CATCH ME IF YOU CAN: THE RACE TO OBTAIN DEEMED LAWFUL STATUS

By Jay Playter

I. INTRODUCTION

In mid-2005, Farmers Telephone of Riceville was a small, local telephone company serving the rural town of Riceville, Iowa.[1] This small telephone company was struggling to maintain customers within its service areas as its traditional business customers migrated to larger, more-populated commercial districts.[2] The company raced to update outdated technology, offered new and expanded services, and embarked on an extensive advertising campaign.[3] Despite its best efforts, Farmers of Riceville only generated around 14 million minutes of telecommunications traffic for the entire year, amounting to approximately $74,253,000 in gross revenues.[4]

By January 2007, Farmers Telephone of Riceville was handling nearly 28 million minutes of telecommunications traffic *per month*.[5] This boom in traffic was not the result of Farmers of Riceville dramatically expanding its service area or offering innovative technological services. Nor could the spectacular increase in minutes be attributed to an explosion in the population of Riceville.[6] In fact, the increase in minutes was the result of Farmer's provision of services to "customers"[7] that did not even reside in Iowa.[8] The enormous upsurge in minutes was a result of Farmer's partnership with free conference calling companies and engaging in a practice known as "traffic pumping"[9] within the telecommunications industry.[10]

Traffic pumping, also known as "access stimulation," has become a growing, and hotly contested, practice in the telecommunications industry,

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[1] Dionne Searcey, *How 2 Guys' Iowa Connection Took Big Telecoms for a Ride --- Calls Sent to Their Area Piled Up Access Fees Until FCC Interceded*, WALL ST. J., Oct. 4, 2007, at A1.
[2] *Id.*
[3] *Id.*
[4] *See id*. ("In November 2006, Mr. Laudner's company handled 27.4 million minutes of calls, more than double the number he had processed in an entire year before he partnered with the Internet companies."). At the time, Farmers Telephone of Riceville's tariffed rate was $0.053 per minute. *Id.*
[5] *See id.*
[6] In 2000, the population of Riceville, Iowa was approximately 840. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, IOWA: 2010 POPULATION AND HOUSING UNIT COUNTS 82 (2012), *available at* http://www.census.gov/prod/cen2010/cph-2-17.pdf. In 2010, the population was approximately 785. *Id.*
[7] For reasons that will be discussed at length later in this article, the term "customers" is used loosely here. *See infra* notes 70-74 and accompanying text.
[8] Qwest Commc'ns Corp. v. Superior Tel. Coop., No. FCU-07-2, 2009 Iowa PUC LEXIS 428, at *4 (Iowa Utils. Bd. Sept. 21, 2009) (stating that local rural carriers like Farmers "partnered with free calling service companies (FCSCs), which are based in large metropolitan areas such as Los Angeles, California, Las Vegas, Nevada, and Salt Lake City, Utah.").
[9] For an examination of the mechanics of traffic pumping, *see infra* Part III.
[10] Searcey, *supra* note 1, at A1.

spurring vast litigation at both the state and federal level throughout the country.[11] Telecommunications providers are arguing over, and state and federal regulatory bodies are wrestling with, whether carriers that have partnered with conference calling companies are entitled to collect charges for terminating traffic generated through traffic pumping arrangements. However, even if carriers like Farmers are found to have engaged in an unlawful practice,[12] such carriers maintain that Congress has provided a shield from refund liability for any illicit charges.[13] Congress's creation of the "deemed lawful" provision under the Telecommunications Act of 1996,[14] and the Federal Communications Commission's interpretation of that provision, has created a potential legal absurdity: a telecommunications carrier whose tariff is "deemed lawful" cannot be required to return unlawfully obtained charges.

This article examines the potential impact of "deemed lawful" status on a carrier engaged in unlawful telecommunications practices. Part II will provide a brief overview of the telecommunications industry, including the players, the different compensation mechanisms, and the governing tariff regime. Part III will examine the mechanics of traffic pumping and the telecommunication industry's reaction to the rise of traffic pumping practices. Finally, Part IV will explore the cat-and-mouse game that has taken shape, and is likely to continue, as a result of the FCC's interpretation and application of the "deemed lawful" provision and possible solutions in eliminating the absurdity created by the "deemed lawful" provision.

II. AN OVERVIEW OF THE TELECOMMUNICATIONS INDUSTRY AND INTERCARRIER COMPENSATION

A. The Players

The telecommunications industry is made up primarily of three types of telecommunications providers: local exchange carriers ("LECs"), interexchange

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[11] *See* Splitrock Props., Inc. v. Sprint Commc'ns Co., No. CIV. 09-4075-KES, 2010 U.S. Dist. LEXIS 30787, at *6 (D.S.D. Mar. 30, 2010) (citing similar cases in Iowa, New York, Minnesota, and Kentucky, as well as at least eight similar cases pending in South Dakota).

[12] 47 U.S.C. § 201(b) (2012) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.").

