

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 FCU-05-43 FCU-05-45
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ORDER DENYING MOTION TO PRESERVE EVIDENCE AND DISCLOSURE

(Issued September 28, 2005)

On August 22, 2005, One Call Communications, Inc. (One Call), filed a motion to preserve electronic data with the Utilities Board (Board). One Call requested that "the informal complainants be prohibited from altering, destroying, or permitting the destruction of, or in any fashion changing any electronic records in the actual or constructive care, custody, or control of such informal complainant, wherever such document is physically located."

One Call stated that: "the electronic records that One Call will be requesting and that One Call seeks to have preserved include all electronic records in the actual or constructive care, custody, or control of the informal complainants which relate to

the Web sites visited by the informal complainants. Such records include, but are not limited to, 'cache files,' history files, temporary Internet files, bookmarks, media files, and cookie files. In addition to the main hard drive on each informal complainants' computer, each informal complainant should preserve all back-up tapes or other back-up hard drives, disks or other hardware containing material back-up of the electronic data at issue in this proceeding."

One Call requested the Board to enter an order that directs the informal complainants (either directly or by instruction from the Consumer Advocate) to preserve such electronic data while this proceeding is pending and for 30 days after entry of a final order closing this matter or after any appeals have been exhausted, whichever is later. One Call's certificate of service states that One Call served the motion on the Consumer Advocate and a list of 15 persons, some of whom are the informal complainants in this proceeding.

On August 30, 2005, One Call filed an amendment to its motion to preserve evidence. One Call stated that it had inadvertently included three persons who were not participating in this formal proceeding in the motion. One Call stated it had notified these persons that inclusion in the motion was in error, attached copies of the letters to these persons, and requested that the three persons be excluded from any order to preserve electronic data issued by the Board.

On September 6, 2005, the Consumer Advocate filed a resistance to One Call's motion. The Consumer Advocate made various arguments and stated that it

had not been served with the motion and learned of the motion from one of the complainants.

On September 14, 2005, One Call filed a reply to the Consumer Advocate's resistance.

The undersigned has carefully considered the arguments of the parties and has determined that One Call's motion should be denied for a number of reasons.

First, the informal complainants are not parties to this case and the Consumer Advocate does not represent them. The only parties are One Call and the Consumer Advocate. 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).

Although discovery procedures applicable to civil actions are available to all parties in contested case proceedings, and the rules are to be liberally construed, the rules of civil procedure do not provide for discovery against persons not parties in the civil action. Woodbury Cty. Atty. V. Iowa Dist. Court, 448 N.W.2d 20, 22 (Iowa 1989); Iowa R. Civ. P. 1.501 – 1.517. The rules allow a party to request the production of documents and things from another party. Iowa R. Civ. P. 1.512 and 1.513; Woodbury. The Iowa Supreme Court in Woodbury stated that the Iowa discovery rules have their counterpart in the federal rules, and the rules provide the federal courts with no authority to order a nonparty to produce documents or permit entry on land.

In its motion, One Call states it will be requesting electronic records from the customers and it is those records it seeks to have preserved. Since the customers are not parties to this case, the undersigned has no authority to order the customers to produce such electronic records and it therefore has no authority to order the customers to preserve such electronic records.

One Call's argument that the Board can order the informal complainants to preserve the requested records because they consented to the jurisdiction of the Board when they filed complaints with the Board is without merit. If there were any

"consent to the jurisdiction of the Board," it only related to the informal complaint proceedings. The informal complainants did not request this formal proceeding, they are not parties to it, and they did not consent to the jurisdiction of the Board with respect to this proceeding. Iowa Code Chapter 476 does not give the Board clear authority over complaining customers who may be called as witnesses in a formal complaint case brought by the Consumer Advocate, but who are not parties to the case.

One Call also argues that the Board has the authority to subpoena information from nonparties, and cites to Iowa Code § 476.2 and 199 IAC 7.7(3) in support. It argues that with the power to subpoena comes the power necessary to give effect to the subpoena, and it would render the Board's subpoena power meaningless if nonparties could circumvent the Board's subpoena by pre-emptive destruction of the evidence.

One Call's argument is not persuasive. One Call is not requesting a subpoena to compel witnesses' attendance at the hearing nor is it requesting that such witnesses be compelled to bring items with them to the hearing. The cited authority does not provide the undersigned with the authority to issue the order requested by One Call.

