



Board's rules. The Kilaru decision is now on appeal to the Iowa Supreme Court. MCI argues that the Kilaru decision provides a sound rationale for dismissing the complaint at issue in this case because it involves actions that occurred prior to January 2006.

Alternatively, if the complaint is not dismissed, MCI argues that this case should be suspended until the Supreme Court rules on the Kilaru appeal. MCI argues neither party will be prejudiced by delay, particularly since it issued a full refund to the customer. It argues suspending this case will allow the Board to conform any rulings to the Iowa Supreme Court decision. MCI cited to the order issued by the undersigned administrative law judge in Office of Consumer Advocate v. MCI, Inc., Docket Nos. FCU-05-53 & 56, "Order Suspending Procedural Schedule," (June 28, 2006), in support.

On July 20, 2006, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a "Resistance to the Renewed Motion to Dismiss and Alternative Motion to Suspend Procedural Schedule." The Consumer Advocate argues that the Kilaru decision is not controlling legal authority because it is an unpublished district court decision and cites Iowa R. App. P. 6.14(5) (unpublished Iowa appellate court opinions are not controlling legal authority) and Frock v. United States Railroad Retirement Bd., 685 F.2d 1041, 1045 (7<sup>th</sup> Cir. 1982) (Frock) ("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 decision maker simply because it was the first court presented with the issues") in support. The Consumer Advocate further argues the Utilities Board (Board) disagrees with the Kilaru decision as shown by the fact it appealed. The Consumer Advocate argues that for the reasons given in its brief and the Board's brief in the Kilaru appeal, which are attached to the resistance, the motion to dismiss should be denied.

With respect to the motion to suspend, the Consumer Advocate argues the four-factor test in Iowa Code § 17A.19(5)(a)(2005) should be applied when deciding whether to stay these proceedings. The Consumer Advocate argues the application of these criteria show the case should not be stayed, there is no irreparable injury to MCI by proceeding, the public interest is broader than the interest of the individual customer, and delay of the proceedings would harm the public interest by rendering the evidence stale and delaying resolution of the case. It argues all of the relevant factors support denial of a stay.

On July 24, 2006, MCI filed a "Reply to OCA's Resistance." MCI argues that under the Kilaru decision, the claims brought by the Consumer Advocate cannot go forward. MCI argues that the Frock decision is irrelevant because this is not an instance where MCI is seeking to apply the law from another jurisdiction. It argues this case involves the same parties, the same issues, and those issues have been fully adjudicated. Therefore, it argues, under the doctrine of issue preclusion, the Consumer Advocate cannot continue to relitigate the same issues against MCI. MCI

argues the Kilaru decision is a final judgment for issue preclusion purposes even though it has been appealed, but notes under some circumstances, it may be appropriate to suspend the proceedings until the first action has been fully appealed. Therefore, MCI argues, it would not be inappropriate to suspend this case until the Supreme Court rules on the Kilaru appeal. MCI argues the Consumer Advocate is incorrect in stating that MCI bears the responsibility of seeking a stay and the burden of showing success on appeal, and the Consumer Advocate must seek a stay of the Kilaru decision if it does not want the ruling to be enforced.

On July 25, 2006, the Consumer Advocate filed a "Response to New Argument on Motion to Dismiss and Alternative Motion to Suspend Procedural Schedule." The Consumer Advocate argues that MCI's argument that this case is barred from proceeding under the doctrine of issue preclusion lacks merit. The Consumer Advocate argues in order for a prior decision to have preclusive effect, four elements must be met: 1) the issue concluded must be identical; 2) the issue must have been raised and litigated in the prior action; 3) the issue must have been material and relevant; and 4) the determination of the issue must have been necessary and essential to the resulting judgment. The Consumer Advocate argues MCI's issue preclusion argument falters on the fourth element because the Kilaru decision rested on alternative determinations, and such alternative grounds are insufficient to invoke the doctrine of issue preclusion.

As stated above, all prepared testimony and exhibits have been filed in this case and it is set for hearing on August 1, 2006. The motions and responses were filed this month, shortly before the scheduled hearing date. Therefore, the parties are not in the same position as they were in Consumer Advocate v. MCI, Inc., Docket Nos. FCU-05-53 & 56. The parties have raised significant legal issues regarding the motion to dismiss and those issues will be considered as part of the legal issues to be decided in the case. Therefore, a ruling on the motion to dismiss is deferred at this time.

With regard to the motion to suspend, it would be helpful to know how the Supreme Court will rule on the Kilaru appeal before ruling in this case. MCI has fully refunded the customer. However, there is a public interest and an interest held by both parties in receiving a timely decision in this case. Further delay will result in staleness of the evidence. The parties and Board staff have already expended considerable time and effort in preparing this case. Because all prepared testimony and exhibits have been filed and the hearing is scheduled for August 1<sup>st</sup>, the evaluation of whether it would be appropriate to grant the motion to suspend is different than in Consumer Advocate v. MCI, Inc., Docket Nos. FCU-05-53 & 56. In this case, the factors supporting going forward outweigh the factors supporting suspension of the procedural schedule and the most appropriate course of action is to proceed. Therefore, the motion to suspend is denied and the hearing will be held on August 1<sup>st</sup> as scheduled.

### QUESTIONS FOR THE PARTIES

The parties should provide answers to the following questions and requests for clarification at the hearing. Questions one through four will be addressed as preliminary matters rather than through witness testimony. Some questions are more appropriately addressed by a witness for MCI, some by a witness for the Consumer Advocate, and some by witnesses for both parties.

1. On July 19, 2006, the Consumer Advocate filed Exhibit SFK-3 as a confidential exhibit attached to the testimony of Mr. Keesler. Does Qwest claim the exhibit is confidential? If it does, Qwest or the Consumer Advocate must explain why the information may be kept confidential pursuant to Iowa Code Chapter 22 and 199 IAC 1.9(5) and must file the written request required by 199 IAC 1.9(6).

2. On July 19, 2006, the Consumer Advocate filed confidential pages MCI000174-MCI000189 and Data Request No. 26 and the answer and stated MCI claims the documents to be confidential.

a) Does MCI claim the documents are confidential? If it does, MCI must explain why the information may be kept confidential pursuant to Iowa Code Chapter 22 and 199 IAC 1.9(5) and must file the written request required by 199 IAC 1.9(6).

b) The Consumer Advocate should designate documents MCI000174-MCI000189 as an exhibit. The Consumer Advocate should separately designate Data Request No. 26 and its answer as an exhibit. The

Consumer Advocate should provide marked exhibits to the court reporter and the undersigned (two copies) at the hearing.

3. Please clarify why the Consumer Advocate filed documents MCI000174-189 and Data Request No. 26 and its answer. Is there a witness who referred to these documents or the data request?

4. Please clarify why the Consumer Advocate filed Data Requests 5B through 28 with their answers. Is there a witness who referred to the data requests?

5. Please explain what documents MCI000174-189 are and what they mean. Please explain who each of the persons named in the documents are and what company each works for.

6. In June or July 2005, on what date did Qwest start billing Mrs. Steele? On what date did Qwest stop billing Mrs. Steele? When did Qwest start billing Mrs. Steele again (i.e., after the situation was resolved and it was clear Mrs. Steele was a Qwest customer)? What events triggered these billing decisions?

7. Were there any other Iowa MCI customers who were affected like Mrs. Steele was (i.e., requested to switch from MCI and were not switched when requested due to the platform conversion)? If yes, please provide details.