[13] *See generally* Sprint Commc'ns Co. v. N. Valley Commc'ns, LLC, 26 FCC Rcd. 10780 (July 18, 2011).

[14] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 613(a)–(g)). The Telecommunications Act of 1996 was enacted in order to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." *Id.*

carriers ("IXCs"), and commercial mobile radio service providers ("CMRS providers").[15]

LECs primarily provide the services to place what is generally thought of as a "local" telephone call.[16] A LEC routes a call from a calling party over a "loop," the telephone line running directly from an individual residence or business, onto the LEC's network where it is then directed to an end office switch.[17] From the end office switch, the call is routed back over the LEC's network to the specific loop terminating at the premises of the called party.[18] A LEC's network is essentially a bicycle wheel, with the end office at the hub and the various loops serving as the spokes of the wheel.[19]

LECs can further be classified as incumbent local exchange carriers ("ILECs") or as competitive local exchange carriers ("CLECs").[20] ILECs are local service providers that were operating on the date that the Telecommunications Act of 1996 ("Telecommunications Act") was enacted.[21] Because LECs operating at that time exclusively owned the traditional wireline local exchange networks (i.e., the only means by which to generate, route, and terminate wireline calls), any other telecommunications provider wishing to compete would have had to duplicate the incumbent's entire existing network, a cost-prohibitive proposition.[22] Thus, those LECs "operated as monopolies" within their local service area, essentially wielding unlimited power to control prices.[23] The Act imposed specific duties on ILECs to open their networks to providers attempting to compete.[24] Such competing providers are known as CLECs.[25]

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[15] *See In re* Developing a Unified Intercarrier Comp. Regime, 16 FCC Rcd. 9610, 9613-14 (2001). A LEC is essentially purely a local telephone provider. A LEC maintains the local telephone lines and equipment that enable a caller to place a telephone call to another party in the same local geographic area. An IXC is essentially solely a long-distance provider. An IXC does not maintain local telephone lines and equipment, but rather maintains the lines and equipment that run between two local providers' end offices. CMRS providers are essentially cell phone providers and may provide services that, at times, mirror those of both LECs and IXCs. In attempting to understand the technical information that follows, it may be more helpful to think in terms of local telephone companies, long-distance companies, and cell phone companies.

[16] Advamtel, LLC v. AT&T Corp., 118 F. Supp. 2d 680, 681 (E.D. Va. 2000).

[17] *Id.*

[18] *Id.*

[19] This is a simplified depiction of a local exchange network. An actual local call may involve switching between multiple switches before terminating at the called party's premises.

[20] *Advamtel*, 118 F. Supp. 2d at 681.

[21] 47 U.S.C. § 251(h)(1) (2012) (defining an "incumbent local exchange carrier" as a local exchange carrier that on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in a local exchange area).

[22] Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2257-58 (2011).

[23] *See* Advamtel, 118 F. Supp. 2d at 681.

[24] 47 U.S.C. §§ 251-261 (2012) (requiring ILECs to, among other duties, allow for the resale of its services at reasonable, non-discriminatory rates).

[25] *Advamtel*, 118 F. Supp. 2d at 680-81.

IXCs facilitate what are commonly thought of as "long distance" calls.[26] When a customer of a LEC attempts to call a customer of a different LEC whose network is not directly interconnected with the first, the call must be transported to the network of the LEC serving the called party.[27] IXCs provide such transport by interconnecting with the networks of both the LEC of the calling party and the LEC of the called party.[28] A long distance call is originated on the network of one LEC, passed on to the IXC (who transports the call to a second LEC), and finally terminated on the network of the second LEC serving a different local service area. Essentially, an IXC serves as a conduit between the customers, and networks, of two LECs.[29]

Finally, CMRS providers supply cell-phone service.[30] When a mobile user places a call, the CMRS provider receives a wireless radio signal at a mobile receiver, which is connected to the CMRS provider's wireline network.[31] If the called party is connected directly to the CMRS provider's wireline network, the call is delivered to the called party in essentially the same manner as a LEC would terminate a "local" call.[32] If the called party is not a member of the CMRS provider's network, the call is then transported to the network of the LEC serving the called party by handing it off directly to the LEC (if the networks of the CMRS provider and the LEC are directly connected) or often through the use of an IXC.[33] When a mobile user receives a call, the call is transported in the reverse order.

B. The Money

Intercarrier compensation for the transport and termination of telecommunications traffic between the networks of different service providers

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[26] Iowa Network Servs., Inc. v. Qwest Corp., 385 F. Supp. 2d 850, 866 n.24 (S.D. Iowa 2005). For the purposes of this article, all references to "long distance" calls will assume that such calls qualify as "toll service" calls. *See infra* note 37.

[27] Sancom, Inc. v. Qwest Commc'ns Corp., 643 F. Supp. 2d 1117, 1122 n.2 (D.S.D. 2009).

