

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 NOS. FCU-05-53 FCU-05-56</p>
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PROCEDURAL ORDER AND NOTICE OF HEARING

(Issued October 18, 2005)

FCU-05-53 Background

On June 20, 2005, Ms. Clara Putz submitted a complaint to the Utilities Board (Board) disputing a charge of \$308.19 on her telephone bill for a call to the United Kingdom. Ms. Putz stated that they did not make the call, they never made international calls, and she wanted the charge removed from her account. Ms. Putz further stated that she had sent two requests to MCI, Inc. (MCI), to have the charge investigated and removed and had called MCI customer service on several occasions, but MCI refused to credit her account for the call they did not make.

The details of the complaint are contained in informal complaint file number C-05-123, which is incorporated into the record in this case pursuant to 199 IAC 6.7.

Upon receiving the complaint, Board staff attempted to informally resolve the dispute. Board staff forwarded the complaint to MCI for response on June 21, 2005. MCI responded by letter dated June 30, 2005, to Ms. Putz and by email to Board staff. In the letter, MCI stated its records showed a direct dialed call to the United Kingdom made on February 26, 2005, from Ms. Putz's home telephone number that lasted 120 minutes. MCI stated she was billed \$308.19 for the call, which was the correct rate based on Ms. Putz's calling plan. MCI stated it was issuing a one-time courtesy credit for \$359.90 to Ms. Putz's account in the interest of resolving her complaint. In the email message to Board staff, MCI stated it had issued full credit for the international call placed from the home telephone number and that Ms. Putz was a long-standing MCI customer with no history of placing international calls.

On July 21, 2005, Board staff issued a proposed resolution stating that staff believed a billing error rather than cramming occurred in the case. Staff noted MCI had applied a credit of \$359.90 to cover all charges related to the call and stated no further action appeared necessary.

On July 28, 2005, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) petitioned the Board to commence a formal proceeding to consider a civil penalty for a cramming violation. The Consumer Advocate asserted the proposed resolution was legally incorrect and argued if Ms. Putz did not make the call, the unauthorized billing fits squarely within the relevant statutory and regulatory definition of "change in service" and the regulatory definition of

"cramming." The Consumer Advocate argued if Ms. Putz did not make the call, the violation is therefore established. The Consumer Advocate argued a civil penalty should be assessed and that the initial unauthorized billing was compounded by MCI's refusal to credit the charges following multiple requests from the customer. The Consumer Advocate further argued the statute encourages companies to resolve customer complaints without involvement of the Board and it seeks the prompt reversal of unauthorized changes in service. The Consumer Advocate argued that imposing a penalty would help secure prompt reversals of charges in future cases without involving the Board in accordance with the remedial goals stated in the statute.

On August 17, 2005, MCI filed a motion to dismiss. MCI argued that the Consumer Advocate did not dispute the Board staff's finding that a billing error occurred and gave no reason why the Board should discount the findings of its staff. MCI, in an alternative argument, stated that if the case is litigated, MCI would demonstrate that its billing system did not err and the fact that the customer questioned the particular charge does not mean that MCI did anything improper. MCI further argued that, with respect to the need for a civil penalty, the Consumer Advocate failed to allege facts sufficient to justify formal proceedings. MCI argued the Consumer Advocate has not alleged that the charge was anything other than an alleged billing error and it is well established that civil penalties will not deter inadvertent errors. MCI contended the Consumer Advocate alleges MCI should be

assessed a civil penalty because it did not resolve the customer's complaint until she filed an informal complaint with the Board, and in essence, the Consumer Advocate's motion for a civil penalty is based on its belief that MCI could have given Ms. Putz better customer service. MCI does not agree with the characterization its customer service was improper. MCI asserted the slamming rules were not enacted to resolve customer service disputes, but were promulgated to prevent a very specific set of facts: unauthorized changes in service. MCI argued there was no finding of an unauthorized change in service and there is no evidence that this was anything other than an alleged billing error. MCI further argued it would be inappropriate to initiate a formal proceeding for the sole purpose of scrutinizing MCI's customer service. MCI asked the Board to find the Consumer Advocate has failed to allege any facts warranting formal proceedings and deny the petition.