8. Was MCI reasonable in the way it managed the platform conversion? Why or why not?

9. On pages 6–9, lines 132 to 207, of the “Supplemental Testimony of Jim Ray”, filed May 22, 2006, MCI witness Mr. Jim Ray testifies that MCI believed there

were procedural safeguards within the Qwest order processing procedures to avoid the processing of conflicting orders. Specifically, on pages 7-8, line 170 to 173, Mr. Ray states that: "Therefore, if Qwest does not initially reject an order and provides an FOC [Firm Order Commitment], it will later issue a jeopardy notice notifying MCI that the order is in jeopardy due to an existing conflicting order." Mr. Ray's testimony included exhibit JMR-106, entitled Manual Local Response (FOC, Error, Reject, Jeopardy, and Cancel Notice) Manual User's Preparation Guide V18.0, which Mr. Ray references on page 7, lines 158–161. Mr. Ray testified that: "Reject code 820 provides that an order is rejected because 'orders exist which are work impacting'." He testified that: "Reject code 821 provides that an order is rejected due to 'pending order in conflict with Retail order'." Mr. Ray concludes on pages 8-9, lines 193-197, that: "Certainly, the McLeod conversion order presented a conflict that impacted the work necessary to complete the [Qwest] win-back order and conflicted with a retail order. As such, MCI expected that if upon submission of the McLeod order to Qwest there was a previously existing order in Qwest's systems (such as the win-back order), the McLeod order would have been rejected by Qwest."

On page 11 of his April 20, 2006, "Prefiled Rebuttal Testimony," Consumer Advocate witness Mr. Stephen F. Keesler testifies that no jeopardy notice was sent to MCI because: "There was no conflict or jeopardy. The June 27, 2005 [Qwest win-back order] was due July 6, 2005 and the June 28, 2005 [conversion order] was due

July 14, 2005. These were two distinct orders due on two different due dates. They did not pose any conflict. We had no reason to question either service order."

Both parties should be prepared to answer the following questions at the hearing.

- a) What are the purposes of jeopardy codes and the firm order commitment (FOC) dates as they relate to both Qwest's and MCI's actions in this case?
- b) Should Qwest have sent a reject code 820 or 821 in this situation to MCI? Why or why not?
- c) Was it reasonable for MCI to rely on Qwest jeopardy notices to prevent situations like Mrs. Steele's from occurring? Why or why not?
- d) Did MCI rely on the FOC dates from Qwest to initiate line loss suppression (record freeze) on the billing numbers (automatic number identification (ANIs)) that had FOC dates for the conversion work? If so, was MCI's reliance reasonable? Why or why not?
- e) Was Qwest aware that MCI was initiating line loss suppression procedures with the conversion order? Is such line loss suppression a standard procedure in order to avoid inappropriate disconnects of customers that are to be converted? Did MCI use line loss suppression during all the Iowa conversions? Did MCI use line loss suppression in all other states that were going through similar UNE provider conversions?
- f) Once MCI received an FOC, how long was the customer account frozen?

- g) Was it reasonable for Qwest to interpret the Steele conversion order as a line loss report and cancel the Steele account? Why or why not? Should Qwest have contacted MCI at that point prior to canceling the Steele account? Why or why not? What is standard industry practice in this situation?
- h) In his July 19<sup>th</sup> testimony at page 2, Mr. Bench testified platform conversions are complicated processes and the conversion was further complicated by the presence of a third company, McLeod. Specifically, how did the presence of McLeod affect the interaction of MCI, Qwest, and McLeod?

10. In his prefiled direct testimony at page 3, filed July 19, 2006, Consumer Advocate witness Mr. David H. Bench testified that: "I disagree, however, with any notion that the freezing or suppression can be inflexible. Customer records are frozen in order that a company may complete as much work as possible prior to the actual completion of the platform conversion and to minimize paperwork. In order for the process to work, however, diligent management must be attentive to events that occur between the date the records are frozen and the date the conversion is completed. They must be prepared to take additional actions in individual cases as events may require. Orders like the Steele order are a prime example. They cannot just be ignored. A project manager with access to key internal and external contacts should have handled these changes."

- a) What other specific actions should MCI have taken? Do companies doing platform conversions commonly take such actions? If such actions are

common in the industry, was it unreasonable for MCI not to take them? Why or why not?

b) What specific actions did MCI take to avoid or correct this situation?