Contrary to the arguments of One Call, the Consumer Advocate does not represent the informal complainants in this proceeding. Iowa Code § 476A.2 (2005). Although the informal complaints were filed by the customers, this formal complaint

case was brought by the Consumer Advocate, a governmental agency charged with investigating the legality of utility practices, bringing civil proceedings to correct any illegality, and representing the interests of consumers generally and the public generally. Iowa Code § 475A.2. Although the Consumer Advocate may choose to call the informal complainants as witnesses, the undersigned has no basis upon which to order the Consumer Advocate to direct the informal complainants to preserve their electronic files.

Second, even if the informal complainants were parties and could be ordered to preserve evidence, the request to preserve evidence is overbroad, intrusive, unduly burdensome, and would certainly include electronic information having no possible relevance to this case. Furthermore, granting One Call's motion would have a chilling effect on customers who wish to file complaints with the Board. One Call requests that the informal complainants be "prohibited from altering, destroying, or permitting the destruction of, or in any fashion changing any electronic records in the actual or constructive care, custody, or control of such informal complainant, wherever such document is physically located." One Call states that "the electronic records that One Call will be requesting and that One Call seeks to have preserved include all electronic records in the actual or constructive care, custody, or control of the informal complainants which relate to the web sites visited by the informal complainants. Such records include, but are not limited to, 'cache files,' history files, temporary internet files, bookmarks, media files, and cookie files. In addition to the

main hard drive on each informal complainants' computer, each informal complainant should preserve all back-up tapes or other back-up hard drives, disks or other hardware containing material back-up of the electronic data at issue in this proceeding." If the undersigned granted One Call's motion, this would effectively mean that the customers could not use their computers, at home or at work, even if these computers were not owned by the customers at the time they filed their complaints with the Board.

Third, the motion is unsupported by evidence in the record or by affidavit. In its motion, One Call stated that the Consumer Advocate has raised the issue of whether the informal complainants in this case authorized the charges billed by One Call for calls placed to certain Web sites. One Call further stated that each of the informal complainants denies visiting the Web sites at issue. The evidence in the record to date does not support either of these statements.

The parties have not yet filed their prepared evidence, so the only evidence in the record is the information contained in the informal complaint files. This case involves the consolidation of 12 informal complaint dockets involving customers who alleged that charges were placed on their telephone bills without their authorization. In three of the cases, the customers complained that they were billed by One Web Direct Bill for access to a proprietary Internet Web site when they had not visited any proprietary Web site. In some of the dockets, the disputed charges were billed as calls to the United Kingdom or other countries. In others, the disputed charges were

billed as hotel/motel calls. In its responses to the complaints in the informal cases, One Call stated that its network was accessed to place the calls via a 10-10-access number.

In approximately six of the cases, either the customer, one of the companies billing the customer other than One Call, or One Call (only in a request for formal proceeding, not in One Call's responses to the complaints), theorized that the charges were related to unsolicited connections to pornographic Web sites and/or were related to computer viruses and "modem hijacking." Complaining customer Mr. Brad Azeltine provided the most comprehensive explanation of what he believed happened with respect to his computer. Mr. Azeltine was one of the customers billed by One Web Direct Bill, and he also had charges placed on his telephone bill. However, even Mr. Azeltine's explanation does not show or explain how One Call came to place the charges on his telephone bills.

Although the informal complaint files are in the record, One Call is incorrect when it states that: "the record is replete with evidence that charges at issue likely resulted from visits to pay-per-view websites," and "there is ample evidence in the record to support One Call's 'assumption' that the calls were the result of visits to pay-per-view websites." The only evidence One Call lists in support are the following five statements by customers: Informal Complaint C-05-065 ("From these conversations I understand this charge is related to some website"); Informal Complaint C-04-243 ("A malicious computer virus has installed itself on my home PC.

This virus automatically installs a dial-up access program to a pornographic website"); Informal Complaint C-05-2 ("I have heard that some of these charges may be for viewing an Internet site in England"); Informal Complaint C-05-64 ("[Qwest] told me [the charge] was from a website I supposedly entered"); and Informal Complaint C-04-238 (In response to question regarding the product or service involved on Consumer Protection Complaint form, complainant responded, "Pay-per-view websites").

As of the date of this order, the statements regarding Web sites, computer viruses, and "modem hijacking" are merely statements of a theory as to how some of the charges may have appeared on the customers' telephone bills. There is nothing in the record yet that explains how or why One Call caused the charges that were billed to each of the customers to be placed on the customers' bills and what authority it had to do so. There is nothing in the record yet that would provide persuasive support for the statement that the customers' computers had anything to do with the placement of the charges on their telephone bills. Based on the limited evidence in the record to date, any connection between the charges One Call caused to be placed on the customers' bills and the customers' computers is still speculative.

