

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="padding-left: 40px;">Complainant,</p> <p style="text-align:center">vs.</p> <p>BULLSEYE TELECOM, INC.,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-05-63</p>
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**ORDER DOCKETING FOR FORMAL PROCEEDING,
ASSIGNING TO ADMINISTRATIVE LAW JUDGE, AND
GRANTING ADMISSION PRO HAC VICE**

(Issued December 14, 2005)

On October 24, 2005, pursuant to Iowa Code §§ 476.3 and 476.103, 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 slamming violation committed by BullsEye Telecom, Inc. (BullsEye).

I. Informal complaint proceedings

In the informal proceedings, Board staff considered the complaint of Robert Peterson of Sioux City, Iowa, that the local telephone service provider for his business, Protective Coatings and Sandblasting, was changed from Qwest Corporation (Qwest) to BullsEye without his authorization. Mr. Peterson stated that a representative for BullsEye called him and said that BullsEye had bought Qwest's

billing contract and that he could save money if billing was handled by BullsEye. Board staff identified the matter as C-05-183 and, pursuant to Board rules, on September 16, 2005, forwarded the complaint to BullsEye and Qwest for response.

The Board received Qwest's response on September 20, 2005. Qwest stated it received a request to change Mr. Peterson's local service to BullsEye on September 6, 2005, with a requested due date of September 9, 2005. Qwest indicated that when Mr. Peterson called to ask why his service had been changed to BullsEye, it changed his service back to Qwest.

The Board received BullsEye's response on October 3, 2005. BullsEye stated Mr. Peterson's account was switched knowingly and without coercion. BullsEye enclosed a copy of a recording of the third-party verification and provided Mr. Peterson with a copy of the recording.

Mr. Peterson reviewed the recording and explained to Board staff that in his conversation with BullsEye, there had been no mention of phone service and that BullsEye had said it was a billing company.

Board staff issued a proposed resolution on October 12, 2005. Staff noted that BullsEye failed to provide the business name, address, and telephone number of the independent third-party verification service it uses. Because the proof provided by BullsEye was questionable and because Mr. Peterson reported that the company said it was a billing company and made no mention of changing services, staff concluded that BullsEye changed Mr. Peterson's service without proper

authorization. Staff directed BullsEye to credit the charges and to refrain from collection activity relating to the charges.

On October 21, 2005, the Board received a letter from BullsEye stating that it had credited Mr. Peterson's account for all charges and that Mr. Peterson could disregard any future invoices he might receive.

II. Consumer Advocate's petition

In its October 24, 2005, petition, Consumer Advocate argues staff's proposed resolution should be augmented with a civil penalty. Consumer Advocate argues a civil penalty is necessary to deter future violations and because credits alone will not stop the unlawful practice of slamming. Consumer Advocate alleges that the recording of the third-party verification does not accurately reproduce the actual conversation and does not contain a valid authorization. Consumer Advocate indicates that Mr. Peterson acknowledges the voice on the recording is his, but recalls that his conversation was with a male and a female and some of the statements made by the female voice on the recording were not made while the conversation was live. Consumer Advocate asserts the misrepresentations alleged by Mr. Peterson were fraudulent and such fraud vitiates any authorization Mr. Peterson may have given for the switch.

III. BullsEye's response

On November 21, 2005, BullsEye filed its response to Consumer Advocate's petition, a motion for permission for an out-of-state attorney to appear on behalf of

BullsEye in this proceeding, and an appearance of local counsel. In its response, BullsEye denies committing a slamming violation and asserts it obtained proper authorization for the change in Mr. Peterson's service. BullsEye contends the recording of the third-party verification is an accurate reproduction of the conversation that took place and demonstrates that Mr. Peterson authorized the change in service. BullsEye also states it sent the customer written materials advising him of the change in service.

Alternatively, BullsEye argues that even if the change was not properly authorized, a civil penalty should not be imposed. BullsEye asserts it has no history of violations in Iowa, it cooperated with the Board's investigation, and it fully credited the customer's account. BullsEye claims it already has policies in place to prevent slamming, there is nothing else civil penalties could encourage BullsEye to do, and the telemarketers it employs agree to abide by guidelines that prohibit the conduct alleged to have occurred in this case. BullsEye states that if the change in service was not properly authorized, the failure was the result of an isolated error that would not be deterred by civil penalties. BullsEye asks the Board to deny Consumer Advocate's petition.

IV. Consumer Advocate's reply

On December 6, 2005, Consumer Advocate filed a reply to BullsEye's response. Consumer Advocate states that Mr. Peterson denies that the recording submitted by BullsEye accurately reproduces the verification portion of the actual

conversation and that such factual disputes are properly resolved at hearing. Consumer Advocate contends that BullsEye's claim that it mailed the customer written materials advising him of the switch does not negate the allegations of the petition and does not address the alleged misrepresentations during the telemarketing portion of the call. Specifically, Consumer Advocate states that the BullsEye telemarketer misrepresented the company as "BullsEye Billing," and made other misrepresentations that BullsEye had bought Qwest's billing contract and the customer would save money by being billed through BullsEye.

Consumer Advocate asserts that the company's history of violations is relevant to determining the amount of a penalty, but not to the question of whether to assess a penalty, and that credits alone are not a sufficient response to the complaint. In response to BullsEye's assertion it has policies in place to ensure its telemarketers do not mislead customers, Consumer Advocate argues that if the allegations of the petition are true, which must be assumed for purposes of determining whether to docket this matter for formal proceeding, the policies were inadequate to prevent this violation. Consumer Advocate argues that granting its petition would advance the legislative purpose of curtailing and eliminating unauthorized changes in service.

V. Discussion

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

Consumer Advocate's petition for proceeding to consider a civil penalty. Because BullsEye has responded to Consumer Advocate's petition and Consumer Advocate has filed its reply to that response, this matter is ready to be assigned 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 will take all appropriate action, which may include setting a hearing date, presiding at the hearing, and issuing a proposed decision.

Finally, the Board has reviewed BullsEye's request to allow out-of-state attorney Matthew P. Misiak to represent BullsEye in this proceeding. The motion appears to comply with 199 IAC 7.2(7)"e" and is accompanied by the appearance by an Iowa attorney upon whom service may be made in all matters connected with this proceeding. The motion for admission pro hac vice will be granted.

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 October 24, 2005, is granted. File C-05-183 is docketed for formal proceedings, identified as Docket No. FCU-05-63.

2. Pursuant to Iowa Code § 17A.11(1)"b" and 199 IAC 7.1(4), Docket No. FCU-05-63 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."

3. The motion for admission pro hac vice filed on November 21, 2005, by BullsEye Telecom, Inc., is granted. Michael P. Misiak is authorized to appear in this proceeding as an attorney on behalf of BullsEye Telecom, Inc.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 14th day of December, 2005.