

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>
--	-----------------------------

**FINAL DECISION AND ORDER**

(Issued March 23, 2007)

**PROCEDURAL HISTORY**

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,

Paullina, and Primghar exchanges<sup>1</sup> that are inconsistent with antitrust laws and the policies which underlie them.

TCA brings its complaint pursuant to Iowa Code § 476.55(2). TCA states that it holds a certificate of public convenience and necessity to provide local exchange service in the cities of Hartley, Paullina, Sanborn, and Primghar, Iowa, and is an agency created under Iowa Code chapter 28E by the cities or city utilities of Hartley, Paullina, Sanborn, and Primghar, each being authorized pursuant to Iowa Code § 388.2 to provide local exchange service.

TCA alleges that Iowa Telecom is charging rates in the Hartley, Paullina, and Primghar exchanges that are substantially lower than what Iowa Telecom charges in areas where its rates are not deregulated;<sup>2</sup> Iowa Telecom's actions constitute predatory pricing because Iowa Telecom's prices in the Hartley, Paullina, and Primghar exchanges are below cost and are designed to eliminate competition; and 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

---

<sup>1</sup>Pursuant to Iowa Code § 476.1D, rates for Iowa Telecom's local exchange services in Primghar were deregulated by the Board in 2004, and rates for services in Hartley and Paullina were deregulated in 2005. See In re: Deregulation of Local Exchange Services in Competitive Markets, "Final Decision and Order," Docket No. INU-04-1 (issued December 23, 2004), and In re: Deregulation of Single Line Flat-Rate Local Exchange Services in Competitive Markets, "Final Decision and Order," Docket No. INU-05-2 (issued December 5, 2005).

<sup>2</sup> TCA alleges that on or about June 12, 2006, Iowa Telecom implemented new rates in Hartley, Paullina, and Primghar at basic rates of \$5.95 to \$6.97 per month. TCA also states that in areas where Iowa Telecom's rates are not deregulated, Iowa Telecom charges \$35.79 to business customers for each basic business line compared to a deregulated rate for business customers in Hartley, Paullina, and Primghar of \$6.97 per month. (Complaint, p. 2). Iowa Telecom's residential rate in certain regulated exchanges is \$18.39 per month. (Tr. 335, 342). (These rates are as of the time of the hearing in this matter; the rates in regulated exchanges have changed since that time to \$37.96 for business customers and \$19 for residential.) Iowa Telecom testified its "triple play" bundle (voice, data, and video) became available for purchase on May 16, 2006. (Tr. 214).

competitive local exchange services. TCA also claims that 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). (Complaint, pp. 2-3). In its complaint, TCA asks the Board to 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.

On August 3, 2006, Iowa Telecom filed an answer to and a motion to dismiss the complaint, arguing that TCA lacks standing to bring a complaint under § 476.55(2) and that TCA's complaint fails to state a claim upon which relief can be granted because it fails to allege the required elements of a predatory pricing claim.

On August 10, 2006, TCA filed a resistance to the motion to dismiss, arguing that city utilities are included in the class of local exchange carriers eligible to file antitrust complaints with the Board pursuant to § 476.55(2) and that its complaint is adequate to put Iowa Telecom on notice of its claim. Moreover, TCA asserted 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.

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, arguing that Iowa Telecom's interpretation of

§ 476.55(2) that would exclude TCA from the category of entities able to file complaints is erroneous and that TCA's complaint gives Iowa Telecom proper notice of its allegations.

On August 17, 2006, TCA filed with the Board an amended complaint and a motion to amend its complaint. In the amended complaint, TCA alleges that Iowa Telecom enjoys a monopoly in 77 percent of the communities it serves in Iowa. Further, the amended complaint includes an allegation that there is a dangerous probability that Iowa Telecom will recoup its investment in below-cost pricing through supracompetitive pricing in its monopolized markets.

On August 18, 2006, the Board issued an order docketing TCA's complaint and denying Iowa Telecom's motion to dismiss. The Board concluded that TCA was eligible to bring a complaint under § 476.55(2) and that the allegations in its complaint were sufficient to state a claim for relief under § 476.55(2) and to survive a motion to dismiss.

On October 16, 2006, the Board issued an order granting TCA's motion to amend its complaint. On January 8, 2007, Iowa Telecom filed an answer to TCA's amended complaint.

A hearing was held on January 8 and 9, 2007, for the purpose of receiving testimony and cross-examination of witnesses. Consumer Advocate appeared at the hearing but did not question any witnesses. On January 16, 2007, both parties filed updated line count information for the relevant exchanges as requested by the Board at hearing. Both parties submitted briefs on January 19, 2007.

On January 19, 2007, TCA filed a motion to reopen the record, asking the Board to admit Exhibit 31 into the record. On January 29, 2007, Iowa Telecom filed a conditional resistance to the motion, stating it did not object to the motion on the condition that the Board admit Iowa Telecom's Exhibit 120. On February 8, 2007, the Board issued an order admitting both exhibits.

### **JURISDICTION**

TCA brings its complaint pursuant to Iowa Code § 476.55(2) (2007), which provides:

Notwithstanding section 476.1D, the board may receive a complaint from a local exchange carrier that another local exchange carrier has engaged in an activity that is inconsistent with antitrust laws and the policies which underlie them. For 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. If, after notice and opportunity for hearing, the board finds that a local exchange carrier has engaged in an activity that is inconsistent with antitrust laws and the policies which underlie them, the board may order any of the following:

- a. The local exchange carrier to adjust retail rates in an amount sufficient to correct the antitrust activity.
- b. The local exchange carrier to pay any costs incurred by the complainant for the pursuit of the complaint.
- c. The local exchange carrier to pay a civil penalty.
- d. Either the local exchange carrier or the complainant to pay the costs of the complaint proceeding before the board, and the other party's reasonable attorney fees.

This subsection shall not be construed to modify, restrict, or limit the right of a person to bring a complaint under any other provision of this chapter.

## DISCUSSION

### **Meaning of Iowa Code § 476.55(2)**

TCA's complaint is the first complaint brought before the Board pursuant to § 476.55(2). The starting point for the Board's consideration of the complaint is to determine the meaning of the phrase "inconsistent with antitrust laws and the policies which underlie them" found in the statute. The parties have argued about whether "inconsistent with" means a violation of antitrust laws and underlying policies or something less than a violation and what it means to be "inconsistent with" antitrust laws and policies if it does not mean to violate those laws and policies.

TCA asserts that § 476.55(2) does not require the Board to find an actual violation of antitrust laws before it can act. TCA argues that by placing municipal utilities within the scope of § 476.55(2), the Legislature showed its concern with the survival of municipal utilities competing against large telecommunications service providers and enabled the Board to assure that municipal utilities and their customers are protected from anticompetitive practices that might not be outright violations of antitrust laws. (TCA Post-hearing Brief, pp. 5-6). TCA also suggests the statute is intended to advance the goal of providing quality telecommunications service to rural Iowa. TCA's witness Dr. Sheehan testified at hearing that the statute "was set up in order to prevent disasters." (Tr. 191). According to TCA, § 476.55(2) serves these goals by providing a mechanism by which the Board can protect municipal utilities from destructive anticompetitive activities before they are harmed by such activities. (TCA Post-hearing Brief, p. 18).

According to Iowa Telecom, this is an antitrust case and the Board must decide whether Iowa Telecom has in fact violated antitrust laws (Iowa Telecom Post-hearing Brief, p. 3). Iowa Telecom has insisted throughout this proceeding that § 476.55(2) requires TCA to prove an actual violation of antitrust law and that "inconsistent with" means "violative of." (Iowa Telecom Pre-hearing Brief, p. 11). Iowa Telecom asserts there is no basis for granting relief to TCA if it fails to prove both an antitrust violation and conduct that is inconsistent with antitrust policies. Iowa Telecom cautions the Board that it would be contrary to antitrust law and underlying policies to sanction Iowa Telecom for engaging in price competition that does not amount to predatory pricing. (Iowa Telecom Post-hearing Brief, pp. 21-22).

The Board concludes that by using the words "inconsistent with antitrust laws **and the policies which underlie them**" (emphasis added), the Legislature created an option not previously available to complainants under traditional antitrust law and meant for the Board to act in response to complaints at some point before the activity complained of rises to the level of a full-blown antitrust violation under traditional antitrust law and theory. If the Legislature had intended that an actual violation was required before the Board could act, it would not have needed to use the emphasized phrase. Thus, adopting Iowa Telecom's preferred interpretation would render that phrase meaningless, a result that is to be avoided. State v. Rickett, 2003 WL 2266923.

Because the Board finds that the statute recognizes a distinction between activity that is inconsistent with antitrust law and underlying policy and activity that

would constitute an outright violation of antitrust law and policy, the Board should define and identify behavior that is inconsistent with antitrust law and policy. For purposes of determining whether the corrective measures available under § 476.55(2) apply in this case, the Board will define inconsistent activity as an unfair and anticompetitive practice that has a reasonable probability of impeding the public's access to competitive telecommunications service.

**Has Iowa Telecom engaged in activity that is inconsistent with antitrust law and policy?**

Having determined that § 476.55(2) allows the Board to impose corrective measures in response to an activity that is inconsistent with antitrust law and policy, the Board's next task is to determine whether Iowa Telecom has engaged in such activity in the Hartley, Paullina, and Primghar exchanges. It can be particularly difficult in the telecommunications industry to identify the point at which competitive behavior becomes anticompetitive, or inconsistent with antitrust law and policy, particularly in light of the numerous ways of defining cost, rapidly changing technology and service offerings, and the bundling of non-telecommunications services with telecommunications services. Inquiries pursuant to § 476.55(2) will require case-by-case analysis of the specific facts of each complaint brought pursuant to the statute to determine whether a competitor's behavior is inconsistent with antitrust law and policy. The Board will consider the standards established in traditional antitrust law cases and theory in its analysis of the facts of these cases, although that may not be the end of the inquiry. Indeed, TCA framed its complaint under § 476.55(2) using terms from traditional antitrust law, alleging that Iowa

Telecom engaged in predatory pricing and arguing that Iowa Telecom's pricing was discriminatory and created a price squeeze.<sup>3</sup> The degree to which Iowa Telecom's behavior matches the traditional elements of these antitrust claims will help the Board identify the extent to which Iowa Telecom's behavior in the three relevant exchanges may have been inconsistent with antitrust law and policy.

### **Predatory Pricing**

TCA alleges that Iowa Telecom's \$5.95 monthly rate does not cover its costs in the relevant exchanges. (Tr. 146). TCA witness Dr. Sheehan testified that Iowa Telecom is making its customers in other exchanges pay the costs that are not being recovered in Hartley, Paullina, and Primghar. (Tr. 149). Dr. Sheehan also testified that, even if the \$5.95 rate covers Iowa Telecom's variable costs, it does so by requiring a cross-subsidy to pay Iowa Telecom's fixed costs and creates the risk of running competitive providers like TCA out of business. (Tr. 156).

In response to Iowa Telecom's reference to the three elements traditionally required to prove a predatory pricing claim (market power, pricing below an appropriate measure of cost, and likelihood of recoupment of losses), Dr. Sheehan testified that Iowa Telecom's market power is evident in its ability to spread, or cross-subsidize, its fixed costs in the three relevant exchanges over all of its exchanges. (Tr. 146, 149-50).

---

<sup>3</sup> The Board notes Iowa Telecom's position that TCA does not have a price discrimination claim or a price squeeze claim, as neither was specifically included in TCA's original complaint or amended complaint. (Iowa Telecom Post-hearing Brief, p. 23). However, because TCA alleged a violation of Iowa Code § 476.55(2), a statute broad enough to encompass a wide variety of anticompetitive activities, the price discrimination and price squeeze claims are properly before the Board.

With respect to the appropriate standard used to determine whether an alleged predator is pricing below its costs, TCA suggests that the traditional variable or marginal cost standard has little usefulness in a market with only two providers. TCA's witness Dr. Sheehan testified that marginal cost is an appropriate standard only in cases of perfect competition because only then will pricing at marginal cost recover a company's cost of doing business. Dr. Sheehan testified that in a situation involving a natural monopoly with high fixed costs and relatively low marginal costs, as in the present case, pricing at marginal cost cannot recover costs and will lead to cross-subsidization. (Tr. 140). As an alternative, TCA proposes that the Board apply an average total cost standard. (Tr. 150-51). TCA asserts that Iowa Telecom should not be allowed to price at a rate below the level at which, if it charged the rate throughout its entire system, it would be able to survive as a business entity. (Tr. 150-51).

TCA asks the Board to identify a cost standard which leaves both TCA and Iowa Telecom in viable positions and which prevents the destruction of municipal competition by dominant providers with superior resources that price below cost. (TCA Post-hearing Brief, pp. 17-19). TCA rejects the use of incremental cost or any standard that would allow Iowa Telecom to cross-subsidize. Specifically, TCA recommends that the appropriate cost standard would:

- a) be exchange-specific for both incremental and capital costs;
- b) prohibit both direct and indirect subsidizations where capital costs in competitive exchanges are covered by higher prices in monopoly exchanges;

- c) provide that prices in competitive exchanges, if charged in all monopoly exchanges, would have to cover the costs of providing basic service system wide; and
- d) allow Iowa Telecom to charge prices which “meet,” meaning “match,” the price charged by a municipal competitor for basic service.

(TCA Post-hearing Brief, p. 19).

As for the requirement that a party alleging predatory pricing must show a dangerous likelihood that the alleged predator will recoup any losses resulting from the predatory pricing scheme, TCA asserts that because Iowa Telecom is able to lower prices in these exchanges to one-sixth of its prices in regulated exchanges, there is a significant possibility that there will be substantial harm to TCA. (Tr. 160). TCA also claims that Iowa Telecom's \$5.95 rate is temporary and that Iowa Telecom will revert to high rates after TCA is run out of the market. (Tr. 157).

Iowa Telecom's position is that the standards TCA relies on to prove Iowa Telecom is engaged in predatory pricing are contrary to well-established law and economics and, if adopted by the Board, would harm consumers and impair competition. (Iowa Telecom Post-hearing Brief, p. 2). Iowa Telecom cites several decisions from the United States Supreme Court, Eighth Circuit Court of Appeals, and other appellate courts to identify the three elements required to prove predatory pricing: the alleged predator must have market power;<sup>4</sup> must have priced below an

---

<sup>4</sup> Morgan v. Ponder, 892 F.2d 1355, 1358 (8<sup>th</sup> Cir. 1989).

appropriate and objective measure of its costs;<sup>5</sup> and must have a dangerous probability of recouping its losses incurred as a result of the below-cost pricing.<sup>6</sup>

First, Iowa Telecom asserts that TCA has failed to prove that Iowa Telecom has market power in the relevant exchanges, given that Iowa Telecom's overall market share in the three exchanges is slightly less than 50 percent while TCA's market share is slightly greater than 50 percent. In response to TCA's assertion that even if Iowa Telecom had only 10 percent of the lines in the three exchanges, it would have market power because it has "financial staying power" (Tr. 149-50), Iowa Telecom argues that TCA's analysis is not how economists or courts define "market power." Iowa Telecom asserts that the fact that a company operates in multiple markets does not mean the company has market power in any specific market. (Iowa Telecom Post-hearing Brief, p. 16).<sup>7</sup>

Next, Iowa Telecom argues that TCA has failed to prove Iowa Telecom is engaged in below-cost pricing. Iowa Telecom asserts that in the Eighth Circuit, the relevant measure of cost is average variable cost, which is a proxy for marginal cost. (Iowa Telecom Post-hearing Brief, p. 13).<sup>8</sup> Iowa Telecom witness Dr. Tardiff testified that in a situation such as this where there are several components to an offer, the question is whether the pattern of prices or prices in their totality are profitable in that they generate revenues above the cost of providing the goods and services in

---

<sup>5</sup> Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993).

<sup>6</sup> Id., at 224.

<sup>7</sup> Citing Bathke v. Casey's General Stores, Inc., 64 F.3d 340 (8<sup>th</sup> Cir. 1995).

<sup>8</sup> Citing International Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1394 (8<sup>th</sup> Cir. 1993), and United States v. AMR Corp., 335 F.3d 1109, 1116 (10<sup>th</sup> Cir. 2003).

question. Further, Dr. Tardiff testified that there is no evidence in this case that Iowa Telecom is pricing below its incremental, marginal, or average variable costs. (Tr. 558). In response to TCA's argument that average variable cost is not an appropriate cost standard in cases involving high fixed-cost industries, Iowa Telecom argues that the Eighth Circuit rejected a total cost standard in a case involving the high-fixed-cost airline industry. (Iowa Telecom Post-hearing Brief, p. 18).<sup>9</sup>

Finally, in determining whether TCA has proven the third element of a predatory pricing claim – that Iowa Telecom will likely be able to recoup its losses after driving TCA from the market – Iowa Telecom states that the Board must consider the viability of TCA as a competitor, whether it has been significantly harmed by the alleged predatory pricing, and whether its exit from the market has occurred or is imminent. (Iowa Telecom Post-hearing Brief, pp. 20-21).<sup>10</sup> Iowa Telecom contends that none of these factors is present in this case, arguing that TCA is entrenched in these markets with almost all of the in-town lines, 70 percent of TCA's customers choose a bundled voice/video offering at a price comparable to that charged by Iowa Telecom for a similar bundle, and TCA is in a strong financial position. (Iowa Telecom Post-hearing Brief, p. 21).

The Board agrees with Iowa Telecom that TCA has failed to prove any of the elements traditionally required of a predatory pricing claim. First, TCA has failed to establish that Iowa Telecom has significant market power in the three relevant

---

<sup>9</sup> *Id.*

<sup>10</sup> Citing Stearns Airport Equipment Co. v. FMC Corp., 170 F.3d 518, 529 (5<sup>th</sup> Cir. 1999).

exchanges in the sense that Iowa Telecom is not able to dictate the market price. TCA has a greater market share in each of the three exchanges, even at somewhat higher prices, and is particularly strong in the urban areas of each exchange. TCA failed to show that Iowa Telecom's pricing plan has caused any erosion of TCA's market share in the three exchanges. Further, there was no persuasive evidence that any dramatic shifts in market share are likely to occur after Iowa Telecom's pricing plan is fully marketed.

The second requirement of a predatory pricing claim is that the alleged predator must be found to be pricing below an appropriate measure of its cost. The Board recognizes that § 476.55(2) gives it some freedom to depart from traditional elements of a predatory pricing case, but concludes that in this case it is not appropriate to disregard the strong presumption recognized by the Eighth Circuit Court of Appeals that prices above average variable cost are legal.<sup>11</sup>

Considering the total revenue generated for Iowa Telecom by each new \$5.95 customer<sup>12</sup> and the comparability of the prices for comparable products and services offered by TCA and Iowa Telecom, it appears to the Board that Iowa Telecom is

---

<sup>11</sup> See Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1061 (8<sup>th</sup> Cir. 2000); International Travel Arrangers v. NWA, Inc., 991 F.2d 1389, 1394 (8<sup>th</sup> Cir. 1993); and Morgan v. Ponder, 892 F.2d 1355, 1358 (8<sup>th</sup> Cir. 1989).

<sup>12</sup> Iowa Telecom is advertising a bundled rate of \$5.95 per month for residential customers in the Hartley, Paullina, and Primghar exchanges. However, the Board's inquiry about pricing cannot be limited to the \$5.95 price for stand-alone voice service because no customer will write a monthly check to Iowa Telecom for just \$5.95. Revenue from the following charges are or may be generated by each \$5.95 customer: a Subscriber Line Charge (SLC) of \$6.50; a long distance charge; toll revenues; switched access revenues; and revenues generated if the customer elects to purchase data services (DSL). (Tr. 216, 330). Thus, the minimum actual cost to the customer is at least \$12.45 per month, compared to TCA's basic residential monthly rate of \$12.50. (Tr. 13).

meeting competition, not selling below its costs. At a minimum, each \$5.95 customer will generate at least \$12.45 in revenue for Iowa Telecom (\$5.95 plus the \$6.50 SLC), and that amount is higher than Iowa Telecom's incremental or average variable cost (as identified in confidential exhibits filed in this proceeding), which includes such things as the cost of billing; bill printing; postage; collection; call completion; and card installation and maintenance. (Tr. 292-93). Thus, TCA has failed to rebut the presumption that Iowa Telecom's prices are lawful and to establish the second element of a predatory pricing claim.

Here, where TCA has failed to prove that Iowa Telecom is selling at a loss, TCA's claim that Iowa Telecom is cross-subsidizing its service in the three exchanges also must fail. Further, TCA failed to introduce any evidence in support of its assertion that Iowa Telecom's pricing plan was temporary, to be followed by raising prices once TCA was out of the market. Consequently, the issue of Iowa Telecom's ability to recoup any losses incurred as a result of predatory pricing is moot and the third element of a predatory pricing claim is unsupported.

### **Price Discrimination**

TCA claims that Iowa Telecom has committed price discrimination against its customers in regulated exchanges by charging higher rates in those exchanges than it charges in deregulated exchanges. TCA argues that Iowa Telecom's pricing plan violates the policies underlying Iowa's statute prohibiting price discrimination, Iowa Code § 551.1, and is inconsistent with that statute. TCA argues that Iowa Telecom cannot justify its prices by claiming it is "meeting" competition where its pricing is

such that TCA cannot meet it. TCA contends it cannot meet Iowa Telecom's price because, as a municipal provider, it is prohibited from using any funds except those of the utility itself to fund its utility operations and must cover all of its costs in its rates. TCA argues that to meet Iowa Telecom's price, it would have to engage in cross-subsidization, something it cannot do because it cannot serve large numbers of other exchanges. (TCA serves one other exchange in Sanborn, Iowa.)

Iowa Telecom responds by noting that TCA did not dispute that Iowa Code § 551.1 exempts pricing comparisons from the scope of the statute when one of the rates is subject to the control of cities or other governmental agency. (Iowa Telecom Post-hearing Brief, p. 23; Tr. 172). Further, Iowa Telecom argues that Iowa's price discrimination statute immunizes prices made to meet competition. Iowa Telecom suggests that its monthly bundle price of \$40.94 (consisting of \$5.95 for voice service, \$29.99 for a DISH network offering, and a \$5.00 local channel charge) does no more than meet the competition posed by TCA's price of \$37.25 for its comparable cable/voice package. (Iowa Telecom Post-hearing Brief, p. 25). Iowa Telecom also argues that because TCA has failed to prove that the alleged price discrimination was done for the purpose of destroying a competitor and has failed to show any proof of anticompetitive effects, as required by the state price discrimination statute, the price discrimination claim fails. (Iowa Telecom Post-hearing Brief, p. 23).<sup>13</sup>

---

<sup>13</sup> Citing Des Moines Area Dairy Queen Store Operators and Owners, Inc. v. Wapello Dairies, Inc., 226 N.W.2d 9, 12 (Iowa 1975).

To the extent that TCA may have standing to advance a price discrimination claim on behalf of Iowa Telecom's customers in its regulated exchanges (a question the Board is not deciding), the Board concludes that TCA has failed to prove price discrimination. The Board finds that the evidence in this case demonstrates that most customers in the relevant exchanges are purchasing a bundle of services. TCA indicated that at least 70 percent of its customers purchase a cable/voice bundle and only 10 percent purchase stand-alone voice service. (Tr. 49). Iowa Telecom testified that it offered its bundled offering to be able to compete with triple play providers like TCA. (Tr. 213-14, 239). Because TCA and Iowa Telecom offer the bundles at comparable prices, the Board concludes that Iowa Telecom's prices do not go beyond what is necessary to meet competition. The Board agrees with Iowa Telecom that TCA has failed to show that Iowa Telecom's pricing plan was discriminatory, as it cannot be said that Iowa Telecom's pricing plan was done for the purpose of destroying a competitor and because it has not had an anticompetitive effect.

### **Price Squeeze**

TCA claims Iowa Telecom has engaged in a "price squeeze" against TCA in the Hartley, Paullina, and Primghar exchanges. TCA defines a "price squeeze" as the exercise of market power in a situation where a second provider like TCA is a reseller and the dominant carrier wholesales local exchange service to the second provider at a rate higher than the dominant carrier's retail rate for the same services in the same market. Since there is no other wholesaler to buy from in the market, the

retail customers have no reason to pay higher prices for the same services. Effectively, the reseller is prohibited from serving the market. TCA claims this behavior is prohibited by Iowa Code § 476.55(2). (Tr. 103-05).

In its January 19, 2007, motion to reopen the record, TCA asked the Board to admit its Exhibit 31, which TCA contends shows that Iowa Telecom continues to exercise a price squeeze on TCA in rural areas by not making the \$5.95 rate available for resale. In its post-hearing brief, TCA asks that the Board require Iowa Telecom to provide a “roll back” of the resale rate to June 2006, when TCA made its initial request. In addition, TCA contends it should be awarded attorney fees in regard to this issue. (TCA Post-hearing Brief, pp. 16-17).

In its January 29, 2007, conditional resistance to TCA's motion to reopen the record, Iowa Telecom stated that its Exhibit 120<sup>14</sup> provides a firm commitment regarding wholesale pricing of the packages. Further, Iowa Telecom explained that TCA's initial request for resale of the \$5.95 bundle was made on June 16, 2006; Iowa Telecom responded the next business day, indicating, erroneously, that the bundle was not available for resale by TCA at a wholesale discount; and that TCA did not escalate the dispute in the manner described in the parties' interconnection agreement.

---

<sup>14</sup> Iowa Telecom's Exhibit 120 is an affidavit by Mr. David N. Porter, Iowa Telecom's Director of Industry Relations, in which Mr. Porter states Iowa Telecom's intent to make the competitive bundle at issue (identified by Iowa Telecom as its \$5.95 Freedom Select – Traditional package) and another higher-priced bundled offering available to TCA for resale.

On February 8, 2007, the Board issued an order reopening the record and admitting both exhibits. Based on Iowa Telecom's Exhibit 120, the Board finds that Iowa Telecom has committed to making the packages available to TCA at wholesale pricing. Given this commitment, and presuming good faith negotiations and cooperation by TCA and Iowa Telecom, there does not appear to be an ongoing price squeeze attempt by Iowa Telecom. Further, because both parties contributed to the continued existence of this problem – Iowa Telecom by providing an erroneous answer in response to TCA's first request and TCA by failing to engage in the dispute resolution process in the parties' interconnection agreement – the Board will not award attorney fees to TCA for this issue. Finally, because Iowa Telecom has offered a reasonable approach to retroactively adjusting past wholesale charges for previously resold lines to the discounted rates going back to January 8, 2007 (the date TCA first escalated the dispute, although allegedly not in proper form), the Board will not order Iowa Telecom to roll back the rates to June 2006 as requested by TCA.

### **CONCLUSION**

Having found that TCA did not satisfy the traditionally required elements of a predatory pricing claim and did not establish that Iowa Telecom's pricing plan was discriminatory, and that there is no longer a threat of a price squeeze, the Board must now determine whether the evidence presented by TCA in support of its antitrust claims was sufficient to show that Iowa Telecom has engaged in activities inconsistent with antitrust law and underlying policies, even in the absence of a full-

fledged violation of antitrust law. The Board finds that TCA did not make that showing. TCA has failed to show that Iowa Telecom's actions in the three relevant exchanges amount to unfair practices that have a reasonable probability of impeding the public's access to competitive telecommunications service. TCA failed to show that Iowa Telecom's pricing plan has had any anticompetitive effect on TCA in the relevant exchanges. While the Board agrees with TCA that Iowa Code § 476.55(2) allows the Board to step in to prevent harm to competition instead of waiting to respond to harm done, there has been no showing in this case that Iowa Telecom's pricing plan will threaten or injure competition in the three relevant exchanges. Instead, evidence introduced in this proceeding has assured the Board that Iowa Telecom's actions are still within the bounds of legal and robust competition that has given consumers in these exchanges lower prices and greater choice in telecommunications service. The Board finds that Iowa Telecom's activities are consistent with antitrust law and underlying policy and fall within the permissible side of the "exceedingly thin line between vigorous price competition and predatory pricing." (Iowa Telecom Post-hearing Brief, p. 22).<sup>15</sup>

In this case, TCA acknowledges that the extent to which it has been damaged by Iowa Telecom's actions is not known, the Legislature did not intend to shield TCA from every adverse effect of competition, and that Iowa Telecom has yet to cause TCA significant injury. (TCA Post-hearing Brief, pp. 6, 19). The Board concludes that it would do greater harm to competition and consumers by applying the remedies

---

<sup>15</sup> Citing United States v. AMR Corp., 335 F.3d 1109, 1121 (10<sup>th</sup> Cir. 2003).

available in § 476.55(2) at this point, when any threat to competition is entirely speculative. Therefore, the Board will deny the relief requested by TCA in its complaint and in its post-hearing brief.

**ORDERING CLAUSE**

**IT IS THEREFORE ORDERED:**

The relief requested by the Community Cable Television Agency of O'Brien County, d/b/a The Community Agency and TCA, in its Complaint filed on July 24, 2006, as amended on August 17, 2006, and as modified in its Post-hearing Brief filed on January 19, 2007, is denied as discussed in this order.

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Margaret Munson  
Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 23<sup>rd</sup> day of March, 2007.