

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<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>DOCKET NO. FCU-05-65</p>
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PROPOSED DECISION

(Issued February 20, 2007)

APPEARANCES:

MR. CRAIG F. GRAZIANO, attorney at law, 310 Maple Street, Des Moines, Iowa 50319, appearing on behalf of the Consumer Advocate Division of the Department of Justice.

MS. KRISTA K. TANNER, attorney at law, Dickinson, Mackaman, Tyler & Hagen, P.C., Suite 1600, 699 Walnut Street, Des Moines, Iowa 50309, appearing on behalf of MCI, INC.

MR. TIMOTHY GOODWIN, attorney at law, Qwest Services Corporation, 10th Floor, 1801 California Street, Denver, Colorado 80202, appearing on behalf of Consumer Advocate witness Mr. Stephen Keesler.

STATEMENT OF THE CASE

On September 19, 2005, Mrs. Alice Steele filed a complaint with the Utilities Board (Board) against MCI, Inc. (MCI), alleging that her son, Mr. Del Steele, had

switched her telephone service from MCI to Qwest Corporation (Qwest) effective July 15, 2005. She further alleged that without approval, MCI switched her service back on August 7, 2005. She stated that her son tried to contact MCI four times and was put on hold for 25 minutes on two occasions and 45 minutes on the other two. Mrs. Steele stated that MCI billed her for service when Qwest was her provider. She stated that MCI should return all fees collected after July 15, 2005, as they were never authorized to change the service and their prices were excessive. Mrs. Steele requested that further contact be with her son since he handles her business affairs. (Informal complaint file.)

Board staff investigated the complaint and forwarded it to MCI for response in a letter dated September 20, 2005. The letter notified MCI that Board rule 6.8(2) required it to respond to the letter within ten days of the date of the letter. MCI did not provide a response other than an email dated October 18, 2005, that said MCI would respond by the close of business on October 19, 2005. MCI did not provide the response. On October 21, 2005, Board staff issued a proposed resolution finding by default that MCI was in violation of the Board's slamming rules and directing MCI to fully credit all charges and close the account.

After the proposed resolution was issued, on October 26, 2005, MCI sent a letter to Mrs. Steele's son responding to the complaint. MCI stated it received notification and processed an order to discontinue Mrs. Steele's local service with MCI on August 19, 2005. MCI stated its records did not show any notification prior to that date. MCI stated it sent a bill dated August 22, 2005, to Mrs. Steele in the

amount of \$36.83 for service in July 2005. MCI stated that it cancelled the account as of August 29, 2005. It further stated MCI received Mrs. Steele's payment of \$36.83 on September 14, 2005. MCI stated the last invoice sent to Mrs. Steele was dated September 22, 2005, and showed a zero balance. In the letter, MCI stated it would send a \$36.83 refund check to Mrs. Steele and the account was cancelled and had a zero balance.

On November 4, 2005, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a petition for a proceeding to consider a civil penalty for a slamming or cramming violation pursuant to Iowa Code §§ 476.3 and 476.103 (2005). The Consumer Advocate argued the proposed decision was correct as far as it went but should be expanded to clarify that companies cannot escape civil penalties by ignoring allegations of violation and should be augmented with a civil penalty.

MCI filed a response and motion to dismiss the Consumer Advocate's petition on November 28, 2005. In the response, MCI argued it strives to meet all required due dates for Board informal complaint cases and takes its responsibility to file timely responses seriously. As a result of this complaint, MCI stated it had taken appropriate action with the representative who filed the late response and had initiated a supervisor-led bi-weekly review process to ensure all complaints were responded to by their due date. MCI argued there was no need for a civil penalty. MCI argued that at most there was a miscommunication between Qwest and MCI and civil penalties would not deter a miscommunication.

The Consumer Advocate filed a reply memorandum on December 6, 2005. The Consumer Advocate argued that, without condoning failures to respond during informal proceedings, it has consistently withdrawn petitions for penalty proceedings based on such failures if the company provides a satisfactory response even if it is untimely. The Consumer Advocate stated it would withdraw the petition if appropriate, but it argued MCI's response did not resolve the controversy. The Consumer Advocate argued there was no evidence of miscommunication and a civil penalty would deter future violations.

On December 20, 2005, the Board issued an order finding that reasonable grounds existed for further investigation of the case, granting the Consumer Advocate's petition, denying MCI's motion to dismiss, docketing the case for formal proceeding, and assigning it to the undersigned administrative law judge. On January 19, 2006, the undersigned issued a procedural order and notice of hearing setting the hearing in the case for March 30, 2006.

Throughout this proceeding, the parties filed various motions and responses regarding discovery, confidentiality, and procedural issues, and these were ruled on in various orders. At the request of the parties, the procedural schedule was amended and the hearing date was postponed several times. With limited exceptions, these filings and orders are not discussed in this decision.

On February 8, 2006, the Consumer Advocate filed the prepared direct testimony and an exhibit of Mr. Del Steele and a prehearing brief.

On March 2, 2006, MCI filed the prepared testimony and exhibits of Mr. Jim Ray and a prehearing brief. For the first time, MCI presented evidence that the events in the case were related to a platform conversion by MCI.

At the request of the Consumer Advocate, the procedural schedule was delayed to allow the Consumer Advocate time to review the materials filed by MCI. The Consumer Advocate filed the rebuttal testimony of Mr. Stephen Keesler, exhibits, and a prehearing reply brief on April 20, 2006.

On April 24, 2006, the parties and the undersigned held a prehearing conference. MCI argued the facts of the case had changed, the charge against it had changed from a slamming to a cramming complaint, and MCI requested an opportunity to file additional evidence. The Consumer Advocate resisted the request and argued that, although the factual basis had been enlarged, its complaint had pled both slamming and cramming. On April 26, 2006, an amended procedural order was issued setting dates for the filing of additional testimony and changing the hearing date.

On May 22, 2006, MCI filed the supplemental testimony and exhibits of Mr. Ray and a supplemental hearing brief.

On July 6, 2006, MCI filed a motion to dismiss, or alternatively, to suspend the procedural schedule. The Consumer Advocate filed a resistance on July 20, 2006. The undersigned issued an order on July 27, 2006, deferring ruling on the motion to dismiss until the proposed decision and denying the motion to suspend.

On July 19, 2006, the Consumer Advocate filed the additional direct rebuttal testimony and exhibit of Mr. Keesler and the direct rebuttal testimony of Mr. David Bench.

On July 28, 2006, MCI filed a motion to substitute a witness. MCI stated since the issues in the case had become increasingly technical, it would be appropriate to substitute witness Ms. Sherry Lichtenberg for its witness Mr. Ray.

The hearing in the case was held on August 1, 2006. The Consumer Advocate was represented by its attorney, Mr. Craig Graziano. Mr. Del Steele, Mr. Stephen Keesler, and Mr. David Bench testified on behalf of the Consumer Advocate. Consumer Advocate Exhibits 1 – 29, 5A, 5B, 7A, 10A, 2App – 6App, 19App, 23App, DS-1 (as revised), SFK-1 through SFK-3, and DHB-1 through DHB-5 were admitted. MCI was represented by its attorney, Ms. Krista Tanner. The Consumer Advocate did not object to MCI's motion to substitute its witness, and Ms. Lichtenberg adopted the testimony of Mr. Ray and testified on behalf of MCI. (Tr. 18, 148.) MCI Exhibits JMR-100 through JMR-109 were admitted. Consumer Advocate witness Mr. Keesler, a Qwest employee, was represented by attorney Mr. Tim Goodwin. (Tr. 21.) Mr. Goodwin clarified that he did not represent Qwest. (Tr. 21.) Qwest did not intervene and is not a party to this case. (Tr. 21-22.) Certain portions of the hearing were held in closed session. At the hearing, the parties agreed to file certain post-hearing exhibits and briefs.

On August 8, 2006, the Consumer Advocate filed marked copies of the following previously-filed exhibits: 1-5, 5A, 5B, 6, 7, 7A, 8-10, 10A, 11-28, 2App,

3App, 4App, 5App, 6App, 19App, 23App, DS-1 as revised at hearing, and DHB-1 through DHB-5 and 29 as offered at hearing. MCI filed post-hearing Exhibits SL-107 through SL-109 on August 23, 2006. The Consumer Advocate and MCI each filed a post-hearing brief on September 22, 2006, and MCI filed post-hearing exhibits on the same date. On October 12, 2006, the Consumer Advocate and MCI each filed a post-hearing reply brief. The Consumer Advocate filed a post-hearing surreply brief on October 13, 2006.

SUMMARY OF THE EVIDENCE PRESENTED

Overview

This case originally appeared to be a simple slamming case. Later, it was learned that the case also involved issues related to MCI's initiation of a platform conversion for its customers, including Mrs. Steele, at the same time that Mrs. Steele attempted to change her carrier from MCI to Qwest, and the electronic intercarrier communication between MCI, McLeod, and Qwest. When reviewing the record, it is important to know that some of the prepared testimony and exhibits filed in the case contain mistaken information. The parties' positions evolved over time as additional evidence was revealed. After months of discovery, filings, and the hearing, it appears that the parties now agree on many of the facts regarding what happened. The parties disagree on the legal effect of those facts and on the appropriate resulting resolution of the case. Whether there was more MCI could have or should have done to protect consumers, including Mrs. Steele, during the platform conversion and whether MCI was reasonable to rely on communications it expected

to receive from Qwest are hotly contested issues. Whether the Iowa statute and Board rule in effect at the time prohibited slamming and cramming and whether the events in this case were slamming and cramming within the meaning of the statute and rule are also contested issues.

