

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>AVENTURE COMMUNICATION TECHNOLOGY, LLC,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">v.</p> <p>NORTHWEST IOWA TELEPHONE, LLC,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-06-43</p>
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**ORDER DECLINING TO ISSUE DECLARATORY ORDER, DOCKETING
COMPLAINT, ESTABLISHING EXPEDITED PROCEDURAL SCHEDULE,
AND OPENING INQUIRY**

(Issued May 31, 2006)

On May 24, 2006, Aventure Communication Technology, LLC (Aventure), a competitive local exchange carrier (CLEC), filed with the Utilities Board (Board) a petition for declaratory judgment, a complaint against Northwest Iowa Telephone, LLC (NWIT), and a request for termination of NWIT's rural exemption. Aventure states NWIT is an incumbent local exchange carrier (ILEC) and a subsidiary of Long Lines, a communications services company that provides through its various entities local, long-distance, video, Internet, and various carrier-to-carrier services.

I. Aventure's request for declaratory ruling

In its filing, Aventure describes itself as a new entrant to the market. Aventure claims NWIT has refused to negotiate terms and conditions for interconnection and

exchange of traffic with Aventure and that such refusal interferes with its ability to enter the marketplace. Aventure asks the Board to issue declaratory orders to assist in obtaining NWIT's good faith cooperation and in Aventure's introduction of competing services in northwest Iowa.

Aventure states it sent its first bona fide request (BFR) for negotiation for interconnection under 47 U.S.C. §§ 251 and 252 to NWIT on November 15, 2005, and that in response to the request, NWIT stated Aventure had to prove it was a telecommunications carrier before NWIT would negotiate. Aventure states it sent NWIT a second BFR on January 20, 2006. Aventure asserts that NWIT failed to file either BFR with the Board, in violation of 199 IAC 38.7(1)(a). Aventure asserts NWIT is refusing to negotiate because it believes it is not subject to the requirements of 47 U.S.C. §§ 251 and 252 under the rural exemption. Attached to Aventure's filing is a copy of the third BFR Aventure states it delivered to NWIT on May 23, 2006.

Aventure asks the Board to declare that NWIT's refusal to negotiate and its insistence on proof of certification as a precondition to negotiation violate various provisions of state and federal law. Aventure also asks the Board to declare that the second BFR served on January 20, 2006, should be considered the valid and currently operative BFR and that NWIT should not be permitted to use the rural exemption to avoid interconnection or Board oversight of terms and conditions of interconnection.

Aventure explains that NWIT has raised some of these issues in an action filed in the federal district court for the Northern District of Iowa.¹ Aventure asserts the Board is a more proper forum for resolution of these issues.

II. Aventure's complaint and request for expedited relief

In its complaint, Aventure states that if the Board finds declaratory relief improper, the Board should find NWIT in violation of various provisions of Iowa Code §§ 476.100 and 476.101, Board rules and order NWIT to comply with the rules and federal obligations.

III. Aventure's request to terminate rural exemption

In its request to terminate NWIT's rural exemption, Aventure states it has reason to believe NWIT will rely on the rural exemption of 47 U.S.C. § 251(f) as a defense in this matter. Aventure asserts that compliance with the first two BFRs is technically feasible for NWIT or Long Lines, NWIT's parent company. Aventure asserts application of the rural exemption in this case would deny competition to the northwest Iowa market and financially harm Aventure and customers it wishes to serve. Aventure asks that the Board, on an expedited basis, terminate NWIT's rural exemption and set an expedited implementation schedule consistent with the time remaining under the second BFR or, at the longest, within the timeframe established in the third BFR.

¹ Northwest Iowa Tel., LLC, and Jefferson Tel. Co., LLC, v. Aventure Communication Technology, LLC, Civil Case No. C06-4043-MWB, U.S. District Court for the Northern District of Iowa.

In addition to the three types of relief described above, Aventure asks the Board to place NWIT on notice that further violations of Iowa Code §§ 476.100 and 101, related rules, or this order will result in civil penalties under Iowa Code § 476.51 and asks the Board to assess all costs related to this proceeding to NWIT.

