

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

<p>IN RE:</p> <p>IOWA DEPARTMENT OF JUSTICE, OFFICE OF CONSUMER ADVOCATE,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">v.</p> <p>AMERICA'S TELE-NETWORK CORP. and JOHN W. LITTLE, President of America's Tele-Network Corp.,</p> <p style="text-align:center">Respondents</p>	<p style="text-align:center">DOCKET NO. FCU-00-6</p>
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**ORDER REGARDING MOTIONS TO STRIKE, TO DEPOSE COMPLAINANTS,  
ISSUE SUBPOENAS, APPLICATION FOR SEPARATE ADJUDICATION OF LAW  
POINTS, AND ESTABLISHING PROCEDURAL SCHEDULE  
AND NOTICE OF HEARING**

(Issued February 26, 2001)

On December 15, 2000, America's Tele-Network, Corp. and John W. Little (AT-N) filed an Objection to the Admission of Evidence and Motion to Strike. AT-N also filed Motions for Leave to Depose Complainants, Issue Subpoenas, and Continuance on the same date.

In its motion to strike, AT-N stated that testimony submitted on behalf of the Consumer Advocate Division of the Department of Justice (Consumer Advocate) by Mr. Drennan incorporated claims of customers not included in the Request for Formal Complaint Proceedings, and alleged that many of the statements and

conclusions found in the Drennan testimony were unfounded and based on conjecture. AT-N moved the Board to strike the testimony and evidence from the record. This portion of the motion was denied in an order issued January 4, 2001. The remainder of the motion will be discussed below.

In its motion for leave to depose each of the customers named in the Request for Formal Complaint Proceedings, AT-N stated, "in order for AT-N to effectively present its evidence at the hearing, it is vitally important for AT-N to have the opportunity to question each of the customers (31 in total) ... as to the circumstances that gave rise to their complaints. A total of 59 different instances of violations of Iowa law have been alleged by the OCA, and thus, the amount of potential penalties at stake is \$590,000 in forfeitures as well as AT-N's future ability to continue doing business in the state of Iowa. Fundamental fairness dictates that AT-N be afforded the opportunity to effectively confront its accusers, and the ability to depose those accusers prior to the hearing is a critical component in preparing for the presentation of AT-N's defenses." AT-N further requested the Board authorize its staff to issue subpoenas duces tecum to each named customer to compel their appearance at the hearing and depositions and to compel production of "any documentary evidence that the customers may have which relate to their relationship with AT-N."

On December 26, 2000, the Consumer Advocate filed a Response to Objection and Resistance to Motion to Strike. The Consumer Advocate's position is discussed below.

On December 28, 2000, the Consumer Advocate filed a Resistance to Application for Leave to Depose, Issuance of Subpoena Duces Tecum, and Continuance. The Consumer Advocate stated that since AT-N's motion fails to establish that it notified any of the customers of its motions for leave to depose and issuance of subpoenas, they have been deprived of a reasonable opportunity to resist said motions. It further stated that AT-N is required to establish that the subpoena "is reasonably required and specifying as nearly as possible the books, papers, records, accounts or documents desired to be produced, and the material or relevant facts to be proved by them." The Consumer Advocate further stated that AT-N has not identified any material or relevant facts to be proved through issuance of the subpoenas, nor is there any reason to compel production of documentary evidence when AT-N is, or should be, in possession of all such materials, and the motions should be denied. The Consumer Advocate further alleged that the request for leave to depose and motion for issuance of subpoenas should be denied because they are irrelevant to the matters at issue and would be unduly burdensome to the complainants. The Consumer Advocate stated that AT-N is attempting to litigate matters that have already been determined by the Board, and that claim preclusion applies. It argues that AT-N had the opportunity to respond to the complaints in the informal complaint process. The Consumer Advocate argues that AT-N did not file a timely response to the allegations in Count I, and did not request an extension, and therefore the allegations are to be deemed admitted. It further alleges that since AT-N did not request formal complaint proceedings in any of the

complaints within the time established by 199 IAC 6.8(5), the Board's proposed resolutions of the complaints are final and binding upon AT-N.

The Consumer Advocate alleges that in the five cases in Count II when AT-N did file timely responses, the Board found that AT-N failed to provide the required proof of authorization for the switch of long distance service, and since AT-N did not request formal complaint proceedings, the Board's decisions are final and binding pursuant to 199 IAC 6.8(5). Therefore, the Consumer Advocate states, AT-N is barred from raising and/or relitigating its defenses with respect to all complaints at issue in this proceeding.

It further states that Board staff found explicitly or implicitly in each case in Counts I and II that AT-N did not supply adequate proof of verification for the switch, and since AT-N did not timely request formal complaint proceedings, it was bound by the Board's finding in each case that it had not supplied adequate proof for the switch of complainants' long distance service.