Comparison of the Witnesses' Experience

Consumer Advocate witness Mr. Stephen Keesler is an executive/regulatory escalations analyst for Qwest. (Tr. 50.) He answers public utility commission, attorney general, and executive office complaints for Qwest. (Tr. 50.) Mr. Keesler investigated Mrs. Steele's complaint for Qwest. (Tr. 51.)

Mr. Keesler testified that as an executive regulatory escalations analyst, he has not had any experience with a platform conversion like the one at issue in this case. (Tr. 82.) He testified he does not have any experience with Qwest's wholesale relationships with other carriers without any retail customer involved. (Tr. 83.) He testified he could not explain the difference between a reject and a jeopardy notice. (Tr. 84, 281.)

Mr. Keesler testified that he was not aware of any collaborative sessions between MCI and Qwest in which the two companies may have discussed the conversion process to be used when MCI converted the service arrangement for its customers from Qwest's unbundled network element platform (UNE-P) to McLeod's unbundled network element loop (UNE-L). (Tr. 82.) He further testified that if such sessions took place, he would not have been aware of them. (Tr. 82.) Mr. Keesler testified he was not a party to any discussions between MCI and Qwest regarding the

platform conversion. (Tr. 89.) He was not involved in the policy that was set up between MCI and Qwest regarding the UNE-P to UNE-L conversion. (Tr. 87.) Mr. Keesler also testified that, although he was not aware that MCI was initiating line loss suppression procedures with the conversion order, it was possible someone at Qwest was aware of it. (Tr. 89.) He testified he does not know whether it is standard industry practice to suppress line loss notifications to avoid inappropriate disconnect of customers being converted. (Tr. 72, 90-1.)

After having heard Mr. Bench's testimony at the hearing, Mr. Keesler testified he did not have any disagreement with it. (Tr. 142-3.) After having heard Ms. Lichtenberg's testimony, Mr. Keesler testified he had no reason to disagree with her testimony other than stating he was not aware of any Qwest policy that called for a jeopardy report to be sent when there is a pending service order and there are subsequent local service requests received with different due dates. (Tr. 280, 285.) Mr. Keesler testified he was not offering any opinion or testimony regarding the collaborative process or the business rules testimony of Ms. Lichtenberg. (Tr. 285.)

Consumer Advocate witness Mr. David H. Bench has over 40 years of experience with an equipment supplier, a long distance carrier, and three local exchange carriers. (Tr. 109.) He is a master telecommunications engineer with an endorsement in traffic engineering. (Tr. 109-10.) Mr. Bench worked for Nortel Networks from 1987 through 2005 and has been a consultant since his retirement from Nortel in 2005. (Tr. 109-10.) At Nortel, Mr. Bench represented Nortel in leadership positions on telecommunications industry standards bodies tasked with

the development of standards, including ordering and billing standards. (Tr. 109-11.) Mr. Bench's curriculum vitae states his experiences "are primarily in areas associated with network elements, referred to as platforms in this case." (Tr. 109.)

Mr. Bench testified he managed multiple platform conversions at the companies where he worked prior to Nortel Networks that involved a few hundred customers to 30,000 customers. (Tr. 104.) He testified this meant he determined the work to be done, determined who was to do the work and directed them, determined when the work was to be done and made the work schedules, chaired all project meetings and published meeting minutes, and conducted de-briefings after the conversions. (Tr. 104.) He testified this included all contact and negotiations with affected connecting companies and switch vendors, including escalation contacts. (Tr. 105.) The platform conversions he had experience with involved a single carrier upgrading its own switching facilities and sales of telecommunications switches to other companies. (Tr. 124-8.)

Mr. Bench testified that the platform conversions from UNE-P to UNE-L are relatively new and he does not know whether other companies involved in such commercial conversions have implemented systemic solutions such as those he recommended. (Tr. 120.) He testified he has had only indirect experience with a conversion from UNE-P to UNE-L. (Tr. 124-5.) He testified he has never done a UNE-P conversion. (Tr. 135.) He testified he knew physically what had to be done but was not aware of the computer-to-computer communication and the Qwest and MCI systems. (Tr. 125-6.) Mr. Bench testified he indirectly participated in industry-

wide collaboratives regarding UNE-P to UNE-L through a proposal his company made to MCI to sell the switch. (Tr. 126-7, 133-5.) He testified his company did not sell any UNE-P service; it sold hardware. (Tr. 127.) Mr. Bench testified he had no experience testing any UNE-P provisioning with Qwest and does not know if it was done by MCI. (Tr. 128.) He testified his only wholesale carrier experience was in an indirect manner of meeting with them and making proposals to them. (Tr. 129, 133.) He testified he had no experience regarding how wholesale orders are communicated back and forth and when and how either reject or jeopardy codes are used. (Tr. 129.)

MCI witness Mr. Jim Ray is an employee of MCI whose job is to research and respond to complaints filed with, or initiated by, regulatory bodies with regard to MCI. (Tr. 153.) At the hearing, the Consumer Advocate did not object to MCI's motion to substitute its witness, the motion was granted, and Ms. Lichtenberg adopted Mr. Ray's testimony and testified on behalf of MCI in place of Mr. Ray. (Tr. 18, 148.)

Ms. Lichtenberg is the senior manager for operational support systems interfaces and facilities development for MCI. (Tr. 147-8.) She has 25 years of experience in the telecommunications field and is an industry recognized expert in the way that customers migrate from one carrier to another carrier. (Tr. 148-9.) Ms. Lichtenberg has testified before the Federal Communications Commission (FCC) and nearly every state commission, excluding Iowa, on the ability of the incumbent carriers to meet the requirements of the 1996 Telecommunications Act regarding switching customers from one carrier to another. (Tr. 149.) She worked on the

development of the systems necessary to implement the FCC's order requiring that CLECs be able to migrate customers in a seamless fashion using automated systems, rather than manual processes, that are equivalent to the automated systems used by the local operating companies. (Tr. 150.) Ms. Lichtenberg participated in the third-party testing for each of the incumbent telecommunications companies, which included developing the process for testing, understanding both the incumbent's operational support systems and the physical work necessary to move customers from one vendor to another, developing standards for that process, and developing MCI's internal computer systems in the way that they interface with the local exchange carriers' systems. (Tr. 150, 185, 191-5.)

Ms. Lichtenberg participated in the collaborative discussions with Qwest and the other telecommunications companies regarding how companies would migrate a customer from the UNE platform to the UNE loop where the incumbent company continued to provide the loop and either a third-party switching vendor or a company like MCI would provide the local switching to give the customer service. (Tr. 150, 185-9.)

Ms. Lichtenberg negotiated MCI's contract with McLeod for the UNE-P to UNE-L migration. (Tr. 150, 264.) Ms. Lichtenberg worked with the project team in charge of the platform conversion at MCI that developed the processes to migrate customers from UNE-P to UNE-L. (Tr. 182-8.) She testified she meets with McLeod on a regular basis to review the metrics of that process. (Tr. 150-1.)

Ms. Lichtenberg testified that Consumer Advocate witness Mr. Keesler was not part of the wholesale operational support systems collaboratives, does not work for the wholesale organization, and was not part of the third-party testing of those systems, so he explained the business rules as best he could, but he may not understand how they worked. (Tr. 217.) She further testified that, if the Qwest information technology staff who manage this process and have knowledge of the operational support systems and how the processes work were asked for their interpretation of the business rules, MCI's and Qwest's interpretation would be in agreement. (Tr. 219-21, 226.) She testified that MCI and Qwest work together and are in agreement. (Tr. 221.) She testified that Mr. Keesler has been put in the unfortunate position of responding to something that is outside of his job. (Tr. 221.)

**DID MCI ACT REASONABLY TO PROTECT CONSUMERS, INCLUDING
MRS. STEELE, DURING THE PLATFORM CONVERSION?**

MCI's Position

MCI argued there is no question it did not set out to slam or cram Mrs. Steele. Instead, it argued, MCI did not act on Qwest's line loss notification due to the procedures in place to implement the conversion from Qwest UNE-P to McLeod UNE-L. MCI argued there was no intent on its part to intentionally retain a customer who did not wish to remain an MCI customer.

MCI argued it is important to realize that its platform conversion was not discretionary and was the direct result of the FCC Triennial Review Remand Order

(TRRO),¹ which provided that incumbents such as Qwest were no longer required to provide UNE-P to companies such as MCI. Therefore, MCI argued, MCI and other companies were required to migrate their customers to a full facilities-based solution either by providing their own switching or purchasing it from a third party such as McLeod. In order to comply with the FCC's requirement, MCI stated it chose to purchase local loops from McLeod and created a project team to implement the conversion from Qwest's UNE-P to McLeod's UNE-L. It argued the team consisted of experts in the development of operational support systems and the development of processes necessary to convert customers from one carrier to another. MCI argued the team created a fully electronic process using established industry practices to move customers seamlessly from Qwest UNE-P to McLeod UNE-L. MCI argued it followed established industry guidelines and completed a successful conversion of between 100,000 and 200,000 customers.

MCI argued its project team considered all issues that could arise during the platform conversion, and one such issue involved line loss notifications. It argued the MCI platform conversion project team recognized that when a customer was migrated from Qwest UNE-P to McLeod UNE-L, Qwest would generate a line loss notification. The team also recognized that the creation of these line loss notifications would be a problem because it would cause cancellation of between 100,000 and 200,000 MCI customer accounts, resulting in cancellation of their long

¹ In the Matter of Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, "Order on Remand," WC Docket No. 04-313 (FCC, February 4, 2005) (TRRO)

distance accounts and voicemail. In order to avoid this, MCI argued the project team had to develop a process to minimize the impact on existing customers. Therefore, it argued, the team opted to suppress the line loss notifications that would be generated by Qwest to prevent hundreds of thousands of MCI customers from losing services.

