

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="padding-left: 100px;">Complainant,</p> <p style="padding-left: 100px;">vs.</p> <p>MCI, INC.,</p> <p style="padding-left: 100px;">Respondent.</p>	<p style="text-align:right">DOCKET NO. FCU-05-56 (FCU-05-53)</p>
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**ORDER DOCKETING FOR FORMAL PROCEEDING,  
DENYING MOTION TO DISMISS, CONSOLIDATING DOCKETS, AND  
ASSIGNING TO ADMINISTRATIVE LAW JUDGE**

(Issued October 17, 2005)

On August 22, 2005, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed with the Utilities Board (Board) a petition for a proceeding to consider a civil penalty for an alleged cramming violation committed by MCI, Inc. (MCI). Based upon the record assembled in the informal complaint proceeding, the events to date can be summarized as follows:

**I. Informal complaint proceeding**

On June 24, 2005, the Board received a complaint from Nancy Anderson of Davenport, Iowa, disputing charges on her phone bill for calls to Switzerland and the Netherlands she claims not to have made. The disputed charges totaled \$127.44 before taxes and surcharges. Ms. Anderson stated she contacted MCI to explain that

no one from her house made the calls and MCI's response was that the calls came from her residence. Ms. Anderson stated that the technician MCI sent to her home found no problem with the telephone line. Ms. Anderson also stated that she had computer trouble around the same time as the dates of the calls and speculated that the calls were initiated through her computer modem.

Board staff identified the matter as C-05-129 and, pursuant to Board rules, on June 29, 2005, forwarded the complaint to MCI for response. MCI responded to the complaint on August 1, 2005, stating that MCI was Ms. Anderson's designated local and long distance service provider. MCI stated its research showed the disputed calls were "fraudulent in nature based on a modem-hijacking situation." MCI stated it had issued a full credit for the calls and placed an international block on Ms. Anderson's account.

Board staff issued a proposed resolution of the complaint on August 8, 2005, concluding that cramming occurred in this matter. Staff noted that MCI had issued a credit of \$127.44 plus applicable taxes.

## **II. Consumer Advocate's petition for proceeding to consider civil penalty**

In its August 22, 2005, petition for proceeding to consider civil penalty, Consumer Advocate supports the proposed resolution but asserts it should be augmented with a civil monetary penalty. Consumer Advocate argues that credits alone will not stop the unlawful practice of cramming and that civil penalties are necessary to ensure compliance and deter future violations.

### **III. MCI's motion to dismiss**

On September 12, 2005, MCI filed a motion to dismiss Consumer Advocate's petition.<sup>1</sup> MCI argues that Consumer Advocate has failed to allege any facts that warrant a formal proceeding. MCI argues the facts in the present case are like those in Re: MCI WorldCom Communications, Inc., Board File No. C-04-273, "Order Denying Request for Formal Proceeding and Clarifying Proposed Resolutions," April 28, 2005 (hereafter "Krantz"), and that the petition should be dismissed. MCI contends that there has been no suggestion that it is responsible for downloading software onto the customer's computer or for initiating the disputed calls. MCI states it transmitted and routed the calls and billed for the calls according to the tariffed rates. MCI argues the petition should be dismissed because, while Board staff found cramming occurred, it did not label MCI as the crammer, MCI has fully credited the consumer's account, and because Consumer Advocate cannot distinguish this case from Krantz. MCI argues that because there is no suggestion that MCI was responsible for the modem hijacking or did anything improper, there is no conduct to be deterred by civil penalties.

### **IV. Consumer Advocate's reply**

Consumer Advocate filed a reply memorandum on September 19, 2005, asking the Board to deny MCI's motion to dismiss. Consumer Advocate argues that for purposes of considering a motion to dismiss, the facts alleged in the petition are

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<sup>1</sup> In its motion to dismiss filed on September 12, 2005, MCI incorrectly stated it responded to Ms. Anderson's complaint on July 1, 2005. On October 3, 2005, MCI filed an errata filing stating it responded to the complaint on August 1, 2005.

assumed to be true and the facts alleged in this case fall within the statutory and regulatory proscription against cramming. Consumer Advocate argues that nothing in the statute exempts a company from a finding of a violation simply because the company alleges another company also violated the statute. Consumer Advocate argues that such an exemption could mean that the law would not be enforced despite the known violation and would render the statute ineffectual. Consumer Advocate states that the bill in this case shows MCI as the billing entity and the statute and rule require no other involvement by MCI to find a violation.

Consumer Advocate argues that MCI overlooks differences between this case and Krantz and that the Board did not rule in Krantz that fraudulent billings will routinely escape scrutiny. Consumer Advocate asserts that this complaint against MCI is no longer isolated, as it was in Krantz. Consumer Advocate states that the factors listed in Krantz, including MCI's relationship with the hijacking party or the destination of the call, whether the company had a role in initiating the call, or has profited from the hijacking, must be considered and there has been no investigation. Consumer Advocate argues that all parties profiting from the disputed transaction should be the ones to prevent or detect the problem and the threat of civil penalties is necessary to encourage companies to take preventive measures.

## **V. Analysis**

The Board has reviewed the record to date and finds there are reasonable grounds to warrant further investigation into this case. It appears that further

investigation is necessary to allow an opportunity to more precisely determine the nature and origin of the disputed calls, how the charges appeared on Ms. Anderson's phone bill, and, because Ms. Anderson denies making the calls, whether the charges were authorized, among other issues. The Board observes that in responding to the informal complaint, MCI stated its investigation showed the disputed calls resulted from modem hijacking. However, there is no explanation in the record to date as to how MCI reached that conclusion.

The Board will grant Consumer Advocate's petition for proceeding to consider a civil penalty. The Board will deny MCI's motion to dismiss Consumer Advocate's petition. Because this complaint involves allegations similar to those raised in another docket involving MCI, the Board will consolidate this proceeding with Docket No. FCU-05-53 and assign this case to the Board's administrative law judge (ALJ) for further proceedings pursuant to Iowa Code § 17A.11(1)"b" (2005) and 199 IAC 7.1(4). The ALJ may take all appropriate action, which may include setting a hearing date, presiding at the hearing, and issuing a proposed decision. Any party objecting to consolidation of this docket with Docket No. FCU-05-53 may file an appropriate motion with the ALJ.

**IT IS THEREFORE ORDERED:**

1. The petition for proceeding to consider civil penalty filed by the Consumer Advocate Division of the Department of Justice in this docket on

August 22, 2005, is granted. File C-05-129 is docketed for formal proceeding, identified as Docket No. FCU-05-56.

2. The motion to dismiss filed in this docket by MCI, Inc., on September 12, 2005, is denied.
3. Docket No. FCU-05-53 is consolidated with Docket No. FCU-05-56.
4. Pursuant to Iowa Code § 17A.11(1)"b" and 199 IAC 7.1(4), Docket No. FCU-05-56 is assigned to the Board's administrative law judge, Amy Christensen, for further proceedings. The administrative law judge shall have the authority provided under 199 IAC 7.1(4)"a" through "j."

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Margaret Munson  
Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 17<sup>th</sup> day of October, 2005.