

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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| <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 style="text-align:center">DOCKET NO. FCU-03-21</p> |
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**PROPOSED DECISION**

(Issued November 4, 2004)

APPEARANCES:

MR. CRAIG GRAZIANO, attorney at law, 310 Maple Street, Des Moines, Iowa 50319, appearing on behalf of the Consumer Advocate Division of the Department of Justice.

MS. KRISTA TANNER and MR. BRET DUBLINSKE, attorneys at law, Dickinson, Mackaman, Tyler & Hagen, P.C., Suite 1600, 699 Walnut Street, Des Moines, Iowa 50309, appearing on behalf of MCI WorldCom, Inc.

**THE ISSUES**

Iowa Code § 476.103(1) (2003) provides that the Utilities Board (Board) may adopt rules to protect customers from unauthorized changes in telecommunications service. Section 476.103(2) provides that a change in telecommunications service includes, among other things, the designation of a new telephone service provider to a consumer, including the initial selection of a service provider. Section 476.103(3)

provides that the Board shall adopt rules prohibiting unauthorized changes in telecommunications service and the rules shall be consistent with Federal Communications Commission (FCC) regulations regarding procedures for verification of customer authorization for a change in service. Unauthorized change of a customer's telephone service provider is commonly called "slamming," which is defined in the Board's rules as: "the designation of a new provider of a telecommunications service to a customer, including the initial selection of a service provider, without the verified consent of the customer." 199 IAC 22.23(1).

In this case, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) alleges that MCI WorldCom, Inc. (MCI) persuaded the customer to switch his long distance telephone service to MCI by offering him certain international long distance rates to India, the offer was false and material, the customer relied on the offer, and the offer worked a fraud on the customer. The Consumer Advocate argues the fraud vitiates any consent the customer gave for the switch, that without valid authorization, the switch was an unlawful slam, and the Board should impose a civil penalty on MCI.

MCI denies the allegations, states it complied with the law requiring verification of the customer's authorization to switch, and says it billed the customer in conformance with the service agreement in the welcome packet it sent to the customer. MCI further stated it had issued a credit to the customer so that he was billed for his international calls at the rate he believed he had been promised and a civil penalty should not be imposed.

This proposed decision finds the customer's testimony to be credible, finds that MCI violated Iowa Code § 476.103 and 199 IAC 22.23, orders MCI to credit the customer's account to zero and refrain from collection activities, and finds that no civil penalty should be imposed.

### **STATEMENT OF THE CASE**

On January 8, 2003, Dr. Syam Kilaru filed a written complaint with the Board against MCI. (Informal Complaint) He stated that a telemarketer from MCI promised that if he switched his long distance telephone service to MCI, he would receive one hour free calling to India per month for three months and an international long distance rate of \$.37 cents per minute for calls to India at any time. (Informal Complaint). He stated MCI did not do what it had promised and charged him a very high bill. (Informal Complaint). 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. (Informal Complaint file).

MCI responded by letter to Dr. Kilaru dated January 31, 2003. (Informal Complaint file). 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. (Informal Complaint file). 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. (Informal Complaint file). MCI provided a copy of the letter and welcome packet it sent to Dr. Kilaru and the third-party verification recording to Board staff. (Informal Complaint file).

On March 10, 2003, Board staff issued a proposed resolution finding that no slam had occurred. (Informal Complaint file). Staff summarized the events and concluded that MCI had obtained proper authorization to make the switch and billed Dr. Kilaru the correct rates in conformance with the service agreement in the welcome packet. Staff noted that MCI had re-rated the November and December calls to India to \$.37 per minute, resulting in a credit of \$219.27, and told the parties what to do if they disagreed with the proposed resolution. (Informal Complaint file).

On March 24, 2003, the 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-slaming 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 because it had obtained proper verification in conformance with Iowa Code § 476.103 and 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 an FCC decision, In re: AT&T Communications, which was vacated in AT&T Corp. v. FCC, 323 F.3d 1081, 1087-88 (D.C. Cir. 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, when 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.

On April 22, 2004, the undersigned administrative law judge issued a procedural order and notice of hearing. The Consumer Advocate filed pre-filed testimony of Dr. Kilaru and a prehearing brief on May 27, 2004. MCI filed pre-filed testimony and exhibits of Mr. Jim Ray and a prehearing brief on June 10, 2004. The Consumer Advocate filed pre-filed rebuttal testimony of Dr. Kilaru and a prehearing reply memorandum on June 17, 2004, and a correction on June 18, 2004. MCI filed additional exhibits on July 1, 2004. The parties filed various motions regarding

discovery disputes and confidentiality issues, and various orders were issued regarding the motions.

The hearing was held on July 14, 2004. The Consumer Advocate was represented by its attorney, Mr. Craig Graziano. Dr. Kilaru testified on behalf of the Consumer Advocate. MCI was represented by its attorney, Ms. Krista Tanner. Mr. James Ray testified on behalf of MCI. Consumer Advocate Exhibits 1–9A and 11–28 were admitted. MCI Exhibits 100–09, 111, and 112 were admitted.

MCI filed Responses to Additional Questions on July 28, 2004, and a correction on August 6, 2004. MCI filed a Post Hearing Brief on August 13, 2004, and a Post Hearing Reply Brief on August 23, 2004. The Consumer Advocate filed a Post-Hearing Brief on August 13, 2004, and a Post-Hearing Reply Brief on August 23, 2004.

### **DISCUSSION OF THE EVIDENCE AND ANALYSIS**

The Consumer Advocate argues that the MCI telemarketer misrepresented MCI's rates for calls to India and that MCI's service would include one hour of free calling to India each month for three months, and that the misrepresentations were false and material. (Prehearing Brief, pp. 1-2; Post-Hearing Brief, p. 2). The Consumer Advocate argues that once this is established, so is the slam. (Post-Hearing Brief, p. 2). The Consumer Advocate argues that the misrepresentations worked a fraud upon Dr. Kilaru. (Prehearing Brief, pp. 1-2). The Consumer Advocate then argues that the misrepresentations, or the fraud, vitiated any authorization Dr. Kilaru gave for the switch. (Prehearing Brief, pp. 1-2; Post-Hearing

Brief, p. 2). Without a valid authorization, argues the Consumer Advocate, the switch is an unlawful slam. (Prehearing Brief, p. 2; Post-Hearing Brief, p. 2).

The Consumer Advocate argues that MCI's indirect evidence of its policies and practices is not direct evidence that refuted Dr. Kilaru's testimony, and is questionable, since its telemarketers are compensated partly on sales. (Consumer Advocate Post Hearing Brief, pp. 1, 3-5). It argues that proof of intent to deceive is not required, and even if it were, there is ample circumstantial evidence to support an inference of intent to deceive. (Consumer Advocate Post-Hearing Brief, pp. 4-5).

