

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. ONE CALL COMMUNICATIONS, INC., Respondent.	DOCKET NOS. FCU-04-54 FCU-04-63 FCU-04-64 FCU-05-1 FCU-05-3 FCU-05-8 FCU-05-12 FCU-05-15 FCU-05-24 FCU-05-25
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**ORDER GRANTING MOTION TO COMPEL AND
MOTION FOR A PROCEDURAL ORDER**

(Issued July 7, 2005)

On May 27, 2005, the Utilities Board (Board) issued an order granting the Consumer Advocate Division of the Department of Justice's (Consumer Advocate) petitions for formal proceedings in Docket Nos. FCU-05-24 and FCU-05-25, consolidating those two dockets with the remaining dockets, for which the Board had previously issued docketing orders, denying motions to dismiss filed by One Call Communications, Inc. (One Call) in Docket Nos. FCU-05-24 and FCU-05-25, and assigning the case to the undersigned administrative law judge. In the order, the Board stated: "It appears that further investigation of these complaints is necessary, in order to allow an opportunity to more precisely determine the true nature of the

calls, the reason the calls were billed as hotel/motel guest calls, and the capacity of a carrier such as One Call to prevent these types of calls and related charges."

MOTION TO COMPEL

On June 10, 2005, the Consumer Advocate filed a motion for an order compelling One Call to produce its most recent audited financial statement and any subsequent unaudited financial statements. The Consumer Advocate stated it had submitted a data request to One Call for the financial statements and One Call had objected to the request as irrelevant and harassing and also that the request sought proprietary and confidential information for no legitimate purpose. The Consumer Advocate argued the documents were relevant because there is a need to investigate whether One Call is 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 situation. It therefore argued the requested financial statements are the logical place to begin to examine "profit," company operations, identification of particular problems or business partners, and are as valuable a start in investigation as any other single type of document. The Consumer Advocate argued One Call is one in a chain of companies that ultimately produced the allegedly unauthorized charges and finance is the tie that links the chain. It further argued requesting such documents was not harassing, and attached a protective agreement signed by the parties that it stated protects One Call's proprietary interests and concern for confidentiality.

On June 20, 2005, One Call filed a resistance to the motion to compel. One Call renewed its objections that the request is irrelevant, harassing, and sought proprietary company information for no legitimate purpose and resisted the motion to compel. It argued that One Call is an interstate long distance company and the overall profits of the company are irrelevant to determining financial relationship between One Call and the individual calls involved in this case, the company's overall financial picture does not shine light on individual calls, and the production of the requested documents would not provide any relevant information to the Consumer Advocate that would be helpful in this matter. One Call further suggested that the Consumer Advocate ask more specific questions related to the financial transactions associated with the calls if it is interested in discerning any financial relationship One Call may or may not have with third parties in the case. It argued that providing company-wide financial information is unnecessary and would do nothing to assist the Board or resolve these complaints and requested the motion be denied.

On June 27, 2005, the Consumer Advocate filed a reply to One Call's resistance. It argued One Call misstated the test for relevance, the law favors full access to relevant information, the rules of discovery are to be liberally construed, parties are entitled to discover any information not privileged that is relevant to the subject matter, and relevancy to the subject matter is broader than relevancy to the precise issues in the pleadings. It argued the calls that prompted the complaints are not isolated phenomena divorced from a larger picture. It argued the concerns in the

case include the true nature of the calls, One Call's role in facilitating them, its capacity to prevent them and related charges in the future, whether One Call is related to the hijacking party or the destination of the calls, and whether it has profited from the calls. The Consumer Advocate argued these concerns inform the question of relevancy for the purposes of discovery. It argued financial statements help explain a respondent's motivation, their production would not be burdensome, they are not privileged, and the parties have executed a protective agreement.

Discovery procedures applicable in civil actions are available to the parties in contested cases before the Board. Iowa Code § 17A.13 (2005). "The rules providing for discovery and inspection shall be liberally construed and shall be enforced to provide the parties with access to all relevant facts. Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request." Iowa R. Civ. P. 1.501(2). "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Iowa R. Civ. P. 1.503(1). "As this rule makes clear, a party is entitled to discover any information that is not privileged and that is relevant to the subject matter of the lawsuit. [citation omitted.] Relevancy to the subject matter of the lawsuit is broader than relevancy to the precise issues in the pleadings because the rule allows discovery of inadmissible

information as long as it leads to the discovery of admissible evidence." Mediacom Iowa, LLC, v. City of Spencer, 682 N.W.2d 62, 66 (Iowa 2004).

