IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

FILED
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SOUTHERN DISTRICT OF IOWA

IOWA NETWORK SERVICES, INC., Plaintiff, vs. QWEST CORPORATION, Defendant.	**No. 4:02-cv-40156** **RULING ON MOTION TO DISMISS**

This matter comes before the Court on Defendant's Motion to Dismiss. The case relates to circumstances arising under the Telecommunications Act of 1996 and the situation in which Qwest delivers to the INS network wireless phone calls originated by customers of third-party CMRS carriers[1] who are calling subscribers of independent local exchange carriers, and whose calls originate and terminate in the same MTA.[2]

FACTUAL BACKGROUND

Due to the largely rural nature of the state, telecommunications service in much of Iowa has historically been provided by small independently owned companies located in and serving small designated geographical areas. Over the years, the number of

[1] In the telecommunications industry, wireless carriers are called Commercial Mobile Radio Service or "CMRS" providers who essentially offer one-way or two-way radio communication services between land stations and mobile receivers. See 47 C.F.R. § 20.3.

[2] In the field of wireless telecommunications, the major trading area (MTA) is the local calling area for wireless telecommunication providers. See 47 C.F.R. § 51.701(b)(2), with MTAs determined pursuant to 47 C.F.R. § 24.202.

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these small companies grew to over 125. These phone companies provided local telephone services, called "telephone exchange service", within a defined geographic area known as the local exchange. Providing such services made these local phone companies "local exchange carrier[s]" (LECs). See 47 U.S.C. § 153(26) (defining "LEC" as any person that is engaged in the provision of telephone exchange service or exchange access). Many, if not all, of these Iowa LECs were independently owned, and are all collectively referred to as Indy-LECs.

Defendant Qwest, which provides local telephone services to customers throughout a fourteen-state area, is also an LEC (not independently owned, thus an LEC rather than an Indy-LEC).[3] Though differing greatly in size, Qwest as an LEC and the Indy-LECs provide identical services.

Both LECs and Indy-LECs typically owned the wires, computer switches, and other facilities necessary to provide telecommunications service to its subscribing customers. Access services or exchange services were available for purchase to competing carriers, thereby allowing purchasers to send or receive calls from a subscriber of an Indy-LEC/LEC over the facilities owned and maintained by the Indy-LEC/LEC. The major benefit of purchasing access was that, without having to build facilities throughout an area served by a particular Indy-LEC/LEC, one could reach specific phone customers by purchasing access to the Indy-LEC/LEC circuits.

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[3] Qwest also provides long-distance telephone services, although this distinction is not at issue in this case.

In 1987, most of the then existing Indy-LECs in Iowa joined together to form the Plaintiff, Iowa Network Services (INS). The major benefit of INS' formation was that calls placed to or from a customer served by one of the companies forming INS now could utilize INS' network to reach whichever Indy-LEC the customer subscribed to through INS' one centralized network. As was customary, INS charged access fees to use its network, fees set forth in tariffs on file with the Federal Communications Commission (FCC), which governed INS' interstate services, and tariffs filed with the Iowa Utilities Board (IUB), governing the intrastate services INS provided.

As long as telephone calls were placed from traditional land-based wire connected phones, the system of ordering access to the INS network detailed above worked well. Technology had an impact on the development and popularity of wireless cellular phones, however, and as the popularity of wireless phones grew, so too did ambiguities surrounding the access services and charges associated with accessing the INS network.

In the field of wireless telecommunications in Iowa, the MTA for wireless telecommunications is called the Des Moines MTA and encompasses nearly all of the State of Iowa. "IntraMTA" wireless traffic originates and terminates in the same MTA. "InterMTA" wireless traffic originates in one MTA and terminates in another.

Traditionally, when a call begins at a third-party wireless caller's phone, the call is connected by radio signal to the wireless service provider. The call then travels over

the wireless carrier's network until it interconnects with Qwest's network/facilities. Qwest then transports the call on its network to a point of interconnection with INS, with INS carrying the call over its network to a point of interconnection with the Indy-LEC network serving the person being called.

Between the late 1980s through 1999, and pursuant either to relevant INS intra-state tariffs filed with the IUB or relevant INS interstate tariffs on file with the FCC, Qwest paid the tariffed rates for taking the wireless-originated calls from non-Qwest customers and delivering them to the Indy-LECs via the INS network. Then, in 1996, something of a revolution in the telecommunications industry occurred with the passage of the Telecommunications Act of 1996.[4]

Congress enacted the Telecommunications Act of 1996 (the Act) in February 1996, greatly amending the Communications Act of 1934. The MO Mun. League v. FCC, 2002 U.S. App. Lexis 16382, *3 (8th Cir. Aug, 14, 2002) (referring to 47 U.S.C.A. §§ 151-615 (West 2001)). Prior to the Act, when a new company entered a geographic area, it routinely had to compete with an established LEC for customers in that particular service area. The Act was intended to jump-start competition in the market for local telephone service. See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999). To break down barriers to competition in the local phone market, the Act established interconnection agreements, requiring incumbent local exchange

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[4] See 47 U.S.C. §§ 151-615 (2001).

carriers (ILECs)[5] to agree, upon request, to provide interconnection to a competing carrier pursuant to the interconnection agreement approved by a state public utility commission rather than pursuant to a tariff. See 47 U.S.C. §§ 251 (c)(1) and 252. In this way, the goal of fostering competition is furthered by allowing carriers to compete with ILECs by utilizing the ILEC telecommunications networks, rather than forcing the competing carriers to build their own networks before serving a given area.

The Act "is a unique hybrid of statutory and common law that divides decision making authority between the Federal Communications Commision (FCC), State commissions, and private parties". Southwestern Bell Tel. Co. v. Connect Comm'n. Corp., et al., 72 F. Supp.2d 1043, 1044 (E.D. Ark. 1999), rev'd on other grounds, 225 F.3d 942 (8th Cir. 2000). In Iowa this structure governs the telecommunications companies doing business in the state. The FCC regulates interstate telephone service, while the IUB oversees intrastate service. Compare 47 U.S.C. § 152 (2002) (defining FCC's jurisdiction); see also 47 U.S.C. §§ 201-205 (indicating that the FCC has jurisdiction over interstate communication), with 47 U.S.C. § 253 (b) (relating to State regulatory authority and discussing that nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service ... and

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[5] See 47 U.S.C. § 251 (h)(1) (defining an incumbent local exchange carrier to mean with respect to a given area, the local exchange carrier that "on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in that area ...").

ensure the continued quality of telecommunications services ... .); see also 47 U.S.C. § 261 (b)-(c) (indicating Congressional intent with respect to existing and additional state requirements that "nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services ... as long as the State's requirements are not inconsistent with this part or the [FCC's] regulations ... .").

