

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>COMMUNITY CABLE TELEVISION AGENCY OF O'BRIEN COUNTY, d/b/a THE COMMUNITY AGENCY AND TCA,</p> <p style="text-align:center">Complainant,</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-06-48</p>
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**ORDER DOCKETING COMPLAINT, DENYING MOTION TO DISMISS,
SETTING PROCEDURAL SCHEDULE, AND
REQUESTING ADDITIONAL INFORMATION**

(Issued August 18, 2006)

PROCEDURAL HISTORY

A. The Complaint

On July 24, 2006, the Community Cable Television Agency of O'Brien County, d/b/a The Community Agency and TCA (TCA), filed with the Utilities Board (Board) a complaint against Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom), alleging that Iowa Telecom has engaged in activities in the Hartley, Paulina, and Primghar exchanges that are inconsistent with antitrust laws and the policies which underlie them. TCA brought its complaint pursuant to Iowa Code

§ 476.55(2). TCA asked that the Board order Iowa Telecom to adjust its rates in the identified exchanges to a level which is consistent with antitrust law and policy; order Iowa Telecom to pay all the costs of these proceedings; assess a civil penalty against Iowa Telecom; order Iowa Telecom to pay damages to TCA; award attorney fees to TCA; and for such other relief as the Board deems appropriate in the circumstances.

B. Iowa Telecom's Motion to Dismiss

On August 3, 2006, Iowa Telecom filed an answer to the complaint and a separate motion to dismiss the complaint. Iowa Telecom makes four basic arguments in support of its motion to dismiss. First, Iowa Telecom says TCA lacks standing to bring a complaint under § 476.55(2). That statute provides that the Board may hear complaints brought by one local exchange carrier against another local exchange carrier alleging activities that are inconsistent with antitrust laws and the policies which underlie them. The statute then provides that "[f]or purposes of this subsection 'local exchange carrier' means the same as defined in section 476.96 and includes a city utility authorized pursuant to section 388.2 to provide local exchange services." Iowa Telecom argues that TCA is not a "local exchange carrier" as defined in § 476.96; that statute defines the term to mean:

the incumbent and historical rate-regulated wireline provider of local exchange services or any successor to such person that provides local exchange services under an authorized certificate of public convenience and necessity within a specific geographic area described in maps filed with and approved by the board as of September 30, 1992.

TCA did not receive a certificate of public convenience and necessity to provide wireline local exchange service until October 17, 2001.¹ Accordingly, TCA is not a "local exchange carrier" as defined in § 476.96, according to Iowa Telecom.

Second, Iowa Telecom argues TCA's complaint fails to state a claim upon which relief can be granted because a valid predatory pricing claim under antitrust law must allege two factors: the respondent's prices are below an appropriate measure of its costs and the respondent has a reasonable probability of recouping its losses after the complainant has been driven from the market.² Further, the complainant must also allege that the respondent has sufficient market power to succeed in its predatory pricing strategy, according to Iowa Telecom. Iowa Telecom says the allegations of TCA's complaint are insufficient to meet these requirements.

Third, Iowa Telecom argues that the Board should not recast TCA's complaint as a request for re-regulation pursuant to Iowa Code § 476.1D, because TCA's complaint does not explicitly request re-regulation of Iowa Telecom in the named exchanges.

Finally, Iowa Telecom argues that even if the complaint were recast, it would be deficient. Iowa Telecom argues that its price-reducing activities should be expected in a competitive market and are beneficial to customers. TCA has not alleged that Iowa Telecom is controlling prices in the three named exchanges or that

¹ Community Cable Television Agency of O'Brien County, d/b/a The Community Agency and TCA, "Order Approving Tariff and Issuing Certificate," Docket Nos. TCU-00-40, TF-01-291 (October 17, 2001).

² Brooke Group Ltd. V. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993).

Iowa Telecom has the ability to do so, so the complaint does not state a claim for re-regulation.

C. TCA's Resistance to the Motion to Dismiss

On August 10, 2006, TCA filed a resistance to the motion to dismiss, making four general arguments. First, TCA argues that under the Iowa Rules of Civil Procedure a motion to dismiss must be filed before an answer is filed, not with the answer. By filing the answer and the motion together, Iowa Telecom has waived its motion to dismiss, according to TCA.