The Consumer Advocate argued that claim preclusion and res judicata bar AT-N from relitigating the matters growing out of the claims resulting in the Board's final decisions. The Consumer Advocate stated that since AT-N is attempting to raise matters that were (or could have been) determined in the earlier complaint proceedings, the requests should be denied as they are irrelevant to the matters at issue, since AT-N's violation of the anti-slamming rules has been established in the underlying complaint proceedings. The Consumer Advocate stated that the only matters to be considered in this proceeding are those identified in Iowa Code

Supplement §§ 476.103(4)(b) and 476.103(5) (1999), and that any information relevant to those issues is already contained in the complaint files included as part of the record in this matter. The Consumer Advocate stated that deposing complainants and issuing subpoenas compelling their attendance would cause undue hardship, that complainants have already obtained a favorable result and should not be subject to further proceedings, and that AT-N had a reasonable opportunity to defend itself in the initial complaint proceedings. The Consumer Advocate requested that AT-N's request for leave to depose and motions for issuance of subpoenas be denied.

On December 29, 2000, the Consumer Advocate filed an Application for Separate Adjudication of Law Points. It stated that AT-N's motion for leave to depose and issue subpoenas suggests that AT-N is attempting to litigate matters already finally determined by the Board. The Consumer Advocate restated a number of arguments made in the Resistance filed December 28, 2000. In addition, it stated that since AT-N did not timely file its answer to the complaint, the allegations in Count I should be deemed admitted. The Consumer Advocate requested a separate adjudication of law points finding:

The doctrine of claim preclusion bars AT-N from raising or relitigating any matters, including defenses and affirmative defenses, growing out of the claims that resulted in the Board's final decision in each complaint finding (explicitly or implicitly through the order of slamming remedies) that AT-N did not supply adequate proof of verification for the switch of complainants' long distance service.

On January 4, 2001, the undersigned issued an Order Granting Motion for Continuance and Requesting Information and Partial Ruling on Motion to Strike. The Order directed the parties to answer questions posed in the Order. The Order stated, "The parties are directed to answer the following questions. Some of the following questions will require submission of evidence, and some will require legal argument to be submitted by the parties. **Testimonial evidence must be presented in the form of prefiled testimony.** ... Responses must include information specific to the eight cases referred to in Mr. Drennan's testimony as well as those contained in Counts I and II of the Request for Formal Proceedings." The Order requested the parties to verify that the names and numbers of informal complaint proceedings on a list attached to the Order were correct, or if any were incorrect, to provide the correct names and numbers.

On January 22, 2001, AT-N filed a Resistance to Application for Separate Adjudication of Law Points and an Answer Brief.

In its Resistance, AT-N argued that the Consumer Advocate's Application should be denied. AT-N stated that the Consumer Advocate's attempt to use claim preclusion to prevent it from offering a defense to the allegations is flawed. It argued that such an outcome flies in the face of the policy of the law, and defaults are to be avoided. AT-N stated it is within this tribunal's discretion to set aside any default and decide the matter on the merits. It also stated it never received adequate notice of the informal complaints referenced in the Request for Formal Complaint Proceedings until well after the time had expired to respond to the Utilities Board. It argued that

any judgement or decision derived from this process would violate AT-N's right to due process and be invalid. AT-N argued that notice and an opportunity to be heard are fundamental requirements of due process. AT-N argued that allowing it only fourteen days to analyze, research and prepare a response to the numerous proposed resolutions it received by the Utilities Board charging it with unauthorized switches does not provide for an effective opportunity to investigate the validity of the allegations and prepare a response. It argued this is contrary to the fundamental fairness requirement behind the due process clause. Therefore, AT-N argued, it should be given an opportunity to defend the allegations against it in this proceeding and the proposed resolutions should have no binding effect.

AT-N further argued that assuming the proposed resolutions are binding, nothing in 199 IAC 6.8(5) states that an entity is prohibited from readdressing a finding of liability, and provides that the board may at any time initiate formal proceedings and alter the allocation of liability. AT-N further argued that assuming the proposed resolutions are binding, the doctrine of res judicata does not apply to this case because there was no final judgment on the merits of the case. Furthermore, AT-N argued that the final resolutions were derived through operational deficiencies, and alleges they "were neither resolved on their merits nor were they evaluated by and independent, non-partisan trier of fact." AT-N further stated it "never appeared to defend the allegations contained in the informal complaints because it was never aware of a substantial number of the informal complaints."

AT-N further argued that if *res judicata* does apply to this matter, the OCA has not shown it has met the requirements of claim preclusion. It stated a fundamental requirement of claim preclusion is identity of parties, and the use of claim preclusion is only available to parties and their privies to the prior judgment. Furthermore, AT-N stated, "for the OCA to contend that John Little, President of AT-N, is individually barred from defending the allegations against him due [to] his failure to respond is simply not supported by the law. He was never named in an informal complaint nor was he personally served with notice of the informal complaints." AT-N further argued the parties are not the same in this complaint as in the informal complaint stage for purposes of invoking claim preclusion. AT-N stated the customers are not parties in this action brought by the Consumer Advocate, the Consumer Advocate has not met the requisite requirements to invoke claim preclusion, and requested that the Application for Separate Adjudication of Law Points be denied.

