

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="padding-left: 40px;">vs.</p> <p>AMERICAN ROAMING NETWORK,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-05-67</p>
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ORDER DOCKETING FOR FORMAL PROCEEDING, DENYING MOTION TO DISMISS, ASSIGNING TO ADMINISTRATIVE LAW JUDGE, DENYING REQUEST FOR CONFIDENTIALITY, AND GRANTING ADMISSION PRO HAC VICE

(Issued January 9, 2006)

On November 15, 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 cramming violation committed by American Roaming Network (ARN).

I. Informal complaint proceeding

In the informal proceeding, Board staff considered the complaint of David Siev of Ames, Iowa, that his phone bill included a charge of \$18.35 submitted on behalf of ARN for a collect call. Mr. Siev said the call "never happened." Board staff identified the matter as C-05-192 and forwarded the complaint to ARN for response.

The Board received ARN's response on October 21, 2005. ARN stated it provides interstate and intrastate cellular call completion services for foreign roamers on cellular systems and that it placed the disputed call for a foreign cellular roamer on the US Cellular system in the Des Moines, Iowa, area. ARN explained that the automated collect wireless calls it places are prefaced with a statement identifying the name of the caller making the cellular collect call, explaining the charges, and telling the called party how to either accept or reject the call. ARN stated that on October 17, 2005, after receiving the complaint, it called Mr. Siev to discuss collect calls but the person who answered the phone terminated the call. ARN indicated it would issue a credit if Mr. Siev would call the company.

Board staff forwarded a copy of ARN's response to Mr. Siev for his review. On November 1, 2005, the Board received Mr. Siev's response. Mr. Siev stated that the billing agent for ARN told his wife that the disputed call was station-to-station from a hospital, hotel, or pay phone, and that no one in his household recalled receiving a call from ARN on October 17, 2005.

On November 2, 2005, Board staff issued a proposed resolution concluding that ARN violated the Board's rules against cramming because it did not prove the disputed charges were authorized. On November 14, 2005, the Board received a letter from ARN responding to the proposed resolution. ARN stated the disputed call was accepted electronically, the resulting charge was not "cramming," and that ARN had nonetheless issued a credit of \$20.18.

II. Consumer Advocate's petition

In its November 15, 2005, petition, Consumer Advocate argues that staff's proposed resolution should be augmented with a civil penalty, asserting that a civil penalty is necessary to deter future violations and because credits alone will not stop the unlawful practice of cramming.

III. ARN's answer and motion to dismiss

On December 12, 2005, ARN filed an answer to and motion to dismiss Consumer Advocate's petition. In its answer, ARN explains the nature of the default roaming service it provides for unregistered wireless customers and states that its service allows customers to place collect calls to a landline phone. ARN states that its automated system ensures that charges will be incurred by a landline user only if that user presses the digit "1" on the phone's keypad to accept the call.

ARN argues that Consumer Advocate's petition should be dismissed because the disputed charge does not constitute cramming, as it was authorized by the customer. ARN asserts that a civil penalty is not necessary to deter future violations because it has refunded the charge, blocked billing of any collect calls placed in the future through the ARN network to Mr. Siev, and because its system is designed to process authorized calls only.

ARN argues that the Board's rules state that cramming does not include acceptance of collect calls. ARN refers to the statement of its employee, Michael McGrath, attached as Exhibit A, to explain that the automated system will not connect

a collect call and no charges will be incurred if the called party does not accept the call by pressing "1."

ARN states its call records and the customer's bill indicate the disputed call was connected for almost eight minutes. ARN suggests it would have been unusual for the cell phone caller to stay on the line for this length of time if the call had not been accepted. ARN also states its records show that other calls were attempted by the cell phone number used to call Mr. Siev and that these calls were not answered or connected. ARN suggests it would be unusual for an incorrect number to be dialed repeatedly over several days.

ARN contends that despite Mr. Siev's statement that the call "never happened," its records show the call and resulting charges were authorized and an eight-minute conversation took place. ARN argues that because the disputed charges were authorized, a proceeding to consider civil penalty is neither permissible nor necessary.

