

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. ONE CALL COMMUNICATIONS, INC., Respondent.	DOCKET NOS. FCU-04-54 FCU-04-63 FCU-04-64 FCU-05-1 FCU-05-3 FCU-05-8 FCU-05-12 FCU-05-15 FCU-05-24 FCU-05-25 FCU-05-43 FCU-05-45
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ORDER GRANTING MOTION TO COMPEL

(Issued January 17, 2006)

On December 9, 2005, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a motion to compel discovery. The Consumer Advocate requested an order compelling One Call Communications, Inc. (One Call) to produce the statistical information requested in the Consumer Advocate's data request numbers 23-25, 45-46, 52-53, and 62-63. The Consumer Advocate stated that One Call had refused to provide the statistical information, except as limited to Iowa, and that it had made a good faith but unsuccessful attempt to resolve the matter without the need for intervention of the Board.

In its motion, the Consumer Advocate provided a detailed description of the data requests and responses by One Call to each data request and attached the data requests and responses to the motion. The Consumer Advocate stated that the data

requests seek "statistical information on billings, inquiries or complaints, and credits or refunds on alleged calls billed by or on behalf of One Call to the destination numbers shown on the disputed bills at issue in these 12 consolidated proceedings." The Consumer Advocate stated that One Call provided the requested information with respect to Iowa consumers but refused to provide it with respect to customers outside the state of Iowa.

The Consumer Advocate argued that the requested information is relevant to the issues in the case without regard to the geographic location of the billed party. It argued the information is relevant to the issue whether the complaining customers placed the calls or authorized the charges, and therefore is relevant to the issue of whether there was a violation. The Consumer Advocate argued that a large number of complaints or credits supports an inference that a large number of the complaints are true and cited Federal Trade Commission v. Verity International, Ltd., 335 F. Supp. 2d 479 (S.D.N.Y. 2004) (Verity) in support. It argued that while the information provided by One Call with respect to Iowa customers may be sufficient to support a similar inference with respect to some of the destination numbers at issue in these proceedings, it is fair to ask whether more complete information would more strongly support the inference. It argues that with respect to some of the other destination numbers, the statistical information for Iowa customers may not be sufficient by themselves to support the inference, but complete information may be.

The Consumer Advocate argued the requested information is also relevant on the penalty issue. It argued the Board has been reluctant to assess a penalty in the absence of evidence the company was playing some role in the scam, or profited by

it or had some ability to prevent it from victimizing customers in the future. It argued billings and collections go directly to profit. It argued the requested statistical information may help to show whether One Call took some action to stop billings or may show it had an ability to prevent future violations. It argued the volume of the complaints may be evidence of One Call's knowledge and may show that the company should have investigated and taken action to stop future violations.

The Consumer Advocate argued in determining whether the data requests are unduly burdensome or expensive, the Board may take into account the needs of the case, the amount in controversy, the limitations on the parties' resources, and the importance of the issues at stake in the litigation. It argued a certain amount of inconvenience is inherent in discovery and the burden is on the resisting party to provide specifics. The Consumer Advocate argued One Call offered no specifics as to why it claimed the requested discovery was burdensome. It argued that One Call provided the requested information with respect to Iowa billings and provided it in electronic form, and it provided no specifics as to why it would be a significant problem to provide the same information for a larger universe of billings, given computerized databases. It argued One Call's unsupported claim of burdensomeness is unpersuasive and legally insufficient and there is no reason to think that requiring compliance would unduly disrupt or seriously hinder normal operation of One Call's business. The Consumer Advocate stated that if providing a paper copy is a concern, it would modify its request so that production only in electronic form was required.

On December 23, 2005, One Call filed a resistance to the Consumer Advocate's motion to compel. One Call stated that the Consumer Advocate alleges One Call violated Iowa's cramming statute by placing unauthorized charges on the telephone bills of various informal complainants, One Call has denied the allegations, and it has provided the Consumer Advocate with its switch records that confirm the disputed calls took place. One Call stated that based on information provided by the informal complainants, it has reason to believe that the calls may have been placed as the result of modem hijacking.