MCI argued that, although it intentionally suppressed incoming line loss notifications, it did not do so to intentionally suppress line loss notifications for customers who actually intended to change service providers. MCI argued it had no particular intent as to the Steele account. Instead, it argued, it suppressed line loss notifications to avoid a situation that would unquestionably have resulted in widespread customer dissatisfaction from losing long distance service and voicemail. MCI argued it was reasonable to take steps to avoid such an outcome and the manner in which it sought to avoid the cancellation of customer accounts, through suppression of line loss notifications, was reasonable. MCI argued the fact that only one customer was affected by the line loss suppression is further evidence that MCI took precautions to ensure minimal impact on customers, and that its precautions were reasonable and exceedingly successful.

MCI argued it believed there were precautions in place to avoid the situation like the Steele's. It argued the telephone industry has developed a number of standard practices to allow companies to interact efficiently to provide high quality service to customers. It argued carriers have developed sophisticated means of communicating with one another and conducting transactions electronically, which

permits the rapid and timely exchange of information. MCI argued these practices are the product of cooperative efforts by various inter-industry organizations, and are documented by standards bodies and individual carriers. MCI argued that Qwest adheres to these practices and has published on its website a series of detailed local business procedures that apply to its wholesale transactions.

MCI argued that, according to Qwest's ordering guidelines, and consistent with Qwest's past practices, Qwest should have rejected the McLeod conversion order on June 28, 2005, using reject codes 820 and 821, because the guidelines provided that an order would be rejected if a conflicting order were already pending in the system. Since there was already a pending order in Qwest's system on June 28, 2005, MCI argued, Qwest should have rejected the subsequent McLeod conversion order for Mrs. Steele. If Qwest had done so, argued MCI, MCI would have had to manually research the rejection and would have discovered that Mrs. Steele intended to switch her service to Qwest. MCI argued that it would have then discontinued her service, issued a final bill, and ceased billing her without moving her account to the new platform.

MCI argued that Qwest's past practice, if it did not initially reject an order due to a conflict, was to later issue a jeopardy notice telling MCI that an MCI order was in jeopardy due to an existing conflicting order. Therefore, MCI argued, based on Qwest's published procedures and MCI's past dealings with Qwest, MCI expected that if Qwest had a conflicting order in its system, MCI's platform conversion order

would not have been processed and no suppression would have been in place to suppress Qwest's line loss notification on July 7, 2005.

MCI argued that since no similar complaints have been raised, the safeguards presumably prevented any other valid line loss notifications from being rejected. MCI further argued that Qwest's electronic system had all the relevant information in it, including the relevant dates and the customers who were moving from and onto Qwest's network. MCI argued that Qwest was in the best position to notice the potential problem and it had that responsibility according to its procedures.

However, MCI argued, Qwest did not follow this expectation and did not reject the McLeod conversion order for Mrs. Steele's account. Rather, Qwest issued a firm order confirmation (FOC) notifying MCI there were no issues with the McLeod conversion order. Therefore, MCI argued, it suppressed any incoming line loss notifications for Mrs. Steele's account for the duration of the platform conversion process.

MCI disagreed with the Consumer Advocate's argument that it was not reasonable for MCI to follow industry practices in its conversion process. MCI argued that, according to the Consumer Advocate, MCI should have foreseen that Qwest would not follow its own ordering guidelines and that MCI should have developed an alternate procedure for dealing with line loss notifications. However, MCI argued, it followed industry practices that are routinely used and that were approved by the FCC in Qwest's 271 long distance certification proceedings. MCI argued when the FCC granted Qwest's 271 application, it relied on third-party testing that showed,

among other things, that Qwest's wholesale ordering processes were dependable so that other carriers could rely on such processes to create ordering interfaces.

Therefore, MCI argued, Qwest's ordering guidelines relied on by MCI were not mere suggestions for dealing with Qwest. MCI argued that Qwest's documentation and implementation of its ordering guidelines were extensively tested by third parties and the FCC reviewed the testing and found Qwest's processes to be adequate so competitors could rely on them. Furthermore, MCI argued, the FCC found in the TRRO that the industry procedures already in place were sufficient to meet the demands of the UNE migration and no new procedures needed to be developed.

MCI argued that, as the FCC's TRRO and 271 Order demonstrate, the sufficiency of Qwest's electronic data interchange processes were carefully scrutinized and approved. It argued these business rules were created so that competing carriers such as MCI would know the rules and the competitive playing field would be leveled. MCI argued that for the Consumer Advocate to suggest it was unreasonable for MCI to rely on these business rules goes against the very reason for the rules' existence. MCI argued the FCC reviewed Qwest's documentation and processes to ensure that Qwest, in practice, followed the business rules it developed, and in approving Qwest's processes, the FCC signaled to competitors that it was safe to rely on Qwest's documentation and procedures. Therefore, MCI argued, its reliance on Qwest's procedures was reasonable and it should not be subject to penalties.

MCI argued it is not appropriate for the Consumer Advocate to second-guess the procedures approved by the FCC in a wholly unrelated proceeding. MCI argued that, by seeking to penalize MCI under the guise of a slamming or cramming complaint because one customer of over 100,000 was impacted during the FCC-mandated conversion process, the Consumer Advocate is impermissibly attempting to regulate an inherently federal process and to use impossible standards to place MCI in an improper Catch-22.

MCI argued the fact that companies such as Qwest and MCI have adopted these standard industry procedures demonstrates that carriers recognize the importance of accurately transmitting customer orders and account information. It argued that although this case demonstrates these procedures are not perfect, carriers are committed to accurately and timely transmitting customer information according to the procedures.

In addition, MCI argued, the Consumer Advocate is incorrect in its argument that MCI could have or should have done more to prevent Mrs. Steele's situation. According to MCI, the Consumer Advocate's argument is absurd as a matter of policy. MCI argued that its preventative planning was extraordinarily effective in that not one customer lost service during the conversion, and its planning resulted in only one error in over 100,000 converted lines. MCI argued that no industry is expected to function at absolute perfection and it is unfathomable that MCI is accused of having a failed process when the success rate was nearly perfect.

MCI argued that any other approach would have resulted in a higher number of customer impacts and regulatory policy should favor minimizing such impacts. MCI argued the Consumer Advocate has not provided any compelling reason why the Board should ignore well-established industry processes in favor of the Consumer Advocate's suggested procedures. MCI argued that the processes proposed by the Consumer Advocate, that MCI either manually review line loss reports or develop an electronic system to distinguish between conversion-related line losses and true line losses, were not feasible, would not have been effective, and would not have worked better than the approach taken by MCI.

MCI argued it could not have manually reviewed all line loss reports during the time of the conversion to determine if they were related to the conversion or the result of a customer seeking to change carriers. MCI argued it converted between 100,000 and 200,000 customers and it was required by the FCC to migrate those customers by March 15, 2006. In order to comply with the FCC's deadline, MCI argued, it worked to create a conversion process that was time-efficient. MCI argued that within the same time period, it had to select and obtain its alternative facilities and implement numerous other technical steps beyond customer migration. MCI argued that a manual process would have been so labor-and-time intensive as to be impractical and would have been economically infeasible. In addition, it argued, there is no evidence in the record to suggest the Consumer Advocate's suggested process would have had a higher success rate.

MCI argued the Consumer Advocate's other suggestion, to develop a new automated system to electronically flag non-conversion-related line losses, showed that the Consumer Advocate does not understand the logistics of inter-carrier communications and ordering processes. MCI argued it could not have unilaterally created a new system for communications with Qwest. Instead, MCI argued, it would have had to initiate a process with the change management committee at Qwest. MCI argued that such a process would have required the agreement and involvement of all CLECs who order from Qwest. MCI argued that the process involving so many carriers could not have been completed until after the MCI platform conversion was finished.

MCI argued that in support of its position, the Consumer Advocate offered the testimony of a Qwest regulatory analyst, whose background consisted of answering public utility, attorney general, and executive office complaints for Qwest, and a retired Nortel switch salesman. MCI argued that Mr. Keesler was wrong when he testified the conversion order did not conflict with Mrs. Steele's request to change to Qwest because the orders had different due dates. MCI argued that Mr. Keesler is a regulatory complaint specialist, is not familiar with reject or jeopardy codes, has no experience with Qwest's wholesale relationships with other carriers, and has no experience with industry standards for communicating orders between companies. MCI further argued that Mr. Keesler did not take part in any of the industry collaboratives in which migrations from UNE-P to UNE-L were discussed.

MCI argued that Mr. Bench was also not qualified to testify regarding Qwest's procedures. MCI argued that his expertise on the reject codes came from reading through the Qwest manual. MCI argued Mr. Bench did not have specific experience with platform conversion from UNE-P to UNE-L, did not have any experience with inter-carrier communications generally, had no knowledge of how wholesale orders are communicated, and had no experience with reject or jeopardy codes.