MCI argues there is no evidence as to whether this was an intentional misrepresentation for the purpose of making a sale, an inadvertent representation, no misrepresentation at all but a misunderstanding by Dr. Kilaru, or whether the telemarketer was perfectly clear about the rates. (Prehearing Brief, pp. 7-8). It argues the Consumer Advocate presented no evidence that MCI intentionally misled Dr. Kilaru. (Post Hearing Brief, pp. 1-3, 8-12). MCI further argues it complied with the only two requirements in the Iowa statute and rules: the requirement for third-party verification and the requirement for post-switch notification. (Prehearing Brief, pp. 6-7; Post Hearing Brief, pp. 3-4). Therefore, it argues, no slam occurred. (Prehearing Brief, pp. 6-7; Post Hearing Brief, pp. 3-4).

The facts in this case do not show MCI worked a fraud upon Dr. Kilaru as alleged by the Consumer Advocate. The essential elements of common law fraud are representation, falsity, materiality, scienter, intent to deceive, reliance, and resulting injury and damage. Ford v. Barcus, 155 N.W.2d 507, 511 (Iowa 1968).

Fraud "cannot be presumed but must be affirmatively proved by the one who relies on it." Id. Scierter requires a showing that false representations were made with knowledge they were false. Cornell v. Wunschel, 408 N.W.2d 369, 375 (Iowa 1987). In this case, the Consumer Advocate did not prove the scierter and intent to deceive elements of fraud.

The only evidence of the conversation between Ms. Johnson, the telemarketer, and Dr. Kilaru, is the testimony of Dr. Kilaru. The undersigned finds that Dr. Kilaru is a credible witness, and there is no reason to doubt his testimony. Dr. Kilaru appeared to be truthful. His informal complaint was clear and specific. His testimony was internally consistent and consistent with the informal complaint he filed with the Board. He testified his recollection regarding the contents of his complaint letter was better at the time of the complaint than at the time he filed his prefiled testimony. When he did not know the answer to a question, Dr. Kilaru admitted it. He did not embellish his story. Dr. Kilaru was the only participant in the telemarketing conversation to testify. The undersigned administrative law judge believes that MCI's telemarketer promised Dr. Kilaru a rate of \$.37 per minute for calls to India and one hour free calling to India once per month for three months if he switched his long distance carrier to MCI. (Informal Complaint file; Testimony of Dr. Kilaru, Tr. 13-26; Tr. 46).

MCI argues that testimony based on human recollection of an oral conversation is ripe with potential for inaccuracies. (MCI Post Hearing Brief, p. 8). It argues that Dr. Kilaru misheard the name of the telemarketer, believing that someone

named Debra Brown called him, when the name of the telemarketer was Debra Johnson. (MCI Post Hearing Brief, p. 9; Tr. 21; Exhibit 1). MCI further argues that Dr. Kilaru was unclear when asked the status of his account and when asked when he was last contacted by MCI regarding his bill. (MCI Post Hearing Brief, p. 9; Tr. 24, 26). MCI argues that Dr. Kilaru does not have a strong recollection of the events surrounding his relationship with MCI or the contents of the initial telephone call. (MCI Post Hearing Brief, p. 9). MCI argues that Dr. Kilaru's testimony demonstrates that, while it may be entirely possible Ms. Johnson misquoted rates to Dr. Kilaru, it is just as possible that Dr. Kilaru misheard the rates or remembers the rates incorrectly. (MCI Post Hearing Brief, p. 9). Therefore, MCI argues his testimony is insufficient to prove that Ms. Johnson gave false information to Dr. Kilaru. (MCI Post Hearing Brief, p. 9).

MCI's argument is unpersuasive. Dr. Kilaru filed his written complaint on January 8, 2003, less than two months after the marketing call of November 16, 2002. (Informal Complaint file). His complaint correctly stated his long distance plan included 200 free minutes per month for a fee of \$12.95, and \$.07 per minute thereafter. (Informal Complaint). He specifically stated he had been promised a \$.37 rate for calls to India any day and time and one hour free calling to India once per month for three months. (Informal Complaint). He mentioned the third-party verification. (Informal Complaint). It is understandable that Dr. Kilaru might not remember the name of the telemarketer, but would remember the terms of the sale, since it was the terms of the sale that induced him to switch carriers, not the

telemarketer's name. Furthermore, although MCI presented evidence that the name of the telemarketer was Debra Johnson, there is no evidence regarding what name she used when she called Dr. Kilaru other than Dr. Kilaru's complaint calling her Debra Brown. Similarly, whether or not Dr. Kilaru remembered the amount of money MCI claimed was owed and when he was last contacted by MCI for collection at the hearing is irrelevant to whether he clearly recalled the terms of the telemarketing call that induced him to switch carriers less than two months after the call's occurrence. MCI overstates the significance of Dr. Kilaru's lack of memory regarding these items. His memory of the core items that caused him to switch carriers was clear and specific at the time he filed his initial complaint, and his testimony regarding them remained consistent. (Informal Complaint file; Testimony of Dr. Kilaru, Tr. 13-26; Tr. 46).

Therefore, the undersigned believes that MCI's telemarketer Ms. Johnson told Dr. Kilaru he would receive an international long distance rate of \$.37 per minute for calls to India, and that he would receive one hour of free calling to India per month for three months. However, there is no showing that Ms. Johnson made these statements knowing they were false, and no showing she intended to deceive Dr. Kilaru. The facts could support such a finding, but they could equally support a finding that Ms. Johnson was mistaken when she spoke with Dr. Kilaru.

The evidence in this case shows there was no meeting of the minds, and therefore no valid contract. For a contract to be valid, the parties must express mutual assent to the terms of the contract. Employers Mut. Cas. V. United Fire &

Cas, 682 N.W.2d 452, 454 (Iowa Ct. App. 2004). If there is a misunderstanding as to the object of the agreement, no meeting of the minds occurs, and there is no contract. Id. The price for calls to India was a material term of the contract, as was whether Dr. Kilaru could receive three free hours of calls to India. Since Dr. Kilaru thought he was agreeing to a price of \$.37 per minute, and MCI thought he had agreed to a price of \$.42 and \$.49 per minute, there was no meeting of the minds, and no valid contract was formed.