One Call argued that the Consumer Advocate's data requests are overly broad because they seek information regarding complaints outside of Iowa. It argued complaints from customers outside Iowa are outside the scope of this proceeding and therefore not relevant. It argued the Board has prohibited discovery of information regarding services outside Iowa and cited to In re: Level 3 Communications, L.L.C. v Qwest Corporation, "Order Denying Request for Hearing and Granting in Part and Denying in Part Motion to Compel," Docket No. ARB-05-4 (August 16, 2005) (Level 3), in support. It stated the Board in Level 3 found the request for information regarding Qwest's services outside of Iowa to be overly broad and not likely to lead to the production of relevant or admissible evidence.

One Call argued that the Consumer Advocate's reliance on the Verity case was not appropriate because, unlike the Board, the FTC has nationwide jurisdiction, so it was appropriate to obtain information regarding complaints from customers across the United States. One Call argued that it is not appropriate in this case

"where the Board only has jurisdiction over Iowa and when the Board has already ruled that discovery of information outside of Iowa is not permissible."

In addition, One Call argued that the Consumer Advocate's request is unduly burdensome. One Call argued that to determine if a request is unduly burdensome, it is necessary to take into account "the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation," and cited to Berg v. Des Moines General Hospital, 456 N.W.2d 173 (Iowa 1990) (Berg) in support. The court found in Berg that a request that the hospital manually examine over 1700 patient files for 10 years of records was unduly burdensome. One Call argued that, as in Berg, the questionable utility of the Consumer Advocate's requested information is outweighed by the drastic steps One Call would have to take to retrieve the information.

One Call argued it conducted burdensome, time consuming, and expensive investigations to produce the requested information with respect to Iowa customers, and provided an affidavit of Mr. Krayterman, One Call's senior systems architect, in support. It argued the requested information is not readily available to One Call, it keeps its data on a per ANI basis, not on a national or international basis, and it does not maintain any reports that would be responsive to the request. Therefore, it argued, Mr. Krayterman would have to write search code that takes about a half a day to write to retrieve the requested information. One Call argued it is a small company with only 64 employees, there are only four employees in Mr. Krayterman's department, and Mr. Krayterman has already spent nearly four full days drafting code to research the Consumer Advocate's requests for Iowa alone. It argued it was very

difficult to find the resources to respond to the requests related to Iowa alone and it does not have the time, employees, or financial resources to duplicate its efforts on a nationwide or worldwide scale. One Call argued that given the burden of researching the Iowa complaints alone, it would be even more burdensome for One Call to conduct nationwide and worldwide searches. One Call argued that obtaining the information becomes even more burdensome in light of the fact that it is outside the scope of this proceeding.

One Call further argued the Consumer Advocate could make less burdensome requests to obtain the evidence it seeks. As an example, it argues the Consumer Advocate could simply ask One Call when it determined the calls were related to modem hijacking and what it did to prevent future calls. One Call argued that given there are less intrusive methods to obtain the evidence and given the enormous burden nationwide and worldwide searches would place on One Call, the Consumer Advocate's motion should be dismissed.

In his affidavit, Mr. Krayterman stated he had to write a code to search the information on One Call's databases to retrieve the information requested in the data requests. He stated he spent approximately one-half day crafting the search for Iowa alone to respond to data requests 23-25. He stated he spent approximately one-half day each crafting the reports for Iowa alone to respond to data requests 45 and 46, nearly one-half day for data requests 52 and 53, and approximately one-half day each for data requests 62 and 63. Although the sum of the one-half days listed in the affidavit appears to be three days, Mr. Krayterman stated in his affidavit that he spent nearly four days total researching One Call's information system to respond to the

Consumer Advocate's request for Iowa information alone. He stated his department does not have the resources to duplicate its efforts on a nationwide or worldwide scale. He did not provide an estimate of the time it would take to do this.

