

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  SOUTH SLOPE COOPERATIVE TELEPHONE COMPANY	DOCKET NO. RPU-07-1 (FCU-06-25)
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**ORDER EXPRESSING INTENT NOT TO ENFORCE PRIOR ORDER,  
GRANTING INTERVENTION, AND  
SETTING PROCEDURAL SCHEDULE**

(Issued May 2, 2007)

**PROCEDURAL HISTORY**

On January 23, 2007, the Utilities Board (Board) issued a final order in Docket No. FCU-06-25 stating, among other things, that South Slope Cooperative Telephone Company (South Slope) is offering local exchange service as a competitive local exchange service provider (CLESP), or competitive local exchange carrier (CLEC), in the Oxford, Solon, and Tiffin, Iowa, exchanges and that South Slope's assessment of a carrier common line charge (CCLC) for originating and terminating intrastate interexchange traffic is in violation of 199 IAC 22.14(2)"d"(1)"2." As part of the January 23, 2007, order, the Board directed South Slope to stop assessing a CCLC within 30 days of the issuance of that order on calls originating or terminating in the subject exchanges.

On February 6, 2007, South Slope filed an application for a new rate for South Slope's carrier common line charge (CCLC) pursuant to Iowa Code §§ 476.6 and 476.7. The application has been identified as Docket No. RPU-07-1. In support of its request, South Slope states that it wishes to provide the requisite cost support for a

CCLC and elects to make the cost-supported CCLC effective February 21, 2007.

South Slope also states that it will refund any amounts collected in excess of amounts finally approved by the Board.

On February 16, 2007, the Board docketed South Slope's application and granted South Slope an interim stay of Ordering Clause No. 2 of its January 23, 2007, order in Docket No. FCU-06-25, which required South Slope to stop assessing the CCLC in the subject exchanges on or before February 22, 2007.

On February 26, 2007, Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom (Iowa Telecom), filed an objection to South Slope's application and to the interim stay. In support of its objection, Iowa Telecom states that South Slope's attempts to justify its access charges by referencing the cost of the system built with revenues from those access charges is circular and improper. Iowa Telecom also states that the Board has already determined that the CCLC is unlawful, citing to the Board's January 23, 2007, order, and as such, South Slope should not be allowed to continue to charge the CCLC during the course of these proceedings. Iowa Telecom also states that there is no interim rate provision in Iowa Code § 476.7, the statute under which the Board docketed South Slope's petition, and that absent an application for judicial review pursuant to Iowa Code chapter 17A, a stay of the Board's January 23, 2007, order is improper. Iowa Telecom also requests the Board require South Slope to post a bond to secure the likely amounts of access charges to be collected, plus interest, should the Board determine that the implementation of the stay is appropriate.

Also on February 26, 2007, AT&T Communications of the Midwest, Inc., and TCG Omaha (collectively, AT&T) filed an objection to South Slope's application and a petition for intervention in this proceeding. In support of its objection, AT&T states that South Slope should not be allowed to retain the CCLC imposed on AT&T because the implementation of the CCLC is a violation of 199 IAC 22.14(2)"d"(2). In addition, AT&T states that South Slope did not provide notice to AT&T or other toll carriers indicating that it was charging a CCLC. AT&T requests the Board allow AT&T to withhold further payment of the CCLC pending the outcome of this proceeding. AT&T also petitions to intervene in these proceedings and asks the Board to rescind the stay and direct South Slope to refund all CCLC charges, with interest.

On March 12, 2007, South Slope filed a reply and resistance to the objections filed by Iowa Telecom and AT&T. In support of its resistance, South Slope states that Iowa Telecom lacks proper standing to contest the merits of this proceeding because Iowa Telecom is not an interexchange carrier (IXC), does not pay a CCLC to South Slope, and is not a disadvantaged competitor. South Slope also resists AT&T's application for intervention because South Slope contends AT&T is attempting to relitigate many issues already decided in Docket No. FCU-06-25. In addition, South Slope seeks clarification from the Board regarding its decision in the February 16, 2007, order to docket South Slope's application under Iowa Code § 476.7 rather than § 476.6.

On March 23, 2007, AT&T filed a response and reply to South Slope's resistance and on March 30, 2007, South Slope responded to AT&T's filing.

## DISCUSSION

The recent submissions filed by South Slope, Iowa Telecom, and AT&T ask the Board to address the following issues: (1) whether South Slope should be allowed to continue to charge the CCLC, subject to refund with interest, while these proceedings are pending; (2) whether the Board should grant AT&T's motion for intervention; and (3) whether the Board should require South Slope to post a bond to secure the refund of the likely amounts of access charges to be collected, plus interest, should the Board determine that it is not appropriate for South Slope to continue to charge the CCLC in the areas it serves as a CLEC. The Board will address each of these issues in this section.

**1. Whether South Slope should be allowed to continue to charge the CCLC, subject to refund with interest, throughout these proceedings.**

As part of the Board's January 23, 2007, order in Docket No. FCU-06-25, South Slope was ordered to stop charging the CCLC for interexchange access services provided in the areas it serves as a CLEC. On February 16, 2007, the Board issued an order docketing South Slope's application for a new rate for a CCLC and as part of that order, the Board granted South Slope a stay of the January 23 order allowing South Slope to continue charging the CCLC. Because Iowa Telecom (and other interested parties) had until February 26, 2007, to file a response to South Slope's application, the Board indicated that it would reevaluate its order based upon any objections. Iowa Telecom and AT&T have both objected to the stay.

In its February 16 order, the Board docketed South Slope's petition pursuant to Iowa Code § 476.7, stating that while South Slope filed its application pursuant to

§§ 476.6 and 476.7, the former does not directly apply to this situation because it is primarily addressed to retail rates. In contrast, § 476.7 is a general rate review statute that allows the Board to consider the reasonableness of any of a utility's rates, charges, schedules, service, or regulations. The Board continues to believe that § 476.7 is the appropriate authority for this proceeding.

In its objection, Iowa Telecom states that § 476.7 does not include a provision for interim rates and that stays are allowed by Board rule only when there is a pending judicial review of the agency's action. Iowa Telecom argues that South Slope did not seek judicial review of the Board's January 23, 2007, order in Docket No. FCU-06-25, and absent a temporary rate provision in § 476.7, a stay of the Board's January 23 order is improper.

AT&T also objects to the stay, asserting that South Slope's request to retain the CCLC is a violation of 199 IAC 22.14(2)"d"(2); the rule provides that a CLEC concurring in Iowa Telephone Association (ITA) Access Service Tariff No. 1 and competing with an incumbent service provider with lower access service rates must deduct the CCLC from its rates.

The Board agrees with Iowa Telecom that there is no express rate provision in Iowa Code § 476.7. The Board also agrees with South Slope's assertion that pursuant to the Board's decision in In re: Fibercomm, L.C., et al. v. AT&T Communications of the Midwest, Inc., (hereafter "Fibercomm")<sup>1</sup>, it is very likely that the Board has the authority under § 476.101(1) to apply any provision of Iowa Code

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<sup>1</sup> In re: Fibercomm, L.C., et al. v. AT&T Communications of the Midwest, Inc., "Final Decision and Order," Docket No, RCU-00-3 (Issued October 25,2001).

chapter 476 to South Slope's CLEC activities.<sup>2</sup> While South Slope seeks to have the Board docket this matter pursuant to § 476.6, which includes an interim rate provision, § 476.6 does not directly apply to this situation. As indicated above, and discussed in greater detail below, § 476.6 addresses retail rates charged by companies that are directly subject to rate regulation. South Slope is not normally subject to rate regulation and this docket addresses issues associated with rates being assessed to other utilities, not retail rates. Therefore, the Board will continue to review South Slope's petition pursuant to Iowa Code § 476.7.

Iowa Telecom has argued that §476.7 does not include a provision for temporary or interim rates like the provision found in § 476.6(10). This appears to be an argument that the inclusion of temporary rate authority in § 476.6(10), but not in § 476.7, implies that temporary rates are not available under the latter statute. However, the Board instead finds this difference to be a useful illustration of the reason that the Board is conducting this case pursuant to the general, and flexible, rate review authority of § 476.7, rather than the specific retail rate review provisions of § 476.6.

Section 476.6 applies to the review of retail public utility rates that are often applicable to tens, or even hundreds, of thousands of Iowa customers. As such, the

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<sup>2</sup> Section 476.101(1) provides, in relevant part, that if the Board determines, after notice and opportunity for hearing, that a CLESP possesses market power in a relevant market, the Board may apply such other provisions of chapter 476 to that CLESP, as the Board deems appropriate. In the Fibercomm case, the Board determined that the CLESPs that were parties to that docket had market power with respect to terminating access to their retail customers. South Slope was not a party to that docket, and the Board is not prejudging the issue of market power in this case, but South Slope appears to be saying that if the Board were to examine the manner in which South Slope provides interexchange carriers with access to South Slope's local exchange customers, the Board would likely conclude that South Slope also has market power in this respect. This would give the Board the authority to apply other provisions of chapter 476 to South Slope's CLESP access services.

statute contains numerous specific provisions that address the unique aspects of a major, broad-ranging retail rate case. Not least of these is § 476.6(10), which provides a public utility with the ability to increase its rates temporarily, while the case is pending, based on previously established regulatory principles, subject to refund with interest at a specified rate that balances the interests of the utility and its customers. Those provisions do not fit well in these circumstances. Other special provisions, such as those relating to newly constructed electric generating facilities and other issues, are also not relevant to this matter. The statute is a poor fit for this proceeding that involves rates charged by one utility to other utilities, i.e., wholesale rates.

In contrast, § 476.7 gives the Board broad general authority to review and "determine the reasonableness of the utility's rates, charges, schedules, service, or regulations . . ." Other than requiring notice and hearing, the statute does not restrict the conduct of the proceeding, but instead allows the Board to address unusual or unforeseen situations. This case is not entirely unforeseen (199 IAC 22.14(2)"d" contemplates the possibility that a CLEC concurring in the ITA tariff may seek approval of access charges in excess of the safe harbor level), but it is a case of first impression, requiring that the Board and the parties proceed in a flexible manner.

This approach is supported by the legislative findings of § 476.95, which generally direct the Board to encourage competition in local exchange communications services and specifically provide that "regulatory flexibility is appropriate" in this area of regulation and that "the board should respond with speed and flexibility to changes in the communications industry." The Board takes these

legislative findings and policy statements very seriously and concludes that it has an affirmative obligation not to force this unusual case into pre-existing processes.

Finally, the Board considers that the background of this case is relevant. In Docket No. FCU-06-25, the Board learned that South Slope collected the CCLC in its CLESP service territory for a number of years, believing in good faith that it was an incumbent provider in those areas and was therefore entitled to collect the CCLC. The Board, after notice and hearing, determined that South Slope was acting as a CLESP or a CLEC in certain geographic areas and ordered South Slope to cease collection of the CCLC in those areas. South Slope has asked the Board to stay the effectiveness of that order pending completion of this docket, subject to an obligation to refund any over collection, with interest.<sup>3</sup>

Subrule 199 IAC 7.28 allows the Board to issue a stay to any party to a contested case proceeding pending judicial review of the proceeding. Iowa Telecom suggests that the Board cannot issue a stay in this proceeding because it is not part of a judicial review of the Board's decision in Docket No. FCU-06-25. While South Slope did not seek judicial review of the Board's decision in Docket No. FCU-06-25; this proceeding follows directly from that decision and its outcome may affect the Board's decision in the underlying matter. The Board has discretion to choose not to enforce Ordering Clause No. 2 of its order under these circumstances and the Board will exercise that discretion here. The effect of this decision is the same as granting a

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<sup>3</sup> This further illustrates the difference between South Slope's request in this docket and temporary rates pursuant to § 476.6(10); South Slope seeks only to maintain the status quo, while temporary rates under § 476.6(10) typically involve an affirmative increase in rates to levels never before approved by the Board.

stay and the Board understands that South Slope has been using the "stay" terminology as a shorthand reference for this type of relief.

On the basis of all these facts and circumstances and relying on South Slope's representations regarding possible refunds, the Board will grant South Slope's request for a "stay" of the Board's January 23, 2007, order and will exercise its discretion to allow South Slope to continue assessing the CCLC as an element of its access charges in the subject exchanges on an interim basis, subject to refund based on the Board's final decision in this docket. To the extent the Board's prior use of the word "stay" may have confused the parties, the Board clarifies that in this order it is declaring its determination that it will not enforce Ordering Clause No. 2 of its January 23, 2007, order in Docket No. FCU-06-25, subject to the conditions and understandings described above, while this docket is pending.

**2. Whether the Board should grant AT&T's request for intervention in this proceeding.**

AT&T requests the Board allow it to intervene in these proceedings, stating that it has a direct and immediate interest in the subject matter of this proceeding and that its interests will not be adequately represented by any other party. AT&T also states that its rights and interests will be substantially affected by the Board's decision in this matter. South Slope objects to AT&T's request, stating that AT&T seeks to revisit many of the issues already determined in Docket No. FCU-06-25 through its participation in these proceedings.

The Board has reviewed AT&T's request and finds that AT&T has demonstrated a unique interest in these proceedings that should be represented.

Therefore, the Board will grant AT&T's request pursuant to 199 IAC 7.13.

**3. Whether the Board should require South Slope to post a bond to secure the likely amounts of access charges to be collected, plus interest, should the Board determine that it is not appropriate for South Slope to continue to charge the CCLC.**

Both Iowa Telecom and AT&T request the Board require South Slope to post a bond to secure the amounts of collected access charges, plus interest. South Slope offers its corporate undertaking to secure the refund of any amounts collected in excess of amounts finally approved by the Board, plus interest. Iowa Telecom and AT&T generally take issue with South Slope's reliance on a corporate undertaking to secure these funds, but do not offer any specific evidence that a corporate undertaking is inadequate.

Based on the record before the Board at this time, South Slope's submission of a corporate undertaking to secure the potential refund is sufficient to ensure a proper refund of any amounts collected in excess of a final amount approved by the Board. Therefore, the Board will not require South Slope to post a bond to secure these funds at this time. If the other parties to this proceeding submit evidence that substantiates their general concerns about the adequacy of the corporate undertaking, the Board will re-visit this issue.

## ORDERING CLAUSES

### IT IS THEREFORE ORDERED:

1. The Board will exercise its discretion and will not enforce Ordering Clause No. 2 of its January 23, 2007, order in Docket No. FCU-06-25, subject to the conditions and understandings described in this order, while this docket is pending.
2. The petition to intervene filed by AT&T Communications of the Midwest, Inc., and TCG Omaha on February 26, 2007, is granted as described in this order.
3. The following procedural schedule is established for this proceeding.
  - a. South Slope shall file updated cost information supporting its petition on or before May 7, 2007. In addition, South Slope shall file an electronic working copy of the separations or apportionment program used in the development of its revenue requirement for access rates, if available, on or before May 7, 2007.
  - b. Iowa Telecommunications Services, Inc., d/b/a Iowa Telecom, AT&T Communications of the Midwest, Inc., and TCG Omaha, and any other intervenors shall file prepared direct testimony, with supporting exhibits and workpapers, on or before May 29, 2007.
  - c. South Slope shall file rebuttal testimony, with supporting exhibits and workpapers, on or before June 18, 2007.
  - d. A hearing for the purpose of receiving testimony and cross-examination of all testimony will commence at 9 a.m. on Thursday, July 26, 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 to request appropriate arrangements.

e. Any party desiring to file an initial brief may do so on or before August 13, 2007.

f. Any party desiring to file a reply brief may do so on or before August 27, 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. Pursuant to 199 IAC 7.15, the time for filing responses or objections to data requests and motions will be shortened to five days from the date the motion is filed or the data request is served. All data requests and motions should be served by facsimile transfer or by electronic mail, in addition to United States mail.

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Krista K. Tanner

Dated at Des Moines, Iowa, this 2<sup>nd</sup> day of May, 2007.