

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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ORDER DENYING REQUEST FOR INTERLOCUTORY REVIEW

(Issued November 1, 2006)

On October 9, 2006, Evercom Systems, Inc. (Evercom), filed a notice of appeal¹ with the Iowa Utilities Board (Board). Evercom purports to appeal the "Order Regarding Motion to Compel" issued by the Board's administrative law judge (ALJ) on September 28, 2006. In that order, the ALJ directed Evercom to produce discovery in response to three data requests from the Consumer Advocate Division of the Department of Justice (Consumer Advocate).

¹ Evercom said it was filing its notice of appeal pursuant to 199 IAC 7.8, apparently based on an older version of the Board's rules. In 2005, the Board adopted revised procedural rules in Docket No. RMU-05-1. The revised rules were effective as of December 14, 2005. The subject matter of 199 IAC 7.8, as revised, is delivery of notice of hearing. Appeals to the Board from a proposed decision of a hearing officer are now covered by 199 IAC 7.26. Evercom seeks relief from an interlocutory ruling of the ALJ regarding a motion to compel discovery, not from a proposed decision of the ALJ. The Board will consider Evercom's "notice of appeal" as an interlocutory appeal, which should have been brought pursuant to 199 IAC 7.25.

I. BACKGROUND

This matter originated with a consumer's complaint that Evercom, a telephone service provider for correctional facilities, placed unauthorized charges on the consumer's local telephone bill. In its response to the complaint, Evercom explained that fraudulent activity by a third party resulted in collect calls being billed to the consumer in error. On May 2, 2006, Consumer Advocate filed a petition for a proceeding to consider a civil penalty for the alleged cramming violation. In an order issued on July 13, 2006, the Board docketed the matter for formal proceeding, denied Evercom's motion to dismiss, and assigned the matter to the ALJ. On September 11, 2006, Consumer Advocate filed a motion to compel discovery.

The specific requests at issue are Consumer Advocate data request numbers 12, 13, and 14. Data request number 12 asks for information relating to other customer complaints to regulatory agencies regarding collect calls customers denied having accepted that were billed by or on behalf of Evercom. In its response to Consumer Advocate, Evercom provided information about complaints in Iowa, but objected to providing information about complaints in other jurisdictions.

Data request number 13 asks Evercom to state whether there are other instances in which it has, on or after January 1, 2005, issued a credit or refund to a consumer for a collect call billed by or on behalf of Evercom and, if so, to provide certain information about each call and credit or refund. Evercom objected to this request on the grounds of undue burden and relevance.

Data request number 14 asks Evercom to state whether there are other instances in which Evercom has determined that a call billed by or on behalf of Evercom was or may have been the result of fraudulent activity by an inmate and, if so, to provide certain information about the call and related charge. Evercom objected to this request on the basis of undue burden and relevance.

II. ALJ'S ORDER

The ALJ concluded that the information requested in data request number 12 may be relevant to the issue of whether a penalty should be assessed because it relates to whether Evercom had prior knowledge of similar complaints, whether a problem existed or continues to exist, the extent of any such problem, and whether Evercom should have taken steps to prevent recurrence of the problem. The ALJ considered Evercom's argument that it would have to devote significant staff time to manually examine individual files to produce the requested information, but concluded that Consumer Advocate's arguments that the request was not unduly burdensome or expensive were more persuasive.

In responding to Evercom's objection to data request number 13, the ALJ directed the parties to work together to clarify what information Consumer Advocate is seeking. The ALJ concluded that the information requested in data request number 14 is relevant for discovery purposes within the meaning of the Iowa rules of civil procedure. Further, because the information relating to fraudulent activity would be contained in the same files requested in data request number 12, the ALJ

concluded it should not be unduly burdensome for Evercom to provide the information requested in data request number 14.

III. EVERCOM'S APPEAL

In its notice of appeal, Evercom asserts that the ALJ erred in concluding that data request number 12 is relevant and not unduly burdensome. Evercom argues the ALJ did not credit the testimony offered by Evercom in support of its resistance to Consumer Advocate's motion to compel. Evercom argues that past regulatory complaints in other jurisdictions are not needed to show Evercom's prior knowledge of the type of fraud involved in this case and would merely duplicate evidence of when Evercom became aware of the fraud. Evercom also argues that evidence of complaints in other jurisdictions does not show Evercom engaged in cramming and that Evercom cannot be punished under Iowa's definition of cramming for occurrences outside of Iowa.

Evercom argues that the ALJ erred in concluding that data request numbers 13 and 14 are relevant and not unduly burdensome. With respect to the information about credits or refunds sought by data request number 13, Evercom argues that it grants credits and refunds for a variety of reasons, not only for disputed charges, and that such information will not enable a determination of whether Evercom profits from the cramming alleged in this case. Further, Evercom argues the ALJ's order directing the parties to work together to clarify data request number 13 was improper. With respect to the information sought by data request number 14, Evercom argues that

the request asks for different information than request number 12 and would require more time searching the files.

Evercom asks the Board to reverse the ALJ's "Order Regarding Motion to Compel" and order that data request numbers 12, 13, and 14 are irrelevant. Alternatively, Evercom asks that, to the extent the requests might lead to discovery of relevant evidence, the Board find that such relevance is outweighed by the burdensomeness of the requests.

IV. CONSUMER ADVOCATE'S RESPONSE

On October 16, 2006, Consumer Advocate filed a response to Evercom's notice of appeal. Consumer Advocate states there is no error in the ALJ's order that is adverse to Evercom or justifies interlocutory review of the order. Consumer Advocate restates its position that the information it seeks is potentially relevant and not unduly burdensome. Consumer Advocate disputes Evercom's assertion that the ALJ's ruling regarding the relevance of data request number 12 was in error. Consumer Advocate argues that the answer given by Evercom to another data request was not sufficient and the issue of whether data request number 12 sought information already provided was not presented to the ALJ. In response to Evercom's argument that its cost to produce the requested information could exceed the maximum civil penalty allowed, Consumer Advocate argues the stakes in this case extend beyond the potential dollar amount of the penalties that may be assessed.

V. ANALYSIS

The Board has discretion regarding whether to entertain interlocutory appeals from orders issued by an ALJ. 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 deny Evercom'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. One important aspect of the ALJ's administration of cases is resolution of discovery disputes. Here, the ALJ granted a motion to compel filed by Consumer Advocate based on her finding that Consumer Advocate's arguments regarding potential relevance of information it sought and the burdensomeness of its requests were more persuasive than those advanced by Evercom. Evercom has failed to provide a compelling reason why the Board should review that finding at this time. Interlocutory review would delay, not expedite, final resolution of this matter.

Moreover, the Board sees no reason to substitute its own judgment for the ALJ's at this stage of the proceeding.

VI. ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The request for interlocutory review of the administrative law judge's "Order Regarding Motion to Compel" issued September 28, 2006, filed by Evercom Systems, Inc., on October 9, 2006, is denied.

UTILITIES BOARD

/s/ John R. Norris

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Curtis W. Stamp

Dated at Des Moines, Iowa, this 1st day of November, 2006.