

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>DOCKET NO. FCU-06-48</p>
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**ORDER GRANTING, IN PART, AND DENYING, IN PART, MOTION TO COMPEL,
DENYING MOTION FOR SANCTIONS, AND
AMENDING PROCEDURAL SCHEDULE**

(Issued November 16, 2006)

On October 4, 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 motion to compel discovery. TCA asked the Board to order Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom), to complete its responses to TCA's data request numbers 1 and 5. Iowa Telecom resisted the motion and sought a protective order.

On October 19, 2006, the Board issued an order granting TCA's motion to compel, denying Iowa Telecom's motion for protective order, and making adjustments to the procedural schedule.

Also on October 19, 2006, TCA filed a second motion to compel discovery, a resistance to Iowa Telecom's motion for protective order, and a motion to amend the procedural schedule. On October 30, 2006, Iowa Telecom filed a resistance to TCA's motion to compel discovery.

On October 31, 2006, TCA filed a motion for discovery sanctions. Iowa Telecom filed a resistance to the motion for discovery sanctions on November 6, 2006.

In its second motion to compel, TCA states that Iowa Telecom's responses to data request numbers 9 through 22 were limited to information about the Hartley, Paullina, and Primghar exchanges. TCA asks the Board to order Iowa Telecom to supplement its responses to data request numbers 9 through 22 to include the requested information about the Harris, May City, Melvin, Ocheyedon, Mallard, Rolfe, and Linn Grove exchanges. TCA also asks the Board to amend the procedural schedule to extend the deadline by which TCA must file direct testimony until ten days after Iowa Telecom provides complete answers to data request numbers 1, 5, and 9 through 22.

In its October 30, 2006, resistance to the motion to compel, Iowa Telecom states it has fully responded to data request numbers 9, 12, 15-17, and 19-22,

leaving only data request numbers 10, 11, 13, 14, and 18 in dispute. Iowa Telecom argues that, with these data requests, TCA is seeking highly confidential information and that the Board should impose a higher relevance standard when a party seeks production of closely-guarded trade secret information.

Iowa Telecom argues that TCA has alleged that Iowa Telecom has engaged in predatory pricing and that, for purposes of the predatory pricing analysis, it is Iowa Telecom's behavior in the Hartley, Paullina, and Primghar exchanges that is at issue, not in any other markets. Iowa Telecom also argues that TCA cannot legally claim price discrimination under federal or state law because such a claim is cognizable only with regard to the sale of commodities, not services, and telephone service is not a commodity. Thus, according to Iowa Telecom, TCA's data requests for information regarding Iowa Telecom's market share, pricing, costs, marketing, and other activities in any exchanges other than Hartley, Paullina, and Primghar are not relevant to any issue involved in this proceeding.

In its October 31, 2006, request for discovery sanctions against Iowa Telecom, TCA states that, on October 24, 2006, Iowa Telecom filed a supplemental answer to TCA data request number 5.¹ In its answer, Iowa Telecom stated that it has yet to examine the extent to which the relevant cost of any service differs between the

¹ TCA's data request number 5 asked Iowa Telecom to describe any claim that there is a cost of service difference between service provided by Iowa Telecommunications Services, Inc., in May City, Ocheyedon, and Melvin compared to service to Hartley, Primghar, and Paullina.

May City, Ocheyedan, and Melvin exchanges as compared to the Hartley, Primghar, and Paullina exchanges. TCA argues in response that cost data is uniquely under the control of Iowa Telecom; sales below cost are an element of an antitrust claim; and Iowa Telecom's assertion it has yet to examine its costs is not an excuse for failing to answer the data request.

TCA claims the Board may enter an order against a party that has disobeyed an order compelling discovery refusing to allow that party to support or oppose certain claims or defenses or prohibiting the disobedient party from introducing certain evidence. TCA asks the Board to prohibit Iowa Telecom from introducing any evidence or claims that its "Win Back" program or related rates in the Primghar, Hartley, or Paullina exchanges are above its costs, in any manner defined.

In resisting the motion for sanctions, Iowa Telecom points out that TCA did not ask Iowa Telecom to produce any cost studies. Iowa Telecom argues that it answered TCA's data request number 5, even though TCA has yet to define either "cost" or "service," and thus there is no legal basis for discovery sanctions. Further, Iowa Telecom argues that the requested sanction has nothing to do with the data request at issue, which concerned the cost differentials among three regulated and three deregulated exchanges. Finally, Iowa Telecom asserts that TCA has not yet defined what it means by "cost," and that such definition can be a critical issue in antitrust cases. Iowa Telecom argues it cannot be expected to respond with regard to all possible meanings TCA may give to the term. Iowa Telecom offers that, if TCA

seeks basic data to conduct its own analysis, it would be willing to provide such data in response to a sufficiently specific request.

The starting point for the Board's consideration of TCA's second motion to compel and motion for sanctions is the Board's October 19, 2006, order granting TCA's first motion to compel complete responses to data request numbers 1 and 5. Despite Iowa Telecom's objection to providing information about exchanges other than the Hartley, Paullina, and Primghar exchanges, the Board concluded that information about Iowa Telecom's behavior in exchanges other than the exchanges served by TCA might lead to the discovery of evidence relevant to whether Iowa Telecom has engaged in activity that is inconsistent with antitrust laws and underlying policies, the subject of TCA's complaint. The Board also rejected Iowa Telecom's attempts to limit the scope of TCA's complaint to a predatory pricing claim.

Another preliminary matter is which data requests remain in dispute. TCA's second motion to compel asks the Board to order Iowa Telecom to fully respond to data request numbers 9 through 22. In response, Iowa Telecom states it has fully responded to request numbers 9, 12, 15–17, and 19–22, leaving only request numbers 10, 11, 13, 14, and 18 at issue. In its most recent filing, the October 31, 2006, motion for discovery sanctions, TCA did not challenge Iowa Telecom's list of the data requests that remain in dispute. Thus, the Board will assume that Iowa Telecom has provided reasonably complete responses to data request numbers 9, 12, 15–17, and 19–22 in accordance with the Board's conclusion regarding TCA's

first motion to compel that information about exchanges other than Hartley, Paullina, and Primghar might lead to discovery of relevant evidence.

This order, then, will focus on TCA data request numbers 10, 11, 13, 14, and 18, and on TCA's motion for discovery sanctions. The requests seek information about Iowa Telecom's market share (request number 10); documents relating to profitability (request number 11); marketing studies and business plans (request number 13); analysis of whether rates in deregulated exchanges cover Iowa Telecom's costs, however defined, and related documents (request number 14); and a list of instances where Iowa Telecom provides service to a retail customer in a regulated exchange for a rate lower than the tariffed rate in that exchange (request number 18). Iowa Telecom's objection to these requests is based, in part, on relevance in that they seek information about exchanges other than the Hartley, Paullina, and Primghar exchanges.

The Board has considered the substance of the data requests remaining at issue and does not agree with Iowa Telecom that the subject matter of these data requests prompts a more rigorous test of possible relevance. The Board concludes that answers to data request numbers 10, 11, 13, and 18 may lead to discovery of evidence relevant to TCA's claims. The Board will grant TCA's motion to compel Iowa Telecom to provide complete answers to data request numbers 10, 11, 13, and 18. Iowa Telecom may be correct in its assertion that the information it is required to provide to fully answer the requests is closely guarded confidential information, but

any concern about protecting that information should be addressed by the parties' protective agreement. The Board will also grant TCA's motion to amend the procedural schedule, with a slight modification to TCA's requested timeframe for filing supplemental testimony.

TCA's motion for discovery sanctions relates to alleged deficiencies in Iowa Telecom's response to data request number 5. TCA argues that Iowa Telecom's statement that it has yet to examine its costs does not excuse failing to answer the request. The Board concludes that Iowa Telecom has answered the data request, albeit not to TCA's satisfaction, and that there is no basis for discovery sanctions. The Board will deny TCA's motion for sanctions.

That said, the Board finds there is still room for exchange of information between the parties on data request number 5 and data request number 14. The Board now finds that the parties' dispute over the meaning of "cost" is obstructing the exchange and discovery of information that may be relevant to TCA's complaint. In other words, it is possible that the relationship between Iowa Telecom's costs and pricing may be an issue at hearing and the Board will need information about that issue. With respect to data request number 5, Iowa Telecom indicates in its resistance to the motion for sanctions that, if TCA seeks raw data to conduct its own analysis, Iowa Telecom is willing to provide that data in response to a sufficiently specific request, but that it is not obligated to perform any sort of cost analysis solely for TCA's benefit. The Board agrees with Iowa Telecom that Iowa Telecom is not

obligated to analyze data solely for TCA's benefit. However, TCA is free to submit a refined data request asking for specific raw data regarding Iowa Telecom's costs, if TCA wants that data, and Iowa Telecom would be obligated to provide the information regardless of the exchange involved.

Data request number 14 asks Iowa Telecom to provide any analysis it has done discussing the issue of whether rates offered in deregulated exchanges cover Iowa Telecom's costs, however defined, and to provide related documents which discuss the proper definition of costs. To the extent that data request number 14 asks for analysis that has not already been prepared by Iowa Telecom, the motion to compel is denied. Again, TCA is free to submit a more refined data request with a more specific explanation of the information TCA seeks regarding Iowa Telecom's costs, which Iowa Telecom must then provide, if the information exists.

IT IS THEREFORE ORDERED:

1. The motion to compel discovery filed by the Community Cable Television Agency of O'Brien County, d/b/a The Community Agency and TCA, on October 19, 2006, is granted as described in this order. Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, shall provide complete answers to TCA's data request numbers 10, 11, 13, and 18 no later than November 22, 2006.
2. The Community Cable Television Agency of O'Brien County, d/b/a The Community Agency and TCA, may file supplemental testimony based upon the

responses to data request numbers 10, 11, 13, and 18 no later than December 1, 2006.

3. The motion for discovery sanctions filed by the Community Cable Television Agency of O'Brien County, d/b/a The Community Agency and TCA, on October 19, 2006, is denied.

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 16th day of November, 2006.