

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 REGARDING MOTION FOR DEFAULT AND ORDER TO SHOW CAUSE

(Issued April 4, 2006)

On December 9, 2005, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a motion to compel discovery in this proceeding with the Utilities Board (Board). 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 argued the information was relevant and discoverable and stated that One Call had refused to provide the statistical information, except as limited to Iowa.

On December 23, 2005, One Call filed a resistance to the Consumer Advocate's motion to compel. One Call argued that the Consumer Advocate's data

requests were overly broad because they sought information regarding complaints outside of Iowa. In addition, One Call argued that the Consumer Advocate's request was unduly burdensome with respect to information outside of Iowa.

On January 5, 2006, the Consumer Advocate filed a reply on the motion to compel denying that the requests were overbroad and challenging One Call's burdensome argument. The Consumer Advocate argued that its motion to compel should be granted.

On January 17, 2006, the undersigned administrative law judge issued an order finding the information to be discoverable and finding One Call's argument that providing the requested information would be unduly burdensome to be unpersuasive. The order granted the Consumer Advocate's motion to compel and allowed One Call to provide the requested information solely in electronic form if it preferred. One Call did not appeal this order or request reconsideration.

On February 24, 2006, One Call filed a motion with the Board to stay this formal complaint proceeding and two others. 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 requested that it be granted a stay of the three formal complaint proceedings pending resolution of the federal district court case.

On March 10, 2006, the Consumer Advocate filed a motion for entry of judgment by default. The Consumer Advocate stated that One Call had not provided

the answers to discovery that One Call was ordered to produce on January 17, 2006. The Consumer Advocate stated that it sent emails to One Call on January 25 and 26, 2006, asking how long it should take to obtain the responses. The Consumer Advocate stated that One Call did not respond. On February 6, 2006, the Consumer Advocate stated it again emailed One Call asking when responses could be expected. On February 6, 2006, One Call's attorney responded by email and stated: "I'm currently working to find out more about the outstanding discovery." The Consumer Advocate filed copies of the email messages with its motion. In the motion, the Consumer Advocate also stated that One Call had not responded to discovery requests sent November 28, 2005, that were the subject matter of a motion to compel filed February 6 and supplemented February 15, 2006.

In its motion, the Consumer Advocate argued that Iowa R. Civ. P. 1.517 provides that if a party fails to obey a discovery order, the court may make such orders as are just, including an order rendering judgment by default. It argued that the same rule provides that if a party fails to serve answers or objections to interrogatories, the court may issue such orders as are just, including a judgment by default. The Consumer Advocate argued that discovery procedures available to civil actions are available to parties in contested cases. It argued that the requirements for entry of judgment by default are met by One Call's failure to comply with the January 17, 2006, order and for failure to respond to the data requests sent November 28, 2005. It further argued that although the range of discretion to impose the sanction of default judgment is narrow, the sanction is justified when the

noncompliance with a discovery order is willful. The Consumer Advocate argued the entry of judgment by default is fully justified in this case because the refusal to provide discovery is willful. It argued the discovery rules do not allow a party to refuse to make discovery because it thinks discovery is a waste of resources. It argued the rules do not allow a party to take the law into its own hands and decide it is not going to comply because it has asked for an injunction. The Consumer Advocate therefore sought entry of judgment by default in the amount of \$380,000, the amount the Consumer Advocate stated was the maximum civil monetary penalty allowed by statute.

On March 20, 2006, the undersigned issued an order regarding a number of motions, including the Consumer Advocate's motion for default. The order stated that One Call had been ordered to provide the answers to data request numbers 23-25, 45-46, 52-53, and 62-63 to the Consumer Advocate on January 17, 2006. The order further stated that One Call did not appeal the January 17th order or request that it be reconsidered, and it remained a validly-issued order. The undersigned noted that the January 17th 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 the agency proceedings on February 24, 2006.

The March 20, 2006, order stated that 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. The order further stated that 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.

The March 20, 2006, order provided that if it had not already done so, One Call was required to immediately provide the answers to data request numbers 23-25, 45-46, 52-53, and 62-63 to the Consumer Advocate as it had been ordered to do on January 17, 2006. One Call was also required to file the following information with the Board by March 28, 2006: (1) the date One Call gave the required answers to the Consumer Advocate; (2) whether the Consumer Advocate's statement that One Call had not provided the required answers was 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.

On March 28, 2006, One Call filed its response. In its response, One Call stated it had not yet provided the required answers to the Consumer Advocate and the Consumer Advocate's statement that it had not provided the required answers was correct. As its answer to why it had not provided the required answers, One Call stated that it appeared the Consumer Advocate and the administrative law judge

believe that the requested information should have been provided immediately after the January 17, 2006, order was issued. One Call argued the amount of data sought by the Consumer Advocate was very large and it would take weeks to compile. One Call stated that only one employee in a small, four-person department was capable of responding to the requests. One Call stated that from January 17, 2006, the date the order was issued, until February 23, 2006, the date One Call sought an injunction in federal court, and February 24, 2006, the date it requested a stay from the Board, that employee and three other employees in his department were conducting time-sensitive end-of-year accounting reports. One Call stated the employee was already working more than a 40-hour work week and he simply could not get to the discovery research. One Call further stated it did not dispute that the January 17, 2006, order is valid. One Call stated that, had it not sought a stay, it would have retrieved the information and provided it to the Consumer Advocate. It further stated that if the stay or preliminary injunction is not granted, One Call would comply with the order.

One Call stated that when it filed its preliminary injunction and stay of the proceedings, it presumed that it was understood that it was seeking relief from all aspects of the proceedings, including discovery. It argues that the purpose of a stay is to avoid unnecessarily expending resources. It argues it makes little sense for One Call to spend weeks of precious employee time to respond to discovery when it is not likely that the discovery will be necessary. Therefore, it stated, it sought a stay.

As its position regarding whether a civil penalty should be imposed, One Call stated it was unable to undertake the research immediately after the January 17,

2006, order was issued. Then, it stated, when it sought declaratory relief in federal court, it sought a preliminary injunction in federal court and a stay from the Board until the jurisdictional issue raised in the federal case was resolved. One Call stated if it is found the Board does not have jurisdiction over One Call's interstate, international, and ISP-bound traffic, then there is no basis for the proceedings to continue. It further stated the relief sought by One Call in federal court will be negated by continuing these proceedings, effectively denying its right to a meaningful review of its claim. One Call argues that from a resources perspective, it makes little sense to require One Call to expend resources that may never be needed. It argues for that reason, it sought a stay of all proceedings, including discovery obligations.

One Call stated that if the stay or preliminary injunction is not granted, it will comply with the January 17, 2006, order. It stated it has no intention of violating the order and does not believe it has violated the order. It stated it did not provide the responses immediately, because it could not have. It stated it ceased research efforts because it was seeking a stay and a preliminary injunction. It argues there was never any intent on the part of One Call to violate the January 17, 2006, order. It argues because it has not violated the order, and does not intend to violate the order if its motion for preliminary injunction or request for stay is not granted, civil penalties are inappropriate.

On March 30, 2006, the Consumer Advocate filed a reply on the motion for entry of judgment by default, in which it replied to One Call's response. The Consumer Advocate stated that One Call filed no other response to its motion for

default, the time for response has expired, and One Call's response reinforces the Consumer Advocate's position. The Consumer Advocate stated One Call mischaracterized its position. The Consumer Advocate stated it sent emails dated January 25 and 26 asking One Call how long it would take to obtain the responses. It stated that One Call said nothing at the time about its alleged inability to respond. The Consumer Advocate stated that One Call did not respond to the emails at all. The Consumer Advocate further stated it repeated the question in an email dated February 6, and counsel for One Call responded that she was "currently working to find out more about the outstanding discovery." The Consumer Advocate stated that, apparently, One Call did not tell its own lawyers at the time about its alleged inability to respond to the order for more than a month. The Consumer Advocate argued that One Call should have responded to the emails and advised it of the alleged problem so the Consumer Advocate could have discussed it with One Call and potentially brought it to the Board's attention at the time. The Consumer Advocate also argued that it is sometimes necessary to work overtime or hire additional personnel to meet obligations and that it had been working overtime to respond to One Call's filings. The Consumer Advocate argued that when One Call has the resources for extensive legal filings in multiple forums, its claim of a lack of resources to meet discovery obligations is hollow.

The Consumer Advocate further argued that One Call exaggerates the amount of time needed to obtain the responses. It argued that, according to One Call's affidavit submitted in response to the motion to compel, the codes needed for

obtaining the information have already been written for Iowa. The Consumer Advocate argued that the affidavit contained 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 in the first place for Iowa. The Consumer Advocate argued there is almost certainly a good deal of usable work already done and the incremental burden is almost certainly less than One Call implied. The Consumer Advocate argued that, while the affidavit filed December 23, 2005, indicated seven half days were needed to obtain the information for Iowa, One Call now asserts the time needed to obtain the information for complaints generally has grown to "weeks."

The Consumer Advocate argued that One Call's explanation of why it did nothing to respond during the second month following the order is equally inadequate. It argued the implicit premise upon which the explanation is based is an argument that filing an action for injunction or moving for stay is the same as obtaining an injunction or stay. The Consumer Advocate states this is not the case, and as a matter of law, One Call's obligations to comply with the order and provide discovery were not abated by the mere filing of an action for injunction or a motion for stay. The Consumer Advocate argued that, as acknowledged in One Call's counsel's February 28th email, no injunction or stay had been issued. The Consumer Advocate stated that the email confirmed what was already obvious, namely, that One Call had simply and unilaterally, without justification, ceased all discovery responses, including but not limited to those required under the January 17th order, in favor of its efforts to

obtain an injunction or stay. The Consumer Advocate argued this was a willful, lawless cessation and in derogation of its general obligation fully and timely to respond to discovery and its specific obligation to comply with the order.

The Consumer Advocate argued that One Call claims it has no intention of violating the order and says it does not believe it has done so. However, the Consumer Advocate argued, One Call offers no support for its argument that the mere filing of an action for injunction or a motion for stay supplied it with justification for continuing to not respond. The Consumer Advocate argued that when this specious argument is stripped away, all that remains is the willful refusal to comply. The Consumer Advocate argued that by doing nothing for two months, and by continuing to do nothing, One Call has violated the order. It argued One Call has also generally refused to make discovery. The Consumer Advocate argued it is not required to prove the company's subjective intent. To secure default, the Consumer Advocate argued, it must prove the violation was willful and such proof plainly appears in the February 28th email. Therefore, the Consumer Advocate seeks judgment by default in the amount of \$380,000.

ORDER TO SHOW CAUSE

The Consumer Advocate seeks a default judgment for both the failure to comply with the January 17th discovery order and for the failure to respond to a separate set of data requests it sent to One Call on November 28, 2005. The data requests sent November 28, 2005, were not the subject of the order issued January 17, 2006. The failure to comply with the validly issued order is different from the

failure to respond to the data requests, and it will be treated separately. This order relates only to One Call's failure to comply with the January 17th order. The undersigned administrative law judge will take no action with respect to the failure to respond to the November 28th discovery requests until after ruling on the motion for stay.

Although the Consumer Advocate requests a default judgment, the undersigned does not believe that a default judgment is appropriate or warranted under the circumstances and at this stage of the proceedings. This does not mean no sanction is possible. Iowa Code § 476.103(4)(a) provides that, in addition to the civil penalties in Iowa Code § 476.51, a service provider who violates an order lawfully issued by the Board pursuant to § 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. Iowa Code § 476.51(2) provides that if the violation is willful, the utility is subject to a penalty of not less than one thousand dollars nor more than ten thousand dollars per violation. Iowa Code § 476.51(3) provides that in the case of a continuing violation, each day a violation continues after the time specified for compliance in the written notice is a separate and distinct offense.

One Call's arguments that it did not violate the January 17th order are completely unpersuasive. One Call did not provide the answers as required by the order. It still has not provided the required answers. One Call did not respond at all to the Consumer Advocate's January 25 and 26 requests regarding when it would provide the required answers. One Call's response to the February 6 request stated only that its attorney was working to find out more about the outstanding discovery. One Call violated the order issued on January 17, 2006. It continues to do so. A company cannot simply ignore a validly issued Board order. The order was issued over one month prior to One Call's filing of its federal court action and request for stay from the Board. One Call should have complied with the order when it was issued or sought appropriate relief in a timely manner.

One Call's assertions of the burdensomeness of the discovery request and its inability to provide the discovery are also unpersuasive. One Call provided a detailed argument with an affidavit in its resistance to the motion to compel prior to the January 17th order, and the undersigned at that time found the argument as to burdensomeness to be unpersuasive. One Call's arguments in response to the order issued March 20, 2006, do not persuade the undersigned to change the January 17th ruling. The discovery requests do not appear to be unduly burdensome.

One Call's arguments are inadequate and provide no excuse for its failure to comply with the January 17th order and its failure to respond to the Consumer Advocate's requests as to when the required answers would be forthcoming. When it did respond to the Consumer Advocate on February 6, One Call did not mention that

there was any difficulty with gathering the information or that more time was required to prepare the response. Parties have an obligation to work with each other to resolve discovery issues. 199 IAC 7.15(4). If One Call had difficulty providing the required answers in a timely manner, it was required to notify the Consumer Advocate and attempt to work out the difficulty.

On March 20, 2006, the undersigned issued an order that, among other things, ordered One Call to immediately provide the answers to data request numbers 23-25, 45-46, 52-53, and 62-63 to the Consumer Advocate as it had been ordered to do on January 17, 2006. Apparently, One Call has not complied with this order.

One Call's arguments as to why it should not be subject to penalty pursuant to Iowa Code § 476.103 are also not persuasive. One Call cannot simply ignore validly issued orders. It appears that One Call continues to intentionally and willfully fail to comply with the January 17, 2006, order. The fact that One Call filed a motion for injunction in federal court and a motion for stay with the Board is no excuse for the failure to comply with an order issued over a month prior to the filings.

Therefore, pursuant to Iowa Code §§ 476.103(4) and 476.51, this matter will be set for a hearing in which One Call will be ordered to show cause why the undersigned administrative law judge should not impose a civil penalty for the failure to comply with the January 17 and March 20, 2006, orders to provide the answers to data request numbers 23-25, 45-46, 52-53, and 62-63. Considering the potential penalties in Iowa Code §§ 476.103(4) and 476.51(1), and the factors in Iowa Code § 476.103(4)(b), at least to the extent the undersigned has knowledge of them given

the limited record in this case to date, and in particular, considering that this is the first time the undersigned is issuing a show cause hearing in these dockets, it appears that a civil penalty in the amount of \$500 for the violation would be reasonable. In addition, One Call must immediately provide the required answers to the Consumer Advocate and must bring the answers with it to the show cause hearing. This may be done in electronic form. One Call is further put on notice that if it does not comply with the orders to provide the required answers to the Consumer Advocate on or before April 18, 2006, the undersigned will regard the failure as willful and One Call will be subject to civil penalties pursuant to Iowa Code § 476.51(2). One Call is further put on notice that Iowa Code § 476.51(3) provides that each day a violation continues after the time specified for compliance is a separate and distinct offense. For the purposes of Iowa Code § 476.51(3), the time specified for compliance is April 18, 2006.

IT IS THEREFORE ORDERED:

1. A public show cause hearing for the reasons set forth in the body of this order will be held beginning at 1:30 p.m. on Wednesday, April 19, 2006, in the Board Hearing Room, 350 Maple Street, Des Moines, Iowa.

2. One Call is hereby ordered to show cause at the hearing why the undersigned administrative law judge should not impose a civil penalty of \$500 for One Call's failure to comply with the January 17 and March 20, 2006, orders to provide the answers to data request numbers 23-25, 45-46, 52-53, and 62-63 to the Consumer Advocate.

3. One Call is hereby ordered to immediately provide the required answers to the Consumer Advocate. This may be done in electronic form.

4. One Call is hereby ordered to bring the required answers with it to the show cause hearing. This may be done in electronic form.

5. If One Call does not comply with the orders to provide the required answers to the Consumer Advocate on or before April 18, 2006, the undersigned will regard the failure as willful and One Call will be subject to civil penalties pursuant to Iowa Code § 476.51(2).

6. One Call is hereby put on notice that Iowa Code § 476.51(3) provides that each day a violation continues after the time specified for compliance is a separate and distinct offense. For the purposes of Iowa Code § 476.51(3), the time specified for compliance is April 18, 2006.

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 4th day of April, 2006.