

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="padding-left: 100px;">Complainant,</p> <p style="padding-left: 100px;">vs.</p> <p>MCI, INC.,</p> <p style="padding-left: 100px;">Respondent.</p>	<p style="text-align:right">DOCKET NOS. FCU-05-53 FCU-05-56</p>
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ORDER SUSPENDING PROCEDURAL SCHEDULE

(Issued June 28, 2006)

This case involves complaints by two customers that MCI, Inc. (MCI) placed charges for international calls they did not make on their respective telephone bills. In each case, MCI refunded the disputed amounts to the customer. In each case, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a petition to consider a civil penalty for an alleged cramming violation with the Utilities Board (Board). On October 17, 2005, the Board issued an order consolidating the dockets, denying MCI's motion to dismiss, and assigning the dockets to the undersigned administrative law judge. On October 18, 2005, the undersigned issued a procedural order and notice of hearing setting a procedural schedule and a hearing date of January 5, 2006.

At the request of the Consumer Advocate and after a prehearing conference, the parties agreed that the procedural schedule would be suspended and a second

prehearing conference set for December 13, 2005. The purpose of the suspension was to allow the Consumer Advocate additional time for investigation and discovery. Since that date, prehearing conferences were held on December 13, 2005, February 21, 2006, April 18, 2006, and June 20, 2006. At each prehearing conference except the last one, the Consumer Advocate requested an additional two-month delay for investigation and discovery, and MCI did not resist each request. At the prehearing conference on April 18, 2006, the attorney for the Consumer Advocate, Mr. Craig Graziano, stated he would be requesting that another attorney be assigned to the case to represent the Consumer Advocate due to the press of business in other cases.

On June 7, 2006, MCI filed a "Renewed Motion to Dismiss." MCI argues that the Iowa District Court for Polk County, in Office of Consumer Advocate v. Iowa Utilities Board, Case No. CV 5605, "Ruling on Petition for Judicial Review," (March 1, 2006) (Kilaru decision), held that Iowa Code § 476.103 and the version of Board rule 199 IAC 22.23 in effect prior to January 2006 did not prohibit "unauthorized changes."¹ MCI argues that in light of the Kilaru decision, the complaints at issue in this case must be dismissed. MCI argues that both complaints in this case allege MCI made an "unauthorized change," specifically "cramming," prior to January 2006. MCI argues that the Kilaru decision clearly states that any action for "unauthorized

¹ "Unauthorized changes" include slamming and cramming. The Kilaru case involves a slamming complaint. This case involves two cramming complaints.

changes" brought prior to January 2006 cannot continue. MCI argues that "cramming" was not prohibited by Iowa Code § 476.103 or the version of 199 IAC 22.23 in effect when the complaints at issue in this case were filed, and therefore, MCI could not have violated the statute or the rule. Therefore, MCI argues, the complaints should be dismissed.

On June 20, 2006, Mr. John Dwyer appeared at the prehearing conference representing the Consumer Advocate. Mr. Dwyer stated he would be filing a resistance to the motion to dismiss the following day. The parties and the undersigned discussed the status of the case and options regarding how to proceed. The participants acknowledged the Kilaru decision is on appeal to the Iowa Supreme Court. MCI stated that its brief in the Kilaru case is due in July and there are no further briefs due. The Consumer Advocate preferred that a procedural schedule be established and a hearing date set. MCI preferred that this case be suspended until the Iowa Supreme Court issues a ruling on the Kilaru decision.

On June 21, 2006, the Consumer Advocate filed an "Opposition to MCI Inc.'s Renewed Motion to Dismiss." The Consumer Advocate argues that the Kilaru decision does not mandate dismissal of this case because the district court decision is not final and is currently on appeal to the Iowa Supreme Court. The Consumer Advocate further argues the decision would not constitute controlling legal authority even if it were final, and cites Iowa R. App. P. 6.14(5) (unpublished Iowa appellate court opinions are not controlling legal authority) and Frock v. United States Railroad Retirement Bd., 685 F.2d 1041, 1045 (7th Cir. 1982) ("courts can, and do, differ in

their conclusions as to the law affecting agency action"; "[t]o find that this circuit's determination governed the Board's actions in all other circuits would be to make this circuit the ultimate decisionmaker simply because it was the first court presented with the issues") in support. The Consumer Advocate further argues there is overwhelming evidence the statute and Board rule in effect in 2005 were intended to prohibit slamming and cramming and described the consequences for engaging in that conduct. The Consumer Advocate argues Iowa Code § 476.103 and the relevant Board rule in effect when the complaints in this case were filed clearly and unambiguously prohibited cramming. Therefore, the Consumer Advocate requested that the Board deny MCI's motion to dismiss and set a procedural schedule and a hearing date in this case.

The Consumer Advocate is correct that the Kilaru decision is not binding in this case because it is unpublished and it is on appeal to the Iowa Supreme Court. Iowa R. App. P. 6.14(5). Since the Kilaru decision is not binding in this case, this case could go forward and a procedural schedule and hearing date be set. However, given the particular circumstances of this case, the wiser course of action is to stay this case until the Iowa Supreme Court rules on the Kilaru decision.

MCI has refunded all disputed amounts to the customers, so they are not harmed by the further delay. This case has been delayed numerous times at the request of the Consumer Advocate. The parties have not filed any prehearing testimony, exhibits, or briefs. Of course, further delay means the evidence in the case will be even less fresh than it is today. However, the parties can take steps to

preserve evidence at this time. Waiting until the Iowa Supreme Court rules on the Kilaru decision means that MCI will not have to expend resources preparing its prefiled testimony, exhibits, and brief at this time. It is not possible to predict with certainty how the Iowa Supreme Court will rule in the Kilaru case or whether the decision in that case will restrict the decision in this case. Since this case has already been delayed for months, it does not appear that waiting a few more months will be particularly harmful to these parties. There is value in waiting to see how the Iowa Supreme Court rules in the Kilaru case so that any rulings in this case can be in conformance with the Iowa Supreme Court decision.

IT IS THEREFORE ORDERED:

1. All activities in this case, including discovery, are hereby suspended until further order.
2. Ruling on MCI's motion to dismiss is deferred until further order.
3. The parties shall notify the undersigned of any orders or decisions issued by the Iowa Supreme Court or Iowa Court of Appeals in the Kilaru case.

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 28th day of June, 2006.