### **The Meaning of Iowa Code § 476.103 and 199 IAC 22.23**

MCI argues that the Consumer Advocate's position that it slammed Dr. Kilaru is legally flawed because it fails to recognize that Iowa's anti-slamming statute only requires that a carrier obtain proper third-party verification before changing a customer's long distance provider and notice of the change after-the-fact. (MCI Prehearing Brief, p. 9; MCI Post Hearing Brief, pp. 3-4). MCI argues it complied with these requirements, and therefore no slam occurred. (MCI Post Hearing Brief, pp. 3-4). It argues that Board staff determined MCI met the requirements of Iowa's anti-slamming law and properly noted the statute required nothing further of MCI. (MCI Post Hearing Brief, p. 4).

MCI cites to the D.C. Circuit's decision in AT&T Corp. v. FCC, 323 F.3d 1081 (D.C. Cir. 2003) (AT&T), in support of its position. MCI states the court in AT&T held that verification was proper so long as the carrier followed the FCC approved verification procedures, even if the underlying authorization was not valid. (MCI Prehearing Brief, p. 9; Post Hearing Brief, pp. 4-5). MCI states the court invalidated

FCC rules requiring actual customer authorization because the federal anti-slamming statute only required that carriers comply with the listed verification procedures. (MCI Prehearing Brief, p. 9; Post Hearing Brief, pp. 4-5).

MCI argues Iowa's anti-slamming statute and the Board's rules do not require carriers to do anything more than follow the Board's verification procedures. (MCI Prehearing Brief, p.11; Post Hearing Brief, p. 6). MCI argues that Iowa Code § 476.103(3) requires state rules to be consistent with FCC regulations regarding procedures for verification and to be consistent with federal rules also means being consistent with federal court decisions interpreting and striking down those rules. (MCI Prehearing Brief, p. 11; MCI Post Hearing Brief, p. 6).

MCI also argues that the Board stated it did not believe the legislature intended to create a strict liability standard on all carriers for all unauthorized changes in Office of Consumer Advocate v. Qwest Corporation, Docket No. FCU-02-22, Order Denying Petition for Proceeding to Impose Civil Penalties (2003). (MCI Prehearing Brief, p. 11; Post Hearing Brief, p. 6). MCI argues the Consumer Advocate's position will result in a standard that no company will be able to conclusively meet and would effectively require carriers to record every telemarketing call, which would be too costly. (MCI Post Hearing Brief, p. 7). MCI argues it complied with the Board's verification procedures, and therefore did not violate the anti-slamming rules. (MCI Prehearing Brief, p. 11). It further argues it made the customer whole by re-rating the calls to the rate Dr. Kilaru says he was promised. (MCI Prehearing Brief, p. 12).

The Consumer Advocate argues that the D.C. Circuit's interpretation of federal law in AT&T cannot be transported to Iowa law. (Consumer Advocate Pre-hearing Reply Memo, p. 2). It argues the clear intent of Iowa's anti-slamming law is to protect consumers from unauthorized changes in service, and to prohibit unauthorized changes in service. (Consumer Advocate Pre-hearing Reply Memo, p. 2). The Consumer Advocate argues recording the telemarketing portion of the call is not the only method available to companies. (Consumer Advocate Pre-hearing Reply Memo, p. 3). It further argues that the required consistency in Iowa Code §476.103(3) is not all encompassing and is limited to the prescribed verification procedures. (Consumer Advocate Pre-hearing Reply Memo, p. 4). It argues that the Board is not required to follow federal court decisions interpreting federal law when it interprets state law. (Consumer Advocate Pre-hearing Reply Memo, p. 4).

The Consumer Advocate further argues that the text of federal and state law is not the same. (Consumer Advocate Pre-hearing Reply Memo, p. 4; Post-Hearing Reply Brief, pp. 1-2). It argues the expressed intent of the Legislature in the Iowa statute is to protect consumers from unauthorized switches, and this relevant statutory provision must be harmonized with the rest of the statute so meaning is given to all parts of the statute. (Consumer Advocate Pre-hearing Reply Memo, p. 4; Post-Hearing Reply Brief, pp. 1-2). The Consumer Advocate argues that the Iowa statute has both an intended protection of consumers from unauthorized switches and an intended consistency with federal verification procedures. (Consumer Advocate Pre-hearing Reply Memo, p. 5). It argues the Iowa statute and rules

require both consent and verification. (Consumer Advocate Pre-hearing Reply Memo, p. 5). It further argues that Iowa's anti-slamming law protects consumers not merely from unverified switches, but from unauthorized switches, and a bad authorization duly verified is a bad authorization. (Consumer Advocate Pre-hearing Reply Memo, p. 6; Post-Hearing Reply Brief, p. 1).

The Consumer Advocate argues that MCI's interpretation that nothing more than compliance with the third-party verification requirement is required would not effectuate the purpose of the statute and would rob the statute of its central requirement: a valid authorization for the switch. (Consumer Advocate Post-Hearing Reply Brief, p. 2). It argues that, although perfect compliance with the slamming laws may not be achievable, the same can be said of most laws. (Consumer Advocate Post-Hearing Reply Brief, p. 2). It further argues this observation provides no basis for reading the authorization requirement out of Iowa law, which would deprive the public of protection the legislature intended to provide. (Consumer Advocate Post-Hearing Reply Brief, p. 2).

The Consumer Advocate is correct that the federal and Iowa anti-slamming statutes are not the same. 47 U.S.C. § 258(a) states: "No telecommunications carrier shall submit or execute a change in a subscriber's selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe." Prior to the decision in AT&T, the FCC had promulgated rules that required the customer's actual

authorization for a switch and prescribed certain verification procedures. 47 C.F.R. § 64.1120.

In AT&T, the D.C. Circuit Court of Appeals ruled that the FCC's requirement that carriers guarantee the actual line subscriber had authorized a change in service exceeded the agency's statutory authority to prescribe procedures to verify that authorization. The court ruled that the regulations went beyond the federal statute's express terms. The court found that the federal anti-slamming statute does not contain an actual authorization requirement. The court considered whether the statute authorized the FCC to create an actual authorization requirement, and concluded it did not. The court said that if Congress had wished to require actual customer authorization, instead of prohibiting carriers from changing service except in accordance with FCC verification procedures, it would have written the statute to prohibit such changes without the subscriber's authorization.

In contrast to the federal statute, the stated purpose of the Iowa statute is to protect consumers from unauthorized changes in telecommunications service. The federal statute is explicitly focused solely on the behavior of the carrier. The Iowa statute is not limited, as is the federal statute, to a statement that carriers may not change a customer's carrier except in accordance with the verification procedures prescribed by the FCC. 47 U.S.C. § 258(a). Therefore, the court's interpretation of the federal statute in AT&T is not binding on an interpretation of the Iowa statute, because the language of the two statutes is not the same.

