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FCC Acts On An Allegation Of LEC Self-Stimulation

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Recently, the FCC released an Order (*Order*) and Notice of Proposed Rulemaking (*NPRM*) regarding the on-going battle over alleged “access stimulation” or “traffic pumping” schemes by certain local exchange carriers (LECs), and complaints by their interexchange carrier (IXC) access customers that such schemes lead to improper LEC over-earnings. A number of LECs have engaged in this practice, and it is our understanding that there are a number of complaints regarding the practice pending at the FCC.

In the *Order*, the FCC addressed a complaint filed by Qwest against Farmers and Merchants Mutual Telephone Co. (FMMT) in Iowa. FMMT had entered into agreements with call conferencing companies to place a conference bridge at the FMMT switch, and pay compensation to the conference calling companies in return for their sending conference call interexchange traffic to FMMT, which traffic FMMT would “terminate” and then bill access charges to the IXC that brought the traffic to FMMT. While FMMT calls this arrangement legitimate, Qwest calls it traffic pumping, since the amount of traffic greatly exceeded the historical traffic patterns used to calculate FMMT’s access rates, leading to extraordinarily large earnings by FMMT. FMMT made things look worse by leaving NECA’s Traffic Sensitive access pool and filing their own tariffed rates just before entering into the agreements with the conference calling companies. Once Qwest saw what was happening, they reacted by engaging in self-help (refusing to pay for the access charges) and filing a complaint with the FCC. The FCC ruled as follows:

- FMMT earned an unlawful rate of return (though the Order does not say what that return was).
- Nevertheless, Qwest is not entitled to damages resulting from FMMT’s overearnings, because the FMMT tariff was “deemed lawful” under Section 204 of the Act, once it went into effect without initial suspension and investigation.

- FMMT’s use of historical data to set tariff rates, in light of its future plans to increase traffic, did *not* constitute the “improper accounting techniques” that would negate the deemed lawful status, even though the Commission states that such an approach constituted a “manipulation of the rules” to “achieve a result unintended by the rules.” The Commission warns in footnote 97 of the Order, though, that it may rule differently in future cases on this. It seems like the Commission is conceding that the rules as currently and ambiguously drafted allow this, but that such ambiguity may be eliminated by this *Order* (as well as by proposed rule changes in the *NPRM* attached to the *Order*).
- It is not a violation of Section 203 or 201 of the Communications Act for a LEC to charge terminating access on conference call traffic. Qwest tried to argue that in this situation, the ILEC is not terminating the traffic, but merely transporting it to the other participants on the conference bridge, and thus cannot charge terminating access. The Commission rejected this approach, finding that the calls terminate at the conference bridge located at the ILEC’s switch, and that all conference call participants are calling into and terminating at the bridge.
- The Commission refused to find that Qwest’s self-help (refusal to pay) is an unlawful violation of the Act. This is very surprising – the Commission has stated in a number of cases in the past that this sort of self-help is unlawful, though they have refused to be the forum in which carrier service providers can seek remuneration from their carrier customers. In any case, in order for FMMT to recover the unpaid access charges, it will have to sue Qwest in court.

Having essentially given FMMT a pass on a retrospective basis, the Commission then balanced the scales a bit on a prospective basis by issuing an *NPRM* which tentatively concludes that tariffing rules should be changed to eliminate this sort of access stimulation practice. The primary findings and proposals are as follows:

1. *Payments for Access Stimulation, and Recovering the Costs of Such Payments.*

The Commission tentatively concludes that an ILEC that includes the cost of compensation it pays to the access stimulation/conference call company in its revenue requirement, or directly provides the stimulating activity and bundles those costs with access, is engaging in an unreasonable practice that violates section 201(b) and the prudent expenditure standard. The Commission nevertheless asks for comments on the lawfulness of the practice from a number of different angles.

2. *Proposed Tariff Language Requiring Revised Rates if Demand “Significantly” Increases.* In light of the fact that the “deemed lawful” provisions of Section 204 protect a carrier once its tariff goes into effect without suspension, even after large increases in

demand for service undercut the possible “reasonableness” of the rates, the Commission tentatively concludes that it should have the opportunity to review the relationship between rates and average costs through the filing of a revised tariff when a section 61.38 or 61.39 carrier experiences “significant” increases in traffic, in order to ensure that just and reasonable rates are maintained. The *NPRM* also invites comments on what an appropriate growth rate would be to trigger a carrier’s having to make a new tariff filing and over what period the growth should be measured.

3. *FCC Forbearance From Enforcing the “Deemed Lawful” Provisions of Section 204.* Under section 10 of the Act, the Commission can forbear from applying “any regulation or any provision of this Act to a telecommunications carrier.” In light of the possible difficulty of determining whether access rates are just and reasonable when demand radically increases, the *NPRM* seeks comments as to whether it would be appropriate for the Commission, on its own motion, to forbear from enforcing the deemed lawful provision of the Act for the remainder of the two-year tariff period if a mid-course tariff filing is triggered by a “sufficient increase in demand.” This proposal raises significant questions as to whether the Commission can use its section 10 forbearance authority in a manner that would appear to *increase* regulation of carriers, rather than in the *deregulatory* manner that section 10 appears to mandate.

The FCC’s proposals may significantly impact the profits and practices of both LECs and IXC’s, and we will keep you up to date as the Commission moves forward in this proceeding.