

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<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>EVERCOM SYSTEMS, INC.,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-06-40</p>
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PROCEDURAL ORDER AND NOTICE OF HEARING

(Issued October 4, 2006)

On March 30, 2006, Mr. Ken Silver filed a complaint with the Utilities Board (Board) alleging that Correctional Billing Services had charged him \$75 for collect calls that were incorrect. Mr. Silver stated he had tried to contact the company many times to resolve the situation, including sending a fax that explained all incoming calls to his business number were answered by a central operator who did not accept the collect calls. Mr. Silver stated the fax was never answered and when he called the company he was put on hold and cut off. He further stated the company gave him a company address in Selma, Alabama but would not give him a telephone number. When he called information for Selma, Mr. Silver stated he was told there was no listing for the company. He stated that Correctional Billing Services showed his

telephone number as being at another address, which led him to believe the company was running some kind of scam instead of making an honest mistake.

Board staff investigated the complaint and forwarded it to Correctional Billing Services for response. On April 17, 2006, Evercom Systems, Inc. (Evercom) filed a response. Correctional Billing Services is a division of Evercom. Evercom stated that the collect calls in Mr. Silver's complaint came from the Bridewell Detention Center in Bethany, Missouri, and that Evercom is the inmate telephone service provider that handles the inmate collect calls for the confinement facility. Evercom stated it uses an automated operator system that requires a positive action, such as pressing a designated number on a keypad, to accept the call. However, Evercom stated, in Mr. Silver's case, it had determined that the charges to Mr. Silver were the result of fraudulent activity by a third party. Evercom stated it had fully credited Mr. Silver for the calls and associated charges and placed a block on his telephone number to prevent future calls from any confinement facilities that Evercom serves. Evercom recommended that Mr. Silver contact his local telephone company for an additional collect call block on his line because Evercom stated that sometimes Evercom's blocks can be released "due to technical reasons."

On April 19, 2006, Board staff issued a proposed resolution noting the credit issued by Evercom and the block it placed on Mr. Silver's telephone number. Staff also stated Evercom had explained that the collect calls were billed to Mr. Silver's account as a result of fraudulent activity by a third party. Staff referred to an

explanation Evercom provided regarding the process some inmates use to complete calls without having the responsible person pay for the calls. Staff made no finding regarding whether Evercom violated a statute or Board rule. The details of the informal complaint case are contained in informal complaint file number C-06-84, 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 May 2, 2006. Evercom filed a response in opposition to the Consumer Advocate's petition on June 12, 2006. On June 28, 2006, the Consumer Advocate filed a reply memorandum.

On July 13, 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 Evercom's request that the Consumer Advocate's petition be denied, and assigning the case to the undersigned administrative law judge.

At the requests of the parties, the undersigned delayed setting a procedural schedule and hearing date so the parties could pursue discovery in an order issued August 16, 2006. The order set a prehearing conference for October 3, 2006, and ordered the parties to file appropriate motions prior to the prehearing conference if they could not comply with a procedural schedule proposed in the order.

On September 11, 2006, the Consumer Advocate filed a motion to compel, in which it requested that Evercom be required to respond to certain data requests. Evercom filed a resistance on September 21, 2006. On September 28, 2006, the undersigned issued an order regarding the motion to compel requiring Evercom to provide answers to Consumer Advocate data request numbers 12, 13, and 14 as discussed in the order.

On September 29, 2006, the Consumer Advocate filed a motion regarding the procedural schedule. The Consumer Advocate set forth detailed reasons why the proposed procedural schedule was not workable and suggested that the proposed dates be moved back approximately 90 days.