The Iowa anti-slamming statute contains two key paragraphs that set forth the intent of the legislature and its delegation of authority to the Board. Iowa Code § 476.103(1) provides: ". . . the board may adopt rules to protect consumers from unauthorized changes in telecommunications service." Iowa Code § 476.103(3) provides:

The board shall adopt rules prohibiting an unauthorized change in telecommunications service. The rules shall be consistent with federal communications regulations regarding procedures for verification of customer authorization of a change in service. The rules, at a minimum, shall provide for all of the following:

a. (1) A submitting service provider shall obtain verification of customer authorization of a change in service before submitting such change in service.

. . .  
(3) The verification may be in written, oral, or electronic form and may be performed by a qualified third party.

. . .  
b. A customer shall be notified of any change in service.

c. Appropriate compensation for a customer affected by an unauthorized change in service.

d. Board determination of potential liability, including assessment of damages, for unauthorized changes in service among the customer, previous service provider, executing service provider, and submitting service provider.

e. A provision encouraging service providers to resolve customer complaints without involvement of the board.

f. The prompt reversal of unauthorized changes in service.

g. Procedures for a customer, service provider, or the consumer advocate to submit to the board complaints of unauthorized changes in service.

The phrase "unauthorized changes in telecommunications service" is not defined in the statute. The term "change in service" is defined as "the designation of a new service provider of a telecommunications service to a consumer, including the initial selection of a service provider" and the term "telecommunications service" is defined as "a local exchange or long distance telephone service." Iowa Code § 476.103(2).

The court in AT&T said that if Congress had wished to require actual customer authorization, instead of prohibiting carriers from changing service except in accordance with FCC verification procedures, it would have written the statute to prohibit such changes without the subscriber's authorization. This is what the Iowa legislature did in § 476.103.

In this case, Dr. Kilaru did not consent to a charge of \$.49/.42 per minute for calls to India. He did not consent to the switch to MCI without the \$.37 rate plus three free hours of calls to India that he was promised by the telemarketer. Therefore, his "authorization" on the third-party verification tape was not valid. The legislature intended to protect consumers from unauthorized switches, and the language of the statute is broad enough to encompass the situation that occurred in this case. MCI switched Dr. Kilaru's service provider without authorization in violation of § 476.103.

Iowa Code § 476.103(1) states that the Board may adopt rules to protect consumers from unauthorized changes in telecommunications service and § 476.103(3) requires the Board to adopt rules prohibiting an unauthorized change in telecommunications service. Section 476.103(3) states that the rules must be

consistent with FCC regulations regarding procedures for verification of customer authorization. The section lists what the rules must include "at a minimum." The Board has adopted such rules at 199 IAC 22.23.

The rules do not specifically define "unauthorized changes in telecommunications service." However, they define "slamming" as the "designation of a new provider of a telecommunications service to a customer, including the initial selection of a service provider, without the verified consent of the customer."

199 IAC 22.23(1). "Verified consent" is defined as "verification of a customer's authorization for a change in service." Id. According to these rules, the customer must have consented to the switch and must have authorized it. Contrary to MCI's argument, the rules do not say that if a carrier complies with the verification procedures in 22.23(2), that is all that is required.

Paragraph 199 IAC 22.23(2)"a" lists the acceptable verification methods and provides the following:

a. Verification required. No service provider shall submit a preferred carrier change order or other change in service order to another service provider unless and until the change has first been confirmed in accordance with one of the following procedures:

(1) . . . written authorization

(2) . . . electronic authorization

(3) . . . an appropriately qualified independent third party has obtained the customer's oral authorization to submit the . . . change order that confirms and includes the appropriate verification data . . . The content of the verification must include clear and conspicuous confirmation that the customer has authorized a preferred carrier change; or

(4) . . . through maintenance of internal records sufficient to establish a valid customer request for change in service (for customer-originated changes to existing accounts only).

These verification procedures are consistent with the FCC verification procedures as required by Iowa Code § 476.103(3). In this case, MCI complied with the requirement for third-party verification of the switch in conformance with 199 IAC 22.23(2)"a"(3). (Exhibit 105). The third-party verification recording shows that Dr. Kilaru agreed to change his long distance provider to MCI. (Exhibit 105). However, Dr. Kilaru's authorization for the switch was based on a promise of an international calling rate of \$.37 per minute for calls to India and one hour of free calling to India for three months. Although MCI complied with the third-party verification requirement, the switch was not actually authorized or consented to within the meaning of Iowa Code § 476.103 and 199 IAC 22.23, since Dr. Kilaru would not have agreed to the switch if he had not received the two promises. Therefore, MCI's switch violated the statute and the Board's rule. In this case, the fact that MCI sent the welcome packet after the call did not cure the lack of authorization and consent for the switch that occurred at the time of the call. However, it does show MCI carefully complied with the notification requirement in the rules, and is relevant for consideration in the penalty analysis.

MCI's argument that it should not be liable for Ms. Johnson's misstatement because she was employed by Reese Brothers and not directly by MCI is unpersuasive. MCI cannot insulate itself from liability for the actions of its telemarketers by contracting with an independent contractor for telemarketing

services. MCI remains ultimately liable for the actions of telemarketers calling on its behalf, whether they are directly employed by MCI, or by its contractor, Reese Brothers. MCI, not Reese Brothers, is the service provider within the meaning of Iowa Code § 476.103 and 199 IAC 22.23 and is the entity subject to its requirements. To hold otherwise would gut the purpose of the statute.

### **The Remedy**

Since the telemarketer's misstatement of the rates caused Dr. Kilaru to agree to switch to MCI, there was no meeting of the minds, and therefore no valid contract. The switch violated Iowa Code § 476.103 and 199 IAC 22.23. Therefore, the first appropriate remedy is to make the customer whole. MCI should not reap any benefit from its telemarketer's quote of the wrong rates and promise of free hours of calls to India.

MCI has already provided Dr. Kilaru with a credit of \$219.27, based on a re-rate of his calls to India at \$.37 per minute. (Tr. 36, 95-97; Exhibit 21; Informal Complaint file). MCI did not give Dr. Kilaru three free hours of calls to India. (Tr. 120). It sent Dr. Kilaru collection letters in December 2003 and January 2004 that stated he owed MCI \$142.45. (Tr. 93-95; Exhibit 18). As of the date of the hearing, MCI is holding this balance from collections until this case is resolved. (Tr. 93-97). MCI should not benefit from its telemarketer's mistake or intentional misstatement of the rates. Therefore, MCI must credit Dr. Kilaru's account so he is left with a zero balance, and may not pursue collection activities regarding the account. In addition, MCI must notify any collection agencies or credit bureaus with

which it has had previous contact regarding Dr. Kilaru's account that Dr. Kilaru's account balance is zero. These actions must be taken as quickly as possible and no later than 15 days after the issuance of this decision.

