STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. MCI WORLDCOM, INC., Respondent.	DOCKET NO. FCU-03-21

ORDER AFFIRMING PROPOSED DECISION AND ORDER

(Issued March 25, 2005)

STATEMENT OF THE CASE

On March 24, 2003, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed with the Utilities Board (Board) a petition for proceeding to consider a civil monetary penalty against MCI WorldCom, Inc. (MCI), pursuant to Iowa Code § 476.103 (2003), for an alleged violation of the Board's slamming rules.

On January 20, 2004, the Board docketed the proceeding as a formal contested case and, on March 29, 2004, the Board assigned the docket to its administrative law judge (ALJ) to establish a procedural schedule, set a hearing date, and conduct the proceedings. A hearing was held in this docket on July 14, 2004. Supplemental testimony was filed by MCI on July 28, 2004, in response to questions

raised at the hearing and a correction to that testimony was filed on August 6, 2004. Post-hearing briefs were filed by both parties on August 13, 2004, and reply briefs were submitted on August 23, 2004.

On November 4, 2004, the ALJ issued a proposed decision stating that MCI made an unauthorized change to a customer's long distance service in violation of Iowa's anti-slamming law, Iowa Code § 476.103 (2003). The proposed decision also stated that civil penalties were not appropriate in this case.

Subrule 199 IAC 7.8(2) provides that appeals from a proposed decision of the ALJ must be filed within 15 days of the date the proposed decision is issued. An appeal was timely filed by Consumer Advocate on November 12, 2004. MCI also filed a timely appeal of the proposed decision on November 19, 2004, in addition to a response to Consumer Advocate's appeal. Both Consumer Advocate and MCI requested an opportunity to file briefs.

Pursuant to 199 IAC 7.8(2)"d," on December 1, 2004, the Board issued a ruling identifying the issues to be decided on appeal as "whether MCI violated Iowa Code § 476.103 and Board rule 199 IAC 22.23," and "whether civil penalties should be assessed against MCI." The parties filed initial briefs on January 18, 2005, and reply briefs on February 8, 2005.

SUMMARY OF FACTS

On January 8, 2003, Dr. Syam Kilaru filed a written complaint with the Board alleging that he was induced to switch his long distance telephone service from AT&T

Communications of the Midwest, Inc. (AT&T), to MCI by a telemarketer who represented that Dr. Kilaru would receive a rate of $.37 per minute for calls to India and one hour per month of free calling to India for three months. Dr. Kilaru alleged that based on this offer, he switched his long distance service to MCI, but MCI did not make good on the offer. Board staff identified the matter as C-03-10, and, pursuant to Board rules, on January 10, 2003, forwarded the complaint to MCI for response.

MCI responded on January 31, 2003, stating that its records show that Dr. Kilaru's long distance service was switched from AT&T to MCI following a third-party verification call. The third-party verification call confirmed that Dr. Kilaru was the authorized decision maker for that phone number and that the new rates with MCI would be $12.95 per month for domestic calling, which included 200 free minutes per month with additional minutes to be billed at $.07 per minute, and an international calling plan billed at $2 per month. MCI further stated that a welcome packet was sent to Dr. Kilaru which specified that the rates for calls to India on weekdays were to be billed at $.49 per minute and calls to India on weekends were to be billed at $.42 per minute. MCI also stated that a review of Dr. Kilaru's account showed that the domestic calls were billed correctly, however, the calls to India were not billed correctly and a credit of $219.27 was placed on Dr. Kilaru's account.

On March 10, 2003, Board staff issued a proposed resolution describing these events and proposing that the credit offered by MCI represented a fair resolution of the situation.

SUMMARY OF ARGUMENTS

MCI asserts that the ALJ erred in her legal conclusion that MCI violated Iowa Code § 476.103 and 199 IAC 22.23. Specifically, MCI states that it was not in violation of any specific provision of § 476.103. In addition, MCI states that it complied with the requirements of 199 IAC 22.23 and, therefore, was not in violation of the Board's rule.

Consumer Advocate asserts that Iowa law adequately protects consumers from unauthorized changes to telecommunications services and that there is no legal basis for MCI's assertions.

