

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>UKI COMMUNICATIONS, INC.,</p> <p style="padding-left: 100px;">Respondent.</p>	<p>DOCKET NOS. FCU-02-27 FCU-03-23 FCU-03-41</p>
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**PROCEDURAL ORDER AND NOTICE OF HEARING AND
ORDER DEFERRING JUDGMENT ON MOTION FOR DEFAULT**

(Issued April 26, 2004)

Background

Docket Numbers FCU-02-27, FCU-03-23, and FCU-03-41, each began with a customer filing a complaint with the Utilities Board (Board) alleging that his or her telephone service had been switched to UKI Communications, Inc. (UKI), without his or her authorization. Each case went through the Board's informal complaint resolution process. In each case, after the conclusion of the informal complaint process, 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 pursuant to Iowa Code § 476.103 (2003).

The details of the complaints are contained in informal complaint file numbers C-02-338, C-03-34, and C-03-91, which are incorporated into the record in this case pursuant to 199 IAC 6.7.

In FCU-02-27, on January 21, 2003, UKI filed a response to the Consumer Advocate's petition and a motion to dismiss the petition, in which it argued the Consumer Advocate's petition was not authorized by Iowa law and imposition of a civil penalty would be inappropriate as a factual matter. In FCU-03-23 and FCU-03-41, UKI did not file a response to the Consumer Advocate's petition. In each of the three cases, the Board issued orders finding sufficient information to warrant further investigation, docketing the proceeding, and assigning the proceeding to the undersigned administrative law judge.

On February 3, 2004, UKI filed a letter with the Board that stated it would be discontinuing intrastate toll service for all of its commercial and residential customers located in Iowa. UKI stated in the letter that all of its retail customers for in-state long distance interexchange services, including 1+, toll free, dial around, casual, and travel card services, would be affected. UKI further stated its customers had been informed that they needed to choose another long distance provider to be able to make long distance calls. In the letter, UKI stated it was requesting cancellation of the Certificate of Authority to transact business in the state of Iowa as of January 27, 2004. The letter was not signed, although it appeared to be on UKI letterhead and "UKI Communications Inc." was printed as the sender of the letter. The letter did not

respond to the allegations in the petitions for civil penalty filed by the Consumer Advocate.

In FCU-02-27, the undersigned issued an order on February 4, 2004, that established a procedural schedule and set March 23, 2004, as the date for the hearing in the case. The parties were ordered to file a stipulation on or before February 17, 2004, and UKI was ordered to file prepared testimony and exhibits and a prehearing brief on or before March 9, 2004. On February 10, 2004, Mr. Richard Lozier, attorney, filed a letter stating he had entered his withdrawal of appearance in this proceeding and had not been engaged by UKI to represent them with respect to ongoing proceedings in the case. On February 10, 2004, the undersigned sent a letter to UKI informing UKI of Mr. Lozier's communication and telling UKI it must comply with the requirements in the order, including the requirement to file an appearance. The Board served UKI with the procedural order and notice of hearing with the letter. On February 17, 2004, the Consumer Advocate filed a second supplemental status report stating it could not file a stipulation as required because UKI was not responding to the Consumer Advocate. The Consumer Advocate detailed the efforts it had made to contact UKI and its attorneys. The Consumer Advocate stated that, in addition to the withdrawal of representation by attorney Mr. Lozier, former UKI counsel Mr. Gregory Kunkel of Washington, D.C., stated he no longer represents UKI.

On February 24, 2004, the Consumer Advocate filed prepared testimony, a prehearing brief, and an application for entry of judgment by default. On March 16, 2004, the Consumer Advocate filed a request to cancel the hearing.

To date, UKI has not filed an appearance, prefiled testimony, a prehearing brief, or any response to the filings of the Consumer Advocate. The only response UKI filed is the letter dated February 3, 2004.

