

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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<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>MCI WORLDCOM COMMUNICATIONS, INC.,</p> <p style="text-align:center">Respondent.</p>	<p>DOCKET NO. FCU-04-47</p>
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**PROCEDURAL ORDER AND NOTICE OF HEARING**

(Issued October 14, 2004)

**Background**

On August 9, 2004, Mrs. Madalene Perkins<sup>1</sup> submitted a complaint to the Utilities Board (Board) against MCI WorldCom Communications, Inc. (MCI), alleging that her long distance telephone service provider was changed without her authorization. The details of the complaint are contained in informal complaint file number C-04-200, which is incorporated into the record in this case pursuant to 199 IAC 6.7.

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<sup>1</sup> The account is in the name of Mr. Tom Perkins, and correspondence in the informal complaint file is addressed to Mr. Perkins. In its petition for formal proceedings, the Consumer Advocate identified Mrs. Perkins as the person who submitted the slamming complaint and that Mr. Tom Perkins is Mrs. Perkins' late husband.

Upon receiving the complaint, Board staff attempted to informally resolve the dispute. On August 12, 2004, Board staff forwarded the complaint to MCI for response. MCI responded by letter filed August 24, 2004. MCI stated that its records showed that in response to a call from a telemarketer on February 5, 2004, Mrs. Perkins authorized the switch to MCI. MCI stated it was unable to locate the recording of the third party verification it claims was completed. MCI also stated it had issued an adjustment to the account to reflect a zero balance and had cancelled the account.

On September 2, 2004, Board staff issued a proposed resolution concluding that slamming had occurred. Staff stated that without the third-party verification recording to prove otherwise, it could only conclude that slamming had occurred. Staff noted that no further action was necessary because MCI had fully credited the account and had cancelled the account.

On September 8, 2004, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) petitioned the Board to docket the complaint for a formal proceeding, affirm the staff determination that MCI committed a slamming violation, and consider imposing a civil penalty. The Consumer Advocate asserts the proposed resolution should be augmented with a civil penalty because crediting the account will not by itself stop the unlawful practice of slamming. It asserts that a civil penalty is necessary to ensure compliance and deter future slamming violations.

On September 28, 2004, MCI filed an answer and motion to dismiss the Consumer Advocate's petition. MCI asserts it took all reasonable steps when it

initiated the account and therefore the account was established with proper verification. It further asserts it followed applicable laws in establishing the account. In support of this claim, MCI described the contact history showing when the outbound call to the customer was made and subsequently referred to a third party verifier. MCI asserts the recording of the verification call was lost due to a technical error that resulted in an archival tape not being recorded by the third-party verifier. MCI resisted the Consumer Advocate's call for civil penalties, asserting that civil penalties would not further public policy goals nor prevent the technical malfunction that caused the recording to be lost. MCI asserts the only purpose of the Consumer Advocate's petition is to obtain civil penalties, penalties are not appropriate in this case because they would not deter unlawful activities or practices, penalties were not intended to punish a party for the inadvertent technical errors of a third-party, and there was no willful act in this case that warrants the assessment of civil penalties.

On October 1, 2004, the Consumer Advocate filed a reply memorandum responding to MCI's answer and motion to dismiss. The Consumer Advocate asserts that crediting the customer's account is an insufficient response to the problem of slamming and imposition of civil penalties can reduce the incidence of slamming. It asserts the violation does not have to be willful before civil penalties may be imposed. The Consumer Advocate asserts that if MCI followed the law, the third-party verification tape would have been retained, and asserts that MCI offers no proof that the customer authorized the switch. The Consumer Advocate further asserts that even if such proof were available, there would be no basis for dismissal because

for the purpose of considering a motion to dismiss, the allegations of the complaint are assumed to be true. It asserts civil penalties are an effective law enforcement tool and can reduce the incidence of slamming, thereby advancing the public policy expressed by the legislature. The Consumer Advocate asserted the Board should deny the motion to dismiss and grant the petition for a proceeding to consider imposing a civil penalty.

On October 11, 2004, the Board issued an order finding that reasonable grounds exist for further investigation of the matter, particularly because the third-party verification tape is unavailable. The Board stated that by itself, the assertion that consideration of civil penalties might deter future slamming violations might not be sufficient to justify further formal proceedings. However, the Board stated that in this case, the lack of required verification led the Board to conclude there are reasonable grounds for further investigation. The Board denied the motion to dismiss, docketed the proceeding, and assigned it to the undersigned administrative law judge.

Pursuant to the Board's order and Iowa Code §§ 476.3(1) and 476.103(4), and 199 IAC 6.5, a procedural schedule will be established and a hearing date set.

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](http://www.state.ia.us/iub).

### **The issues**

The issues in this case generally involve the change of Mrs. Perkins' long distance telephone service to MCI, whether MCI complied with applicable law when it changed her service, and whether imposition of a civil penalty is appropriate. Specifically, the issue in this case is whether the imposition of civil penalties is appropriate and in accordance with applicable law since MCI is unable to produce the third-party verification tape. 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 MCI are currently the parties to this proceeding. If Mrs. Perkins wishes to be a party to this case, she must notify the Board in writing in accordance with the procedural schedule established in this order.

Each party other than the Consumer Advocate 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.

Pursuant to 199 IAC 6.7, the written complaint and all supplemental information from the informal complaint proceedings, identified as Docket No. C-04-200, 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. Board orders are available on the Board's website at [www.state.ia.us/iub](http://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, the parties are encouraged, although not required, to file a stipulation of facts, so that only facts in dispute need to 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.

If the parties agree there are no factual issues to be resolved, and the only issue is the legal question of whether imposition of civil penalties is appropriate and in accordance with applicable law in this particular case, they may file a joint motion to suspend the procedural schedule and submit the case on briefs for decision without a hearing. If the parties wish to have the opportunity for oral argument, they may request this as well.

**IT IS THEREFORE ORDERED:**

1. If it has not already done so, on or before October 25, 2004, MCI 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 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 199 IAC 2.2 and verifies that a copy of the document was served upon the Consumer Advocate.

2. The parties are encouraged, but not required, to file a stipulation of facts. Such stipulation should be filed on or before October 26, 2004.

3. If Mrs. Perkins wishes to become a party to this case, she must file written notice with the Board no later than October 26, 2004.

4. On or before November 2, 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 explain why it believes imposition of a civil penalty would be appropriate and in accordance with applicable law in this particular case. If Mrs. Perkins becomes a party to this case and wishes to file prepared testimony and a brief, she must do so on or before November 2, 2004.

5. On or before November 16, 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 explain why it believes imposition of a civil penalty would not be appropriate and would not be in accordance with applicable law in this particular case.

6. If any party wishes to have witnesses connected to the hearing by telephone conference call, the party must notify the undersigned no later than November 16, 2004, at Amy.Christensen@iub.state.ia.us.

7. If the Consumer Advocate or any intervenor is going to file prepared rebuttal testimony and exhibits, it must do so by November 23, 2004.

8. A hearing for the presentation of evidence and the cross-examination of witnesses will be held in Board Conference Room 3, 350 Maple Street, Des Moines, Iowa, on Tuesday, November 30, 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 five business days prior to the hearing to request that appropriate arrangements be made.

9. 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.

10. 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 14<sup>th</sup> day of October, 2004.