A prehearing conference was held on October 3, 2006. Evercom was represented by its attorneys Ms. Krista Tanner and Mr. Jeffrey Anderson. Mr. Curtis Hopfinger was also present for Evercom. The Consumer Advocate was represented by its attorney, Mr. Craig Graziano. The Consumer Advocate's request that the proposed procedural dates be moved back approximately 90 days was acceptable to Evercom. The Consumer Advocate stated it would send additional follow-up data requests from previously provided information to Evercom this week or early next week. Depending on the answers received to these data requests, the Consumer Advocate may need to ask a few follow-up questions. Evercom stated it could provide the answers to data request numbers 12, 13, and 14 to the Consumer Advocate by November 7, 2006. Evercom stated it had not yet decided whether to

appeal the September 28th order with respect to "off-site" records, but even if it did, it would continue to search the "on-site" records to minimize delay. The Consumer Advocate stated it could provide any data requests needed as follow-up from the answers to data requests 12, 13, and 14 to Evercom by November 28, 2008. The Consumer Advocate's remaining data requests will all be follow-up to answers received from Evercom, and the Consumer Advocate will not initiate any new lines of discovery. The parties agreed they would try to resolve any discovery disputes without the involvement of the undersigned. If any discovery motions or responses are required, the parties will file them as early as possible so that any rulings regarding discovery may be issued on or before Thursday, December 21, 2006. The parties agreed to the procedural schedule set forth below.

Therefore, pursuant to the Board's order assigning this docket issued July 13, 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.

THE ISSUES

The issues in this case generally involve Evercom's billing Mr. Silver \$75 for collect calls he did not authorize, whether Evercom 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). These factors include the size of the service provider, the gravity of the violation, any history of prior violations by the service provider, remedial actions taken by the service provider, the nature of the conduct of the service provider, and any other relevant factors.

Pursuant to the Board's July 13, 2006, order, the issues also include what role Evercom had in billing for the fraudulent calls made by inmates, the details of the scheme inmates may be using to make collect calls that are billed to someone other than the person actually receiving the calls, and the extent to which Evercom may be able to prevent this kind of fraudulent billing in the future. 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 Evercom are currently the only parties to this proceeding. If Mr. Silver 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.

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-06-84, 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.

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.

IT IS THEREFORE ORDERED:

1. The parties must comply with the agreements regarding discovery made at the prehearing conference on October 3, 2006, as set forth in the body of this order.
2. If Mr. Silver wishes to become a party to this case, he must file written notice with the Board no later than January 15, 2007.
3. On or before January 15, 2007, 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. Silver becomes a party to this case and wishes to file prepared testimony and a brief, he must do so on or before January 15, 2007.
4. On or before January 29, 2007, Evercom must file prepared testimony and exhibits and a prehearing brief. Evercom 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, Evercom must address the issues discussed above, support each of the allegations made in its responses to the informal complaint and the Consumer Advocate's petition, and file any other evidence not previously filed. In its prepared testimony and exhibits, Evercom must explain its (or its divisions') customer service policies and the training it provides to its customer service representatives regarding responses to customer complaints, what it learned from the complaint by Mr. Silver, and any corrective actions it took to improve customer service after receiving the complaint by Mr. Silver. In addition, Evercom must explain what caused it to place the charges for collect calls on Mr. Silver's telephone bill. Evercom must explain the basis for its opinion that the charges were the result of fraud and how the fraud caused the calls to be billed to Mr. Silver's telephone number. Evercom must explain what actions it took to prevent fraud prior to billing Mr. Silver, what it learned from the complaint by Mr. Silver, and any corrective actions it took to improve its system to more effectively prevent such fraud after receiving Mr. Silver's complaint. Evercom must explain the basis for its statement that sometimes Evercom's blocks can be released "due to technical reasons," and what actions Evercom has taken to prevent this. If Evercom claims any part of the information should be held confidential, it must comply with the requirements of 199 IAC 1.9. Evercom should use exhibit numbers 100 and following. In its prehearing brief, Evercom 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.

5. 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 February 1, 2007.

6. 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 February 7, 2007.

7. A hearing for the presentation of evidence and the cross-examination of witnesses will be held in the Board Hearing Room, 350 Maple Street, Des Moines, Iowa, on Tuesday, February 20, 2007, commencing at 9:00 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.

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 4th day of October, 2006.