The Consumer Advocate argues that credits alone are insufficient to stop the violations and a civil penalty should be imposed. (Consumer Advocate Prehearing Brief, p. 2). It argues that meaningful civil penalties are needed to ensure compliance with the law and to deter future violations. (Consumer Advocate Prehearing Brief, p. 2). It argues that slamming will not be stopped until the profit is taken out of it, small credits of unlawful charges have not done the job in the past, and they will not do the job in the future. (Consumer Advocate Pre-Hearing Reply Memo, p. 9). The Consumer Advocate argues that credits, while a necessary response, are insufficient alone to deter slamming. (Consumer Advocate Pre-Hearing Reply Memo, p. 9). The Consumer Advocate argues the legislature provided for civil penalties in the statute. (Consumer Advocate Pre-Hearing Reply Memo, p. 11). It further argues the Board has logged hundreds of telephone complaints per year, most of them slamming and cramming violations. (Consumer Advocate Pre-Hearing Reply Memo, p. 13).

It argues that MCI's statements about its policies and procedures and efforts to avoid slams are self-serving. (Consumer Advocate Pre-Hearing Reply Memo, pp. 13-14). It argues that there is something at the heart of the authorization process that MCI should have done differently: it should have correctly represented its rates and not misrepresented them to induce Dr. Kilaru to switch. (Consumer Advocate Pre-Hearing Reply Memo, p. 14). The Consumer Advocate argues that rates

typically lie at the heart of the authorization process and this case is not one where an error appears to be inadvertent or beyond the control of the company. (Consumer Advocate Pre-Hearing Reply Memo, p. 14).

The Consumer Advocate argues that MCI seeks to impose on the state the burden to prove a pattern of violations before imposition of a civil penalty, contrary to Iowa Code § 476.103(4), which clearly directs that "each" violation is subject to penalty. (Consumer Advocate Pre-Hearing Reply Memo, p. 15). The Consumer Advocate argues that when a pattern of violations is found, Iowa Code § 476.103(5) provides for additional remedies, but section 476.103(4) requires no showing of a pattern. (Consumer Advocate Pre-Hearing Reply Memo, p. 15). It argues that civil penalties are an effective law enforcement tool and can reduce the incidence of slamming and therefore advance the public policy expressed by the legislature. (Consumer Advocate Pre-Hearing Brief, p. 3; Consumer Advocate Pre-Hearing Reply Memo, p. 16).

The Consumer Advocate argues that in determining the amount of the penalty, the Board should consider all relevant factors, including the gravity of the violation, the size of the provider, and any history of past violations. (Consumer Advocate Pre-Hearing Brief, p. 2). It argues the violation in this case is serious and fraudulent, MCI is one of the larger long distance providers, and there is a history of past violations. (Consumer Advocate Pre-Hearing Brief, p. 3). The Consumer Advocate cited to the Settlement Agreement in Board Docket No. FCU-02-5 as evidence of past violations. (Consumer Advocate Pre-Hearing Brief, p. 3). It also argues there are many

slamming complaints against MCI filed with the FCC. (Consumer Advocate Post Hearing Brief, pp. 2-3; Reply Brief, p. 6).

MCI argues that it did not violate the rules so no civil penalty should be imposed. (MCI Prehearing Brief, p. 13). It further argues that even if the Board finds MCI did not obtain proper authorization for the switch, a civil penalty is not appropriate. (MCI Prehearing Brief, p. 13).

MCI argues that the Consumer Advocate's reliance on the settlement agreement in Docket No. FCU-02-5, another slamming complaint involving MCI, is not valid. (MCI Prehearing Brief, p. 13). MCI argues it denied the slamming allegations in the settlement agreement and only agreed not to contest the allegation and pay a civil penalty to resolve the dispute with the Consumer Advocate. (MCI Prehearing Brief, p. 13). It argues the settlement agreement was only a settlement, not an admission by MCI nor a finding of fact by the Board. (MCI Prehearing Brief, pp. 13-14). Furthermore, MCI argues the settlement agreement supports its position because the Consumer Advocate acknowledged that MCI had taken steps to avoid slamming occurrences, including training employees in the requirements for signing up long distance customers and avoiding slamming complaints. (MCI Prehearing Brief, p. 14).

MCI further argues that the majority of the slamming cases before the FCC were denied and two were resolved. (MCI Reply Brief, pp. 3, 7-8). It argues the Consumer Advocate did not provide citations or copies of the FCC orders and its arguments are exaggerated. (MCI Reply Brief, pp. 7-8).

MCI argues that since it already takes steps to avoid slamming, no purpose would be served by a civil penalty to encourage MCI to take such steps. (MCI Prehearing Brief, p. 14). It argues this is particularly true here because Board staff found MCI took all legally required steps and refunded money to Dr. Kilaru based on his misunderstanding. (MCI Prehearing Brief, p. 14). It argues it obtained verification and followed the verification with a welcome kit to ensure clarity of the terms of service. (MCI Post Hearing Brief, p. 2).

MCI argues that the Consumer Advocate must prove its marketer intentionally provided Dr. Kilaru with incorrect rates to justify civil penalties, and the Consumer Advocate has not done so. (MCI Post Hearing Brief, p. 2). It states the Consumer Advocate claims that because Ms. Johnson had the opportunity to receive bonuses based on her sales performance, she likely gave Dr. Kilaru incorrect information to induce him to switch. (MCI Post Hearing Brief, p. 10; Reply Brief, p. 3). MCI argues this position has two major flaws. (MCI Post Hearing Brief, p. 10). First, it is based on unsupported speculation and the Consumer Advocate presented no evidence to support its argument that people who are compensated partly on sales are untrustworthy. (MCI Post Hearing Brief, p. 10; Reply Brief, p. 4). MCI argues the Consumer Advocate's position is based on stereotypes and biases without evidence to support them. (MCI Post Hearing Brief, pp. 9-10, Reply Brief, p. 4). Second, MCI argues its marketers are only eligible for a bonus if they receive no escalations. (MCI Post Hearing Brief, p. 11; Reply Brief, pp. 4-5). A Reese Brothers employee is not eligible for a bonus, regardless of the number of sales made by that employee, if the

employee receives an escalation. (MCI Post Hearing Brief, p. 11). MCI argues any incentive to give false information due to compensation based on sales is removed by Reese Brothers' escalation policy, because the employee will not be compensated for those sales. (MCI Post Hearing Brief, p. 11). MCI further argues that if such conduct continued, the employee would be terminated. (MCI Post Hearing Brief, p. 11). Therefore, MCI argues, the Consumer Advocate presented no proof that Ms. Johnson intentionally misled Dr. Kilaru and its attempt to impose civil penalties should fail. (MCI Post Hearing Brief, pp. 11-12).