Pursuant to this regulatory structure, INS, as a common carrier [of telephone services] must file tariffs with the FCC, setting forth a schedule of charges for the various interstate services INS provides. See 47 U.S.C. § 203. For services provided in the state of Iowa, the Iowa Utilities Board regulates the telecommunications industry and other public utilities through tariffs, or regulations of utility rates and services. See Teleconnect Co. v. U.S. WEST Comm'n. Inc., 508 N.W.2d 644, 646 (Iowa 1993). Every public utility [doing business in Iowa] must "file with the board tariffs showing the rates and charges for its public utility services" under this regulatory scheme, and every public utility "shall keep copies of its tariffs open to public inspection under such rules as the board may prescribe". Id. (citing to Iowa Code Ann. § 476.4 (West 1999)). The utilities board has been delegated the authority to "regulate the rates and services of public utilities". Iowa Code Ann. § 476.1 (West 1999). Based on this structure, the Iowa Legislature implemented various rules and definitions found in the Iowa Administrative Code to guide the Iowa Utilities Board in regulating the telecommunications industry in Iowa. See Iowa Admin. Code 199-38.1 (1).

Due to the complexity of the Act, the FCC created an order directing the implementation the Act, and in that order, the FCC specifically addressed the billing of calls that a wireless carrier delivers to an LEC for termination, where the call both originates and terminates in a geographic area, the MTA. See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Interconnection between Local Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC. Rcd 15499 ¶¶ 1035-1045 (1996) [hereinafter "FCC 1996 Local Competition Order"]. In the FCC 1996 Local Competition Order, the FCC specifically found that traffic between an LEC and a CMRS provider that at the beginning of the call originates and terminates within the same MTA is local traffic, not subject to access charges. See id. at ¶ 1036.

Despite the FCC's stated position in its 1996 Local Competition Order, up until April 1999, Qwest continued to pay access charges to INS for its ability to deliver phone calls originated by third-party wireless phone subscribers who at the time the call originated and terminated were in the same MTA. In early 1999, Qwest stopped paying these access charges to INS for the intraMTA wireless traffic of third parties Qwest delivered to the Indy-LECs via the INS network. Qwest based its decision on the FCC's determination that traffic between an LEC and a CMRS provider that at the beginning of the call originates and terminates within the same Major Trading Area is

local traffic, not subject to access charges.[6] See FCC 1996 Local Competition Order at ¶ 1036.

Procedural Background[7]

Prior to commencing this action in federal court, the same parties, along with others, were involved in administrative proceedings before the IUB. On March 27, 2002, INS filed this "collection action" against Qwest claiming Qwest breached its payment obligation owed to INS for various telecommunication services. In its complaint, INS alleges three counts against Qwest: (1) failure to pay for telecommunications services under federal tariffs; (2) failure to pay for telecommunications services under state tariffs; and (3) an unjust enrichment claim.

Partially based on the prior IUB proceeding, on May 9, 2002, Qwest filed its motion to dismiss INS' complaint asserting, "to the extent [that] the complaint seeks recovery of charges relating to the carriage of intraMTA wireless telecommunications traffic, it is barred by the Iowa law of claim preclusion". See Qwest's Motion to Dismiss, ¶ 1. Additionally, Qwest offers two alternative reasons to justify dismissing this case: First, pursuant to 47 U.S.C. §§ 251 (c)(1) & 252 (b), INS must negotiate with the third party CMRS whose traffic Qwest sends to INS and pursue arbitration by the IUB if necessary before seeking relief in this court, and, second, INS, by seeking to

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[6] During oral argument on the motion, counsel for Qwest explained that the delay resulted from initial attempts to negotiate a resolution to this dispute.

[7] Further procedure facts are set forth in the discussion of the IUB actions below.

impose access charges on Qwest, challenges the FCC 1996 Local Competition Order indicating access charges do not apply to the local traffic at issue, a challenge which, under the Hobbs Act, only the Court of Appeals can entertain. See 28 U.S.C. § 2342. Finally, Qwest argues that INS cannot recover access charges under unjust enrichment, and, for these reasons collectively, the INS complaint in its entirety should be dismissed.

In contrast, INS' arguments in resisting Qwest's motion to dismiss are based on four major points. First, quite simply, INS says res judicata is inapplicable under the facts in this case. To support this position, INS offers two reasons: First, state utility commissions cannot adjudicate rights arising under FCC tariffs, and, second, under Iowa statutes, the IUB is unauthorized to decide collection actions.

INS' second major point in resisting Qwest's motion is that this Court does have jurisdiction to hear this case because negotiation and arbitration are not prerequisites to INS bringing this suit, and, furthermore, INS is not challenging a prior FCC ruling but instead is only interpreting the rule differently. INS' third point raised in resistance is that this Court must apply a "deemed lawful tariff" to the traffic at issue, and to not do so is essentially a challenge to the tariff, which again, can only be entertained by the Court of Appeals. See 28 U.S.C. § 2342. Finally, INS reiterates that "Qwest's receipt of services from INS without payment is unjust enrichment".

On July 8, 2002, a hearing was held on Qwest's motion to dismiss. At this hearing, Sean Murphy, Lawrence McLellan, and James Troup appeared on behalf of Plaintiff INS, and David Sather and Alex M. Duarte appeared on behalf of Defendant Qwest. For the reasons set forth below, this Court holds that claim preclusion, or res judicata, does bar INS from maintaining this current suit. Accordingly, pursuant to Fed. R. Civ. P. 12(b)(6), the Court grants Defendant Qwest's motion to dismiss.[8]

THE APPLICABLE LAW

The binding effect of a former adjudication, often generically termed res judicata, comes in one of two forms. Anderberg-Lund Printing Co. v. Anderberg-Lund Printing Co., 109 F.3d 1343, 1346 (8th Cir. 1997). Claim preclusion (traditionally termed res judicata) "bars relitigation of the same claim between parties or their privies where a final judgement has been rendered upon the merits by a court of competent jurisdiction". Id. (citing Plough v. West Des Moines Cmty. Sch. Dist., 70 F.3d 512, 517 (8th Cir. 1995) (quoting Smith v. Updegraff, 744 F.2d 1354, 1362 (8th Cir. 1984)). Issue preclusion (or collateral estoppel) applies to legal or factual issues "actually and necessarily determined, with such a determination becoming "conclusive in subsequent suits based on a different cause of action involving a party to the prior

[8] Finding res judicata and collateral estoppel work to bar Plaintiff's claim, this Court does not reach other issues raised in this case, such as whether either party is indirectly attacking an FCC order; whether the doctrine of primary jurisdiction is necessary to clarify what controls, an amended FCC tariff "deemed lawful" or whether an FCC ruling is arguably at odds with the charges the amended FCC tariff allocates.

litigation". Id. (quoting Montana v. United States, 440 U.S. 147, 153 (1979)). In this case, the question is one of claim preclusion since INS has brought this "collection action" to collect the same charges, access charges, for the same Qwest activity (Qwest's delivery to the INS network wireless phone calls originated by customers of third-party wireless carriers who are calling subscribers of Indy-LECs and whose calls originate and terminate in the same MTA) that it sought to collect from Qwest when INS intervened in the prior proceeding before the IUB.[9]

Almost forty years ago, the Supreme Court clearly stated its position on the preclusive effect of administrative proceedings: "[o]ccassionally courts have used language to the effect that res judicata principles do not apply to administrative proceedings, but such language is certainly too broad." See United States v. Utah Construction & Mining Co., 384 U.S. 394, 421 (1966).

The Restatement (Second) of Judgments reaches a similar conclusion:

> Where an administrative forum has the essential procedural characteristics of a court, ... its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court.

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[9] Compare INS' complaint filed in the United States District Court for the Southern District of Iowa at ¶¶ 4, 24, 25, 27, 30, 32, and 35-40, with IUB Proposed Decision and Order at pp. 4, 9-14, 21, and 28.

Restatement (Second) of Judgments § 83.[10]

The prior proceeding at issue occurred in state administrative proceedings; therefore, we apply state res judicata law because "it is fundamental that the res judicata effect of the first forum's judgment is governed by the first forum's law, not by the law of the second forum". Canady v. Allstate Ins. Co., 282 F.3d 1005, 1014 (8th Cir. 2002) (citing Hillary v. Trans World Airlines, Inc., 123 F.3d 1041, 1043 (8th Cir. 1997)). "Under claim preclusion, an adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination, and a party must litigate all matters growing out of its

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[10] To emphasize, the Iowa Utilities Board, though an administrative agency, does provide for true court-like adversarial proceedings. In fact, many aspects of IUB proceedings mirror court proceedings. For instance, the Iowa Administrative Code indicates that "[w]hen a paper is served, the party effecting service shall file with the board proof of service ... in the form prescribed in board rule 2.2(16) or by admission of service by the party served or his attorney [and] ... attached to a copy of the paper served". Iowa Admin. Code 199-1.8(4)(a). This is substantially similar to general rules relating to service of documents in a court proceeding. Equally true in court proceedings is the requirement that "[a] party or other person filing a notice, motion, or pleading in any proceeding shall serve the notice, motion, or pleading on all other parties". Id. at 199-1.8(4)(c). Specific forms are available to facilitate a hearing or other action before the IUB. See Iowa Admin. Code 199-2.2(1)-2.2(18) (including forms for declaratory rulings, complaints, counter-complaints, petitions to intervene, resistance/response to intervention petitions, motions to reopen hearings, applications for rehearings). Whenever the IUB conducts investigations and hearings, specific rules, identical to formal court processes, control. For example, "[w]hen the board orders a hearing, witnesses shall be examined orally under oath or affirmation ... subpoenas may be issued by the board for the attendance of witnesses or for the production of books, papers, records, accounts, or documents ... parties to any proceeding or investigation ... may [create stipulations] ... objections to the admission or exclusion of evidence [is also available]". See id. at 199-7.7(1)-(8). Finally, as exists in court proceedings, parties to IUB proceedings are able to file briefs, participate in oral arguments, and seek a reopening of the record for purposes of receiving additional evidence. See id. at 199-7.7(12)-(15). These full procedures before this specialized agency were available and utilized by the parties to the action now before this Court.

claim at one time rather than in separate actions." Huffey v. Lea, 491 N.W.2d 518, 520 (Iowa 1992). Claim preclusion provides that a valid and final judgment on a claim precludes a second action on that claim or any part of it. Arnevik v. Univ. of Minn., 642 N.W.2d 315, 319 (Iowa 2002). This rule applies to every matter actually offered and received to sustain or defeat the claim or demand; it also applies to any other admissible matter which could have been offered for that purpose. Id. Thus, claim preclusion can bar litigation on matters that have never been determined. Id. (citing Penn v. Iowa State Bd. of Regents, 577 N.W.2d 393, 398 (Iowa 1998) (discussing that claim preclusion bars all matters actually determined in the first action and all relevant matters that could have been determined). Claim preclusion will not apply, however, unless the party against whom preclusion is asserted had an opportunity to fully and fairly litigate the claim or issue in the first action. Id.

The Supreme Court of Iowa recently discussed the factors to be examined in considering claim preclusion:

> [W]e look for the presence of three factors: the parties in the first and second action were the same; the claim in the second suit could have been fully and fairly adjudicated in the prior case; and there was a final judgment on the merits in the first action.

Id.

There is no question that the parties in this case, Qwest and INS, also took part in the IUB proceeding. Qwest sought a refund of access and termination charges paid to INS, while INS sought access and termination charges withheld by Qwest since April

1999. While the IUB proceedings were commenced unilaterally by Qwest and INS later intervened, the obligation for such charges was litigated as between these parties. The first element for claim preclusion does exist.

In a creative attempt to avoid the preclusive effect of the previous IUB proceeding, INS offers two new arguments, one that this Court addresses under prong 2 and the other argument addressed under prong 3 of the claim preclusion factors.

First, INS argues that the IUB could not have determined rights arising under an FCC tariff. This Court views this argument as going to the second prong of the claim preclusion factors. INS argues since the IUB could not determine INS' rights arising under the FCC tariff, the IUB proceeding has no preclusive effect on this case, a case seeking to impose charges on Qwest based on a FCC tariff, because INS has not had a full and fair chance to litigate the issue of collecting charges from Qwest under the amended FCC tariff. INS' argument apparently rests in comments contained in footnote 4 of the IUB Order Affirming the Proposed Decision and Order.[11] See Order Affirming Proposed Decision and Order at p. 4. Fn. 4.

INS does not now allege any new facts that change the basic activity of Qwest. In this "collection action", INS seeks to recover charges it claims Qwest owes due to

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[11] See IUB Order Affirming Proposed Decision and Order at p. 4 Fn. 4 (showing the IUB discussing INS' argument that INS had filed revisions to its FCC tariff that make it the governing tariff for all delivery [of] CMRS traffic in Iowa ... INS offers no explanation as to how a federally filed tariff can govern intrastate traffic and still comply with 47 U.S.C. § 152(b), which prohibits the FCC from exercising jurisdiction over intrastate communications services ... [t]he board finds this argument without merit and will not further address it).

Qwest delivering to the INS network wireless phone calls originated by customers of third-party wireless carriers who are calling subscribers of Indy-LECs and whose wireless calls originate and terminate in the same MTA. This was the precise complaint INS used when intervening in the IUB proceeding initiated by Qwest, who had sought a declaratory order from the IUB that access charges could not be applied to the traffic Qwest was delivering to the INS network. Furthermore, in both actions, INS has maintained that Qwest is acting as an interexchange carrier (IXC), and that access charges therefore apply to Qwest's activities.[12] This demonstrates that the underlying facts in each action are the same.

Significantly, there is very little difference between the grounds INS used in the IUB proceeding and the grounds INS now alleges to justify charging Qwest. In the prior IUB action, INS originally sought to collect access charges against Qwest pursuant to either an Iowa Telecommunications Association (ITA) proposed tariff,[13] or an FCC tariff amended in November 2000.[14] In this action, INS now asks this court to hold Qwest liable for charges pursuant to valid state and federal tariffs.[15] The problem confronting INS however is that, in this case, although a new theory of recovery is

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[12] Compare IUB Proposed Decision and Order at pp. 12-13, with Complaint ¶¶ 18-19 and Plaintiff's Memorandum in Opposition to Qwest Corporation's Motion to Dismiss at p. 7.

[13] See IUB Proposed Decision and Order at p. 14 (indicating that INS "apparently intend[ed] to rely upon the proposed tariff filed by ITA).

[14] See IUB Order Affirming Proposed Decision and Order at p. 4 Fn. 4.

[15] See Complaint ¶¶ 32-40.

used, INS has requested the same recovery. See Shumaker v. Iowa Dep't of Transp., 541 N.W.2d 850, 852 (Iowa 1995) (indicating that two actions are the same for purposes of claim preclusion if the recovery demanded in the second claim is the same as that demanded in the first claim). Ultimately, the recovery sought by INS in both proceedings appears to be based on imposing access charges on Qwest for its delivery to the INS network of traffic deemed local, and thus not subject to access charges.

Therefore, the issue this Court must determine is not, as INS maintains, whether the IUB can adjudicate the rights arising under an amended FCC tariff. Instead, the issue is whether INS raised, or could have raised, in the IUB proceeding the type of charges and rates that could be properly applied to the Qwest activities at issue. Based on the nature of INS' arguments, this Court must discuss the jurisdiction of the IUB as well as the prior IUB proceeding in its entirety for purposes of clarifying exactly what the IUB did and did not do.

Jurisdiction of the Iowa Utilities Board

Initially, Plaintiff is correct, the FCC alone is responsible for determining the lawfulness of rates in tariffs filed with the FCC. See H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485, 493-494 (8th Cir. 1992). Congressional intent could not be clearer ("FCC has exclusive jurisdiction over the terms and conditions contained in the federal tariff"). 47 U.S.C. § 203; see also MCI Telecomms. Corp. v. Commonwealth of Virginia State Corp. Comm'n, 11 F. Supp.2d 669, 675 (E.D.Va. 1998) (concluding

that "review and rejection by a state regulatory agency of a federal tariff is in direct conflict with the Communications Act of 1934 and is preempted under the Supremacy Clause of the United States Constitution"), vacated as moot, 178 F.3d 1285 (4th Cir. 1999) (unpublished opinion). As previously mentioned, however, the IUB has jurisdiction over telecommunications services provided inside the State of Iowa, as long as the Board does not act in a manner inconsistent with the Act or FCC regulations. 47 U.S.C. §§ 253(b), 261.

The Proceedings Before the Iowa Utilities Board

In May of 2000, Qwest petitioned the IUB for a declaratory order stating that INS could not impose access charges for intraMTA wireless traffic originated by third-party carriers, from April 1999. Qwest's decision to file this petition was apparently based on the 1996 FCC Local Competition Order.

After examining Qwest's request, the IUB found numerous facts to be in dispute and also found that "broad" issues regarding the proper treatment of "transit traffic" or traffic carried by intermediary carriers existed. Based on these things, the IUB refused to issue Qwest a declaratory order.

Instead, on June 23, 2000, the IUB opened Docket No. SPU-00-7 to address specific issues dealing with transit traffic and related issues. INS was allowed to intervene; thus, INS, Qwest, and others became parties to this action. According to the IUB, this proceeding was to provide for a full and complete record since the proceeding

would establish certain policies regarding transit traffic that could impact the entire telecommunications industry.

All parties involved in the IUB action had a chance to file initial briefs and reply briefs. Hearings lasted nine days, spread over several weeks, and concluded on April 19, 2001. On November 26, 2001, the IUB issued a Proposed Decision and Order. Crucial to our purposes here is the identification of the issues addressed by the IUB.