In contrast, MCI argued, its witness Ms. Lichtenberg had extensive experience with Qwest's wholesale communications. MCI argued Ms. Lichtenberg is the senior manager for MCI's operational support systems interfaces and facilities development, and in that position, has become an industry-recognized expert in the way customers are migrated from one carrier to another. MCI argued Ms. Lichtenberg has personally participated in industry collaboratives on behalf of MCI with Qwest and other competing carriers, and together, they created an electronic data interchange that allows the processing of orders. MCI argued Ms. Lichtenberg also participated in the third-party testing of Qwest's ordering processing system as part of Qwest's 271 hearings, which, among other things, verified Qwest's wholesale ordering processes were dependable and that other carriers could rely on such processes to create ordering interfaces. MCI argued that Ms. Lichtenberg, as a person who participated in the development of Qwest's order processing procedures, including the development of reject and jeopardy notices and their subsequent testing, had first-hand knowledge of Qwest's ordering processes. Therefore, MCI argued, Ms. Lichtenberg's testimony should be credited and Mr. Keesler's and Mr. Bench's should

not. MCI argued that Mr. Keesler recognized Ms. Lichtenberg's expertise, testified he had no reason to look into these matters, and testified he had no reason to disagree with Ms. Lichtenberg's testimony.

MCI noted that, although Mr. Keesler and the Consumer Advocate were given the opportunity at the end of the hearing to submit additional testimony from Qwest to address Ms. Lichtenberg's testimony, both declined. MCI argued that if there were someone at Qwest who could testify that Ms. Lichtenberg's description of Qwest's ordering processes was incorrect, the Consumer Advocate would have called that witness, but clearly, no witness existed.

Consumer Advocate's Position

The Consumer Advocate argued that MCI's justification for suppression of the Qwest line loss notification is without merit. It further argued that MCI's universal suppression during the pendency of McLeod's order went well beyond the alleged justification of preventing MCI from improperly discontinuing MCI local service upon completion of the McLeod conversion order.

The Consumer Advocate argued that MCI sought to escape responsibility by blaming Qwest. However, the Consumer Advocate argued, as Qwest observed, there were two distinct orders with two different due dates, no conflict, and Qwest had no reason to question either order.

The Consumer Advocate argued if someone had looked at Mrs. Steele's order, it would have been apparent the July 6 date on the line loss report did not match the July 14 completion date on the conversion to McLeod, and the

discrepancy should have raised a red flag. It further argued the notation "win-back" on the line loss report should also have signaled that the customer had switched back to Qwest. The Consumer Advocate argued that when MCI received the line loss report from Qwest for Mrs. Steele's number on July 6, it should have cancelled the conversion order for her number, discontinued the account, and ceased future billing, and it was reasonable for a customer to expect that MCI would do so. Instead, argued the Consumer Advocate, MCI did none of these things and gave ascendancy to its own conversion order over Mrs. Steele's order and continued to bill Mrs. Steele without justification.

The Consumer Advocate disagreed with MCI's argument that it had to act as it did because there was no other way to do the conversion except by suppressing consumer orders. The Consumer Advocate argued that the ability of a consumer to switch from one company to another is of central importance in a competitive marketplace. Therefore, although Mrs. Steele was a customer of MCI on June 28 when McLeod placed the conversion order for MCI, and although there was no change of service on that date, it was foreseeable that she would leave MCI for another company prior to the July 14 due date on McLeod's order, which is what occurred. The Consumer Advocate argued the suppression of customer orders failed to address the needs of consumers and the 16-day suppression in this case was totally unreasonable. The Consumer Advocate argued there is no industry standard or FCC or Board ruling that says, in effect, it is a reasonable or acceptable practice

for a company managing a platform conversion to suppress customer orders during the pendency of the conversion and then do nothing with the customer orders.

The Consumer Advocate argued MCI should have put a system or mechanism in place to flag legitimate customer orders and give them effect. The system should have distinguished between line loss reports that were part of the conversion and those that originated from other sources, including customer orders. The Consumer Advocate argued making such distinctions is possible and as its expert testified, it is simply a matter of devoting the resources. The Consumer Advocate argued that systems could have been developed so the coding in the orders made the distinction automatically or the flagging could have been done manually. The Consumer Advocate pointed out the platform conversions were staggered over time. The Consumer Advocate argued that MCI's argument it would have been too expensive to make the distinction between spurious and genuine line losses was unpersuasive. It argued that companies are capable of developing sophisticated means of communicating with each other and have project teams to develop necessary solutions.

The Consumer Advocate argued that the legislature expected companies to do what is necessary to comply with the law. It argued that MCI recognized it would receive line losses unrelated to the platform conversion as far back as February 2005 but apparently did not take action. The Consumer Advocate argued that by failing to take actions necessary to protect service integrity and consumer choice, MCI did not act reasonably in managing the platform conversion.

When MCI stated Qwest should have sent a reject or jeopardy notice, the Consumer Advocate argued it is not unusual for one company to blame another company and consumers are caught in the middle. The Consumer Advocate argued that MCI reads more into the reject codes than is there, and neither reject code provides generally that one order should be rejected because another order is pending. The Consumer Advocate argued that Mr. Keesler's and Mr. Bench's explanation of why Qwest should not have sent a reject or jeopardy notice makes perfect sense. It argued it is entirely plausible that a customer would call one day and make one choice and call the next day and make another choice, and the system must accommodate customer orders that come in succession.

The Consumer Advocate argued if it were true that Qwest has sent MCI reject notices in other like cases, MCI should have offered one or more in evidence. It argued the example provided by MCI is not at all like this case.

The Consumer Advocate further argued that if Qwest employees other than Mr. Keesler agreed with MCI regarding the reject and jeopardy notices as Ms. Lichtenberg testified, MCI could have called a more appropriate witness from Qwest.

The Consumer Advocate argued MCI failed in its responsibility to monitor and manage its platform conversion, which should have been more than relying on the possibly mistaken belief as to what Qwest would do. It argued MCI should have had a project manager in constant communication with responsible people at all three companies, and should have checked with Qwest to see if Qwest would send reject notices for genuine line losses during the pendency of a conversion order. The

Consumer Advocate argued that instead, MCI relied on alleged "business rules" that were established over a period dating back as much as six years. The Consumer Advocate argued there is nothing in MCI's post-hearing exhibits to support its claim that Qwest should have sent a reject or jeopardy notice in circumstances like this case, and argued MCI acknowledged at hearing there is nothing in FCC issuances to support such a claim.

The Consumer Advocate argued that Qwest did not incorrectly interpret McLeod's order as MCI claims, and MCI's witness acknowledged that Qwest acted according to the business rule that says to move the customer.

The Consumer Advocate argued there is no industry standard to support MCI's suppression of the Steele's order. It further argued such suppression is antithetical to the premise of the statute: that customers should be billed only for authorized services and their orders should be given effect. The Consumer Advocate argued that none of the passages cited by MCI from the FCC orders or Qwest documents provide support for MCI's claim that suppression of consumer orders or MCI's reliance on Qwest to issue reject orders in cases like this was in conformity with any standard or "business rule." The Consumer Advocate argued that MCI's witness admitted there is no such standard.

The Consumer Advocate argued it is impossible for anyone to say that Mrs. Steele was the only customer who was adversely affected in this way. It argued that many violations go unreported, and in this case, it appears that no complaint would have been filed if MCI had not left Mr. Steele on hold for a total of nearly two and

one-half hours on four occasions. Furthermore, the Consumer Advocate argued, the probability that Ms. Lichtenberg would have been given every relevant communication is not high.

Analysis

The undersigned administrative law judge agrees with the Consumer Advocate that a premise of the statute is that customers should be billed only for authorized services and customer orders must be given effect. Nonetheless, the undersigned finds the arguments by MCI on this issue to be the more persuasive, largely because of the more direct experience of MCI's witness, Ms. Lichtenberg. Ms. Lichtenberg was the only witness with experience regarding the wholesale interactions between Qwest and MCI. She was the only witness who participated in the collaboratives regarding Qwest's Section 271 long distance application and the meetings regarding the migration of customers from UNE platform to UNE loop. She was the only witness who participated in the development of the business rules for inter-carrier communication, including when Qwest would send rejects and jeopardy notices. While the fact that Mr. Keesler works for Qwest would ordinarily give his testimony regarding the meaning of Qwest's reject codes more weight, his lack of experience and Ms. Lichtenberg's extensive experience regarding wholesale interactions between the companies persuades the undersigned that Ms. Lichtenberg's testimony is more credible. Therefore, the undersigned finds the testimony of Ms. Lichtenberg on these issues to be more credible than that of Mr. Keesler and Mr. Bench.

The evidence presented in this case showed it was reasonable for MCI to rely on the business rules and systems developed during the Section 271 proceedings for electronic communication between Qwest and competing carriers. Both MCI and McLeod reviewed their records and determined Mrs. Steele was an MCI customer immediately before initiating the conversion order for her account. It was reasonable for MCI to expect that Qwest's system would reject the order received from McLeod on June 28, 2005, to convert Mrs. Steele's account to McLeod, because Qwest had already entered the order in its system to change Mrs. Steele's service from MCI to Qwest on June 27, 2005. It was reasonable for MCI to expect that Qwest's system would send a reject code 820 or 821 to MCI or McLeod in this situation. It was reasonable for MCI to expect that, even if the Qwest system did not initially reject the June 28, 2005, order, it would have issued a jeopardy notice.

In addition, the evidence in this case showed that there were apparently no other Iowa MCI customers who were adversely affected like Mrs. Steele, that is, who requested to switch from MCI and who were not switched when requested due to the platform conversion. Across the region of both Qwest and another operating company, MCI migrated between 100,000 and 200,000 customers from UNE-P to UNE-L, and Mrs. Steele's case was the only problem of this type of which MCI is aware.

The evidence in the record shows that MCI engaged in reasonable planning for the platform conversion given the work involved and the timeframe available. The persuasive evidence shows that the suggestion by Consumer Advocate witness Mr.