In its Answer Brief, AT-N answered the questions posed in the order issued January 4, 2001. The Answer Brief contains a combination of legal argument and what should have been presented as prefiled testimony. (See January 4, 2001 order at page 9.) AT-N must separate the legal argument from the factual information presented, and refile two separate documents: 1) the factual information as prefiled testimony; and 2) the legal arguments presented in a brief. This will allow for spreading the testimony on the record at the hearing. AT-N must file the separated documents within 30 days of the issuance of this order.

In its Answer Brief, AT-N stated it did not notify the customers in the informal complaint files of its motion to depose because it could not depose the customers until it was given authority to do so by the Utilities Board or the Administrative Law Judge. AT-N cites 199 IAC 7.7(8) to support this statement. AT-N has incorrectly interpreted rule 7.7(8). Rule 199 IAC 7.7(8) provides "The board or administrative law judge, either upon its or the administrative law judge's own motion, or upon application in writing by any party, may cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the district courts of the state of Iowa." This rule is intended to cover the situation when the Utilities Board is initiating the taking of a deposition itself as in an investigation. (See 199 IAC 7.7(1)). This rule does not mean that before a party may take the deposition of a potential witness, it must seek the permission of the Utilities Board or the administrative law judge (ALJ). Discovery procedures applicable to civil actions are available to all parties in contested cases before agencies. Iowa Code § 17A.13(1) (2001). Just as in civil actions, the parties are expected to attempt to resolve discovery disputes among themselves prior to seeking the assistance of the Utilities Board or ALJ. Nevertheless, AT-N has requested such permission, and the Consumer Advocate has resisted. Therefore, the dispute will be resolved in this order.

In its Answer Brief, AT-N reiterated its arguments against the use of default judgments and claim preclusion it provided in its Resistance, and restated that it did not have adequate notice of the informal complaints. AT-N further stated that the

customers in the informal complaint files are not parties to this case. AT-N also argued that evidence regarding the alleged non-contribution to the universal service fund is not relevant or material to this proceeding or to any proceeding involving slamming complaints. It also argued that any probative value is outweighed by the danger of unfair prejudice or confusion of the issues. AT-N submitted additional argument against based on the Iowa Rules of Evidence. The Iowa Rules of Evidence are not applicable to agency contested cases. Iowa Code § 17A.14 (2001).

In its Answer Brief, AT-N also submitted its Amended Answer to the additional customer complaints added through the Drennan testimony and Order issued January 4, 2001. It also stated why it should be allowed to depose the customers in the informal complaint files and have subpoenas duces tecum issued for them.

On January 22, 2001, the Consumer Advocate filed a Response to Order Directing Parties to Respond to Questions and Responsive Testimony of Mr. Ted Drennan. In its response, the Consumer Advocate reiterated its position that AT-N is precluded from relitigating the informal complaints under the legal doctrine of claim preclusion and incorporated by reference arguments previously made on this issue. It also restated its position that AT-N is bound by the informal complaint resolutions because it did not file requests for formal complaint proceedings within the 14-day time limit in 199 IAC 6.8(5). It provided additional arguments as to why AT-N should not be allowed to depose the customers in the informal complaint files. The Consumer Advocate stated that the customers in the informal complaint files are not

parties to this case. It also argued that evidence regarding the FCC's finding of AT-N's non-contribution to the universal service fund is relevant.

On January 23, 2001, the Consumer Advocate filed a Request for Permission to Amend Response to Questions. It also filed Amended Responsive Testimony of Mr. Drennan.

On February 7, 2001, the undersigned issued an Order granting the Consumer Advocate's motion to amend and acknowledging the correction to its answer to question nine.

#### **MOTION TO STRIKE**

In its Motion to Strike filed December 15, 2000, AT-N objected to testimony and exhibits surrounding AT-N's actions in other jurisdictions as being irrelevant and immaterial. AT-N stated the matters referred to in the Drennan testimony were mere allegations that AT-N elected to address through settlement proceedings, without any admission of liability. AT-N further stated there was no finding of fault on AT-N's part, "nor was any instance of slamming ever proved within the proper evidentiary parameters." AT-N argued that admission would unfairly prejudice AT-N and violate due process.

