

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>QWEST CORPORATION AND SOUTH SLOPE COOPERATIVE TELEPHONE COMPANY</p>	<p>DOCKET NO. FCU-08-14 (C-07-246, C-07-251, C-07-252, C-07-254, C-07-256, C-07-257, C-07-265, C-07-266, C-07-270, C-07-271, C-07-272)</p>
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PROCEDURAL ORDER AND NOTICE OF HEARING

(Issued November 13, 2008)

During October and November 2007, 11 residential and business customers from Cedar Rapids, Oxford, Solon, and Marion, Iowa, filed written complaints with the Utilities Board (Board) against Qwest Corporation (Qwest) and South Slope Cooperative Telephone Company (South Slope). The customers complained that Qwest and South Slope discontinued toll-free calling between certain Qwest and South Slope customers in Cedar Rapids, Oxford, Solon, and Tiffin, Iowa. The Qwest customers stated they had received a letter from Qwest telling them that effective November 15, 2007, calls placed from Cedar Rapids to Oxford, Solon, and Tiffin would be billed as long distance calls.

Board staff forwarded the complaints to Qwest and South Slope for response. Qwest and South Slope filed responses, and later filed additional information requested by Board staff. On December 31, 2007, Board staff issued a proposed resolution concluding that Qwest had violated the Board's rules by failing to provide

proper notice to the Board of its discontinuance of non-toll interexchange trunking service (EAS) for calls between Cedar Rapids and Oxford, Solon, and Tiffin.

On January 14, 2008, Qwest requested that Board staff reconsider its proposed resolution. On February 1, 2008, Board staff issued a revised proposed resolution finding that Qwest never included EAS or toll-free service from Cedar Rapids to Oxford, Solon, and Tiffin in its tariff. Board staff concluded that such calls had been mistakenly treated as EAS calls because they appeared to terminate in North Liberty. Staff concluded that the Board's rules regarding discontinuance of service did not apply because the service was never a properly tariffed service.

On February 8, 2008, South Slope filed a request that the Board reinstate staff's original proposed resolution, or alternatively, to initiate a formal complaint proceeding.

On February 12, 2008, Mr. Aaron Smith, one of the customers who filed a complaint with the Board, filed a letter further expressing his concerns and requesting a formal complaint proceeding. On February 26, 2008, Mr. Smith filed an additional letter expressing his concerns.

On April 4, 2008, the Board issued an order denying formal complaint proceedings. On April 30, 2008, South Slope filed a motion for reconsideration of the order. On May 30, 2008, the Board issued an order granting South Slope's motion for reconsideration. The Board ordered South Slope to file either a statement of material factual issues in dispute that required a hearing, or a statement that there

were no such issues. South Slope filed its response on June 19, 2008, in which it listed the material factual issues it alleges are in dispute.

The details of the informal complaint dockets are contained in informal complaint files C-07-246, C-07-251, C-07-252, C-07-254, C-07-256, C-07-257, C-07-265, C-07-266, C-07-270, C-07-271, and C-07-272, which are incorporated into the record in this formal proceeding pursuant to 199 IAC 6.7.

On September 8, 2008, the Board issued an order docketing this case for a formal proceeding and assigning it to the undersigned administrative law judge. In the order, the Board made the following tentative rulings, which it stated were subject to change after hearing the evidence and argument.

At this time, the Board does not agree with South Slope that the Board is conditioning, restricting, or revoking South Slope's certificate or proposing to take any such action. A certificate of public convenience and necessity issued pursuant to § 476.29 represents authorization to offer landline local telephone service in a defined service territory in Iowa. It does not specify, limit, or define the terms and conditions of that service offering; that is typically done in the Board's rules or the utility's tariff. The Board is not proposing to revoke or alter South Slope's authorization to offer local services in the exchanges it serves; instead, the issues here appear to revolve around statutes, rules, and tariff provisions, not certificates. Thus, there is no need to notify South Slope of any inadequacies in its services and facilities or to allow South Slope an opportunity to cure the alleged inadequacies, because there is no expectation that this proceeding will result in Board-ordered changes to South Slope's certificate.

The Board emphasizes that this is a tentative conclusion, offered for the guidance of the parties. If, after hearing the evidence and argument, the ALJ concludes that it is, in fact, necessary to place conditions on South Slope's certificate or to revoke it, in whole or in part, the ALJ will notify South Slope of any identified inadequacies

in its services and facilities and will allow South Slope a reasonable time to address them.

