

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

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| <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>BULLSEYE TELECOM, INC.,</p> <p style="text-align:center">Respondent.</p> | <p style="text-align:center">DOCKET NO. FCU-05-63</p> |
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PROCEDURAL ORDER AND NOTICE OF HEARING

(Issued December 21, 2005)

On September 15, 2005, Mr. Robert Peterson filed a complaint with the Utilities Board (Board) against BullsEye Telecom, Inc., (BullsEye), alleging that the local telephone service provider for his business was changed from Qwest Corporation (Qwest) to BullsEye without his authorization. Board staff investigated the complaint, and after investigation, issued a proposed resolution finding that BullsEye had changed Mr. Peterson's service without proper authorization. The Consumer Advocate Division of the Department of Justice (Consumer Advocate) subsequently filed a petition for a proceeding to consider a civil penalty, which was resisted by BullsEye. The details of the informal complaint case are contained in informal complaint file number C-05-183, which is incorporated into the record in this case pursuant to 199 IAC 6.7.

On December 14, 2005, the Board issued an order finding that reasonable grounds exist for further investigation of the case, granting the Consumer Advocate's petition, docketing the case for formal proceedings, and assigning it to the undersigned administrative law judge. The Board also granted BullsEye's motion for admission pro hac vice.

Pursuant to the Board's order and Iowa Code §§ 476.3(1) and 476.103(4), 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 recently amended its procedural rules in rule 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 the change of Mr. Peterson's local telephone service to BullsEye, whether BullsEye complied with applicable law when it changed his service, and whether imposition of a civil penalty is appropriate. 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).

In addition to including prepared evidence regarding the issues listed above, BullsEye is directed to present prepared evidence that the third-party verification company on the call at issue in this case was VoiceLog LLC, the address and telephone number of the third-party verification company used on the call at issue in

this case, and evidence that the third-party verification company used on the call at issue in this case is an appropriately qualified independent third-party that complies with the requirements of 199 IAC 22.23(2)"a"(3).

PARTY STATUS AND COMMUNICATION WITH THE BOARD

The Consumer Advocate and BullsEye are currently the only parties to this proceeding. If Mr. Peterson wishes to be a party to this case, he must notify the Board in writing in accordance with the procedural schedule established in this order.

BullsEye filed the information required to be included in an appearance with its response to the petition and surreply memorandum and filed an appearance by local counsel. Therefore, Bullseye has fulfilled the requirements of 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 at 350 Maple Street, Des Moines, Iowa 50319-0069, 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 written complaint and all supplemental information from the informal complaint proceeding, identified as informal complaint file C-05-183, 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

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

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.

IT IS THEREFORE ORDERED:

1. If Mr. Peterson wishes to become a party to this case, he must file written notice with the Board no later than January 18, 2006.
2. On or before January 18, 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 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, 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. If Mr. Peterson becomes a party to this case and wishes to file prepared testimony and a brief, he must do so on or before January 18, 2006.

3. On or before February 8, 2006, BullsEye must file prepared testimony and exhibits and a prehearing brief. BullsEye 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, BullsEye must address the issues discussed above, include the required information regarding its third-party verification company, support each of the allegations made in its response and surreply, and file any other evidence not previously filed. BullsEye should use exhibit numbers 100 and following. In its prehearing brief, BullsEye 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 notification with the Board no later than February 14, 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 on or before February 22, 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 Tuesday, March 7, 2006, commencing 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 Board at 1-515-281-5256 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 7.23(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.

8. 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 21st day of December, 2005.