MCI argues this case is squarely on point with the Board's April 16, 2003, order in Consumer Advocate v. Qwest Corporation, Docket No. FCU-02-22: that there is nothing else required by law that civil penalties could encourage MCI to do. (MCI Prehearing Brief, p. 14). MCI argues that the Consumer Advocate is really arguing it should record the initial sales call, which is not required by law. (MCI Prehearing Brief, p. 14). It argues that if, despite its efforts and compliance with the law, one of its telemarketers made an error, this should not trigger civil penalties. (MCI Prehearing Brief, p. 15).

MCI argues the law and the Board's orders make it clear that not every slamming case should result in civil penalties, and cites to the Board's order denying request for formal proceeding in Office of Consumer Advocate v. LCR Telecommunications, Docket No. FCU-02-18. (MCI Post Hearing Brief, p. 2). MCI argues the evidence shows that even if the marketer intentionally provided incorrect rates, it was in spite of, not because of, MCI's policy. (MCI Post Hearing Brief, p. 2).

It argues it goes to great lengths to ensure its telemarketers are trained to provide professional, courteous, and ethical service to prospective customers, and trained to avoid even the appearance of misinformation. (MCI Post Hearing Brief, pp. 2, 12). It argues its marketers are trained to make sales, but not to make sales at any cost. (MCI Post Hearing Brief, pp. 2-3). Instead, MCI argues, it trains marketers to uphold MCI's standards and ethical policies at all times, which is hardly conduct that warrants civil penalties. (MCI Post Hearing Brief, pp. 3, 12-13). It also argues, in addition to new hire and ongoing training, MCI's telemarketers are monitored several times per month to ensure they comply with MCI standards. (MCI Post Hearing Brief, p. 14). MCI argues if the monitoring sessions or a customer complaint indicate an employee is not following MCI procedures, the employee receives additional training. (MCI Post Hearing Brief, p. 14). Therefore, MCI argues, the evidence shows it takes significant steps to avoid giving prospective customers incorrect information. (MCI Post Hearing Brief, p. 14).

MCI argues the Consumer Advocate's position that regardless of the procedures MCI has adopted, the Consumer Advocate will always advocate for civil penalties is unfair and ignores the statutory requirements. (MCI Post Hearing Brief, p. 14). MCI argues that Iowa Code § 476.103(4) requires that when determining whether to assess a civil penalty, the Board should consider, among other things, the remedial actions taken by the service provider, the nature of the conduct of the service provider, and any other relevant factors. (MCI Post Hearing Brief, p. 14). MCI argues that it has clearly demonstrated it takes significant steps to remedy and

prevent violations. (MCI Post Hearing Brief, pp. 14-15). MCI argues there is nothing in the nature of MCI's conduct that would warrant civil penalties and it has demonstrated its commitment to ethical sales and high quality. (MCI Post Hearing Brief, p. 15).

Iowa Code § 476.103(4)(a) and 199 IAC 22.23(5)"a" provide that a service provider who violates the statute or a rule adopted pursuant to the statute is subject to a civil penalty of no more than \$10,000 per violation, which the Board may levy. There is no requirement that the violation be intentional in either the statute or the rule. Consumer Advocate v. Qwest Corporation and MCI WorldCom Communications, Inc., Docket No. FCU-02-5, *Order Docketing Complaint, Requiring Additional Information, and Assigning to Administrative Law Judge*, p. 6 (May 14, 2002). The Board has ruled that the statutory language that the Board "may" levy a civil penalty in § 476.103(4)(a) clearly requires the Board to exercise its discretion whether to impose a civil penalty in a particular case, and violation of the slamming law does not automatically mean a civil penalty should be imposed. Office of Consumer Advocate v. Qwest Corporation, Docket No. FCU-02-22, *Order Granting Request for Leave to Amend and Denying Request for Reconsideration*, p. 3 (May 28, 2003).

Iowa Code § 476.103(4)(b) and 199 IAC 22.23(5)"b" provide that a civil penalty may be compromised by the Board, and in determining the amount of the penalty, or the amount agreed upon 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. Although this is a close case, a consideration of this statute and rule and the facts of this case lead the undersigned administrative law judge to conclude that no civil penalty should be imposed.

The evidence shows that MCI's marketer gave Dr. Kilaru incorrect information regarding the price of calls to India and promised him three hours of free calling to India, which induced him to switch to MCI. There is no evidence whether the marketer intentionally or mistakenly gave the correct information. However, since the price of calls to India was the central motivating factor for Dr. Kilaru, giving him the incorrect rate was a grave violation, whether it was given on purpose or by mistake. The evidence further shows that MCI complied with the requirement for third-party verification and with the requirement to provide subsequent notice. The subsequent notice clearly stated that international calling rates to India were \$.49 per minute during the week and \$.42 per minute on weekends. (Informal Complaint file).

The evidence shows that Ms. Johnson was compensated partly on the basis of sales, which might motivate an unscrupulous telemarketer to quote lower rates than were actually available to induce a sale. There was no evidence regarding the character of Ms. Johnson. The evidence also shows that telemarketers who received

an escalation,<sup>1</sup> which could be started by providing incorrect rates to prospective customers, were not eligible for a daily bonus regardless of the number of successful sales, and it was highly unlikely the telemarketer could receive a cycle bonus. Telemarketers were also monitored. These factors would tend to motivate a telemarketer to give correct information to customers. Therefore, the telemarketer compensation method is neutral, and no inference is drawn either way as to whether the method would encourage telemarketers to lie or tell the truth.

MCI provides extensive training to its telemarketers when they are initially hired. It provides ongoing training, including additional training to telemarketers who have had an escalation. Since Ms. Johnson is no longer employed by Reese Brothers, there is no need to order that she receive remedial training. However, since this case shows that at least one of MCI's telemarketers was not clear on international calling rates to India, MCI should consider taking the opportunity to provide additional training on international calling rates to its telemarketers and those employed by Reese Brothers.

Once it learned of Dr. Kilaru's complaint, MCI provided a partial credit on Dr. Kilaru's bill in an attempt to resolve the matter. On the other hand, it pursued collection of the remaining amount while this case was pending.

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<sup>1</sup>An escalation starts with a situation in which someone alleges that one of MCI's employees did not follow MCI policy and procedures. (Tr. 114-116; Exhibit 25). An escalation can start with a customer complaint or with something overheard in a monitoring session. (Tr. 115). As a result, MCI investigates the situation, discusses it with the employee, and takes appropriate personnel action, up to and including termination. (Tr. 114-116; Exhibit 25).

