

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">vs.</p> <p>ONE CALL COMMUNICATIONS, INC.,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-06-13</p>
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**PROCEDURAL ORDER AND NOTICE OF HEARING  
AND RULING ON MOTION TO COMPEL**

(Issued April 27, 2006)

On December 7, 2005, Mr. George L. Walling filed a complaint with the Utilities Board (Board) against One Call Communications, Inc. a/k/a Opticom (One Call), alleging that One Call had charged him \$33.95 for 18 minutes of Internet Web access he had not authorized. Mr. Walling stated that at the time the service was allegedly used, no one in his household was at home. Mr. Walling stated he had attempted to resolve the matter without success and attached the bill he received from One Call. The bill states that One Call billed the charge on behalf of Navicomm.

Board staff investigated the complaint and forwarded it to One Call for response. Opticom Operator Services responded to the complaint in a letter filed December 22, 2005. The letter stated that since the customer was unaware that

someone was using the service, full credit had been issued. The letter further stated that the charges were billed on behalf of Navicomm for Internet Web site access and that someone in the customer's household used the computer to access one of a number of Internet sites supported by Navicomm. Opticom stated that it had blocked the customer's line to prevent future access.

On January 6, 2006, Board staff issued a proposed resolution finding that cramming had occurred. The details of the informal complaint case are contained in informal complaint file number C-05-237, which is incorporated into the record in this case pursuant to 199 IAC 6.7.

The Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a petition requesting the Board to commence a proceeding to consider a civil penalty for a cramming violation on January 17, 2006. One Call filed a motion to dismiss the Consumer Advocate's petition on February 6, 2006. On February 16, 2006, the Consumer Advocate filed a reply memorandum.

On February 21, 2006, the Board issued an order finding that there are reasonable grounds to warrant further investigation into the case, granting the Consumer Advocate's petition, docketing the case for formal proceeding, denying One Call's motion to dismiss, and assigning the case to the undersigned administrative law judge.

On February 24, 2006, One Call filed a motion with the Board to stay this proceeding and two others also pending before the Board. The Consumer Advocate resisted the motion and One Call filed a reply to the resistance.

On March 10, 2006, the Consumer Advocate filed a motion to compel, in which it requested that One Call be required to respond to data request numbers 1-7 by a date certain in the immediate future. One Call did not directly respond to the motion to compel.

On March 20, 2006, the undersigned issued an order requiring the parties to file briefs regarding the motion to stay and stating she would take no action with respect to the order assigning the case and the motion to compel until after ruling on the motion to stay. The parties filed briefs regarding the motion to stay as ordered.

On April 25, 2006, the undersigned issued an order denying the motion to stay. Therefore, a procedural schedule and hearing date should be set for this proceeding and a ruling made on the motion to compel. Since the parties have a number of cases between them pending before the Board, the undersigned will establish a more relaxed procedural schedule than would ordinarily be set. See Board Docket Nos. FCU-04-54 through FCU-05-45 and FCU-05-74.

Pursuant to the Board's order assigning this docket issued February 21, 2006, Iowa Code §§ 476.3(1) and 476.103(4), and 199 IAC 6.5, a procedural schedule will be established and a hearing date set.

The statutes and rules involved in this case include Iowa Code §§ 476.3 and 476.103 and Board rules at 199 IAC 1.8, 1.9, 22.23, and chapters 6 and 7. Links to the Iowa Code and the Board's administrative rules (in the Iowa Administrative Code (IAC)) are contained on the Board's Web site at [www.state.ia.us/iub](http://www.state.ia.us/iub).

### **THE ISSUES**

The issues in this case generally involve One Call's billing Mr. Walling \$33.95 for Internet Web access, whether One Call complied with applicable law when it did so, whether imposition of a civil penalty is appropriate, and the factors regarding the amount of civil penalty in Iowa Code § 476.103(4)(b). The parties may raise other issues prior to and during the hearing.

### **PREPARED TESTIMONY AND EXHIBITS**

All parties will have the opportunity to present and respond to evidence and make argument on all issues involved in this proceeding. Parties may choose to be represented by counsel at their own expense. Iowa Code § 17A.12(4). The proposed decision that will be issued in this case must be based on evidence contained in the record and on matters officially noticed. Iowa Code §§ 17A.12(6) and 17A.12(8).

