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the undersigned administrative law judge and the parties have filed a number of motions with regard to one or more of these proceedings.

MOTION TO STAY

One Call's Motion to Stay

On February 24, 2006, One Call filed a motion with the Board to stay these three formal complaint proceedings. One Call stated it had filed a request for a declaratory ruling and injunctive relief against the Board in federal district court on February 23, 2006, in which it alleged that the Board does not have jurisdiction over complaints concerning One Call's interstate, international, and ISP-bound communications services. One Call requests that it be granted a stay of these three formal complaint proceedings pending resolution of the federal district court case. One Call further states that all three proceedings are in the discovery process, the first proceeding will not be set for hearing until September, a hearing date has not been set yet in Docket No. FCU-06-13, and Docket No. FCU-05-74 is scheduled for hearing on April 20, 2006. It further states that all three proceedings involve One Call services that are interstate, international, ISP-bound in nature, or some combination thereof.

One Call argues there is no Board rule governing a request for stay and therefore it is appropriate to look at Iowa R. Civ. P. 1.1502 for guidance. It argues that this rule provides that a temporary injunction may be issued when, during litigation, a party is acting in a way that violates the other party's right respecting the

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subject matter of the action and tending to make the judgment ineffectual. One Call also argues that the federal suit will determine whether the Board has jurisdiction over these cases. It argues that if the Board continues to exercise its jurisdiction, before a federal ruling on whether such jurisdiction is valid, any ultimate ruling by the federal court becomes ineffectual. Therefore, it argues, a stay is proper to protect One Call's rights that are the subject of the federal suit and to avoid rendering the federal suit ineffectual.

One Call further argues the Board has the authority to control its own dockets and granting a stay of the Board proceedings would save the Board and the Consumer Advocate from expending valuable resources that would be wasted if the federal court rules that the Board does not have jurisdiction over One Call's interstate, international, and ISP-bound communications service.

One Call also argues that no consumers will be harmed by a stay because One Call has refunded all amounts in dispute. It argues that staying the formal proceedings, which are solely for civil penalties, does no harm but would ensure that jurisdiction is proper.

The Consumer Advocate's Resistance

On March 10, 2006, the Consumer Advocate filed a resistance to the motion for a stay. The Consumer Advocate argues that the fact One Call filed the federal court action asking the court to enjoin these proceedings is no reason why the Board should stay them. It argues that if it were, One Call or any other company could

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obtain a stay of state proceedings merely by filing a federal suit. The Consumer Advocate argues that the state proceeding would have been unnecessarily and wrongfully delayed if the federal suit is unsuccessful. The Consumer Advocate further argues that denial of a stay would not render the federal action ineffectual and, if One Call establishes the Board does not have jurisdiction and it is entitled to an injunction, the federal court will enter an injunction. The Consumer Advocate argues that until that occurs, One Call's claims are no more than disputed allegations. The Consumer Advocate argues that One Call could have raised the jurisdictional claims in the cases before the Board, but did not do so. It argues that docket number FCU-05-74 is scheduled for hearing, there is no good reason for delay, and unless the federal court enjoins the proceedings, the cases should properly proceed.

The Consumer Advocate further argues that One Call is in no position to urge the Board to grant it relief because the 12 consolidated cases have been continued due to discovery delays on One Call's part. It argues that One Call is out of compliance with Board discovery rules in all 14 cases. The Consumer Advocate argues that motions to compel are pending in the first 13 cases and a motion to compel is due to be filed in the 14th case. It argues that in the 12 consolidated cases, the time for resistance has passed but no resistance was filed. The Consumer Advocate argues that before MCI filed its federal action, it halted its discovery responses in anticipation of the federal action. The Consumer Advocate argues

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these actions plainly reflect an effort by One Call to avoid and delay discovery in the ongoing state action. The Consumer Advocate argues that discovery is needed and should proceed and the stay application should be denied.

One Call's Reply

On March 17, 2006, One Call filed a reply to the Consumer Advocate's resistance to the motion to stay. One Call argues that it filed a good faith claim in federal court and the Consumer Advocate is incorrect when it argues that One Call is attempting to avoid or delay discovery. One Call further argues that the Consumer Advocate's claims cannot continue under the ruling in Office of Consumer Advocate v. Iowa Utilities Board, Case No. CV 5605, in which Polk County District Court Judge Staskal held that the Board rules did not prohibit unauthorized charges. Therefore, One Call argues, these three proceedings should be stayed pending the resolution of the federal court case and pending any motions related to the Polk County District Court case.

