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.	)	

ORDER ON RECONSIDERATION

Adopted: December 20, 2012 **Released: December 21, 2012**

By the Commission:

I. INTRODUCTION

1. This Order on Reconsideration dismisses on procedural grounds and, as an alternative and independent basis for the decision, denies on the merits certain issues raised in a petition for reconsideration[1] filed under section 1.106 of the Commission's rules[2] by Alpine Communications, LLC, Clear Lake Independent Telephone Company, Mutual Telephone Company of Sioux Center, Iowa, Preston Telephone Company, and Winnebago Cooperative Telecom Association (collectively, the Iowa LECs). The Order further denies the remaining issues raised in the Petition. The Iowa LECs seek reconsideration of the Commission's Memorandum Opinion and Order[3] granting a formal complaint[4] filed by AT&T Corp. (AT&T) against them under Section 208 of the Act.[5] In the *Order*, the Commission found that the Iowa LECs violated Sections 201(b) and 203 of the Communications Act of 1934, as

[1] Defendants' Petition for Reconsideration of Memorandum Opinion and Order, File No. EB-12-MD-003 (filed Oct. 11, 2012) (Petition).

[2] 47 C.F.R. § 1.106.

[3] *AT&T Corp. v. Alpine Communications, LLC, Clear Lake Independent Telephone Company, Mutual Telephone Company of Sioux Center, Iowa, Preston Telephone Company, and Winnebago Cooperative Telecom Association*, Memorandum Opinion and Order, 27 FCC Rcd 11511 (2012) (*Order*).

[4] Formal Complaint of AT&T Corp., File No. EB-12-MD-003 (filed Apr. 13, 2012) (Complaint).

[5] 47 U.S.C. § 208.

amended (Act),[6] by engaging in an unlawful "mileage-pumping" scheme. As explained below, the Petition is procedurally flawed and lacks merit, and we decline to reconsider the *Order*.

II. BACKGROUND[7]

2. The Iowa LECs are incumbent local exchange carriers (ILECs) that provide local exchange telecommunications services in rural areas of Iowa.[8] AT&T is an interexchange carrier (IXC) furnishing telecommunications services that enable customers from one local exchange area to call customers in other local exchange areas.[9] Iowa Network Services (INS) is a statewide fiber-optic network and switching system that "offers and provides" centralized equal access (CEA) telecommunications services[10] used to facilitate the delivery of interstate (and intrastate) calls in Iowa.[11] IXCs must deliver their traffic to INS and typically do so by interconnecting with the INS central access tandem switching system in Des Moines.[12] INS delivers the long-distance traffic received from IXCs over its fiber ring to one of sixteen Points of Interconnection (POIs) located across the state and bills IXCs at a flat, non-distance-sensitive rate for every minute of traffic transported.[13] 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.[14]

3. The Iowa LECs initially established POIs with the INS network at toll centers in close physical proximity to their operating territories.[15] Then, between 2001 and 2005, each of the Iowa LECs purported to change its POI to Des Moines and began billing AT&T mileage-based transport charges for carrying the traffic between their local exchanges and Des Moines.[16] This created a sizeable increase in

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[6] 47 U.S.C. §§ 201(b), 203.

[7] The *Order* contains a complete description of the facts underlying this case, which we incorporate by reference. *See Order*, 27 FCC Rcd at 11512-17, paras. 2-17.

[8] *Order*, 27 FCC Rcd at 11512, para. 3.

[9] *Order*, 27 FCC Rcd at 11512, para. 2.

[10] In states where multiple rural LECs each serve a separate rural area, the Commission has approved CEA arrangements. *Order*, 27 FCC Rcd at 11512-13, para. 5. CEA service provides presubscription and equal access capabilities through a centralized switching system rather than through each end office switch. *Order*, para. 5. The Commission approved the CEA arrangement for Iowa in 1988. *Order*, 27 FCC Rcd at 11513, para. 6. *See Application of Iowa Network Access Division*, Memorandum Opinion, Order, and Certificate, 3 FCC Rcd 1468 (Com. Car. Bur. 1988).

[11] *Order*, 27 FCC Rcd at 11513, para. 7. INS is a single legal entity with three divisions. This case involves two of the divisions: INICD and INAD. INICD owns the applicable INS facilities. INAD leases digital switching, fiber optic transmission capacity, and certain related service from INICD to provide CEA service. *Order*, 27 FCC Rcd at 11513, para. 7, n.19.

[12] *Order*, 27 FCC Rcd at 11513, para. 7.

[13] *Order*, 27 FCC Rcd at 11513-14, paras. 7, 9.

[14] *Order*, 27 FCC Rcd at 11513, para. 7.