In its Resistance to the Motion to Strike filed December 26, 2000, the Consumer Advocate stated that the evidence regarding AT-N's activities in other jurisdictions involving complaints alleging slamming and deceptive practices is properly considered as part of its history of prior violations in determining an

appropriate civil penalty. It further alleged that AT-N's "willful and repeated" violations regarding payment of universal service contributions in Federal Communications Commission (FCC) File No. EB-00-IH-0053 were egregious and intentional, and were "similar to its conduct in Iowa." The Consumer Advocate further stated that the Board may properly consider this evidence of similar conduct in other jurisdictions in determining an appropriate civil penalty in this case. It further stated evidence regarding slamming cases in other jurisdictions is a relevant factor in determining appropriate penalties. The Consumer Advocate requested that AT-N's objection and motion to strike be denied on all grounds.

In its Response to the questions posed by the ALJ filed on January 22, 2001, the Consumer Advocate argued that evidence regarding the FCC's finding of AT-N's non-contribution to the universal service fund is relevant because it "establishes AT-N's disregard for the FCC's regulatory authority and agency rules similar to its disregard of Iowa's law governing the processing of slamming complaints. In this matter, the FCC specifically found a repeated failure by AT-N to timely respond to letters and notices. AT-N's failure to respond in a timely manner was alleged in Count I of OCA's complaint concerning slamming complaints."

In contested cases, irrelevant, immaterial, or unduly repetitious evidence should be excluded, and findings must be based on "the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based on such evidence even if it would be inadmissible in a jury trial." Iowa Code § 17A.14(1) (2001). Relevant evidence in this slamming case

would include evidence regarding the factors contained in Iowa Code §§ 476.103(4)(b) and 476.103(5) (2001). These statutes provide that "in determining the amount of the penalty, ...the board may consider the size of the service provider, the gravity of the violation, any history of prior violations by the service provider, remedial actions taken by the service provider, the nature of the conduct of the service provider, and any other relevant factors," and that if the board determines that a service provider has shown a pattern of violations of the rules, it may impose certain sanctions. Iowa Code §§ 476.103(4)(b), 476.103(5) (2001). Board rules at 199 IAC 22.23(5)"b" and 22.23(6) mirror the language of the statutes.

Evidence regarding slamming complaints and adjudications in other jurisdictions regarding AT-N may be relevant in this case if it is determined that penalties should be imposed. The motion to strike regarding this evidence should therefore be denied. AT-N is free to attack the weight to be given the evidence by presenting its own evidence to support the statements it made in briefs regarding the alleged flaws in the slamming cases from other jurisdictions.

However, evidence regarding the FCC's finding of AT-N's non-contribution to the universal service fund is not relevant to this case involving slamming complaints against AT-N in Iowa. Even though the FCC Order found that AT-N repeatedly failed to respond to the USAC's invoices, telephone calls, and letters, the case is simply too different from the character of this case before the Utilities Board to be relevant to any of the issues before us. Therefore, AT-N's motion to strike with regard to the

FCC case should be granted, and the evidence will not be considered in any way in this case.

### **APPLICATION FOR SEPARATE ADJUDICATION OF LAW POINTS**

On December 29, 2000, the Consumer Advocate requested a separate adjudication of law points finding that:

The doctrine of claim preclusion bars AT-N from raising or relitigating any matters, including defenses and affirmative defenses, growing out of the claims that resulted in the Board's final decision in each complaint finding (explicitly or implicitly through the order of slamming remedies) that AT-N did not supply adequate proof of verification for the switch of complainants' long distance service.

The Consumer Advocate argued that claim preclusion prevented AT-N from relitigating matters in the informal complaints in its Resistance to the request to depose the complainants filed December 28, 2000, and restated a number of those arguments (see above).

As discussed above, AT-N filed a Resistance to the application on January 22, 2001, and argued the application should be denied for a number of reasons.

There is a fundamental problem with the use of claim preclusion arising from the informal complaint proceedings before the Utilities Board. The cases involving the use of claim preclusion contemplate that there has been a prior adjudication with a judgment on the merits after trial. Penn v. Iowa State Board of Regents, 577 N.W.2d 393 (Iowa 1998); Riley v. Maloney, 499 N.W.2d 18 (Iowa 1993). Cases involving the use of claim preclusion in administrative agencies also have had final

judgments arising from adjudicative hearings. Toomer v. Iowa Dept. of Job Service, 340 N.W.2d 594 (Iowa 1983).

In contrast, the informal complaint proceedings before the Utilities Board are intentionally procedurally simple, and involve no hearing before an administrative law judge or the Utilities Board. The use of claim preclusion in these circumstances would be inappropriate. Therefore, the Application should be denied.

**MOTION FOR LEAVE TO DEPOSE COMPLAINANTS AND ISSUE  
SUBPOENAS DUCES TECUM**

As discussed above, AT-N submitted a request to depose each of the complainants named in the Consumer Advocate's Request for Formal Complaint Proceedings. Since the addition of the eight additional complaints, it is assumed that AT-N wishes to add those complainants to its request. AT-N also requested the Board authorize its staff to issue subpoenas duces tecum to each named customer to compel their appearance at the hearing and depositions and to compel their appearance at the hearing and depositions and to compel the production of "any documentary evidence that the customers may have which relate to their relationship with ATN." AT-N provided additional detail in its Answer Brief.