Analysis

Board rule 199 IAC 7.8 provides that any party may petition the Board for a stay or other temporary remedy pending judicial review of the proceeding. The rule further provides that in determining whether to grant a stay, the Board shall consider the factors listed in Iowa Code § 17A.19(5)(c).

Iowa Code §17A.19 is the judicial review section of the Iowa Administrative Procedure Act. Iowa Code § 17A.19(5)(a) provides that the filing of a petition for

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judicial review does not itself stay the execution or enforcement of the agency action, and that unless precluded by law, the agency may grant a stay or other temporary remedies during judicial review. Iowa Code § 17A(5)(b) provides that a party may file an interlocutory motion in the reviewing court seeking review of the agency's action on an application for stay while judicial review is pending. Iowa Code § 17A.19(5)(c) provides:

If the agency refuses to grant an application for stay or other temporary remedies, or application to the agency for a stay or other temporary remedies is an inadequate remedy, the court may grant relief but only after a consideration and balancing of all of the following factors:

- (1) The extent to which the applicant is likely to prevail when the court finally disposes of the matter.
- (2) The extent to which the applicant will suffer irreparable injury if relief is not granted.
- (3) The extent to which the grant of relief to the applicant will substantially harm other parties to the proceedings.
- (4) The extent to which the public interest relied on by the agency is sufficient to justify the agency's action in the circumstances.

Although the rule and code section relate to a stay pending judicial review of agency action, the Board recently used the four-factor test in Iowa Code § 17A.19(5)(c) to analyze whether to grant motions to hold four Board cases in abeyance pending a FERC ruling on one party's FERC petition for a declaratory order. In re: Midwest Renewable Energy Projects LLC v. Interstate Power and Light Company, Docket Nos. AEP-05-1, AEP-05-2, AEP-05-3, and AEP-05-4, "Order Denying Motions to Hold Dockets in Abeyance and Setting Time for Answers or Responses," (September 21, 2005) (Midwest Renewable Order). In stating that it is

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appropriate for the Board to use the four-factor test when ruling on a stay application, the Board cited to its ruling in Fibercomm, L.C., et al., v. AT&T Communications of the Midwest, Inc., "Order Denying Motion for Stay," Docket No. FCU-00-3, (April 26, 2002) (Fibercomm Order). Midwest Renewable Order, p. 7.

In the motion to stay, resistance, and reply in these three formal complaint proceedings, the parties did not correctly analyze the question of whether One Call's motion to stay should be granted using the above authorities. Therefore, the parties must each file a brief analyzing the question using the principles enunciated in Iowa Code § 17A.19(5)(c), the Midwest Renewable and Fibercomm Orders, the Board's order denying a motion for stay issued in the Fibercomm case on April 10, 2002, and any other relevant authority. The briefs must be filed on or before April 7, 2006.

In Docket No. FCU-05-74, One Call's prefiled testimony, exhibits and brief are currently due to be filed with the Board on March 24, 2006, and the Consumer Advocate's rebuttal is due April 7, 2006. Therefore, these two requirements of the procedural schedule will be suspended until after the undersigned rules on the motion to stay.

MOTION FOR DEFAULT

On March 10, 2006, the Consumer Advocate filed a motion for entry of judgment by default in the first proceeding, Docket Nos. FCU-04-54 through FCU-05-45. The Consumer Advocate states that One Call has not provided answers to discovery that One Call was ordered to produce on January 17, 2006, and seeks

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entry of judgment by default in the amount of \$380,000, the maximum civil monetary penalty allowed by statute.

One Call was ordered to provide the answers to data request numbers 23-25, 45-46, 52-53, and 62-63 to the Consumer Advocate in an order issued on January 17, 2006. One Call was given the option to provide the requested information solely in electronic form if it preferred. One Call did not appeal this order or request that it be reconsidered, and it remains a validly issued order. The undersigned notes that this order was issued over one month before One Call filed its federal district court suit on February 23, 2006, and its motion with the Board to stay these agency proceedings on February 24, 2006.

Iowa Code § 476.103(4)(a) provides that, in addition to the applicable civil penalties in Iowa Code § 476.51, a service provider who violates an order lawfully issued by the Board pursuant to section 476.103 is subject to a civil penalty, which, after notice and the opportunity for hearing, may be levied by the Board in the amount of not more than \$10,000 per violation. Iowa Code § 476.51(1) provides that a public utility, which after written notice by the Board of a specific violation, violates the same provision of an order lawfully issued by the Board, is subject to a civil penalty of not less than \$100 nor more than \$2,500 per violation.