One Call further argued that the Consumer Advocate's request should be denied because it is not likely to lead to the discovery of admissible evidence. One Call argued the Consumer Advocate claims the information is relevant to whether the complaining customers placed the calls, but the Consumer Advocate mistakes the issues. One Call states there is no doubt the calls were placed and the Consumer Advocate has the switch records that proved the calls were made. One Call argued the question is whether One Call is responsible in some way for initiating the calls to the websites in question.

One Call further argued the Verity case does not support the Consumer Advocate's position that the number of complaints will provide enough information to support an inference of One Call's guilt. One Call argued that in Verity, the FTC brought charges against operators of adult websites who, just like in the present case, arranged payment for visiting the sites by including the charges on the telephone bills for the telephone lines over which the customers accessed the internet. One Call argued that companies such as AT&T, Sprint, and eBillit provided transiting and billing services similar to those provided by One Call. One Call argued that the court in Verity found that the number of complaints to the billing companies supported an inference of wrongdoing by Verity International, but did not support an inference of guilt against AT&T and eBillit. One Call argued that Verity does not support an inference that the number of complaints made to the billing/transitor

demonstrates that the billing/transitor is responsible for initiating the traffic. Rather, it is the Web site operator who induced the customers to visit the sites, either through modem hijacking or unclear terms, who is responsible. One Call argued that the fact it carried and billed for the disputed traffic does not, by itself, make One Call culpable for the Web sites' operations and actions.

One Call argued it is known that the calls or Web site visits took place and the complainants deny making the calls or visiting the Web sites. It argued therefore, that the issue before the Board is how the calls were initiated and if One Call was responsible for the initiation of the calls in any way. It argued the number of complaints is not at issue in this proceeding and, therefore, the data requests are in no way relevant to the issues before the Board. One Call requested that the Consumer Advocate's motion to compel be denied.

On January 5, 2006, the Consumer Advocate filed a reply on the motion to compel. The Consumer Advocate argued that on the violation phase of the case, the issue is whether the charges were authorized. It argued that this issue is the same as in Verity: whether the defendants billed customers for calls that they neither made nor authorized. The Consumer Advocate argued that the statistical evidence sought will support an inference that the charges were unauthorized based on evidence of the volume of complaints and the volume of credits, as the court found in Verity. It stated its position regarding relevance on the penalty phase was contained in its motion, the argument did not rest on Verity, and it rested on Board cases and cases cited in the motion.

The Consumer Advocate further argued that although the Board prohibited discovery of information outside Iowa in Level 3, the order was specific to that case and did not generally prohibit discovery of information regarding services outside of Iowa. The Consumer Advocate argued that in cases where evidence regarding services outside Iowa is relevant to issues requiring decision in Iowa, such a general prohibition would contravene Iowa R. Civ. P. 1.503(1), which provides that parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action.

The Consumer Advocate further argued that the maximum penalty and the amount in controversy is \$380,000, the harm to consumers from unauthorized billings is substantial, many consumers who receive bills simply pay them or are unwilling to engage in extended debates with billers, some are fearful of damage to their credit ratings, and the complexity of the facts is no contrivance of the Consumer Advocate's. It further argued that with respect to the nine data requests at issue in this motion, One Call's objection of undue burden is an afterthought. It argued that One Call originally objected to the data requests on the basis that it had no obligation to provide information with respect to complaints outside of Iowa and had nothing to do with alleged burden.

The Consumer Advocate argued that the recitations in the Krayterman affidavit provide no justification for denying the requested discovery. It argued the implicit premise that discovery obligations are confined to information maintained in the ordinary course of business lacks legal support and it is not surprising that the requested information resides in an electronic database or that programming must be

done to retrieve it. The Consumer Advocate argued that seven one-half days is not an inordinate amount of time for a company to have to spend to obtain information no one else has. It argued that One Call made no claim at the time that retrieving the information was an undue burden, that no such claim is apparently made now, and the objection is to crossing the borders of the state.