This case involves the consolidation of ten dockets involving eleven customers who alleged that charges were placed on their telephone bills without their authorization. The charges show several different company names. The Consumer Advocate alleges that One Call may be related to other companies with respect to placement of the charges. Many of the disputed charges were billed as calls to the United Kingdom and several were billed as hotel/motel calls. There are allegations that some billings were related to unsolicited connections to pornographic websites. The case includes a complicated theory called "modem hijacking" that One Call and some customers have suggested is an explanation of how at least some of the charges appeared on the customers' bills. Given the nature and subject matter of this case and the favoring of the law toward liberal interpretation of the discovery rules, One Call's financial statements appear to be relevant to the subject matter of the case. One Call's arguments resisting the motion to compel are not persuasive. The Consumer Advocate's motion to compel should be granted.

The undersigned notes that the protective order filed by the Consumer Advocate does not refer to all the docket numbers in this case. The parties should verify that the protective order applies to all docket numbers.

MOTION FOR A PROCEDURAL ORDER

On June 10, 2005, the Consumer Advocate filed a motion for a procedural order that allows six months of investigation and discovery prior to the presentation of evidence. The Consumer Advocate alternatively moved for a bifurcation of the violation and penalty issues, with only the violation issues to be tried and decided initially. The Consumer Advocate argued that the Board's docketing orders issued in these cases noted that the complaints may involve modem hijacking and stated that further investigation appeared to be necessary to more precisely determine One Call's role in facilitating the calls and its ability to prevent them.

The Consumer Advocate argued that it did not seek further investigation or a penalty and the Board did not order it in MCI Worldcom Communications, Inc., Docket No. C-04-273, "Order Denying Request for Formal Proceeding" (April 28, 2005) (MCI Worldcom Order), because the complaint appeared to be isolated, but that there are a number of considerations that must be addressed in this case in light of the MCI Worldcom Order. These include that each case must be addressed under the rules in place at the time of each violation and whether the allegedly unauthorized charges violate the Board's cramming rules. The Consumer Advocate argued that the sole issue in the violation phase of the case is whether the charges were authorized.

The Consumer Advocate argued there are a number of cases and witnesses requiring greater preparation time than is typical, but that could be done and the

violation phase of the case be brought to hearing in a reasonably short time period. However, the Consumer Advocate argued, the penalty phase will require more time because the Board is asking for an understanding of how the hijacking operates, whether One Call is profiting from it, and what One Call can do to stop the violations. The Consumer Advocate argued that extensive discovery is needed to learn the facts and then determine whether and how to proceed. It argued the facts are largely in One Call's possession and additional discovery will need to be done.

The Consumer Advocate argues the problem is wide in scope, that the Federal Trade Commission and other states are trying to understand how modem hijacking works, the role telecommunications carriers are playing, and what they can do to stop unauthorized charges to their customers. The Consumer Advocate argued the investigation may require inquiry to third parties and cooperative investigation with authorities in other jurisdictions. The Consumer Advocate therefore moved for a procedural order that allowed a six-month period for investigation and discovery or bifurcation of the violation and penalty phases of the case.

On June 20, 2005, One Call filed a resistance to the motion. One Call argued that the Consumer Advocate filed the first petition in this combined docket on November 8, 2004, the first case was docketed on January 13, that One Call responded to 30 data requests in January and February, and that the Consumer Advocate had not sought further discovery or settlement discussions since then. One Call argued the Consumer Advocate has had nearly four months to prepare

witnesses and seek further discovery and has not done so. One Call stated it does not dispute that the problem may exist beyond the borders of Iowa, but that those cases are not the subject of this matter before the Board.

One Call argued that a traditional procedural schedule of one to two months will be sufficient and that it should not bear the burden and expense of the Consumer Advocate's not seeking additional discovery during the past four months. It argued that witness preparation should not take long because the complaints are limited to one or two discrete calls per customer and the issues in each case are rather simple. One Call argued that if the problem is of greater magnitude, the proper course of action is a broader investigation initiated by the Board involving all carriers, rather than trying to solve an industry-wide problem at the expense of One Call through burdensome and protracted investigation. One Call requested that the Consumer Advocate's motion be denied.

On June 27, 2005, the Consumer Advocate filed a reply to One Call's resistance. The Consumer Advocate argued One Call is mistaken about the number of disputed calls and the issues in the case are not simple. It argued it has been diligently pursuing these cases, including sending discovery requests and responding to motions to dismiss filed by One Call, and the Board did not provide the necessary focus for investigation until May 27, 2005, when it assigned the cases to the undersigned administrative law judge for formal proceedings. The Consumer Advocate argued One Call's statement that it had not sought settlement discussions

since February is irrelevant and misleading, and that One Call was invited to participate in settlement conferences with other companies, but declined.

The Consumer Advocate argued that no one had yet found answers to the questions the Board is asking and therefore investigation is needed. The Consumer Advocate stated that the Indiana Office of Utility Consumer Counselor had filed a complaint and request for action with the Indiana Regulatory Commission against One Call based on consumer complaints similar to those in this case. The Consumer Advocate stated a hope that it could coordinate its investigation with Indiana's.