Bench that MCI could have manually reviewed all the line loss reports during the platform conversion was not realistic and there is nothing to indicate it would have provided better results than the method chosen by MCI. The evidence also shows that, in order to implement Mr. Bench's suggestion that MCI develop new codes to electronically distinguish between legitimate line losses and those related to the conversion, MCI would have had to go to the change management committee at Qwest and all CLECs would have had to agree to the change, which would have taken longer than the time MCI had available to complete the conversion by the FCC-mandated deadline.

Therefore, the evidence in the record shows that MCI acted reasonably to protect consumers during the platform conversion. Although the execution was not perfect, as shown by Mrs. Steele's case, it does not appear that MCI's actions were unreasonable.

DID THE STATUTE AND RULE PROHIBIT SLAMMING AND CRAMMING?

MCI's Position

MCI argued that its conduct was not prohibited by the version of Iowa Code § 476.103 and 199 IAC 22.23 in effect at the time because an unauthorized change was not prohibited at the time of MCI's alleged violation. MCI based this argument on the Polk County District Court ruling in Office of Consumer Advocate v. Iowa Utilities Board, "Ruling on Petition for Judicial Review," Case No. CV-5605 (March 2, 2006) (Kilaru Order). MCI argued the Kilaru Order held the rules in effect prior to January 25, 2006, did not prohibit unauthorized changes in service. MCI argued

these are the same rules that were in effect on July 7, 2005, and the same rules in effect on the date the Consumer Advocate filed its petition in this case. MCI argued that 199 IAC 22.23 did not expressly prohibit unauthorized changes or cramming until January 25, 2006.

MCI argued that the Consumer Advocate's argument that every unauthorized change can rise to the level of a slamming or cramming violation was squarely addressed and rejected in the Kilaru Order. MCI argued that the Kilaru Order rejected the argument that Iowa Code § 476.103 prohibits unauthorized changes in service. It argued the Kilaru Order found that, although the purpose of Iowa Code § 476.103 was to prohibit unauthorized changes in service, the purpose of a statute alone cannot create a specific duty or standard of care that a party can be penalized for violating. MCI argued that the Kilaru Order noted that neither the statute nor the rules actually defined an unauthorized change in service as prohibited behavior. It argued the Kilaru Order stated the legislature did not state in 476.103 that unauthorized changes were prohibited and it was not clear the legislature intended the phrase "unauthorized change" to mean anything more than a change made without compliance with the minimally required verification rules.

MCI argued the Kilaru Order controls the decision in this proceeding. It argued that, although the Consumer Advocate and the Board have appealed the Kilaru Order, it remains controlling law. MCI argued the Consumer Advocate could have sought a stay in this proceeding and others affected by the Kilaru Order, but it

did not do so. Therefore, MCI argued, the Consumer Advocate and the Board are limited by the Kilaru Order until it is overturned.

MCI further argued the Consumer Advocate's argument is based on its position that the bills sent to Mrs. Steele after July 7 constituted an unauthorized change in service. However, MCI argued, the Kilaru Order rejected that same argument. At a minimum, MCI argued, the Kilaru Order states that the rules in effect during the relevant time period in this case did not prohibit unauthorized changes in service. MCI argued 199 IAC 22.23 did not expressly prohibit unauthorized changes or cramming until the new rules became effective on January 25, 2006. Therefore, MCI argued, under the clear and unequivocal ruling in the Kilaru case, the Consumer Advocate's claims cannot continue as a matter of law.

MCI argued that the Kilaru Order is binding on this case under the doctrine of issue preclusion and the Consumer Advocate cannot re-litigate the same issues in this case. MCI argued the Kilaru Order controls the decision in this proceeding because this case involves the same parties, the same issues, and those issues have been fully adjudicated. Therefore, it argued, under issue preclusion, the Consumer Advocate may not continue to relitigate the same issues against MCI.

Consumer Advocate's Position

The Consumer Advocate opposed MCI's argument that the Board rules did not prohibit unauthorized changes until they were revised in January 2006 after the events at issue in this case.

The Consumer Advocate argued that the primary goal in interpreting a statute is to ascertain the legislature's intent. It argued the adjudicator must consider the objects sought to be accomplished and the evils and mischief sought to be remedied, seeking a result that will advance, rather than defeat, the statute's purpose.

The Consumer Advocate argued that Iowa Code § 476.103 is a remedial, not punitive, statute, and is therefore to be broadly construed to effect its stated purpose: to protect consumers from unauthorized changes in telecommunications service.

The Consumer Advocate argued the statute defines "change in service" and the statutory definition is controlling. The Consumer Advocate argued the statute does not define "unauthorized," so the word is given its ordinary meaning. The Consumer Advocate argued the statute requires the Board to adopt rules prohibiting unauthorized changes and the Board did so in 199 IAC 22.23. The Consumer Advocate argued the Board's notice of intended action when it proposed the rules stated that subrule 22.23(2) prohibited unauthorized changes in service.

The Consumer Advocate argued the statutory definition of a "change in service," which includes "the designation of a new service provider" and "the addition ... of a telecommunications service for which a separate charge is made to a consumer account," is plainly intended to include the terms "slamming" and "cramming," although the statute does not use those terms. The Consumer Advocate also argued, since the statute does not define "unauthorized," the word is given its ordinary meaning. It argued the statute directed the Board to prohibit unauthorized changes in service, and in response, the Board adopted rules defining

slamming and cramming. It argued slamming and cramming are intended as examples of unauthorized changes in service, but do not constrict the statutory phrase, which is potentially broader than slamming and cramming together.

The Consumer Advocate disagreed with MCI's position that the Kilaru Order controls this decision and with MCI's position that the statute and rules did not prohibit unauthorized changes in 2005. The Consumer Advocate argued the Kilaru Order is not controlling legal authority because it is an unpublished district court decision. The Consumer Advocate also argued the Board appealed the Kilaru Order, so it evidently disagrees with it. In addition, the Consumer Advocate argued, the elements for issue preclusion are not met because the Kilaru Order rested on alternative grounds and such alternative grounds are insufficient to invoke the doctrine of issue preclusion.

The Consumer Advocate argued that the statute is not a bare statement of purpose, and contains on its face a policy judgment to prohibit unauthorized changes in telecommunications service and a penalty for violation. It argued the title of the session law gave notice to all: "An Act prohibiting unauthorized changes in telecommunications service ... and providing remedies and penalties." The Consumer Advocate argued that, although implementation was left to the Board, the Board had no discretion and was directed to implement the policy judgment already made by the legislature.

The Consumer Advocate argued Board rule 199 IAC 22.23 was explicitly intended to implement Iowa Code § 476.103, so the statute and rule are properly

read together. When read together, the Consumer Advocate argued, they give the plainest of notice that unauthorized changes in service are prohibited in Iowa.

The Consumer Advocate argued the primary goal when interpreting a statute is to give effect to the legislature's intent as expressed by the language used in the statute. It argued the Court is to consider the whole statute, including its title. It argued the legislature's intent is plainly expressed in the statute: to protect consumers from and to prohibit unauthorized changes in telecommunications service. The Consumer Advocate argued the intent of the rule is the same and is plainly expressed in the title of subrule 22.23(2) and by the statements made by the Board when it adopted the rule. The Consumer Advocate argued this intent should be given, not denied, effect. The Consumer Advocate argued the rule provided clear notice of the prohibition and MCI could reasonably discern that its conduct would violate the statute and rule.

The Consumer Advocate argued that the amendment to the rule in 2005 simply repeated in the text of the subrule what the title of the subrule already said, that unauthorized changes are prohibited. The Consumer Advocate argued the rule amendment made explicit what was already evident from the definitions in the statute and rule, that "unauthorized change in service" includes "slamming" and "cramming." It argued the regulatory history makes it clear that the Board's intent was to clarify the rule, not change its content.

The Consumer Advocate further argued the federal statute is unlike Iowa Code § 476.103, because the federal statute only prohibits non-compliance with

verification procedures, while the manifest intent of the Iowa legislature was to protect customers from unauthorized switches. The Consumer Advocate argued the title of the session law, "An Act prohibiting unauthorized changes in telecommunications service," stated the legislature's purpose, and if the intent had been merely to require compliance with federal verification procedures, it would have been easy to draft such a limited title.

The Consumer Advocate argued in enacting the statute, it is presumed the entire statute is intended to be effective, and the statute should be construed so effect is given to all its provisions and no part is superfluous or void. It argued the Court attempts to harmonize all relevant legislative enactments, including agency rules, so as to give meaning to all, if possible. The Consumer Advocate argued the Court does not place undue importance on any single or isolated portion.

The Consumer Advocate argued the Kilaru Order renders major parts of the statute and rule superfluous and ineffectual and ignores the many references to a company's need for "authorization" before it switches a customer's telephone service. It argued the Kilaru Order placed undue importance on the single sentence requiring the adoption of rules consistent with federal verification procedures. The Consumer Advocate further argued the Kilaru Order gives the statutorily defined term "change in service" no effect. Similarly, argued the Consumer Advocate, it gives no effect to the rule's use of "verified consent" of the customer and the requirement for authorization. The Consumer Advocate argued the district court's interpretation defeats the purpose of the statute rather than giving it effect.

The Consumer Advocate argued the provisions in the statute and rule are harmonized and given effect by recognizing both an intended protection of consumers from unauthorized changes and an intended consistency with federal verification procedures. It argued that no one could have read the statute and rule and come away thinking unauthorized changes were not prohibited.

Analysis

Although the undersigned has read the district court's decision in the Kilaru Order carefully and considered its rationale in reaching the decision on this issue, an unpublished district court ruling in another case is not binding on this case. See Iowa R. App. P. 6.14(5).

The undersigned finds the arguments by the Consumer Advocate on this issue to be the more persuasive.

MCI's position is based on a parsing of the statute and rule without examining them as a whole so that the true meaning of the statute and rule is lost. When looked at together and as a whole, it is clear that the statute and rule in effect in 2005 prohibited unauthorized changes in customers' telecommunications accounts. The point is: did the statute and rules in effect at the time provide fair warning to the telecommunications carriers that slamming and cramming were prohibited? Clearly, they did. Particularly when read with the title of the bill and statements of legislative intent upon enactment of the statute and the Board orders and notice of intended action adopting the rule, the language of the statute and rule made it clear to MCI and the other telecommunications companies that slamming and cramming were

prohibited. There is no doubt that MCI and the other telephone companies were put on notice by the enactment of Iowa Code § 476.103 and the implementing Board rule that slamming and cramming were prohibited in Iowa.

Iowa Code § 476.103 is entitled "Unauthorized change in service – civil penalty." Iowa Code § 476.103(1) provides that the Board may adopt rules to protect consumers from unauthorized changes in telecommunications service. Iowa Code § 476.103(2) provides that a "change in service" means "the designation of a new provider of a telecommunications service to a consumer, including the initial selection of a service provider, and includes the addition or deletion of a telecommunications service for which a separate charge is made to a consumer account."

Iowa Code § 476.103(3) provides that the Board shall adopt rules prohibiting unauthorized changes in telecommunications service and the rules shall be consistent with Federal Communications Commission (FCC) regulations regarding procedures for verification of customer authorization for a change in service. The paragraph also states a number of specific requirements that must be included in the rules, some of which relate to the verification procedures.

Iowa Code § 476.103(4)(a) states that a telephone service provider "who violates a provision of this section, a rule adopted by this section, or an order lawfully issued by the board pursuant to this section" is subject to civil penalty. Iowa Code § 476.103(4)(b) lists the factors the Board is to consider when assessing a civil penalty. Iowa Code § 476.103(5) provides that the Board may impose additional sanctions if a service provider has shown a pattern of violation of the rules adopted

pursuant to the section. Clearly, the legislature would not have provided for civil penalties if it did not believe the statute prohibited unauthorized changes in service.

Unauthorized change of a customer's telephone service provider is commonly called "slamming," which is defined in the Board's rules as: "the designation of a new provider of a telecommunications service to a customer, including the initial selection of a service provider, without the verified consent of the customer." 199 IAC 22.23(1). The unauthorized addition or deletion of a telecommunications service for which a separate charge is made to a consumer account is commonly called "cramming," which is defined in the Board's rules as: "the addition or deletion of a product or service for which a separate charge is made to a telecommunications customer's account without the verified consent of the affected customer." 199 IAC 22.23(1).

The version of 199 IAC 22.23(2) in effect at the time, entitled "Prohibition of unauthorized changes in telecommunications service," provided that no service provider could submit a preferred carrier change order to another service provider unless the change had been confirmed by one of the methods listed in the rule.

MCI's argument that the later change in the rule by the Board shows the earlier version of the rule did not prohibit slamming and cramming is not persuasive. As argued by the Consumer Advocate, the Board stated it was merely clarifying the rule, not changing the law, when it adopted the change to rule 22.23(2). Also as argued by the Consumer Advocate, the Board merely inserted the words explicitly

prohibiting unauthorized changes into the rule that had already existed in the title of the rule.

Although the legislature could have explicitly included the words "unauthorized changes in service are prohibited" in the statute, "we determine legislative intent from the words chosen by the legislature, not what it should or might have said." Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004). Although the rule in effect prior to January 2006 could have been more clearly written, this does not mean that it did not prohibit slamming and cramming. The statute and rule in effect in June 2005, when read together as a whole, were clear enough and provided fair notice to MCI and other carriers that unauthorized changes in service, including slamming and cramming, were prohibited.

**WERE THE EVENTS IN THIS CASE SLAMMING AND CRAMMING AND SHOULD
A CIVIL PENALTY BE ASSESSED?**

Consumer Advocate's Position

The Consumer Advocate argued that the evidence in this case shows an unauthorized change in service, whether viewed in terms of the designation of a new provider on July 14, 2005, or in terms of the separate charges billed July 22 and August 22, 2005. It argued the Steeles clearly did not authorize the change to McLeod on July 14, 2005. The Consumer Advocate argued the only change the Steeles authorized was the one to Qwest on July 6, 2005. The Consumer Advocate argued it is equally clear the MCI charges were unauthorized from and after July 7,

2005, and therefore the July 22 bill was partly unauthorized and the August 22 bill was completely unauthorized.

The Consumer Advocate argued the violation technically meets the regulatory definitions of both slamming and cramming: the July 14 change was a slam and the unauthorized billings on July 22 and August 22, 2005, were cramming. The Consumer Advocate argued it does not matter whether the term slamming or cramming is used because the statutory term "change in service" includes both. The Consumer Advocate argued the switch to McLeod for MCI on July 14, 2005, was unauthorized and a slam because the order should have been cancelled. It further argued that the MCI billings after July 7, 2005, were similarly unauthorized and hence crammed onto Mrs. Steele's bills. The Consumer Advocate argued the evidence establishes an unauthorized change in service and therefore a violation of the statute and rule.

The Consumer Advocate disagreed with MCI's argument that its actions do not rise to the level of a slam or a cram. The Consumer Advocate argued there is no mention in the statute of rising to a particular level. It argued there is nothing in the statute that calls for an assessment that a particular unauthorized change in service rises to a particular, undefined level and that higher levels are prohibited while lower levels are not. Such a distinction, argued the Consumer Advocate, would encourage litigation over level and render the statute uncertain and ineffectual.

The Consumer Advocate argued the evidence refutes MCI's argument that it was Mrs. Steele's service provider and it did not change her provider. The Consumer

Advocate argued there were two designations of a new provider. It argued the first, to Qwest, was authorized, but the second, to MCI, was not. The Consumer Advocate also argued there was no miscommunication between Qwest and MCI. It argued the source of the difficulty was clear: that MCI suppressed the Steele's order.

The Consumer Advocate argued the text of the statute refutes MCI's argument there was no addition of service, only a continuation of the same service. According to the Consumer Advocate, the statute does not mention a new or different service and defines "change in service" to include "the addition ... of a telecommunications service for which a separate charge is made to a customer account." The Consumer Advocate argued the relevant unit of service under the statute is thus determined by the customer's bill. It argued if an added service results in a separate charge to a customer account, it is a cram if unauthorized. The Consumer Advocate argued the addition of another month's service results in a separate charge to the customer's account, and is therefore a cram if unauthorized.

The Consumer Advocate argued that MCI should be assessed a civil penalty because the purpose of the statute is to remedy problems like Mrs. Steele's and there is no exception in the statute that excuses a company because two or more orders from two or more companies were placed in rapid succession. In addition, the Consumer Advocate argued, the statute does not have a "we're not perfect" exception that can be used to escape imposition of a penalty. Instead, the Consumer Advocate argued, the statute authorizes civil penalties for proven violations to deter future violations, to make companies more attentive to the needs of consumers, and

to make them less likely to take actions such as the suppression of the Steele's order that result in unauthorized billings to consumers. Although the statute does not contemplate perfection, the Consumer Advocate argued, it encourages the pursuit of perfection.

The Consumer Advocate argued that the imposition of civil penalties will deter inadvertent violations and this position is well supported by case law.² However, argued the Consumer Advocate, the issue of whether civil penalties will deter inadvertent violations is irrelevant to this case because there is no evidence to support MCI's position that the violation in this case was inadvertent or negligent. The Consumer Advocate argued MCI intentionally suppressed the Steeles' order and a person is presumed to intend the natural consequences of an act intentionally done. The Consumer Advocate argued the natural consequence of suppressing the Steeles' order was that Mrs. Steele was switched back to MCI and billed by MCI in contravention of her request. The Consumer Advocate argued that suppression of customer orders is antithetical to the premise of the statute: that customer orders be given effect and that customers be billed only for authorized services. The Consumer Advocate argued that civil penalties can secure appropriate remedial action by MCI and the industry, not only in this specific case, but generally. Therefore, the

² The Consumer Advocate stated it sought judicial review on the issue and asked the Board to officially notice its position in the Kilaru case. The Consumer Advocate attached the parts of its briefs discussing the issue in the Kilaru case to its pre-hearing reply brief in this case. The Consumer Advocate's request to take official notice is granted, and the parts of the attached briefs and the Consumer Advocate's position are officially noticed. Iowa Code § 17A.14(4).

Consumer Advocate argued, a civil penalty in this case would advance the purpose of the statute and should be assessed.

The Consumer Advocate argued that even if Mrs. Steele's case were the only violation, it was still a violation. The Consumer Advocate argued the statute provides for a civil penalty for each violation, and if a pattern of violations is established, for more severe sanctions. Therefore, the Consumer Advocate argued, the civil monetary penalty is the legislature's choice of remedy of first resort.³ The Consumer Advocate argued it does not have to prove a pattern of violations before a civil penalty may be assessed.

The Consumer Advocate argued that civil penalties have remedial potential and advance public policy. However, it argued, the threat of civil penalty has no deterrent effect unless it is credible it will be carried out, and without such imposition, a good deal of the enforcement potential of the statute is lost. The Consumer Advocate argued the civil penalty works to secure compliance on both the offending company and other companies. It argued that without the penalty, companies may conclude the statute has no teeth and may be disregarded. It argued that market forces and credits or refunds provide no teeth or deterrent effect.