[28] *Id.*

[29] Continuing the bicycle analogy, *see supra* text accompanying notes 15-18, just as a LEC's network may be thought of as a bicycle wheel, an IXC's network may be thought of as the bicycle frame. While the frame connects the two wheels, the frame does not connect to the individual spokes of the wheels. While the IXC's network connects the LECs' networks, the IXC's telephone lines and equipment are distinct and separate from those of the LECs. An IXC therefore must rely on the use of the originating and terminating LECs' networks in order to deliver a long distance call. For using the LECs' networks, the IXC pays an originating access charge to the calling party's LEC and a terminating access charge to the called party's LEC. *See infra* notes 36-40 and accompanying text.

[30] Alma Commc'ns Co. v. Mo. Pub. Serv. Comm'n, 490 F.3d 619, 621 (8th Cir. 2007).

[31] *See* Southwestern Bell Tel. Co. v. Fitch, 801 F. Supp. 2d 555, 577 (S.D. Tex. 2011).

[32] *How Wireless Technology Works*, CTIA – THE WIRELESS ASSOCIATION, 4, *available at* http://files.ctia.org/pdf/Brochure_HowWirelessWorks.pdf (last visited Mar. 19, 2013). *See supra* notes 15-18 and accompanying text for discussion regarding the mechanics of a "local" telephone call.

[33] Alma Commc'ns Co. v. Mo. Pub. Serv. Comm'n, 490 F.3d 619, 621-22 (8th Cir. 2007).

generally is governed by one of two distinct categories of charges: access charges and reciprocal compensation.[34] The application of the rules associated with each category "treat different types of carriers and different types of services disparately, even though there may be no significant differences in the costs among carriers or services."[35] The interconnection regime that applies in a particular case "depends on such factors as: whether the interconnecting party is a local carrier, an interexchange carrier, [or] a CMRS carrier . . . and whether the service is classified as local or long-distance, interstate or intrastate . . . ."[36]

Access charges apply to traffic that does not originate and terminate in the same local area, i.e. "long distance" calls.[37] Because a long distance call actually originates and terminates on network equipment owned and operated by LECs, the IXC involved in transporting the call must pay an originating access charge and a terminating access charge to the originating and terminating LEC respectively.[38] Access rates can be further broken down into *intrastate* access rates, which are governed by state regulatory bodies, and *interstate* access rates, which are governed by the FCC.[39] These charges are typically small, with some as low as $.01 per minute.[40] However, in typically rural areas where providing

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[34] *In re* Developing a Unified Intercarrier Comp. Regime, 16 FCC Rcd. 9610, 9613 (2001) (summarizing the current intercarrier compensation regimes). However, the FCC has noted that stating that all calls are subject to either access charges or reciprocal compensation "is clearly an oversimplification . . . as both sets of rules are subject to various exceptions." *Id. See infra* note 37.

[35] *Id.*

[36] *Id.*

[37] *Id*. However, it may be more appropriate to state that access charges apply to "toll service" calls. Access charges apply for the provision of "exchange access." *See In re* Implementation of the Local Competition Provisions in the Telecomm. Act of 1996, 11 FCC Rcd. 15499, 15680 (1996) ("Our exchange access rules remain in effect and will still apply where incumbent LECs retain local customers and continue to offer *exchange access* services.") (emphasis added). "Exchange access" means "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of *telephone toll services*." 47 U.S.C. § 153(20) (2011) (emphasis added). "Telephone toll service" means "telephone service between stations in different exchange areas *for which there is made a separate charge not included in contracts with subscribers for exchange service*." § 153(55) (emphasis added). While most long distance calls have traditionally incurred a separate charge on top of a calling party's base rate for telephone service (thereby meeting the definition of a "toll service" call), theoretically a call could originate and terminate in different local exchanges and not incur a separate charge. In that case, it could be argued that the LEC is not providing exchange access and so is not entitled to charge the IXC access charges. For purposes of this article, when the term "long distance call" is used, it will be assumed that the call is a "toll service" call.

[38] *In re* Developing a Unified Intercarrier Comp. Regime, 16 FCC Rcd. at 9613-14. The mechanics of a long distance call are explained in Part II.A. Because the lines and equipment that actually deliver the call from the calling party's premises to the IXC's network and then from the IXC's network to the called party's premises are maintained and operated solely by LECs, IXCs must pay the LECs for the use of the LECs' networks. The IXC then collects fees for the long distance call directly from the calling party. That is why long distance callers have traditionally had to obtain a separate long-distance provider and pay a separate per minute fee for placing a long distance call.

[39] *Id.*

[40] *In re* Access Charge Reform, 16 FCC Rcd. 9923, 9931 (2001).

service has traditionally been more expensive,[41] access charges may be as high as $.13 per minute.[42]

C. The Rules

When applicable access charges are not established by an interconnection agreement between telecommunications providers, access charges are governed by rates contained in state and federal tariffs.[43] A tariff is a document filed with the FCC that outlines the services provided by a telecommunications provider and the applicable charges for the provision of those services.[44] While not all providers must file tariffs,[45] any telecommunications carrier that does file a tariff is strictly prohibited from providing any services or charging any rates other than those specifically listed in its tariff.[46]

Generally, the rates contained in an interstate access service tariff are valid for a two-year period.[47] Typically, the access rates contained in an

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[41]Qwest Commc'ns Corp. v. Superior Tel. Coop., No. FCU-07-2, 2009 Iowa PUC LEXIS 428, at *6 (Iowa Utils. Bd. Sept. 21, 2009).

[42] *Id.*

[43] *See In re* Developing a Unified Intercarrier Compensation Regime, Declaratory Ruling and Report and Order, 20 FCC Rcd. 4855 (February 24, 2005) (finding that tariffed rates are properly applied in the absence of a valid interconnection agreement). This article will focus on interstate tariffs and applicable federal statutes and FCC regulations. Filing requirements for intrastate tariffs may vary from state to state.

[44] *See* Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 221-22 (1998) (citing 47 U.S.C. § 203(a) (2012)).

[45] *In re* Hyperion Telecomm., Inc. Petition Requesting Forbearance, 12 FCC Rcd. 8596, 8611 (1997) (providing that non-ILEC, i.e. CLECs, may, but do not have to, file tariffs covering access services and rates); Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Commc'ns Act of 1934, as amended, 11 FCC Rcd. 20730, 20773 (1996) (providing that IXCs are no longer permitted to file tariffs covering access services and rates).

[46] 47 U.S.C.§ 203(c)(1) ("[N]o carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect. . . ."); *Am. Tel. & Tel. Co*., 524 U.S. at 222-26 (noting that the Communications Act prohibits the offering of services not included in a filed tariff).

[47] 47 C.F.R. § 69.3(a) (2011) ("[A] tariff for access service shall be filed with this Commission for a two-year period."); however, new tariffs containing changes in services or rates may be filed more often, *Id.* §§ 61.38-.39. The two-year limitation does not apply to CLECs or "price cap" ILECs, but rather only to so called "rate-of-return" ILECs. *Id.* § 69.3(f)(1)-(2) (establishing filing requirements only for ILECs which file tariffs pursuant to 47 CFR § 61.38 or § 61.39). Such ILECs are known as "rate-of-return" ILECs because §§ 61.38-.39 allow an ILEC to establish tariffed rates based on either their projected revenues versus projected costs or their historical revenues versus their historical costs, i.e. their projected or historical "rate of return." Rather than basing their tariffed rates on their "rate of return," LECs can also set their rates based on price cap rules established by the FCC. *See id.* §§ 61.41-.49. However, because complaints regarding illicit telecommunications activities have not directly involved price cap carriers given the relatively low

interstate access tariff must be based on the LEC's projected or historical costs for providing service plus a prescribed return on investment.[48] A carrier is permitted to adjust its rates during a prescribed period if its actual return deviates from its projected return and, for practical purposes, may be obligated to make such adjustments to avoid refund liability for revenues that significantly exceed its costs.[49] After each two-year period, a LEC must recalculate its rates based on either its projected costs for the next two years or its actual costs for the previous two years and submit a new tariff with the FCC.[50]

When a tariff is filed with the FCC, the FCC can, on the filing of a petition challenging the tariff or on its own initiative, institute a hearing regarding the lawfulness of the rates listed in the tariff.[51] If the FCC does not institute such a hearing, or if it does institute such a hearing and does not find that the rates are unjust or unreasonable, the rates are presumed to be lawful and the LEC is entitled to charge such rates.[52] However, while the rates are presumed lawful, the FCC can later find that the rates are and/or were in fact unjust or unreasonable and order the LEC to refund any revenue collected pursuant to rates over and above rates that would have been just and reasonable as determined by the FCC.[53]

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rates available under price cap rules, *In re* Connect Am. Fund, 26 FCC Rcd. 4554, 4760 (2011), this article will focus on regulations related to so called "rate-of-return" carriers.

[48] *In re* Access Charge Reform, 15 FCC Rcd. 12962, 12968 (2000) ("LECs calculate the specific access charge rates using projected costs and projected demand for access services."); *see also* 47 C.F.R. § 61.26(b) (CLECs are not required to submit cost justification data but generally cannot charge access rates higher than the access rates of the ILEC in the same service area, which do have to be cost-based).

[49] *See In re* MCI Telecomm. Corp. v. Pac. Nw. Bell Tel. Co., 5 FCC Rcd. 216, 223 (1989) ("Carriers are permitted to make mid-course corrections if their actual return deviates from the authorized return. If actual earnings are higher than the authorized return, a carrier can file reductions and thereby avoid the risk of being ordered to pay damages.").

[50] *See* 47 C.F.R. § 69.3(f)(1)-(2); *see also* §§ 61.38-.39. The ability to use historical cost data rather than projected cost data is limited to LECs that have annual operating revenues not more than forty million dollars and that serve 50,000 or fewer access lines. *See* 47 C.F.R. § 61.39(a).

[51] 47 U.S.C. § 204(a)(1) (2012) ("Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof."). Any tariff filed with the FCC must meet a mandated minimum notice period before taking effect. 47 C.F.R. § 61.58(a). Generally, an ILEC must provide sixteen days' notice, while a CLEC may provide as little as one days' notice. *Id.* § 61.58(2)(ii). *But see infra* note 52. Such notice period is meant to enable challenges to the lawfulness of the tariff. *See* 47 C.F.R. § 1.773 (2012) (requiring any person filing a petition for "investigation, suspension, or rejection of a new or revised tariff filing" to show that "there is a high probability the tariff would be found unlawful after investigation.").

[52] *In re* Implementation of Section 402(b)(1)(A) of the Telecomm. Act of 1996, 12 FCC Rcd. 2170, 2182-83 (1997). *See also* 47 U.S.C. § 205(a) (2012). If the FCC determines that the rates listed in the tariff are unlawful, the FCC can mandate what rates are just and reasonable. *Id.*

[53] *See In re Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd. at 2182-83 ("Under current practice, . . . if . . . a tariff filing is subsequently determined to be unlawful in a complaint proceeding commenced under section 208 of the Act, customers who obtained service under the tariff prior to that determination may be entitled to damages."). *See also* 47 U.S.C. § 205(a).

D. The "Get Out of Jail Free" Card

The Telecommunications Act implemented sweeping changes in the telecommunications industry, with one change in particular significantly affecting the rules of the game. Congress included a provision that enabled LECs, subject to certain notice requirements,[54] to obtain "deemed lawful" status for a tariff filed with the FCC.[55] Tariffs that are not suspended for investigation during the required initial notice period are automatically treated as being deemed lawful.[56] The FCC has indicated that rates charged under a deemed lawful tariff are conclusively presumed to be lawful for the period the tariff is in effect.[57] If the rates are later found to be unlawful in an investigation initiated by the FCC or in a complaint proceeding, the offending LEC cannot be required to refund charges collected prior to the determination of unlawfulness.[58] So long as service is provided pursuant to the terms and conditions of the tariff, the LEC can argue that its "deemed lawful tariff" is an absolute shield against refund liability, and the LEC can only be liable for continuing to collect the unlawful rates on a prospective basis.[59]

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[54] Any LEC, whether incumbent or competitive, can now file on a streamlined basis: on seven days' notice, in the case of a reduction in rates, or on fifteen days' notice, in the case of an increase in rates or any other change in the terms of service. 47 C.F.R. § 61.58(2)(i). For background regarding notice requirements for tariffs not filed on a streamlined basis and the reason for notice periods generally, *see supra* notes 49-51 and accompanying text.

[55] 47 U.S.C. § 204(a)(3) ("Any . . . charge, classification, regulation, or practice [filed under the streamlined filing provisions] shall be deemed lawful . . . .").

[56] *See In re Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd. at 2182 ("[W]e conclude that, because section 204(a)(3) uses the phrase 'deemed lawful,' it must be read to mean that a streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect.").

[57] *Id.*

[58] *Id.* at 2183. For treatment of tariffs that are not deemed lawful, see *supra* notes 48-50 and accompanying text.

[59] *See id.* Whether "service is provided pursuant to the terms and conditions of the tariff" is the basis for much of the current traffic pumping litigation. *See, e.g*,, Splitrock Props., Inc. v. Sprint Commc'ns Co., No. CIV. 09-4075-KES, 2010 U.S. Dist. LEXIS 30787, at *3-4 (D.S.D. Mar. 30, 2010) ("Sprint denies that it failed to pay switched access charges for services provided pursuant to Splitrock's tariffs on the ground that the services provided by Splitrock do not qualify as 'switched access service,' as that term is defined in Splitrock's tariffs.").

III. THE GAME IN ACTION

A. "Traffic Pumping" – A New Practice

Over the past decade, LECs such as Farmers Telephone of Riceville, have increasingly engaged in "traffic pumping"[60] in order to generate enormous numbers of minutes of traffic and, correspondingly, enormous revenues. Traffic pumping typically involves an agreement between a rural LEC and a free calling service company (FCSC).[61] The LEC assigns local telephone numbers to the FCSC, which then advertises those numbers across the nation through online advertisements, offering customers the opportunity to participate in conference calling by dialing the advertised number.[62] These conference services allow customers from all over the U.S. to teleconference with one another, even though none of the participants or the FCSC might actually be located in the area serviced by the terminating LEC.[63] Callers utilizing these conference services drive up the amount of long distance traffic sent to the LEC, increasing volumes as much as 100-fold in some instances.[64]

When callers dial these numbers, the caller's IXC or CMRS provider must deliver the long distance call to the LEC for termination.[65] The LEC bills the IXC or CMRS provider for such termination at the LEC's tariff access rate, which in the case of a rural LEC is relatively high.[66] Because these high rates are based on the LEC's historically low long distance traffic volumes and small number of customers,[67] as the number of long distance minutes increases, any costs associated with handling the increased traffic are vastly eclipsed by the

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[60] The FCC recently formally defined this practice as "access stimulation." *In re* Connect Am. Fund, 26 FCC Rcd. 17663, 17676 (2011).