On September 18, 2008, the undersigned issued an order setting a prehearing conference and requiring the parties to file certain information. At the request of South Slope, the filing deadlines were extended and the prehearing conference was moved to November 5, 2008. The order told Mr. Smith he should notify the Board by October 29, 2008, if he did not wish to be a party to this case. The order also required the remaining customers who had filed informal complaints with the Board to notify the Board if they wished to become parties to the case.

Pursuant to the order, South Slope filed a list of the prior dockets, orders, statutes, and rules it asserts are related to the subject matter of this proceeding, and a list of issues it asserts must be decided in the case, on October 17, 2008. Qwest filed a list of the prior dockets, orders, statutes, and rules it asserts are related to the subject matter of this proceeding, and a list of issues it asserts must be decided in the case, on October 24, 2008. Mr. Smith did not file a notification with the Board. The remaining customers also did not file notification with the Board. Therefore, Mr. Smith will continue to be considered a party to the case and the remaining complaining customers will NOT be considered to be parties to the case.

On November 5, 2008, a prehearing conference was held in Conference Room 3, Iowa Utilities Board, 350 Maple Street, Des Moines, Iowa. Qwest was represented by its attorney, Mr. George Baker Thomson. Mr. Robert Brigham was also present by telephone for Qwest. Qwest requested that the Board's service list

be changed to include Mr. Thomsen and attorney Mr. David Sather, rather than Ms. Diana Ornelas, on behalf of Qwest. South Slope was represented by its attorney, Ms. Terri C. Davis. Mr. J.R. Brumley was also present for South Slope. The Consumer Advocate Division of the Department of Justice (Consumer Advocate) was represented by its attorney, Ms. Alice Hyde. Mr. Smith was not present at the prehearing conference. Ms. Hyde agreed to take the lead to contact Mr. Smith in an attempt to determine whether he intends to participate as a party in the case. None of the complaining customers appeared at the prehearing conference. The parties agreed to the procedural schedule set forth in this order at the prehearing conference.

On November 7, 2008, the Consumer Advocate filed a letter with the Board stating that Ms. Hyde had spoken with Mr. Smith regarding his interest in this docket. The letter states that Mr. Smith remains interested in having the matter resolved and provides information regarding his interest. It further states that Mr. Smith does not anticipate being actively involved in the docket, but may want to offer a statement at the hearing if he can do so by telephone. Based on the representations in the letter, Mr. Smith remains a party in this case and will remain on the Board's service list.

Pursuant to the Board's order docketing the case for investigation, Iowa Code § 476.3, 199 IAC 6.5, and 199 IAC 7, a procedural schedule will be established and a hearing date set.

The statutes and rules involved or potentially involved in this case include Iowa Code §§ 17A.2(6), 17A.18, 476.2, 476.3, 476.4, 476.5, 476.7, 476.11, 476.20, 476.29, 476.95, 476.96, 476.100, 476.101, and Board rules at 199 IAC 1.8, 1.9, 22.1(3), 22.2(5), 22.8, 22.16, 22.20, and chapters 6 and 7. Links to the Iowa Code and the Board's administrative rules (in the Iowa Administrative Code (IAC)) are contained on the Board's Web site at www.state.ia.us/iub.

THE ISSUES

The issues in this case include the following:

1. Whether a telephone *exchange* under Iowa law is exclusive or nonexclusive.
2. Whether a *rate center* is a specific geographic point identified by specific vertical and horizontal (V&H) coordinates used to measure distant sensitive End User Customer traffic to/from a particular NPA-NXX designation with the specific rate center.
3. Whether an *exchange* under Iowa law is a geographic area.
4. Whether Qwest's discontinuance of toll-free calling between certain Qwest customers and South Slope customers in Oxford, Solon, and Tiffin violated Iowa Code § 476.20(1).
5. Whether Qwest's discontinuance of toll-free calling between certain Qwest customers and South Slope customers in Oxford, Solon, and Tiffin has the effect of unlawfully conditioning, restricting, or partially revoking

South Slope's Certificate No. 0120 issued pursuant to Iowa Code § 476.29, such that approval by the Board of Qwest's action would constitute a violation of Iowa Code § 476.29.

6. Whether Qwest's alleged justifications for discontinuance of toll-free calling between certain Qwest customers and South Slope customers in Oxford, Solon, and Tiffin are barred by Board principles of *res judicata*.

7. Have the complainants and/or South Slope ever complied with or requested a Board waiver from the requirements of 199 IAC 22.8 regarding establishing toll-free EAS from Cedar Rapids to the Oxford, Tiffin, and Solon exchanges, as suggested by the Board at pp. 7 and 8 of the "Order Denying Requests for Formal Complaint Proceedings," issued on April 4, 2008, in Docket Nos. C-07-246, *et al.*

8. Whether the "Final Order," issued on January 23, 2007, in Docket No. FCU-06-25, the "Final Order," issued on February 13, 2008, in Docket No. RPU-07-1, the "Order Denying Requests for Formal Complaint Proceedings," issued on April 4, 2008, in Docket Nos. C-07-246, *et al.*, and the "Arbitration Order," issued on June 23, 2008, in Docket No. ARB-08-1,¹ taken together, conclusively establish that South Slope operates as a competitive local exchange carrier (CLEC) in the Oxford, Tiffin, and Solon exchanges.

¹ The Board issued an "Order Denying Request for Reconsideration" in Docket No. ARB-08-1 on July 31, 2008.

9. Whether South Slope timely appealed any of the following: the "Final Order," issued on January 23, 2007, in Docket No. FCU-06-25, the "Final Order," issued on February 13, 2008, in Docket No. RPU-07-1, and the "Arbitration Order," issued on June 23, 2008, in Docket No. ARB-08-1.

10. Whether Qwest has ever included EAS or toll-free service from Cedar Rapids to the Oxford, Tiffin, and Solon exchanges in a tariff or catalog offering.

11. If an EAS "service" was never a tariffed service, and/or was never properly authorized by the Board, whether the Board's discontinuance of service rules would apply to Qwest's actions that led to the complaints.

12. Whether South Slope's still-pending request to the Federal Communications Commission (FCC) to be treated as the incumbent local exchange carrier (ILEC) in the Oxford, Tiffin, and Solon exchanges implicitly acknowledges that, prior to any FCC decision or opinion on this request, South Slope operates in those three exchanges as a CLEC or competitive local exchange service provider (CLESP).

13. When the Board ordered South Slope to correct the Local Exchange Routing Guide (LERG) at page 19 of the "Final Order" in Docket No. FCU-06-25, whether that correction had the effect of requiring Qwest to charge toll rates for calls from Cedar Rapids into the Oxford, Tiffin, and Solon exchanges.

14. Consequently, if an EAS "service" between Cedar Rapids and the Oxford, Tiffin, and Solon exchanges was never tariffed, and the Board's discontinuance of service rules do not apply, and South Slope adjusted the LERG pursuant to the Board's directions at page 19 of the "Final Order" in Docket No. FCU-06-25, whether there is any basis in law or rule for these complaints.

15. How the concerns expressed by Mr. Smith and the other complaining customers should be addressed.

16. Other issues may be raised during the course of this proceeding.

PREPARED TESTIMONY AND EXHIBITS

All parties will have the opportunity to present and respond to evidence and make argument on all issues involved in this proceeding. Parties may choose to be represented by counsel at their own expense. Iowa Code § 17A.12(4). The proposed decision that will be issued in this case must be based on evidence contained in the record and on matters officially noticed. Iowa Code §§ 17A.12(6) and 17A.12(8). The undersigned notes that there are numerous prior Board dockets and orders that relate to the subject matter of this proceeding and that may affect the decision in this case.

The submission of prepared evidence prior to hearing helps identify disputed issues of fact to be addressed at the hearing. Prepared testimony contains all statements that a witness intends to give under oath at the hearing, set forth in

question and answer form. When a witness who has submitted prepared testimony takes the stand, the witness does not ordinarily repeat the written testimony or give a substantial amount of new testimony. Instead, the witness is cross-examined concerning the statements already made in writing. The use of prepared testimony and submission of documentary evidence ahead of the hearing prevents surprise at the hearing and helps each party to prepare adequately so a full and true disclosure of the facts can be obtained. Iowa Code §§ 17A.14(1) and (3); 199 IAC 7.10.

PARTY STATUS AND COMMUNICATION WITH THE BOARD

Qwest, South Slope, Mr. Smith, and the Consumer Advocate are currently the parties in this proceeding.

Any party who communicates with the Board must send an original and ten copies of the communication to the Executive Secretary, 350 Maple Street, Des Moines, Iowa, 50319-0069, accompanied by a certificate of service. One copy of the communication must also be sent at the same time to each of the other parties to this proceeding, except that three copies must be served on the Consumer Advocate. 199 IAC 7.4(6)"c."

These procedures are necessary to comply with Iowa Code § 17A.17 and 199 IAC 7.22, which prohibit ex parte communication. Ex parte communication is when one party in a contested case communicates with the judge without the other parties being given the opportunity to be present. In order to be prohibited, the communication must be about the facts or law in the case. Calls to the Board to ask

about procedure or the status of the case are not ex parte communication. Ex parte communication may be oral or written. This means the parties in this case may not communicate about the facts or law in this case with the undersigned administrative law judge unless the other parties are given the opportunity to be present, or unless the other parties are provided with a copy of the written documents filed with the Board.

The materials that have been filed in this docket are available for inspection at the Board Records and Information Center, 350 Maple Street, Des Moines, Iowa 50319. Copies may be obtained by calling the Records and Information Center at 515-281-5563. There will be a charge to cover the cost of the copying. Board orders are available on the Board's Web site at www.state.ia.us/iub.

All parties should examine the applicable law listed above for substantive and procedural rules that apply to this case.

IT IS THEREFORE ORDERED:

1. Pursuant to 199 IAC 6.7, the written complaints and all supplemental information and filings from the informal complaint proceedings, identified as informal complaint files C-07-246, C-07-251, C-07-252, C-07-254, C-07-256, C-07-257, C-07-265, C-07-266, C-07-270, C-07-271, and C-07-272, are part of the record in this formal complaint proceeding.

2. Any person not currently a party who wishes to intervene in this case must meet the requirements for intervention in 199 IAC 7.13 and must file a petition

to intervene with the Board no later than 20 days following the issuance of this order.

199 IAC 7.13(1).

3. On or before December 12, 2008, South Slope must file prepared direct testimony and exhibits. South Slope must also file an exhibit list with its exhibits. South Slope should use exhibit numbers one and following.

4. On or before January 9, 2009, Qwest must file prepared direct and responsive testimony and exhibits. Such testimony and exhibits are to be both Qwest's initial testimony and testimony that is responsive to South Slope's testimony. Qwest must also file an exhibit list with its exhibits. Qwest should use exhibit numbers 100 and following.

5. If the Consumer Advocate or Mr. Aaron Smith wish to file testimony and exhibits in this case, the testimony and exhibits must be filed on or before January 16, 2009. Such testimony and exhibits are to be both the initial testimony of the party and testimony responsive to South Slope's and Qwest's testimony. The Consumer Advocate should use exhibit numbers 200 and following and must file an exhibit list with its exhibits. Mr. Aaron Smith should use exhibit numbers 300 and following and must file an exhibit list with his exhibits.

6. If South Slope chooses to file prepared reply testimony and exhibits, it must do so on or before January 23, 2009. If it files additional exhibits, South Slope must file an updated exhibit list.

7. On or before January 23, 2009, South Slope and Qwest must file a stipulation of facts with the Board. South Slope and Qwest must provide a draft copy of the stipulation of facts to the Consumer Advocate and to Mr. Aaron Smith at least one week prior to January 23, 2009. In the filing, South Slope and Qwest must state whether the Consumer Advocate and Mr. Aaron Smith agree or disagree with the stipulation of facts. If there is any disagreement by the Consumer Advocate or Mr. Aaron Smith with the stipulation of facts, the party with the disagreement must file a statement detailing the disagreements on or before January 30, 2009.

8. If any party objects to Mr. Aaron Smith's participation in the hearing by telephone conference call, the party must file such objection on or before January 30, 2009, and provide reasons for the objection.

9. On or before February 6, 2009, South Slope, Qwest, and the Consumer Advocate must each file a prehearing brief. If Mr. Aaron Smith chooses to file a prehearing brief, he must do so on or before February 6, 2009.

10. A hearing for the presentation of evidence and the cross-examination of witnesses will be held in the Board Hearing Room, 350 Maple Street, Des Moines, Iowa, on Tuesday, February 24, 2009, beginning at 9 a.m. Each party must provide a copy of its prepared testimony and exhibits, and its exhibit list, to the court reporter. If Mr. Aaron Smith chooses to participate in the hearing by telephone conference call, he must dial 1-866-685-1580, and enter conference code number 2816326 followed by the pound key at the time set for the hearing. Persons with disabilities requiring

assistive services or devices to observe or participate in the hearing must contact the Board at 515-281-5256 no later than five business days prior to the hearing to request that appropriate arrangements be made.

11. A post-hearing briefing schedule will be set at the conclusion of the hearing.

12. In the absence of objection, all data requests and responses referred to in oral testimony or on cross-examination will become part of the evidentiary record of this proceeding. Pursuant to 199 IAC 7.23(4)"d," the party making reference to the data request must file one original and three copies of the data request and response with the Executive Secretary of the Board at the earliest possible time.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 13th day of November, 2008.