

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 GRANTING REQUEST FOR INTERLOCUTORY REVIEW,
DENYING REQUESTED RELIEF, AND AFFIRMING ORDER
DENYING MOTION TO PRESERVE EVIDENCE**

(Issued November 2, 2005)

On October 13, 2005, One Call Communications, Inc. (One Call), filed a notice of appeal pursuant to 199 IAC 7.8 asking the Utilities Board (Board) to reverse the decision of the administrative law judge (ALJ) issued on September 28, 2005, denying One Call's motion for order to preserve electronic data. One Call contends that because adverse discovery rulings can be and are routinely reviewed on interlocutory appeal in other forums, the ALJ's order may be reviewed by the Board on interlocutory appeal.

On October 27, 2005, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a response to One Call's notice of appeal.

Consumer Advocate opposes the grant of interlocutory review. In the event the Board grants interlocutory review, Consumer Advocate asks the Board to affirm the ALJ's decision denying One Call's motion for order to preserve electronic data.

I. BACKGROUND

This matter involves a discovery issue in 12 consolidated proceedings presently before the Board's administrative law judge. While the facts of the consolidated cases differ, each involves an allegation by Consumer Advocate that One Call violated Iowa's law against "cramming" by placing unauthorized charges on the complainant's telephone bill. Consumer Advocate seeks civil penalties against One Call for the alleged violations. Some of the informal complaints involved speculation that the disputed charges may have been caused by "modem hijacking," by which downloaded software containing a computer virus causes a customer's modem to dial a destination Web site without the customer's knowledge.

On August 22, 2005, One Call filed with the Board a motion for an order to preserve electronic data, asking the Board to order 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, where such document is physically located." In its motion, One Call stated it was seeking preservation of records relating to Web sites visited by the informal complainants, and that such records include cache files, history files, temporary Internet files, bookmarks, media files, and cookie files. One

Call sought preservation of the main hard drive on each complainant's computer as well as back-up tapes or other back-up hard drives, disks, or other hardware containing material back-up of the electronic data at issue.

On September 28, 2005, the ALJ issued an order denying One Call's motion for order to preserve evidence. The ALJ noted that the rules of civil procedure do not provide for discovery against non-parties. The ALJ reasoned that because the complainants are not parties to the case, the ALJ has no authority to order them to produce the electronic records One Call said it would be requesting and, therefore, has no authority to order the complainants to preserve the records.

The ALJ also determined that even if the complainants were parties and could be ordered to preserve evidence, One Call's request to preserve evidence was overbroad, intrusive, unduly burdensome, and would include electronic information having no relevance to this case. The ALJ observed that granting the motion would have a chilling effect on customers who wish to file complaints with the Board. The ALJ also determined the motion was unsupported by evidence in the record or by affidavit as required by 199 IAC 7.7(11). The ALJ was not persuaded by One Call's argument it could find relevant information on the complainants' computers because the record does not yet contain evidence about specific Web sites at issue or evidence that the complainants' possible visits to Web sites had anything to do with the disputed charges. The ALJ observed that One Call did not provide any evidence

or supporting affidavit showing how the information it sought to preserve on the complainants' computers could demonstrate that a modem had been hijacked.

II. ONE CALL'S NOTICE OF APPEAL

In its notice of appeal, One Call asserts that the ALJ erred in concluding that the Board did not have jurisdiction over the complainants and could not order that they preserve evidence. One Call also contends the ALJ erred by applying a test for a motion to compel when One Call had not yet asked the Board to compel production. One Call asserts there is nothing burdensome or overbroad about its request. Further, One Call states its request satisfies relevancy criteria. One Call reasons that where the issue is whether the complainants authorized the charges, evidence of whether modem hijacking occurred would shed light on whether the complainant intentionally visited a Web site or whether the visit occurred as a result of modem hijacking. One Call states that discovery of the identity of Web sites visited by the computer modems could help lead to the discovery of the responsible entity. One Call argues the ALJ's conclusion that its motion should have been accompanied by an affidavit is incorrect. Finally, One Call asserts that the ALJ's decision deprived One Call of its due process rights to defend itself. One Call explains that where Consumer Advocate's case rests on allegations that the complainants did not authorize the charges billed by One Call, One Call must be allowed to obtain evidence to determine whether the complainants visited the Web

sites that caused the charges or whether the visits and resulting charges were caused by some other entity.

