

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">vs.</p> <p>MCLEODUSA TELECOMMUNICATIONS, INC.,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-03-1</p>
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PROCEDURAL ORDER AND NOTICE OF HEARING

(Issued February 12, 2004)

Background

On November 1, 2002, Mr. Lee Athearn filed a written complaint with the Utilities Board (Board) stating that his local and long distance telephone service had been changed to McLeodUSA Telecommunications, Inc. (McLeod) without his authorization. He stated his telephone service had been returned to Qwest and AT&T in September. However, he stated, McLeod continued to bill him even after he called several times and McLeod assured him everything was closed out and cancelled.

The details of the complaint are contained in informal complaint file number C-02-381, which is incorporated into the record in this case pursuant to 199 IAC 6.7.

Upon receiving the complaint, Board staff attempted to informally resolve the dispute. On November 6, 2002, Board staff forwarded the complaint to McLeod for response. McLeod responded by letter dated December 18, 2002, and stated that Mr. Athearn's telephone service was converted to Qwest on October 16, 2002. McLeod stated Mr. Athearn's account was canceled and he would be issued a credit back to that date.

On December 20, 2002, Board staff issued a proposed resolution telling Mr. Athearn that McLeod cancelled his account on October 16, 2003, and gave him a credit back to that date, and asking him to allow one to two billing cycles for the credits to appear on his statement. The letter stated no further action appeared necessary and informed Mr. Athearn of the procedure if he disagreed with the proposed resolution. Mr. Athearn did not challenge the proposed resolution.

On January 3, 2003, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) petitioned the Board to commence an administrative proceeding to impose a civil penalty for a slamming violation. The Consumer Advocate stated the complaint alleged Mr. Athearn's telephone service was switched to McLeod without authorization in violation of Iowa Code § 476.103 (2003), and that McLeod's response and the proposed resolution did not address this allegation. The Consumer Advocate requested a formal proceeding, argued a civil penalty should be imposed to deter future violations, and stated the Board should consider remedial action taken (or not taken) by the company and other alleged violations when determining the amount of the penalty. The Consumer Advocate stated that McLeod

had not taken adequate remedial action because Mr. Athearn continued to be billed for unauthorized services despite repeated protests from Mr. Athearn and repeated assurances from McLeod that the account had been cancelled. The Consumer Advocate stated the latest billing dated December 26, 2002, sought payment in the amount of \$177.86. The Consumer Advocate also cited five informal complaint files it believed the Board should consider when imposing a civil penalty.

On January 17, 2003, McLeod filed a tape recording of a conversation between Mr. Athearn and Kim with ADC Verification.

On February 12, 2003, McLeod filed an answer and motion to dismiss the Consumer Advocate's petition. McLeod stated it did not violate Iowa Code § 476.103 in this case and no history of prior violations of the section had been shown. McLeod asserted it received oral authorization on August 20, 2002, from Mr. Athearn to make the switch and the authorization was verified by a third-party verification service. McLeod attached a transcript of the conversation of the representative of the third-party verification service with Mr. Athearn. McLeod argued since Mr. Athearn authorized the switch, there was no basis for imposition of a civil penalty because there had been no violation of Iowa Code § 476.103. McLeod further stated it responded to the "billing after downgrade" aspect of the complaint with full remedial action and would credit Mr. Athearn's account back to October 16, 2002, the date it converted service back to Qwest. McLeod stated it followed standard industry practice not to cancel service until it received a line loss notification from Qwest to protect the customer from loss of service, and that Qwest failed to provide line loss

notification to McLeod. McLeod argued that billing after downgrade was not a violation of § 476.103 and could not serve as the basis for imposing a civil penalty under that statute. McLeod also responded regarding each of the informal complaint files the Consumer Advocate asserted the Board should consider when imposing a civil penalty. Details of those responses are contained in McLeod's answer. McLeod stated that two of the five complaints did not involve allegations of a violation of § 476.103, the alleged violation of § 476.103 was disproven in another complaint, and one of the remaining two complaints was an inadvertent processing error in the course of making a properly authorized change for another service. McLeod admitted an intentional violation of § 476.103 in one case, but asserted it took appropriate remedial action. McLeod argued that the complaints are inadequate to establish a history of violation of § 476.103 that warrants imposition of a civil penalty.

