

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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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 DENYING REQUEST FOR INTERLOCUTORY REVIEW**

(Issued April 19, 2006)

On April 14, 2006, pursuant to 199 IAC 7.25, One Call Communications, Inc. (One Call), filed a request for interlocutory review of an order regarding motion for default and order to show cause issued on April 4, 2006, by the Utilities Board's (Board) administrative law judge (ALJ), along with a request for expedited relief.

**I.    BACKGROUND**

The Consumer Advocate Division of the Department of Justice (Consumer Advocate) is seeking civil penalties against One Call in these consolidated dockets, which have been assigned to the Board's ALJ. One Call resisted Consumer

Advocate's requests for certain data,<sup>1</sup> arguing that the requests were overly broad and burdensome. On January 17, 2006, the ALJ issued an order (the January 17<sup>th</sup> order) granting Consumer Advocate's motion to compel, concluding that the information sought was discoverable and the requests were not overly burdensome. One Call did not appeal the January 17<sup>th</sup> order.

On February 23, 2006, One Call filed an action in federal district court alleging the Board lacks jurisdiction over complaints involving interstate and international calls and calls to an Internet service provider, which are the subject of these proceedings. On February 24, 2006, One Call filed with the Board a motion to stay these proceedings pending resolution of the federal district court case, arguing that a stay is necessary to protect its rights asserted in the federal case and to avoid rendering the federal suit ineffectual. The ALJ has not yet ruled on the motion for stay.

On March 10, 2006, Consumer Advocate filed a motion for default judgment against One Call for not providing the answers to the discovery requests it was ordered to produce pursuant to the January 17<sup>th</sup> order. Consumer Advocate sought a penalty of \$380,000 (\$10,000 penalty per day for 38 days).

On March 20, 2006, the ALJ issued an order (the March 20<sup>th</sup> order) responding to various motions including Consumer Advocate's motion for default. The ALJ observed that One Call did not appeal or request reconsideration of the January 17<sup>th</sup> order and it remained a validly-issued order that was in effect over one

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<sup>1</sup> The data requests in dispute are Nos. 23-25, 45-46, 52-53, and 62-63.

month before One Call filed its federal district court action and request for stay of agency proceedings. The ALJ directed One Call to give Consumer Advocate answers to the discovery requests if it had not already done so and to file certain information with the Board by March 28, 2006, including One Call's position on whether a civil penalty should be imposed pursuant to Iowa Code § 476.103(4)(a) for failure to comply with the January 17<sup>th</sup> order.

One Call filed its response to the ALJ's request for information on March 28, 2006. That response and Consumer Advocate's reply are detailed in an order issued by the ALJ on April 4, 2006, described in greater detail below (the April 4<sup>th</sup> order).

## **II. ALJ's ORDER**

In her April 4<sup>th</sup> order, the ALJ concluded that a default judgment was not appropriate in these circumstances and at this stage of the proceedings, but other sanctions were possible under Iowa Code §§ 476.103(4)(a) and 476.51. The ALJ concluded that One Call should have either complied with the January 17<sup>th</sup> order when it was issued or sought appropriate relief in a timely manner. The ALJ was not persuaded by One Call's arguments regarding the difficulties of providing answers to the data requests and as to why it should not be assessed a penalty. The ALJ concluded that One Call continues to intentionally and willfully fail to comply with the January 17<sup>th</sup> order and the fact that One Call later filed a motion for injunction in federal court and for a stay of agency proceedings is no excuse for failing to comply

with a Board order. The ALJ ordered One Call to immediately provide Consumer Advocate with the answers to the discovery requests and stated the date for compliance would be April 18, 2006. The ALJ set the matter for a hearing on April 19, 2006, at which time One Call would have an opportunity to show cause why the ALJ should not impose a civil penalty in the amount of \$500 for One Call's failure to comply with the January 17<sup>th</sup> and March 20<sup>th</sup> orders. The ALJ's order also stated that if One Call failed to comply with the orders to provide the answers to Consumer Advocate on or before April 18, 2006, the ALJ would regard the failure as willful and One Call would be subject to penalties pursuant to Iowa Code § 476.51(2).

