

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: MCI WORLDCOM COMMUNICATIONS, INC.	DOCKET NO. C-04-273
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**ORDER DENYING REQUEST FOR FORMAL PROCEEDING
AND CLARIFYING PROPOSED RESOLUTIONS**

(Issued April 28, 2005)

On February 24, 2005, MCI WorldCom Communications, Inc. (MCI), filed with the Utilities Board (Board) a request for formal proceedings pursuant to 199 IAC 6.8(5) and 199 IAC 6.5. Based upon the record assembled in the informal complaint proceedings, the events to date can be summarized as follows:

On December 13, 2004, Sandra Krantz of Sioux City, Iowa, filed a complaint with the Board disputing charges of over \$600 from MCI, her long distance provider, for international calls to Austria and the Netherlands she claims not to have made. Ms. Krantz stated she does not make international calls. Ms. Krantz speculated that her dial-up modem had been hijacked¹ and routed through an international number. Pursuant to Board rules, Board staff forwarded the complaint to MCI for a response.

MCI responded to the complaint with a letter dated January 28, 2005, addressed to the customer. In the letter, MCI explained that the customer is

¹ "Modem hijacking" is a computer scam affecting some computer users with dial-up Internet access and can occur when downloaded software disconnects the computer's modem, reconnects it and dials a different phone number, often to international destinations, without the consumer's knowledge.

responsible for the use of her phone and any billing that results from such use. MCI stated that it carried the traffic for the disputed calls over its network and that its billing for those calls was accurate and in good faith.

MCI stated that because the international numbers in question had been associated with modem hijacking, it issued a one-time courtesy credit for the full cost of the calls. MCI noted that when Ms. Krantz first contacted the company about the charges, it re-rated the disputed calls to an international plan rate. The credit as a result of re-rating the calls to a lower rate was \$628. MCI later issued a second credit of \$11.89 to cover any remaining balance. Finally, MCI told the customer that removing the international calling plan that had been added after she first contacted the company would allow an international calling block on the computer line.

On January 31, 2005, Board staff issued a proposed resolution finding MCI in violation of the Board's cramming rules because it failed to show the customer authorized the charges.

On February 8, 2005, MCI responded to the proposed resolution with additional information in a stated effort to clarify its position. MCI provided a copy of the third-party verification call confirming that the customer authorized MCI to be her designated long distance provider. Also, MCI noted that unless a customer requests a restriction, the customer will have access to international service. According to MCI, the charges at issue resulted from service initiated or requested by the customer and, for that reason, MCI should not be found to have crammed the international charges on the customer's bill.

On February 10, 2005, Board staff responded to MCI's restatement of its position. Board staff stated that there was no dispute that the customer authorized MCI to be her long distance provider. In response to MCI's assertion that the charges were not crammed because the customer initiated the calls, staff replied that the customer has no control over what calls are made when her computer modem is hijacked. Staff noted that while MCI acknowledged that the numbers in question had been associated with modem hijacking, it had done nothing to block calls to those numbers. Staff concluded that the third-party verification provided by MCI did not change the proposed resolution issued on January 31, 2005.

On February 24, 2005, MCI filed with the Board a request for formal proceeding pursuant to 199 IAC 6.8(5) and 199 IAC 6.5. In the request, MCI states that it credited the customer a total of \$666.95. MCI notes that regardless of the circumstances surrounding the calls, an actual telephone call was made before MCI billed for the calls. MCI claims that the calls were carried over its network, the billing for the calls was accurate and done in good faith, and that no one disputes that the calls originated from the customer's number and equipment.

MCI states that no claim or showing has been made that it is responsible for the hijacking of the customer's modem or for initiating the disputed calls. MCI asserts it has no way to prevent such calls or to know in advance they are unauthorized.

MCI cites 199 IAC 22.23(1), which provides that cramming does not include telecommunications services that are initiated or requested by the customer, and argues that the Board's cramming rules do not apply to long distance calls. MCI

asserts that because the calls were initiated from the customer's home using the customer's equipment, the charges cannot be deemed to be cramming under the Board's rule.

MCI argues that the proposed resolution does not specify any provision of law that MCI violated and an examination of the Board's rules at 199 IAC 22.23 reveals no direct prohibition on cramming. MCI's position is that while the Board has defined cramming at 199 IAC 22.23(1), the rule actually prohibiting unauthorized changes in service only covers slamming.