[61] Qwest Commc'ns Corp. v. Superior Tel. Coop., No. FCU-07-2, 2009 Iowa PUC LEXIS 428, at *6 (Iowa Utils. Bd. Sept. 21, 2009).

[62] *Id.* at *4-7.

[63] *See id.* at *4.

[64] *Id.* at *2.

[65] *In re* Establishing Just and Reasonable Rates for Local Exchange Carriers, 22 FCC Rcd. 11629, 11631 (2007) ("Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way.").

[66] *See supra* note 40 and accompanying text. However, based on new regulations promulgated by the FCC, LECs engaged in traffic pumping are unlikely to be able to obtain such high rates. *See In re* Connect Am. Fund, 26 FCC Rcd. 17663, 17882 (2011). Going forward, ILECs will be required to file revised tariffs with rates based on projected costs within 45 days after qualifying as participating in "access stimulation." *Id.* at 17882-83. Such rates will have to account for the large volumes of traffic generated by traffic pumping, thereby raising revenues and lowering costs, which in turn will lower the rates the ILECs can charge and still meet the FCC's regulations regarding rates of return. *See supra* text accompanying notes 46-48. Similarly, a CLEC engaged in "access stimulation" will be required to benchmark its rates at "a rate no higher than the lowest rate of a price cap LEC in the state," thereby significantly lowering the CLEC's rates. *In re* Connect Am. Fund, 26 FCC Rcd. at 17885.

[67] Qwest Commc'ns Corp. v. Superior Tel. Coop., No. FCU-07-2, 2009 Iowa PUC LEXIS 428, at *2 (Iowa Utils. Bd. Sept. 21, 2009).

revenues generated under the LEC's high access rates. The LEC then pays a portion or percentage of the access revenues to the conference calling companies (CCC) as a "marketing fee" for generating the traffic.[68] This system essentially enables a CCC to receive telecommunications services, even though neither the CCC nor the callers utilizing the conference calling services are located in the LEC's service area, and get paid for receiving those telecommunications services. A LEC and a CCC can maintain this relationship for up to two years before tariff regulations require the LEC to adjust its access rates to account for the high traffic volumes generated by a traffic pumping arrangement.[69]

B. The IXCs Strike Back

As was inevitable, the IXCs responsible for delivering these tremendous volumes of long distance traffic (and for paying the access charges for termination), noticed the significant increases in traffic to areas that traditionally generated relatively low volumes of long distance traffic. Upon learning of the traffic pumping arrangements responsible for generating such increases, the IXCs challenged the LECs' right to share revenues with "customers" and to collect such high access rates given the FCC's restrictions on carriers' available rates of return.[70]

Initially, the FCC determined that the LECs were not prohibited from entering into revenue sharing agreements with the CCCs,[71] and that, while the rates collected by the LECs unlawfully exceeded their prescribed rates of return, the IXCs were only entitled to prospective relief because the LECs tariffs, and thus their rates, were deemed lawful.[72] However, after it was later discovered that the CCCs had not paid any fees for the services provided by the LECs, the FCC determined that the CCCs were therefore not "customers" as defined by the LECs' tariffs.[73] Because the CCCs were not "customers" the LECs tariffs, though deemed lawful, did not apply and the LECS were not entitled to collect

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[68] *See id.* at *2-3..

[69] *See supra* notes 47-50 and accompanying text. The relationship may last even longer in the case of an agreement between a CCC and a CLEC, given that the two-year tariff limitation does not apply to CLECs. *See supra* note 45.

[70] Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co., 22 FCC Rcd. 17973, 17976-77 (2007). *Superior Tel. Coop.*, 2009 Iowa PUC LEXIS 428 at *40-41. *See also supra* notes 47-50 and accompanying text (examining interstate access tariff requirements).

[71] *Farmers & Merchants Mut. Tel. Co.*, 22 FCC Rcd. at 17987-88 (2007) ("We find that Farmers' payment of marketing fees to the conference calling companies does not affect their status as customers, and thus end users, for purposes of Farmers' tariff.").

[72] *Id.* at 17983-84. One section of the FCC's order was specifically entitled "Although Farmers Earned an Unlawful Rate of Return During the Complaint Period, Qwest Is Not Entitled to Damages." *Id*. at 17983.

[73] Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co., 24 FCC Rcd. 14801, 14805 (2009).

access charges for terminating long distance traffic destined to CCCs.[74] Thus, the IXCs were entitled to retrospective relief, namely damages.