On August 30, 2005, the Consumer Advocate filed a reply memorandum in which it noted that the absence of a staff finding of an unauthorized change is not determinative. The Consumer Advocate argued whether there was an unauthorized change in service depends on the law and the evidence. The Consumer Advocate argued the statute and regulation define "unauthorized change in service" to include "the addition ... of a telecommunications service for which a separate charge is made to a customer account." It further argued the customer's bill shows a separate charge for a telecommunications service to a consumer account. The Consumer Advocate argued the only real question on the violation phase of the case is whether

the charge was authorized. The Consumer Advocate stated that its petition alleged the charge was not authorized and, for the purposes of a motion to dismiss, the allegations of the petition are assumed to be true.

On the issue of a penalty, the Consumer Advocate noted the issue of whether a civil penalty will deter inadvertent errors is currently the subject of a judicial review proceeding in Polk County District Court. The Consumer Advocate argued it has not yet been established that the violation in this case was inadvertent. The Consumer Advocate stated that in prior cases, the Board has noted the relevance of such factors as whether the company is related to the originating party or the destination of the calls, whether it had some role in causing the calls to be initiated, whether it had profited from the hijacking or other scheme, the role of the company in facilitating the calls, and its capacity to prevent them. It argued these are matters that require investigation in this case.

The Consumer Advocate argued the statute encourages resolution of slamming and cramming cases without Board involvement and the prompt reversal of unauthorized changes in service. It further argued if a penalty is assessed, all relevant factors are appropriately considered in determining the amount of the penalty. The Consumer Advocate argued that MCI's motion to dismiss should be denied and the petition for a proceeding to consider a civil penalty should be granted.

On September 16, 2005, the Board issued an order finding there were reasonable grounds to warrant further investigation. The Board stated it appeared

that further investigation is necessary to allow an opportunity to more precisely determine the nature of the disputed call, how the charge appeared on Ms. Putz's telephone bill, and because Ms. Putz denied making the call, whether the charge was authorized, among other issues. The Board granted the Consumer Advocate's petition and denied MCI's motion to dismiss, docketed the case for formal proceeding, and assigned the case to the undersigned administrative law judge for further proceedings.

FCU-05-56 Background

On June 24, 2005, Ms. Nancy Anderson filed a complaint with the Board disputing charges on her telephone bill for 12 calls to Switzerland and the Netherlands she claims not to have made. The disputed charges totaled \$127.44 plus taxes and surcharges. Ms. Anderson stated she contacted MCI but MCI customer service staff and customer service management could not offer her any assistance or explanation as to how this could happen. She said she explained that no one from her house made the calls, but all they could offer was that the calls came from her residence. Ms. Anderson stated she spoke with MCI repair staff who said she may have a crossed line with someone in the neighborhood. She said they were very helpful and sent a technician who quickly discovered their line was just fine. Ms. Anderson also stated that they had computer trouble around the same dates as the billed calls and speculated that the calls were somehow initiated through their computer modem. Ms. Anderson requested a credit of the disputed amount.

The details of the complaint are contained in informal complaint file C-05-129, which is incorporated into the record in this case pursuant to 199 IAC 6.7.

Upon receiving the complaint, Board staff attempted to informally resolve the dispute. Board staff forwarded the complaint to MCI for response on June 29, 2005. MCI investigated the complaint and responded by letter on August 1, 2005. MCI stated it 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. MCI also stated the FCC had outlined steps customers could take to avoid being impacted by "modem hijacking" and provided a summary of the steps.

On August 8, 2005, Board staff issued a proposed resolution stating that, according to MCI, the calls were made due to modem hijacking and are considered fraudulent. Board staff found that cramming had occurred in this matter. Staff noted that MCI had issued a credit of \$127.44 plus applicable taxes to the customer and stated it appeared no further action was necessary.

