

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="padding-left: 40px;">Complainant,</p> <p style="padding-left: 40px;">vs.</p> <p>USA VOICEMAIL SERVICE,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-04-65</p>
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PROCEDURAL ORDER AND NOTICE OF HEARING

(Issued April 12, 2005)

Background

On November 5, 2004, Mr. Curtis McClurg submitted a complaint to the Utilities Board (Board) disputing charges on his local telephone bill that appeared to be for voice mail service. Mr. McClurg stated that he did not receive an offer for voice mail and did not sign up for voice mail.

The details of the complaint are contained in informal complaint file number C-04-250, 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. Through correspondence with Mr. McClurg's local telephone service provider and OAN Service, Inc., a company identified on Mr. McClurg's telephone bill, Board staff learned the disputed charges were submitted on behalf of USA Voicemail

Service (USA Voicemail). Board staff forwarded the complaint to USA Voicemail for response on November 30, 2004.

On December 6, 2004, USA Voicemail filed its response with the Board. USA Voicemail stated the account was opened through an online application on August 18, 2004, and was cancelled on December 2, 2004. USA Voicemail stated it had processed a credit of \$51.80 back to the account for the billings of August, September, October, and November. It attached a copy of what it stated was the online application.

On December 21, 2004, Board staff issued a proposed resolution concluding that USA Voicemail's response was insufficient proof of authorization to charge for the services and that cramming had occurred. Staff stated that it could not determine if information on the web page was enough to clearly indicate what Mr. McClurg was signing up for and it could not determine if the web page was combined with inducements. Staff noted OAN provided a full credit on the account and that USA Voicemail had closed the account. Staff stated USA Voicemail was prohibited from pursuing collection activity in relation to the charges and notified USA Voicemail that the violation could be considered by the Board in any future proceeding to determine whether civil penalties should be levied.

On December 28, 2004, USA Voicemail provided Board staff with additional information stating that, during a survey, Mr. McClurg had requested \$1,000 in grocery coupons with the voicemail service. USA Voicemail enclosed a copy of a web page sample it stated included disclosure of the cost of the voicemail service.

On December 28, 2004, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) petitioned the Board to commence a formal proceeding to consider a civil penalty for a cramming violation. The Consumer Advocate asserted the proposed resolution was correct as far as it goes, but should be augmented with a civil penalty, because a credit alone will not stop the unlawful practice. The Consumer Advocate asserted that a meaningful civil penalty is necessary to ensure compliance and deter future violations.

On December 29, 2004, Board staff stated in a letter to USA Voicemail that it would not change the proposed resolution based on the additional information. Staff stated it appeared that USA Voicemail did not conform to the requirements of 199 IAC 22.23(2) and staff continued to categorize the case as a cramming violation.

On February 1, 2005, the Board issued an order finding sufficient information to warrant further investigation, docketing the case for formal proceedings and ordering USA Voicemail to file a response to the Consumer Advocate's petition by March 2, 2005. The Board granted an extension of this deadline pursuant to USA Voicemail's motion.

USA Voicemail filed its response to the petition on March 18, 2005. USA Voicemail stated Mr. McClurg signed up for voicemail service on August 18, 2004, "through a promotional offer whereby he filled out a survey that provided him with \$1,000 in grocery coupons." USA Voicemail stated the request came from a certain email address and that Mr. McClurg had provided the last four digits of his social security number, home telephone number, and email address. USA Voicemail

alleged Mr. McClurg selected a box that stated the charge for the voicemail service was \$12.95 per month. Attached to the response as "Exhibit A" was what the company alleges to be the Internet letter of authorization that Mr. McClurg saw and completed when he signed up for the service. USA Voicemail stated that a "screen shot" copy of Mr. McClurg's customer information was attached as "Exhibit B," although USA Voicemail stated that it was not alleging that Exhibit B is the letter of authorization. USA Voicemail also included a decision of the Texas Public Utility Commission finding that the company had provided sufficient documentation to prove compliance with Internet enrollments in what USA Voicemail characterized as a "virtually identical" case. USA Voicemail stated it hoped the information provided was sufficient to allow the complaint to be withdrawn.

On March 29, 2005, the Consumer Advocate filed a reply memorandum responding to USA Voicemail's information. The Consumer Advocate stated that the company's Exhibit A did not appear on Mr. McClurg's computer screen on August 18, 2004, Mr. McClurg never completed Exhibit A and did not authorize the charges, and the telephone number USA Voicemail alleges Mr. McClurg provided had not been his telephone number since March 24, 2003. The Consumer Advocate requested that the matter be set for hearing.

On April 7, 2005, the Board issued an order assigning the case to the undersigned administrative law judge for further proceedings.

Pursuant to the Board's order, Iowa Code §§ 476.3 and 476.103 (2005), 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.

The issues

The issues in this case generally involve USA Voicemail's placement of charges for voicemail service on Mr. McClurg's telephone bills, whether USA Voicemail complied with applicable law when it did so, whether USA Voicemail provided acceptable proof of authorization to place its charges on Mr. McClurg's telephone bills in accordance with applicable law, whether imposition of a civil penalty is appropriate, the factors regarding the amount of civil penalty in Iowa Code § 476.103(4)(b), and what should be done to resolve the case. Other issues may be raised by the parties prior to and during the hearing.

Prepared testimony and exhibits

All parties will have the opportunity to present and respond to evidence and make argument on all issues involved in this proceeding. Parties may choose to be represented by counsel at their own expense. Iowa Code § 17A.12(4). The proposed decision that will be issued in this case must be based on evidence contained in the record and on matters officially noticed. Iowa Code §§ 17A.12(6) and 17A.12(8).

The submission of prepared evidence prior to hearing helps identify disputed issues of fact to be addressed at the hearing. Prepared testimony contains all

statements that a witness intends to give under oath at the hearing, set forth in question and answer form. When a witness who has submitted prepared testimony takes the stand, the witness does not ordinarily repeat the written testimony or give a substantial amount of new testimony. Instead, the witness is cross-examined concerning the statements already made in writing. The use of prepared testimony and submission of documentary evidence ahead of the hearing prevents surprise at the hearing and helps each party to prepare adequately so a full and true disclosure of the facts can be obtained. Iowa Code §§ 17A.14(1) and (3).

Party status and communication with the Board

The Consumer Advocate and USA Voicemail are currently the parties to this proceeding. If Mr. McClurg wishes to be a party to this case, he 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. The undersigned notes that the response filed by USA Voicemail on

March 18, 2005, was filed by attorney Mr. Scott Shaffer, The Lustigman Firm, P.C., 149 Madison Ave, Suite 805, New York, New York 10016-6713. Mr. Shaffer presented no evidence that he is licensed to practice in the state of Iowa. Therefore, he must file a written request for permission to appear with the Board and the written appearance of a resident attorney must be provided for service pursuant to Iowa Admission to the Bar rule 31.14(2). 199 IAC 7.2(7)"e."

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-04-250, 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.

All parties should examine Iowa Code §§ 476.3, 476.103, and Board rules at 199 IAC 1.8 and 22.23, and Chapters 6 and 7, for substantive and procedural rules that apply to this case.

Iowa Code § 476.103(4)(a) provides that a service provider who violates a provision of the cramming statute, a rule adopted pursuant to the statute, or an order lawfully issued by the Board¹ pursuant to the statute, is subject to a civil penalty of not more than \$10,000 per violation, which, after notice and opportunity for hearing, may be levied by the Board. Each violation is a separate offense. Iowa Code § 476.103(4)(b) provides that a civil penalty may be compromised by the Board. It further provides that in determining the amount of the penalty, or the amount agreed on in a compromise, the Board may consider the size of the service provider, the

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

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.

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 a civil penalty 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 April 29, 2005, USA Voicemail 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 number 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. In addition, on or before April 29, 2005, since Mr. Scott Shaffer, attorney for USA Voicemail, is not licensed to practice law in Iowa, he must file a written request for permission to appear with the Board and must provide the written appearance of a resident attorney for service pursuant to Iowa Admission to the Bar rule 31.14(2). 199 IAC 7.2(7)"e."

2. The parties are encouraged, but not required, to file a stipulation of facts. Such stipulation must be filed on or before April 29, 2005.

3. If Mr. McClurg wishes to become a party to this case, he must file written notice with the Board no later than April 29, 2005.

4. On or before May 13, 2005, 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 Mr. McClurg becomes a party to this case and wishes to file prepared testimony and a brief, he must do so on or before May 13, 2005.

5. On or before May 31, 2005, USA Voicemail must file prepared testimony and exhibits and a prehearing brief. USA Voicemail 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, USA Voicemail must address the issues discussed above, support each of the allegations made in its responses, and file any other evidence not previously filed. USA Voicemail should use exhibit numbers 100 and following. In its prehearing brief, USA Voicemail 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 a witness connected to the hearing by telephone conference call, the party must file written notice with the Board no later than June 1, 2005.

7. If the Consumer Advocate or any intervenor is going to file prepared rebuttal testimony and exhibits or a rebuttal brief, it must do so by June 14, 2005.

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 Thursday, June 23, 2005, commencing at 9:30 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 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 12th day of April, 2005.