The Consumer Advocate argued that the Board already ruled on One Call's argument that a proper course of action would be a broader investigation involving all carriers by denying One Calls' motions to dismiss. The Consumer Advocate argued bifurcation of the violation and penalty issues has merit and meets the convenience test in Iowa R. Civ. P. 1.914, and One Call did not resist this alternative.

The Consumer Advocate also argued that One Call's discovery responses are not always complete and provided the answer to Data Request No. 49 as an example. The Consumer Advocate argued the response gave no explanation or date and provided no documents. The Consumer Advocate requested that the procedural order include a statement that all discovery responses are expected to be complete. The Consumer Advocate attached copies of Data Requests 9 and 49 and the responses, the complaint and request for commission investigation filed in Indiana, and a subpoena duces tecum issued to OCMC, Inc. by the Nevada Attorney General.

On July 1, 2005, the Consumer Advocate filed a supplement to its motion, in which it stated that an attached email string between the Consumer Advocate and Brenda Spence of Qwest Communications, Inc. (Qwest) illustrated why time is needed for investigation. In the email string, the Consumer Advocate requested information from Qwest regarding five calls billed as hotel/motel guest calls on behalf of Opticom, which the Consumer Advocate understands to be another name for One Call. Qwest responded that it could not answer the Consumer Advocate's questions and suggested other possible sources of information.

As discussed above, this case involves a number of customer complaints, allegations that multiple companies may be involved, and a complicated and as yet unproven theory regarding how some of the charges may have been placed on customers' telephone bills. It appears from the information in the informal complaint files that the customers' accounts have been credited for the amounts of the disputed charges and blocks have been placed on their telephone numbers to prevent future similar charges. The parties should verify that this has been done. Therefore, it does not appear that the customers will be placed at a disadvantage by a six-month delay.

One Call's arguments against a six-month period for investigation are not persuasive. It appears that the Consumer Advocate has been sufficiently diligent in pursuing these cases. This case does not involve modem hijacking with respect to other companies. However, One Call itself has suggested modem hijacking as a theory to explain why at least some of the disputed charges were placed on the

customers' bills. Therefore, this case does involve the modem hijacking theory with respect to One Call and the disputed charges in this case and it is the proper subject of investigation by both parties. The Board has previously denied One Call's motions to dismiss and has docketed this case. Whether or not there should be another broader investigation by the Board as proposed by One Call is irrelevant and does not mean that this case specifically involving One Call and these disputed charges will not proceed. Contrary to One Call's argument, this case does not involve an attempt to solve an industry-wide problem at the expense of One Call through a burdensome and protracted investigation.

The Consumer Advocate's motion for a six-month period of time to investigate the case and pursue discovery appears to be reasonable and should be granted. The Consumer Advocate's alternative motion to bifurcate the violation and penalty phases of the case should be denied because the evidence regarding violation and penalty is too closely related and bifurcation would not be an efficient use of the Board's resources.

When the parties are pursuing and responding to discovery requests, the undersigned expects that both parties will behave professionally and follow the requirements of the Iowa Rules of Civil Procedure in good faith.

The undersigned will not establish a procedural schedule at this time. Rather, the parties will be required to provide a status report five months from the date of this order, and a procedural schedule will be established at that time.

IT IS THEREFORE ORDERED:

1. The motion to compel filed by the Consumer Advocate on June 10, 2005, is hereby granted. One Call shall provide the requested financial statements to the Consumer Advocate within 14 days of the date of this order. The Consumer Advocate shall file a statement with the Board verifying that the protective agreement signed by the parties' covers all dockets in the case within ten days of the date of this order.

2. The motion for a procedural order that allows for six months of investigation and discovery prior to the presentation of evidence filed by the Consumer Advocate on June 10, 2005, is hereby granted. One Call shall file a statement verifying that it has fully credited each customer account for the amount of the disputed calls and placed a block on each customer's telephone number to prevent future similar charges within 14 days of the date of this order.

3. On December 7, 2005, the Consumer Advocate and One Call shall each file a status report regarding the investigation and discovery. In its report, each party shall state whether investigation and discovery is complete, or if incomplete, an estimate of when it will be complete. Each party shall state whether it believes settlement discussion would be productive or whether a procedural schedule should be established. If it takes the position a procedural schedule should be established, the party shall provide a proposed procedural schedule.

DOCKET NOS. FCU-04-54, FCU-04-63, FCU-04-64, FCU-05-1, FCU-05-3,
FCU-05-8, FCU-05-12, FCU-05-15, FCU-05-24, FCU-05-25
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4. The undersigned will issue an appropriate order following the receipt of
the status reports.

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 7th day of July, 2005.