

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: 40px;">Complainant,</p> <p style="padding-left: 40px;">vs.</p> <p>VOICEXPRESS,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-05-50</p>
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**PROCEDURAL ORDER AND NOTICE OF HEARING**

(Issued November 16, 2005)

**Background**

On June 13, 2005, Mr. Marvin Jackson submitted a complaint to the Utilities Board (Board) alleging that ESBI added a charge of \$14.95 to his telephone bill for services he and his wife did not order. Mr. Jackson stated his wife, Fern Jackson, had filled out an online survey but did not know she was ordering a service. The details of the complaint are contained in informal complaint file number C-05-117, 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 ESBI and requested a response. ESBI informed staff it was an aggregator, the disputed charge was submitted on

behalf of VoiceXpress, and a full credit of \$14.95 plus tax was issued on June 6, 2005. Staff then forwarded the complaint to VoiceXpress for response.

VoiceXpress filed a response on June 30, 2005, in which it stated Mrs. Jackson completed an online survey on May 11, 2005, and the company's voicemail service was offered on the Web site. VoiceXpress stated its service, billing, and terms were clearly stated on the Web page. It attached two documents labeled "Sample Web Page" and "Customer Service Information." VoiceXpress stated that after Mr. Jackson contacted their customer service department on June 3, 2005, the company issued a refund for the May billing of \$14.95 as a customer service.

On July 11, 2005, Board staff issued a proposed resolution concluding that VoiceXpress violated the Board's cramming rules by failing to follow the standards outlined in the rules when obtaining a letter of agency. Staff found that VoiceXpress had improperly combined the letter of agency used to obtain the customer's authorization with an inducement of free grocery coupons. Staff further concluded that the letter of agency was not clearly legible. In addition, staff stated that VoiceXpress had provided a screen print with an offer for grocery coupons and toll-free voicemail, but the information did not show the actual information Mrs. Jackson would have seen when she provided her customer information online.

On July 21, 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 correct and a civil penalty should be assessed because a credit alone will not stop the fraudulent practice. The Consumer Advocate stated that Mr. and Mrs. Jackson deny that the sample Web page submitted by VoiceXpress appeared on their computer screen and deny ordering the voicemail service. The Consumer Advocate further stated that according to the customer's complaint, the information obtained from a survey was wrongly used to say they ordered the voicemail service. The Consumer Advocate argues that meaningful civil penalties are needed to ensure compliance and deter future violations.

On July 29, 2005, the Board received a letter from out-of-state counsel for VoiceXpress, but did not consider it because the letter was not filed within 14 days of the proposed resolution as required by 199 IAC 6.5(2).

On August 30, 2005, the Board issued an order finding reasonable grounds for further investigation, docketing the case for formal proceedings, and ordering VoiceXpress to file a response to the Consumer Advocate's petition within 30 days of the order.

VoiceXpress filed a motion for extension, which the Board granted in an order issued October 7, 2005. VoiceXpress filed its answer to the Consumer Advocate's petition on October 7, 2005. VoiceXpress denied the proposed resolution was correct and denied that a civil penalty is warranted or appropriate under the circumstances. It argued the proposed resolution is erroneously based on a determination that the screen on the Web site is a letter of agency. VoiceXpress

argued that the Board's rule provides that a letter of agency shall be a separate document containing authorizing language "having the sole purpose of authorizing a service provider to initiate a preferred service provider change," the order does not initiate a preferred service provider change, and the order is an order for additional service and has nothing to do with the selection or change of a preferred service provider. VoiceXpress also argued the Board's rules define cramming but there is no rule currently in force that says cramming is prohibited. It further argued that even if the Board found cramming occurred, which it should not, since cramming is not prohibited, the Board has no authority to impose a civil penalty based on a determination of cramming. VoiceXpress requested the Board to dismiss the Consumer Advocate's petition.

On October 28, 2005, the Consumer Advocate filed a reply memorandum. The Consumer Advocate argued that VoiceXpress's argument that there is no rule prohibiting cramming is without merit. The Consumer Advocate argued Iowa Code § 476.103 (2005) and 199 IAC 22.23 prohibit "unauthorized changes in service," including slamming and cramming. It argued the intent of the legislature in enacting the statute and the intent of the Board in promulgating the rules was clearly to prohibit cramming. The Consumer Advocate argued the Board ruled in its order 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), that its rules prohibit unauthorized changes in telecommunications services.

