

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 FCU-05-74 FCU-06-13
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**ORDER DENYING REQUEST FOR STAY**

(Issued April 25, 2006)

There are currently three separate formal complaint proceedings involving the Consumer Advocate Division of the Department of Justice (Consumer Advocate) and One Call Communications, Inc. (One Call) pending before the Utilities Board (Board) and assigned to the undersigned administrative law judge. The first proceeding is a consolidation of the following 12 dockets: 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, and FCU-05-45. The second and third proceedings are docket numbers FCU-05-74 and FCU-06-13. On February 21, 2006, the Board assigned Docket No.

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,  
FCU-05-74, FCU-06-13

PAGE 2

FCU-06-13 to the undersigned administrative law judge. Prior to March 20, 2006, the parties filed a number of motions with regard to one or more of these proceedings.

On March 20, 2006, the undersigned issued an order regarding these motions and the Board order assigning Docket No. FCU-06-13. The order made the following rulings.

1. The parties were ordered to file briefs regarding the motion for stay on or before April 7, 2006. This applied to all docket numbers listed in the caption above.

2. The requirements in Docket No. FCU-05-74 that One Call's prefiled testimony, exhibits and brief be filed by March 24, 2006, and that the Consumer Advocate's rebuttal be filed by April 7, 2006, were suspended until further order.

3. In Docket Nos. FCU-04-54 through FCU-05-45, One Call was ordered to immediately provide the answers to certain data requests to the Consumer Advocate as had been previously ordered and file certain information by March 28, 2006.

4. The hearing scheduled for April 20, 2006, in Docket No. FCU-05-74 was cancelled and the hearing was not rescheduled until further order.

5. The undersigned stated she would take no action with respect to the various motions and the order assigning Docket No. FCU-06-13 until after ruling on the motion for stay filed by One Call.

As ordered, on March 28, 2006, in Docket Nos. FCU-04-54 through FCU-05-45, One Call filed the required information. This information and the Consumer Advocate's related motion for a default judgment filed March 10, 2006, were discussed in an "Order Regarding Motion for Default and Order to Show Cause"

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,  
FCU-05-74, FCU-06-13

PAGE 3

issued on April 4, 2006, and an "Order Rescheduling Show Cause Hearing" issued April 18, 2006. A show cause hearing was held on April 24, 2006.

As ordered, on April 7, 2006, both parties filed additional briefs regarding the motion to stay.

Separate orders will be issued regarding the show cause issue, the various motions, and the scheduling of Docket Nos. FCU-05-74 and FCU-06-13. This order will only rule on the motion for stay.

#### **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 requested that it be granted a stay of these three formal complaint proceedings pending resolution of the federal district court case.

On March 10, 2006, the Consumer Advocate filed a resistance to the motion for a stay. The Consumer Advocate argued 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. The Consumer Advocate argued that One Call could have raised

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FCU-05-8, FCU-05-12, FCU-05-15, FCU-05-24, FCU-05-25, FCU-05-43, FCU-05-45,  
FCU-05-74, FCU-06-13

PAGE 4

the jurisdictional claims in the cases before the Board, but did not do so. The Consumer Advocate argued that the stay application should be denied.

On March 17, 2006, One Call filed a reply to the Consumer Advocate's resistance to the motion to stay. One Call argued that it filed a good faith claim in federal court and 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 argued, 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.

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 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

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FCU-05-74, FCU-06-13

PAGE 5

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 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

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FCU-05-74, FCU-06-13

PAGE 6

the Midwest, Inc., "Order Denying Motion for Stay," Docket No. FCU-00-3, (April 26, 2002) (Fibercomm Order). Midwest Renewable Order, p. 7.

On March 20, 2006, the undersigned issued an order finding that the parties did not correctly analyze the question of whether One Call's motion to stay should be granted. Therefore, the parties were ordered to file briefs 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.

#### **Requests to take Official Notice**

Rather than filing a new brief regarding the motion for stay, on April 7, 2006, One Call filed a request that the undersigned take official notice of two briefs that One Call filed in federal district court in the Southern District of Iowa in OCCMC, Inc. v. John Norris, Diane Munns, and Curtis Stamp, Case No. 4:06-cv-00069 (hereinafter, federal district court case): a "Memorandum in Support of Motion for Preliminary Injunction," (filed February 23, 2006), and the "Reply to OCA's Resistance to One Call's Motion for Preliminary Injunction," (filed March 23, 2006). One Call filed copies of the Memorandum with its request and filed the Reply in an errata filing on April 12, 2006.

