

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">vs.</p> <p>SILV COMMUNICATION, INC.,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-05-62</p>
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**ORDER DENYING MOTION TO DISMISS AND
ASSIGNING TO ADMINISTRATIVE LAW JUDGE**

(Issued December 21, 2005)

On October 12, 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 Silv Communication, Inc. (Silv).

I. Informal complaint proceedings

In the informal complaint proceedings, Board staff considered the complaint of Steve Rust of Rust & Associates of Ankeny, Iowa, that Silv changed the long distance telephone service of Rust & Associates without authorization. In responding to the complaint, Silv stated it discontinued services to the customer as of August 4, 2005, and issued a credit of \$169.71. Silv provided a copy of a recording of a third-

party verification. Board staff forwarded a copy of the recording to Mr. Rust for his review.

On October 3, 2005, Board staff issued a proposed resolution finding that Silv violated the Board's rules against slamming. Staff observed that Silv had stated that someone named Lydia Pea authorized the change in service, but Mr. Rust indicated that Rust & Associates employed no one by that name. Staff concluded the authorization was not valid.

II. Consumer Advocate's petition for proceeding to consider civil penalty

In its October 12, 2005, petition, Consumer Advocate asserted the proposed resolution should be augmented with a civil penalty because civil penalties are necessary to stop the unlawful practice of slamming, ensure compliance, and deter future violations. Silv did not respond to Consumer Advocate's petition.

In its November 18, 2005, order, the Board reviewed the record, found reasonable grounds for further investigation, docketed Consumer Advocate's petition for formal proceeding, and directed Silv to file a response to the petition.

III. Silv's response and motion to dismiss

On December 2, 2005, Silv filed a response to and motion to dismiss Consumer Advocate's petition. Silv states it established the account for the customer on the mistaken belief the information provided by the independent marketing company it had contracted with was reliable. Silv states it terminated its relationship with the marketing company once it was apparent the company was not providing

adequate audiotape verification of legitimate changes in service. Silv states that upon receipt of the complaint, it started the process of issuing a full credit of all charges. Further, Silv states it has never been fined in any state, has resolved all complaints to the satisfaction of all parties and regulatory agencies, and is a small company with four employees and limited resources. Silv argues the penalty sought by Consumer Advocate is excessive and disproportionate to any actual financial damage to the customer. Silv contends the customer suffered no economic loss, was never made to pay any charges, and was not deprived of any telecommunications service. Silv asks the Board to dismiss Consumer Advocate's petition.

IV. Consumer Advocate's reply

On December 13, 2005, Consumer Advocate filed a reply to Silv's response and motion to dismiss. Consumer Advocate states that Silv has neither explained nor denied the violation and its arguments as to why a civil penalty should not be assessed are without merit. Consumer Advocate asserts that Silv attempts to shift responsibility for the violation to its telemarketing agent and that the facts alleged by Silv cannot be resolved by the motion to dismiss. In response to Silv's statement that it issued a credit when the customer complained, Consumer Advocate argues that credits are an insufficient response to the violation. Consumer Advocate cites the deterrent effect of settlement of cases with penalties secured by Consumer Advocate and approved by the Board and argues that its ability to secure such settlements is

compromised when a company chooses to litigate and no penalty of meaningful size is assessed. Consumer Advocate suggests the purpose of civil penalties is not to compensate the customer but to prevent recurrent violations. Consumer Advocate asks the Board to deny Silv's motion to dismiss.

V. Discussion

The Board has already determined there are reasonable grounds for further investigation of this matter and docketed Consumer Advocate's petition for formal proceeding. The Board has considered Silv's response and Consumer Advocate's reply. For purposes of ruling on Silv's motion to dismiss, the Board will take the allegations of Consumer Advocate's petition as true under those limited circumstances. The petition states a claim that, if proven, may justify the relief requested. The Board will therefore deny Silv's motion to dismiss Consumer Advocate's petition. The Board will assign this case to its administrative law judge (ALJ) for further proceedings pursuant to Iowa Code § 17A.11(1)"b" (2005) and 199 IAC 7.3. The ALJ may take all appropriate action, which may include setting a hearing date, presiding at hearing, and issuing a proposed decision.

IT IS THEREFORE ORDERED:

1. The motion to dismiss filed in Docket No. FCU-05-62 by Silv Communication, Inc., on December 2, 2005, is denied.
2. Pursuant to Iowa Code § 17A.11(1)"b" and 199 IAC 7.3, Docket No. FCU-05-62 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 7.3.

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 21st day of December, 2005.