

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="padding-left: 100px;">Complainant,</p> <p style="padding-left: 100px;">vs.</p> <p>MCI, INC.,</p> <p style="padding-left: 100px;">Respondent.</p>	<p>DOCKET NO. FCU-05-65</p>
--	-----------------------------

**ORDER REGARDING SUPPLEMENT TO MOTION TO COMPEL
FILED FEBRUARY 6, 2006**

(Issued February 9, 2006)

On January 27, 2006, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a motion to compel discovery and request for expedited ruling. The Consumer Advocate stated that it had submitted seven data requests to MCI, Inc., (MCI) and that MCI had not provided responses. Data request number one requested a copy of MCI's "most recent audited financial statement and (if later) the most recent unaudited financial statement." Data requests two through seven requested information related to the complaining customer's account and the transactions in dispute in the case.

The discovery dispute related to the parties' positions with respect to Customer Proprietary Network Information (CPNI). MCI required the Consumer

Advocate to obtain a waiver from the customer before MCI would release the requested information because MCI claimed that turning over the customer's information would violate federal CPNI requirements in 47 U.S.C. § 222. The Consumer Advocate argued that the following exception at 47 U.S.C. § 222(d)(2) applied and allowed MCI to provide the requested discovery without a customer waiver:

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) . . . or to protect users of those services and other carriers from fraudulent, abusive, or unlawful use of, or subscription to, such services.

On February 2, 2006, the undersigned administrative law judge sent an email to the attorneys for Consumer Advocate and MCI stating: "On Monday, I will be issuing an order granting the Consumer Advocate's Motion to Compel without requiring the customer to execute a waiver and also stating that if MCI is concerned about the customer's proprietary network information in this case, the parties are to execute an appropriate protective agreement. I expect that the parties will execute the protective agreement and that MCI will provide the requested information without waiting until the order is issued on Monday."

On Monday, February 6, 2006, the undersigned administrative law judge issued an order granting the Consumer Advocate's motion to compel and making the following findings:

1. Data request number one does not request information that meets the definition of CPNI in 47 U.S.C. § 222(h)(1). Therefore, MCI must provide the requested information to the Consumer Advocate.

2. The customer in this case filed an informal complaint with the Utilities Board that included CPNI, the documents in the informal complaint file are open to the public, this formal complaint case is based on the same set of facts involved in the informal complaint file, and the customer is a witness for the Consumer Advocate.

3. Given these facts, the nature of this case, and the statutory role of the Consumer Advocate, the exception in 47 U.S.C. § 222(d)(2) and 47 C.F.R. § 64.2005(d) is broad enough to apply to the release of the customer's CPNI when MCI responds to the data requests.

4. If MCI is concerned about the customer's privacy, the parties may execute an appropriate protective agreement.

In the order, the undersigned noted that the ruling only applied to the grant of the request for discovery in this particular case and given this particular set of facts. In addition, the ruling stated it did not make any determination with respect to whether any of the requested information would be a public record under Iowa Code chapter 22 if either party decided to introduce any of the information.

The order further noted that Board rule 199 IAC 7.15(4) states that prior to filing any motion related to discovery, the parties shall make a good faith effort to resolve the discovery dispute without the involvement of the Board or presiding

officer. The order stated that this appeared to be one discovery dispute that could have been resolved by the parties with minimal cooperative effort on both sides. The undersigned ordered MCI to provide the information requested in data requests one through seven to the Consumer Advocate without the customer signing a waiver.

On February 6, 2006, the Consumer Advocate filed a supplement to its motion to compel and a request for expedited ruling. The Consumer Advocate stated, among other things, that it had received the above email and sent an electronic protective agreement to MCI early on February 3, 2006. It further stated that MCI had revised the protective agreement to add CPNI language to the end of the "Scope of Agreement" section. The Consumer Advocate attached a copy of both versions of the protective agreement to its motion as Exhibits A and B. The Consumer Advocate argued that the change proposed by MCI did not seek to protect any particular information, but sought to encompass all CPNI information within the protective agreement. It argued that the change proposed by MCI would bring within the protective agreement all of the information the company may have about the consumer and her use of telephone services. The Consumer Advocate further argued that the exception in 47 U.S.C. § 222(d)(2) means that MCI cannot escape its obligation to make discovery by claiming the information fits within the definition of CPNI and it is no more appropriate to ignore the exception when the issue is a protective agreement than when the issue is a waiver.

