

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>COON CREEK TELECOMMUNICATIONS CORP.,</p> <p style="text-align:center">Petitioner,</p> <p style="text-align:center">vs.</p> <p>IOWA TELECOMMUNICATIONS SERVICES, INC., d/b/a IOWA TELECOM,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-06-42</p>
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**ORDER DOCKETING COMPLAINT, DENYING MOTION TO DISMISS,
AND SETTING PROCEDURAL SCHEDULE**

(Issued June 27, 2006)

I. Background

On May 4, 2006, Coon Creek Telecommunications Corp. (Coon Creek) filed with the Utilities Board (Board) a complaint and request for emergency and permanent relief against Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom), pursuant to Iowa Code §§ 476.1D and 476.101(8) (2005), among other provisions.

On May 10, 2006, Coon Creek filed with the Board an amended complaint and motion for leave to amend its complaint. Also on May 10, 2006, Iowa Telecom filed with the Board a response to Coon Creek's motion for leave to amend its complaint.

On May 19, 2006, the Board issued an order granting Coon Creek's request to amend its complaint, directing Iowa Telecom to file an answer, and stating that all relevant time calculations in this docket shall be made from May 19, 2006.

II. Coon Creek's complaint

In its amended complaint, Coon Creek, a competitive local exchange carrier (CLEC), alleges that Iowa Telecom, an incumbent local exchange carrier (ILEC), is engaging in predatory pricing, discriminatory behavior, and anti-competitive practices in violation of various provisions of Iowa law. Coon Creek argues Iowa Telecom's practices directly threaten competition, contrary to Iowa Code § 476.1D and the public interest. Coon Creek alleges Iowa Telecom's practices constitute specific violations of Iowa Code §§ 476.100(6), 476.100(2), 476.100(7), 476.101(9), and 476.3(1). Coon Creek asserts the Board has jurisdiction over the allegations, causes of action, and requested remedies included in its complaint.

The markets at issue in Coon Creek's complaint are the Belle Plaine and Marengo, Iowa, exchanges. Coon Creek suggests that, as a practical matter, these markets are duopoly markets. Coon Creek states Iowa Telecom's services are deregulated in Belle Plaine and Marengo and alleges the bundled packages of services Iowa Telecom offers business and residential customers in those exchanges constitute "give-aways" not offered in regulated exchanges. Coon Creek alleges these bundles are unsustainable in the long term. Coon Creek asserts Iowa Telecom's pricing, bundling, and marketing practices threaten competition in the Marengo and Belle Plaine exchanges.

Coon Creek also alleges Iowa Telecom is determining and controlling prices in Belle Plaine and Marengo and that Iowa Telecom is improperly subsidizing deregulated services with revenue from its regulated services in violation of Iowa Code § 476.100(6).

Coon Creek argues the Board should not have to wait until competition is destroyed before taking action to ensure deregulated markets remain competitive. Coon Creek asserts wireless, cable, and VoIP are not effective competitive alternatives to Iowa Telecom in the relevant exchanges.

Coon Creek states the Board has announced its intention to use the formal complaint process to control anti-competitive practices. Further, Coon Creek argues that nothing in Iowa Code § 476.55(2) prevents the Board from exercising complaint jurisdiction in this case and argues the "savings" provision in that subsection contemplates that the Board maintains complaint jurisdiction over competition issues in the telecommunications marketplace.

Coon Creek asks the Board to docket its complaint for a formal proceeding to investigate Iowa Telecom's actions and to establish an expedited procedural schedule pursuant to Iowa Code § 476.101(8) for Iowa Telecom's alleged failure to comply with provisions of Iowa Code §§ 476.100 and 476.101 and pursuant to 199 IAC 5.3(2) for reregulation of exchanges for lack of competition. Alternatively, Coon Creek asks the Board to establish a similar procedural schedule under the Board's inherent authority to control its docket and pursuant to 199 IAC 7.4(1)(d). Coon

Creek states it does not seek relief pursuant to any price regulation provisions in the Iowa Code.

III. Iowa Telecom's answer and motion to dismiss

On May 30, 2006, Iowa Telecom filed with the Board an answer and motion to dismiss Coon Creek's amended complaint. Iowa Telecom states the complaint is based on substantially the same facts as were alleged in an earlier complaint filed by Coon Creek which was dismissed by the Board, see Coon Creek Telecommunications Corp. v. Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, Docket No. FCU-06-31, "Order Dismissing Complaint Without Prejudice," April 17, 2006.

Iowa Telecom contends the only difference between the dismissed complaint and the present complaint is the inclusion of a jurisdiction argument and the replacement of allegations of price regulation violations with allegations of violations of Iowa Code §§ 476.100 and 476.101. Iowa Telecom argues Coon Creek still has not stated claims for which the Board can grant relief.

Iowa Telecom asserts that because Coon Creek is not a "local exchange utility" as defined in Iowa Code § 476.96 and as used in Iowa Code § 476.55, it cannot bring an antitrust complaint before the Board to address claims of anticompetitive behavior in deregulated markets. Iowa Telecom argues Coon Creek's only remedy in this case is reregulation, and then only if it can show the market is no longer subject to effective competition. Iowa Telecom contends Coon Creek's claim for reregulation under § 476.1D fails because it has not set forth

sufficient facts to show the Belle Plaine and Marengo exchanges are no longer subject to effective competition.

Iowa Telecom disputes Coon Creek's reliance on the last sentence of Iowa Code § 476.55(2), arguing that Coon Creek's construction of the statute would render meaningless the express mention of local exchange carriers (as defined therein) and the exclusion of other carriers.

Iowa Telecom states Coon Creek's complaint concerns Iowa Telecom's pricing, which the Board has already found is not subject to its jurisdiction because the rates have been deregulated in these exchanges. Iowa Telecom disputes Coon Creek's assertion that wireless, cable, and VoIP-based services are not effective competitive alternatives to Iowa Telecom and that other CLECs are not likely to attempt to enter the Marengo and Belle Plaine exchanges.

Iowa Telecom asserts Coon Creek fails to state any claim for antitrust violations on the part of Iowa Telecom and argues Iowa Telecom should not be punished for Coon Creek's decision not to lower prices to compete with Iowa Telecom. Iowa Telecom argues Coon Creek has not made a factual showing that Iowa Telecom is controlling prices or is able to control prices as is required for a finding of lack of effective competition under Iowa Code §476.1D. Iowa Telecom maintains that Coon Creek seeks regulation of rates charged by Iowa Telecom for bundled offerings and argues that § 476.1D does not provide for such relief.

Iowa Telecom urges the Board to dismiss Coon Creek's complaint in its entirety, with prejudice.

IV. Coon Creek's resistance

On June 7, 2006, Coon Creek filed a resistance to Iowa Telecom's motion to dismiss. As part of its reply, Coon Creek states it is not seeking relief pursuant to Iowa Code § 476.55(2) but instead seeks an opportunity to show the market is not subject to effective competition. Coon Creek argues it has made a sufficient pleading to make a claim for reregulation. Coon Creek argues it need not prove its case in its complaint and that it has identified a genuine and material fact issue which requires the case to go forward.

V. Iowa Telecom's reply

On June 14, 2006, Iowa Telecom filed a reply to Coon Creek's resistance to the motion to dismiss. Iowa Telecom states the statutory provisions relied on by Coon Creek do not apply in this case because the relevant exchanges have been rate-deregulated. Iowa Telecom argues Coon Creek's only remedy is found in Iowa Code § 476.1D(8) and that remedy is not available because the Iowa Legislature preempted the Board's jurisdiction by statutorily deregulating all services and facilities other than single line flat-rate services.

VI. Discussion

In ruling on a motion to dismiss, the Board considers the pleadings in the light most favorable to the petitioner and will deny the motion if any reasonable grounds exist on which the petitioner may be able to justify relief. Based on that standard and reading Coon Creek's petition generously, the Board will deny the motion to dismiss. In its April 17, 2006, order dismissing Coon Creek's earlier complaint without

prejudice, the Board found that the allegations of violations were based entirely on Iowa Telecom's pricing in the Belle Plaine and Marengo exchanges. The Board concluded that because Iowa Telecom's prices in those exchanges had been deregulated, the price regulation sections of the Iowa Code did not apply. The Board explained that while it potentially has jurisdiction in deregulated exchanges pursuant to Iowa Code § 476.1D, Coon Creek's complaint failed to state a cause of action under § 476.1D upon which the requested relief could be granted. The Board also observed that it was not clear from Coon Creek's complaint whether it contemplated that any reregulation would apply to all providers of the service, as is required by Iowa Code § 476.1D(8).

In its refiled complaint, Coon Creek specifically states it is not seeking relief pursuant to the price regulation provisions of the Iowa Code. Instead, Coon Creek alleges Iowa Telecom's pricing, bundling, and marketing practices threaten competition in the Belle Plaine and Marengo exchanges and are contrary to the public interest. Coon Creek alleges Iowa Telecom's behavior and practices are harmful to competition and are driving Coon Creek out of the market, which Coon Creek alleges is a duopoly. The Board understands these allegations to mean that Coon Creek believes there is not effective competition in these two exchanges, such that some degree of regulation should be reimposed pursuant to § 476.1D(6).

Coon Creek also alleges Iowa Telecom has violated numerous provisions of Iowa Code chapter 476. It appears to the Board that Coon Creek is alleging these activities as evidence of the lack of effective competition in the Belle Plaine and

Marengo exchanges. Coon Creek's resistance to Iowa Telecom's motion to dismiss indicates that Coon Creek seeks to prove there is a lack of effective competition in the markets at issue and that the relief it seeks is some degree of reregulation of those markets.

The Board has jurisdiction even in deregulated exchanges. Iowa Code § 476.1D(6) provides as follows:

The board may reimpose rate and service regulation on a deregulated service or facility if it determines the service or facility is no longer subject to effective competition.

While the services offered by Iowa Telecom that are the subject of Coon Creek's complaint are no longer subject to rate regulation by the Board, the Board retains the authority to investigate whether effective competition still exists and whether rate and service regulation should be reimposed. The allegations in Coon Creek's petition raise the issue of whether rate regulation ought to be reimposed under the alleged circumstances. As such, the Board finds that its authority under Iowa Code § 476.1D is sufficient at this stage to deny Iowa Telecom's motion to dismiss and docket the complaint for further investigation.

As described above, for purposes of ruling on the motion to dismiss the Board reads the allegations of Coon Creek's complaint in a light most favorable to Coon Creek and disregards any ambiguity in the pleadings. The complaint states a claim that Iowa Telecom is engaging in behavior that threatens competition and is contrary to the public interest. If proven, that claim may justify some degree of reregulation of all relevant providers in the Belle Plaine and Marengo exchanges.

Because this matter will move ahead pursuant to the provisions of Iowa Code § 476.1D, the provisions in Iowa Code § 476.101(8) regarding expedited proceedings do not apply.¹ Nonetheless, the Board will set a procedural schedule that will allow this matter to move ahead rapidly.

Because the Board is docketing the complaint pursuant to § 476.1D, the Board tentatively concludes that the parties should be required to submit for this record the same information that the Board has considered in past deregulation dockets, along with a current update. Accordingly, the Board will direct the parties to file in this docket the same market share information for the Marengo and Belle Plaine exchanges that they provided to the Board for the 2003 competition study, the 2005 competition study (Docket No. NOI-05-3), the most recent deregulation docket (Docket No. INU-05-2), and the same information for the Marengo and Belle Plaine exchanges as of May 1, 2006 (or other recent date, if more readily available and representative of current conditions). The information should be filed within seven days of the date of this order. The parties may request confidential treatment of the information if they believe it is entitled to such pursuant to Iowa law; if they make such a request, then they need not provide the information to the other party until they have entered into a confidentiality agreement.

¹ Coon Creek has alleged violations of various other provisions of chapter 476, but those provisions do not apply in a deregulated exchange. For purposes of ruling on the motion to dismiss, the Board understands that Coon Creek is alleging those violations as evidence that there is no effective competition in these exchanges, not as separate, standalone violations.

IT IS THEREFORE ORDERED:

1. The complaint filed on May 4, 2006, and as amended on May 10, 2006, by Coon Creek Telecommunications Corp. against Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, is docketed for investigation and identified as Docket No. FCU-06-42.

2. The request to dismiss Coon Creek's complaint filed by Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, on May 30, 2006, is denied.

3. The following procedural schedule is established for this proceeding:

a. Coon Creek and any intervenors shall file prepared direct testimony, with supporting exhibits and workpapers, on or before July 14, 2006.

b. Iowa Telecom shall file rebuttal testimony, with supporting exhibits and workpapers, on or before August 4, 2006.

c. Coon Creek may file reply testimony, with supporting exhibits and workpapers, on or before August 18, 2006.

d. On or before September 6, 2006, the parties shall each file a prehearing brief that includes an analysis of the appropriate legal standards for the Board to apply in this proceeding.

e. A hearing for the purpose of receiving testimony and cross-examination of all witnesses will commence at 9 a.m. on Tuesday, October 3, 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 October 18, 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 parties are directed to file in this docket the same market share information for the Marengo and Belle Plaine exchanges (specifically, number of

residential and business connections served) that they provided to the Board for the 2003 competition study, the 2005 competition study (Docket No. NOI-05-3), the most recent deregulation docket (Docket No. INU-05-2), and the same information for the Marengo and Belle Plaine exchanges as of May 1, 2006, or such other date as may be most readily available and representative of current conditions. The information shall be filed within seven days of the date of this order. The parties may request confidential treatment of the information if they believe it is entitled to such pursuant to Iowa law; if they make such a request, then they need not provide the information to the other party until they have entered into a confidentiality agreement.

UTILITIES BOARD

/s/ John R. Norris

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 27th day of June, 2006.