ARN asserts that the petition should be dismissed because billing for a single collect call is a function of the local exchange service, not the addition of a service, and thus is not covered by the prohibition of unauthorized changes in service. Also, ARN argues that because Iowa Code § 476.103(2)(f) excludes commercial mobile radio services (CRMS) from the definition of telecommunications service and from the reach of the statute authorizing civil penalties, the call in question in this case – a call that originated on a cellular telephone – is outside of the Board's jurisdiction.

IV. ARN's request for confidentiality and motion for admission pro hac vice

On December 12, 2005, ARN applied to the Board for an order giving confidential treatment to the information attached to ARN's answer and motion to dismiss. The information consists of the declaration of Michael McGrath, an employee of ARN. Mr. McGrath's declaration generally describes the automated system used by ARN to process collect calls. It also includes a description of the disputed call in this case, Mr. Siev's landline telephone number, and a history of other calls attempted from the cell phone in question to Mr. Siev's phone number, according to ARN's records.

The request relies upon Iowa Code § 22.7(6), relating to reports to governmental agencies, and § 22.7(18), relating to communications made to a government body. ARN asserts the information is considered confidential under §§ 22.7(6) and 22.7(18) as it is a report to a governmental agency that includes information that is private to the customer which, if made public, would serve no public purpose. The request also alleges the information is protected as customer proprietary network information under 44 U.S.C. § 222. In support of its application, ARN attaches an affidavit of an attorney for the company.

On December 13, 2005, ARN filed with the Board a request to allow out-of-state attorney Marc A. Paul to be admitted pro hac vice as additional counsel for ARN in this proceeding.

V. Consumer Advocate's reply and resistance to request for confidentiality

On December 27, 2005, Consumer Advocate filed a reply to ARN's motion to dismiss and a resistance to ARN's request for confidentiality. Consumer Advocate states that the motion to dismiss disregards the proper methods of determining controverted facts. Consumer Advocate rejects ARN's argument that billing for a single call is not the addition of a service within the meaning of the cramming statute and rule. Consumer Advocate asserts this position would allow unauthorized charges to escape scrutiny simply because a customer has local service. Consumer Advocate also rejects ARN's argument that the Board does not have jurisdiction over a matter involving a disputed charge for a call that originated on a cellular phone. Consumer Advocate states the call in question was billed to a wireline account and thus falls within the statutory purpose of preventing unauthorized charges and within the Board's jurisdiction.

Consumer Advocate asserts that issuing a credit and blocking future calls is a necessary but insufficient response to an unauthorized charge and asks the Board to deny ARN's motion to dismiss.

In its resistance to ARN's request for confidential treatment, Consumer Advocate argues that Iowa Code § 22.7(6) does not apply to Mr. McGrath's declaration. Consumer Advocate characterizes the declaration as a statement of alleged facts relied upon to deny a charge against ARN, not a report to a governmental agency. Regarding ARN's request pursuant to Iowa Code § 22.7(18),

Consumer Advocate states that the calling history contained in the declaration includes no private information and does not include the identity of the calling party or the alleged originating cell phone number.

Consumer Advocate also denies that 47 U.S.C. § 222 applies to the declaration. Consumer Advocate cites the following portion of 47 U.S.C. § 222 and argues this exception applies to this proceeding as its purpose is to protect users from unlawful use:

Nothing in this section prohibits a telecommunications carrier from using, disclosing, or permitting access to customer proprietary network information obtained from its customers, either directly or indirectly through its agents . . . (2) to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services.

Consumer Advocate asks the Board to deny ARN's request for confidentiality.

VI. 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 docket Consumer Advocate's petition for proceeding to consider civil penalty, identified as Docket No. FCU-05-67. For purposes of ruling on ARN's motion to dismiss the petition, the Board takes the allegations of the petition as true under those limited circumstances. The petition states a claim that the disputed charge was unauthorized and, if proven, that claim may justify the relief requested. The Board will therefore deny ARN'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 the hearing, and issuing a proposed decision.

