

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: 40px;">vs.</p> <p>VCI COMPANY,</p> <p style="padding-left: 100px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-05-39</p>
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**PROCEDURAL ORDER AND NOTICE OF HEARING**

(Issued August 10, 2005)

**Background**

On May 5, 2005, Ms. Lora Bennett submitted a complaint to the Utilities Board (Board) against VCI Company (VCI), alleging that VCI "took over" her telephone service without her permission. Ms. Bennett's local telephone service was switched to VCI on April 20, 2005. The details of the complaint are contained in informal complaint file number C-05-102, which is incorporated into the record in this case pursuant to 199 IAC 6.7.

Board staff forwarded the complaint to VCI for response. VCI responded that a third-party verification was performed, an account was started, and Ms. Bennett provided a social security number, address, birth date, and existing telephone

number. VCI stated it could not retrieve the recording of the verification because the identification number recorded in its database had not been accurately entered.

On May 27, 2005, Board staff issued a proposed resolution stating that without the proof of authorization, staff had no assurance that the verification was properly completed. Staff concluded that because VCI was unable to produce the independent third-party verification recording in response to Ms. Bennett's complaint, staff would record the case as slamming. Staff directed VCI to fully credit the account and to refrain from any collection activity related to the charges.

On June 3, 2005, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) petitioned the Board to docket the complaint for a proceeding to consider a civil penalty, provide VCI notice and an opportunity for hearing, and affirm the staff determination that VCI committed a slamming violation. The Consumer Advocate asserted the proposed resolution should be augmented with a civil penalty because crediting the account will not by itself stop the unlawful practice of slamming. It asserted that a civil penalty is necessary to ensure compliance and deter future slamming violations.

On July 5, 2005, the Board issued an order finding there were reasonable grounds to warrant further investigation into the matter, docketing the proceeding, granting the Consumer Advocate's petition, and directing VCI to file a response to the petition within 30 days.

VCI filed its response on July 21, 2005, in which it stated that its records showed that Ms. Bennett contacted the company on April 14, 2005, to ask about the

company's telecommunications services. VCI stated that Ms. Bennett provided her social security number, birth date, address, and telephone number. VCI stated it could provide its records of Ms. Bennett's information as proof she initiated contact with the company should the Board issue an appropriate protective order.<sup>1</sup> It stated that Ms. Bennett was transferred to VCI's independent third-party verification company to verify her consent to subscribe to VCI's services. VCI stated that a recording of this conversation was created, but because the customer service representative mistyped the confirmation number, VCI is unable to access the recording. It stated the employee who created the error is no longer with the company.

VCI asserted that because it does not telemarket or obtain customer lists that might include personal information, the only means by which it could have obtained Ms. Bennett's personal information is by Ms. Bennett contacting the company. VCI does not contest the proposed resolution's finding of slamming and asked the Board to approve the proposed resolution. It requested the Board not to impose a civil penalty, and argued a civil penalty is not appropriate. VCI argued because the facts, circumstances, law and issues presented in the cases cited by the Consumer Advocate are irrelevant to this case, the Board should not consider the cases as binding authority for the proposition that a civil penalty is meaningful, appropriate, or required. VCI argued that civil penalties will not promote compliance or deter future

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<sup>1</sup> If any party wishes to have information filed with the Board treated as confidential, it must comply with the requirements of 199 IAC 1.9.

violations. It argued that Ms. Bennett authorized VCI to provide service and it has already instituted procedures to prevent slamming. VCI argued that, to the extent its request for approval of the proposed resolution may be considered a request for compromise, the criteria in Iowa Code § 476.103(4)(b) (2005) and 199 IAC 22.23(5)"b" indicate the Board should forebear from assessing civil penalties.

On July 25, 2005, the Consumer Advocate filed a reply memorandum to VCI's response. The Consumer Advocate argued that missing recordings are serious violations and that accepting VCI's argument would render the verification requirement useless. The Consumer Advocate argued that Ms. Bennett does not deny she contacted VCI, but denies she approved VCI as her local carrier. It argued the only direct evidence on the question whether Ms. Bennett ordered the service is Ms. Bennett's claim she did not. The Consumer Advocate argued that providing personal information is not the same as ordering the service. It argued the law seeks compliance, not excuses. The Consumer Advocate argued that, although the cases it cited are not binding in Iowa, they are not irrelevant. It argued that the Board should consider the Iowa statutory criteria in determining the amount of the penalty, not in determining whether to assess a penalty. The Consumer Advocate further argued the law does not require a pattern or practice in order to impose a civil penalty.

On August 1, 2005, the Board issued an order assigning this case to the undersigned administrative law judge.

Pursuant to the Board's order and Iowa Code §§ 476.3 and 476.103, 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, 1.9, 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](http://www.state.ia.us/iub).

### **The issues**

The issues in this case generally involve the change of Ms. Bennett's local telephone service to VCI, whether VCI complied with applicable law when it changed her service, and whether imposition of a civil penalty is appropriate. Specifically, the issue in this case is whether the imposition of a civil penalty is appropriate and in accordance with applicable law, since VCI is unable to produce the third-party verification recording. 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 VCI are currently the parties to this proceeding. If Ms. Bennett wishes to be a party to this case, she 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.

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-05-102, 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](http://www.state.ia.us/iub).

All parties should examine Iowa Code §§ 476.3, 476.103, and Board rules at 199 IAC 1.8, 1.9, and 22.23, and Chapters 6 and 7, for substantive and procedural rules that apply to this case.

#### **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 civil penalties 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 August 24, 2005, VCI 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.

2. The parties are encouraged, but not required, to file a stipulation of facts. Such stipulation should be filed on or before August 24, 2005.

3. If Ms. Bennett wishes to become a party to this case, she must file written notice with the Board no later than August 24, 2005.

4. On or before August 31, 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 Ms. Bennett becomes a party to this case and wishes to file prepared testimony and a brief, she must do so on or before August 31, 2005.

5. On or before September 21, 2005, VCI must file prepared testimony and exhibits and a prehearing brief. VCI 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, VCI must address the issues discussed above, support each of the allegations made in its response, and file any other evidence not previously filed. VCI should use exhibit numbers 100 and following. In its prehearing brief, VCI 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 witnesses connected to the hearing by telephone conference call, the party must notify the undersigned no later than September 21, 2005, at [Amy.Christensen@iub.state.ia.us](mailto:Amy.Christensen@iub.state.ia.us). The party must copy all other parties on the email.

7. If the Consumer Advocate or any intervenor is going to file prepared rebuttal testimony and exhibits, it must do so by September 30, 2005.

8. A hearing for the presentation of evidence and the cross-examination of witnesses will be held in the Board Hearing Room, 350 Maple Street, Des Moines, Iowa, on Tuesday, October 11, 2005, commencing at 10 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 1-515-281-5256 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 10<sup>th</sup> day of August, 2005.