On August 22, 2005, the Consumer Advocate filed a petition for a proceeding to consider a civil penalty in which it supported the proposed resolution but asserted it should be augmented with a civil penalty. The Consumer Advocate argued that a credit alone would not stop the unlawful practice of cramming and meaningful civil penalties are needed to ensure compliance and deter future violations. The

Consumer Advocate requested that the Board commence a formal complaint proceeding to give MCI notice and an opportunity for hearing, affirm staff's determination that MCI committed a violation, and consider a civil penalty in an amount designed to deter future violations by MCI.

On September 12, 2005, MCI filed a motion to dismiss, which it corrected in an errata filing on October 3, 2005. MCI argued the facts in this case are like those in a previous case¹ in which the Board denied the request for formal proceeding and clarified that, although there was an unauthorized charge, MCI was not the cause and should not be labeled as a crammer. In this case, MCI argued there is no suggestion it was responsible for downloading software onto the customer's modem or for initiating the international calls. MCI stated it transmitted and routed the calls and billed for the calls according to the tariffed rates as it was authorized to do. It argued that MCI and Ms. Anderson were both victims of a scam of unknown origin. It argued the petition should be dismissed because, while Board staff found that cramming occurred, it had not labeled MCI a crammer, MCI fully credited the customer's account, and because the Consumer Advocate cannot distinguish this case from the Krantz case. MCI argued there is no suggestion that MCI was responsible for the modem hijacking or did anything improper. Therefore, it argues, there is no conduct to be deterred by civil penalties. MCI argued the Consumer

¹ 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) (hereinafter, Krantz).

Advocate failed to allege any facts that warrant formal proceedings and requested the Board to deny the petition.

The Consumer Advocate filed a reply memorandum on September 19, 2005, in which it asked the Board to deny the motion to dismiss. The Consumer Advocate argued, for the purpose of considering a motion to dismiss, the facts alleged in the petition are assumed to be true. It argued that MCI seeks a ruling that would absolve every company from responsibility who asserted it did not know where its fraudulent bills came from. It argued the facts alleged in this case fall within the statutory and regulatory proscription against cramming. The Consumer Advocate argued that nothing in the statute exempts a company from a finding of a violation merely because the company alleges another company also violated the statute. It argued that companies who bill for fraudulent or otherwise unauthorized charges at times seek to deflect responsibility away from themselves and onto other companies and disclaim any knowledge of who those other companies are or where the problem is coming from. It argued that such an exemption would mean that the law would not be enforced despite the known violation, would encourage companies that send fraudulent bills to learn nothing about the source of the problem and do nothing preventative to correct it. The Consumer Advocate argued such an exemption would render the statute ineffectual and it is thus understandable that the statute omits such an exemption.

The Consumer Advocate argued the bill in this case showed MCI as the billing entity and the statute and rule require no other involvement by MCI to find a violation. The Consumer Advocate further argued the law does not require any particular intent on the part of MCI. It argued the only real question on the violation phase of the case is whether the charges were authorized; the petition alleges they were not and, for the purpose of a motion to dismiss, the allegations in the petition are assumed to be true.

The Consumer Advocate argued this case is different from Krantz and the Board did not rule in Krantz that fraudulent billings would routinely escape scrutiny. The Consumer Advocate argues the complaint against MCI in this case is no longer isolated, as the complaint was in Krantz, and cited to other complaints against MCI. The Consumer Advocate argued 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 and whether the company has profited from the hijacking, must be considered and there has been no investigation. The Consumer Advocate argued 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. It argued that MCI's assertion that another unidentified company is more culpable than MCI, if established, will be relevant on the question of the amount of the penalty, not on the

question of violation. The Consumer Advocate argued the motion to dismiss should be denied and the petition be granted.

On October 17, 2005, the Board issued an order docketing the case for a formal proceeding, denying the motion to dismiss, consolidating Docket Nos. FCU-05-53 and FCU-05-56, and assigning the case to the undersigned administrative law judge. The Board found there were reasonable grounds to warrant further investigation and stated it appeared 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 telephone bill, and because Ms. Anderson denied making the calls, whether the charges were authorized, among other issues. The Board observed that in responding to the informal complaint, MCI stated its investigation showed the disputed calls resulted from modem hijacking. However, the Board stated, there is no explanation in the record to date as to how MCI reached that conclusion. The Board granted the Consumer Advocate's petition and denied MCI's motion to dismiss. Because the complaint involved allegations similar to those in another docket involving MCI, the Board consolidated the proceeding with Docket No. FCU-05-53, docketed the case for formal proceeding, and assigned the case to the undersigned administrative law judge for further proceedings. The Board stated that any party objecting to the consolidation could file an appropriate motion with the undersigned.