MCI states that cramming is the addition of a service and, in this case, international calling was part of the normal long distance calling service provided to the customer. MCI asserts that because an additional service was not added, there can be no cramming violation.

In response to Board staff's statement in the February 10, 2005, proposed resolution that the record showed that MCI did nothing to block the calls from going to overseas numbers, MCI states that it placed a block on the numbers to Austria on October 29, 2004, and to the Netherlands on November 19, 2004.

MCI argues that long distance calls by definition are initiated or requested by the customer, and that MCI has no way of distinguishing between legitimate calls and those that are not. MCI states that it cannot be guilty of cramming when all information available to it indicates the calls were initiated by the customer and appropriate for billing. MCI suggests that if this complaint does involve modem hijacking, then it is just as much a victim as the customer because it has no

relationship with the destinations dialed and should not be held liable under the cramming rules for being an unknowing participant in an Internet virus or scheme.

Finally, MCI questions whether the Board has jurisdiction over the disputed international calls. MCI requests that the Board initiate formal proceedings and reverse the staff's proposed findings.

On February 28, 2005, Board staff requested additional information from MCI regarding its billing for the disputed calls, whether any fees other than long distance charges were billed and collected for the hijacking party or any other third party, and whether MCI remitted the money it collected to another party.

On March 1, 2005, Consumer Advocate filed a statement of its position regarding MCI's request for a formal proceeding. Consumer Advocate argues that MCI's request for formal proceedings should be denied. Consumer Advocate's position is that Board staff correctly found a cramming violation and that MCI's argument that the Board's rules do not prohibit cramming is without merit. Suggesting that MCI ignores the relevant half of the statutory definition, Consumer Advocate cites Iowa Code § 476.103(2)"a," in which "change in service" is defined as "the designation of a new provider of a telecommunications service to a consumer, including the initial selection of a service provider, and includes the addition or deletion of a telecommunications service for which a separate charge is made to a consumer account."

Consumer Advocate contends that if the legislature had stopped at the second comma, MCI would be right in its assertion that the statute reaches only slamming,

an unauthorized change in service provider. Consumer Advocate contends that when the legislature directed the Board to adopt rules prohibiting unauthorized changes in service, it directed the Board to adopt rules prohibiting both slamming and cramming. Consumer Advocate states that the board has done so, even though the rules do not contain the exact words, "cramming is hereby prohibited in Iowa."

Consumer Advocate argues that in construing a rule, an agency must consider the whole rule, including the title. Consumer Advocate cites the titles of the relevant rules, 22.23 ("Unauthorized changes in telephone service") and subrule 22.23(2) ("Prohibition of unauthorized changes in telecommunications service") and suggests that because both titles use the term "change in service," they reach both slamming and cramming because the definition of "change in service" reaches both.

Consumer Advocate refutes MCI's claims that Iowa's cramming rules do not apply to long distance calls, arguing that if an added service generates a separate charge on a customer's bill, it is, if unauthorized, a cram.

Consumer Advocate states that accepting MCI's argument that the cramming rules do not apply to long distance calls would leave a sizeable loophole by which unauthorized charges for unauthorized calls would escape scrutiny just because the customer had chosen the company's long distance service.

In response to MCI's suggestion that the Board does not have jurisdiction over a case involving an international call, Consumer Advocate states that the legislature has clearly given the Board jurisdiction to address slamming and cramming violations. Consumer Advocate states that because most slamming and cramming

complaints involve interstate or international services, MCI's position would render state law meaningless.

Consumer Advocate states that it expresses no opinion on the validity of MCI's claims that modem hijacking is a problem beyond its control, that it carried the calls in good faith, has no way of preventing such calls, and cannot distinguish between legitimate and illegitimate calls. Consumer Advocate asserts that it is unwise to pursue every violation to a formal proceeding. Consumer Advocate suggests that whether a problem is beyond MCI's control is relevant to whether a penalty should be assessed, not to the question of the violation. Consumer Advocate states that it is unwise to pursue every violation to a formal proceeding and that it has not sought civil penalties in this case.

On March 16, 2005, the Board received MCI's response to staff's request for additional information about billing for the disputed charges. MCI explains that it billed traditional long distance charges for completed calls from the customer's number to Austria and the Netherlands. The completed calls were billed at tariffed rates for a total of \$560.04, not including taxes and surcharges. MCI also billed for taxes and surcharges, including international mobile termination charges, and a federal universal service fee. MCI states that it did not bill any fees or charges collected for the hijacking party or other third party and that it did not bill on behalf of or for another party. MCI states that it contracts with foreign carriers to terminate calls into their countries, and that rates for terminating calls are calculated according

to the agreements with the foreign carriers. MCI states that the disputed calls were billed in the same manner as any other international long distance calls.