The Consumer Advocate further argued there was no authorization for the charge because the customers never saw the computer screen VoiceXpress claims they saw and therefore did not order the voicemail service for which VoiceXpress billed them. It argued that if the complaint is true, the addition of voicemail service to the Jackson's account by new provider VoiceXpress falls squarely within the definition of "change in service" and the regulatory definitions of both slamming and cramming. The Consumer Advocate further argued there was no compliant verification, and the verification requirements apply to all changes in service. The Consumer Advocate argued that before submitting the change to Qwest, VoiceXpress was required to verify it by one of the means listed in the rule, and a letter of agency is one of those means. The Consumer Advocate argued that the reason the rule requires a letter of agency not be combined with inducements is to avoid confusing the reader between an advertisement and an order. It argued the verification requirement was not met. Therefore, the Consumer Advocate argued, a hearing is necessary to resolve the factual dispute and to provide a basis for assessment of a civil penalty.

On November 10, 2005, the Board issued an order assigning the case to the undersigned administrative law judge for further proceedings.

Pursuant to the Board's order, 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 Web site at [www.state.ia.us/iub](http://www.state.ia.us/iub). However, when viewing the Board's rules on the Internet, parties should know that the Board's amended procedural rules contained in subrules 1.8(4) and Chapter 7 have already been posted, even though they are not effective until December 14, 2005. All rule references in this order are to the version of the rules currently in effect.

### **The issues**

The issues in this case generally involve VoiceXpress's placement of the charge for voicemail service on Mr. Jackson's telephone bill and whether VoiceXpress complied with applicable law when it did so. The issues also include whether VoiceXpress provided acceptable proof of authorization to place its charge on Mr. Jackson's telephone bill in accordance with applicable law, whether imposition of a civil penalty is appropriate, the factors regarding the amount of civil penalty in Iowa Code § 476.103(4)(b), whether Iowa law prohibits cramming, whether the screen on the Web site at issue in this case is a letter of agency, whether the Board has authority to impose a civil penalty based on a determination of cramming, and what should be done to resolve the case. 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 VoiceXpress are currently the parties to this proceeding. If Mr. Jackson wishes to become a party to this case, he must notify the Board in writing in accordance with the procedural schedule established in this order.

VoiceXpress has filed the information required to be included in an appearance with its answer to the Consumer Advocate's petition and therefore does not need to file an appearance pursuant to 199 IAC 7.2.

Any party who communicates with the Board should send an original and ten copies of the communication to the Executive Secretary, Iowa Utilities Board, 350 Maple Street, Des Moines, Iowa 50319, 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 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-05-117, 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 Web site 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 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 section, a rule adopted pursuant to the section, or an order lawfully issued by the Board<sup>1</sup> pursuant to the section, 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.

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<sup>1</sup> In this case, the term "Board" includes the Board itself and the undersigned administrative law judge.

**IT IS THEREFORE ORDERED:**

1. If Mr. Jackson wishes to become a party to this case, he must file written notice with the Board no later than December 12, 2005. If Mr. Jackson becomes a party to this case and wishes to file prepared testimony and a brief, he must do so on or before December 12, 2005.

2. On or before December 12, 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 reply memorandum, 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.

3. On or before January 5, 2006, VoiceXpress must file prepared testimony and exhibits and a prehearing brief. VoiceXpress 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, VoiceXpress must address the issues discussed above, support each of

the allegations made in its response in the informal complaint case and answer, and file any other evidence not previously filed. VoiceXpress should use exhibit numbers 100 and following. In its prehearing brief, VoiceXpress 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.

4. 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 as soon as possible, and no later than January 19, 2006.

5. 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 January 19, 2006.

6. A hearing for the presentation of evidence and the cross-examination of witnesses will be held in Board Conference Room 3, 350 Maple Street, Des Moines, Iowa, on Thursday, February 2, 2006, beginning at 9:30 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.

7. 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.

8. 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 16<sup>th</sup> day of November, 2005.