11. Has MCI learned from this experience and taken steps to avoid similar situations in the future? If yes, what has MCI done or what will it do?

12. Please verify whether the following timeline is correct and accurately represents what happened in this case. Please make any needed additions or corrections.

- June 27, 2005, Ms. Alice Steele was an MCI customer. (Supp. Ray, pp. 2-3, May 22, 2006).
- June 27, 2005, Ms. Steele's son contacted Qwest and changed her service to Qwest. (Supp. Ray, pp. 2-3, May 22, 2006).
- June 27, 2005, Qwest entered the order to change Ms. Steele's service back to Qwest into Qwest's system with a due date of July 6, 2005. (Supp. Ray, pp. 2-3, May 22, 2006).
- June 28, 2005, Qwest received an order from McLeod to convert the provisioning of Ms. Steele's MCI local service from Qwest's unbundled network elements (UNEs) to McLeod's UNEs. (Supp. Ray, pp. 2-3, May 22, 2006).
- June 28, 2005, Qwest entered the McLeod conversion order into Qwest's system and assigned a due date of July 14, 2005 to a subset of the 29 customers in the order that included the Steele's service. (Supp. Ray, pp. 2-3, May 22, 2006).
- July 7, 2005, Qwest sent a line loss report (C.A.R.E., Customer Account Records Exchange, Qwest term) to MCI. (Rebuttal, Keesler, p. 5, Apr. 20, 06) (Supp. Ray, pp. 2-3, May 22, 2006).
- July 14, 2005, Qwest completed the McLeod conversion order including the Steele's MCI service. (Supp. Ray, pp. 2-3, May 22, 2006).

- July 14, 2005, Qwest interpreted the conversion order on the Steele account as a Qwest line loss and canceled Ms. Steele's account. [Did Qwest billing start on July 7, 2005? Did Qwest stop billing July 14, 2005?] (Supp. Ray, pp-3. 2, May 22, 2006).
- After receiving a final bill from Qwest in July, Ms. Steele's son believed the account had been switched back to MCI. Sometime in August, Mr. Steele contacted Qwest again to switch from MCI to Qwest. (Supp. Ray, pp. 2-3, May 22, 2006).
- August 18, 2005, MCI received a line loss notice from Qwest for the Steele account. (Supp. Ray, pp. 2-3, May 22, 2006).
- August 22, 2005, invoice date on MCI bill sent to Ms. Steele for \$36.83 for service in July. (MCI letter to Ms. Steele, Bates, C-05-187, October 26, 2006).
- August 29, 2005, MCI cancelled the Steele account. (Direct, Jim Ray, p. 4, March 2, 2006).
- September 14, 2005, MCI received payment of \$36.83 from Ms. Steele for service in July. (MCI letter to Ms. Steele, Bates, C-05-187, October 26, 2006).
- September 19, 2005, Ms. Steele filed an informal complaint against MCI, alleging that MCI billed her for service after her son had requested that her service be switched to Qwest. (Direct, Jim Ray, p. 4, March 2, 2006).

At the conclusion of the hearing, a briefing schedule will be established. In their briefs, the parties should address the following issue: Are the actions by MCI in this case the kind of actions that were intended to be addressed by Iowa Code § 476.103 and 199 IAC 22.23? Why or why not? Do the actions by MCI fit within the definition of "change in service," "slamming," and/or "cramming" in Iowa Code § 476.103 and 199 IAC 22.23? Why or why not?

**IT IS THEREFORE ORDERED:**

1. A ruling on the motion to dismiss is deferred for the reasons given above.
2. The motion to suspend is denied for the reasons given above.
3. The parties must provide answers and clarifications to the questions listed in this order at the hearing.
4. A briefing schedule will be set at the conclusion of the hearing.

**UTILITIES BOARD**

/s/ Amy L. Christensen  
Amy L. Christensen  
Administrative Law Judge

ATTEST:

/s/ Sharon Mayer  
Executive Secretary, Assistant to

Dated at Des Moines, Iowa, this 27<sup>th</sup> day of July, 2006.