C. Return of the LECs

Following the seeming victory for the IXCs in the *Farmers* decision, the LECs moved quickly to counter. LECs began to file tariffs defining "customers" as any user of the LEC's telecommunications services, regardless of whether the user paid for such services or not.[75] IXCs again moved to challenge such tariffs.

The FCC determined that such definitions were unlawful under FCC regulations.[76] The FCC noted that for more than 25 years its regulations and orders allowed for the imposition of access charges by a LEC only when terminating traffic to a customer that subscribed to telecommunications services offered for a fee.[77] Despite being contrary to FCC regulations, the FCC determined that based on the tariffs' terms and conditions, the tariffs applied to the LECs' traffic for the period prior to the FCC's determination and that, because the tariffs were deemed lawful, the IXCs were entitled to prospective relief only.[78]

IV. LEVELING THE PLAYING FIELD

While the FCC has created regulations to curb the effects of traffic pumping,[79] the shadow cast by the FCC's interpretation and application of § 204(a)'s deemed lawful provision continues to loom over the telecommunications industry. As the battle over traffic pumping practices illustrates, the deemed lawful provision has created a perverse game of cat-and-mouse between LECs and IXCs. It is estimated that traffic pumping practices generated over $2.3 billion in revenue for LECs from 2005 to 2010,[80] so LECs clearly have a tremendous incentive to explore and adopt alternative practices

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[74] *Id.*

[75] *See, e.g.*, Qwest Commc'ns Co. v. N. Valley Commc'ns, LLC, 26 FCC Rcd. 8332, 8333-34 (2011).

[76] *Id.* at 8332-33.

[77] *Id.* at 8336-37 ("[T]he Commission's access service rules and orders establish that a CLEC may tariff access charges only if those charges are for transporting calls to or from an individual or entity to whom the CLEC offers service *for a fee.*") (emphasis in original).

[78] *See* Qwest Commc'ns Co v. Farmers & Merchants Mut. Tel. Co., 22 FCC Rcd. 17973, 17980; *see also* Sprint Commc'ns Co. v. N. Valley Commc'nc, LLC, 26 FCC Rcd. 10780, 10788 (2011) ("Pursuant to section 204(a)(3) of the Act, the Tariff is "deemed lawful" until found otherwise by this Commission or a court of law.").

[79] *See In re* Connect Am. Fund, 26 FCC Rcd. 17663 (2011).

[80] *Id.* at 17876 ("TEOCO estimates that the total cost of access stimulation to IXCs has been more than $ 2.3 billion over the past five years. Verizon estimates the overall costs to IXCs to be between $330 and $440 million per year, and states that it expected to be billed between $66 and $88 million by access stimulators for approximately two billion wireline and wireless long-distance minutes in 2010.").

that will generate large volumes of access minutes. Because the "deemed lawful" status appears to provide an absolute shield against retrospective relief, LECs have an incentive to adopt such practices even if such practices are contrary to established FCC regulations and precedent. This leaves IXCs and the FCC in the unenviable, and untenable, position of attempting to monitor and challenge each and every access tariff filed with the FCC for not only apparent unlawful terms and conditions, but also for any possible future unlawful application of a LEC's proposed terms and conditions. Because IXCs have to continually attempt to stay ahead of any possible traffic inflating schemes, they will increasingly have to challenge proposed tariffs, thus requiring more time and resources on behalf of all LECs and IXCs and the FCC. However, there are a number of possible solutions available to lessen the effects of the "deemed lawful" provision.

A. Refereeing the Game

One available solution to avoid providing LECs an arguably absolute shield of "deemed lawful" status is to simply increase the time and resources expended on reviewing tariffs filed with the FCC. The FCC could simply suspend for investigation all tariffs filed pursuant to the streamlined notice period. In promulgating the streamlined tariff provisions under the Telecommunications Act, Congress did not eliminate the FCC's suspension authority for investigation of LEC tariffs.[81] Tariffs that are suspended within the streamlined notice period are not eligible for deemed lawful status even if found to be lawful pursuant to FCC determination.[82]

Given what are already limited available resources, such a solution seems untenable. The resources required to monitor, suspend, and investigate the tremendous number of tariffs filed daily with the FCC would be enormous. Further, such an approach would seem to be contrary to Congress' stated intentions of deregulation and accelerated provision of telecommunications services.[83]

B. An Exception to the Rules

Another possibility for deterring LECs from proposing tariffs that enable them to artificially stimulate traffic, is to create a recognized exception to

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[81] *In re* Implementation of Section 402(b)(1)(A) of the Telecomm. Act of 1996, 12 FCC Rcd. 2170, 2183-84 (1997) ("Congress did not amend the Act to eliminate the Commission's suspension authority for LEC tariffs . . . .").
[82] *See id.* at 2182 ("[T]he 'deemed lawful' language does not govern streamlined tariff filings that become effective after suspension in those instances where the Commission suspends and initiates an investigation of a LEC tariff within the 7 or 15 day notice periods specified in section 204(a)(3).").
[83] *See id.* at 2172-74.

