

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>ELIGIBILITY, CERTIFICATION, AND REPORTING REQUIREMENTS FOR ELIGIBLE TELECOMMUNICATIONS CARRIERS [199 IAC 39]</p>	<p>DOCKET NO. RMU-06-1</p>
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ORDER DENYING REQUEST FOR RECONSIDERATION

(Issued November 20, 2006)

On October 6, 2006, the Utilities Board (Board) issued an order in Docket No. RMU-06-1, In Re: Eligibility, Certification, and Reporting Requirements for Eligible Telecommunications Carriers [199 IAC 39], "Order Adopting Amendments and Scheduling Workshops." The order amended the Board's rules at 199 IAC 39 and established new eligibility, certification, and reporting requirements for carriers choosing to be designated as eligible telecommunications carriers (ETCs) for the purpose of receiving funds from the federal universal service fund (USF).¹ The order also adopted minor changes to the Board's rules at 199 IAC 1 and 199 IAC 22 to reflect changes made to 199 IAC 39.

¹ A telecommunications carrier that would like to receive federal universal service funding must be designated as an ETC. State commissions have the primary responsibility for designating ETCs. See 47 U.S.C. § 214(e)(2). The services supported by the federal universal service fund are listed in 199 IAC 39.2(1) and include voice grade access; local usage; dual tone multifrequency signaling; single-party service; access to emergency services, operator services, interexchange service, and directory assistance; and toll limitation for qualifying low-income customers.

On October 26, 2006, U.S. Cellular Corp. (U.S. Cellular), Alltel Corp., and Midwest Wireless Iowa, LLC (collectively referred to as "Alltel"), and NPCR, Inc. (Nextel Partners), filed with the Board a request to reconsider the Board's adoption of 199 IAC 39.2(3)"f"(9) regarding wireless carriers and the Board's complaint jurisdiction. U.S. Cellular, Alltel, and Nextel Partners (hereafter referred to as "the petitioners") assert that portions of new subparagraph 9 should be stricken or revised because (1) the notice on this issue was unclear and the Board's order inconsistent as to the applicability of complaint jurisdiction, and (2) the application of complaint jurisdiction conflicts with preemptive federal jurisdiction and presents significant pragmatic problems for implementation.

On November 9, 2006, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a resistance to the petitioners' request for reconsideration. In its resistance, Consumer Advocate asserts that Iowa administrative law does not contemplate applications for reconsideration or rehearing in rule making proceedings and that the petitioners should have requested that the Board adopt, amend, or repeal the rule by following the procedures set forth in Iowa Code § 17A.7(1) (2005). In addition, Consumer Advocate asserts that there is nothing in the adopted rule that inappropriately extends the Board's complaint jurisdiction for wireless ETCs.

The Board agrees with Consumer Advocate that Iowa administrative law does not provide for reconsideration of a rule making and the Board may not revise

the adopted rules without initiating a new rule making proceeding with notice and opportunity for public participation. The proper remedy for the petitioners would have been to request the Board adopt, amend, or repeal the rule pursuant to Iowa Code § 17A.7(1) or to seek a declaratory ruling regarding the application of the rule pursuant to Iowa Code § 17A.9. The petitioners did not seek either of the allowed forms of relief and, as such, the Board cannot reconsider the adopted rules as requested. Nevertheless, the Board will provide some clarification of the rule by addressing the issues raised by the petitioners.

The petitioners assert that the notice of proposed rule 199 IAC 39.2(3)"f"(9) was unclear and the Board's final order was inconsistent as to the application of that rule with respect to the Board's complaint jurisdiction over wireless carriers. Specifically, the Petitioners claim that the rule as noticed made reference to an "unauthorized change in service," commonly referred to as "slamming," but the adopted rule references only the addition of an authorized product or service charge, otherwise referred to as "cramming" and that the adopted rule does not provide a substantive basis for hearing cramming complaints.

An unauthorized change in service can take the form of either a "slam," the unauthorized change of a service provider, or a "cram," an unauthorized charge on a consumer's telephone bill. See 199 IAC 22.23(1), defining "change in service." The notice of the proposed rule sought comments regarding such unauthorized changes in service and, as such, the adopted rule was properly noticed.