IV. Discussion

Subrule 199 IAC 4.9(1) allows the Board to decline to issue a declaratory order where the questions presented by the petition are also presented in a contested case proceeding that will definitively resolve the questions. In this case, the issues raised in Aventure's request for declaratory judgment are the same as those raised in its complaint against NWIT, which the Board must treat as a contested case pursuant to Iowa Code § 476.101(8). The proceeding conducted pursuant to Iowa Code § 476.101(8) will resolve the issues raised in Aventure's request for declaratory judgment. Therefore, the Board will deny Aventure's request for declaratory judgment.

The Board will docket Aventure's complaint for further investigation. Iowa Code § 476.101(8) provides, in relevant part, that when the Board initiates formal complaint proceedings in response to a written complaint regarding a local exchange carrier's compliance with §§ 476.96 through 476.102, "[t]he Board shall render a decision in the proceeding within ninety days after the date the written complaint was filed." Thus, the deadline for Board action in this docket is August 22, 2006, and the Board will establish a procedural schedule that will allow it to satisfy that requirement.

The Board has reviewed Aventure's request for termination of NWIT's rural exemption. Federal law, 47 U.S.C. § 251(f)(1)(B), provides that a party making a bona fide request of a rural telephone company for interconnection shall submit a notice of its request to the State commission, which must conduct an inquiry for the purpose of determining whether to terminate the exemption and, within 120 days after receiving notice of the request, shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with 47 U.S.C. § 254, which specifies universal service requirements. Upon termination of the exemption, the State commission must establish an implementation schedule for compliance with the request that is consistent in time and manner with Federal Communications Commission regulations. Pursuant to 47 U.S.C. § 251(f)(1)(B), the Board will docket for inquiry Aventure's request for termination of NWIT's rural exemption. The Board intends to determine whether to terminate the exemption at the same time it issues a decision in the complaint proceeding. Therefore, the procedural schedule established for the complaint proceeding will apply to the inquiry.

Finally, further discussion is necessary in light of Aventure's statement that NWIT has raised some of the same issues involved in this matter in an action filed in the federal district court for the Northern District of Iowa. The Board recognizes that as a result of this order, there is a chance that these issues will be considered simultaneously by the Board and by the Court. However, the statutory deadlines applicable to Board action in this docket require that the Board proceed, even at the

risk of creating parallel proceedings. In at least one recent situation where related cases were pending before a United States District Court and this agency, the Board filed a motion with the Court asking the Court to abstain from deciding the issues in the case pursuant to the doctrine articulated by the Supreme Court in Younger v. Harris, 401 U.S. 37 (1971), and the Court granted that motion and dismissed the case before it.² The Board (or, more accurately, the Board members individually in their official capacities) was a party to that case, so it was appropriate for the Board to file pleadings with the Court.

The Board is not a party to the federal case mentioned by Aventure. Accordingly, the Board will set out its understanding of the Younger abstention doctrine in this case with the expectation that one or both of the parties to this agency docket will file this order with the Court, perhaps as an attachment to an appropriate pleading.

In Younger, the Supreme Court held that a federal court may not interfere with a pending state criminal proceeding. Younger, 401 U.S. at 41. The Court stated two reasons for this policy. First, the doctrine that courts should not act in equity when the moving party has an adequate remedy at law and will not suffer irreparable injury if the court chooses not to act and, second, the principle of comity, that is, "a proper respect for state functions, a recognition of the fact that the entire country is made up

² OCCMC, Inc., v. Norris, et al., U.S. District Court for the Southern District of Iowa, No. 4:06-cv-00069, "Order," issued April 24, 2006.

of a Union of separate state governments." Id. at 43-44. Since then, the Court has extended the Younger doctrine to civil cases in which the state is a party, to civil cases implicating important state interests, and to state administrative proceedings where an important state interest is at stake. Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 437 (1982) (holding that Younger required the court to abstain from interfering with a disciplinary proceeding brought by the state bar ethics committee).

Younger requires a federal court to abstain from issuing injunctive relief when a three-part test is satisfied. First, there must be an ongoing state proceeding; second, the state proceeding implicates important state interests; and third, the state proceeding affords an adequate opportunity to raise the federal questions presented. Fuller v. Ulland, 76 F.3d 957, 959 (8th Cir. 1996). Here, the first factor is satisfied; there is an ongoing state proceeding that will be handled as a contested case, that is, an adjudicatory proceeding with an opportunity for a full-blown evidentiary hearing and, in the end, a written order that will explain the Board's decision and identify the record evidence that supports that decision.

