

Advocate Division of the Department of Justice (Consumer Advocate) filed a petition for a formal proceeding and requested the Board to consider imposing a civil penalty for an alleged cramming violation. One Call Communications, Inc., (One Call) resisted each of the petitions. The Board docketed the cases, consolidated them, and assigned them to the undersigned administrative law judge. At the request of the Consumer Advocate, the parties were given a six-month period of time for investigation and discovery.

On December 7, 2005, the Consumer Advocate filed a status report requesting an additional two months beyond the end of the current six-month discovery period to complete discovery. The Consumer Advocate also stated there was no reason to believe further settlement discussions would be productive and proposed a procedural schedule that provided for 30 days beyond the close of the discovery period to prepare pre-filed direct testimony. The Consumer Advocate further requested that sequential post-hearing briefs, rather than pre-hearing briefs, be required.

On December 14, 2005, One Call filed a response to the status report. One Call did not object to the Consumer Advocate's request for an additional two months for discovery and did not object to the Consumer Advocate's proposed procedural schedule. However, One Call stated that pre-hearing briefs are necessary in this case.

The request for an additional two-month period for discovery and the procedural schedule agreed to by the parties appear reasonable. Both pre-hearing and post-hearing briefs would be useful.

Pursuant to the Board's orders, 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. The parties should be aware that the Board amended its procedural rules in rules 1.8 and Chapter 7, and the amended rules became effective December 14, 2005. All rule references in this order are to the amended procedural rules.

THE ISSUES

The issues in this case generally involve One Call's placement of the disputed charges on the customers' telephone bills and whether One Call complied with applicable law when it did so. Other issues include whether the charges were authorized, the nature and origin of the disputed calls, how the disputed charges appeared on the customers' telephone bills, the reason some calls were billed as hotel/motel calls, whether allegations of modem hijacking are supported by the evidence, and the ability of a carrier such as One Call to prevent these types of calls and related charges. The issues also include whether imposition of a civil penalty is

appropriate and the factors regarding the amount of civil penalty in Iowa Code
§ 476.103(4)(b). 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 One Call are currently the only parties in this case. If any customer wishes to become a party to this case, he or she must notify the Board in writing in accordance with the procedural schedule established in this order.

One Call has filed the information required to be included in an appearance with its multiple filings in the case and, therefore, does not need to file an appearance pursuant to 199 IAC 7.4(7).

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 7.4(6)"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 customers' complaints and all supplemental information from the informal complaint proceedings 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.

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 Board¹ 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

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

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.

IT IS THEREFORE ORDERED:

1. The Consumer Advocate's request for a two-month extension beyond the end of the current six-month discovery period to complete discovery is granted. The discovery period will therefore end on March 7, 2006.

2. If any customer wishes to become a party to this case, he or she must file written notice with the Board no later than April 7, 2006. If any customer becomes a party to this case and wishes to file prepared testimony and a brief, he or she must do so on or before April 7, 2006.

3. On or before April 7, 2006, 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 processes 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 subsequent filings, 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 each docket. Prehearing briefs do not need to include an extensive discussion of the facts in each docket, but must include reference to sufficient facts expected to be proven to support the party's legal theory.

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 no later than May 1, 2006.

5. On or before May 1, 2006, the parties must propose three mutually agreeable June dates for the hearing. The undersigned will set a date for the hearing and issue a notice of hearing after receipt of these dates. A post-hearing briefing schedule will be established at the conclusion of the hearing.

6. On or before May 12, 2006, One Call must file prepared testimony and exhibits and a prehearing brief. One Call 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, One Call must address the issues discussed above, support each of the allegations made in its responses in the informal complaint cases and subsequent filings, and file any other evidence not previously filed. One Call should use exhibit numbers 100 and following. In its prehearing brief, One Call must explain why it believes imposition of a civil penalty would not be appropriate and would not be in accordance with applicable law in each docket. Prehearing briefs do not need to include an extensive

discussion of the facts in each docket, but must include reference to sufficient facts expected to be proven to support the party's legal theory.

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 on or before June 2, 2006.

8. 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 7.23(4)"d," 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.

9. Any person not currently a party who wishes to intervene in this case must meet the requirements for intervention in 199 IAC 7.13. 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 7.13(1).

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 20th day of December, 2005.