The Consumer Advocate further argued that MCI ignores the fundamental concept of "good cause" that guides consideration of a protective agreement or order

and cited to Iowa R. Civ. P. 1.504(1) in support. The Consumer Advocate argued that although there may be an occasional legitimate privacy concern with respect to particular information in a particular case, in no prior case had the provision requested by MCI been sought or needed. The Consumer Advocate argued there is no remote justification for a routine and blanket protective provision for all CPNI information.

The Consumer Advocate also argued there are practical difficulties with MCI's position related to the practice of closing the hearing when allegedly confidential information is the subject of testimony. However, the Consumer Advocate argues, it would not be appropriate to close the hearing every time a consumer bill is the subject of testimony, and this would be the practical effect of treating all CPNI as protected and confidential in litigation of this type. The Consumer Advocate further argued that MCI's position would require almost every exhibit in every case to be filed under seal, and without any support in law, this would impose clerical burdens on the Consumer Advocate and the Board. The Consumer Advocate further argued that such a restrictive agreement would slow or stop its ability to be free to exchange and discuss questionable bills or practices and related information with other enforcement agencies. The Consumer Advocate argued it should not have to sign the unjustified and problematical protective agreement and MCI should be directed to execute the Consumer Advocate's version of the protective agreement and provide the requested discovery.

On February 6, 2006, MCI filed a resistance to the supplement to the motion to compel. MCI argued the Consumer Advocate's proposed protective agreement did not cover the CPNI documents MCI seeks to protect and, it therefore, proposed the amendment to include CPNI documents. MCI argued that without ever responding to those terms, or attempting to negotiate terms with MCI, the Consumer Advocate filed an unwarranted and premature second motion to compel. MCI argued the motion should be denied because if CPNI information is not included in the protective agreement, it would render the prior order meaningless. MCI argues it would make no sense for the ALJ to require the parties to enter into a protective agreement to protect CPNI data, but that the protective agreement would not govern CPNI information. Further, it argues, the protective agreement is not unduly broad and should cover all documents MCI deems to be CPNI just as it covers all documents MCI deems to be trade secrets. MCI argued a protective agreement must be worded broadly enough so the parties are not forced to re-negotiate an agreement for each document deemed to be confidential. MCI further argued that the protective agreement provides a mechanism for the Consumer Advocate to challenge the confidentiality of the information if it does not agree that the information should be protected. MCI argued that including CPNI information in a protective agreement does not make it immune from discovery, but places the same safeguards on it that are given to other confidential information: that the Consumer Advocate must notify MCI before it discloses federally protected customer information, and MCI must petition the Board for confidential treatment.

MCI further argued that the federal requirement that MCI protect its customers' CPNI according to the requirements of 47 U.S.C. § 222 and 47 C.F.R. § 64.2009 provide "good cause" for a protective agreement. MCI argued that the prior order provided that MCI could provide the information subject to an appropriate protective agreement and the order provides a balanced solution to MCI's obligation to follow federal law and provide the Consumer Advocate with discovery. MCI further argued that if the administrative law judge had found that section 222 did not apply to the present situation, it would not have ordered a protective agreement. MCI stated it had responded to the requests not requiring a protective agreement, would provide the requested information once a satisfactory protective agreement is received, and requested an order requiring the Consumer Advocate to enter into a protective agreement with MCI that includes CPNI and dismissing the motion to compel.

Analysis

Board rule 199 IAC 7.15(5) requires any motion related to discovery to allege that the moving party has made a good faith attempt to resolve the discovery dispute with the opposing party. The Consumer Advocate's supplement to its motion to compel makes no such allegation. MCI's resistance states that after it proposed the modified protective agreement to the Consumer Advocate, "without ever responding to those terms, or attempting to negotiate terms with MCI, the [Consumer Advocate] filed an unwarranted and premature second motion to compel." The Board's rule requiring good faith negotiation prior to involving the Board in discovery disputes is important and must be followed. The undersigned administrative law judge would be

fully justified in denying the Consumer Advocate's supplementary request for an order and requiring the Consumer Advocate to negotiate in good faith regarding the protective agreement. In the interest of keeping the case moving forward, the undersigned will issue an order ruling on the supplement to the motion to compel. However, if the parties do not negotiate in good faith regarding their discovery disputes and future motions do not comply with subrule 7.15(5), they may be summarily denied.