The submission of prepared evidence prior to hearing helps identify disputed issues of fact to be addressed at the hearing. Prepared testimony contains all statements that a witness intends to give under oath at the hearing, set forth in

question and answer form. When a witness who has submitted prepared testimony takes the stand, the witness does not ordinarily repeat the written testimony or give a substantial amount of new testimony. Instead, the witness is cross-examined concerning the statements already made in writing. The use of prepared testimony and submission of documentary evidence ahead of the hearing prevents surprise at the hearing and helps each party to prepare adequately so a full and true disclosure of the facts can be obtained. Iowa Code §§ 17A.14(1) and (3); 199 IAC 7.10.

#### **PARTY STATUS AND COMMUNICATION WITH THE BOARD**

The Consumer Advocate and One Call are currently the only parties to this proceeding. If Mr. Walling wishes to become a party to this case, he must notify the Board in writing in accordance with the procedural schedule established in this order.

One Call filed the information required to be included in an appearance with its motion to dismiss. Therefore, One Call has fulfilled the requirements of 199 IAC 7.4(7).

Any party who communicates with the Board should send an original and ten copies of the communication to the Executive Secretary, 350 Maple Street, Des Moines, Iowa 50319-0069, accompanied by a certificate of service. One copy of the communication should also be sent at the same time to each of the other parties to this proceeding, except that three copies must be served on the Consumer Advocate. 199 IAC 7.4(6)"c." These requirements apply, for example, to the filing of prepared testimony and exhibits with the Board.

These procedures are necessary to comply with Iowa Code § 17A.17 and 199 IAC 7.22, which prohibit ex parte communication. Ex parte communication is when one party in a contested case communicates with the judge without the other parties being given the opportunity to be present. In order to be prohibited, the communication must be about the facts or law in the case. Calls to the Board to ask about procedure or the status of the case are not ex parte communication. Ex parte communication may be oral or written. This means the parties in this case may not communicate about the facts or law in this case with the undersigned administrative law judge unless the other parties are given the opportunity to be present, or unless the other parties are provided with a copy of the written documents filed with the Board.

Pursuant to 199 IAC 6.7, the written complaint and all supplemental information from the informal complaint proceeding, identified as informal complaint file C-05-237, are part of the record of this formal complaint proceeding.

The materials that have been filed in this docket are available for inspection at the Board Records and Information Center, 350 Maple Street, Des Moines, Iowa 50319. Copies may be obtained by calling the Records and Information Center at (515) 281-5563. There will be a charge to cover the cost of the copying. Board orders are available on the Board's Web site at [www.state.ia.us/iub](http://www.state.ia.us/iub).

All parties should examine Iowa Code §§ 476.3, 476.103, and Board rules at 199 IAC 1.8 and 22.23, and chapters 6 and 7, for substantive and procedural rules that apply to this case.

### **MOTION TO COMPEL**

In its motion to compel filed March 10, 2006, the Consumer Advocate stated it had sent data request numbers 1-7 to One Call on February 16, 2006. The Consumer Advocate further stated One Call did not provide responses to the data requests by the due date of February 24, 2006. The attorney for the Consumer Advocate stated he sent an email message to the attorney for One Call asking about the responses on February 27, 2006, and on February 28, 2006, One Call's attorney sent an email message in response stating that One Call would not respond to the discovery until the Board ruled on its motion for stay and the federal district court ruled on the motion for preliminary injunction One Call had filed in federal district court. The Consumer Advocate attached the data requests to the motion to compel and stated they go to the heart of the case.

Discovery procedures applicable in civil actions are available to the parties in contested cases before the Board. Iowa Code § 17A.13 (2005). "The rules providing for discovery and inspection shall be liberally construed and shall be enforced to provide the parties with access to all relevant facts. Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request." Iowa R. Civ. P. 1.501(2). "Parties may

obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Iowa R. Civ. P. 1.503(1). "As this rule makes clear, a party is entitled to discover any information that is not privileged and that is relevant to the subject matter of the lawsuit. [citation omitted.] Relevancy to the subject matter of the lawsuit is broader than relevancy to the precise issues in the pleadings because the rule allows discovery of inadmissible information as long as it leads to the discovery of admissible evidence." Mediacom Iowa, LLC, v. City of Spencer, 682 N.W.2d 62, 66 (Iowa 2004).

It appears that the cover sheet attached to the data requests erroneously states that the discovery requests are for Docket No. FCU-05-74. Although data requests four and five refer to One Call's answers in Docket No. FCU-05-73, and data request six refers to data requests four and five, the data requests appear to relate to this case and are looking for information similar to that provided by One Call in Docket No. FCU-05-73. However, data request seven appears to have been included by mistake. It refers to a response received in Docket No. FCU-05-73 and requests follow-up information related to that information. It does not appear that data request seven relates to this case.