On February 19, 2003, the Consumer Advocate filed a reply memorandum. The Consumer Advocate stated Mr. Athearn did not deny that the telephone conversation on August 20, 2002, occurred substantially as alleged in the transcript. However, the Consumer Advocate stated, Mr. Athearn said he would consider a change to McLeod only under the condition that he be sent a written confirmation of the charges to consider, that he did not receive the written confirmation of rates, that Mr. Athearn called McLeod to cancel service and was assured service was cancelled on several dates, and that McLeod continued to bill him and sent past due notices. The Consumer Advocate argued that McLeod worked a fraud upon Mr. Athearn and the fraud vitiated any authorization. It further argued that without a valid

authorization, the change was an unlawful slam. The Consumer Advocate further argued that McLeod unlawfully billed Mr. Athearn for cancelled and therefore unauthorized service. The Consumer Advocate argued the motion to dismiss should be denied, that the amount of a penalty that should be imposed need not be large to achieve the purpose of securing future compliance, and that inadvertent violations should not be ignored.

On February 21, 2003, McLeod filed a letter addressed to Mr. Craig Graziano of the Consumer Advocate enclosing a tape recording of the third-party verification call and a copy of the "welcome kit" mailed to Mr. Athearn on August 28, 2002.

On February 27, 2003, the Consumer Advocate filed a supplemental argument that no contract was formed because McLeod did not send written confirmation and the motion to dismiss should be denied.

On January 8, 2004, the Board issued an order finding sufficient information to warrant further investigation, docketing the proceeding, and ordering the parties to submit a status report. On January 30, 2004, the Consumer Advocate filed a status report that stated it adhered to its previously stated position. McLeod filed a status report on the same date in which it argued its previous positions, advised the Board of the parties' negotiations, and notified the Board the parties had been unable to settle. On February 2, 2004, the Consumer Advocate filed a supplemental status report advising the Board of the parties' negotiations, stating no agreement was reached, and requesting a hearing at the earliest feasible time.

On February 4, 2004, the Board issued an order assigning the case to the undersigned administrative law judge.

Pursuant to Iowa Code §§ 476.3(1) and 476.103(4), and 199 IAC 6.5, a procedural schedule will be established and a hearing regarding this complaint will be held if needed.

The statutes and rules involved in this case include Iowa Code §§ 476.3 and 476.103 and Board rules at 199 1.8, 22.23, and Chapters 6 and 7. A link to the Board's administrative rules (in the Iowa Administrative Code (IAC)) is contained on the Board's website at www.state.ia.us/iub.

The issues

The issues in this case generally involve the change of Mr. Athearn's local and long distance telephone service to McLeod, whether McLeod complied with state and federal law when it changed Mr. Athearn's service and subsequently billed him, whether imposition of a civil penalty is appropriate, and what should be done to resolve the case. Other issues may be raised by the parties prior to and during the hearing.

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 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).

Party status and communication with the Board

The Consumer Advocate and McLeod are currently the parties to this proceeding. If Mr. Athearn wishes to be a party to this case, he must notify the Board in writing in accordance with the procedural schedule established in this order.

Each party must file an appearance identifying one person upon whom the Board and the other parties may serve all orders, correspondence, or other documents. 199 IAC 7.2. The written appearance must substantially comply with 199 IAC 2.2(15). The appearance must include the docket number of this case as stated in the caption above. Appearances must be filed at the earliest practical time with the Executive Secretary, Utilities Board, 350 Maple Street, Des Moines, Iowa

50319. The appearance must be accompanied by a certificate of service that conforms to 199 IAC 2.2 and verifies that a copy of the document was served upon the other parties.

Any party who communicates with the Board should send an original and ten copies of the communication to the Executive Secretary at the address above, accompanied by a certificate of service. One copy of the communication should 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 1.8(4)"c." These requirements apply, for example, to the filing of an appearance or to the filing of prepared testimony and exhibits with the Board.

Ex parte communication is prohibited as provided in Iowa Code § 17A.17. Parties or their representatives and presiding officers shall not communicate directly or indirectly in connection with any issue of fact or law in a contested case except upon notice and an opportunity for all parties to participate. The undersigned administrative law judge is the presiding officer in this case.

Pursuant to 199 IAC 6.7, the written complaint and all supplemental information from the informal complaint proceedings, identified as Docket No. C-02-381, are part of the record of this formal complaint proceeding.

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.

All parties should examine Iowa Code §§ 476.3, 476.103, and Board rules at 199 IAC 1.8 and 22.23, and Chapters 6 and 7, for substantive and procedural rules that apply to this case.

Stipulation of Facts and Prehearing Brief

The facts underlying this case have already been the subject of an informal complaint proceeding. Therefore, it is appropriate that the parties file a stipulation of facts, so that only facts in dispute need be resolved in this formal complaint proceeding. In addition, it is appropriate that the parties file prehearing briefs that identify and discuss their respective positions. Finally, the parties must discuss whether it is possible to settle this case without further formal proceedings and the involvement of the undersigned administrative law judge.

IT IS THEREFORE ORDERED:

1. If the parties are unable to settle this case, on or before February 26, 2004, the parties must file a document stipulating to as many of the facts in this case as possible. The stipulation must also identify which facts remain in dispute and need to be resolved. The parties must also state whether they believe a hearing is necessary in this case, or whether the case could be submitted on the stipulated facts, prefiled testimony and evidence, and the prehearing briefs. If Mr. Athearn wishes to become a party to this case, he must file written notice with the Board no later than February 26, 2004, and must join in the stipulation of the parties.

2. If the parties are unable to stipulate to all the facts of this case, prefiled testimony and exhibits must be filed only with respect to the facts that remain in dispute and need to be resolved in this proceeding.

3. If needed pursuant to paragraph two, on or before March 4, 2004, the Consumer Advocate and any intervenors must file prepared direct testimony and exhibits and a prehearing brief. The prepared direct testimony may refer to any document already in the record, and parties do not need to refile exhibits already submitted in the informal complaint process and made a part of the record. In prepared testimony and exhibits, the Consumer Advocate and any intervenors must address the issues discussed above, and file any other evidence not previously filed. In its prepared testimony and exhibits, the Consumer Advocate must address the total amount of McLeod charges on Mr. Athearn's account and the total amount of credit that McLeod provided to Mr. Athearn's account, unless this information was provided in the stipulation of facts. The Consumer Advocate should use exhibit numbers one and following. In its prehearing brief, the Consumer Advocate must state what actions it believes would be necessary to bring this matter to a proper resolution, and why such actions would be appropriate and in accordance with applicable law.

4. If needed pursuant to paragraph two, on or before March 18, 2004, McLeod must file prepared testimony and exhibits and a prehearing brief. McLeod may refer to any document in the record, and does not need to refile exhibits already submitted in the informal complaint process and made a part of the record. In its

prepared testimony and exhibits, McLeod must address the issues discussed above and file any other evidence not previously filed. In its prepared testimony and exhibits, McLeod must address the total amount of McLeod charges on Mr. Athearn's account and the total amount of credit that McLeod provided to Mr. Athearn's account, unless this information was provided in the stipulation of facts. On February 21, 2003, McLeod filed a letter and what it stated was a copy of the "welcome kit" provided to Mr. Athearn on August 28, 2002. The "welcome kit" indicates that Mr. Athearn selected local service and call waiting, but the box for long distance is not checked. In addition, the kit does not include any recitation of the amounts of the charges quoted to Mr. Athearn. McLeod must address these two items in its prepared testimony and exhibits, unless they were addressed in the stipulation of facts. McLeod should use exhibit numbers 100 and following. In its prehearing brief, McLeod must state what actions it believes would be necessary to bring this matter to a proper resolution, and why such actions would be appropriate and in accordance with applicable law.

5. If the Consumer Advocate or any intervenor is going to file prepared rebuttal testimony and exhibits, it must do so by March 25, 2004.

6. 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 Wednesday, March 31, 2004, commencing at 10 a.m. Each party must provide a copy of its prepared testimony and exhibits to the court reporter. Persons with disabilities requiring assistive services or devices to observe or participate

should contact the Utilities Board at 1-515-281-5256 no later than Friday, March 26, 2004, to request that appropriate arrangements be made.

7. 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 these proceedings. Pursuant to 199 IAC 7.2(6), 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.

8. Any person not currently a party who wishes to intervene in this case must meet the requirements for intervention in 199 IAC 7.2(7). The person must file a petition to intervene on or before 20 days following the date of issuance of this order, unless the petitioner has good cause for the late intervention. 199 IAC 7.2(8).

UTILITIES BOARD

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

ATTEST:

/s/ Sharon Mayer
Executive Secretary, Assistant to

Dated at Des Moines, Iowa, this 12th day of February, 2004.