ANALYSIS

Iowa Code § 476.3 (2005) provides, in relevant part, that the Board shall grant a request for formal complaint proceedings whenever the Board determines there are reasonable grounds for investigating a complaint. While it appears that § 476.3 may not directly apply to deregulated services, the Board finds that the statutory standard for granting formal complaint proceedings is appropriate for cases under § 476.103, as well. Here, the Board is unable to find any reasonable grounds for further investigation and will deny MCI's request for formal proceeding. However, the Board does find that there is reason to clarify staff's proposed resolutions to better explain the application of § 476.103 and 199 IAC 22.23 to complaints like this one.

The Board agrees with its staff that the customer did not authorize the charges at issue and that proposed finding will be affirmed. However, because there is no evidence or suggestion in this record that MCI was in any way responsible for downloading the software onto the customer's modem or otherwise initiating the calls from the customer's line, the charges it made to the customer's account were not "crammed" onto the account in the traditional sense. MCI did nothing other than what it was authorized to do by transmitting and billing for long distance calls made from the customer's equipment. The Board concludes, based on the record in this case, that MCI and the customer are in the same general position: Both are victims of a scam of unknown origin.

The Board affirms staff's conclusion that the charges were not authorized, but clarifies staff's proposed resolutions dated January 31 and February 10, 2005, to state that because MCI was not the party that instigated the act that resulted in the unauthorized charges, MCI did not directly violate the Board's proscription against cramming. The Board observes that this is an isolated complaint against the company. Further, MCI fully credited the customer; informed the customer about steps that can be taken to prevent further calls and charges caused by modem hijacking; stated that it has no relationship with the hijacking entity or other third party that initiated the calls; and cooperated with the Board's inquiries about this matter. MCI also demonstrated in its response to Board staff's inquiry about billing for the calls that it treated the calls as it would any other long distance international calls and has no relationship with the destinations of the telephone numbers at issue.

Further, the Board observes that a company that incurs the cost of crediting customers for unauthorized charges will have an incentive to prevent the recurrence of modem hijacking or other means of causing any unauthorized change in service.

This analysis does not mean that an unauthorized change in service did not occur in this case. There can be no dispute that the bill sent to Ms. Krantz "includes the addition . . . of a telecommunications service for which a separate charge is made," to-wit, the long distance calls, and was therefore a "change in service" as defined in § 476.103(2)"a." It is equally clear, on this record, that Ms. Krantz did not authorize the change. The Board's rules, adopted pursuant to § 476.103(3), prohibit unauthorized changes. (See subrule 22.23(2), entitled "Prohibition of unauthorized

changes in telecommunications service.") But it is also clear, on this record, that MCI is not the cause of the unauthorized change and should not be labeled a crammer.

The Board emphasizes that its discussion is based on the record in this isolated complaint against MCI, where no suggestion has been made that MCI initiated the unauthorized change in service and where the company has fully credited the customer. While it finds no fault of the part of MCI in this case, the Board will continue to monitor and maintain jurisdiction over other cases involving claims of modem hijacking or other means of cramming charges onto telephone bills.

It is easy to imagine other circumstances where a charge appearing on a customer's bill would more readily be classified as a cram committed by the company that issued the bill. For example, there may be instances where a company is somehow related to the hijacking party or the destination of the calls, has some role in causing the calls to be initiated, or has profited from the hijacking or other scheme. Under those circumstances, the company's acts would more readily fall within the Board's proscription of cramming. These are only examples of some of the factors that might affect the outcome. Each case will have to be judged on its own merits.

Finally, the Board concludes that Iowa law, including the relevant statute and regulations, prohibits cramming as one form of unauthorized change in telecommunications service. Any further clarification of that position will be made in an anticipated rule making proceeding revising 199 IAC 22.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The proposed resolutions issued by Board staff on January 31 and February 10, 2005, are affirmed insofar as they conclude that the disputed charges in File C-04-273 were not authorized by the customer.
2. The proposed resolutions issued by Board staff on January 31 and February 10, 2005, are clarified as discussed in the body of this order.
3. MCI WorldCom Communications, Inc.'s, request for formal proceeding filed on February 24, 2005, is denied.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 28th day of April, 2005.