### **III. ONE CALL'S REQUEST FOR INTERLOCUTORY REVIEW**

In its request for interlocutory review, One Call asserts the ALJ erred by ordering One Call to provide responses to the data requests before determining whether the proceeding should be stayed; by finding that One Call violated the January 17<sup>th</sup> and March 20<sup>th</sup> orders; and by ordering One Call to produce the discovery responses by April 18, 2006. One Call argues that it will be impossible to comply with the April 18<sup>th</sup> deadline given the demands of the request and the fact that only one employee is able to prepare the answers. For relief, One Call asks that the discovery be considered as part of the request for stay of agency proceedings and that One Call be allowed to wait for a decision on the stay before spending the resources necessary to prepare a response to the data requests; that the Board find

that One Call did not violate the January 17<sup>th</sup> and March 20<sup>th</sup> orders; and if and when a stay is denied, that One Call have no less than five weeks to comply with the discovery requests or, alternatively, that the Board find the requests are irrelevant or unduly burdensome and strike the requests. One Call also asks that the show cause hearing scheduled for April 19, 2006,<sup>2</sup> be continued indefinitely until this issue is resolved.

#### **IV. CONSUMER ADVOCATE'S REPLY**

On April 17, 2006, Consumer Advocate filed with the Board a resistance to One Call's request for interlocutory review. Consumer Advocate states that it relies on arguments and authorities included in its March 10, 2006, motion for default judgment. In resisting the request for interlocutory review, Consumer Advocate cites an e-mail message it received on February 28, 2006, and which it attached to its March 10, 2006, motion for default judgment, in which counsel for One Call stated, "One Call has asked for a preliminary injunction in federal court and a stay at the IUB level to stay the proceedings at issue. One Call will not be expending any resources at the Board level until these have been ruled on." Consumer Advocate argues this message advances the unsupported proposition that the mere filing of a

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<sup>2</sup> The Board notes that in the request for interlocutory review, One Call inadvertently states the show cause hearing is scheduled for April 18, 2006. The hearing is scheduled for April 19, 2006.

federal action requesting an injunction or a request for a stay from the Board relieves a party of its obligation to comply with discovery orders. Consumer Advocate asserts there is no basis for interlocutory review and that any error can be corrected on final review. Consumer Advocate requests that One Call's request for interlocutory review be denied or, alternatively, if the request is granted, that the Board enter judgment by default in the amount of \$380,000.

## V. ANALYSIS AND DISCUSSION

The Board has discretion regarding whether to entertain interlocutory appeals from orders issued by an ALJ. The Board has already considered two other requests for interlocutory review in these proceedings. The Board has stated that it does not want to encourage the filing of interlocutory appeals, but understands that certain situations may require intervention to serve the interests of justice. Re: Office of Consumer Advocate v. Qwest Corporation and MCI WorldCom Communications, Inc., Docket No. FCU-02-5, "Order Affirming Administrative Law Judge Decision and Denying Request for Hearing," issued September 13, 2002.

Rule 199 IAC 7.25 provides that upon written request of a party or on its own motion, the Board may review an interlocutory order of the presiding officer. In determining whether to review an interlocutory order, the Board may consider the extent to which granting the interlocutory appeal would expedite final resolution of the

case and the extent to which review of the interlocutory order by the Board at the time it reviews the proposed decision would provide an adequate remedy.

The Board has considered these factors and the parties' arguments and concludes it will not grant One Call's request for interlocutory review of the ALJ's order. Granting One Call's request would not expedite final resolution of these proceedings. Instead, granting the request would delay the final resolution of these proceedings.

The ALJ's order requiring responses was issued January 17, 2006. One Call's federal court action was not filed until February 23, 2006, over five weeks later. Thus, it appears that One Call was out of compliance with the ALJ's January 17<sup>th</sup> order well before it filed its action seeking declaratory and injunctive relief in federal court and its motion for stay of agency proceedings. If One Call wanted to avoid the burdens and costs of preparing responses to Consumer Advocate's data requests, it should have sought relief in a timely manner. Instead, One Call chose to simply ignore the January 17<sup>th</sup> order, a form of self-help not recognized in the Board's rules.

As the Board stated in its March 31, 2006, order denying Consumer Advocate's request for interlocutory review of an order of the ALJ in these proceedings, once the Board assigns a case to the ALJ, it is reluctant to interfere with the ALJ's administration of the case. The Board finds no reason to disrupt the schedule set by the ALJ or to interfere with her resolution of the question of whether

a civil penalty should be imposed against One Call for its apparent failure to comply with a Board order.

**V. ORDERING CLAUSE**

**IT IS THEREFORE ORDERED:**

The request for interlocutory review of the administrative law judge's "Order Regarding Motion for Default and Order to Show Cause" issued April 4, 2006, filed by One Call Communications, Inc., on April 14, 2006, is denied.

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

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Dated at Des Moines, Iowa, this 19<sup>th</sup> day of April, 2006.