On January 20, 2004, in FCU-03-23, the Board issued an order docketing the proceeding and ordering UKI to file a response to the Consumer Advocate's petition on or before February 16, 2004. UKI filed the letter discussed above on February 3, 2004. On March 1, 2004, the Consumer Advocate filed an application for entry of judgment by default. On March 5, 2004, the Board issued an order that assigned the case to the undersigned and stated UKI had not responded to the petition. In the order, the Board noted UKI had filed the February 3, 2004, letter that stated it would be discontinuing intrastate toll service as discussed above. The Board stated "While it is apparent that UKI is no longer providing intrastate toll service in Iowa . . . , it remains unclear as to what services UKI continues to offer in other states and what effect a default judgment would have." The Board, therefore, requested the Consumer Advocate to file a statement describing the anticipated effect of a default judgment in the matter within ten days of the order. On March 12, 2004, the Consumer Advocate filed a request for an additional ten days to file the statement. To date, the only response UKI has filed is the letter dated February 3, 2004.

On January 20, 2004, in FCU-03-41, the Board issued an order docketing the proceeding and requesting UKI to file a response to the Consumer Advocate's petition on or before February 23, 2004. On February 3, 2004, UKI filed the letter discussed above. On March 5, 2004, the Board issued an order assigning the case to the undersigned. In the order, the Board noted UKI had filed the February 3, 2004, letter that stated it would be discontinuing intrastate toll service and that it had informed its customers to choose another provider. On March 8, 2004, the Consumer Advocate filed an application for entry of judgment by default. To date, the only response UKI has filed is the letter dated February 3, 2004.

Since the three cases involve common parties and common questions of law, they were consolidated by order dated March 18, 2004. The order required UKI to file an appearance and any response to the Consumer Advocate's applications for default by March 31, 2004, cancelled the hearing, granted the Consumer Advocate's request for extension, and deferred ruling on the applications for default.

On March 25, 2004, the Consumer Advocate filed a request for an additional ten days to file its additional statement regarding the effect of a default judgment. The request was granted in an order issued March 29, 2004. In the order, the undersigned administrative law judge granted the request for extension, and extended the deadline for UKI to file an appearance and any response to the motions for default until April 12, 2004.

On April 5, 2004, the Consumer Advocate filed its supplemental statement explaining the anticipated effect of a default judgment. In its statement, the

Consumer Advocate stated the most important effect of a default judgment is systemic, that the ability to enter a default judgment is important in the maintenance of an orderly, efficient judicial system, and that it is a useful remedy for a good faith litigant who follows the rules. The Consumer Advocate acknowledged default judgments should not be entered lightly. The Consumer Advocate argued that UKI has failed to file an appearance, thwarted its efforts to negotiate the required stipulation, disregarded attempted discovery, and not filed required prepared testimony. It stated the sole response has been the letter stating UKI is discontinuing intra-state toll service in Iowa. The Consumer Advocate argued this is an insufficient response and UKI cannot escape responsibility by leaving the state. It argued UKI's disregard of procedure has been extreme, the amount in controversy is relatively small, and this is a compelling case for default judgment.

As of the date of this order, UKI has not filed any response other than the letter dated February 3, 2004.

Iowa Code §17A.12(3) provides that if a party fails to appear or participate in a contested case proceeding after proper service of notice, the presiding officer may, if no adjournment is granted, enter a default decision or proceed with the hearing and make a decision in the absence of the party.

In Docket No. FCU-02-27, UKI failed to respond to the order requiring it to file a written appearance, and has failed to communicate with the Consumer Advocate so that the required stipulation could be filed. UKI failed to file prepared testimony and a prehearing brief by the March 9, 2004, deadline. UKI has apparently not

responded to data requests from the Consumer Advocate, and has not responded to repeated attempts by the Consumer Advocate to communicate with UKI. In Docket Nos. FCU-03-23 and FCU-03-41, apparently in response to the Board orders dated January 20, 2004, UKI filed the letter dated February 3, 2004, which stated its intent to discontinue service but did not respond to the allegations of the petitions filed by the Consumer Advocate. It appears that an entry of default at this point may be premature, particularly in Docket Nos. FCU-03-23 and FCU-03-41. Therefore, the undersigned will defer ruling on the motions for default and will establish a procedural schedule and set a date for hearing. However, it appears that requiring the parties to file stipulated facts may be fruitless, and this will not be required.

Therefore, pursuant to Iowa Code §§ 476.3(1) and 476.103(4), and 199 IAC 6.5, the procedural schedule and hearing date set forth below are established.

The issues

The issues in this consolidated case generally involve the change of the customers' telephone service to UKI, whether UKI complied with applicable law when it changed the customers' telephone service and subsequently billed them, whether UKI used a third-party verification company that complies with applicable law, whether the third-party verification recordings provided by UKI are authentic and comply with applicable law, whether imposition of a civil penalty is appropriate, the factors regarding the amount of civil penalty in Iowa Code § 476.103(4)(b), whether there is a pattern of violations pursuant to Iowa Code § 476.103(5), 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, UKI must state the name, address, and telephone

number of the third-party verification company it used in each case, provide evidence regarding each third-party verification company it used, and provide evidence showing how it complied with the requirements in 199 IAC 22.23(2)"a" and "c." UKI 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 UKI are currently the parties to this proceeding. If any of the customers wish to become a party to this case, they must notify the Board in writing in accordance with the procedural schedule established in this order.

UKI 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. The appearance must be filed in accordance with the procedural schedule set forth in this order 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 Consumer Advocate.

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.

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 7¹.

Iowa Code § 476.103(4)(a) provides that a service provider who violates a provision of the slamming statute, a rule adopted pursuant to the statute, or an order lawfully issued by the Board² pursuant to the statute, is subject to a civil penalty of not more than \$10,000 per violation, which, after notice and opportunity for hearing, may be levied by the Board. Each violation is a separate offense. Iowa Code § 476.103(4)(b) provides that a civil penalty may be compromised by the Board. It further provides that in determining the amount of the penalty, or the amount agreed on in a compromise, 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. Iowa Code § 476.103(5) provides that, if the Board determines, after notice and opportunity for hearing, that a service provider has shown a pattern of violations of the rules adopted pursuant to the slamming statute, the Board may, by order, among other things, prohibit any other service provider from billing charges to residents of Iowa on behalf of the violating service provider and prohibit certificated local exchange service providers from providing exchange access services to the violating service provider.

¹ 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.

² In this case, the term "Board" includes the Board itself and the undersigned administrative law judge.

IT IS THEREFORE ORDERED:

1. On or before May 10, 2004, UKI must file an appearance identifying one person upon whom the Board may serve all orders, correspondence, or other documents. The written appearance must substantially comply with 199 IAC 2.2(15). The appearance must include the docket numbers of this case as stated in the caption above. The appearance must be filed 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 Consumer Advocate.

2. The Consumer Advocate has already filed prepared testimony and a brief in Docket No. FCU-02-27. This paragraph applies to Docket Nos. FCU-03-23 and FCU-03-41. On or before May 18, 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 address the statutory factors and appropriate applicability of Iowa Code §§ 476.103(4) and 476.103(5) to this case. If the Consumer Advocate wishes to have witnesses connected to the hearing by

telephone conference call, it should file notice of this request as soon as possible, and in no case later than two weeks prior to the hearing date, so that appropriate arrangements may be made.

3. If any customer wishes to become a party to this case and wishes to file prepared testimony, he or she must do so on or before May 18, 2004.

4. On or before June 1, 2004, UKI must file prepared testimony and exhibits and a prehearing brief. UKI 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, UKI must address the issues discussed above. UKI should use exhibit numbers 100 and following. In its prehearing brief, UKI must address the statutory factors and appropriate applicability of Iowa Code §§ 476.103(4) and 476.103(5) to this case. If UKI wishes to have witnesses connected to the hearing by telephone conference call, it should file notice of this request as soon as possible, and in no case later than two weeks prior to the hearing date, so that appropriate arrangements may be made.

5. 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, June 8, 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.

6. 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.

7. 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).

8. A copy of this order will be delivered to the Consumer Advocate and sent by first-class U.S. mail to UKI. In addition, a copy of this order will be sent via electronic mail to juancamilo@ukicomunications.com and to monica@ukicomunications.com.

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 26th day of April, 2004.