The limited evidence and argument by the Consumer Advocate regarding other alleged slamming violations by MCI did not show that MCI has a history of prior violations that is relevant to an assessment of a civil penalty. The Consumer Advocate did not present any compelling evidence of other cases that should be considered when deciding whether to impose a civil penalty, or the amount of the penalty that should be imposed.

It cannot be said that this case necessarily involves an inadvertent error as discussed by the Board in Office of Consumer Advocate v. Qwest Corp., Docket No. FCU-02-22, *Order Denying Petition for a Proceeding to Impose Civil Penalties* (June 24, 2003) (Qwest), because we do not know whether Ms. Johnson intentionally lied to Dr. Kilaru or was merely mistaken as to the correct rates. However, since the evidence does not show conclusively that there was anything other than a mistake by Ms. Johnson, the remedy discussed by the Board in the Qwest order is considered here. In the Qwest order, the Board stated that many slamming cases appeared to be the result of inadvertent errors that would not be deterred by civil penalties. In such cases, the Board said, the appropriate remedy is to make the customer whole, since the error is clearly not the customer's. The Board stated that it did not believe the legislature intended to impose a strict liability standard where every violation of the statute would necessarily lead to imposition of a civil penalty.

It does not appear that imposition of a civil penalty is necessary to motivate MCI to provide additional or different training to its staff, because it already provides comprehensive training. Although it compensates its telemarketers partly on sales, it

already has a compensation structure that prevents telemarketers with escalations from receiving daily bonuses and that makes it unlikely the telemarketer would receive a cycle bonus. It monitors its telemarketing calls. If a telemarketer has an escalation, it provides additional training. MCI and Reese Brothers require employees to adhere to codes of conduct and Ms. Johnson signed documents stating she would adhere to the codes of conduct.

Although it could be said that imposition of a civil penalty would serve a valid punitive purpose, this would make more sense if the evidence showed Ms. Johnson intentionally lied to Dr. Kilaru, if MCI's training or compensation scheme were inadequate, if MCI had not complied with the third-party verification and subsequent notification requirement, or if a number of similar complaints showed that MCI was inadequately taking measures to comply with the law. It does not make sense to impose punishment when the most that can conclusively be said is that Ms. Johnson made a mistake and that MCI already provides adequate training to its marketers and a compensation scheme that appropriately prevents marketers with an escalation from receiving sales bonuses. The Consumer Advocate did not present persuasive evidence of a number of similar complaints regarding MCI. Therefore, no civil penalty should be imposed in this case.

### **FINDINGS OF FACT**

1. On November 16, 2002, a telemarketer named Ms. Debra Johnson called Dr. Syam Kilaru on behalf of MCI. (Informal Complaint; Tr. 16, 21, 22, 36, 71-72). Ms. Johnson worked for Reese Brothers. (Tr. 36, 37). MCI contracted with

Reese Brothers to telemarket MCI's telecommunications services and products.

(Tr. 36, 37, 50–52; Exhibits 7, 8, 8B).

2. The telemarketer told Dr. Kilaru if he changed his telephone service from AT&T to MCI he would receive the following benefits: 1) one hour free calling to India per month for three months; 2) an international long distance rate of \$.37 per minute for calls to India at any day and time; and 3) 200 free domestic long distance minutes per month and seven cents per minute thereafter for a monthly fee of \$12.95. (Informal Complaint; Tr. 16, 22, 46).

3. Based on these promises, Dr. Kilaru agreed to switch his telephone service to MCI. (Informal Complaint; Tr. 16, 17, 19). If the telemarketer had not promised him a rate of \$.37 per minute for calls to India and one hour of free calling to India per month, Dr. Kilaru would not have switched his long distance telephone service to MCI. (Tr. 19).

4. After the marketing part of the call, Dr. Kilaru was transferred to RMH, a third-party verification (TPV) company that MCI uses. (Tr. 6,7, 36, 39; Exhibit 105; TPV call recording). The verification part of the call was recorded, although the marketing part of the call was not. (Tr. 17, 36, 39, 46, 72-73; Exhibits 12, 13, 105; TPV call recording). During the verification part of the call, Dr. Kilaru agreed that he was changing his local toll, long distance, and international long distance telephone service to MCI. (Exhibit 105; TPV call recording; informal complaint). The third-party verifier stated MCI would mail Dr. Kilaru a welcome packet and general service agreement approximately one week after service had started. (Exhibit 105; TPV call

recording). The verifier stated Dr. Kilaru's plan gave him 200 minutes of domestic long distance calls per month for a charge of \$12.95 per month. (Exhibit 105; TPV call recording). The verifier stated Dr. Kilaru's international calling plan had a monthly fee of \$2, and Dr. Kilaru agreed to the fee. (Exhibit 105; TPV call recording). The verifier did not state any per minute rate for calls to India or that Dr. Kilaru's plan included one hour free calling to India once per month for three months. (Exhibit 105; TPV call recording).

5. MCI sent Dr. Kilaru a welcome packet five or six business days after the marketing call, but Dr. Kilaru did not review it. (Tr. 22, 23, 36; Exhibit 104). The welcome packet states that the rate for calls to India is \$.49 per minute Monday through Friday, and \$.42 per minute on weekends. (Tr. 36; Exhibit 104). The welcome packet also stated that Dr. Kilaru would receive 200 minutes of domestic long distance calls per month for \$12.95 per month and his international calling service had a monthly fee of \$2. (Exhibit 104). The welcome packet did not state that Dr. Kilaru would receive one hour free calling to India once per month for three months, although it did state he received a bonus of a free month of domestic direct-dialed state-to-state, instate and local toll calls. (Exhibit 104).

6. On January 8, 2003, Dr. Kilaru filed a complaint with the Board, in which he stated MCI did not give him one hour free calling to India per month for three months and did not give him a rate to India of \$.37 per minute as promised. (Informal Complaint file). Dr. Kilaru complained MCI charged him a very high bill. (Informal Complaint). He also complained that when the connection to India was not

good, his wife told the MCI operator, the MCI operator helped her get a good connection, and for that Dr. Kilaru was charged for an operator-assisted call. (Informal Complaint). Dr. Kilaru included copies of the bills he received from MCI with his complaint. (Informal Complaint). MCI billed Dr. Kilaru \$.49 and \$.42 per minute for direct-dialed calls to India, \$13.48 for one minute for one call to India, and \$5.176 per minute for one call to India. (Informal Complaint; Tr. 36).

7. Dr. Kilaru does not know whether the telemarketer was intentionally trying to mislead him or made a mistake when she quoted him the rate of \$.37 per minute for calls to India. (Tr. 22).