The Consumer Advocate argued that the codes needed to retrieve the information for Iowa have been written and the affidavit contains no allegation that reworking the codes to retrieve the same information on complaints generally would require the same amount of time as was required to write the codes for the Iowa information. It argued there is almost certainly a good deal of usable work already done, and the incremental burden is therefore almost certainly less than One Call implies. Moreover, the Consumer Advocate argued, the incremental burden is of One Call's own making, since the Krayterman affidavit contains no allegation that writing the codes to retrieve the same information for the wider complaint base requested would have required more time than writing the codes to retrieve the information for Iowa.

The Consumer Advocate stated that it has already directed data requests to One Call asking when the company determined the calls were related to modem hijacking and what One Call did to prevent further calls. It argued that it should not be forced to rely solely on these answers and the information requested in the disputed data requests may provide key proof that the disputed charges were unauthorized. With respect to the alleged four-day work effort, the Consumer Advocate argued that One Call is not the small company that the Krayterman affidavit

alleges, and it provided confidential asset and sales information in support. The Consumer Advocate argued that its motion to compel should be granted.

ANALYSIS

In its order in the Level 3 case, the Board found that certain data requests were overbroad in that they sought information regarding Qwest and Qwest's affiliates outside of Iowa. The undersigned agrees with the Consumer Advocate's argument that the Board's order was specific to the data requests presented in the Level 3 case, and the Board did not make a general prohibition against discovery of information with respect to services or complaints from customers outside the state of Iowa. The undersigned is not aware that the Board has ever issued a general prohibition of discovery of information regarding complaining customers outside Iowa.

Discovery procedures applicable in civil actions are available to the parties in contested cases before the Board. Iowa Code § 17A.13 (2005). "The rules providing for discovery and inspection shall be liberally construed and shall be enforced to provide the parties with access to all relevant facts. Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request." Iowa R. Civ. P. 1.501(2). "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Iowa R. Civ. P. 1.503(1). "As this rule makes clear, a party is entitled to discover any information that is not privileged and that is relevant to the subject matter of the lawsuit. [citation

omitted.] Relevancy to the subject matter of the lawsuit is broader than relevancy to the precise issues in the pleadings because the rule allows discovery of inadmissible information as long as it leads to the discovery of admissible evidence." Mediacom Iowa, LLC, v. City of Spencer, 682 N.W.2d 62, 66 (Iowa 2004).

Therefore, the undersigned has examined the disputed data requests and the arguments of the parties to determine whether the data requests meet the requirements of the relevant rules of civil procedure, seek information relevant to the subject matter of this proceeding, and seek information that could result in the discovery of admissible evidence.

This case involves the consolidation of 12 informal complaint dockets involving customers who alleged that charges were placed on their telephone bills without their authorization. Since the parties have not yet filed their prefiled testimony, the evidence in the record is somewhat limited. In three of the cases, the customers complained that they were billed by One Web Direct Bill for access to a proprietary Internet Web site when they had not visited any proprietary Web site. In some of the dockets, the disputed charges were billed as calls to the United Kingdom or other countries. In others, the disputed charges were billed as hotel/motel calls. In its responses to the complaints in the informal cases, One Call stated that its network was accessed to place the calls via a 10-10-access number.

In approximately six of the cases, either the customer, one of the companies billing the customer other than One Call, or One Call (only in a request for formal proceeding, not in One Call's responses to the complaints), theorized that the charges were related to unsolicited connections to pornographic Web sites and/or

were related to computer viruses and "modem hijacking." Complaining customer Mr. Brad Azeltine provided the most comprehensive explanation of what he believed happened with respect to his computer, but even Mr. Azeltine's explanation does not show or explain how One Call came to place the charges on his telephone bills.

