

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>MERCURY INTERNET AND WIRELESS SERVICE AND I4MATION, INC.,</p> <p style="text-align:center">Respondents.</p>	<p>DOCKET NOS. FCU-03-44 FCU-03-57 FCU-03-58 FCU-03-59</p>
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**PROCEDURAL ORDER AND NOTICE OF HEARING AND ORDER
CONSOLIDATING DOCKETS**

(Issued April 29, 2004)

Background

Docket Numbers FCU-03-44, FCU-03-57, FCU-03-58, and FCU-03-59 each began with a customer filing a complaint with the Utilities Board (Board) stating that Mercury Internet and Wireless Service (Mercury), I4MATION, INC. (I4Mation), or both, had placed unauthorized charges on the customer's telephone bills. Each case went through the Board's informal complaint process and Board staff issued a proposed resolution finding in favor of the customer. The details of the complaints are contained in informal complaint file numbers C-03-149, C-03-251, C-03-255, and C-03-256, which are incorporated into the record in this case pursuant to 199 IAC 6.7.

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 consider imposition of a civil penalty for a cramming violation pursuant to Iowa Code §§ 476.103 and 476.3 (2003). In its petitions in FCU-03-57 and FCU-03-58, the Consumer Advocate stated it appeared that I4Mation may be an affiliate of Venus Voicemail Services, Inc. and Mercury Internet and Wireless Service.

In each case, the Board issued an order finding sufficient information to warrant further investigation, docketing the case, and ordering Mercury or I4Mation to respond to the Consumer Advocate's petition. In each case, Mercury or I4Mation did not file a response by the deadline as required, and the Board issued an order assigning the case to the undersigned administrative law judge to hold a hearing and issue a proposed decision.

On April 21, 2004, in Docket No. FCU-03-59, Mercury filed a letter dated January 29, 2004. The letter does not contain the correct name and a telephone number of the person who filed the complaint, but does indicate that a copy of the letter was sent to the business of the person who filed the complaint. The letter is the identical form letter sent in Docket Nos. FCU-03-44 and FCU-03-58, with the names and telephone numbers changed. The letter states the service billed was authorized, but Mercury cancelled the services and would credit the customer in the amount of \$29.95. The letter also stated the Web site designed for the customer would be removed from the world-wide-web and the email account would be inactivated. Since

the customer name and telephone number is not that of the complaining customer, it is not clear whether Mercury intended this letter to be a response to the Board's order requiring it to respond. Regardless of Mercury's intent, the response is inadequate because it is not about the complaining customer and does not address the allegations in the Consumer Advocate's petition.

These four cases involve similar fact patterns, common parties and common questions of law. Each involves an allegation of cramming in violation of Iowa Code § 476.103. It appears that Mercury and I4Mation are either affiliated or the same company. It does not appear that consolidation of the cases would adversely affect the substantial rights of any party. Consolidation would provide for more efficient administration of the cases. Therefore, the cases should be consolidated.

Pursuant to Iowa Code §§ 476.3(1), 476.103(4) and (5), and 199 IAC 6.5, a procedural schedule will be established and a hearing regarding the complaints will be held.

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 Web site at www.state.ia.us/iub.

The issues

The issues in this case generally involve Mercury's and I4Mation's placement of charges on the complaining customers' telephone bills, whether Mercury and I4Mation complied with applicable law when they did so, the business relationship

between Mercury and I4Mation, 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).

Party status and communication with the Board

The Consumer Advocate, Mercury, and I4Mation are currently the parties to this proceeding. If the complaining customers wish to become parties to this case, they must notify the Board in writing in accordance with the procedural schedule established in this order.

Mercury and I4Mation must each 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 numbers 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. If Mercury and I4Mation assert they are not affiliated or the same company, they must each serve a copy of the appearance on the other in addition to service on 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 Web site 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.

Iowa Code § 476.103(4)(a) provides that a service provider who violates a provision of the cramming statute, a rule adopted pursuant to the statute, or an order

lawfully issued by the Board¹ 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 cramming 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.

IT IS THEREFORE ORDERED:

1. Docket Numbers FCU-03-44, FCU-03-57, FCU-03-58, and FCU-03-59 are hereby consolidated. All further filings must include both company names and the four docket numbers in the caption.

¹ In this case, the term "Board" includes the Board itself and the undersigned administrative law judge.

2. On or before May 20, 2004, Mercury and I4Mation must each 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 and 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 rule 199 IAC 2.2 and verifies that a copy of the document was served upon the Consumer Advocate. If Mercury and I4Mation assert they are not affiliated or the same company, they must each serve a copy of the appearance on the other in addition to service on the Consumer Advocate.

3. On or before June 15, 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 in Iowa Code § 476.103(4), discuss the appropriate applicability of Iowa Code §§ 476.103(4) and (5) to this case, state what actions it believes would be necessary to bring this matter

to a proper resolution, and explain why such actions would be appropriate and in accordance with applicable law. 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.

4. 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 June 15, 2004. If a customer who is a party wishes to have witnesses connected to the hearing by telephone conference call, he or she 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. On or before July 6, 2004, Mercury and I4Mation must file prepared testimony and exhibits and a prehearing brief. Mercury and I4Mation may refer to any document in the record, and do not need to refile exhibits already submitted in the informal complaint process and made a part of the record. In their prepared testimony and exhibits, Mercury and I4Mation must address the issues discussed above and file any other evidence not previously filed. Mercury and I4Mation should use exhibit numbers 100 and following. If Mercury and I4Mation assert they are not affiliated or the same company, they must file evidence in support of this assertion, file separate prepared testimony, exhibits, and prehearing briefs, Mercury should use exhibit numbers 100 and following, and I4Mation should use exhibit numbers 200 and following. In their prehearing brief, Mercury and I4Mation must address the

statutory factors in Iowa Code § 476.103(4), discuss the appropriate applicability of Iowa Code §§ 476.103(4) and (5) to this case, state what actions they believe would be necessary to bring this matter to a proper resolution, and explain why such actions would be appropriate and in accordance with applicable law. If Mercury and I4Mation wish to have witnesses connected to the hearing by telephone conference call, they 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.

6. If the Consumer Advocate, a customer who is a party, or any intervenor is going to file prepared rebuttal testimony and exhibits, it must do so by July 20, 2004.

7. 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, August 4, 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, July 30, 2004, to request that appropriate arrangements be made.

8. 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.

9. 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 29th day of April, 2004.