Data request numbers 1-6 appear to meet the requirements of the relevant rules of civil procedure and appear to seek information relevant to the subject matter of this proceeding. Data request number seven does not. If the Consumer Advocate

intended to seek information requested in data request number seven in this docket, the data request should be redrafted and resent to One Call so it is clear that the data request relates to issues in this docket.

One Call has not responded directly to the Consumer Advocate's motion to compel. It is not clear whether One Call has already provided part or all of the requested information. It is also not clear whether One Call has any objections to providing the requested information or the length of time it will need to provide the requested information.

Subrule 199 IAC 7.15(2) provides that unless otherwise ordered or agreed, data requests shall be either responded or objected to, with concisely stated grounds for relief, within seven days of receipt. For the purposes of this rule and this order, the date of receipt of data requests 1-6 is deemed to be May 1, 2006.

Parties have an obligation to work with each other in good faith to resolve discovery issues. 199 IAC 7.15(4); Iowa R. Civ. P. 1.501(2). If One Call has difficulty providing the required answers to data request numbers 1-6 on or before May 15, 2006,<sup>1</sup> it must notify the Consumer Advocate on or before May 15, 2006, and attempt to work out the difficulty. If One Call has an objection to any of the data requests, it must provide its objections to the Consumer Advocate on or before May 15, 2006. In

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<sup>1</sup> The May 15, 2006, date is intentionally set beyond the seven-day period in the rule due to the requirements of other pending cases before the Board involving these parties. See Board Docket Nos. FCU-04-54 through FCU-05-45 and FCU-05-74.

either of these circumstances, both parties are required to act reasonably and negotiate in good faith in an attempt to resolve the situation. After negotiating in good faith, if the parties cannot resolve the situation, they may file an appropriate motion. 199 IAC 7.15(5).

**IT IS THEREFORE ORDERED:**

1. If Mr. Walling wishes to become a party to this case, he must file written notice with the Board no later than May 31, 2006.

2. On or before May 31, 2006, the Consumer Advocate and any intervenors must file prepared direct testimony and exhibits and a prehearing brief. The prepared direct testimony may refer to any document already in the record, and parties do not need to refile exhibits already submitted in the informal complaint process and made a part of the record. In prepared testimony and exhibits, the Consumer Advocate must address the issues discussed above, support each of the allegations made in its petition and reply, and file any other evidence not previously filed. The Consumer Advocate should use exhibit numbers one and following. In its prehearing brief, the Consumer Advocate must explain why it believes imposition of a civil penalty would be appropriate and in accordance with applicable law in this particular case. If Mr. Walling becomes a party to this case and wishes to file prepared testimony and a brief, he must do so on or before May 31, 2006.

3. On or before June 28, 2006, One Call must file prepared testimony and exhibits and a prehearing brief. One Call may refer to any document in the record,

and does not need to refile exhibits already submitted in the informal complaint process and made a part of the record. In its prepared testimony and exhibits, One Call must address the issues discussed above, support each of the allegations made in its response to the informal complaint and motion to dismiss, and file any other evidence not previously filed. One Call should use exhibit numbers 100 and following. In its prehearing brief, One Call must explain why it believes imposition of a civil penalty would not be appropriate and would not be in accordance with applicable law in this particular case.

4. If any party wishes to have a witness connected to the hearing by telephone conference call, the party must file written notification with the Board no later than July 12, 2006.

5. If the Consumer Advocate or any intervenor is going to file prepared rebuttal testimony and exhibits or a rebuttal brief, it must do so on or before July 12, 2006.

6. A hearing for the presentation of evidence and the cross-examination of witnesses will be held in Board Conference Room 3, 350 Maple Street, Des Moines, Iowa, on Wednesday, July 26, 2006, commencing at 9:30 a.m. Each party must provide a copy of its prepared testimony and exhibits to the court reporter. Persons with disabilities requiring assistive services or devices to observe or participate should contact the Board at 1-515-281-5256 no later than five business days prior to the hearing to request that appropriate arrangements be made.

7. The parties must comply with the requirements regarding data request numbers 1-7 contained in the body of this order.

8. In the absence of objection, all data requests and responses referred to in oral testimony or on cross-examination will become part of the evidentiary record of these proceedings. Pursuant to 199 IAC 7.23(4)"d," the party making reference to the data request must file one original and three copies of the data request and response with the Executive Secretary of the Board at the earliest possible time.

9. Any person not currently a party who wishes to intervene in this case must meet the requirements for intervention in 199 IAC 7.13. The person must file a petition to intervene on or before 20 days following the date of issuance of this order, unless the petitioner has good cause for the late intervention. 199 IAC 7.13(1).

**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 27th day of April, 2006