Second, TCA says that Iowa Telecom has filed a speaking demurrer, which is not allowed. Facts outside the complaint are not to be considered in ruling upon a motion to dismiss.³ The motion to dismiss relies on factual assertions not included in the complaint, so the motion must be denied, according to TCA.

Third, TCA argues that § 476.55(2) authorizes city utilities that provide local exchange services to file antitrust complaints with the Board. TCA notes that every city utility that provides local exchange service in Iowa is excluded from the definition of "local exchange carrier" in § 476.96, because none of them offered that service as of September 30, 1992. Therefore, Iowa Telecom's interpretation of § 476.55(2) would make the statutory language "and includes a city utility authorized pursuant to section 388.2 to provide local exchange services" meaningless. Statutes are not to be construed in a manner that renders statutory language meaningless or reduces it

³ Rieff v. Evans, 630 N.W.2d 278, 284 (Iowa 2001).

to mere surplusage. Instead, TCA argues that the quoted language from § 476.55(2) was intended to add city utilities to the class of local exchange carriers eligible to file a complaint pursuant to the statute.

Finally, TCA argues that its complaint is adequate to put Iowa Telecom on notice of TCA's claim, which is all that is required.⁴ TCA says that Iowa Telecom confuses the question of what TCA must plead with the question of what TCA must prove. Moreover, TCA says that under § 476.55(2) it is not required to prove predatory pricing on the part of Iowa Telecom, but only that Iowa Telecom "has engaged in an activity that is inconsistent with the antitrust laws and the policies which underlie them."

D. Consumer Advocate's Resistance

On August 11, 2006, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed an appearance and a resistance to Iowa Telecom's motion to dismiss. In its resistance, Consumer Advocate argues that Iowa Telecom's interpretation of § 476.55(2) is in error. The statute authorizes two mutually-exclusive categories of entities to file complaints (local exchange carriers and city utilities), and Iowa Telecom's interpretation of the statute eliminates one of the two categories. Consumer Advocate also argues that TCA's complaint gives proper notice of its allegations of fact which, if proven, would permit the Board to find

⁴ Kleman v. Charles City Police Dept., 373 N.W.2d 90 (Iowa 1985).

that Iowa Telecom had violated § 476.55(2). TCA is not required to prove its allegations as part of its complaint.

E. Iowa Telecom's Reply

On August 15, 2006, Iowa Telecom filed a reply in support of its motion to dismiss. First, Iowa Telecom repeats its argument that § 476.55(2) requires that a complaining party must be a local exchange carrier as defined in § 476.96. Iowa Telecom argues the language of § 476.55(2) is unambiguous, so the arguments of TCA and Consumer Advocate concerning legislative intent are irrelevant.

Next, Iowa Telecom responds to two "technical" arguments raised by TCA, involving the timing of Iowa Telecom's answer and motion to dismiss and the alleged speaking nature of Iowa Telecom's motion. With respect to the first argument, Iowa Telecom notes that TCA's legal authority is based on a superseded version of the Iowa Rules; the current version of Iowa R. Civ. P. 1.421 makes it clear that the defense of "failure to state a claim upon which relief can be granted" is not waived, even if it is not raised in a pre-answer motion.

With respect to the speaking nature of the motion, Iowa Telecom says that in ruling on a motion to dismiss, a tribunal may consider matters "of which judicial notice may be taken."⁵ The only matters outside the complaint on which Iowa Telecom relies are certain orders of the Board, of which the Board may take official notice, according to Iowa Telecom.

⁵ Ritz v. Wapello County Board of Supervisors, 595 N.W.2d 786, 788 n.1 (Iowa 1999).

Finally, Iowa Telecom reiterates that TCA's complaint falls short of making the allegations required in a predatory pricing case and should be dismissed. Iowa Telecom recognizes that TCA does not have to prove its predatory pricing claim now, but Iowa Telecom argues TCA has to allege the facts necessary to support its claim.⁶ Iowa Telecom cites various cases to the effect that a predatory pricing claim should not advance past the pleading stage without substantive allegations concerning the defendant's market power in the relevant market.

ANALYSIS

The Board will deny the motion to dismiss. The Board finds that TCA has standing to bring a complaint pursuant to § 476.55(2) and that TCA's complaint is sufficient for purposes of initiating a case pursuant to that statute.⁷

As far as TCA's standing is concerned, the Board finds that the language of § 476.55(2) is ambiguous in the sense that it can support at least two alternative interpretations. It could mean that the class of eligible complainants consists only of "local exchange carriers" as defined in § 476.96, including municipal utilities that offer local exchange service. This is the interpretation preferred by Iowa Telecom. However, the statute could also mean that there are two distinct classes of eligible complainants, the traditional local exchange carriers and the municipal utilities. This is the interpretation favored by TCA and Consumer Advocate. In light of the

⁶ Malek Wholesaler, Inc., v. First Film Extruding, Ltd., 1998 WL 142385 at *3 (N.D. Ill. 1998).

⁷ The Board finds that Iowa Telecom's responses to the two "technical" arguments are sufficient and correct and no further analysis is required.

ambiguity of the statute, the Board must interpret the statute in a manner that will give effect to the legislative intent.

Clearly, the Legislature included the phrase "and includes a city utility authorized pursuant to section 388.2 to provide local exchange services" for a reason. It cannot have meant that city utilities are qualified to bring a complaint only if they are also "local exchange carriers," because that is a class of zero; there are no such city utilities. Iowa Telecom's preferred interpretation would render this statutory language meaningless, and the interpretation must therefore be rejected. Instead, the Board will apply the interpretation supported by TCA and Consumer Advocate, which gives effect to all the words of the statute.

As for the adequacy of TCA's complaint, the Board notes that TCA alleges the following elements:

1. Iowa Telecom is charging rates in the Hartley, Paulina, and Primghar exchanges that are substantially lower than Iowa Telecom charges in areas where its rates are not deregulated. (Paragraph 7.)
2. Iowa Telecom's actions constitute predatory pricing because the prices in the Hartley, Paulina, and Primghar exchanges are below cost and are designed to eliminate competition. (Paragraph 8.)
3. Wireless, cable, and VoIP service do not present effective competition to Iowa Telecom in the named exchanges. (Paragraph 10.)

4. The actions of Iowa Telecom threaten to eliminate TCA from the market, creating a monopoly in the named exchanges and chilling public and private investment in competitive local exchange services. (Paragraph 10.)

5. Accordingly, Iowa Telecom's actions are inconsistent with antitrust laws and the policies which underlie them and are therefore in violation of Iowa Code § 476.55(2). (Paragraphs 8 and 9.)

These allegations are sufficient to state a claim for relief under § 476.55(2) that will survive a motion to dismiss. Moreover, they appear to be sufficient to meet the requirements of the antitrust cases cited by Iowa Telecom (assuming those standards apply in this forum, a question the Board is not deciding). TCA alleges Iowa Telecom's prices in the named exchanges are below cost and that the result will be to drive Iowa Telecom's only effective competition from the market, creating a monopoly and chilling future competition. If true, this would permit Iowa Telecom to recoup its losses from offering below-cost service. Thus, each of the elements that Iowa Telecom asserts must be present is, in fact, contained in the complaint.

For these reasons, the Board will docket the complaint, deny the motion to dismiss, and establish a procedural schedule in this docket.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The "Complaint" filed by Community Cable Television Agency of O'Brien County, d/b/a The Community Agency and TCA, on July 24, 2006, is

docketed pursuant to Iowa Code § 476.55(2) as Docket No. FCU-06-48. The matters asserted shall be as described in the complaint and as they may develop during the course of the proceeding.

2. The "Motion To Dismiss" filed by Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, on August 3, 2006, is denied.
3. The following procedural schedule is established for this proceeding:
 - a. TCA shall file prepared direct testimony, with supporting exhibits and workpapers, on or before October 23, 2006.
 - b. Iowa Telecom shall file rebuttal testimony, with supporting exhibits and workpapers, on or before November 20, 2006.
 - c. TCA may file reply testimony, with supporting exhibits and workpapers, on or before December 15, 2006.
 - d. On or before December 15, 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 January 8, 2007, 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 January 19, 2007.

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 Hartley, Paulina, and Primghar 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 named exchanges as of July 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

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 18th day of August, 2006.