

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="padding-left: 100px;">Complainant,</p> <p style="padding-left: 100px;">vs.</p> <p>MCI WORLDCOM, INC.,</p> <p style="padding-left: 100px;">Respondent.</p>	<p>DOCKET NO. FCU-03-21</p>
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PROCEDURAL ORDER AND NOTICE OF HEARING

(Issued April 22, 2004)

Background

On January 8, 2003, Dr. Syam Kilaru filed a written complaint with the Utilities Board (Board) stating that a telemarketer from MCI WorldCom, Inc. (MCI) promised him one hour free calling to India once a month for three months, a long distance fee of \$12.95 per month with 200 free minutes per month and 7 cents per minute over the 200 minutes, and 37 cents per minute for calls to India at any time, if he switched long distance service to MCI. He stated MCI did not do what it had promised and charged him a very high bill.

The details of the complaint are contained in informal complaint file number C-03-10, 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 January 10, 2003, Board staff forwarded the complaint to MCI for response.

MCI responded by letter to Dr. Kilaru dated January 31, 2003. In the letter, MCI noted the details of the complaint, stated that review of the verification tape confirmed Dr. Kilaru had authorized the switch, and listed details of MCI records regarding the account. MCI stated its review of records showed Dr. Kilaru was billed correctly for domestic calls but incorrectly for international calls, and that it had issued a total credit in the amount of \$219.27. MCI provided a copy of the letter and "welcome packet" it sent to Dr. Kilaru and the third-party verification recording to Board staff.

On March 10, 2003, Board staff issued a proposed resolution summarizing the events, finding that MCI obtained proper authorization to make the switch and that Dr. Kilaru was billed in conformance with the service agreement in the welcome packet, noting that MCI had issued the credit, and notifying the parties what to do if they disagreed with the proposed resolution.

On March 24, 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 that the proposed resolution was incorrect. It stated MCI had not included a recording of the telemarketing portion of the telephone call, and it was entirely possible the MCI telemarketer made the promises alleged by Dr. Kilaru. The

Consumer Advocate further stated the representations by the MCI telemarketer were false and material, relied on by Dr. Kilaru, fraudulent, and vitiated any consent for the switch. Therefore, argued the Consumer Advocate, there was no valid authorization for the switch, the switch was an unlawful slam in violation of Iowa Code § 476.103, and a civil penalty should be imposed to deter future violations and help secure future compliance with the anti-slamming statute. The Consumer Advocate argued the Board should consider any history of violations in determining the amount of the penalty, and cited one informal complaint file it believed the Board should consider when imposing a civil penalty.

On April 14, 2003, MCI filed a motion to dismiss the Consumer Advocate's petition and a brief in support of its position. MCI stated it had provided the verification recording that showed Dr. Kilaru agreed to change his long distance service to MCI. MCI further stated it sent a welcome packet and service agreement stating its rates to Dr. Kilaru four days after the marketing call. MCI stated it sends welcome packets and service agreements to verify the terms agreed to in the marketing calls to avoid misunderstandings regarding MCI's rates and service policies. MCI noted the proposed resolution in favor of MCI, stated that it had provided a credit to Dr. Kilaru, and stated that it would bill Dr. Kilaru according to the service agreement in the future. MCI stated neither it nor Dr. Kilaru disputed the proposed resolution. MCI argued it was, therefore, unreasonable for the Consumer Advocate to seek to reopen the resolved issue and it was inappropriate under a prior

Board order in Docket No. FCU-02-18, In re: Office of Consumer Advocate v. LCR Telecommunications (LCR).

MCI further argued that Iowa Code § 476.3 requires there to be a reasonable ground for investigating a complaint, the Consumer Advocate had not provided a reasonable ground in this case, and the petition should therefore be dismissed. MCI argued it had obtained proper verification in conformance with Iowa Code § 476.103 and implementing Board rules, it therefore did not violate the anti-slamming statute, and civil penalties were improper. MCI argued although it was not required to send Dr. Kilaru written confirmation of its rates and policies once it followed approved verification procedures, it had done so. It argued that the Consumer Advocate's position would require it to record all marketing calls, even though this is not required by the anti-slamming rules. It argued the Consumer Advocate's filing of petitions based solely on the argument that the content of the initial call is in dispute, and attempting to shift the burden to the carrier to record the call, unfairly costs carriers resources to defend and thereby creates a requirement the law does not include.