8. The telemarketer no longer works for Reese Brothers or MCI and did not testify. (Tr. 41, 46; Exhibit 4).

9. Dr. Kilaru was a credible witness. He appeared to be truthful. His informal complaint was clear and specific. His testimony was internally consistent and consistent with the informal complaint he filed with the Board. He testified his recollection regarding the contents of his complaint was better at the time of the complaint than at the time he filed his prefiled testimony. When he did not know the answer to a question, Dr. Kilaru admitted it. He did not embellish his story. Dr. Kilaru was the only participant in the telemarketing conversation to testify. The undersigned administrative law judge believes Dr. Kilaru told the truth and believes MCI's telemarketer promised him an international rate of \$.37 per minute for calls to India and three free hours of calls to India if he switched to MCI. (Informal Complaint file; Testimony of Dr. Kilaru, Tr. 13-26; Tr. 46).

10. There is no evidence in the record as to whether the telemarketer mistakenly told Dr. Kilaru his rate for calls to India would be \$.37 per minute and he would receive one hour of free calling to India per month for three months, or whether she intentionally misled Dr. Kilaru to persuade him to switch his service to MCI. (Tr. 22, 41, 42, 46).

11. As part of the informal settlement of this case, MCI re-rated Dr. Kilaru's calls to India for his November and December 2002, bills to \$.37 per minute, crediting his account in the amount of \$219.27. (Tr. 36, 95-97; Exhibit 21; Informal Complaint file). However, MCI stated that future bills would be at the international rates listed in the service agreement. (Tr. 36, 37; Informal Complaint file). MCI did not provide Dr. Kilaru with one hour free calling to India for three months. (Tr. 120).

12. MCI sent Dr. Kilaru collection letters in December 2003 and January 2004 that stated Dr. Kilaru owed MCI \$142.45. (Tr. 93-95; Exhibit 18). As of the date of the hearing, MCI is holding this balance from collections until this case is resolved. (Tr. 93-97).

13. As of the date of the hearing, MCI was no longer Dr. Kilaru's telephone company. (Tr. 24).

14. Employees who worked for Reese Brothers in November 2002, including Ms. Johnson, the telemarketer who called Dr. Kilaru, were paid an hourly wage and were eligible to receive daily and cycle sales bonuses if they met certain sales and quality criteria. (Tr. 57-68, 99, 111-114, 121; Exhibits 3, 28, 106, 107, 108; MCI Responses to Additional Questions). A cycle is one-half month. (Tr. 65). If an

employee received an escalation, the employee was not eligible for a daily sales bonus, and it would be highly unlikely, although not impossible, that an employee would qualify for a cycle sales bonus. (Exhibit 3A).

15. MCI compensated Reese Brothers based upon the number of hours that sales representatives at Reese Brothers were telemarketing MCI's products and services. (Tr. 117; Exhibits 8B, 9). MCI also provided incentives or imposed penalties based upon sales and quality performance standards. (Tr. 117-119; Exhibits 8B, 9).

16. MCI attempts to prevent its telemarketers from providing incorrect information to prospective customers through training programs. (Tr. 73-84; Exhibits 28, 100-102, 109). Telemarketers receive this training whether they work for Reese Brothers or directly for MCI. (Tr. 80). Ms. Johnson received new hire training and was tested at the end of the training. (Tr. 84-86; Exhibit 111). MCI also monitors some telemarketing calls. (Tr. 84). It provides additional training, coaching, and monitoring to telemarketers who have had an escalation that did not result in job termination. (Tr. 83-84). MCI and Reese Brothers require employees to adhere to codes of conduct and Ms. Johnson signed documents stating she would adhere to the codes of conduct. (Tr. 86-87; Exhibit 112).

### **CONCLUSIONS OF LAW**

1. Iowa Code § 476.103(1) provides that the Utilities Board (Board) may adopt rules to protect customers from unauthorized changes in telecommunications service.

2. Iowa Code § 476.103(2) provides that a change in telecommunications service includes, among other things, the designation of a new telephone service provider to a consumer, including the initial selection of a service provider.

3. Iowa Code § 476.103(3) provides that the Board shall adopt rules prohibiting unauthorized changes in telecommunications service and the rules shall be consistent with Federal Communications Commission (FCC) regulations regarding procedures for verification of customer authorization for a change in service.

4. Unauthorized change of a customer's telephone service provider is commonly called "slamming," which is defined in the Board's rules as: "the designation of a new provider of a telecommunications service to a customer, including the initial selection of a service provider, without the verified consent of the customer." 199 IAC 22.23(1).

5. 199 IAC 22.23(2) provides that no service provider shall submit a preferred carrier change order to another service provider unless the change has been confirmed by one of the methods listed in the rule, including qualified third-party verification.

6. Iowa Code § 476.103 and 199 IAC 22.23 do not require any particular intent on the part of the slamming entity. Consumer Advocate v. Qwest Corporation and MCI WorldCom Communications, Inc., FCU-02-5, *Order Docketing Complaint, Requiring Additional Information, and Assigning to Administrative Law Judge*, p. 6 (May 14, 2002).

7. Although MCI complied with the third-party verification requirement, the switch was not actually authorized or consented to within the meaning of Iowa Code § 476.103 and 199 IAC 22.23, since Dr. Kilaru would not have agreed to the switch if he had not received the promises of a \$.37 per minute rate for calls to India and three hours of free calling to India. Therefore, MCI's switch violated Iowa Code § 476.103 and 199 IAC 22.23. Therefore, MCI should not receive any benefit from its telemarketer's mistake or intentional misstatement, and must credit Dr. Kilaru's account so it has a zero balance.

8. Iowa Code § 476.103(4)(a) states that the Board may levy a civil penalty if it finds a service provider violated the statute, a Board rule, or a Board order. This section requires the Board to exercise its discretion when determining whether to impose a civil penalty. Consumer Advocate v. Qwest, FCU-02-22, *Order Granting Request for Leave to Amend and Denying Request for Reconsideration*, p. 3 (May 28, 2003). Although it is a close case, no civil penalty should be imposed.

**IT IS THEREFORE ORDERED:**

1. Arguments in briefs not addressed specifically in this proposed decision are denied, either as not supported by the evidence or as not being of sufficient persuasiveness to warrant comment.

2. MCI must credit Dr. Kilaru's account so it has a zero balance and may not pursue collection regarding his account.

3. MCI must inform each collection agency or credit bureau with which it has had contact regarding Dr. Kilaru's account that his account balance is zero and

no further collection activities are to be pursued. These actions must be taken as quickly as possible and no later than 15 days after the issuance of this decision.

4. MCI should consider providing additional training on international calling rates to its telemarketers and those employed by Reese Brothers.

5. A civil penalty is not assessed.

**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 4<sup>th</sup> day of November, 2004.