III. CONSUMER ADVOCATE'S RESPONSE

In its response to One Call's notice of appeal, Consumer Advocate argues that the order appealed from is interlocutory and no rule gives One Call a right of appeal before the ALJ's final proposed decision and order. Consumer Advocate observes that courts authorize granting interlocutory appeals on a finding that such ruling or decision involves substantial rights and will materially affect the final decision and argues those criteria are not satisfied here.

Consumer Advocate restates the position it took in its September 6, 2005, resistance to One Call's motion to preserve, arguing that the motion is a prelude to a fishing expedition of unprecedented scope; One Call does not know what Web sites it claims to be looking for; there is no indication that preservation or subsequent discovery will exculpate One Call or advance the case; and One Call made no effort to resolve the discovery dispute before filing its motion.

Consumer Advocate further resists the implication that the complainants have filed an appearance in the penalty phase of these proceedings and that they are participating in any capacity other than prospective witness. Consumer Advocate argues that because One Call has not yet sought a subpoena, One Call's arguments regarding the Board's subpoena powers are not yet ripe for appellate review. Consumer Advocate acknowledges that it is a common practice in proceedings

before the Board to submit discovery requests to a party regarding a witness whom the party plans to call at hearing, but denies the implication that this practice justifies the submission of discovery requests to non-party witnesses or ordering non-party witnesses to preserve evidence. Consumer Advocate also argues that One Call's search for the responsible party is irrelevant to the issues in this case and, even if successful, would not preclude a finding that One Call violated the law. Finally, Consumer Advocate denies One Call's assertion that the preservation order is not burdensome or overbroad and suggests it would have a chilling effect on submission of complaints and the willingness of complainants to testify.

IV. ANALYSIS AND DISCUSSION

A. Interlocutory review

It is within the Board's discretion whether it should entertain interlocutory appeals from an order issued by an ALJ. The Board has stated that it does not want to encourage the filing of interlocutory appeals, but understands that certain situations require intervention to serve the interests of justice. Re: Office of Consumer Advocate v. Qwest Corporation and MCI WorldCom Communications, Inc., Docket No. FCU-02-5, "Order Affirming Administrative Law Judge Decision and Denying Request for Hearing," issued September 13, 2002.

The Board also observes that while its current rules do not contemplate interlocutory appeals, the procedural rules it recently adopted in Docket No. RMU-05-1 will go into effect on December 14, 2005, and those rules address

interlocutory appeals. The Board will consult those rules in deciding whether to address One Call's appeal, not as binding rules, but as appropriate guidance as allowed by Young Plumbing and Heating Co. v. Iowa Natural Resources Council, 276 N.W.2d 377 (Iowa 1979). The new rules provide a useful framework for analyzing One Call's interlocutory appeal and for deciding whether the Board should exercise its discretion and consider the merits of the appeal.

Proposed rule 7.25 provides that upon written request of a party or on its own motion, the Board may review an interlocutory order of the presiding officer. In determining whether to review an interlocutory order, the Board may consider the extent to which granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of the interlocutory order by the Board at the time it reviews the proposed decision would provide an adequate remedy.

Having considered these factors and recognizing that certain situations require intervention to serve the interests of justice, the Board concludes that it is appropriate to consider One Call's request for interlocutory review of the ALJ's order denying its motion for preservation of evidence. While interlocutory review may (or may not) expedite final resolution of the case, it is possible that review of the interlocutory order at the same time as the Board reviews the proposed decision may not provide an adequate remedy. One Call claims a need to base its defense, at least in part, on this kind of evidence, and One Call appears to believe the evidence may be lost if the

Board does not grant One Call's request. Interlocutory review of the ALJ's order, then, is appropriate in this case.

B. One Call's requested relief

The Board finds that the ALJ properly denied One Call's motion for preservation of evidence and will affirm the result of the ALJ's order. The Board will deny One Call's requested relief and will not order the informal complainants to preserve the electronic data.

First, the Board finds that One Call did not make a credible motion for preservation of evidence. The motion lacked specificity and clarity. One Call's motion is so broad it is not clear exactly what it seeks to preserve or what the complainants would be required to do to comply with a preservation order. In other words, One Call asks for broad, general relief but offers no specifics, either as examples or otherwise. Thus, it is impossible for the Board to evaluate the potential adverse effect of the requested relief.