Consumer Advocate asserts that the ALJ erred in refusing to assess civil penalties against MCI. Consumer Advocate argues that the assessment of a penalty is supported by the evidence in this docket and furthers public policy and the enforcement of Iowa's slamming laws.

MCI responds by stating that there is no basis for the assessment of civil penalties in this case. Specifically, MCI maintains that it did not violate either Iowa law or the Board's rules and, therefore, there can be no assessment of civil penalties.

ANALYSIS

1. Did MCI violate Iowa Code § 476.103 and Board rule 199 IAC 22.23?

MCI relies, in part, on the argument that the D.C. Circuit's decision in AT&T Corp. v. FCC, 323 F.3d 1081 (D.C. Cir. 2003), requires only that a carrier employ approved verification procedures before changing a customer's telephone service

provider, regardless of whether the underlying authorization for that change was valid. MCI argues that neither the language of Iowa Code § 476.103 nor Board rule 199 IAC 22.23 impose additional requirements on carriers beyond third-party verification, a basic requirement which MCI maintains it met. MCI also asserts that because it performed all the prescribed requirements set forth by statute and rule, MCI was not in violation of Iowa Code § 476.103 or 199 IAC 22.23.

MCI's arguments on appeal are substantially similar to those raised during the course of the hearing. The ALJ provided a thorough and detailed analysis of MCI's arguments and determined that "although MCI complied with the third-party verification requirement, the [change in service] was not actually authorized or consented to within the meaning of Iowa Code § 476.103 and 199 IAC 22.23." (Proposed Decision p. 24). Therefore, the change MCI made to its customer's long distance service violated Iowa Code § 476.103 and 199 IAC 22.23. (Proposed Decision, p. 43).

MCI did not raise any new arguments regarding this issue and the ALJ thoroughly discussed this issue in its decision. The Board does not find any reason to alter the ALJ's findings with respect to MCI's violation of Iowa Code § 476.103 and 199 IAC 22.23.

2. Should civil penalties be assessed against MCI?

Consumer Advocate maintains that civil penalties against telecommunications carriers that make unauthorized changes to customers services are necessary to ensure compliance with the law and deter future violations. Consumer Advocate

argues that making a customer whole (i.e., crediting the customer all costs associated with an unauthorized change in service) is not enough to deter future slamming violations and Consumer Advocate provides case law from around the country that supports the notion that civil penalties serve as a deterrent for future transgressions.

Consumer Advocate also claims that the ALJ's proposed decision effectively imposes a burden on Consumer Advocate to prove that the telemarketer in this case acted with an intent to deceive AT&T's customer. Consumer Advocate asserts that the circumstantial evidence in this case is sufficient to support an inference of intent.

The ALJ gave careful consideration to the facts of this case and Consumer Advocate's request for civil penalties. The ALJ found that "[a]lthough 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." (Proposed Decision p. 33). The ALJ determined that the evidence demonstrated that MCI's telemarketer gave the customer incorrect information, but there was no evidence as to whether the telemarketer acted with the intent to deceive the customer. (Proposed Decision p. 33). In addition, the ALJ found that even though MCI sought collection from the customer on some portion of the disputed bill, MCI provided a partial credit to the customer's bill in attempt to resolve the matter and that MCI's history of prior alleged slamming violations were not relevant to an assessment of a civil penalty. (Proposed Decision pp. 34-35).

The Board does not agree with Consumer Advocate's assertion that this decision imposes a burden on Consumer Advocate to prove an intent to deceive on the part of MCI's telemarketer. The ALJ discussed the telemarketer's intent in the proposed decision and determined that the evidence does not show that there was anything other than a mistake committed by MCI's telemarketer. The ALJ reasoned that civil penalties would not serve to deter future inadvertent errors. The Board finds no reason to overturn the ALJ's decision regarding the assessment of civil penalties.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The proposed decision and order issued by the administrative law judge on November 4, 2004, is affirmed as provided in this order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Margaret Munson
Executive Secretary, Deputy

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 25th day of March, 2005.