deemed lawful status. The FCC recently adopted such an exception for LECs involved in traffic pumping.[84] The FCC determined that any LEC engaged in traffic pumping that failed to meet regulatory guidelines regarding tariff filings would be considered to have engaged in "furtive concealment" and would forfeit deemed lawful status for its tariff, subjecting the LEC to refund liability as of the date on which the tariff was required to have been filed.[85]

However, such a measure would be ineffective against alternative future traffic stimulating activities. The FCC indicated that finding that a LEC had engaged in furtive concealment would require a knowing circumvention of FCC regulation aimed at curbing a recognized telecommunications practice.[86] As the long-raging battle over traffic pumping illustrates, the FCC's regulations necessarily leave room for argument over whether a given practice is unlawful. Before the FCC has the opportunity to address the lawfulness of a traffic stimulating activity, LECs would be able to rack up enormous amounts of revenue while avoiding knowingly circumventing FCC regulations, nullifying the effectiveness of a "furtive concealment" exception to deemed lawful status.

C. Redefining the Rules

Another alternative available is to redefine what "deemed lawful" status means. When the FCC originally interpreted the meaning of deemed lawful status, it acknowledged two possible available alternative interpretations with vastly different effects.[87] Under the alternative interpretation originally rejected by the FCC, deemed lawful status would establish a presumption of lawfulness for all tariffs filed pursuant to the streamlined notice period. The presumption of lawfulness would merely establish a higher burden for suspension and investigation[88] and would not protect a LEC from refund liability.[89]

However, the FCC is unlikely to reinterpret the deemed lawful provision. Doing so would require a tremendous reversal of FCC precedent and federal case law relying on the FCC's interpretation of the deemed lawful provision. Further, in adopting the alternative interpretation of deemed lawful status, the FCC would be required to adopt an interpretation that the FCC has already determined would be clearly contrary to unambiguous statutory language and relevant appellate case law.[90]

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[84] *In re Connect Am. Fund*, 26 FCC Rcd. at 17888-89.
[85] *Id.*
[86] *See id.*
[87] *In re Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd. at 2175-76.
[88] Several carriers suggested that the FCC interpret the "deemed lawful" provision to provide a presumption of lawfulness which would require that a party challenging a tariff filed under the streamlining provisions show that the tariff would "more likely than not" be found to be unlawful. *Id. at* 2179-80.
[89] *Id.* at 2175-76.
[90] *See id.* at 2181-82 ("[W]e determine that [the current interpretation of the deemed lawful language] is compelled by the language of the statute viewed in light of relevant appellate

D. Eliminating the Rule

A final alternative is for Congress to repeal the deemed lawful provision altogether. In instituting the streamlined provisions of the Telecommunications Act, Congress sought to deregulate the telecommunications industry while providing for the "deployment of advanced telecommunications and information technologies and services to all Americans."[91] While Congress has certainly provided the means for deregulation by creating the streamlined filing provisions, when it established the deemed lawful provision, Congress failed to ensure the deployment of advanced telecommunications and information technologies and services. The deemed lawful provision provides LECs an incentive to engage in practices that impose undue costs on consumers and harm competition.[92] By repealing the deemed lawful provision and maintaining the streamlined filing provisions, Congress would continue to promote the deregulation of the telecommunications industry. It would also simultaneously deny LECs an absolute shield against refund liability, thereby eliminating any incentive for LECs to engage in traffic stimulating activities that would inefficiently divert funds away from the development and deployment of more advanced and sophisticated telecommunications technologies.

V. CONCLUSION

By including the "deemed lawful" provision in the Telecommunications Act of 1996, Congress sought to create a "pro-competitive, deregulatory national policy framework."[93] Instead, Congress arguably provided LECs an absolute shield against refund liability, creating a legal absurdity whereby LECs are not even required to refund revenues generated by practices that are contrary to established FCC regulations and precedent. The deemed lawful provision has created a perverse game of cat-and-mouse, with LECs attempting to adopt new, and questionable, practices to artificially stimulate access traffic while IXCs and CMRS providers challenge tariffs for any seemingly questionable possible future unlawful application. While the deemed lawful provision sought to lessen regulation regarding tariff filings, it has actually created a mechanism for generating increased investigation and litigation. Congress can avoid such inconsistency with its stated goals simply by repealing the deemed lawful provision and maintaining the streamlined filing provisions of the Telecommunications Act of 1996. In doing so, Congress can be assured that resources will be channeled into the development and deployment of more

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decisions, and that our alternative approach outlined in the NPRM is not a permissible reading of this statutory provision.").

[91] *Id.* at 2172.

[92] *See In re* Connect Am. Fund, 26 FCC Rcd. 17663, 17875 (2011).

[93] *In re Implementation of Section 402(b)(1)(A)*, 12 FCC Rcd. at 2172.

advanced and sophisticated telecommunications technologies rather than the exploration of, and litigation over, traffic stimulating practices.