The second factor, implication of important state interests, is also satisfied. Iowa has an express policy, adopted as a statute, in favor of encouraging competition in the telecommunications marketplace, with the goal that communications services should be available throughout the state at just, reasonable, and affordable rates from a variety of providers. Iowa Code § 476.95. The State has charged the Board with the duty to resolve disputes between competitors in that marketplace in a timely

manner, see Iowa Code § 476.101(8). That statute establishes a 90-day "rocket docket" for issuing a Board decision regarding any complaint that is filed with the Board and that asks the Board to determine whether a local exchange carrier is fulfilling its obligations under specified Iowa statutes. The State would not impose that duty, and require that it be handled in an expedited manner, if there were no important state interests at issue.

This leaves only the third factor, a proceeding that affords an adequate opportunity to raise the federal questions presented. With this order, the Board is establishing a procedural schedule that will allow the parties to conduct discovery and submit pre-filed testimony in support of their respective positions. The Board is also scheduling a hearing at which that sworn, pre-filed testimony will be admitted into the record and the witnesses will be made available for cross-examination. The parties will have the opportunity to submit legal argument in the form of written briefs and they will receive a written order that explains the basis for the Board's decision, whatever that decision may be. That order will be subject to judicial review in Iowa's courts pursuant to Iowa Code §§ 17A.19 and 476.13. The Board believes these procedures present an adequate opportunity for the parties to raise their issues.

Because this is an ongoing proceeding in front of this agency that implicates an important state interest and affords the parties the opportunity to raise any and all issues they may have, the Board believes that Younger abstention is appropriate.

IT IS THEREFORE ORDERED:

1. The request for declaratory order, filed May 24, 2006, by Aventure Communication Technology, LLC, is denied.
2. The complaint filed on May 24, 2006, by Aventure Communication Technology, LLC, against Northwest Iowa Telephone, LLC, is docketed for a formal complaint proceeding identified as Docket No. FCU-06-43.
3. The following procedural schedule is established for this proceeding:
 - a. Aventure shall file prepared direct testimony, with supporting exhibits and workpapers, on or before June 14, 2006.
 - b. NWIT shall file rebuttal testimony, with supporting exhibits and workpapers, on or before June 28, 2006.
 - c. Aventure may file reply testimony, with supporting exhibits and workpapers, on or before July 5, 2006.
 - d. On or before July 19, 2006, the parties shall each file a prehearing brief that includes an analysis of the appropriate legal standard for determining whether violations of the Iowa Code provisions identified in Aventure's complaint have been violated.
 - e. A hearing for the purpose of receiving testimony and cross-examination of all witnesses will commence at 9 a.m. on Wednesday, July 26, 2006, in the Board's hearing room at 350 Maple Street, Des Moines, Iowa. Parties shall appear at the hearing one-half hour prior to the time of hearing to mark exhibits. Persons with disabilities requiring assistive services or devices

to observe or participate should contact the Board at 515-281-5256 in advance of the scheduled date to request that appropriate arrangements be made. The parties are advised that the Board has reserved two days for the hearing in this matter.

f. Any party desiring to file a post-hearing brief may do so on or before August 2, 2006.

4. In the absence of objection, all workpapers shall become a part of the evidentiary record at the time the related testimony and exhibits are entered in the record.

5. In the absence of objection, all data requests and responses referred to in oral testimony or cross-examination, which have not previously been filed with the Board, shall become a part of the evidentiary record. The party making reference to the data request or response shall file an original and six copies at the earliest possible time.

6. In the absence of objection, if the Board calls for further evidence on any issue and that evidence is filed after the close of hearing, the evidentiary record shall be reopened and the evidence will become a part of the evidentiary record three days after filing. All evidence filed pursuant to this paragraph shall be filed no later than five days after the close of hearing.

7. The request to terminate the rural exemption for Northwest Iowa Telephone, LLC, filed by Aventure Communication Technology, LLC, on May 24, 2006, is docketed for inquiry pursuant to 47 U.S.C. § 251(f)(1)(B). The inquiry shall

proceed according to the schedule established in this order for the complaint proceeding.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 31st day of May, 2006.