The Consumer Advocate resisted the requests to depose and for subpoenas as discussed above.

The procedures for handling informal slamming complaints are contained at 199 IAC 6.8. Each of the underlying complaints involved in this case was the subject of an informal complaint proceeding as outlined in Rule 6.8. Attached to this Order is

a list of the informal complaints that underlie this formal complaint proceeding. The parties should notify the undersigned whether the names and file numbers on the list are correct.

The informal complaint files shall be made a part of the record in this formal complaint proceeding. 199 IAC 6.7. Each of the informal complaint files on the attached list are hereby officially noticed and made a part of the record in this case. Iowa Code § 17A.14(4) (2001).

In the informal complaint proceedings, Utilities Board staff issued a proposed resolution letter in each case pursuant to 199 IAC 6.8(4). AT-N did not request formal complaint proceedings pursuant to 199 IAC 6.5 and 6.8(5) in any of the cases. Rule 199 IAC 6.8(5) provides that "if no request for formal complaint proceedings is received by the board within 14 days after issuance of the proposed resolution, the proposed resolution will be deemed binding upon all persons notified of the informal proceedings and affected by the proposed resolution. Notwithstanding the binding nature of any proposed resolution as to the affected persons, the board may at any time and on its own motion initiate formal proceedings which may alter the allocation of liability."

In its Answer Brief, AT-N maintains it was never notified of the informal complaint in a number of the cases. It maintains it was not aware of the following informal complaints until receipt of the Proposed Resolution: C-00-95, C-00-153, C-00-158, and C-00-284. It maintains the Complaint was never received and it was made aware of the informal complaint through its billing intermediary in the following

cases: C-00-168, C-00-174, C-00-112, C-00-115, C-00-238, C-00-248, and C-00-255. AT-N maintains it was not aware of the informal complaint until receipt of the Request for Formal Complaint Proceedings, and to date, has still not received a copy of the informal complaint in the following cases: C-00-253, C-00-288, C-00-319, C-00-320, C-00-336, and C-00-340. It maintains it was not aware of the complaint in C-00-441 until receipt of Mr. Drennan's testimony, and to date, has still not received a copy of the informal complaint.

AT-N states in its Answer Brief that "because AT-N lacked sufficient notice, there are no instances where Respondent requested formal complaint proceedings within 14 days after issuance of the proposed resolution."

AT-N's statements in its Answer Brief regarding notice are inexplicable in the majority of the above cases. The informal complaint files in every listed case other than C-00-340 and C-00-441 contain letters from AT-N stating it received the complaint and providing its response. The following files contain a response from AT-N that was received after the proposed resolution had been issued, and AT-N did not request formal complaint proceedings in any of the responses: C-00-95, C-00-137 (first proposed resolution), C-00-141, C-00-150 (first proposed resolution), C-00-153, C-00-158, C-00-182, C-00-183, C-00-188, C-00-192, C-00-207, C-00-211, C-00-217, C-00-219, C-00-253, C-00-255, C-00-256, C-00-284, C-00-319, and C-00-320. In some cases, AT-N appears to have enclosed with its cover letter the originals of the letters sent to AT-N by the Utilities Board staff. (See files in C-00-115, C-00-336, C-00-253, and C-00-255.)

It appears there originally may have been a notice problem in C-00-253. In that case, the letter informing AT-N of the complaint was returned on July 12 as "no such number", and the file does not clearly indicate the letter was resent. However, the file contains two letters received from AT-N on July 11 and 18, 2000, stating it received the complaint. The July 11<sup>th</sup> letter requested the complainant's telephone number, and the July 18<sup>th</sup> letter provides AT-N's response and encloses the apparent originals of letters received from the Utilities Board and others, including the letter containing the proposed resolution. AT-N did not request a formal complaint proceeding in its July 18<sup>th</sup> letter, even though it obviously had received the proposed resolution. There is also a letter in the file received from AT-N in December 2000 providing a response to a different named complainant but with file number C-00-253 listed in the letter.

There is no definitive indication in the C-00-340 and C-00-441 files that AT-N received notice of the complaints or the proposed resolutions. No notice of the complaint was sent to AT-N in C-00-340. The proposed resolution in C-00-340 was sent to AT-N. Notice of the complaint and proposed resolution was sent to AT-N in C-00-441. It should be noted the letters were sent to AT-N's address in Georgia contained on its letterhead, and the letters were not returned. The files also contain copies of letters from ILD, the company that bills for AT-N, responding to the complaint. The ILD letters show copies of those letters were also sent to AT-N at its Georgia address.

In a review of the Utilities Board records of telecommunications service provider registrations, we notice AT-N has not registered as required by 199 IAC 22.23(3). A copy of the form is attached to this order. Copies may also be obtained through the link to the Iowa Administrative Code on the Utilities Board website at [www.state.ia.us/iub](http://www.state.ia.us/iub). AT-N must fill out the form and return it to the Board within 30 days of the issuance of this Order.

It should be noted that there is no response from AT-N in the following files, even though AT-N did not state in its Answer Brief that it had not received notice of the cases: C-00-366, C-00-368, C-00-387, C-00-407, C-00-432, C-00-441, C-00-445, and C-00-458.

Therefore, the proposed resolutions in all but a very few cases are deemed binding on AT-N pursuant to 199 IAC 6.8(5) and 6.8(5). However, rule 6.8(5) also provides that notwithstanding the binding nature of the proposed resolutions, the board may at any time initiate formal proceedings that may alter the allocation of liability. The Consumer Advocate requested a formal complaint proceeding that has been granted in this case. The issues in the Consumer Advocate's request involve whether additional sanctions should be imposed as a result of the listed complaints, not a request to relitigate any of the issues in the underlying complaints themselves.

Since this case is already opened, AT-N will be allowed to present relevant additional evidence it wishes regarding its own actions it believes rebut the allegations in the informal complaint files, the Consumer Advocate's Request for Formal Complaint Proceedings, and Mr. Drennan's testimony. Although AT-N will be

allowed to present additional evidence of its own actions, there is no requirement or expectation that any of the customers will present any additional evidence or re-litigate their complaints. They are not parties to this case. The evidence they submitted is contained in the informal complaint files which are at the Iowa Utilities Board Records Center and readily available to AT-N.

AT-N argues the procedures followed in the informal complaint files including the 14-day period for filing requests for formal complaint proceedings violate AT-N's right to due process. However, AT-N never complained of those procedures or requested additional time to file documents in the informal proceedings. It never filed a request for formal complaint proceedings in any of the cases. AT-N's claims of lack of notice are not persuasive. AT-N is in a poor position now to complain about the procedures' inadequacy. Reynolds v. Iowa Dept. of Human Services, 493 N.W. 2d 813, 815 (Iowa 1992).

AT-N wishes to depose the customers in the informal complaint files. It stated, "AT-N further maintains that these customers can testify to what their present intentions were the day they were contacted by the telemarketer. They can testify as to their conversation with the telemarketer. They can testify as to whether or not AT-N immediately responded to their concerns (i.e. received the refunds promised) and whether or not they consider the issue resolved." "If the customers are allowed to testify, they can support or rebut the OCA's contentions that the verifications were not obtained in accordance to both federal and Iowa state laws regarding 'slamming' and support the contentions offered by AT-N that the verifications are lawful."

"Assuming AT-N is allowed to depose the customers, they can directly affirm or deny the OCA's allegations of inadequate verifications and even more importantly, they can confirm whether or not AT-N participated in the criminal conduct as alleged by Mr. Drennan. To disallow the depositions of at least those customers that Mr. Drennan alleges submitted spliced verifications (namely C-00-207; C-00-320; C-00-340) is clearly a violation of AT-N's Sixth Amendment right to confront its accusers."<sup>1</sup> "Clearly the customers can testify to what their thoughts were during the verification process and whether or not they were confused, misled or understood what was taking place." AT-N wants to ask the customers in several of the cases involving inaccurate billing whether or not they consented to the preferred carrier change. AT-N wants to ask the customers whether they have received full refunds if the parties are not in agreement as to the amount of refunds provided. AT-N wishes to ask the customers what they perceived was happening during their conversations with the telemarketer and during the verification process. They want the customers to provide "(1) The nature of the telemarketing conversation, as best they can recall; (2) the nature of the verification, as best as they can recall; (3) their understanding of the telemarketing phone call and verification, at the time of the call; (4) whether any refunds or credits were received as a result of direct contacts with AT-N Customer

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<sup>1</sup> The Sixth Amendment to the U.S. Constitution applies to criminal cases.

This is not a criminal case.

Care Department; and (5) whether the informal complaints and allegations made by the Iowa Utilities Board staff and OCA accurately reflects the nature of their individual complaint."

AT-N states that if subpoenas duces tecum are issued, the customers could provide copies of their telephone bills showing the disputed charges and the "welcome package" they received from AT-N.

The Consumer Advocate argued AT-N had the opportunity to litigate the complaints during the informal complaint process, and that allowing the customers to be deposed would be burdensome, particularly when they already filed their complaints during the informal complaint process. The Consumer Advocate also stated that the information sought to be obtained by AT-N is readily available in the informal complaint files and is irrelevant to the issues in this formal complaint proceeding.

Once a customer submits a slamming complaint, the company must submit evidence to the Utilities Board that it complied with federal and state law regarding the change in service, and must submit evidence of 1) written authorization for the change; 2) electronic authorization; or 3) qualified independent third party verification. 199 IAC 6.8(2); 22.23(2). Each customer has filed a complaint with the Utilities Board, which is contained in the informal complaint files. The complaints address the questions AT-N stated it would ask the customers in its Answer Brief, except for the question whether they received full refunds of amounts owed to them. At this point, it does not matter what the customer was thinking at the time he or she

received the call. The only possibly relevant evidence at this point regarding the conversations is the submission by AT-N showing it has one of the allowable three types of verifications.

AT-N argues it has qualified independent third party verification tapes showing the customers authorized the change in service. Although staff made findings in the informal complaint cases that AT-N failed to provide such verification, the undersigned will make an independent judgment as to whether AT-N has submitted such proof and has complied with the statutes and rules of the Utilities Board. At this point, the thoughts and impressions of the customers are irrelevant to this determination. The third party verification tapes themselves must show compliance with the rules.

However, discovery rules are to be liberally construed. Iowa R. Civ. P. 121. Depositions may be taken of non-parties. Iowa R. Civ. P. 140. However, parties may only obtain discovery regarding matters that are relevant to the pending case. Iowa R. Civ. P. 122. Appropriate protective orders may be issued. Iowa R. Civ. P. 123. Requests for production of documents are only available as to parties. Iowa R. Civ. P. 129. Furthermore, there is no showing of need for discovery when the information is available from other sources. State ex. rel. Shanahan v. Iowa Dist. Court, 356 N.W. 2d 523 (Iowa 1984).

Therefore, AT-N's request to depose the customers in the underlying informal complaint files is granted with the following restrictions. Appropriate protections to minimize the burden on the customers must be imposed and followed. When

serving notice of each deposition, AT-N must provide a complete copy of the customer's informal complaint file to the customer. At the deposition, AT-N may ask if the informal complaint file accurately represents what happened according to the customer. AT-N may ask the customer if he or she has anything to add to the file, or any corrections to be made. If the customer has additions or corrections, AT-N may ask appropriate follow-up questions. AT-N may not ask the customer what the customer thought during the marketing/verification call or require the customer to answer detailed questions about what happened unless the customer volunteers the information. AT-N may show the customer a copy of AT-N's "welcome packet", and ask the customer if he or she ever received one or if the "welcome packet" received by the customer was the same as that shown at the deposition. AT-N may ask the customer if he or she has any documents not in the informal complaint file that relate to the customer's complaint, what those documents are, and ask if the customer would voluntarily provide a copy of the documents to AT-N or the Consumer Advocate. AT-N may ask the customer if the customer remembers how much AT-N billed the customer, and whether the customer knows if AT-N fully reimbursed the customer. AT-N may ask when the customer was reimbursed. AT-N may ask if the customer has documents showing amounts owed or received other than those in the informal complaint file, what the documents are, and whether the customer would voluntarily provide copies to AT-N or the Consumer Advocate. AT-N may ask customers if they believe the verification tapes contain the complete conversation by the telemarketer and/or verification company, although this information is available in

several of the cases in the informal complaint files. Customers are not lawyers and are not qualified to answer whether AT-N complied with federal and state law, and may not be asked this in depositions.

AT-N must provide reasonable notice of the deposition to each customer and to the Consumer Advocate. Depositions may only be taken in the town in which the customer resides or works at a location convenient to the customer, or by telephone conference call. Depositions must be scheduled at the convenience of the customer. Any costs must be paid for by AT-N according to the rules of civil procedure.

AT-N's request for subpoenas duces tecum is denied at this time. Non-parties may not be forced to produce documents. Iowa R. Civ. P. 129; Woodbury Cty. Atty. v. Iowa Dist. Court, 448 N.W. 2d 20 (Iowa 1989). Furthermore, AT-N has not made a showing it needs to obtain any documents from the customers. Shanahan, supra at 531. Documents have already been submitted by the customers to the Utilities Board, are contained in the informal complaint files, and are readily available to AT-N through the Utilities Board Records Center. Furthermore, AT-N has made no showing a subpoena is necessary to procure the attendance of a customer at a deposition.

It is premature to rule on whether subpoenas should issue to compel the attendance of customers at the hearing. After the depositions, if AT-N (or the Consumer Advocate) wishes to call a customer as a witness and needs a subpoena, AT-N (or the Consumer Advocate) must submit a list of proposed witnesses and evidence specific to each customer it wishes to call showing: 1) what testimony the

witness will provide; 2) why that testimony is relevant to this case; 3) why that evidence cannot be obtained from another source; and 4) that AT-N (or the Consumer Advocate) has requested the voluntary attendance by the witness at the hearing and the witness has indicated he or she would not attend either in person or by telephone conference call without a subpoena. If any customer is to appear as a witness at the hearing, the appearance will be by telephone conference call unless the witness voluntarily elects to appear in person.

Each customer has never received notice of AT-N's request to depose, nor has it had the opportunity to file any objection to the taking of the deposition. By granting AT-N's motion, the undersigned does not mean to imply that the customers do not continue to have that right once they receive notice.

#### **ADDITIONAL PREFILED TESTIMONY AND EVIDENCE**

In addition to submitting additional prefiled testimony and evidence regarding its own actions as discussed above, AT-N must submit prefiled testimony and documentary evidence regarding the factors in Iowa Code §§ 476.103A(4)(b) and (5) (2001). In providing evidence regarding "the size of the service provider," AT-N must submit evidence showing: 1) when it started doing business in Iowa; 2) the number of customers it has in Iowa; 3) AT-N's gross revenues from Iowa customers in each year it has been doing business in Iowa; 4) corporate gross revenues, including subsidiaries, and including all states in which it does business; and 5) the most recent annual report.

AT-N should also provide evidence showing the dates it received the complaints and the dates it reimbursed the customers to the extent this evidence is not already in the record.

AT-N should also provide evidence showing when and how it complied with 199 IAC 22.23(2)"c."

AT-N should provide the verification tapes for the eight cases in Mr. Drennan's testimony and for any other cases on the attached list in which no tape was previously provided to the Utilities Board.

The Consumer Advocate should provide any evidence regarding the issues in Iowa Code §§ 476.103A(4)(b) and (5) not previously filed.

**IT IS THEREFORE ORDERED:**

1. The following procedural schedule is established:
  - a. All depositions must be completed by Monday, April 30, 2001. No further continuances to accommodate the taking of depositions will be granted.
  - b. If any party wishes to call any customer(s) as a witness at the hearing, and believes that a subpoena(s) must issue to compel the attendance of the witness, the party must file a motion requesting the issuance of necessary subpoenas and submit the information discussed above by Tuesday, May 8, 2001.
  - c. Parties must submit any additional prefiled testimony by Tuesday, May 15, 2001.

d. Parties must submit any additional rebuttal testimony by Tuesday, May 29, 2001.

e. The hearing for the purpose of receiving testimony and cross-examination of all testimony will be held at 10:00 a.m. on Tuesday, June 12, 2001, in the Board hearing room, 350 Maple Street, Des Moines, Iowa. Parties shall bring one copy of all prefiled testimony to the hearing for the court reporter, and shall appear 15 minutes ahead of the hearing to mark exhibits. Persons with disabilities who will require assistive services or devices to observe or participate should contact the Board at (515) 281-5256 to request that appropriate arrangements be made.

f. A briefing schedule will be established at the hearing if briefs are deemed necessary.

g. The remaining ordering clauses contained in the Board order issued November 20, 2000 remain in effect.

2. AT-N must re-file its answers to the questions (separated prefiled testimony and brief) within 30 days of the issuance of this decision.

3. The Motion to Strike is denied as to other jurisdiction slamming complaints and is granted as to the FCC non-contribution case.

4. The Application for Adjudication of Law Points is denied.

5. AT-N must file its telecommunications service provider registration within 30 days of the issuance of this order.

6. The parties must notify the undersigned whether the names and numbers on the attached list of informal complaint files accurately state the informal complaint files that underlie this formal complaint proceeding.

7. Official notice of each of the informal complaint files on the attached list is hereby taken.

**UTILITIES BOARD**

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

ATTEST:

/s/ Judi K. Cooper  
Acting Executive Secretary

Dated at Des Moines, Iowa, this 26<sup>th</sup> day of February, 2001.

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C Dockets in Request for Formal Complaint Proceedings:

C-00-95	Keplinger
C-00-112	Hrycyszyn
C-00-115	DeVoe
C-00-137	Cook
C-00-141	Graybill
C-00-150	Kaufman
C-00-151	O'Brian
C-00-153	Penner
C-00-158	Berthel
C-00-168	Ruppenkamp
C-00-174	Lynch
C-00-182	Rogers
C-00-183	Tackett
C-00-188	Stepp
C-00-192	Schmaljohn
C-00-207	David
C-00-211	Flickinger
C-00-217	Rubel
C-00-219	Alatalo
C-00-238	Kaberle
C-00-248	Schuldt
C-00-253	Hutchins
C-00-255	Seiberling
C-00-256	Derr
C-00-284	Forbes
C-00-288	Shawver
C-00-319	Crews
C-00-320	Stewart
C-00-328	Bosworth
C-00-336	Lentz
C-00-340	Schmidt

C-Dockets in OCA testimony (Drennan) but not in Request:

C-00-366	Merrick
C-00-368	Meyer
C-00-387	Van Gorder
C-00-407	Theobald
C-00-432	Sickels
C-00-441	Folken (Bravard)
C-00-445	Tillmann (Page)
C-00-458	Fitzgerald