The "Order Granting Motion to Compel" issued February 6, 2006, held that the exception in 47 U.S.C. § 222(d)(2) and 47 C.F.R. § 64.2005(d) was broad enough to apply to the release of the customer's CPNI when MCI responded to the data requests. Although not specifically stated in the order, this meant that the statute and rule did not prohibit MCI from releasing the customer's CPNI to the Consumer Advocate if it needed to do so when responding to the Consumer Advocate's data requests.

The Order did not require the parties to sign a protective agreement. It stated that if MCI was concerned about the customer's privacy, the parties could execute an appropriate protective agreement. The order further stated that the ruling did not make any determination with respect to whether any of the requested information would be a public record under Iowa Code chapter 22 if either party decided to introduce any of the information.

The "Scope of Agreement" section of the protective agreement proposed by the Consumer Advocate states that it governs the filing, dissemination, and use of

confidential information provided by MCI to the Consumer Advocate in this proceeding. It states that the confidential information "shall consist of (1) information that Company claims to constitute confidential records under sections 22.7(3) and (6), Iowa Code, because they are (a) trade secrets which are recognized and protected as such by law and/or (b) reports to government agencies which, if released, would give advantage to competitors and serve no public purpose."

The "Scope of Agreement" section of the protective agreement proposed by MCI is identical to that of the Consumer Advocate, except that the following phrase is added to the end of the above sentence: "or (2) information that Company claims to constitute Customers' Proprietary Network Information (CPNI) under 47 U.S.C. § 222."

The protective agreements are otherwise identical. Both state that MCI must clearly mark each page of the materials it claims are confidential. Both state that if the Consumer Advocate files a document with the Board that includes information MCI claims as confidential, it must mark each page as confidential and subject to a protective agreement. Both further provide that the Consumer Advocate must advise MCI when it files any such information with the Board, and that the complete document containing protected material shall not be filed in the public record. The protective agreements state that the Consumer Advocate may oppose any attempt by MCI to maintain the information as confidential. The protective agreements provide that the Consumer Advocate reserves the ability, with the agreement of MCI or approval by the Board or a court, to disclose confidential information to other

governmental agencies if identified in advance and the other agency agrees to be bound by an equivalent agreement. MCI may agree to or oppose such disclosure. Both protective agreements state: "Nothing in this agreement shall infringe upon the ability of the administrative law judge or the Board, or a court on review of Board action, to consider and discuss any of the information claimed to be confidential as a part of its public ruling on the merits in this matter."

Iowa Code chapter 22 does not relate to discovery disclosures between parties in litigation. However, the proposed protective agreements have chapter 22 implications because, if the Consumer Advocate files any document containing protected information with the Board, they require that the Consumer Advocate file those documents as confidential. Furthermore, they state that the complete document containing protected material shall not be filed in the public record. The Board does not have the authority to hold documents confidential unless allowed by chapter 22. Iowa Code §§ 22.7(3) and (6) specifically allow for confidential treatment of trade secrets and reports to government agencies that, if released, would give advantage to competitors and serve no public purpose. There is no such provision related to CPNI. Therefore, the protective agreement proposed by MCI is problematic because it does not appear to have a legal basis for keeping CPNI confidential under Iowa public records law and it would require the Consumer Advocate to file documents containing CPNI as confidential and prohibit the complete document containing protected material from being filed in the public record.

Therefore, the Consumer Advocate should not be required to sign the protective agreement proposed by MCI prior to receipt of the requested information. MCI should provide the information requested in data requests one through seven to the Consumer Advocate without further delay. Under the circumstances of this case, nothing in 47 U.S.C. § 222 or the implementing rules at 47 C.F.R. §§ 64.2001 – 64.2009 prohibits this action.

IT IS THEREFORE ORDERED:

1. The Consumer Advocate is directed to sign the protective agreement it proposed and attached to its "Supplement to Motion to Compel" as Exhibit A and deliver it to MCI.

2. Upon receipt of the signed protective agreement, if it has not already done so, MCI is hereby ordered to provide the information requested in data requests one through seven to the Consumer Advocate.

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 9th day of February, 2006.