Regarding ARN's request for confidentiality, the Board concludes that the information included in the declaration is not confidential information warranting protection under the provisions of Iowa Code chapter 22. ARN requests confidential treatment under Iowa Code § 22.7(6), which provides for confidential treatment of "reports to governmental agencies which, if released, would give advantage to competitors and would serve no public purpose." On this point, the Board agrees with Consumer Advocate that the declaration appears to be simply a statement of alleged facts submitted to the Board for the purpose of denying the allegations raised in Consumer Advocate's petition rather than a report to the Board containing confidential information. In particular, there appears to be no basis on which the Board could find that release of this information "would give advantage to competitors" of ARN. The declaration contains a limited and general description of ARN's system for obtaining authorization for collect calls, but virtually the same information was included in ARN's public filings. This indicates ARN does not really believe release of the information would give advantage to its competitors.

The declaration also contains very limited information regarding Mr. Siev's bill (his landline telephone number, the length of the alleged call, and times and dates of

other alleged calls or attempted calls). ARN does not explain, and the Board cannot find, that release of this information would give advantage to ARN's competitors.

On the question of whether the request for confidentiality should be granted based on Iowa Code § 22.7(18) or 42 U.S.C. § 222, the Board also agrees with Consumer Advocate that these sections do not apply to the declaration.

Section 22.7(18) provides for confidential treatment of communications that are not required by law, rule, or procedure that are made to a government body, but only "to the extent that the government body receiving those communications from such persons outside of government could reasonably believe that those persons would be discouraged from making them to that government body if they were available for general public examination." ARN's request for confidentiality does not offer any explanation or support for its claim that its filing fits within this category.

Moreover, the Board notes that, the information at issue is already in the public record in this docket. ARN's public response describes its automated call response system in some detail. Mr. Siev's telephone number is already in the public record. Thus, while the declaration includes Mr. Siev's landline telephone number, he was not ARN's customer and ARN need not assert a protection that Mr. Siev apparently has not sought. Further, the telephone number would be readily available to the public in a local telephone directory and, on December 30, 2005, Consumer Advocate filed a supplement to its resistance indicating Mr. Siev waives any right of privacy to the putative call history contained in Mr. McGrath's declaration. Finally, the

declaration does not identify the name of the person who made the cell phone call that resulted in the disputed charges nor does it identify the originating phone number.

In any event, the Board is reluctant to grant ARN's request for confidential treatment for information that the Board will need to consider and discuss when analyzing and resolving the issues raised in this proceeding. The declaration contains information about call history and patterns and that information may be probative of whether the disputed charge was in fact authorized. Granting confidential treatment for the information in the declaration would unnecessarily restrict the Board's ability to discuss the information in any future orders in this proceeding. Therefore, the Board will deny ARN's request for confidential treatment. The document will be handled as provided in 199 IAC 1.9(6)"d."

Finally, the Board has reviewed ARN's request to allow out-of-state attorney Marc A. Paul to represent ARN in this proceeding. The request appears to comply with 199 IAC 7.4(8)"a" and ARN is represented by Iowa attorneys upon whom service may be made in all matters connected with this proceeding. The request 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

November 15, 2005, is granted. File C-05-192 is docketed for formal proceeding, identified as Docket No. FCU-05-67.

2. The motion to dismiss filed in Docket No. FCU-05-67 by American Roaming Network on December 12, 2005, is denied.

3. Pursuant to Iowa Code § 17A.11(1)(b) and 199 IAC 7.3, Docket No. FCU-05-67 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.

4. The motion for confidential treatment filed by American Roaming Network in this docket on December 12, 2005, is denied.

5. The motion for admission pro hac vice filed by American Roaming Network on December 13, 2005, is granted. Marc A. Paul is authorized to appear in this proceeding as an attorney on behalf of American Roaming Network.

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 9th day of January, 2006.