If it has not already done so, One Call must immediately provide the answers to data request numbers 23-25, 45-46, 52-53, and 62-63 to the Consumer Advocate as it was ordered to do on January 17, 2006. One Call must also file the following

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information with the Board: (1) the date One Call gave the required answers to the Consumer Advocate; (2) whether the Consumer Advocate's statement that One Call has not provided the required answers is correct; (3) if One Call did not provide the required answers subsequent to the January 17, 2006, order, why it did not do so; and (4) if One Call did not provide the required answers subsequent to the January 17, 2006, order, One Call's position with regard to whether a civil penalty should be imposed pursuant to Iowa Code § 476.103(4)(a) for the failure to comply with the January 17, 2006, order.

REQUEST TO CHANGE HEARING DATE

On February 28, 2006, in Docket No. FCU-05-74, the Consumer Advocate filed a request to change the hearing date, currently scheduled for April 20, 2006. The Consumer Advocate states that its witness will be out of town and not available to testify on the hearing date. The Consumer Advocate further states that One Call has not responded to an email regarding the change of hearing date. One Call did not specifically respond to the Consumer Advocate's request. However, One Call filed its motion to stay this proceeding on February 24, 2006. Therefore, the undersigned will assume that One Call does not object to a cancellation of the April 20, 2006, hearing. The hearing scheduled for April 20, 2006, will be cancelled and the undersigned will not rule on rescheduling the hearing until after ruling on the motion to stay.

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OTHER MOTIONS and ORDER ASSIGNING DOCKET NO. FCU-06-13

On February 15, 2006, the Consumer Advocate filed a supplement to its motion to compel discovery in Docket Nos. FCU-04-54 through FCU-05-45. The Consumer Advocate requests an order requiring One Call to respond to data requests 102–108 by a date certain in the immediate future. The undersigned will take no action with regard to this motion until after ruling on the motion to stay.

On March 14, 2006, One Call filed a motion for relief from direct assessments in Docket Nos. FCU-04-54 through FCU-05-45. One Call requested that the Board issue an order relieving it from any direct assessment of the costs from docket numbers FCU-04-54 *et al.* and TF-05-121 under Iowa Code § 476.10. The undersigned understands that the Board will rule on this motion for relief.

On February 24, 2006, the Consumer Advocate filed a motion to compel discovery in Docket No. FCU-05-74. The Consumer Advocate requests an order requiring One Call to respond to data requests 1–13 by a date certain in the immediate future. The undersigned will take no action with regard to this motion until after ruling on the motion to stay.

On February 21, 2006, the Board issued an order docketing FCU-06-13 and assigning it to the undersigned administrative law judge. The undersigned will take no action to set a procedural schedule and a hearing date until after ruling on the motion to stay. In the same proceeding, the Consumer Advocate filed a motion to compel discovery on March 10, 2006. The Consumer Advocate requests an order

requiring One Call to respond to data requests 1–7 by a date certain in the immediate future. The undersigned will take no action with regard to this motion until after ruling on the motion to stay.

IT IS THEREFORE ORDERED:

1. On or before Friday, April 7, 2006, each party shall file a brief regarding the motion to stay as discussed in the body of this order.

2. The requirements in Docket No. FCU-05-74 that One Call's prefiled testimony, exhibits, and brief are due on March 24, 2006, and the Consumer Advocate's rebuttal is due April 7, 2006, are hereby suspended until further order.

3. In Docket Nos. FCU-04-54 through FCU-05-45, as discussed in the body of this order, if it has not already done so, One Call must immediately provide the answers to data request numbers 23-25, 45-46, 52-53, and 62-63 to the Consumer Advocate as it was ordered to do on January 17, 2006. In addition, on or before Tuesday, March 28, 2006, One Call must file the following information with the Board: (1) the date One Call gave the required answers to the Consumer Advocate; (2) whether the Consumer Advocate's statement that One Call has not provided the required answers is correct; (3) if One Call did not provide the required answers subsequent to the January 17, 2006, order, why it did not do so; and (4) if One Call did not provide the required answers subsequent to the January 17, 2006, order, One Call's position with regard to whether a civil penalty should be imposed pursuant to Iowa Code § 476.103(4)(a) for the failure to comply with the January 17, 2006, order.

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4. In Docket No. FCU-05-74, the hearing currently scheduled for April 20, 2006, is hereby cancelled and the hearing will not be rescheduled until further order.

5. As discussed in the body of this order, the undersigned will take no action with respect to the various motions and order assigning Docket No.

FCU-06-13 until after ruling on the motion to stay filed by One Call on February 24, 2006.

UTILITIES BOARD

/s/ Amy L. Christensen
Amy L. Christensen
Administrative Law Judge

ATTEST:

/s/ Margaret Munson
Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 20th day of March, 2006.