

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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<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 DENYING REQUEST FOR INTERLOCUTORY REVIEW**

(Issued July 28, 2006)

On July 7, 2006, pursuant to 199 IAC 7.25, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a request for interlocutory review of the June 28, 2006, order suspending procedural schedule issued by the Utilities Board's (Board) administrative law judge (ALJ).

**I. BACKGROUND**

Consumer Advocate is seeking civil penalties against MCI in each of these dockets. The Board denied MCI's motions to dismiss, consolidated the dockets and assigned them to the Board's ALJ. Each case involves an allegation by Consumer Advocate that MCI violated Iowa's law against "cramming" by placing unauthorized charges on the consumer's telephone bill. The informal complaints involved the

possibility that the disputed charges may have been caused by "modem hijacking," by which downloaded software containing a computer virus causes a consumer's modem to dial a destination Web site without the consumer's knowledge.

On June 7, 2006, MCI filed a renewed motion to dismiss based on the March 1, 2006, ruling of the Iowa District Court for Polk County in Office of Consumer Advocate v. Iowa Utilities Board, No. CV-5605 (hereinafter the Kilaru decision), in which the district court judge ruled that Iowa Code § 476.103 and the Board's rules in effect at the relevant time did not prohibit unauthorized changes in service. In light of that decision, MCI argued these cases, which were covered by the rules at issue in the Kilaru decision, should be dismissed.

On June 21, 2006, Consumer Advocate filed its opposition, arguing that the district court decision is not final and has been appealed by both the Board and Consumer Advocate.

## II. ALJ's ORDER

In her June 28, 2006, order, the ALJ acknowledged that Consumer Advocate correctly states that the Kilaru decision is not binding in this matter because it is unpublished and has been appealed. The ALJ concluded that while the case could proceed to hearing, the wiser course is to stay the case until the appellate court rules on the appeal of the Kilaru decision. The ALJ stated that the case has already been delayed numerous times at the request of Consumer Advocate and that the consumers involved in these cases will not be harmed by further delay because MCI

has credited the disputed charges. The ALJ observed there is value in waiting for the appellate court's decision so that any rulings in this matter can conform to that decision. The ALJ suspended all activities in this case, including discovery, until further order. Also, the ALJ deferred ruling on MCI's motion to dismiss until further order.

### **III. CONSUMER ADVOCATE'S REQUEST FOR INTERLOCUTORY REVIEW**

In its request for interlocutory review, Consumer Advocate argues that suspending the procedural schedule amounts to a stay of the proceedings and that the ALJ did not apply the proper criteria in determining whether to issue a stay. Consumer Advocate also argues the order overlooks the public interest and underestimates the time it will take to secure a decision from the appellate court. Further, Consumer Advocate argues that delaying the proceedings harms the public interest by rendering the evidence stale and delaying resolution of the case.

Consumer Advocate states its purpose in seeking interlocutory review is to expedite resolution of the case and that review at the time the ALJ enters a proposed decision would be unavailing. Consumer Advocate asks the Board to vacate the stay and remand the proceedings to the ALJ.

### **IV. MCI'S RESISTANCE**

On July 24, 2006, MCI filed a resistance to Consumer Advocate's request for interlocutory review. MCI argues the fact that the Board and Consumer Advocate

have appealed the Kilaru decision is irrelevant. MCI asserts that a district court's decision is considered a final judgment for issue preclusion purposes even if the district court decision has been appealed. MCI argues that this case involves the same parties and issues as the Kilaru decision and that those issues have been fully adjudicated. MCI acknowledges that in some cases it may be appropriate to suspend proceedings until the first action has been fully appealed.

MCI argues that the Kilaru decision is final and binding on the Board, Consumer Advocate, and MCI and requires dismissal of Consumer Advocate's claims. MCI argues that Consumer Advocate has the burden of seeking a stay if it does not want the judgment enforced. MCI asks the Board to dismiss Consumer Advocate's claims or, alternatively, to affirm the ALJ's decision to suspend the procedural schedule pending a decision in the appeal of the Kilaru decision.

## V. DISCUSSION

The Board has discretion regarding whether to entertain interlocutory appeals from orders issued by an ALJ. 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 concludes it will not grant Consumer Advocate's request for interlocutory review of the ALJ's order. As the Board has stated in previous orders denying requests for interlocutory review of an order of the ALJ, 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 that Consumer Advocate has failed to identify a compelling reason for the Board to review the ALJ's decision. The Board concludes that Consumer Advocate's concerns about the effect of the ALJ's decision to suspend the procedural schedule will have on the pace at which these proceedings will be resolved are not sufficient to justify interlocutory review. The Board finds no reason to interfere with the ALJ's decision to suspend the procedural schedule in this case pending the outcome of the appeal of the Kilaru decision.

**VI. ORDERING CLAUSE**

**IT IS THEREFORE ORDERED:**

The request for interlocutory review of the administrative law judge's "Order Suspending Procedural Schedule" issued June 28, 2006, filed by the Consumer Advocate Division of the Department of Justice on July 7, 2006, is denied.

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Margaret Munson  
Executive Secretary, Deputy

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 28<sup>th</sup> day of July, 2006.