Motions based on matters not yet in the record must be supported by affidavit. 199 IAC 7.7(11). Since the parties have not yet filed their prepared evidence in the case, and the motion is based on matters not yet in the record, One Call was required to support its motion by affidavit. 199 IAC 7.7(11).

Fourth, One Call's argument that it could find relevant information on the customers' computers is unpersuasive. In its motion, One Call stated that: "evidence of whether the informal complainants did, in fact, visit the sites at issue in this proceeding is highly relevant." The record does not yet include evidence that there are Web sites at issue in the case and what those Web sites are. One Call further stated that the "evidence regarding the web surfing habits of the complainants is relevant in that it will demonstrate the informal complainants' familiarity with such sites and the charges that accompany them. Even if complainants did not intentionally visit any relevant Web sites, the electronic history may demonstrate a hijacked modem, which would support one of One Call's alternate theories of the case." The record does not yet include evidence that customers visiting any Web sites had anything to do with how the charges appeared on the customers' bills and why One Call was authorized to place the charges. The customers' web surfing habits are irrelevant to this case, based on the limited evidence in the file to date. One Call did not provide any evidence or a supporting affidavit that shows how the information on the customers' computers could demonstrate a hijacked modem. Bare allegations are insufficient to support the motion. Without evidence or an affidavit, One Call's statements in its motion are insufficient to persuade the undersigned that One Call could find relevant information on the customers' computers.

In addition, it is questionable whether looking at the customers' computers could lead to discovery of relevant evidence at this late date. Most customers filed their complaints in late 2004 and early 2005. The latest complaints were filed in May and June 2005. Mr. Brad Azeltine told the Consumer Advocate he erased his hard drive. In the informal complaint files, other customers stated they had reinstalled their operating systems. It is too late to move to preserve evidence when it is likely that the evidence on the customers' computers is already gone. Even if the other procedural problems did not exist, before asking for a blanket order to preserve evidence on all of the customers' computers, One Call should have provided some assurance that it had determined that the customers had not already erased their hard drives and other relevant information on their computers that existed at the time of the complaint. Even if the undersigned were persuaded that relevant evidence could have been found on any customers' computers, at this point, One Call is more likely to find any relevant evidence by asking the customers for it than by looking at the customers' computers.

Finally, there is no clear statute or rule of civil procedure that provides the undersigned with the authority to enter an order to preserve evidence, particularly to a nonparty. The Board is an agency of state government and as such, its authority is derived from statute. In its motion, One Call cites to Iowa R. Civ. P. 1.503(1), stating that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action as the basis for its

request for an order to preserve electronic data. Iowa Code § 17A.13 states that discovery procedures applicable to civil actions are available to all parties in contested cases. The Iowa rules of civil procedure and the statutes that provide the Board with its authority do not contain the authority for the undersigned to issue an order to preserve evidence to a nonparty.

The undersigned reminds the parties of their obligation to attempt to work out discovery issues without the involvement of the undersigned. The undersigned urges the parties to work cooperatively to share information.

DISCLOSURE PURSUANT TO 199 IAC 10.29

If the undersigned administrative law judge knows of information which might reasonably be deemed to be a basis for disqualification and decides voluntary withdrawal is unnecessary, the undersigned must disclose the relevant information on the record and state reasons why voluntary withdrawal is unnecessary. 199 IAC 10.29(3)"c." Mr. Curt Stamp represented One Call earlier in these proceedings. As of September 26, 2005, Mr. Stamp is a member of the Utilities Board. It is the understanding of the undersigned administrative law judge that the Board has: 1) identified this proceeding as one in which Mr. Stamp may not participate; and 2) clarified that the undersigned will not be subject to the authority, direction or discretion of Mr. Stamp with respect to this proceeding. Therefore, the undersigned does not believe it is necessary to withdraw from this proceeding. Any party may

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timely request the disqualification of a person as a presiding officer by filing a motion supported by affidavit upon discovering facts establishing grounds for disqualification. Iowa Code § 17A.11(3).

IT IS THEREFORE ORDERED:

The "Motion for Order to Preserve Electronic Data" filed by One Call on August 22, 2005, and amended on August 30, 2005, is hereby denied.

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 28th day of September, 2005.