The Board is left to wonder, for example, if simply turning off a computer would be contrary to an order requiring preservation of evidence in the manner requested by One Call. According to Consumer Advocate in footnote 2 to its response to One Call's notice of appeal, a certain amount of writing and erasing takes place on a computer's hard drive every time the computer is turned on and off and it is likely that some or all of the computers in question contain security software designed to erase things like system caches or lists of recently-visited addresses every time they are

shut down. Thus, it would appear that granting One Call's request would effectively prohibit the informal complainants from shutting down or rebooting their computers and could even be interpreted as requiring that they install uninterruptible power supplies to prevent inadvertent shut downs. If this is what One Call is requesting, it appears on its face to be an unreasonable request in these cases.

Similarly, use of the computer to visit new Web sites may erase the addresses of sites visited in the past. Thus, it is possible that granting One Call's broad request for relief would effectively prohibit the complaining customers from even using their computers until such time as One Call decides its discovery is complete. This may not be an intended result of One Call's request, but the request is so broad that it is a possible result. Again, the Board concludes this would not be a reasonable result.

The lack of clarity in One Call's motion is troubling because if One Call proceeds to file a motion to compel production of the evidence it seeks to preserve, the Board will be unable to assess the burden of the intrusion on the informal complainants against the harm to One Call if the evidence it seeks is not forthcoming. Without more specific information about what steps the informal complainants would need to take to preserve the evidence One Call seeks, the Board is not able to weigh the burden on the complainants against the harm to One Call.

Further, the Board is not aware that One Call has taken any steps one would expect if One Call were genuinely in pursuit of the evidence it seeks to preserve. For example, based on the record before the Board, it does not appear that One Call has

contacted the informal complainants, either during the informal complaint proceedings or after the start of formal proceedings, either directly or by way of a request through Consumer Advocate, to ask about the status of the computers in question and to ask if it could investigate the contents of the computers and any patterns of computer use by the informal complainants. If One Call is serious about needing this evidence, the Board would expect that One Call would have attempted to actually discover the evidence by now, rather than have merely sought to preserve it for potential future discovery.

One Call asserts as error the ALJ's conclusions that the Board does not have jurisdiction over the informal complainants and that the Board and Consumer Advocate do not have authority to order complainants to preserve evidence. One Call argues that because the Board has the authority to subpoena documents from the complainants, it follows that the Board can order the complainants to preserve evidence it intends to subpoena. The Board agrees with Consumer Advocate's assertion that any arguments regarding the Board's subpoena power are not yet ripe for appellate review because One Call has not yet requested a subpoena. The Board will decline to rule at this time on the issues of its authority to order non-parties to preserve evidence and the extent of its subpoena authority over non-parties.

One Call has asked for guidance from the Board on whether One Call should direct discovery regarding the Web sites visited by the informal complainants to Consumer Advocate or to the informal complainants. In response, the Board

encourages One Call and Consumer Advocate to attempt to work out discovery questions themselves before involving the ALJ or the Board. Thus, one might expect One Call to direct its discovery initially to Consumer Advocate, which is likely to rely on the informal complainants as witnesses, and see whether the parties can work it out. Alternatively, One Call might direct discovery to Consumer Advocate asking for a proposed witness list and then proceed on that basis. There are many alternatives for the parties to explore, and the Board will not dictate any particular one at this time.

Finally, the Board observes that One Call advances many arguments about other specific alleged errors in the ALJ's decision. Without addressing these arguments individually, the Board concludes that the outcome of the order being reviewed is correct and should be affirmed, thus making the other alleged errors moot.

V. ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. The interlocutory appeal of the administrative law judge's "Order Denying Motion to Preserve Evidence" issued September 28, 2005, filed by One Call Communications, Inc., on October 13, 2005, is granted.
2. The relief requested by One Call Communications, Inc., in its notice of appeal filed on October 13, 2005, is denied.

3. The administrative law judge's "Order Denying Motion to Preserve Evidence" issued September 28, 2005, is affirmed as discussed in the body of this order.

4. This matter is returned to the administrative law judge for continued proceedings with the remainder of this case, which has been with the administrative law judge throughout this interlocutory review of a single order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 2nd day of November, 2005.