[15] Complaint, Exhibit 3, Stipulations With Regard to Referred Matters in *Alpine et al. v. AT&T*, at 9, para. 57 (Stipulations). 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.

[16] Stipulations at 9, para. 60.

the transport mileage used to calculate the Iowa LECs' switched access charges without affording corresponding benefits to end users or IXCs.[17] The Iowa LECs contend that the applicable tariffs permit them to alter their POIs and, as a result, impose distance-sensitive charges for the transport of IXC traffic that INS is required to provide at a flat, distance-insensitive rate.[18]

4. In the *Order*, the Commission found, for three independent reasons, that the Iowa LECs violated the NECA Tariff in contravention of Sections 203 and 201(b) of the Act.[19] *First*, the Commission determined that the Iowa LECs billed AT&T mileage charges that are not authorized under the NECA Tariff.[20] The Commission concluded that the NECA Tariff incorporates the INAD Tariff's terms regarding POI selection, because the parties stipulated that INS is a "non telephone company provider" of CEA.[21] The Commission then noted that the INAD Tariff does not describe how the POI is to be selected but rather defines the "Point of Interconnection" as the "demarcation point or network interface, on an Iowa Network premises at which Iowa Network's *responsibility* for the provision of [CEA] ends."[22] After considering AT&T's and the Iowa LECs' equally "reasonable constructions of the term 'responsibility,'" the Commission concluded that the term is ambiguous, thereby rendering the NECA Tariff ambiguous as well, and it construed the ambiguity against the Iowa LECs.[23] The Commission thus held that Des Moines was not the POI for the Iowa LECs because INS retained "responsibility" for transmission between Des Moines and the Iowa LECs' traditional POIs.[24] *Second*, the Commission found that three of the Iowa LECs (Alpine, Mutual, and Preston) that 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) violated provisions in the NECA Tariff stating that access services may be provided only "in" or "within a LATA."[25] *Third*, the Commission held that, even assuming that the POI

[17] *Order*, 27 FCC Rcd at 11515, para. 11 & chart, para. 14.

[18] *Order*, 27 FCC Rcd at 11514, paras. 8-9, 11. NECA Tariff F.C.C. No. 5 (NECA Tariff) is the tariff under which the Iowa LECs provide switched access service to IXCs (such as AT&T) and bill the IXCs for such service. *Order*, 27 FCC Rcd at 11514, para. 8. The Iowa LECs do not file individual tariffs. Rather, they utilize the NECA Tariff. *Order*, 27 FCC Rcd at 11514, n.26. Iowa Network Access Division Tariff F.C.C. No. 1 (INAD Tariff) is the tariff under which INS provides CEA services to IXCs and bills IXCs for such service. *Order*, 27 FCC Rcd at 11514, para. 9. 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 POIs. *Id.*

[19] *Order*, 27 FCC Rcd at 11518-30, paras. 18-48.

[20] *Order*, 27 FCC Rcd at 11518-23, paras. 18-30.

[21] *Order*, 27 FCC Rcd at 11518-19, paras. 21-22 (citing Stipulations at 21, para. 129). NECA Tariff Section 6.1.3(A) states "[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*." *Order*, 27 FCC Rcd at 11519, para. 22 (citing NECA Tariff § 6.1.3(A), Original Page 6-7.3 (emphasis added)).

[22] *Order*, 27 FCC Rcd at 11520, para. 23 (citing INAD Tariff § 2.5, 1st Rev. Page 62) (emphasis added).

[23] *Order*, 27 FCC Rcd at 11520-23, paras. 23-30. The Commission further explained that its construction was supported by the rules that tariffs should be construed to avoid unfair/absurd results and to advance the purpose for which the tariff was imposed. *Order*, 27 FCC Rcd at 11522, para. 29 (noting the Iowa LECs' stipulations that moving their POIs to Des Moines benefitted neither their end user customers nor IXCs and, in fact, substantially increased access charges, in contravention of the Iowa CEA arrangement's purpose (i.e., *lowering* transport costs)).

[24] *Order*, 27 FCC Rcd at 11522, paras. 28-29.

[25] *Order*, 27 FCC Rcd at 11523-24, paras. 31-34.

had changed, four of the Iowa LECs (Alpine, Clear Lake, Mutual, and Preston) failed to comply with the provision in the NECA Tariff requiring that they give "reasonable notice" of "service-affecting" activities, which encompassed changes in POIs that resulted in substantial increases in access bills.[26]

5. In the alternative, the Commission held that, if the NECA Tariff were interpreted to allow the Iowa LECs to change their POIs for the sole purpose of inflating mileage charges, the tariff is unreasonable in violation of Section 201(b).[27] The Commission explained that carriers do not have "unbounded authority" to determine POIs and that any CEA arrangement that "significantly increas[es] IXCs' operating costs without significant increases in service choices or benefits to subscribers" and IXCs would be unreasonable.[28] The Commission relied on the undisputed facts in the record establishing that the Iowa LECs' purported changes to their POIs with INS (i) were designed to, and in fact did, result in "net increases" to the LECs' billed access charges to AT&T and thereby would have "increased" the LECs' net "revenues and profits," and (ii) provided "no benefits" to end users or to AT&T.[29]

III. DISCUSSION

6. The Iowa LECs offer five reasons the Commission should reconsider its determination that they violated the NECA Tariff in contravention of Sections 203 and 201(b) of the Act. Specifically, the Iowa LECs argue that (1) INAD is the party to the INAD Tariff and did not possess the facilities to provide the services in issue;[30] (2) the POI changes did not affect service, and sufficient proof was offered that AT&T received actual and constructive notice of the POI changes;[31] (3) INAD removed the facilities leased by the Iowa LECs from their facilities leased from INICD;[32] (4) the Commission's conclusions should be applied only prospectively, and AT&T should be estopped from the recovery of damages or other retroactive relief;[33] and (5) because AT&T paid several years of invoices for switched access transport, it should be estopped from the recovery of damages or other retrospective relief.[34] We address each of these arguments in turn.[35]

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[26] *Order*, 27 FCC Rcd at 11524-26, paras. 35-38.

[27] *Order*, 27 FCC Rcd at 11528-30, paras. 44-48. Because this determination afforded AT&T all the relief it sought in Count II of its Complaint, the Commission did not reach AT&T's claims relating to "sham arrangements." *Order*, 27 FCC Rcd at 11526, para. 39.

[28] *Order*, 27 FCC Rcd at 11522, para. 29, 11528-29, para. 44 (citing *Application of Indiana Switch Access Div.*, Memorandum Opinion and Order, 1 FCC Rcd 634, 635, at para. 5 (1986) (*Indian Switch*)).

[29] *Order*, 27 FCC Rcd at 11529, para. 45 (citing Stipulations at 11, para. 71, 17, para. 100, 19, para. 120).

[30] Petition at 1-4.

[31] Petition at 4-7.

[32] Petition at 7-8.

[33] Petition at 8-10.

[34] Petition at 10-13. The Petition does not seek reconsideration of the *Order*'s finding that three of the Iowa LECs violated the NECA Tariff by charging for transport service outside their local access and transport areas (LATAs).

[35] AT&T filed its Opposition to the Iowa LECs' Petition on October 22, 2012. Opposition of AT&T Corp. to Petition for Reconsideration, File No. EB-12-MD-003 (filed Oct. 22, 2012) (Opposition). The Iowa LECs filed their Reply to AT&T's Opposition on October 29, 2012. Reply to AT&T's Opposition to Petition for Reconsideration of Memorandum Opinion and Order, File No. EB-12-MD-003 (filed Oct. 29, 2012) (Reply to Opposition).

A. The Commission Properly Concluded that the Iowa LECs Were Not Responsible for Providing Service Between Des Moines and the Traditional POIs Within the Meaning of the Tariff.

1. Because the Petition is Procedurally Defective, We Dismiss It.

7. In the *Order*, the Commission found that the NECA Tariff incorporates the INAD Tariff's definition of "Point of Interconnection," which is the "demarcation point or network interface, on an Iowa Network premises at which Iowa Network's *responsibility* for the provision of [CEA] ends."[36] The Commission then construed the term "responsibility," considering each side's arguments about that word's meaning. AT&T maintained that "responsibility" means "own[ing], control[ling], operat[ing], and maintain[ing] the facilities that are used to provide the CEA service."[37] AT&T argued that, under that construction, responsibility shifted from INS to the Iowa LECs at the traditional POIs, because INS retained ownership and control of the facilities between Des Moines and the traditional POIs, notwithstanding any leases between the Iowa LECs and INS.[38] The Iowa LECs, on the other hand, asserted that "responsibility" means "accountability" for the CEA service.[39] They claimed that, by virtue of their "leases" with INS, they acquired the means to transport the traffic and became exclusively entitled to impose transport charges for that traffic.[40] As part of their argument, the Iowa LECs spent "considerable time . . . making distinctions between two divisions of INS,"[41] asserting that one division (INAD) "removed the facilities" used to transport traffic from Des Moines to the traditional POIs from the facilities it leased from another division (INICD) and that the Iowa LECs subsequently became responsible for those facilities by virtue of their leases with INICD.[42]

8. The Commission asked "whether the Iowa LECs, as opposed to *any* part of INS, exercised 'responsibility.'"[43] In other words, for purposes of its analysis, the Commission assumed that the Iowa LECs' assertions about the internal leases were true and concluded that the Iowa LECs had proffered one "reasonable construction[] of the term 'responsibility.'"[44] Nevertheless, the Commission also found that AT&T presented an equally plausible construction of the term "responsibility."[45] The resulting ambiguity led the Commission to construe the language in the INAD Tariff and, in turn, the NECA Tariff against the Iowa LECs.[46]

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[36] *Order*, 27 FCC Rcd at 11520, para. 23 (citing INAD Tariff § 2.5, 1st Rev. Page 62) (emphasis added).

[37] *Order*, 27 FCC Rcd at 11523, para. 26.

[38] *Id.*

[39] *Order*, 27 FCC Rcd at 11520-21, para. 25.

[40] *Id.*

[41] *Order*, 27 FCC Rcd at 11521, n.96.

[42] *Id.*

[43] *Id.* The Iowa LECs stipulated that INS is a single legal entity. Stipulations at 6, para. 37.

[44] *Order*, 27 FCC Rcd at 11521-22, para. 27.

[45] *Id.*

[46] *Id.* It is undisputed that the Iowa LECs "utilize [the] NECA Tariff . . . for their switched access services" and that they billed AT&T for those services pursuant to the tariff. Stipulations at 3-4, paras. 14, 19, at 18-19, paras. 111-13, 119. Yet the Iowa LECs now suggest that, because they are "merely concurring parties to the tariff's language," the Commission should not have construed the NECA Tariff against them. Reply to Opposition at 1. This argument is (continued…)

9. Although the *Order* squarely considered and rejected the Iowa LECs' argument about the significance of INS's internal divisions,[47] the Iowa LECs advance it a second time in their Petition, asserting that the relationship between the INS divisions was "highly relevant" and that the *Order*'s "refusal to address" the issue resulted in an "internal inconsistency."[48] We dismiss this aspect of the Petition because it is "settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected."[49]

2. On Alternative and Independent Grounds, We Deny the Petition Because It Lacks Merit.

10. As an alternative and independent basis for our decision, we deny the argument on the merits because it is based on a mischaracterization of the *Order*. The Iowa LECs contend that the Commission "apparently" agreed that "INAD (by virtue of its lease of the facilities for transport from INICD) obtained 'responsibility' for the transport of the traffic under the CEA relationship" and that the Iowa LECs subsequently assumed that responsibility by virtue of their leases with INICD.[50] According to the Iowa LECs, it is "inconsistent" for the Commission to conclude that "responsibility . . . can be conferred from INICD to INAD by virtue of a lease, but to reject this proposition . . . when the same type of leasing arrangement is utilized and only the identity of the lessee is changed from INAD to [the Iowa LECs]."[51] To the extent the Iowa LECs believe the Commission reached conclusions about the relative "responsibility" between INAD and INICD under leases, however, they are mistaken. The record contained no evidence regarding the substance of leases between INAD and INICD, and the Commission made no findings about those leases.

11. The Iowa LECs further argue that, when faced with an ambiguity, the Commission

(Continued from previous page)

unconvincing. The NECA Tariff lists all five Iowa LECs as "issuing carriers," which the Commission's rules define as "a carrier subject to the Act that publishes and files a tariff or tariffs with the Commission." 47 C.F.R. § 61.3(u).

[47] *Order*, 27 FCC Rcd at 11521, n.96.

[48] Petition at 1-4 (citing *Order* paras. 23 and 27 and n.96). The Iowa LECs contend that the first sentence of paragraph 27 of the *Order* is a conclusion that constitutes material error. But that sentence is merely a recitation of AT&T's argument, not a conclusion of the Commission.

[49] *Qwest Communications Company, LLC v. Northern Valley Communications, LLC*, Order on Reconsideration, 26 FCC Rcd 14520, 14522, para. 5 (2011) (citing *S&L Teen Hosp. Shuttle*, Order on Reconsideration, 17 FCC Rcd 7899, 7900, para. 3 (2002) (citations omitted)). *Cf.* 47 C.F.R. § 1.106(p)(3) (a Bureau may dismiss or deny a petition for reconsideration of a Commission action that "plainly do[es] not warrant consideration by the Commission," including petitions that "[r]ely on arguments that have been fully considered and rejected by the Commission within the same proceeding").

[50] Petition at 2. Specifically, the Iowa LECs rely upon footnote 19 of the *Order*, which cited the parties' stipulation that INAD "leases digital switching, fiber optic transmission capacity, and certain related services from INICD to provide CEA service." *Order*, 27 FCC Rcd at 11513, n.19 (citing Stipulations at 6, para. 37). The Iowa LECs maintain that the stipulation contains an "inference" (which the Commission purportedly "acknowledged" by citing to it) that "INAD had responsibility under the [INAD] [T]ariff for the transport of CEA traffic." Reply to Opposition at 2-3. The Iowa LECs further contend that, because the *Order* cited the definition of POI in the INAD Tariff, the Commission "has, either expressly or implicitly . . . recognized that the lease between INAD and INICD conferred 'responsibility' under the tariff to INAD for the transport of CEA traffic." Reply to Opposition at 3.

[51] Petition at 3.

should have considered extrinsic evidence "to aid in tariff interpretation."[52] To begin, they cite a letter from INS indicating that the Iowa LECs "provide and determine how to provide transport"[53] and a letter from NECA stating that the Iowa LECs "possess authority to reconfigure their networks and provide transport."[54] Neither of these letters, however, addresses the precise question at hand—i.e., the appropriate construction of the word "responsibility" as it is used in the NECA Tariff. Rather, the letters express opinions about the Iowa LECs' "rights" under the NECA Tariff based upon provisions of the tariff that the Commission held are not relevant to determining the locations of the POIs.[55] Next, the Iowa LECs highlight decisions by the Iowa Utilities Board and the Iowa Supreme Court that "conferred upon [the Iowa LECs] the right to designate the POI and to provide transport capacity."[56] Yet those decisions similarly do not discuss the meaning of the term "responsibility" in the NECA Tariff, which the Commission held determines the POI location. Finally, the Iowa LECs rely upon the "uncontroverted testimony of Robert Sherlock regarding 'responsibility' for delivery of the CEA traffic."[57] Although Mr. Sherlock's testimony is consistent with the Iowa LECs' construction of the term "responsibility," it does nothing to undercut AT&T's equally plausible construction of the term. Indeed, Mr. Sherlock acknowledged that the leases between the Iowa LECs and INS were "paper changes" that effected "no change with respect to INS's control of the traffic" and that the "network is still maintained by INS personnel."[58] We thus conclude that none of these arguments provide a basis for reconsidering the *Order*.

B. The Commission Properly Determined that the POI Changes Constituted "Service-Affecting Activities" Under the NECA Tariff and that, with the Exception of Winnebago, the Iowa LECs Did Not Provide Reasonable Notice of the Changes as Required by the NECA Tariff.

12. In the *Order*, the Commission found that all but one of the Iowa LECs violated the NECA Tariff's requirement that they provide customers with "reasonable notification of service-affecting

[52] Reply to Opposition at 2.

[53] Reply to Opposition at 2 (citing Defendants' Answer to Formal Complaint of AT&T Corp, File No. EB-12-MD-003 (filed May 3, 2012) (Answer), Exhibit E). With the exception of Alpine, the Iowa LECs were among the carriers that formed INS, and they remain INS shareholders. *Order*, 27 FCC Rcd at 11513, para. 6.

[54] Reply to Opposition at 2 (citing Answer, Exhibit DD).

[55] *See* Answer, Exhibit E (citing the first sentence of NECA Tariff § 6.1.3(A)); *Order*, 27 FCC Rcd at 11519, para. 22 (holding that the first sentence of NECA Tariff § 6.1.3(A) is inapplicable because INS is a "non telephone company" provider of CEA); Answer, Exhibit DD (citing NECA Tariff § 6.8.3); *Order*, 27 FCC Rcd at 11519, n.82 (holding that NECA Tariff § 6.8.3 "describes only the call path and not the designation of the POI"). Although the Commission discussed section 2.1.9 of the NECA Tariff (*see* Answer, Exhibit DD (citing NECA Tariff § 2.1.9)), it was not in the *Order*'s analysis of how the POI is established. Rather, it was in the *Order*'s discussion of whether the Iowa LECs provided adequate notice of the POI changes, assuming they had in fact changed their POIs. *See Order*, 27 FCC Rcd at 11524-25, paras. 35-38 (holding that, with the exception of Winnebago, the Iowa LECs violated NECA Tariff § 2.1.9 by not providing reasonable notice of purported POI changes).

[56] Reply to Opposition at 2 (citing Answer, Exhibits P and Q, and Complaint, Exhibit 11).

[57] Petition at 3-4. *See* Reply to Opposition at 4-5.

[58] Stipulations at 15-16, paras. 92, 93. *Cf.* Stipulations at 16, para. 95 ("INS remained responsible for the maintenance and operation of the leased facilities."), para. 96 ("Plaintiffs' representatives acknowledged that INS still 'runs the show' with respect to the facilities leased to Plaintiffs."), para. 98 ("Plaintiffs' representatives testified that they had no knowledge about what happened to the traffic while it was on the INS facilities subject to the lease other than it reached the desired destinations."), 17, para. 99 ("Plaintiffs depended on INS to ensure that the traffic was delivered between Des Moines and the Plaintiffs' prior designated POIs.").

activities."[59] In particular, the *Order* highlighted the NECA Tariff's language identifying "rearrangements" as an example of a "service-affecting activity," noted the Iowa LECs' characterization of a POI as the "location where the facilities of INAD meet the facilities of the LEC," and explained that a "change in that location—especially when accompanied by a significant increase in mileage charges" is equivalent to a "rearrangement."[60] The *Order* went on to find that Winnebago alone provided AT&T with actual notice of the POI change,[61] and it rejected the Iowa LECs' assertions that AT&T otherwise received constructive notice of the POI changes.[62]

13. The Iowa LECs challenge the *Order*'s conclusion that the change of POIs is a "service-affecting activity."[63] Although they acknowledge that POI changes "may, arguably, be classified as a 'rearrangement,'" the Iowa LECs assert that the *Order* did "not provide any rationale for the conclusion . . . that this activity 'affected service.'"[64] This assertion is baseless. The Commission explained how this particular rearrangement – which was intended to, and in fact did, drastically increase the amount of mileage for which the Iowa LECs would bill transport – affected the service AT&T received.[65]

14. The Iowa LECs further claim that the Commission "failed to address" a purported "inconsistency" between this conclusion and AT&T's argument that the change of POIs "had no effect" upon the transport of AT&T's traffic.[66] There is no inconsistency, however. The argument AT&T made in its Complaint is that the "leases" between INS and the Iowa LECs did not bring about a true change of responsibility for handling the traffic.[67] In the portion of the *Order* dealing with the notice issue, the Commission *assumed* that the Iowa LECs changed their POIs,[68] and examined whether the POI changes affected the Switched Access Service AT&T received under the NECA Tariff. As explained above, the Commission found that the service was altered as a result of the POI changes (assuming there was a change), because the Iowa LECs significantly increased the number of miles (an additional 79 to 135

[59] *Order*, 27 FCC Rcd at 11524-26, paras. 35-38 (citing Complaint Ex. 6, NECA Tariff No. 5, § 2.1.9).

[60] *Order*, 27 FCC Rcd at 11524-25, para. 36.

[61] *Order*, 27 FCC Rcd at 11525, para. 37.

[62] *Order*, 27 FCC Rcd at 11525-26, para. 38.

[63] Petition at 5; Reply to Opposition at 6.

[64] Petition at 5. *See also* Reply to Opposition at 6 ("The Commission's Order fails to address [the Iowa LECs'] contentions, instead assuming that because the POI changes were a rearrangement, they must affect service.").

[65] *See* paragraph 12.

[66] Petition at 5 (citing unspecified portions of the Complaint); Reply to Opposition at 6 (citing Answer at 7-8, para. 13, at 19-20, para. 63, at 40, para. 122).

[67] *See* Complaint at 37, para. 95 ("Although the Iowa LECs claim to have oral or written agreements with INS that, according to them, are 'leases' of the INS facilities, it is clear that those arrangements were, as INS has admitted, merely 'paper changes' that had no effect on INS's responsibility or control over its fiber ring facilities"); 65, para. 153 ("the so called 'lease' arrangements between INS and each Iowa LEC had little or no economic substance, *cf. Total II*, 317 F.3d at 233, and had no effect whatsoever on the actual operation of the network facilities."). The fact that the leases had no effect on the transport of AT&T's traffic only highlights the unreasonableness of the Iowa LECs' scheme.

[68] *Order*, 27 FCC Rcd at 11528-26, para. 38 ("Thus, even if the Iowa LECs changed their POIs, those changes were done in violation of the NECA Tariff . . . .").

miles) for which they imposed transport charges.[69]

15. Next, the Iowa LECs argue that the Commission erroneously disregarded expert witness affidavits and reports purportedly showing that AT&T received "constructive and/or actual notice" of POI changes through "adjustments made to the Local Exchange Routing Guide [LERG] . . . and to NECA Tariff FCC No. 4."[70] As the *Order* explained, the Iowa LECs did not pinpoint the portions of the LERG or the NECA Tariff they contend support their assertions, in violation of the Commission's rules requiring parties to plead all facts in support of their claims and defenses fully and with specificity.[71] The Iowa LECs nonetheless argue that Federal Rule of Evidence 703 relieved them of the obligation to proffer information regarding the facts upon which their experts relied.[72] The Commission's formal complaint rules, rather than Rule 703, apply here, however.[73] The Iowa LECs have never identified the portions of the NECA Tariff (which is thousands of pages long and frequently updated),[74] or the LERG (which is similarly voluminous) they contend constituted "reasonable notification of [a] service-affecting activit[y],"[75] as required by the Commission's formal complaint rules.[76]

[69] *Order*, 27 FCC Rcd at 11524-25, para. 36.

[70] Petition at 5; Reply to Opposition at 6-7.

[71] *Order*, 27 FCC Rcd at 11525-26, para. 38, n.40. Contrary to the Iowa LECs' assertion, the Commission's formal complaint rules relate to "substantive evidence," Reply to Opposition at 7, because they require parties to file "fact based" pleadings. *See 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, 22529, para. 70 (1997) (*Formal Complaints Order*) ("The Commission's rules have always required fact-based pleadings. That is, all complaints, answers and related pleadings are required to contain complete statements of fact, supported by relevant documentation and affidavits."). Rule 1.720(h) applies to tariffs in particular. *See* 47 C.F.R. § 1.720(h) ("Specific reference shall be made to any tariff provisions relied on in support of a claim or defense. Copies of relevant tariffs or relevant portions of tariff that are referred to or relied upon in a complaint, answer, or other pleading shall be appended to such complaint, answer, or other pleading.").

[72] Petition at 6 (citing Fed. R. Evid. 703) ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted . . . .").

[73] Although the Commission consulted the Federal Rules of Civil Procedure for guidance when revising its formal complaint rules, that guidance "was limited by the many differences between federal court proceedings and Commission proceedings." *Formal Complaints Order*, 12 FCC Rcd at 22535, para. 85. The Commission has broad statutory authority to "conduct its proceedings in such manner as will be conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 4(j). *See also* 47 U.S.C. § 4(i) ("The Commission may . . . make such rules and regulations . . . as may be necessary in the execution of its functions).

[74] Opposition at 12, n.13.

[75] Reply and Reply Legal Analysis of AT&T Corp., File No. EB-12-MD-003 (filed May 10, 2012) at 24. Nor have the Iowa LECs shown when they purportedly changed the NECA Tariff and LERG and linked those changes to the timing of the POI changes. Although the NECA Tariff does not require a "specific advance notification period," in order to constitute notice, the Iowa LECs must have alerted AT&T *in advance* of the POI changes. *See* Complaint, Exhibit 6, NECA Tariff, § 2.1.9 ("The Telephone Company will work cooperatively with the customer to determine reasonable notification requirements.").

16. Finally, the Iowa LECs object to the Commission's failure to "accept the allegation of Preston's representative that he provided AT&T with a letter informing it of the POI change," given that AT&T "never claimed that it did not receive the letter."[77] The Commission, the Iowa LECs argue, "should have required satisfactory evidence from AT&T (i.e., an affidavit) that it did not possess the letter before concluding that there was a lack of evidence supporting the assertion."[78] As explained in the *Order*, however, the Commission declined to credit Mr. Kilburg's testimony that he specifically recalled sending a letter to each IXC eight years earlier without any documentary evidence to support his recollection.[79] The Commission was well within its discretion "to refuse to accord evidentiary value to a witness' uncontradicted testimony where such testimony was found to be inherently improbable . . . ."[80]

C. The *Order* Accurately Stated that AT&T Was Billed Twice for Transport.

17. The Iowa LECs object to the *Order* "to the degree that [it] can be read to infer that AT&T was 'double-billed' for transport."[81] The phrase "double-billed" appears nowhere in the *Order*. The *Order* does note that AT&T is being billed for transport both by INS (at a flat rate) and by the Iowa LECs (at a mileage-based rate). Those statements reflect, nearly verbatim, the parties' stipulations and are in no way inaccurate.[82]

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[76] Even assuming that Rule 703 somehow applied here, that Rule still requires identification of the "facts or data in the case" on which the Iowa LECs' expert bases his opinion. *See* Fed. R. Evid. 703. Thus, the Iowa LECs have not demonstrated that they even satisfied that standard (if it had applied).

[77] Petition at 6-7.

[78] *Id*.

[79] *Order*, 27 FCC Rcd at 11525, para. 37. Neither Preston nor AT&T produced a copy of the purported Preston form notice letter. Stipulations at 10, paras. 65, 66. Rather, Preston relied exclusively upon deposition testimony of Mr. Kilburg, who testified regarding his general understanding of the process that he believed would have occurred to notify IXCs that Preston's POI had changed. *See* Answer, Exhibit U, Deposition of Roger Kilburg at 42-43. Unlike the specific evidence supporting Winnebago's assertion that it provided advance notice to AT&T in a billing insert about its change and when it would be effective, Mr. Kilburg did not testify about any of the specifics of Preston's purported notice letter, including when and how it was sent, whether it was in advance of any change, and whether Preston worked cooperatively with AT&T regarding notice of the POI change. In the absence of any documentary evidence supporting such details, the Commission declined to credit Mr. Kilburg's purportedly detailed recollection about mailing a letter to each IXC more than eight years ago. Nor did the Commission misapply the burden of proof, as the Iowa LECs contend. *See* Petition at 7. As the carrier attempting to enforce the terms of its tariff in the underlying litigation, Preston, not AT&T, bears the burden of proving that it complied with its tariff. *See, e.g.*, *Hi-Tech Furnace Systems, Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) (affirming the Commission's decision to impose the burden of proof on the complainant).

[80] *In re Applications of Henderson Broad. Co.*, Decision, 63 F.C.C.2d 149, 423 (1977). *See also Application of Albert E. Gary Killington Broad.*, Memorandum Opinion and Order, 5 FCC Rcd 6235, 6236 (1990) ("[p]robative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds").

[81] Petition at 7 (citing *Order*, para. 20 & n.108).

[82] Stipulations at 17, para. 101 ("INS continues to bill AT&T its flat, distance-insensitive charge, which covers transport to any point on the INS ring, regardless of distance."); at 9, para. 60 (listing the dates on which each of the Iowa LECs "began billing AT&T mileage-based transport charges"); at 22, para. 142 (discussing the Iowa LECs' switched access invoices to AT&T, which included transport service charges between Des Moines and the Iowa LECs' local switches). The *Order* also noted the parties' stipulation that the INS rate excluded the facilities INICD (continued…)

D. The Iowa LECs' Remaining Assertions Pertain to Damages and Can Be Addressed in Connection with Any Damages Complaint AT&T Files.

18. The Petition argues that AT&T should be "estopped from the recovery of damages or other retrospective relief."[83] According to the Iowa LECs, it was "material error for the Commission to conclude that an award of damages to AT&T was justified and appropriate" because they proffered a "reasonable" interpretation of the NECA Tariff and, accordingly, were not on "fair notice" that their actions were inconsistent with their tariff.[84] The Iowa LECs further contend that AT&T was aware of the increase in transport charges resulting from the Iowa LECs' POI changes and yet "never advised [the Iowa LECs] of any objection to the increase . . . ."[85] In their view, it was "inappropriate for the Commission to conclude that an award of damages to AT&T was justified and appropriate" because AT&T's "actions and inactions establish the elements of equitable estoppel."[86]

19. Nowhere in the *Order* did the Commission conclude that AT&T is entitled to an award of damages. The *Order* ruled in AT&T's favor on issues of liability, noted that AT&T had requested damages to be determined in a separate proceeding, and stated that AT&T "may file with the Commission a supplemental complaint for damages in accordance with 47 C.F.R. § 1.722(e)."[87] In response to any supplemental complaint for damages that AT&T files,[88] the Iowa LECs will have ample opportunity to present and substantiate their estoppel defenses.[89] After considering those and any other defenses, the Commission will decide whether AT&T is entitled to an award of damages.

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 203, 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 208, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Defendants' Petition for Reconsideration of Memorandum Opinion and Order is DISMISSED.

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leased to the Iowa LECs and that INS has not quantified any reduction in the rates IXCs pay as a result. *Order*, 27 FCC Rcd at 11516, n.54. *See* Stipulations at 18, para. 109.

[83] Petition at 8, 10-11. *See also* Reply to Opposition at 7-8.

[84] Petition at 8-10 (citing *Order*, n.2 and paras. 39-45); Reply to Opposition at 9.

[85] Petition at 10-12 (citing *Order*, paras. 11, 15, 37).

[86] Petition at 12-13.

[87] *Order*, 27 FCC Rcd at 11511, para. 1 & n.2.

[88] The Commission recently granted the parties' joint motion to extend the time period in which AT&T can file a supplemental complaint for damages to 90 days following the Commission's order resolving the Iowa LECs' Petition. *See* Consent Motion of AT&T Corp. to Extend the Time to File a Supplemental Complaint Regarding Damages, File No. EB-12-MD-003 (filed Oct. 22, 2012), and Letter from Rosemary H. McEnery, FCC, to Counsel for the Parties, File No. EB-12-MD-003 (filed Oct. 25, 2012).

[89] *See* 47 C.F.R. § 1.724(e).

21. It is FURTHER ORDERED, pursuant to sections 1, 4(i), 4(j), 201, 203, 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, 203, 208, and 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that, as an alternative and independent holding, the Defendants' Petition for Reconsideration of Memorandum Opinion and Order is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary