenes the Commission's orders authorizing CEA arrangements."[159] Specifically, AT&T relies upon the Commission's statements in *Indiana Switch* rejecting AT&T's challenge to the ability of independent LECs (ITCs) to "control . . . the designation of [POIs]."[160] The Commission stated:

> [T]he cost increases ISAD's proposed arrangement imposes on AT&T are outweighed by the proposal's benefits to thousands of subscribers in Indiana. . . . If in some future case an IXC demonstrates that an ISAD-like proposal significantly increases IXCs' operating costs without significant increases in service choices or benefits to subscribers, or unreasonably designates ITC points of interconnection with IXCs, we may reach a different result. In other words, our decision permitting ISAD to proceed should not be interpreted as unbounded authority on the part of ITCs, or their affiliates, to determine points of interconnection with IXCs.[161]

(Continued from previous page)

[because] . . . the tariffs are unreasonable under Section 201 . . . [and] Plaintiffs have engaged in a sham transaction").

157 *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 410-11 (D.C. Cir. 2002) (*ACS of Anchorage*) (citations omitted).

158 *ACS of Anchorage*, 290 F.3d at 411.

159 Complaint, Legal Analysis at 53, para. 129.

160 *Indiana Switch*, 1 FCC Rcd at 635, para. 5.

161 *Indiana Switch*, 1 FCC Rcd at 635, para. 5.

According to AT&T, the NECA Tariff cannot reasonably authorize the Iowa LECs to change POIs and increase costs on the IXCs unless there are also significant increases in service choices or other benefits.[162] AT&T further asserts that there are no such benefits in this case.[163] The undisputed evidence confirms AT&T's assertion.

45. The Iowa LECs make several important admissions in this case. To begin, they concede that they "entered into the lease agreements and purported to change their POIs with INS because, in part, they determined that they would increase their net revenues and profits."[164] Moreover, the relocated POIs and leases with INS admittedly have "resulted in net increases in the access charges" they billed.[165] Indeed, the Iowa LECs acknowledge that, as a result of their conduct, IXCs' local transport costs have increased by as much as seven times.[166] Finally, the Iowa LECs admit that their relocated POIs and leases "brought about no benefits for the[ir] end user customers … and no benefits for IXCs."[167] In other words, the stipulated record demonstrates that the Iowa LECs' conduct is precisely the type of future questionable behavior that the Commission contemplated in *Indiana Switch*.[168] We conclude that the NECA Tariff is unjust and unreasonable in violation of Section 201(b) to the extent it allows the Iowa LECs' admitted manipulation of POIs undertaken with the intent and effect of "pumping" mileage charges.[169]

46. Citing interrogatory responses filed in the underlying litigation, the Iowa LECs make a fleeting attempt at the end of the Answer to identify "various advantages" they accrued from changing their POI to Des Moines.[170] Specifically, the Iowa LECs posit that these advantages include: "cost savings; more efficient aggregation of traffic; the ability to provide a wider variety of increased, future service, redundancy and the ability to interface with the networks of other telecommunications providers."[171] Having reviewed the interrogatory answers, as well as deposition testimony of the Iowa LECs concerning the purported "advantages" of relocating their POIs, we conclude that their strained attempts to manufacture other reasons for moving the POI utterly lack credibility and do not support the merits of their contention. Indeed, most of the purported "advantages" touted by the Iowa LECs relate to improvements on the LEC side of the POI—i.e., efficiencies that have nothing to do with the

[162] Complaint at 6, para. 16, 13-14, para. 35.

[163] Complaint at 6, para. 16.

[164] Stipulations at 11, para. 71.

[165] Stipulations at 19, para. 120.

[166] Complaint, Legal Analysis at 21, para. 53; Answer, Legal Analysis at 16, para. 53.

[167] Stipulations at 17, para. 100.

[168] *See* paragraph 44 & n.160 above.

[169] Because we find that a carrier changing POIs for the sole purpose of inflating mileage charges is an unjust and unreasonable practice, we would have similar concerns regarding, and thus examine closely, any tariff revisions that appear to permit this practice.

[170] Answer, Legal Analysis at 51-52, paras. 155-56. The Iowa LECs made these assertions in response to AT&T's "sham arrangements" argument, which we do not reach in this Order. Nonetheless, given the potential subject matter overlap, we consider the Iowa LECs' contentions in deciding AT&T's tariff illegality argument. *See* discussion *supra* Section III.A.1.b.

[171] Answer, Legal Analysis at 51-52, paras. 155-56.

facilities/services that are the subject of the leases between INS and the Iowa LECs.[172]

47. The Iowa LECs' remaining defenses fare no better. First, the Iowa LECs protest that *Indiana Switch* does not represent a Commission "blanket policy" concerning CEA arrangements and the rights of LECs to designate POIs.[173] We agree. Our decision today rests not upon an overarching rule, but upon the particular stipulated record in this case. The Iowa LECs further argue that, "[w]hile the specific costs do increase on these routes, there is no indication that the cost of CEA in Iowa is greater than if all the IXCs had to make connection with all the LECs in Iowa."[174] Even if true, that does not justify a tariff provision that allows the Iowa LECs to change their POIs solely to inflate mileage charges. A justification for imposing costs on IXCs without corresponding benefits to consumers undermines the goal of the Iowa CEA arrangement, which was to "speed the availability of high quality, varied competitive services to small towns and rural areas."[175]

48. Second, the Iowa LECs contend that INS reduced its cable and wire facility expenses to reflect the reduction in its transport facilities in circumstances where the transport service is provided by the Iowa LECs.[176] The parties stipulated, however, that "INS has not quantified any resulting actual reduction in the rates paid by IXCs."[177] Moreover, INS's flat rate still covers both tandem switching and transport, INS has continued to bill AT&T that CEA rate, and the Iowa LECs are also billing AT&T for transport.[178] Finally, any reduction in INS's rate does not offset the substantial increases in billed transport.[179]

[172] Alpine is the only Defendant that even purports to demonstrate cost savings in its interrogatory answer, yet its own deposition testimony refutes the claimed savings. In fact, Alpine admits that it could have gained the improvements it sought in its network without moving the POI to Des Moines, but that it would not have gained the increased mileage charges from the IXCs. Complaint, Exhibit 28, Deposition of Christopher James Hopp (Alpine) at 63-67.

[173] Answer, Legal Analysis at 43-45, paras. 129, 132.

[174] Answer at 45-46, paras. 134, 136.

[175] *INAD Application Order*, 3 FCC Rcd at 1468, para. 4.

[176] Answer, Legal Analysis at 47, para. 142, 52, para. 156 (citing Stipulations at 19, para. 109).

[177] Stipulations at 19, para. 109.

[178] Stipulations at 17, para. 101, 18, paras. 107, 109.

[179] Stipulations at 17, para. 101, 18, paras. 107, 109-10.

IV. ORDERING CLAUSES

49. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, that Count I of the Complaint is GRANTED to the extent indicated herein.

50. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201, 203, 206, and 208, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 206, 208, that Count II of the Complaint is GRANTED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary