

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

IOWA TELECOMMUNICATIONS
SERVICES, INC. *dba* IOWA
TELECOM,

Plaintiff,

vs.

IOWA UTILITIES BOARD, Utilities
Division, Department of Commerce;
JOHN NORRIS and CURTIS STAMP,
in their Official Capacities as Members
of the Iowa Utilities Board and not as
Individuals; SPRINT
COMMUNICATIONS, L.P., *dba*
SPRINT COMMUNICATIONS
COMPANY, L.P.; MCC TELEPHONY
OF IOWA, INC.

Defendants.

No. 4:07cv0032 JAJ

ORDER

I. INTRODUCTION

This case comes before the court pursuant to Plaintiff Iowa Telecommunications Service's ("Iowa Telecom") January 19, 2007, complaint for declaratory, injunctive, and other relief against Defendants Iowa Utilities Board ("Board"), Sprint Communications Company, L.P. ("Sprint"), MCC Telephony of Iowa, Inc. ("MCC"), and John Norris and Curtis Stamp in their official capacities as members of the Iowa Utilities Board. (Dkt. No. 1). Iowa Telecom challenges the Board's November 9, 2006, order interpreting the interconnection agreement between Iowa Telecom and Sprint. In accordance with Section 252(e)(6) of the Telecommunications Act, the court reviews the Board's decision. At issue in this matter is (1) the interpretation of two provisions of the parties' interconnection agreement and (2) whether Iowa Telecom

violated Iowa Code § 476.51, which provides for civil penalties when a party willfully violates an Iowa Utilities Board order.

II. BACKGROUND

A. Statutory Background

Prior to the Telecommunications Act of 1996 (“the Act”), local phone service was a “natural monopoly.” See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999). States granted the exclusive right to provide local telephone service to a local exchange carrier, which provided “traditional land-line phone services.” Alma Communs. Co. v. Mo. PSC, 490 F.3d 619, 620 (8th Cir. 2007). The Act restructured the telecommunications industry by permitting multiple carriers to provide telephone service in a local market. AT&T, 525 U.S. at 371. To do this, the Act requires incumbent local carriers (“ILECs”) to connect with competitive local exchange carriers (“CLEC”) in order to “facilitate the market entry of competitors and ensure the integration of competitors’ networks with incumbents’ networks.” WWC License, L.L.C. v. Pub. Serv. Comm’n, 459 F.3d 880, 884 (8th Cir. 2006) (citing 47 U.S.C. § 251(c)(1)(6)). Interconnection allows customers of multiple carriers to exchange telephone traffic. Without interconnection, the transportation and termination of calls would be much more costly because each carrier would have to pay long-distance prices any time they wanted to call another carrier’s customer.

To assert these rights of interconnection, a CLEC must request interconnection with the ILEC. In this case, Sprint sought interconnection with Iowa Telecom and various other ILECs. 47 U.S.C. § 252(a). The carriers then may “negotiate and enter into a binding agreement with the requesting telecommunications carrier.” Id. § 252(a)(1). If negotiations fail, either party “may petition a State commission to arbitrate any open issues” between the 135th and 160th day after the LEC receives the

request for negotiation. Id. § 252(b)(1). The state commission then “resolve[s] each issue set forth in the petition” and, if necessary, compels interconnection. Id. § 252(b)(4)(c). The state commission must approve an interconnection agreement between the parties. Id. § 252(e)(1). In Iowa, the state commission is the Iowa Utilities Board. Either party may then seek judicial review of the arbitrated interconnection agreement in the appropriate federal district court. Id. § 252(e)(6). Here, Iowa Telecom seeks judicial review of the Board’s interpretation of the interconnection agreement between it and Sprint.

B. Procedural History

On October 20, 2004, Sprint requested interconnection negotiations with Iowa Telecom, as well as several other RLECs throughout Iowa. After unsuccessful negotiations, Sprint filed a petition for arbitration with the Board on March 31, 2005, pursuant to § 252(b)(1) of the Telecommunications Act. See 47 U.S.C. § 252(b)(1) (“[T]he carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.”). Iowa Telecom filed a motion to dismiss the arbitration on April 26, 2005, arguing that Sprint is not a telecommunications carrier and therefore not entitled to interconnection under the Telecommunications Act. On May 26, 2005, the Board denied the motion, finding that Sprint is a telecommunications carrier. This court affirmed that decision on April 18, 2008. Iowa Telecomm. Serv. v. Iowa Util. Bd., 545 F. Supp. 2d 869 (S.D. Iowa 2008). The Eighth Circuit Court of Appeals affirmed this court’s decision on April 28, 2009. Iowa Telecomm. Serv. v. Iowa Utils. Bd., No. 08-2140, 2009 U.S. App. LEXIS 8981 (8th Cir. Apr. 28, 2009).

After finding that Iowa Telecom was required to interconnect with Sprint, the Board issued an Arbitration Order on March 24, 2006, resolving the parties’ issues and directing them to file an interconnection agreement. The parties filed a joint interconnection agreement on April 24, 2006, which was approved by the Board on May 24, 2006.

Following the Board's approval, the parties began implementation of their interconnection agreement. Sprint submitted an Access Service Request ("ASR") to Iowa Telecom on June 29, 2006. An ASR is a "request from Sprint to an ILEC to order an interconnection facility to enable Sprint's network to interconnect with the ILEC's network." (Sprint Br. at 5, n.5). Iowa Telecom disputed Sprint's interpretation of the interconnection agreement and refused to comply with Sprint's ASR. After an unsuccessful dispute resolution process, Sprint filed a complaint with the Board on July 24, 2006, asking it to interpret the interconnection agreement and to provide injunctive relief. The Board held a hearing on the matter and issued a decision on November 9, 2006. Sprint Commc'ns Co. L.P. v. Iowa Telecomm'ns Services, Docket No. FCU-06-49 (Iowa Util. Bd. Nov. 9, 2006). The Board ordered Iowa Telecom to interconnect, denying the relief it sought. Id. The Board denied rehearing on December 22, 2006 (Dkt. No. 1, Ex. B).

On January 19, 2007, Iowa Telecom filed the present action against the Board, Sprint, MCC,¹ and Board members in their official capacity, asking this court to review three issues from the Board's order. Iowa Telecom first challenges the Board's interpretation of the interconnection agreement. The Board found that Sprint had correctly registered Iowa Telecom's tandem switch in the Local Exchange Routing Guide ("LERG"). Second, the Board also held that the agreement required Iowa Telecom to set up two points of interconnection ("POIs"), one physical and one financial. Last, Iowa Telecom asks the court to review the Board's authority to put Iowa Telecom on notice that it will impose civil penalties if it further violates the arbitration order.

¹ Sprint and MCC have created a business model in which they jointly provide telephone, cable, and internet service. For a discussion of this business model, see this court's order in Iowa Utils. Bd., 545 F. Supp. 2d at 873-74.

On May 7, 2008, Iowa Telecom and Sprint filed a new interconnection agreement with the Board. The 2008 agreement replaced the 2006 agreement. The effect of the superseding interconnection agreement is discussed in Part III.C below.

III. CONCLUSIONS OF LAW

A. Jurisdiction

This court has jurisdiction to review the Board's order under federal question jurisdiction as it involves a federal statute, the Telecommunications Act of 1996. 28 U.S.C. § 1331. Congress also expressly delegated to district courts review of state utility boards' interpretation of the Telecommunications Act. 47 U.S.C. § 252(c)(6). ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court"). This court has supplemental jurisdiction to review the Board's state law determinations. 28 U.S.C. § 1367; see also Connect Communs. Corp. v. Sw. Bell Tel., 467 F.3d 703, 708 (8th Cir. 2006).

B. Standards of Review

1. Review of Compliance with the Act

This court reviews the Board's compliance with the Telecommunications Act *de novo*. See WWC License, LLC v. Pub. Serv. Comm'n, 459 F.3d 880, 889-90 (8th Cir. 2006). The Court "owes no deference to the [the Board's] interpretations of federal law." Id. Deference is owed to the Federal Communications Commission ("FCC") "based on the fact that Congress expressly charged the FCC with the duty to promulgate regulations to interpret and carry out the Act." Id. at 890.

2. Review of the Board's Factual Findings

The parties dispute the standard of review for the Board's findings of fact. Iowa Telecom contends that the Board's factual findings should be reviewed under the substantial evidence standard, while Defendants argue for the arbitrary and capricious

standard. The Eighth Circuit Court of Appeals has consistently held that in telecommunications cases, questions of fact are reviewed under a deferential standard, affirming unless the decision was arbitrary and capricious. *Id.* (citing Qwest Corp. v. Koppendrayer, 436 F.3d 859, 863 (8th Cir. 2006) (“[I]n recognition of the state commission’s superior technical expertise, we review its factual determinations under the arbitrary and capricious standard.”)).

Under this standard, the court reviews “whether the agency’s decision was ‘based on consideration of the relevant factors and whether there has been a clear error of judgment.’” Voyageurs Nat’l Park Ass’n v. Norton, 381 F.3d 759, 763 (8th Cir. 2004) (quoting Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971)). The Supreme Court recently explained the application of the arbitrary and capricious standard:

[W]e will not vacate an agency’s decision unless it ‘has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.’

Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 127 S. Ct. 2518, 2529 (2007) (quoting Motor Vehicle, 463 U.S. at 43).

3. Review of the Board’s Interpretation of the Interconnection Agreement

Two of the issues presented involve the Board’s interpretation of the interconnection agreement. Interconnection agreements are interpreted as contracts and are reviewed pursuant state contract law. Connect Communs. Corp., 467 F.3d at 708 (quoting Sw. Bell Tel. Co. v. Pub. Util. Comm’n of Tex., 208 F.3d 475, 485 (5th Cir. 2000) (“[S]tate law principles govern the questions of interpretation of the contracts and enforcement of their provisions.”)). The parties dispute whether the court should

review the Board's interpretation of the interconnection agreement *de novo* or under an arbitrary-and-capricious standard.

In Connect Communications v. Southwestern Bell, the Eighth Circuit Court of Appeals discussed the appropriate standard for reviewing a state utility board's interpretation of interconnection agreements pursuant to state contract law. Connect Communs. Corp., 467 F.3d at 709. The court held that in reviewing factual determinations, such as the evaluation of extrinsic evidence used to aid in the interpretation of a contract, it applies the arbitrary-and-capricious standard. Id. at 708-09. The court in Connect Communications declined to articulate a standard, however, for reviewing a state commission's application of state contract law to legal contractual issues, such as whether a contract is ambiguous. Id. at 709 (“[W]e need not wade through this standard of review quagmire, for regardless of the standard applied, we believe that the Interconnection Agreement contains a latent ambiguity.”). The court in Connect Communications court gave a clear indication, however, that if it was to articulate the standard of review, it would follow their sister circuit courts and apply the arbitrary-and-capricious standard. Id. at 709 (citing Global NAPs, Inc. v. Verizon New Eng., Inc., 454 F.3d 91, 96 (2d Cir. 2006) (“[W]e review the Board's decisions as congruent with state law under the arbitrary-and-capricious standard.”)); Sw. Bell Tel. Co., 208 F.3d at 482 (reviewing “under the more deferential arbitrary-and-capricious standard”); Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc., 339 F.3d 428, 433 (6th Cir. 2003) (same); US West Commc'ns v. MFS Intelenet, Inc., 193 F.3d 1112, 1117 (9th Cir. 1999) (same), cert. denied, 530 U.S. 1284 (2000); Sw. Bell Tel. Co. v. Brooks Fiber Communs. Of Okla., Inc., 235 F.3d 493, 498 (10th Cir. 2000) (same)). The discussion in Connect Communications compels the court to apply the arbitrary-and-capricious standard to the Board's application of state contract law.

C. The Effect of the Parties' 2008 Interconnection Agreement

As an initial matter, the court finds that the parties' adoption of a new interconnection agreement does not moot the first two issues. As noted above, the parties filed a new interconnection agreement with the Board on May 7, 2008. MCC argues that the 2008 agreement overrides the 2006 agreement, mooting the two issues involving the interpretation of the 2006 agreement. Iowa Telecom responds that an issue is only moot if the court can provide no relief to the parties. It also argues that an express reservation-of-rights clause in the 2008 agreement keeps these issues viable.

This case fits within an exception to the mootness doctrine. "That exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Davis v. FEC, 128 S.Ct. 2759, 2769 (2008) (internal citations omitted).

Here, the 2006 agreement expired before the court was able to review the challenged issues, meeting the first prong of the Davis test. The agreement expired two years after it became effective on April 24, 2006. Second, the language of the 2008 agreement presents similar interpretation issues as the 2006 agreement, creating a "reasonable expectation that the same complaining party will be subject to the same action again." Id.

The court also enforces the parties' intention, made clear in the reservation-of-rights clause. The clause states,

Other issues related to the Agreement between the parties that was deemed approved on May 24, 2005 are pending in that case and in Case No. 4:07-cv-00032 before the same court. The execution of this Agreement does not waive any of the rights Iowa Telecom sought to be protected in those proceedings and this Agreement shall be subject to the orders of the federal court to the same extent as would have been that Agreement between the Parties that was deemed

approved on May 24, 2006. The Parties agree that this Agreement is subject to any order of the court reversing, vacating, or otherwise modifying the Board's Decision which is the subject of those proceedings.

2008 Interconnection Agreement at 17, ¶ 2.4. It is clear that the parties did not intend for the 2008 agreement to moot the interpretation issues in the 2006 agreement. Based on the parties' intentions, as well as the exception to the mootness doctrine, the court finds that the interpretation issues in the 2006 agreement are justiciable.

D. Contractual Issues

Iowa Telecom asks the court to review three issues from the Board's November 9, 2006, order, two of which are contractual issues challenging the Board's interpretation of the interconnection agreement. Iowa Telecom first argues that pursuant to the plain terms of the interconnection agreement, there should only be one *physical* point of interconnection. Second, Iowa Telecom argues that the LERG entries are incorrect; Sprint should not pass toll traffic over the Iowa Telecom tandem switch.

1. Iowa Contract Law

The court applies Iowa contract law when reviewing the Board's interpretation of the agreement. See Connect Communs. Corp., 467 F.3d at 709 ("Although federal law plays a large role in this dispute, the ultimate issue in this case – interpretation of the Interconnection Agreement – is a state law issue."). Contract interpretation is the process of "determ[ing] the meaning of contract words." Rick v. Sprague, 706 N.W.2d 717, 723 (Iowa 2005). "The cardinal rule of contract interpretation is to determine what the intent of the parties was at the time they entered into the contract." Pillsbury Co. v. Wells Dairy, Inc., 752 N.W.2d 430, 436 (Iowa 2008).

Under Iowa case law, contract interpretation is a two-step process. "First, from the words chosen, a court must determine 'what meanings are reasonably possible.' In so doing, the court determines whether a disputed term is ambiguous." Walsh v. Nelson, 622 N.W.2d 499, 503 (Iowa 2001) (quoting Restatement (Second) of Contracts

§ 202 cmt. a (1981)). Second, if the disputed term is ambiguous, the court must decide among possible meanings. Walsh, 622 N.W.2d at 503. In assessing whether a term is ambiguous, courts may use the modes of contract interpretation to decide whether there is an ambiguity, even where a term is plain and unambiguous. “We now recognize the rule in the Restatement (Second) of Contracts that states the meaning of a contract ‘can almost never be plain except in a context.’” Pillsbury Co. v. Well Dairy, Inc., 752 N.W.2d 430, 436 (Iowa 2008); Restatement (Second) § 212 cmt. b. “Long ago we abandoned the rule that extrinsic evidence cannot change the plain meaning of a contract.” Pillsbury, 752 N.W.2d at 436. While “[e]xtrinsic evidence may shed light on the intention of parties, . . . it may not be used to modify, enlarge, or curtail the contract terms.” Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg, 461 N.W.2d 598, 600 (Iowa 1990). The court will use extrinsic evidence in the first step to identify meanings and to determine whether an ambiguity exists. The court will also use extrinsic evidence in the second step to decide among possible meanings. See Walsh v. Nelson, 622 N.W.2d 499, 503 (Iowa 2001) (“[R]ules of interpretation are used both to determine what meanings of disputed terms are reasonably possible as well as to choose among two reasonable meanings.”).

2. Toll Transiting Services

Iowa Telecom argues that the Board erred in its interpretation of the interconnection agreement regarding the transportation of toll traffic. The interconnection agreement states,

The provisions of this section apply only to the transport, switching and/or termination of *Local Traffic*. Terms under which the transport, switching, and/or termination of ISP-Bound Traffic, CMRS Traffic, *intrastate toll traffic and interstate toll traffic* are established pursuant to Iowa Telecom’s *access tariffs and other negotiated agreements*.

ICA at 12, ¶ 19.1 (emphasis added). The agreement continues to read, “Sprint *will not transport* ISP-bound, CMRS or *toll traffic* using the Interconnection Facilities established pursuant to this Agreement.” ICA at 15, ¶ 20.3 (emphasis added).

Iowa Telecom contends that the Board erred when it ordered Iowa Telecom to allow toll traffic to pass over its tandem switch.² Toll traffic, commonly known as long-distance traffic, is traffic from non-Sprint/MCC customers outside the geographic region to Sprint/MCC customers within the region and vice-versa. Sprint/MCC and the Board believe that Iowa Telecom’s tandem switch should be the “homing tandem” for this traffic, meaning that toll traffic would pass along Iowa Telecom’s tandem switch. A tandem switch is a hub that aggregates traffic from many smaller switches and passes the traffic to other tandem switches outside the region. Transporting traffic this way relieves each end-user household or business from directly connecting to another end-user. For example, if an Iowa caller calls a home in California, the call will be aggregated first at an end-office switch and then further aggregated at the tandem switch. The call will then be connected from tandem switch to tandem switch.

Sprint lists the Iowa Telecom tandem switch in the “toll” field on the LERG. The LERG is a database that directs telecommunication traffic to the appropriate local switching entity. The effect of listing the Iowa Telecom tandem in the “toll” field is that any toll traffic that is directed to a Sprint/MCC customer in this region will pass through the Iowa Telecom tandem switch. Iowa Telecom appeals the Board’s Order in which it interpreted the interconnection agreement as allowing Sprint to use Iowa Telecom’s tandem switch for toll traffic. Sprint, MCC and the Board respond that using Iowa Telecom’s tandem switch for toll traffic is consistent with industry practice and necessary to effectuate the interconnection agreement as no other options exist for tandem switches in this calling area. The respondents also argue that the Board’s order

² At the time of the hearing, the transportation of CMRS traffic, or wireless traffic, was also in dispute. The parties have since resolved the issue.

was appropriate because the interconnection agreement states that toll traffic will be governed by Iowa Telecom's access tariff. Iowa Telecom responds that its access tariff does not allow for automatic use of its tandem switch.

The primary goal of contract interpretation is to determine the intent of the parties at the time they entered into the contract. See Pillsbury, 752 N.W.2d at 436. When determining the intent of the parties, the plain meaning of the words is paramount. Id. (“[T]he words of the agreement are still the most important evidence of the party's intentions at the time they entered into the contract.”). Looking at the plain language of the terms, the court finds the terms exceedingly clear. Paragraph 19.1 states that the interconnection agreement pertains only to the “transport, switching and/or termination of *Local Traffic*.” ¶ 19.1 (emphasis added). The agreement states that the transportation of toll traffic will be determined through separate negotiations or Iowa Telecom's access tariff. ¶ 19.1. Paragraph 20.3 again states that the agreement excludes toll traffic. “Sprint *will not transport* ISP-bound, CMRS or *toll traffic* using the Interconnection Facilities established pursuant to this Agreement.” ICA at 15, ¶ 20.3 (emphasis added).

In addition to Paragraphs 19.1 and 20.3, there are numerous other clauses in the agreement that refer to using Iowa Telecom's facilities only for local traffic, not toll traffic:

- “Interconnection to Iowa Telecom's Tandem Switch(es) will provide Sprint *local interconnection for local service purposes. . . .*” (¶ 19.2) (emphasis added).
- “Interconnection at the appropriate Iowa Telecom end office switch will provide Sprint with interconnection *sufficient to deliver Local Traffic* to any NXX assigned to that Iowa Telecom End Office including any NXXs served by remotes that subtend that End Office.” (¶ 19.3) (emphasis added).

- “The Parties agree to work cooperatively to establish trunk requirement for the *exchange or delivery of local traffic* between the Parties.” (¶ 19.5) (emphasis added).
- “The Parties *will not exchange toll traffic* on the Interconnection Facilities established pursuant to this Agreement.” (¶ 21.4.3) (emphasis added).

Further, Paragraph 21.4.1 states that “toll traffic . . . between the Parties shall be based on applicable tariff access charges,” not based on the interconnection agreement. (¶ 21.4.1).

Contracts should be viewed in light of their whole. Am. Family Mut. Ins. Co. v. Peterson, 679 N.W.2d 571, 579 (Iowa 2004) (“The intention of the parties to a contract must be derived from the language of the entire contract.”). Viewing the whole contract, these clauses show that the parties did not intend to use the interconnection agreement for toll traffic. Rather, they intended to enter separate negotiations or use Iowa Telecom’s access tariff.

The respondents – Sprint, MCC and the Board – argue that Paragraphs 19.1 and 20.3 are inconsistent. They argue that the Paragraph 20.3 refers to Sprint’s other telecommunications entities. At a hearing before the Board, Sprint witness Janette Luehring explained,

[T]he intent of that language was to make it clear until we negotiate additional terms, this agreement would not be used for CMRS or toll traffic for Sprint’s other entities, for Sprint PCS traffic to transverse this interconnection facility, or for long-distance traffic that’s not exchange access for MCC’s customers to go across this facility. So we agreed to include that language to make it clear we weren’t using this for multi-use or multi-jurisdictional, and again I stated in the issues list, we included a statement that we had agreed that we would negotiate those terms into the agreement at a later date.

(App. 784).

The court finds Sprint's argument unconvincing. Nowhere in the contract do the parties specify that these clauses refer to Sprint's other entities. In fact, there is no mention of Sprint's other entities anywhere in the interconnection agreement. While the court defers to the Board's findings of fact unless arbitrary and capricious, this bare assertion does not negate the clear and unambiguous language of Paragraphs 19.1 and 20.3.

Sprint next argues that listing the Iowa Telecom tandem switch in the toll field of the LERG is appropriate because it is consistent with industry practice. Sprint witness Lloyd Lantz testified that the industry practices was to "list the incumbent [carrier] as the homing tandem for the exchanges that the CLECs and wireless carriers serve because the [incumbent carrier] is the owner of the homing tandem." (App. 271). Lantz testified that it is done this way "99.99 percent of the time." (App. 696). "It's not only the most efficient way, but it's the only way that we've ever implemented any markets." (App. 713).

In determining whether an ambiguity exists and the possible meaning of disputed terms, the court may look to the industry practice and usage of trade. See Restatement (Second) of Contracts § 212 cmt. b (emphasis added), quoted in Walsh, 622 N.W.2d at 503 ("Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, *usages of trade*, and the course of dealing between the parties.") "A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." Iowa Code § 554.1303(3) (1993). While industry practice may be to connect via the incumbent carrier's tandem switch, the court does not find that this evidence negates the clear and unambiguous terms of the interconnection agreement, stating that the agreement does not apply to toll traffic.

The court is mindful of the highly deferential arbitrary-and-capricious standard it is to apply here. Nevertheless, the court finds that the Board erred. In its order, the Board did not state that it was applying contract law principles, let alone cite or discuss any Iowa contract law. Rather, the Board seemed to look for a way to make the interconnection agreement work rather than interpreting the interconnection agreement as a contract. For example, the Board found, “there are no viable alternative tandem providers for Iowa Telecom’s territory; and it is not possible to leave the toll field blank, as doing so would cause toll calls destined for MCC customers to be dropped.” (Board Order at 7). In so doing, the Board wrote new terms into the contract instead of interpreting the contract. This is impermissible under Iowa contract law. “The court may not rewrite the contract for the purpose of accomplishing that which, in its opinion, may appear proper . . . or make for the parties a contract which they did not make for themselves, or make for them a better contract than they chose, or saw fit, to make for themselves. . . .” Smith v. Stowell, 125 N.W.2d 795, 799 (Iowa 1964), quoted in Kern v. Palmer College of Chiropractic, 757 N.W.2d 651, 669 (Iowa 2008) (Appel, J., concurring). Because there is no reference to the controlling law—Iowa contract law—the court finds the Board’s opinion was arbitrary and capricious.

In deciding that the Board wrongly interpreted the interconnection agreement, the court also considers the purpose of the Telecommunications Act, which is to promote competition. Sprint, MCC, and the Board argue that if Sprint does not use Iowa Telecom’s tandem switch, it will have no way to connect to this geographic region, resulting in less competition. But both Iowa Telecom and Sprint’s witnesses testified that Iowa Network Services (“INS”) and Qwest Communications have tandem switches in this geographic area. Sprint witness Lloyd Lantz testified, however, that Qwest refused to allow Sprint to use Qwest’s tandems.⁴ Another Sprint witness raised

⁴In an e-mail to Lloyd Lantz, a Qwest representative wrote regarding use of their tandem switch, “After taking a look at your proposal, Qwest has decided that it is not something we are

doubt that Sprint would be able to use INS' tandem switch.⁵ While the court is sympathetic, Qwest and INS' refusal to allow Sprint to use their tandem switches should not have compelled the Board to rewrite the contract between Sprint and Iowa Telecom. Where the terms of the interconnection agreement are abundantly clear, the Board should not create new terms for the sake of furthering the statute's purpose of increasing competition.

The court finds that the Board erred when it ordered Iowa Telecom to comply with Sprint's ASR, resulting in Iowa Telecom's tandem switch to be listed in the "toll" field on the LERG. The Board's conclusion was arbitrary and capricious because the terms of the interconnection were clear and unambiguous; the extrinsic evidence did not cast doubt or confusion on the plain language of the interconnection agreement. Further, the Board did not interpret the interconnection agreement as a contract. The Board did not discuss principles of contract interpretation or reference Iowa contract law. The Board did not discuss principles of contract law and did not apply Iowa

interested in pursuing with Sprint. We will continue to require non-Qwest rate centers to be homed to their appropriate tandems via the LERG." (App. 465).

⁵ Sprint witness Karen Riepenkroger testified regarding use of the INS tandem,

[A]ccording to my research, INS does have two tandems in LATA 632, one in Des Moines, and one in Kamrar, Iowa. However, in the rate centers in this LATA where Sprint has obtained numbering resources, the incumbent LEC is Iowa Telecom. Because Iowa Telecom is the incumbent LEC in these rate centers, it would simply be incorrect to designate a homing tandem other than the one belonging to the incumbent LEC. That would be inconsistent with both industry practice and the way Sprint has implemented the cable telephony business model in Iowa and other state In LATAs 630, 634, 635, and 644, there are no INS tandems, so Iowa Telecom's argument is moot. Again, for the rate center in these LATAs where Sprint has obtained numbering resources, the incumbent LEC is Iowa Telecom.

(App. 297).

contract law in its interpretation of the interconnection agreement. For these reasons, the Board's decision was arbitrary and capricious.

3. Iowa Telecom's Access Tariff

Sprint and MCC alternatively argue that they are entitled to use Iowa Telecom's tandem switch for toll traffic pursuant Iowa Telecom's access tariff.⁶ Paragraph 19.1 states, "Terms under which the transport, switching, and/or termination of . . . intrastate toll traffic and interstate toll traffic are established pursuant to Iowa Telecom's access tariffs and other negotiated agreements." ICA ¶ 19.1. Iowa Telecom, in its reply brief (dkt. no. 35), argues that the terms of the tariff allow it to reject Sprint/MCC's request to use its tandem switch.⁷

In its order, the Board does not address the terms of Iowa Telecom's access tariff. The court is bound only to review the Board's decision. The terms of the access tariff are not at issue in the present case and little briefing has been done regarding the content and interpretation of the access tariff. The court, therefore, will not decide whether Iowa Telecom is complying with its own tariffs.

4. Points of Interconnection

Iowa Telecom next argues that the Board erred in its interpretation of the interconnection agreement as it relates to the POIs. Section 18.1 states, "The parties will establish a meet point interconnection arrangement at the exchange boundary. . . ."

⁶ A tariff is filed with the FCC and "contain[s] the rates, terms and conditions of certain services provided by telecommunications carriers." FCC, Tariffs, <http://www.fcc.gov/wcb/ppd/tariffs.html> (last visited March 31, 2009).

⁷Section 2.1.4(B) of Iowa Telecom's FCC Interstate Access Tariff provides, "[Facilities for interstate access] provided to a [carrier] customer under this tariff may, at the election of the Telephone Company (Iowa Telecom), be connected directly to customer facilities and/or may be connected to access facilities of another telephone company or companies in the joint provision of interstate access." (Iowa Telecom Access Tariff, quoted in Iowa Telecom Rep. Br. at 12).

Section 18.3 says that Sprint may obtain facilities in a number of different ways – “owned, leased, or obtained pursuant to tariff, etc.” Section 18.4 says, “Each Party shall pay the entire cost of any transport switching, billing, testing or other facilities required on its side of any POI to perform as required by this agreement.” ICA at ¶ 18.4.

Iowa Telecom contends that the interconnection agreement did not include both physical and financial POIs, only a physical POI. It argues that the financial demarcation should be at the same place as the physical POI. Iowa Telecom argues that the contract is unambiguous and the Board erred when it looked outside of the four corners of the agreement to interpret its meaning.

Sprint, MCC and the Board respond that the interconnection agreement contemplated two different points of demarcation – a physical and financial. Sprint contends that the terms “meet point interconnection agreement” used in Section 18.1 of the agreement refers to the point to which each side is financially responsible. The point of financial responsibility may be, but does not have to be, the same point as the point of physical interconnection. Sprint witnesses testified that Sprint and Iowa Telecom intended to interconnect at the Qwest/Iowa Telecom meet-point facility. The respondents argue that creating two POIs – a physical and financial – is the only way to harmonize all clauses of the interconnection agreement. “[R]eading the provisions together, the reference to a meet point at the exchange boundary and a physical POI at an Iowa switch location leaves no doubt that the parties did not intend to prohibit a separate physical and financial POI.” (Sprint Br. at 27).

In reviewing the Board’s order, the court again applies the arbitrary-and-capricious standard to the Board’s application of Iowa contract law to the interconnection agreement. Connect Communs, 467 F.3d at 708.

The Board made the following finding regarding the interconnection clause,

The Board finds that Complainants offer a reasonable reading of the agreement that (1) pursuant to section 18.1, Sprint may choose the location of the physical POI; (2) pursuant to section 18.3, the facilities may be provisioned in a number of different ways (e.g., owned, leased, or obtained pursuant to tariff, etc.), such as leased Qwest interconnection facilities; and (3) pursuant to Section 18.4, each party is financially responsible for its side of the POI. The Board will order Iowa Telecom to process Sprint's order for an interconnection facility according to Sprint's interpretation of section 18 of the agreement allowing for a separate physical and financial POI.

(Board Order at 13).

Iowa Telecom argues that these terms are clear and that the Board need not look outside of the four corners of the agreement. See Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc., 714 N.W.2d 603, 615 (Iowa 2006) (“Generally, contracts are interpreted based on the language within the four corners of the document.”). The court agrees that this is a long-standing tenant of Iowa contract law, but equally fundamental is the concept that a contract should be read as a whole and interpreted to effectuate all terms. Koenigs v. Mitchell Cty. Bd of Supervisors, 659 N.W.2d 589, 594 (Iowa 2003) (“We, however, do not interpret this contractual term apart from the context of the agreement as a whole.”); City of Coralville v. Faulkner USA, Inc., No. 3:05-cv-00027-JEG, 3:05-cv-00022, 2006 U.S. Dist. LEXIS 91819 (S.D. Iowa Dec. 15, 2006) (“When affixing meaning to the terms used in a contract, the Court must read the contract as a whole and not parse and then interpret individual provisions.”); Restatement (Second) of Contracts: Rules in Aid of Interpretation § 202(2) (1981) (“A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.”).

Here, the Board heard testimony of witnesses of who explained the meaning of paragraphs 18.1, 18.3, and 18.4. Sprint witness Jeanette Luehring explained that paragraph 18.1 was the financial demarcation. Section 18.3 stated that Sprint had the

choice of using any one of a number of facilities and Section 18.4 discusses that the “POI is at the meet point at the exchange boundary.”⁸ Luehring also testified that during the course of negotiations, the parties had contemplated the use of the Qwest/Iowa Telecom meet-point facility as the POI.⁹

Iowa Telecom argues that the Board erred in relying on this extrinsic evidence to determine the meaning of the contract. It contends that under Iowa contract law, the Board should have first determined whether an ambiguity existed before introducing and relying on extrinsic evidence, citing Mopper v. Circle Key Life Ins. Co., 172

⁸ Luehring explained,

“[T]he agreement provides for, in 18.1, a meet-point interconnection agreement. That meet-point interconnection arrangement establishes the POI for financial demarcation purposes at the exchange boundary. . . .

In 18.3, it discusses specifically that those facilities could be provisioned in a number of manners, whether it’s owned, leased from Iowa Telecom or another party, or obtained pursuant to tariff, so we specifically address the fact that facility might come from someone else and not be provided specifically by each party.

Then, in 18.4, we talk about the financial responsibility that each party is paying for a facility on its side of the POI, and that POI is that meet point at the exchange boundary.

(App. at 787).

⁹Luehring testified,

Q: [S]ection 18.3, the party that says, ‘Each party is individually responsible to provide facilities to the POI,’ does that mean each party is required to physically build out to the POI?

A: No. In fact, during the negotiations we specifically discussed using the existing Qwest/Iowa Telecom meet-point facility.

Q: And it also says very clearly in the first sentence, does it not, that it suggests that those facilities might be leased?

A: That is correct, which is what we’re proposing in this situation.

(App. 778). Luehring also testified, “I have the history of the negotiations and what [was] discussed [about] using the Qwest/Iowa Telecom facility . . . but that’s not specifically mentioned in the agreement.” (App. 795).

N.W.2d 118, 124 (Iowa 1969). However, Iowa courts “allow extrinsic evidence to aid in the process of interpretation.” Pillsbury Co. v. Wells Dairy, Inc., 752 N.W.2d 430, 436 (Iowa 2008). Extrinsic evidence can be admitted to discern the meaning of a contract. Id. (“[T]he meaning of a contract ‘can almost never be plain except in a context.’”). “Contract interpretation involves ascertaining the meaning of contractual words, and extrinsic evidence is admissible as an aid to interpretation when it sheds light on the situation of the parties, antecedent negotiations, the attendant circumstances, and the objects they were striving to attain.” Kroblin v. RDR Motels, Inc., 347 N.W.2d 430, 433 (Iowa 1984). “The rules [of interpretation] do not depend on a determination that there is an ambiguity, but we use them to determine ‘what meanings are reasonably possible as in choosing among possible meanings.’” Pillsbury Co., 752 N.W.2d at 436 (quoting Fausel, 603 N.W.2d at 618).

Under Iowa law, it was not improper for the Board to use extrinsic evidence to discern the parties’ intention at the time of contracting. While the Board did not find that an ambiguity existed, it was not improper to admit evidence of prior negotiations and dealings in order to understand the parties’ intention at the time they entered into the contract. The Board’s decision harmonizing provisions 18.1, 18.3, and 18.4 was neither arbitrary nor capricious.

E. Notice of Civil Penalties Under Iowa Law

Iowa Telecom next argues that the Board should not have put it on notice of its intent to impose civil penalties. Sprint responds by citing several portions of the arbitration order that Iowa Telecom has violated. MCC argues that the issue is not justiciable for three reasons: (1) the court lacks jurisdiction because the issue involves the application of a state statute, Iowa Code § 476.51; (2) the issue is unripe because the Board has not yet enacted the civil penalties, it has only given notice of future penalties; and (3) the Eleventh Amendment bars this court from adjudicating a matter against a state utilities board in federal court.

In its Order, the Board stated that it will impose civil penalties due to Iowa Telecom's willful violation of the Board's arbitration order. The Board stated,

The record before the Board in this case establishes that Iowa Telecom delayed the implementation of the Board-approved interconnection agreement by refusing to process Sprint's ASRs and exchange traffic for reasons that the Board finds to be specious, and therefore is in violation of the Board's Arbitration Order. . . . Iowa Telecom's obstructionist behavior has caused significant expense for Complainants and has impaired their ability to provide consumers with competitive local exchange service offerings. Any further delays in exchanging traffic are prohibited by this order and may form the basis for civil penalties pursuant to Iowa Code § 476.51. The Board will give notice that any further delay by Iowa Telecom in processing Sprint's ASRs and in exchanging traffic may be considered a violation of this order and may subject Iowa Telecom to civil penalties pursuant to Iowa Code § 476.51.

(Board Order at 19).

Before turning to the merits of the parties' arguments, the court will first address the justiciability issues.

1. Justiciability

Jurisdiction. This court has supplemental jurisdiction to review the Board's decision to fine Iowa Telecom for violations of the arbitration order. 28 U.S.C. § 1367(a). The court finds that this claim is "so related" to the claims in which the court has original jurisdiction that supplemental jurisdiction is appropriate under 28 U.S.C. § 1367(a). The basis for the violations are failure to comply with federal law, specifically, failure to follow the arbitration order that was enacted pursuant to the Telecommunications Act. See 47 U.S.C. 252(b).

The Eighth Circuit Court of Appeals confronted a similar issue in Qwest Corp v. Minn. PUC, where it decided whether, under Minnesota state law, the Minnesota

Public Utilities Commission (“MPUC”) could order restitution for failing to file interconnection agreements in violation of 47 U.S.C. § 252(a) & (e). Qwest Corp. v. Minn. PUC, 427 F.3d 1061, 1064 (8th Cir. 2005). There, the court exercised supplemental jurisdiction over state law remedies for violations of the Telecommunications Act. Id. The court applied the arbitrary-and-capricious standard to the agency’s findings of fact and the *de novo* standard to the question of whether the MPUC acted within its statutory authority. Id. Relying on Qwest Corp. and principles of supplemental jurisdiction, the court has jurisdiction to decide whether the Board erred when it put Iowa Telecom on notice that it will impose civil penalties if Iowa Telecom continues to violate the arbitration order.

Ripeness. Respondents argue that this case is not ripe because the Board has only given notice that if Iowa Telecom continues to violate the arbitration order, it will fine Iowa Telecom. Iowa Telecom responds that because formal notice is a requirement of Iowa Code § 476.51(1), the notice is enough punishment to make this issue ripe. Iowa Telecom analogizes the notice requirement to the “third strike” in baseball – they cannot be fined unless they receive their “third strike,” which is formal notice.

The “basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” Abbott Labs v. Gardner, 387 U.S. 136, 148 (1967). The doctrine requires “a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.” Babbitt v. United Farm Workers Nat’l Union, 442 U.S. 289, 298 (1979). “The Supreme Court has directed that the ripeness inquiry requires examination of both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1038 (8th Cir. 2000) (internal quotations omitted). In determining fitness and hardship, the court

must consider: “(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented.” Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 773 (1998).

Regarding the first factor, the Supreme Court has found harm in similar situations, where an agency has threatened sanctions or penalties. See id. (failing to find harm where the agency action did not cause the Sierra Club “to modify its behavior in order to avoid future adverse consequences, as, for example, agency regulations can sometimes force immediate compliance through fear of future sanctions.”); Abbott Laboratories, 387 U.S. at 148 (allowing judicial review where “a regulation require[d] an immediate and significant change in a plaintiff’s conduct of its affairs with serious penalties attached to noncompliance”); Columbia Broadcasting Sys., Inc. v. United States, 316 U.S. 407, 417-18 (1942) (finding regulations reviewable where “failure to comply with them penalizes licensees, and appellant, with whom they contract”). Based on Ohio Forestry, Abbott Laboratories, and Columbia Broadcasting, the threat of civil penalties is enough to make this case ripe.

Regarding the second Ohio Forestry factor, “whether judicial intervention would inappropriately interfere with further administrative action,” judicial review would not interfere as the Board has already ruled on this issue. Ohio Forestry, 523 U.S. at 773. The parties have not argued that judicial interference would thwart the Board’s attempts to refine its policies.

Last, no further fact-finding is necessary in this case. The Board fully developed the record with a two-day hearing and extensive briefing. This issue is ripe for review.

Sovereign Immunity. Under the Eleventh Amendment, states are generally immune from suits in federal court without consent. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996). In the context of the Telecommunications Act, a

state utilities board that applies federal telecommunications law consents to being sued in federal jurisdiction. MCI Telecom. Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 512 (3d Cir. 2001). The Third Circuit Court of Appeals explained,

[A] state commission that decides to participate in this statutory scheme is on notice from the outset that it will be subject to suit, brought only in federal court, by any party aggrieved by its decision. . . . The statutory language places the state utility commission on notice that, by choosing to act on an interconnection agreement and to make a decision as to its legality, it submits itself to the jurisdiction of the federal courts.

Id. In MCI Telecommunications, the court emphasized the voluntary nature of a state board's decision to arbitrate an interconnection agreement. "A state commission is not obligated to waive its sovereign immunity by participating in the regulatory process."

Id. If the state commission declines to mediate or negotiate an agreement, "the FCC is to assume that responsibility. For that reason, state participation in the regulation of local telecommunications competition is a choice, not a mandate." Id. Accordingly, the Board has waived its sovereign immunity by participating in the negotiations process and approving and interpreting the interconnection agreement as set out by the Telecommunications Act.

2. Iowa Code § 476.51

Finding that this issue is justiciable, the court now turns to the merits of Iowa Telecom's argument. The Board found that Iowa Telecom violated Iowa Code § 476.51(1), which provides civil penalties for violations of Board orders and rules. § 465.51(1) provides:

A public utility which, after written notice by the board of a specific violation, violates the same provision of this chapter, the same rule adopted by the board, or the same provision of an order lawfully issued by the board, is subject to a civil penalty, which may be levied by the board, of not

less than one hundred dollars nor more than two thousand five hundred dollars per violation.

Id.

Iowa Telecom argues that it did not violate the arbitration order because the order only required that the parties enter into an interconnection agreement, which it did. The respondents argue that Iowa Telecom engaged in several violations of the Board order and that the order requires much more than just interconnection. “Any number of those issues add up to the type of general delay that violates Iowa law (including without limitation Iowa Code §§ 476.3, 476.100, and 476.101). This serves as an adequate basis to trigger the civil penalties provisions of Iowa Code § 476.51.” (MCC Br. at 28-29). The Board stated:

The record before the Board in this case establishes that Iowa Telecom delayed the implementation of the Board-approved interconnection agreement by refusing to process Sprint’s ASRs and exchange traffic for reasons that the Board finds to be specious, and therefore is in violation of the Board’s Arbitration Order. The interconnection agreement between Sprint and Iowa Telecom was approved pursuant to Board rules on May 24, 2006. Iowa Telecom’s obstructionist behavior has caused significant expense for Complainants and has impaired their ability to provide consumers with competitive local exchange service offerings. Any further delays in exchanging traffic are prohibited by this order and may form the basis for civil penalties pursuant to Iowa Code § 476.51.

(Board Order at 19).

In light of the court’s finding that the Board erred by requiring Iowa Telecom to exchange toll traffic, the court remands this issue to the Board for reconsideration. The court is uncertain whether Iowa Telecom’s refusal to allow Sprint to use its tandem switch for toll traffic formed the basis for the notice of civil penalties. If so, the Board should reconsider whether notice of civil penalties are appropriate.

IV. CONCLUSION

The court finds that the interconnection agreement does not allow Sprint to use Iowa Telecom's tandem switch for toll traffic. The Board erred in its interpretation of the interconnection agreement on this issue.

The court affirms the Board's interpretation of the POI clauses, allowing both a physical and a financial POI.

The court remands to the Board to reconsider the notice of civil penalties in light of the court's finding regarding toll traffic.

Upon the foregoing,

IT IS ORDERED the Iowa Utilities Board's March 24, 2007, Order is affirmed in part, reversed in part and remanded in part to the Iowa Utilities Board.

DATED this 12th day of June, 2009.



JOHN A. JARVEY
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF IOWA