The Findings of the IUB

Only two issues from the IUB proposed decision and order are relevant for our purposes. The first issue identified and addressed in the IUB order was: "Issue No. 1: Do access charges apply to intraMTA CMRS traffic?" See Proposed Decision and Order at p. 7. In addressing this issue, Qwest repeatedly argued that the FCC had decided the issue in the FCC 1996 Local Competition Order at ¶ 1036. See IUB Proposed Decision and Order at p. 7. Qwest pointed to ¶ 1043 of the FCC 1996 Local Competition Order as emphatically clarifying that "traffic between an ILEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5) rather than interstate and intrastate access charges". See IUB Proposed Decision and Order at p. 8.

In response, INS argued to the IUB that Qwest and CMRS carriers are mistaken in focusing their analysis on whether the traffic at issue in this case is "local". See IUB

Proposed Decision and Order at p. 9. The essence of INS's argument was that by focusing on whether the calls are local, the interplay between Section 251 (b) and (g) are overlooked. See IUB Proposed Decision and Order at p. 9. The proper analysis, according to INS, must focus on the universe of traffic falling within Section 251(g), and not the universe of traffic that is "local". See IUB Proposed Decision and Order at p. 9. The bare essential of INS' argument was that because access charges applied to Qwest whenever Qwest carried intraMTA calls between a CMRS carrier and INS before the enactment of the Act, this access traffic should be excluded from reciprocal compensation requirements (and thus should continue to be subject to access charges). See IUB Proposed Decision and Order at p. 10. Additionally, according to INS, ¶ 1043 of the FCC 1996 Local Competition Order could be read to allow for access charges to be charged where traffic between LECs and CMRS providers "is carried by an interexchange carrier (IXC)". See Proposed Decision and Order at pp. 12-13.

The IUB rejected INS' arguments, finding instead that the FCC had previously deemed intraMTA traffic as being local, and, therefore, access charges could not apply. See Proposed Decision and Order at p. 7 (citing FCC 1996 Local Competition Order at ¶ 1036). The IUB made other determinations affecting the parties' current case as well. Specifically, the IUB rejected INS' argument that Qwest was acting as an IXC, and, therefore, access charges could still be applied to Qwest's activity.

Additionally, the IUB found that both Qwest and INS are "telecommunications carriers" as defined in 47 U.S.C. § 153(44) and, as such, have an obligation to interconnect, upon request, either directly or indirectly with other carriers pursuant to 47 U.S.C. § 251(a). See IUB Proposed Decision and Order at p. 13. Having concluded that access charges were not to be charged for the type of traffic at issue, the IUB recognized that, although both Qwest and INS have an obligation to interconnect, they both also have a right to reasonable compensation for carrying such traffic. See IUB Proposed Decision and Order at p. 13. As the basis for this compensation, the IUB recognized that INS had "apparently intend[ed] to rely upon the proposed tariff filed by ITA [as justification for continuing to bill Qwest the access charges, despite the FCC 1996 order]". See IUB Proposed Decision and Order at p. 14.

The second issue addressed by the IUB was: "Issue No. 2: Should the [(ITA)] proposed tariff be approved?" [thereby allowing INS to base its charges on this tariff]. See IUB Proposed Decision and Order at p. 14. The ITA, apparently recognizing the implications the FCC 1996 Local Competition Order, had developed a wireless transport and termination tariff addressing the intraMTA wireless traffic transiting Qwest facilities which Qwest then delivered to the INS network, for delivery to the Indy-LECs. See IUB Proposed Decision and Order at p. 14.

Arguing for the tariff's approval, the ITA pointed out that, because CMRS carriers are neither LECs or ILECs, they are not required to establish arrangements for

reciprocal agreements or negotiate interconnection agreements. See IUB Proposed Decision and Order at p. 15. Therefore, ITA argued, if the CMRS carriers choose to do nothing but deliver traffic to Qwest for transiting to a third-party LEC network, the third-party LEC cannot compel negotiation of an interconnection agreement and reciprocal compensation. See IUB Proposed Decision and Order at p. 15. The proposed tariff of ITA would give the LECs the ability to charge for this traffic in the absence of an agreement. See IUB Proposed Decision and Order at p. 15.

In response, the IUB pointed out that "the vast majority of the wireless traffic at issue [in this case] is intraMTA", and the IUB reiterated that "the FCC has defined intraMTA wireless-originated traffic as local traffic". See IUB Proposed Decision and Order at p. 21. The IUB then pointed out that [although] "[t]he ITA tariff was intended to address [traffic between an LEC and a CMRS provider that at the beginning of the call originates and terminates within the same Major Trading Area is local traffic, which is not subject to access charges] and only this type of traffic, [the ITA tariff] attempts to impose access charges on traffic that is not subject to such charges". See IUB Proposed Decision and Order at pp. 21, 40-41.

For these reasons, the IUB found the that the ITA tariff "has no application and is rejected as unjust, unreasonable, and unlawful". See IUB Proposed Decision and Order at pp. 21, 40-41. The IUB's rejection of the ITA tariff foreclosed on INS'

ability to rely on the ITA tariff as the basis for the charges imposed on Qwest for the traffic at issue in this case.

The Appeal of the IUB Decision

On December 11, 2001, INS, Qwest, and others filed notices of appeal with the IUB. See Order Affirming Proposed Decision and Order at p. 2. On appeal, the board focused on four major issues identified and decided by the presiding officer at the first IUB proceeding. Id. Although some of the parties requested a new schedule to brief the issues on appeal, the board denied this request, pointing out that the parties "fully briefed each of these issues ... [the] responsive filings are substantial and appear to contain all arguments the parties would present to the board if additional briefing were permitted". Id.

The first issue addressed was whether "access charges apply to intraMTA CMRS traffic". Id. at 4. On appeal, INS argued that the Proposed Decision of the IUB was in error when it concluded that the FCC ruled that intraMTA CMRS traffic is local and that, because of this designation, access charges do not apply. See IUB Order Affirming Proposed Decision and Order at p. 4. In support, INS indicated that in 2001, the FCC found that 47 U.S.C. § 251 (g) excluded data traffic bound for an internet service provider (ISP) from the other provisions of § 251. See IUB Order Affirming Proposed Decision and Order at p. 4 (referring to Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order on

Remand and Report and Order, 16 FCC Rcd. 9151 (2001)) [hereinafter "ISP Remand and Order"]. INS argued that this reasoning also excluded intraMTA CMRS traffic that had been treated as access traffic prior to the passage of the Telecommunications Act of 1996. See IUB Order Affirming Proposed Decision and Order at p. 4.

All three members of the IUB rejected INS' position. See IUB Order Affirming Proposed Decision and Order at pp. 5-6. Pointing to paragraph 47 of the ISP Remand and Order, which clearly stated that the ISP data traffic analysis does not apply to CMRS traffic and that the analysis of the 1996 FCC Local Competition Order continued to apply, the IUB affirmed the Proposed Decision and Order with respect to this issue. See IUB Order Affirming Proposed Decision and Order at p. 6.

The second issue addressed was "whether the ITA's proposed tariff should be approved". See IUB Order Affirming Proposed Decision and Order at p. 6. On appeal, the IUB found that the rates in the proposed tariff, despite claims to the contrary, were entirely based on access rate elements with the resulting rates being, in fact, access rates. See IUB Order Affirming Proposed Decision and Order at p. 10. "Otherwise, the rates in the proposed tariff [would] have no cost justification at all." See IUB Order Affirming Proposed Decision and Order at p. 10. For this reason, the board affirmed the Proposed Decision and Order and rejected the proposed ITA tariff. Id. at 10. On March 18, 2002, the three-member panel of the IUB formally entered an order affirming the IUB Proposed Decision and Order.

Since the IUB's Proposed Decision and Order was affirmed, this court paraphrases the conclusions of law, findings of fact, and ordering clauses. Relevant conclusions of law made by the IUB included that the FCC had previously ruled that traffic to or from a CMRS network that originates or terminates within the same MTA as of the beginning of the call is local, subject to transport and termination rates under 47 U.S.C. § 251(b)(5), rather than access charges; that INS and Qwest have a duty to allow interconnection with other telecommunication carriers and carry traffic delivered through such interconnections; and that INS and Qwest have a right to be compensated for providing such services but cannot charge access charges since the traffic at issue is local and not subject to access charges. See IUB Proposed Decision and Order at p. 39.

Turning to the findings of fact made by the IUB, the IUB discussed that the type of telecommunications traffic at issue in the IUB proceeding arose "[w]hen customers of CMRS carriers in Iowa place calls to customers of independent wireline telephone companies, the calls are often delivered by the CMRS carrier to Qwest, which delivers the calls to INS, which in turn delivers the calls to the independent telephone company for completion to the called customer". See IUB Proposed Decision and Order at p. 40. Additional findings of fact included that ITA's proposed tariff would apply only to access services and purports to apply to the intraMTA traffic at issue; that, because the intraMTA traffic at issue is local, it is not subject to access charges; that, because

ITA's proposed tariff proposed to apply access charges to local traffic, the tariff was rejected as unjust, unreasonable, and unlawful; that INS was not entitled to access charges from Qwest for CMRS traffic from April 1999 to the present; and that Qwest was not required to pay for access services for CMRS carrier-originated traffic that is not Qwest originated traffic. See IUB Proposed Decision and Order, at p. 41.

Finally, turning to the ordering clauses issued by the IUB, although Qwest had delivered traffic to INS that originated with a CMRS carrier and had originated and terminated within the same MTA as of the beginning of the call, Qwest was found to not be obligated to pay for the access Qwest had to the INS network or for access services provided to Qwest by the Indy-LECs back to April 1999; that INS must interconnect with Qwest, the Indy-LECs, and any other telecommunications carriers and carry traffic delivered over these interconnections; and, lastly, that the proposed tariff filed by ITA was rejected because it was unjust, unreasonable, and unlawful. See IUB Proposed Decision and Order at p. 42.

It is clear then that INS argued that access charges apply to the traffic at issue in this case before the IUB and once again on appeal to the full IUB board. INS did not seek rehearing on any issue decided by the IUB, although other parties taking part in the IUB proceedings did seek rehearing, which was denied. See Order Denying Application for Rehearing, May 3, 2002.

"Any person dissatisfied with a decision of the utility board may file a petition for rehearing." See Teleconnect Co. v. U.S.WEST Comm'n. Inc., 508 N.W.2d 644, 648 (Iowa 1993) (citing Iowa Code § 476.12). "Judicial review of the board's decision is provided for in Iowa district court." Id. (citing Iowa Code § 476.13 which provides for judicial review under Iowa Code Chapter 17A). Rather than seek rehearing or appealing any part of the IUB decision to state court, specifically the District Court for Polk County, instead, on March 27, 2002, only nine days after the IUB affirmed the Proposed Decision and Order, INS came to this Court with this "collection action" attempting to recover unpaid charges for telecommunications services since April 1999. See Complaint, at p. 2, ¶ 7.

Although INS correctly maintains that the IUB could not adjudicate rights arising under an FCC tariff, as seen above, that is not what the IUB did, nor what it necessarily had to do. What the IUB did do was determine that access charges cannot be applied to the traffic at issue in this case, and, as discussed, INS had a full and fair opportunity to litigate this issue. Moreover, during the IUB proceeding, the amended FCC tariff was simply found to be inapplicable under the circumstances. The IUB made this determination because nearly all of the traffic at issue in this case takes place in the Des Moines MTA, an MTA spanning nearly the entire state of Iowa and therefore intrastate activity.

The traffic at issue being comprised of intrastate activity vests the IUB with jurisdiction to determine rates, services, etc., and the prices and means best suited to provide compensations for rates and services provided inside the state of Iowa. See 47 U.S.C. §§ 253(b), 261. The IUB, in looking at the amended FCC tariff, found the tariff simply did not apply to the intrastate traffic at issue. Such action is clearly not the same as finding the tariff is invalid, unlawful, or that the charges the amended FCC tariff provides for are unreasonable. See Brown, III v. MCI Worldcom Network Services, Inc., 277 F.3d 1166, 1171-72 (9th Cir. 2002) (discussing the filed-rate doctrine precludes courts from deciding whether a tariff is reasonable, reserving this evaluation to the FCC, but it does not preclude courts from interpreting the provisions of a tariff and enforcing that tariff ... implying that nothing would prevent a court from making a fundamental determination that a tariff is inapplicable); but see MCI Telecomms. Corp. v. Commonwealth of Virginia State Corp. Comm'n., 11 F. Supp.2d 669 (E.D. Va. 1998) (standing for the proposition that once FCC tariff is filed, a state administrative body is not the appropriate forum or body to look at the services provided, say the services are intrastate and then say a "deemed lawful tariff" of the FCC tariff does not apply), vacated as moot, 178 F.3d 1285 (4th Cir. 1999) (unpublished opinion). It was the FCC, not the IUB, that made the essential underlying determination that traffic between an LEC and a CMRS provider originating and terminating in the same MTA is local traffic.

Significantly, the IUB did not challenge the validity of the amended FCC tariff, and neither Qwest nor the IUB argued that the several hundred thousands of dollars, if authorized by the tariff, was unreasonable. See Brown III, 277 F.3d at 1171-72 (indicating that reviewing an FCC tariff to enforce the tariff is not the same as challenging the tariff, resisting the tariff, or arguing the charges provided for by the tariff are unreasonable, which can only be done by the Court of Appeals.). Moreover, implicit in 47 U.S.C. §§ 253(b), 261, is the power of an administrative body regulating intrastate activities to look at the traffic at issue in this case, determine the traffic was largely intrastate, and view an FCC tariff and say the FCC tariff simply does not apply to the intrastate traffic involved.

This Court has little doubt that during the IUB proceeding, INS had a chance to, and did in fact, fully and fairly litigate the ultimate issue at the heart of this case, that issue being whether or not access charges apply to the traffic at issue. Having made the choice to intervene in the IUB proceeding, INS gambled that the proceeding might act as res judicata on any subsequent related proceedings INS wished to bring. With respect to the issue of whether access charges apply to the traffic at issue, INS has lost its bet. For these reasons, this Court finds that INS did have a full and fair opportunity to raise in the IUB proceeding the issue of what type of charges and rates could be properly applied to the Qwest activities INS now complains of. Therefore, the second claim preclusion factor has been satisfied in this case.

The second argument INS uses to avoid claim preclusion is that the IUB could not have decided collection actions, a contention this Court views as INS alleging the IUB proceeding was not a final judgement on the merits. The irony in INS' claim is that INS in fact asked the IUB to do just that – decide a collection action.[16] To support their position, INS points to the Central Scott case. See Central Scott Tel. Co. v. Teleconnect Long Distance Serv. and Sys. Co., 832 F. Supp. 1317 (S.D. Iowa 1993).

In Central Scott, after learning a customer had refused to pay for services from the carrier, the Iowa State Utilities Board (ISUB) docketed the matter in order to determine whether the customer was billed by the carrier in accordance with the intrastate tariff on file. Id. at 1318. In that case, the ISUB acknowledged that it was "not the proper forum to compel [the customer] to pay [the carrier]". Id. at 1318-19. After an administrative law judge entered an order favoring the customer, the carrier (Central Scott) filed a collection action in the Southern District of Iowa. Id.

The customer, Teleconnect, moved for summary judgment in the collection action, arguing issue preclusion based on the ISUB order. Id. at 1319. Although Judge Longstaff recognized the parties were afforded full due process rights in presenting their cases before the ISUB, and the proceeding had many aspects of an "adjudication", Judge Longstaff decided that "[t]he ISUB could not compel payment in the event it interpreted the intrastate tariff in Central Scott's favor". Id. at 1323. Finding the

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[16] See IUB Proposed Decision and Order at p. 4.

ISUB's opinion had no binding effect on the parties' relationship resulted in the ISUB's proceeding as being merely advisory. Id. For this reason, Judge Longstaff refused to characterize the ISUB decision as one deserving preclusive effect. Id.

Judge Longstaff's thoughtful and appropriate concerns in Central Scott are wholly absent in the IUB proceedings related to this litigation. As discussed, the focus of the IUB proceedings concerned, in general, whether or not access charges could be levied on the third-party CMRS traffic that Qwest was delivering to the INS network. The IUB determined that access charges do not apply to the traffic at issue. Determining this issue did bind the parties to that conclusion.

Unlike Central Scott, the situation before the IUB in this case was one where, had access charges been the appropriate method of providing compensation for accessing the INS network, the IUB could have approved the ITA tariff, thereby allowing INS to collect the charges INS now seeks, pursuant to the proposed ITA tariff. Having determined that access charges cannot be applied to this traffic, the IUB then went on to reject the proposed intrastate ITA tariff because it sought to charge access charges.

There is nothing advisory about what the IUB did in this case. Having found access charges do not apply, the IUB refused to apply tariffs that applied nothing more than access charges. The IUB's determination that access charges do not apply to this traffic did clearly bind the parties in this action to that ultimate determination, and

nothing could be more final with respect to the issue of whether access charges can be charged for the traffic at issue. This Court must base its determination on what the IUB was asked to do and did in this instance, not what remedial powers may have been available to the IUB had it done something else. For these reasons, this Court finds the prior IUB proceedings do stand as a final judgment on the merits. Therefore, the third requirement necessary for claim preclusion is met, leading this Court to conclude that INS is barred by claim preclusion from continuing to pursue this collection from Qwest.

INS' Unjust Enrichment Claim

The Court now addresses whether INS' unjust enrichment claim can survive Qwest's motion to dismiss. In Iowa, the general principle against unjust enrichment has existed for a long time. See Norway v. Clear Lake, 11 Iowa 506 (1861) (adopting and defining the general principle against unjust enrichment as being where money is received by one which belongs to another, the law implies a promise to pay it over). Proving unjust enrichment does not require complicated or technical legal arguments. "[I]t is essential merely to prove that a defendant has received money which in equity and good conscience belongs to the plaintiff." In Re Estate of Stratman, 1 N.W.2d 636, 642 (Iowa 1942).

Recognizing that "unjust enrichment does not occur in the abstract", the Southern District of Iowa, with approval of the Eighth Circuit Court of Appeals, has

looked to "federal statute[s] for guidance in determining whether one has ... been unjustly enriched". See Iconco v. Jensen Constr. Co., 622 F.2d 1291, 1296, 1299 (8th Cir. 1980). Because this case involves the Telecommunications Act of 1996, whether Qwest has been unjustly enriched in this case can be clarified by the obligations the Act imposes on Qwest.

As an ILEC, Qwest is required to interconnect with the networks of other telecommunications carriers upon demand. 47 U.S.C. § 251(a)-(c). What that means for current purposes is that Qwest has been mandated to carry the third-party CMRS traffic, if requested to do so. As Qwest puts it, "Qwest is merely an involuntary intermediary carrying telecommunications traffic from wireless carriers to INS for eventual termination to the customers of independent local exchange carriers". See Qwest's Brief in Support of Motion to Dismiss at p. 14.

INS' argument for unjust enrichment seems to arise from two bases. INS argues it is not an ILEC and, thus, has no duty to interconnect, pursuant to 47 U.S.C. § 251 (a)-(c). The IUB determined that INS did have a duty to allow interconnection. See IUB Proposed Decision and Order at p. 39.[17]

INS' second basis for arguing unjust enrichment seems to arise from the fact that Qwest, pursuant to a valid transit traffic tariff governing transiting service between

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[17] It seems likely that the Indy-LECs who formed INS would be considered ILECs, leading this Court to conclude that INS as a company comprised of these Indy-LECs should also be considered an ILEC. This conclusion is further substantiated by the fact that the Act was intended to have broad application.

Qwest and third-party wireless carriers, charges the wireless carriers a "toll" fee for its services in routing wireless originated calls to the Indy-LECs over Qwest's facilities. However, as the IUB explained:

> [F]ederal law defines the wireless traffic at issue as "local", so access charges do not apply. The wireless carriers could build their own networks and interconnect directly with the independent LECs ... pursuant to [IUB and FCC] rules. If, however, the wireless carriers want to use INS facilities for an indirect connection, they may do so, but INS is entitled to compensation for providing those services ... . If the wireless carriers want to include Qwest in the transaction, Qwest is also entitled to compensation for carrying this traffic, but it has no obligation to pay access or other terminating fees because this is local traffic.

See IUB Order Denying Application for Rehearing at p. 2. The payments from the wireless carriers Qwest charges then are for the wireless carriers' use of the Qwest network, which allows the wireless carriers to fill gaps in their own network and not for the use of INS' or the Indy-LECs' networks. See Qwest's Brief in Support of Motion to Dismiss.

In a case addressing a substantially similar claim, the District Court in Montana analyzed whether unjust enrichment could be utilized to recover two types of access charges at issue in the case. See 3 Rivers Tel. Coop., Inc., v. U.S. WEST Comm'n., Inc., 125 F. Supp.2d 417 (D. Mont. 2000), rev'd and remanded on other grounds, 2002 WL 1986469 (9th Cir. Aug. 27, 2002) (unpublished opinion). The facts in 3 Rivers were that nine independent phone companies sought to recover two types of access charges from U.S. WEST: (1) charges for services related to calls placed by

customers of wireless carriers, handed off to U.S. WEST's network for a portion of the transport to their destination and then delivered by U.S. WEST to independent LECs for delivery to their customers, and (2) calls that originated at one independent LEC and were transported by U.S. WEST for termination by another. Id. at 419.

In denying the nine independent phone companies' request, the court pointed out:

> Plaintiffs ... argue that ... U.S. WEST is liable for the terminating access charges "having received the benefit of those transactions." But where is the benefit? If U.S. WEST is not the end user's long distance carrier and therefore lacks the ability to receive any compensation through billing for that call, no benefit accrues to U.S. WEST for which it should be asked to pay charges to an independent [LEC]. Moreover, ... the national mandatory interconnection policy requires that [U.S. WEST] accept the traffic from the independent local exchanges.

Id. U.S. WEST was then granted summary judgment. Id.

In an unpublished opinion, the Ninth Circuit reversed and remanded, ordering the District Court of Montana to interpret the filed tariffs of the Indy-LECs, to determine the parties' respective rights, "because the Independent's tariffs form the exclusive source of the obligations". In the District Court case in Montana, the original complaint stated claims for breach of contract, unjust enrichment, estoppel, and breach of covenant of good faith and fair dealing. 3 Rivers, 125 F. Supp.2d at 417. The unpublished opinion was unclear, however, whether, on remand, analyzing the

Independent tariff must be used to analyze the unjust enrichment claim or merely the breach of contract claim.

This Court finds as a matter of law that Qwest is not a beneficiary of the services INS provides, rather, Qwest is required to carry this traffic pursuant to the national interconnection policy established by the Act to encourage competition in providing local telecommunications services. As Qwest has pointed out, the true beneficiaries to INS' services are (1) the Indy-LECs and their customers who can receive wireless calls, and (2) the wireless carriers and their customers who can make wireless calls to customers of Indy-LECs. Qwest has reached agreement with the wireless carriers for compensation related to the use of the Qwest facilities.

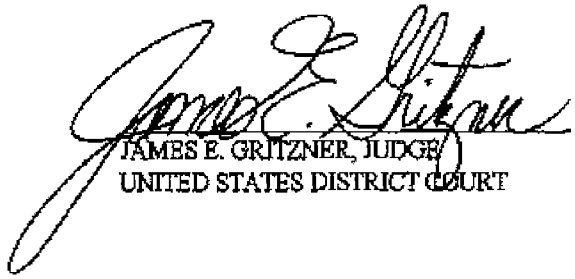
On a motion to dismiss, the Court must take the plaintiff's facts as alleged as true. Wescott v. Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990). The Court must construe the allegations in the complaint and reasonable inferences arising from the complaint favorably to the plaintiff. Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986). A motion to dismiss will be granted if it appears beyond reasonable doubt that the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "[I]n treating the factual allegations of a complaint as true pursuant to Rule 12(b)(6), the court must 'reject conclusory allegations of law and unwarranted inferences'." Wiese v. State, 2002 WL 31127485, *5 (N.D. Iowa Sept. 19, 2002) (quoting Silver v. H & R Block, Inc., 105 F.3d 394, 397 (8th

Cir. 1997)). The focus then is "whether the *facts* alleged in the petition, accepted as true, are sufficient to state a claim upon which relief can be granted". Wiese, 2002 WL 31127485 at *5 (emphasis in original).

Based on this standard, for all of the reasons discussed and pursuant to Fed. R. Civ. P. 12 (b)(6), Defendant Qwest's Motion to Dismiss (Clerk's No. 4) is **GRANTED** in its entirety, and this case is **DISMISSED**.

IT IS SO ORDERED.

Dated this 9th day of October, 2002.



JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT