

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>QWEST COMMUNICATIONS CORPORATION,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">vs.</p> <p>SUPERIOR TELEPHONE COOPERATIVE; THE FARMERS TELEPHONE COMPANY OF RICEVILLE, IOWA; THE FARMERS & MERCHANTS MUTUAL TELEPHONE COMPANY OF WAYLAND, IOWA; INTERSTATE 35 TELEPHONE COMPANY, d/b/a INTERSTATE COMMUNICATIONS COMPANY; DIXON TELEPHONE COMPANY; REASNOR TELEPHONE COMPANY, LLC; GREAT LAKES COMMUNICATION CORP.; AND AVENTURE COMMUNICATION TECHNOLOGY, LLC,</p> <p style="text-align:center">Respondents.</p>	<p style="text-align:center">DOCKET NO. FCU-07-2</p>
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**ORDER GRANTING MOTION TO WITHDRAW AND
GRANTING MOTIONS TO COMPEL IN PART AND DENYING IN PART**

(Issued August 16, 2007)

There are four outstanding motions to compel discovery responses currently before the Utilities Board (Board) in this docket. This order will address each motion individually.

QCC's Motion to Compel Answers to Written Discovery Propounded Upon Superior Telephone Cooperative, Great Lakes Communication Corp., and Aventure Communication Technology, LLC.

Parties' Position

On July 3, 2007, Qwest Communications Corporation (QCC) filed with the Board a motion to compel answers to written discovery propounded upon Superior Telephone Cooperative (Superior), Great Lakes Communication Corp. (Great Lakes), and Aventure Communication Technology, LLC (Aventure), all of which are respondent parties to this action.

On July 5, 2007, QCC filed a reformed motion to compel stating that after filing its July 3 motion, Superior, Great Lakes, and Aventure agreed to produce some of the material sought by QCC. Therefore, QCC filed a reformed motion to identify the remaining issues between the parties.

On July 17, 2007, QCC filed a request to withdraw its reformed motion to compel stating that Superior, Great Lakes, and Aventure agreed to produce the requested information.

Discussion

The Board has reviewed QCC's request and finds that it is reasonable. The Board will grant QCC's motion to withdraw its previously filed reformed motion to compel discovery propounded upon Superior, Great Lakes, and Aventure.

QCC's Motion to Compel Answers to Written Discovery Propounded Upon the Rural Iowa Independent Telephone Association.

Parties' Positions

On July 12, 2007, QCC filed a motion to compel answers to written discovery propounded upon the Rural Iowa Independent Telephone Association (RIITA). In support of its motion, QCC states that on June 5, 2007, QCC served RIITA with a subpoena duces tecum seeking information about the role RIITA played, if any, regarding the matters alleged in QCC's complaint, namely discriminatory conduct in the provision of local services and the development of revenue sharing schemes. QCC asserts that RIITA has refused to provide any of the requested information or acknowledge the Board's statutory authority to compel RIITA to answer QCC's subpoena. QCC asserts that the Board has jurisdiction to hear the issues presented in its complaint and that discovery is not restricted so long as it is reasonably calculated to lead to the production of admissible evidence.

On July 23, 2007, RIITA filed a resistance to QCC's motion to compel. In support of its resistance, RIITA states that this action does not identify RIITA as being involved in the matters that are the subject of this contested case. RIITA asserts that it is a trade association, not a utility, and that it has not intervened in this proceeding; RIITA acknowledges that five of its members are named respondents in this proceeding. RIITA also states that because it is not a party to this action, discovery is not available to QCC from RIITA and the Iowa Rules of Civil Procedure do not provide for motions to compel against non-parties.

Discussion

Iowa Code § 17A.13(1) provides that agency subpoenas shall be issued to a party on request and that discovery procedures that are applicable to civil actions are available to all parties in contested cases before an agency. Iowa Rule of Civil Procedure 1.514 provides that an independent action against a non-party for production of documents may be allowed. Therefore, the Board subpoena served upon RIITA by QCC was appropriate by statute and the rules of civil procedure.

However, it appears that the information QCC seeks to obtain from RIITA is ascertainable through the discovery procedures available to QCC from the other parties to this action. QCC states that it requested 11 sets of documents, specifically seeking documents about revenue sharing, correspondence between RIITA and its members about "traffic pumping" schemes, copies of newsletters sent to member ILECs, documents exchanged with certain consultants that have already produced documents in this case, documents that relate to types of equipment and configurations used in the schemes QCC complains about, documents relating to the assignment of telephone numbers, and documents relating to call routing. RIITA acknowledges that five of the named respondents in this action are members of RIITA. Therefore, it appears that the information QCC seeks from RIITA can be obtained (or may have already been obtained) through the discovery channels available to QCC with respect to the parties in this action. The Board will deny QCC's motion to compel with respect to RIITA at this time, at least until a showing is made that RIITA has, or is likely to have, documents that the respondents do not.

QCC's Motion to Compel Discovery Responses Propounded Upon Farmers Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; and Dixon Telephone Company

Parties' Positions

On July 16, 2007, QCC filed a motion to compel discovery responses propounded upon Farmers Telephone Company of Riceville, Iowa (Farmers – Riceville), The Farmers & Merchants Mutual Telephone Company of Wayland (Farmers & Merchants), Interstate 35 Telephone Company, d/b/a Interstate Communications Company (Interstate 35), and Dixon Telephone Company (Dixon) (collectively referred to as "Farmers Respondents"). In support of its motion, QCC states that it propounded its first set of discovery on the Farmers Respondents on February 20, 2007; a second set of discovery was propounded on May 14, 2007. QCC asserts that the discovery propounded upon the Farmers Respondents was identical to the discovery propounded upon Reasnor Telephone Company, LLC (Reasnor), which was also the subject of a Board order issued July 3, 2007, wherein the Board granted a similar motion to compel discovery responses. QCC states that in the July 3 order, the Board found that the information QCC sought regarding interstate calling was discoverable and germane to QCC's claims in this docket. QCC asserts that despite the Board's finding in the July 3 order, the Farmers Respondents have not provided complete and thorough responses to QCC's discovery requests and continue to object to QCC's attempt to obtain discovery regarding interstate calling.

On July 23, 2007, the Farmers Respondents filed a resistance to QCC's motion to compel and assert that QCC is attempting to use this proceeding as an opportunity to seek unlimited information from rural incumbent local exchange carriers (ILECs) regarding their relationships with conference calling companies, regardless of whether the information relates to traffic under the Board's jurisdiction. The Farmers Respondents state that the Board limited its review of QCC's complaint to local and intrastate access service tariffs and intrastate traffic¹ and, as such, the Farmers Respondents argue that the discovery requests propounded by QCC relating to interstate traffic are irrelevant and will not likely lead to the discovery of evidence admissible before the Board in this proceeding.

On July 27, 2007, QCC filed a reply to the Farmers Respondents' resistance. QCC argues that all traffic involved in QCC's initial complaint, both intrastate and interstate, is either directly relevant or at the very least likely to lead to the discovery of admissible evidence. QCC asserts that the standard for determining the scope of discovery is broad and that each of QCC's requests seeks information regarding the Farmers Respondents' conduct, particularly concerning both intrastate and interstate traffic, and is designed to determine the facts and scope of the alleged conduct. QCC also argues that every relationship between the Farmers Respondents and a free calling company is directly relevant to QCC's claims of discrimination in local service.

¹ See "Order Docketing Complaint, Setting Procedural Schedule, Denying Motion for Summary Judgment, Denying Motions to Dismiss, Denying Motion to Defer Discovery, and Denying Cross-Motion for Emergency Evidentiary Hearing," Docket No. FCU-07-2 (issued May 25, 2007).

In addition, QCC specifically identifies several of its requests as seeking information that may be included in the Farmers Respondents' call detail records (CDRs). QCC states that the Farmers Respondents claim that QCC will be able to compile the requested information by analyzing the CDRs, which are available from Iowa Network Services (INS). QCC states that INS has objected to the production of these documents and that a motion to compel that information has been filed with the Board (see below).

On August 6, 2007, the Farmers Respondents filed a surreply to QCC's motion, stating again that QCC's discovery requests were overbroad. The Farmers Respondents included an example to illustrate their position; QCC's Request No. 35 seeks "all correspondence or other documents exchanged with RIITA, ITA [Iowa Telecommunications Association], INS, Burnie Snoddy or Kiesling Associates since January 1, 2002." The Farmers Respondents assert that this request, with no modifier or limitation, requires these respondents to produce massive amounts of documents that have no relevance to the issues in this case including, but not limited to, invitations to the ITA golf outing, ITA newsletters, and all documents between the respondents and Kiesling Associates for bookkeeping services, accounting, or auditing services. The Farmers Respondents also state that with respect to the production of the CDRs, a request was made to INS by the rural ILECs to produce the CDRs and QCC subpoenaed the documents from INS. The Farmers Respondents assert that this is a dispute between QCC and INS and does not involve the Farmers Respondents.

On August 10, 2007, QCC filed a reply to the Farmers Respondents' surreply, which generally restates QCC's previous position that the Farmers Respondents have improperly resisted responding to QCC's discovery requests.

On August 15, 2007, the Farmers Respondents filed a response to QCC's reply to the Farmers Respondents surreply, which generally restates the Farmers Respondents' previous positions and finds fault in QCC's representation of the facts and law pertaining to its pending motion to compel discovery.

Discussion

Iowa Rule of Civil Procedure 1.503(1) provides that

[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

It is also well established that discovery rules mandate a liberal construction of the scope of discoverable materials. Carolan v. Hill, 553 N.W.2d 882, 886 (Iowa 1996) (citing Hutchinson v. Smith Lab., Inc., 392 N.W.2d 139, 140-41 (Iowa 1986)); see also Jochims v. Isuzu Motors, Ltd., 145 F.R.D. 507, 509 (S.D. Iowa 1992).

In an order issued July 3, 2007, in this proceeding, the Board resolved a discovery dispute between QCC and Reasnor, which involved similar discovery requests propounded upon Reasnor by QCC. In that order, the Board specifically stated that "QCC's discovery requests need not be restricted to intrastate traffic as long as requests regarding interstate traffic are reasonably calculated to lead to the

discovery of admissible evidence as provided for in Iowa Rule of Civil Procedure 1.503(1)." The Board acknowledges the Farmers Respondents' reference to the Board's limited jurisdiction over local and intrastate access service tariffs and intrastate traffic and recognizes that several of QCC's discovery requests seek information relating to interstate traffic. Nevertheless, the Board has broad discretion in rulings on discovery matters and the information sought by QCC, while it may not be admissible at a hearing before the Board in this matter, appears to be reasonably calculated to lead to the discovery of admissible evidence. The Board nevertheless agrees with Farmers Respondents that QCC's Request No. 35 may be overly broad as it is written. However, it is unclear from the parties' filings on this issue whether QCC and the Farmers Respondents have attempted to negotiate more limiting language for this question. Therefore, QCC's motion to compel discovery responses from the Farmers Respondents is generally granted, however, the parties are encouraged to negotiate a more refined discovery Request No. 35 that involves a more specific explanation of the information QCC seeks, which Farmers Respondents must then provide. If a negotiated agreement cannot be reached regarding a more narrow scope of Request No. 35, the parties may re-file a motion with the Board to compel the information.

However, insofar as QCC's discovery requests information that can be obtained by a review of the Farmers Respondents' CDRs, the Board agrees with the Farmers Respondents that this issue is between QCC and INS and will be determined separately in this order. The Board directs the Farmers Respondents to

provide complete and thorough responses to the discovery requests propounded by QCC on February 20, 2007, and May 14, 2007, with the exception of the production of information that may be obtained through the production by INS of the Farmers Respondents' CDRs.

QCC's Motion to Compel Information Requested in a Subpoena for Documents Served Upon Iowa Network Services.

Parties' Positions

On August 1, 2007, QCC filed a motion to compel information requested in a subpoena for documents served upon INS. QCC states that it has requested from the respondents to this action information that is available on their CDRs. QCC claims that several respondents have informed QCC that they do not have their own CDRs because INS performs the services for them that generate those records. QCC states that on June 1, 2007, it served INS with a subpoena requesting, among other things, the respondents' CDRs. QCC asserts that INS has opposed producing four categories of documents requested by the subpoena, specifically Request Nos. 10 and 14 in their entirety, and Request Nos. 12 and 13 in part.

QCC states that Request Nos. 10 and 14 seek CDRs from INS and Request Nos. 12 and 13 seek information regarding the volume of traffic routed to INS from the respondents and the volume of traffic that was expected to be routed, or actually was routed, to INS after the respondents began their revenue sharing arrangements. QCC states that INS objects to Request Nos. 10 and 14 because INS expects compensation for collecting the CDRs responsive to these requests. QCC also states that INS objects to Request Nos. 12 and 13 to the extent of providing

confidential information regarding non-respondent carriers. QCC states that INS has signed a protective agreement for purposes of this proceeding and that by signing that agreement, all the information submitted in response to Request Nos. 12 and 13 is considered to be protected. QCC asserts that INS's objections are not well-founded and the Board should compel INS to fully respond to QCC's requests for information.

On August 6, 2007, INS filed a motion to modify a portion of QCC's subpoena, a request for a protective order, and a resistance to QCC's motion to compel. INS states that it is not a party to QCC's action and that the issues in dispute regarding Request Nos. 10, 12, 13, and 14 include the broad nature of the subpoena, the costs that INS will incur in responding to the subpoena, QCC's unwillingness to reimburse INS for the expense and costs associated with responding to the subpoena, and a general understanding of the actual documents that QCC is seeking.

INS states that there are approximately 9.25 million records that are responsive to Request Nos. 10 and 14 and that INS seeks reimbursement from QCC for the production of these records at the cost of \$.0025 per record, which is the same rate that QCC charges INS and others for CDRs when INS requests them from QCC. INS states that the production of these records will result in a charge of approximately \$23,125 and seeks an order directing QCC to compensate INS for the production of these documents. In addition, INS seeks compensation of \$2,874 for personnel time associated with its response and \$3,589 for legal fees it has incurred in responding to the subpoena.

INS also states that with regard to Request Nos. 12 and 13, its objection is that QCC is seeking to obtain projections of call volumes from local exchange carriers and other interexchange carriers (IXCs) that are competitors of QCC and that are not parties to the action before the Board. INS asserts that it does not believe it can provide proprietary and confidential information of non-parties to QCC when those non-parties are not signatories to the protective agreement. Specifically, INS asserts that it cannot invoke the protections of the protective agreement for a non-signatory merely because INS is a signatory to the agreement. INS requests the Board modify Request Nos. 12 and 13 and require that INS only produce the records responsive to those requests that involve either the respondents or QCC from January 1, 2005, to June 30, 2007.

Discussion

With respect to INS's request for compensation for the production of the records sought by QCC, the Board finds that QCC should pay INS the reasonable cost of producing these documents. It is understood that some burden on subpoenaed parties is to be expected. INS, however, says that in order to fully respond to QCC's Request Nos. 10 and 14, INS must produce approximately 9.25 million records. INS argues that compliance with QCC's request involved 24 hours of computer time and 7 hours of INS personnel time to amass the 9.25 million records. The Board finds that the number of records required to fully respond to QCC's requests is significant and the burden of producing that volume should not fall on INS alone.

In determining whether discovery is unduly expensive, courts may take into account "the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." State of Iowa v. Publishers Clearing House, Inc., 633 N.W.2d 732, 738 (Iowa 2001) (citing Berg v. Des Moines Gen. Hosp. Co., 456 N.W.2d 173, 177 (Iowa 1990)). In this situation, QCC is seeking information from INS that QCC originally sought from party respondents to this action. Several respondents indicated that INS had the information that QCC sought and as such, QCC subpoenaed the information from INS. However, INS is not a party to this action and compliance with the subpoena has resulted in the production of a large number of records. INS seeks compensation for the production of these records at the rate of \$.0025 per record (the same rate which QCC charges INS and others for the production of similar records), amounting to a charge of approximately \$23,125.

The Board has considered QCC's need to obtain these records and tempered this need with the amount in controversy, the limitations on the parties' resources, and the importance of the issues at stake. In its initial complaint filed February 20, 2007, QCC asserts that the amount in controversy likely exceeds \$1 million. QCC's resources are certainly greater than those of INS and the respondent rural independent local exchange carriers. The Board also recognizes that the issues raised in this proceeding are also the subject of various proceedings before both the Federal Communications Commission (FCC) and federal courts, and as such, these issues are important to the Board, the parties, and the public in general.

While a certain amount of inconvenience is expected in the discovery process and must therefore be tolerated by all involved, "where the nature and complexity of the inquiry show compliance with the discovery request would require an unreasonable amount of time and an unreasonable expenditure of money, a protective order is appropriate." The Board finds that in this situation, compliance by INS, a non-party, involves an unreasonable amount of time and expenditure of money. Therefore, QCC is directed to compensate INS for the production of those records at the rate of \$.0025 per record as requested by INS. The Board understands that this compensation may reasonably be expected to include the number of records, the computer time required to generate these records, and the personnel time involved in doing so, including legal fees. Therefore, the Board will deny INS's request for compensation for additional personnel time and legal fees.

With respect to INS's request to modify the subpoena regarding QCC's Request Nos. 12 and 13, the Board agrees that INS should not provide proprietary and confidential information to QCC that belongs to companies that are not a party to the Board action or a signatory to the protective agreement between QCC and INS. The language of the protective agreement does not sufficiently protect non-parties and non-signatories against the release of confidential materials. Therefore, the Board will modify the subpoena regarding Request Nos. 12 and 13 and require that INS only needs to produce the records responsive to those requests that involve either the respondents or QCC. Any date limitations sought by INS should be negotiated with QCC.

IT IS THEREFORE ORDERED:

1. The request to withdraw its reformed motion to compel propounded upon Superior Telephone Cooperative, Great Lakes Communication Corp., and Aventure Communication Technology, LLC, filed by Qwest Communications Corporation on July 17, 2007, is granted.

2. The motion to compel answers to written discovery propounded upon the Rural Iowa Independent Telephone Association filed by Qwest Communications Corporation on July 12, 2007, is denied as described in this order.

3. The motion to compel discovery responses propounded upon Farmers Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; and Dixon Telephone Company filed by Qwest Communications Corporation on July 16, 2007, is granted as described in this order.

4. Farmers Telephone Company of Riceville, Iowa; The Farmers & Merchants Mutual Telephone Company of Wayland; Interstate 35 Telephone Company, d/b/a Interstate Communications Company; and Dixon Telephone Company are directed to provide complete and thorough responses to the discovery requests propounded by QCC within ten days of the issuance of this order.

5. The motion to compel information requested in a subpoena for documents served upon Iowa Network Services filed by Qwest Communications Corporation on August 1, 2007, is granted in part and denied in part, as described in this order.

6. Qwest Communications Corporation is directed to compensate Iowa Network Services for the production of the records in response to Request Nos. 10 and 14 at the rate of \$.0025 per record.

7. Request Nos. 12 and 13 of the subpoena propounded upon Iowa Network Services by Qwest Communications Corporation on June 1, 2007, are modified to require INS to produce only the records responsive to those requests that involve either the party respondents in this docket or QCC.

UTILITIES BOARD

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Krista K. Tanner

Dated at Des Moines, Iowa, this 16th day of August, 2007.