MCI argued that the Consumer Advocate's position that the authorization to switch was invalid because it was based on false representations and, therefore, the verification was invalid, is legally flawed, because it fails to recognize that Iowa's anti-slamming statutes only require a carrier to follow prescribed verification procedures before changing a customer's long distance provider. MCI argued the Consumer Advocate's argument is legally and factually flawed because MCI immediately provides a written welcome kit with terms to avoid these types of disputes.

MCI further argued that the Consumer Advocate's argument is based on the FCC decision In re: AT&T Communications, but this decision was vacated in AT&T Corp. v. FCC (AT&T), No. 01-1485, 2002 U.S. App. LEXIS 6568 (D.C.Cir, April 8, 2003). MCI argued the Court rejected the argument as made by the Consumer Advocate, issued a decision that supports the proposed resolution, and held verification was proper so long as the carrier followed the approved procedure, even if the underlying authorization was not valid. MCI further argued the Court held the federal anti-slamming statute requires only that a carrier use approved verification procedures before making a switch. MCI argued Iowa's anti-slamming statute and implementing regulations are like the federal statute, and the Board should follow the reasoning of the D.C. Court and not allow the Consumer Advocate to create a "strict liability" standard in Iowa.

MCI further argued the petition presented no reasonable grounds for a proceeding, the Consumer Advocate sought to shift the burden of proof to MCI, and the Consumer Advocate presented no suggestion it has proof of a misrepresentation. MCI argued there is no "entirely possible" standard in Iowa law and the Board should not adopt such a standard. MCI argued that since it did not violate the anti-slamming statute, there was no basis to assess a civil penalty. It further argued that even if the Board found MCI had not obtained proper authorization, civil penalties were not appropriate.

It stated the Board had indicated it disfavored formal proceedings for the sole purpose of assessing civil penalties in LCR, where Board staff had found a slam had

occurred, and it should find the Consumer Advocate's petition even less appropriate when Board staff found no slam had occurred.

MCI further argued the other informal complaint case involving MCI cited by the Consumer Advocate did not support the Consumer Advocate's position. In that case, MCI stated, it denied the slamming allegation, but agreed not to contest it in order to settle the case. MCI further argued the settlement agreement in the case supported its position because the Consumer Advocate acknowledged MCI had taken steps to avoid occurrences of slamming. It argued there was, therefore, no need to assess a civil penalty to encourage it to take such measures, particularly when it had taken all legally required steps and refunded money to the customer based on the customer's misunderstanding, going over and above what the law required. MCI requested the Board to dismiss the petition.

On April 22, 2003, the Consumer Advocate filed a reply memorandum, in which it stated dismissal on factual grounds would be inappropriate because there are disputed facts, a motion to dismiss is not the place to resolve disputed facts, and the allegations of the petition are deemed admitted for the purpose of ruling on the motion to dismiss. The Consumer Advocate argued the factual allegations, if true, establish a fraud, which vitiates any authorization, and without a valid authorization, the switch was an unlawful slam in violation of Iowa Code § 476.103.

The Consumer Advocate argued the fact MCI is not required to record telemarketing calls is beside the point. Even though recording is not required, the

Consumer Advocate argued this does not give carriers a license to defraud consumers during telemarketing calls.

The Consumer Advocate argued MCI misread the law when it argued the law does not require carriers to do anything more than follow the Board's verification procedures. The Consumer Advocate argued the federal statute is different from the Iowa statute. It argued the Court's reasoning in AT&T has no relevance under Iowa law because Iowa Code § 476.103 requires actual consumer authorization, and the statute directed the Board to adopt rules that protect consumers against unauthorized changes. The Consumer Advocate further argued the AT&T case had no relevance because this case does not involve an issue of who authorized the change, but rather, whether the change was fraudulently obtained.

The Consumer Advocate further argued MCI mischaracterized what it seeks in this case. It argued "formal review" is different from "informal review" under the complaint statute, Iowa Code § 476.3. The Consumer Advocate argued it seeks processing of this case under the slamming statute, not under the complaint statute. The Consumer Advocate argued Iowa Code § 476.103 directed the Board to adopt rules prohibiting unauthorized changes, and its purpose is expressly stated, "to protect consumers." It argued violators are subject to a civil penalty as stated in the statute. It argued the statute explicitly contemplates commencing an administrative proceeding to impose a civil penalty under § 476.103. The Consumer Advocate argued the statute does not specify additional substantive requirements beyond establishment of a violation that must be met before imposition of a civil penalty is

appropriate. It argued the statute provides for notice and opportunity for hearing for companies such as MCI. The Consumer Advocate stated it seeks processing of the case in accordance with these requirements. It argued the statute could not be clearer in stating that prosecutions for civil penalties for slamming violations are to be commenced under the section.

It further argued reasonable grounds existed for further investigation, the central issue was whether Dr. Kilaru is telling the truth, and resolution depended on the testimony of two people. The Consumer Advocate argued that civil penalties should be imposed on companies that violate the slamming statute for the same reason that fines are imposed on motor vehicle drivers who exceed the lawful speed limit: to deter future activity. The Consumer Advocate argued if Dr. Kilaru is telling the truth, a civil penalty should be imposed. It cited another case in which MCI was alleged to have defrauded a customer, and argued the motion to dismiss should be denied.

On January 20, 2004, the Board issued an order finding sufficient information to warrant further investigation, docketing the proceeding, and ordering the parties to file a status report.

On February 16, 2004, the Consumer Advocate filed a status report stating the parties were discussing settlement and that it was ready to have a hearing scheduled, although it would continue to discuss settlement.

On February 20, 2004, the Board issued an order delaying action in the case. On March 29, 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 IAC 1.8, 22.23, 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 website at www.state.ia.us/iub.

The issues

The issues in this case generally involve the change of Dr. Kilaru's long distance telephone service to MCI, whether MCI complied with applicable law when it changed Dr. Kilaru's service and subsequently billed him, whether MCI's marketer misrepresented MCI's rates to Dr. Kilaru, the legal effect of the misrepresentation if it occurred, 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).

As discussed below, each party must address the above issues in prepared testimony and exhibits and support each statement it has made in previously filed documents. Among other things, MCI must provide evidence regarding its third party verifier and how it complied with the requirements in 199 IAC 22.23(2)"a" and "c." MCI must explain its business relationship with its marketers, such as whether its marketers are employees, independent contractors, or subcontractors. It must state whether its marketers are expected to use a script, provide the script its marketers use, describe the training it gives its marketers, describe supervisory and quality

control measures it uses with respect to its marketers, and explain how its marketers are compensated.

Party status and communication with the Board

The Consumer Advocate and MCI are currently the parties to this proceeding. If Dr. Kilaru 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.

These procedures are necessary to comply with Iowa Code § 17A.17, which prohibits 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 website at www.state.ia.us/iub.

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 May 13, 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 Dr. Kilaru wishes to become a party to this case, he must file written notice with the Board no later than May 13, 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 May 27, 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 must address the issues

discussed above, support each of the allegations made in its petition, and file any other evidence not previously filed. 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. It should also provide current citations (not Westlaw or LEXIS citations) to cases previously cited in filed documents. If Dr. Kilaru wishes to become a party to this case and wishes to file prepared testimony, he must do so on or before May 27, 2004.

4. If needed pursuant to paragraph two, on or before June 10, 2004, MCI must file prepared testimony and exhibits and a prehearing brief. MCI 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, MCI must address the issues discussed above, support each of the allegations made in its response, and file any other evidence not previously filed. MCI should use exhibit numbers 100 and following. In its prehearing brief, MCI 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. It should also provide current citations (not Westlaw or LEXIS citations) to cases previously cited in filed documents.

5. If the Consumer Advocate or any intervenor is going to file prepared rebuttal testimony and exhibits, it must do so by June 17, 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 Thursday, June 24, 2004, beginning 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 five days prior to the hearing date 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/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 22nd day of April, 2004.