The adopted rule provides that "when the board receives a complaint alleging the addition or deletion of a product or service for which a separate charge is made to a customer account without the verified consent of the customer, the complaint shall be processed by the board pursuant to 199 Chapter 6." The petitioners suggest that the Board does not have the authority to handle complaints of unauthorized charges because the statutory definition of "telecommunications service" specifically excludes commercial mobile radio service² (i.e., wireless service) and that 199 IAC 22.23(2), which creates the Board's jurisdiction over slamming and cramming complaints, only refers to "telecommunications service."³

The petitioners raised similar issues during the course of this rule making proceeding. As the Board has previously indicated, the application for ETC status is a voluntary exercise by the carrier. By choosing to apply for and receive ETC status, a provider, including a wireless provider, submits to certain specific regulatory obligations. If a wireless carrier weighs the pros and cons and decides that the benefit of the federal USF subsidy outweighs the regulatory obligations, it will make the decision to apply for ETC status. The voluntary nature of ETC certification and weighing of the benefits and obligations that accompany the public subsidy and

² "Telecommunications service" means a local exchange or long distance telephone service other than commercial mobile radio service. Iowa Code § 476.103.

³ 199 IAC 22.23(2) Prohibition of unauthorized changes in telecommunications service. Unauthorized changes in telecommunications service, including but not limited to cramming and slamming, are prohibited.

designation gives the Board the appropriate jurisdiction over complaints against ETC-certified carriers concerning unauthorized changes in service.

The petitioners also assert that complaints brought against wireless carriers pursuant to 199 IAC 39.2(3)"f"(9), as adopted, are likely to be preempted by federal law. While federal law prevents the states from regulating "the entry of or the rates charged by" wireless carriers as the petitioners contend, the states have been expressly granted the authority to regulate "the other terms and conditions" of wireless service.⁴ Several federal district courts have determined that state efforts to combat consumer fraud and other practices injurious to consumers are not considered "rate regulation" and therefore are not preempted by federal law, provided they do not enmesh the states in a determination of the reasonableness of the rates charged.⁵

The petitioners rely on the Eighth Circuit decision of *Cellco Partnership v. Hatch*, 431 F.3d 1077 (8th Cir. 2005), to support their preemption argument. The petitioners state that in *Cellco*, the Eighth Circuit looked in part to whether the rules being considered were business laws of general applicability or whether they were state rules applicable expressly to wireless carriers, which impacted wireless rates when determining what fell within the federal preemption of "other terms and conditions." *Id.*, at 1083. The petitioners suggest that the language of

⁴ See, 42 U.S.C. § 332(c)(3)(A).

⁵ See, *National Association of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238, 1258 (11th Cir., 2006); *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1073-74 (7th Cir. 2004); *State ex rel. Nixon v. Nextel West Corp.*, 248 F.Supp.2d 885, 892 (E.D. Mo. 2003).

199 IAC 39.2(3)"f"(9), as adopted, impacts the rates of wireless carriers and therefore is subject to federal preemption. The Board disagrees with this assertion and agrees with Consumer Advocate's distinction between *Cellco* and this rule making. The *Cellco* decision rested on the Court's conclusion that the state regulation at issue there, which required wireless providers to notify consumers of a proposed material change in their contracts 60 days before the change was proposed to take effect, "prevent[ed] the wireless providers from raising rates for a period of time, and thus fix[ed] the rates." *Id.*, at 1082. The rule at issue here does not share a similar impact on the rates of wireless carriers and is not preempted by federal law.

Finally, the petitioners assert that the complaint jurisdiction contemplated in 199 IAC 39.2(3)"f"(9), as amended, is difficult to implement and will likely be confusing to consumers. The petitioners suggest that there will be three separate entities with jurisdiction over at least some wireless complaints arising in Iowa: the Board, the Attorney General's Office of the Department of Justice, and the Federal Communications Commission (FCC). Petitioners suggest this overlap may cause customer confusion.

The Board has indicated that the implementation of this rule making has raised many questions from telecommunications providers about their initial and ongoing obligations. As with any change in rules, it is possible there will be issues that need to be addressed when the new procedures are implemented. In order to minimize those issues, the Board held workshops to clarify some of these implementation

issues with the industry. If other, unforeseen problems develop, the Board may initiate a follow-up rule making or the participants (or any other interested person) may seek to amend this rule pursuant to Iowa Code § 17A.7. Thus, if customers are confused by having three places to submit their complaints, the problem can best be addressed after everyone involved has had a chance to see it.

IT IS THEREFORE ORDERED:

The "Request for Reconsideration" filed by U.S. Cellular, Alltel Corp., Midwest Wireless Iowa, LLC, and NPCR, Inc., on October 26, 2006, is denied as discussed in this order.

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 20th day of November, 2006.