Procedural schedule

Pursuant to the Board's orders, Iowa Code §§ 476.3 and 476.103 (2005), 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.

The issues

The issues in this case generally involve MCI's placement of charges for international calls on Ms. Putz's and Ms. Anderson's telephone bills. They include whether MCI complied with applicable law when it did so, whether MCI's customer service to the customers is relevant, and if it is, how it is relevant, whether imposition of a civil penalty is appropriate, the factors regarding the amount of civil penalty in Iowa Code § 476.103(4)(b), and what should be done to resolve the case. Other issues include the nature and origin of the disputed calls, how the disputed charges appeared on the customers' telephone bills, and whether the charges were authorized. Since MCI asserted its investigation in Docket No. FCU-05-56 showed the disputed calls resulted from modem hijacking, the issues include how MCI came to that conclusion and whether the conclusion is supported by the evidence in the case. The parties may raise other issues 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 MCI are currently the parties to this proceeding. If Ms. Putz and Ms. Anderson wish to become parties to this case, they 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. The undersigned notes that attorney Ms. Krista Tanner represents MCI in both dockets in this case. MCI's appearance should clearly state whether MCI wishes service to be on Ms. Tanner or on an identified individual in the company.

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 C-05-123 and C-05-129, 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.

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

Iowa Code § 476.103(4)(a) provides that a service provider who violates a provision of the cramming statute, a rule adopted pursuant to the statute, or an order lawfully issued by the Board² pursuant to the statute, is subject to a civil penalty of not more than \$10,000 per violation, which, after notice and opportunity for hearing, may be levied by the Board. Each violation is a separate offense. Iowa Code § 476.103(4)(b) provides that a civil penalty may be compromised by the Board. It further provides that in determining the amount of the penalty or the amount agreed on in a compromise, the Board may consider the size of the service provider, the gravity of the violation, any history of prior violations by the service provider, remedial actions taken by the service provider, the nature of the conduct of the service provider, and any other relevant factors.

Stipulation of facts and prehearing brief

The facts underlying the dockets in this case have already been the subject of informal complaint proceedings. 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.

IT IS THEREFORE ORDERED:

1. If it has not already done so, on or before October 28, 2005, MCI must file an appearance identifying one person upon whom the Board may serve all orders, correspondence, or other documents. The written appearance must

² In this case, the term "Board" includes the Board itself and the undersigned administrative law judge.

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. The appearance should clearly state whether MCI wishes service to be on its attorney Ms. Krista Tanner or on an identified individual in the company.

2. The parties are encouraged, but not required, to file a stipulation of facts. Such stipulation must be filed on or before November 4, 2005.

3. If Ms. Putz and Ms. Anderson wish to become parties to this case, they must file written notice with the Board no later than November 4, 2005.

4. On or before November 9, 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 identified in the body of this order, support each of the allegations made in its petitions and reply memoranda, 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. Putz or Ms. Anderson becomes a party to this case and wishes to file prepared testimony and a brief, she must do so on or before November 9, 2005.

5. On or before November 30, 2005, MCI must file prepared testimony and exhibits and a prehearing brief. MCI 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, MCI must address the issues identified in the body of this order, support each of the allegations made in its responses in the informal complaint cases and its motions to dismiss, and file any other evidence not previously filed. MCI should use exhibit numbers 100 and following. In its prehearing brief, MCI 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 a witness connected to the hearing by telephone conference call, the party must file written notice with the Board no later than November 30, 2005.

7. If the Consumer Advocate or any intervenor is going to file prepared rebuttal testimony and exhibits or a rebuttal brief, it must do so by December 14, 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 Thursday, January 5, 2006, commencing at 9 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 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/ Margaret Munson
Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 18th day of October, 2005.