As of the date of this order, any statements regarding Web sites and "modem hijacking" are merely statements of a theory as to how some of the charges may have appeared on the customers' telephone bills. Since the parties have not yet filed their prefiled testimony, there is nothing in the record yet that explains how or why One Call caused the charges that were billed to each of the customers to be placed on the customers' bills and what authority it had to do so.

The Consumer Advocate's data requests 23-25 seek the monthly total billings by or on behalf of One Call to Iowa consumers and to U.S. consumers for calls to three destination telephone numbers at issue in this case. Data request 45 seeks information regarding complaining customers worldwide and those who requested or received credits on billings created by or on behalf of One Call for telephone calls to or from certain foreign destination telephone numbers at issue in this case. Data request 46 seeks the same information with respect to certain domestic destination telephone numbers at issue in this case. Data requests 52 and 53 seek information regarding consumers who inquired or complained about charges for calls involving the same destination telephone numbers as in data requests 45 and 46, and regarding consumers who did not. The Consumer Advocate stated these data requests seek information that would allow it to compare the number of complaints and their dollar volume with the total number of billings and their dollar volume with

respect to the same destination telephone numbers involved in data requests 45 and 46. Data requests 62 and 63 seek the same information as data requests 45 and 46 for destination telephone numbers in two dockets that are part of this case that had not been docketed at the time data requests 45 and 46 were sent.

The undersigned finds the Consumer Advocate's arguments regarding relevance to be more persuasive and finds One Call's arguments that provision of the requested information should be limited to Iowa customers to be unpersuasive. The disputed data requests seek information relevant to the subject matter of this proceeding, and seek information that could result in the discovery of admissible evidence. This relevance of discoverable information is not necessarily limited to Iowa customers. Some of the arguments of the parties appear to relate to the merits of the case rather than to the discoverability of the requested information. By making this ruling, the undersigned is not making any findings with respect to the merits of the case, but only with respect to whether the requested information is discoverable. The undersigned finds that it is.

The second question to be considered is whether One Call has shown that it would be unduly burdensome for it to provide the requested information with respect to customers outside of Iowa. One Call presented the affidavit of Mr. Krayterman, in which he stated that he had to write computer code to retrieve the requested information from One Call's database and that he spent nearly four days to be able to respond to the Consumer Advocate's request for the Iowa information alone. Mr. Krayterman's affidavit stated that his department has only four employees and does not have the resources to duplicate its efforts on a nationwide or worldwide basis.

The undersigned is not persuaded by the information One Call provided that it would be unduly burdensome for One Call to provide the requested information for customers outside of Iowa. The information is in One Call's database. This is not the same situation as that in Berg. One Call has already written the code and retrieved the information with respect to Iowa. Mr. Krayterman provided no estimate of the time or expense it would take to modify the computer code to retrieve the rest of the requested information. In its resistance at pages 4-5, One Call stated it does not keep the data on a national or international basis and keeps no reports that would be responsive and, therefore, Mr. Krayterman must write a search code, which takes about a half a day to write. It is unclear whether One Call meant to say that Mr. Krayterman would have to spend an additional one-half day per data request to write the additional search code.

There is nothing in the record to support the conclusion that it would be difficult for One Call to rewrite the code or that it would take an inordinate amount of time. One Call is the only entity with the information and the information exists in One Call's database. Therefore, the undersigned finds that One Call's argument that providing the requested information would be unduly burdensome is unpersuasive.

In its motion, the Consumer Advocate stated that it would accept production only in electronic form if the volume of paper needed to produce a paper exhibit is a concern. The undersigned directs the Consumer Advocate to ask One Call whether it would prefer to produce the information in electronic form, and if One Call prefers, production may be in electronic form without a paper copy.

The undersigned reminds the parties of their obligation to attempt to work out discovery issues without the involvement of the undersigned and urges the parties to work cooperatively to share information.

IT IS THEREFORE ORDERED:

The "Motion to Compel Discovery" filed by the Consumer Advocate on December 9, 2005, is hereby granted. If One Call prefers, it may provide the requested information solely in electronic form.

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 17th day of January, 2005.