On April 7, 2006, the Consumer Advocate filed Supplemental Briefing and Supplemental Materials, Volume II. The Consumer Advocate requested that the undersigned take official notice of the following briefs and accompanying material it

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FCU-05-74, FCU-06-13

PAGE 7

filed in the federal district court case: a "Motion for Abstention and Request for Expedited Relief," (filed March 8, 2006), a "Memorandum in Support of Motion for Extension," (filed March 8, 2006), a "Supplemental Appendix in Support of Motion for Abstention," (filed March 8, 2006), a "Motion for Leave to File Expanded Redacted Brief and for Leave to File Unredacted Brief Under Seal," with attached "Memorandum in Resistance to Motion for Preliminary Injunction," (filed March 13, 2006), and a "Motion for Leave to File Expanded Reply Brief," with attached "Reply Memorandum in Support of Motion for Abstention," (filed April 5, 2006). The Consumer Advocate stated it also filed in federal court an Appendix consisting (except for two pages) of filings already of record in these 14 Board proceedings on March 3, 2006. The Consumer Advocate also asked that official notice be taken of the following filings made by the Board in the federal district court case: a "Motion for Abstention and Request for Expedited Relief," (filed March 9, 2006) and a "Memorandum in Support of Motion for Abstention," (filed March 9, 2006).

On April 24, 2006, U.S. District Court Judge Robert W. Pratt issued an order in the federal district court case granting the motions for abstention filed by the Consumer Advocate and the Board, denying One Call's motion for preliminary injunction, denying One Call's motion to strike, and dismissing One Call's complaint.

Therefore, since the federal district court case was dismissed, the underlying basis for One Call's motion for stay no longer exists. Given the dismissal of One

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FCU-05-74, FCU-06-13

PAGE 8

Call's federal district court case, One Call's motion for a stay of the three complaint cases before the Board involving Docket Numbers 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, FCU-05-74, and FCU-06-13 should be denied.

Although One Call mentioned Judge Douglas F. Staskal's "Ruling on Petition for Judicial Review," issued on March 1, 2006, in the Iowa District Court for Polk County, Office of Consumer Advocate v. Iowa Utilities Board, Case No. CV 5605, as an additional basis for the stay request in its reply to the Consumer Advocate's resistance to the motion for stay filed March 17, 2006, this argument was not briefed or argued by the parties and it appears that it was not pursued.

**IT IS THEREFORE ORDERED:**

1. One Call's April 7, 2006, request to take official notice of the following two documents filed in the federal district court case: a "Memorandum in Support of Motion for Preliminary Injunction," (filed February 23, 2006), and the "Reply to OCA's Resistance to One Call's Motion for Preliminary Injunction," (filed March 23, 2006), is granted and the documents are officially noticed. Iowa Code § 17A.14(4).

2. The Consumer Advocate's April 7, 2006, request to take official notice of the following documents filed in the federal district court case: a "Motion for Abstention and Request for Expedited Relief," (filed March 8, 2006), a "Memorandum in Support of Motion for Extension," (filed March 8, 2006), a "Supplemental Appendix

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FCU-05-74, FCU-06-13

PAGE 9

in Support of Motion for Abstention," (filed March 8, 2006), a "Motion for Leave to File Expanded Redacted Brief and for Leave to File Unredacted Brief Under Seal," with attached "Memorandum in Resistance to Motion for Preliminary Injunction," filed (March 13, 2006), a "Motion for Leave to File Expanded Reply Brief," with attached "Reply Memorandum in Support of Motion for Abstention," (filed April 5, 2006), a "Motion for Abstention and Request for Expedited Relief," (filed March 9, 2006) and a "Memorandum in Support of Motion for Abstention," (filed March 9, 2006), is granted and the documents are officially noticed. Iowa Code §§ 17A.14(4).

3. Judge Pratt's "Order" issued on April 24, 2006, in OCMC, Inc. v. John Norris, Diane Munns, and Curtis Stamp, Case No. 4:06-cv-00069 (S.D. Iowa), is officially noticed. Iowa Code §§ 17A.14(4).

3. The "Motion to Stay Proceedings" filed by One Call on February 24, 2006, is hereby denied.

**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 25<sup>th</sup> day of April, 2006.