The Consumer Advocate argued that if the goal of the statute is to be achieved, companies can and must develop and use systems and processes that

³ The Consumer Advocate asked the Board to officially notice the more extended position it presented on a similar issue in the Kilaru case, and attached its petition for judicial review and briefs in the Kilaru appeal from the Board's decision to Polk County District Court. The Consumer Advocate's request is granted and the documents and its argument are officially noticed.

enable them to respect consumer choice. It argued the civil penalty is an essential means to a desired end and is designed to secure needed changes in the practices and mindsets that cause unauthorized charges. The Consumer Advocate argued that, while the precise type of conversion that occurred in this case may not occur in the future, there will be other conversions and transactions and the outcome here will affect them. Absent a penalty, the Consumer Advocate argued, MCI will continue to say it did nothing wrong and the beneficial effects sought by the legislature will not happen.

MCI's Position

MCI argued that the Consumer Advocate deems the purchase order McLeod sent to Qwest to convert Mrs. Steele's service from Qwest UNE-P to McLeod UNE-L on June 28, 2005, to be a "switch back" from Qwest to MCI and a slam. MCI argued that what the Consumer Advocate considers a slam was simply a conversion order sent by McLeod to Qwest to convert services for existing MCI customers from UNE-P to UNE-L. MCI stated the circumstances that led Mrs. Steele to believe she was switched back from Qwest to MCI would be confusing to the average consumer. However, MCI argued, the chain of events that led to her complaint is not a slam and not every consumer complaint is a slam. It argued the McLeod purchase order sent on June 28, 2005, was not a change in service, but was rather a system conversion performed for existing MCI customers, including Mrs. Steele. MCI argued the disconnect between the timing of Qwest's communication to MCI regarding Mrs. Steele's line loss notification and MCI's platform conversion has no relation to Iowa's

slamming statute. Instead, it argued, such inter-carrier orders are governed by industry practice. MCI argued there is no need to stretch the slamming regulations beyond recognition to address this issue. It argued rules exist and carriers follow them and expanding Iowa's slamming statute beyond its scope to try to respond to every consumer complaint is not necessary.

MCI argued the Consumer Advocate alleges that MCI violated either the cramming or slamming rules when it did not cancel Mrs. Steele's service on July 7. MCI argued it had to suppress the July 7 line loss notification to avoid improperly discontinuing service to all of MCI's customers affected by the platform conversion. As a result, MCI argued, it was not aware that Mrs. Steele had switched her service to Qwest. Therefore, MCI continued to provide service to Mrs. Steele and bill her for that service for one extra month, which amount was refunded once the facts were determined. MCI argued that the Consumer Advocate's claim that it is either a slam or a cram to continue serving and billing an existing customer for the same subscribed services in these circumstances has no merit.

MCI argued another fatal flaw in the Consumer Advocate's argument is that there was no change in service provider or addition of service whether authorized or unauthorized. MCI argued the facts are undisputed that the unfortunate timing of Mrs. Steele's request to change to Qwest and MCI's platform conversion led to a brief delay in the cancellation of MCI's service to her. MCI argued a slamming violation requires a change in service provider and MCI did not change Mrs. Steele's service provider. Instead, argued MCI, it was her service provider on July 7, 2005, and

continued to provide service and bill her accordingly. MCI further argued that once it learned she had changed her service to Qwest on August 18, MCI discontinued her service and ceased billing her. MCI argued that a "quickly cleared-up miscommunication between Qwest and MCI regarding a win-back from MCI, based on technical limitations during a conversion from UNE-P to UNE-L, does not meet the definition of a 'slam' under the statute or the Board rules."

MCI also argued there was no addition of a service as is required to meet the definition of cramming in the Board's rule. MCI argued it did not add a service to Mrs. Steele's account. Instead, MCI argued, it continued to treat Mrs. Steele as a customer by continuing to provide and bill her for the same services she had previously ordered. MCI acknowledged it was true it did not cancel Mrs. Steele's account on July 7, 2005, but it did not cancel the account because the conversion and the related suppression caused MCI to be unaware that Mrs. Steele had changed her service to Qwest. However, it argued, the alternative to the general suppression of line loss notifications would have been the automatic discontinuation of service to thousands of MCI customers. MCI stated that while it regretted the confusion and inconvenience caused to Mrs. Steele and her son, Mrs. Steele was never without telephone service and MCI refunded her July payment of \$36.83.

Furthermore, MCI argued, the miscommunication between MCI and Qwest was caused by failures or inadequate processes on Qwest's end. MCI argued that Qwest cancelled the win-back order because Qwest misinterpreted the platform conversion order and Qwest did not flag or report potential problems regarding the

two competing orders for the same line with overlapping due dates as its procedures required. MCI argued that this part of the transaction, without which the one month of billing that is the subject of this complaint could not have occurred, was beyond MCI's control and is not MCI's responsibility. MCI argued that this one misunderstanding is minimal compared to the chaos and disruption that thousands would have suffered if MCI had not suppressed the line loss notifications.

MCI argued the Board's slamming and cramming rules are not meant to be catch-all rules that govern every customer dispute. MCI argued the "violation" was that MCI cancelled Mrs. Steele's account just over a month later than she requested. MCI further argued it would be unlawful for the Board to expand the slamming and cramming rules to regulate all consumer issues because it would expand the statute beyond what the legislature authorized, exceed any reasonable interpretation of the rules, and render meaningless other service quality standards in the rules, including the general complaint provisions of Iowa Code § 476.3.

MCI stated it was unfortunate that Mrs. Steele was inconvenienced by a one-month delay in switching her service from MCI to Qwest. MCI argued the inconvenience was an unfortunate result of an FCC mandate that required MCI to undertake a very complex conversion that required changing service facilities while over 100,000 lines remained active and alive. MCI argued its commitment to thorough planning resulted in success without service interruption for all customers and only one customer suffered any adverse impact. MCI argued the law must recognize it is nearly impossible to achieve better results. MCI further argued Qwest

should have provided the needed protection through its electronic notices to MCI. MCI argued it did nothing wrong and there was nothing more within reason that MCI could have done.

MCI argued that even if the miscommunication between it and Qwest constituted a slam or a cram, civil penalties should not be assessed because the delay was caused by an error and was inadvertent. MCI argued the Board has previously stated that civil penalties will not deter inadvertent conduct and the Board does not believe the legislature intended to impose a strict liability standard.

MCI argued the delay in canceling Mrs. Steele's account was an unintended consequence of MCI's platform conversion and was an isolated event. It argued that, as the Board has previously ruled, civil penalties will not deter inadvertent errors resulting from good faith actions. Therefore, it argued, assessment of a civil penalty in this case would not deter miscommunication that arose as a part of a rarely occurring platform conversion. MCI requested the Board to find that it did not violate Iowa's slamming or cramming rules and civil penalties are unwarranted.

Analysis

The undersigned finds the arguments by MCI to be more persuasive on this issue. Although the change of Mrs. Steele's service from Qwest to MCI on July 14, 2005, admittedly unauthorized by Mrs. Steele, could technically be regarded as a slam in the broadest sense of the word, the undersigned does not believe Iowa Code § 476.103 and the implementing Board rule were intended to cover a situation such as the circumstances that occurred in this case. Similarly, although MCI's continued

billing of Mrs. Steele after July 7, 2005, could technically be regarded as a cram in the broadest sense of the word, the undersigned does not believe the statute and rules were intended to cover a situation such as the one in this case. This is not to say that the unauthorized continued billing of a former customer could never be a cram. However, the one and one-half month delay in the (permanent) change of Mrs. Steele's service from MCI to Qwest as she requested and the resulting billing occurred during the process in which MCI was converting the provision of local service to its customers from Qwest UNE-P to McLeod UNE-L. During the conversion, no customers lost service. Despite MCI's planning for the conversion and reasonable reliance on Qwest's reject and jeopardy electronic notification system, Mrs. Steele's service was not switched at the time she intended. Mrs. Steele was apparently the only customer who was affected in this manner. The error in communication between Qwest and MCI that occurred during the platform conversion is not the type of behavior that the statute and rules are intended to prohibit. This case involved a one-time unfortunate convergence of events that caught Mrs. Steele's change in service from MCI to Qwest in the middle.

By attempting to apply the slamming and cramming prohibitions to the circumstances of this case, the Consumer Advocate is doing the same thing MCI is doing when it argues Iowa Code § 476.103 and 199 IAC 22.23 did not prohibit slamming and cramming prior to January 2006: parsing the statute and rule to the extent their true meaning is lost. There was no slam or cram in this case within a fair interpretation and reasonable reading of Iowa Code § 476.103 and 199 IAC 22.23.

Even if the behavior were viewed as a slam or a cram because of the result to the customer, given the unique circumstances of this case, it would not be appropriate to assess a civil penalty. The undersigned administrative law judge believes this case falls squarely within the pronouncement by the Board in Consumer Advocate v. Qwest, Docket No. FCU-02-22, "Order Denying Petition for Proceeding to Impose Civil Penalties," p. 5, (April 16, 2003). The result to Mrs. Steele was the result of inadvertent errors that would not be deterred by the imposition of a civil penalty and the customer was made whole, albeit one month later than she requested.

FINDINGS OF FACT

1. Prior to January 2005, Mrs. Alice Steele had Qwest local service and MCI long distance telephone service. (Tr. 44, 154.)
2. On January 24, 2005, Mrs. Steele received a call from MCI wanting her to switch her local service to MCI. (Tr. 44; Consumer Advocate Exs. 3, 8.) Mrs. Steele agreed, and her local service was switched to MCI. (Tr. 44; Consumer Advocate Exs. 3, 8.) The Steeles do not complain of this switch. (Tr. 44.)
3. On June 27, 2005, Mrs. Steele was an MCI customer for both local and long distance service. (Informal complaint file; Tr. 51, 154, 162-4, 168.)
4. On June 27, 2005, Mrs. Steele's son, Mr. Del Steele, contacted Qwest and placed an order with Qwest to switch Mrs. Steele's service to Qwest for both local and long distance service. (Informal complaint file; Tr. 44, 51, 83, 156, 168, 172, 209.)

5. On June 27, 2005, Qwest entered the Steeles' order to change Mrs. Steele's local and long distance service to Qwest into Qwest's system with a due date of July 6, 2005. (Tr. 51-2, 60, 83, 168, 172.)

6. At the end of June 2005, MCI was in the process of converting the provisioning of its local service customers in Iowa from Qwest's UNE-P to McLeod's UNE-L service arrangement. (Tr. 154, 156-62, 182-4; Consumer Advocate Ex. 23App.) As it did with each of its customers subject to the conversion, MCI checked to see if Mrs. Steele was an MCI customer and then sent an order to McLeod telling McLeod to put Mrs. Steele on the McLeod switch. (Tr. 184.) When McLeod received the order, it also checked to see whether Mrs. Steele was an MCI customer, and she was. (Tr. 184, 233, 237-9, 241.)

7. On June 28, 2005, McLeod placed an order (on behalf of MCI) with Qwest (the conversion order) to convert the provisioning of Mrs. Steele's MCI local service from Qwest UNE-P to McLeod UNE-L. (Tr. 57, 84, 156, 158-9, 164-5, 173; Consumer Advocate Ex. 9.) This order appeared in all respects to be identical to an ordinary order to switch Mrs. Steele's account from Qwest to McLeod, was in the form of such an order called a local service request, and Qwest did not know the order was part of the platform conversion. (Tr. 57, 71-3, 84, 97, 112-3, 137, 146-7, 156-9, 164-5, 173, 196, 198-9.) This conversion order had a due date assigned by McLeod of July 14, 2005. (Tr. 58.)

8. On June 28, 2005, Qwest entered the McLeod conversion order into its system with the due date of July 14, 2005. (Tr. 58, 168, 173, 198-9.) This action was in accordance with standard industry practice. (Tr. 198-9.)

9. On June 28, 2006, Qwest sent a firm order confirmation for the conversion order to McLeod, who sent it to MCI, and MCI put a suppression in place for Mrs. Steele's account. (Tr. 106, 187-8, 242.)

10. On July 6, 2005, Qwest processed the Steeles' June 27 order, switched the account to Qwest, and began providing service to Mrs. Steele. (Tr. 52, 68, 75, 93-4, 204-5, 209; Consumer Advocate Ex. DS-1.)

11. On July 6, 2005, Qwest sent a line loss report to McLeod or MCI that told MCI it was no longer Mrs. Steele's local service provider, effective July 5, 2005. (52-7, 77-8, 88-9, 91-3, 95-6, 99, 154, 157, 160, 162, 164, 168-9, 204-6, 209; Consumer Advocate Exs. SFK-1, SFK-2, 5B.) MCI received the electronic notification of the line loss at 7:30 p.m. on July 6, 2005. (Tr. 205.) On July 7, 2005, Qwest sent a CARE report to McLeod or MCI that informed MCI that Mrs. Steele had switched her long distance service to Qwest. (Tr. 53-7, 77-8, 88-9, 91-3, 95-6, 99, 154, 157, 160, 162, 164, 168-9, 204-6, 209; Consumer Advocate Exs. SFK-1, SFK-2, 5B.)

12. MCI did not process the July 6 line loss notification it received for Mrs. Steele's account because MCI had suppressed line loss notifications for its customers affected by the platform conversion, including Mrs. Steele. (Tr. 168, 170-2, 187-8, 209, 245; Consumer Advocate Exs. 5B, 7A, 12.) If MCI had not suppressed

receipt of line loss notifications from Qwest for MCI's customers affected by the platform conversion, including Mrs. Steele, the line loss notification would have triggered the process to discontinue each customer's account. (Tr. 168, 170-1, 187-8, 245; Consumer Advocate Ex. 12.) This would have meant the loss of the customer's long distance service and voicemail. (Tr. 187.) To prevent the successful completion of the McLeod conversion orders from resulting in the improper discontinuance of thousands of MCI local service customers, MCI modified its system to suppress line loss notifications for its affected customers while their respective McLeod conversion orders were pending. (Tr. 170-2, 186-8, 197-8, 209, 245, 265-8; Consumer Advocate Ex. 12.) As a result, MCI was not aware that Mrs. Steele had switched her service to Qwest, MCI continued to believe Mrs. Steele was an MCI customer, and MCI continued to provide service to her and bill her for that service. (Tr. 168, 170-2, 187-8, 209; Consumer Advocate Exs. 5B, 7A, 12.)

13. On July 7, 2005, Mrs. Steele was a Qwest customer and Qwest began billing her for service. (Tr. 68-9, 75-6, 93-4; Consumer Advocate Ex. DS-1.)

14. On July 14, 2005, Qwest completed the McLeod conversion order dated June 28, 2005, for Mrs. Steele's account, which cancelled Mrs. Steele's account with Qwest. (Tr. 58, 60, 68-9, 169, 198-9.)

15. On July 22, 2005, MCI sent Mrs. Steele a bill in the amount of \$39.70 for telephone service for the period June 22 through July 21, 2005. (Consumer Advocate Exs. 15, 2App (pp. MCI21-22); Tr. 209-10.)

16. On July 25, 2005, Qwest sent Mrs. Steele a bill for telephone service for the period July 7 through July 15, 2005. (Tr. 44-5, 68-9, 75-7, 93-4; Consumer Advocate Ex. DS-1.) The bill was labeled a "final" bill. (Tr. 45; Consumer Advocate Ex. DS-1.)

17. After Mrs. Steele received her final bill from Qwest, her son contacted Qwest, who told him his mother's telephone service had been switched to MCI. (Tr. 45.) Mr. Steele attempted to contact MCI on several occasions but was never able to talk with a live person. (Tr. 45, 207.) Mr. Steele testified he was put on hold. (Tr. 45.) MCI witness Ms. Lichtenberg testified she reviewed the customer account notes and did not see the calls or the holds. (Tr. 207-8, 275.) She testified it is possible that Mr. Steele hit a wrong key or did not opt out of the questions. (Tr. 207-8, 275.) The undersigned has no reason to doubt Mr. Steele's testimony and finds Mr. Steele to be a credible witness on this point. Given the testimony of Ms. Lichtenberg that during this time period MCI was in the throes of downsizing, being purchased, and reorganizing, the undersigned finds that for whatever technical reason, MCI did not provide a live person for Mr. Steele to talk with when he called about his mother's account. (Tr. 45, 206-8, 275.) MCI did not provide Mr. Steele with reasonable customer service in this circumstance. (Informal complaint file; Tr. 45, 206-8, 275.)

18. On August 1, 2005, Mr. Steele called Qwest to re-establish his mother's telephone service with Qwest. (Tr. 59, 80-1, 169.)

19. On August 18, 2005, Qwest switched Mrs. Steele's account back to Qwest and started billing her again. (Tr. 57, 59, 68, 81, 169.)

20. On August 18, 2005, Qwest sent a line loss notification regarding Mrs. Steele's account to McLeod, and McLeod sent it to MCI. (Tr. 81, 96, 203.)

21. On or before August 22, 2005, the Steeles paid MCI the \$39.70 billed on July 22, 2005. (Consumer Advocate Ex. 2App (p. MCI24.) It does not appear that MCI refunded this amount, or any part of this amount, to Mrs. Steele.

22. On August 22, 2005, MCI sent Mrs. Steele a bill in the amount of \$36.83 for the period July 22 through August 18, 2005. (Tr. 210; Consumer Advocate Ex. 16, 2App (pp. MCI24-6).

23. On August 29, 2005, MCI cancelled Mrs. Steele's account. (Tr. 169; Consumer Advocate Ex. 4App.)

24. On September 14, 2005, MCI received the Steele's payment of \$36.83. (Consumer Advocate Ex. 4App.)

25. On September 19, 2005, Mrs. Steele filed an informal complaint against MCI with the Board, alleging that MCI billed her for service after her son had requested that her service be switched to Qwest. (Informal complaint file; Tr. 43-4, 155.) In her complaint, Mrs. Steele requested that further questions be directed to her son as he handles her business affairs. (Informal complaint file; Tr. 44.)

26. During the informal complaint investigation by Board staff, MCI did not respond to the Board staff's letter asking for information other than sending an email dated October 18, 2005, that said MCI would respond by the close of business on October 19, 2005. (Informal complaint file.) MCI did not provide this response. (Informal complaint file.) On October 21, 2005, Board staff issued a proposed

resolution finding by default that MCI was in violation of the Board's slamming rules and directing MCI to fully credit all charges and close the account. (Informal complaint file.) At the hearing, when asked why MCI had not responded to the Board staff letter during the informal complaint investigation, MCI witness Ms. Lichtenberg testified: "Well, this is the sad part of the MCI history. This complaint came in when MCI was in the throes of downsizing, being purchased, reorganizing, and it apparently sat on a desk. As soon as MCI realized it was sitting on a desk somewhere, we responded, but there may not have been a person to respond, unfortunately." (Tr. 206-7.) This is an unacceptable reason for a company to fail to respond to a Board staff investigation in a timely manner. (Informal complaint file; Tr. 206-7.)

27. After the proposed resolution was issued, MCI sent a letter to Mr. Steele dated October 26, 2005, responding to the complaint. (Informal complaint file; Consumer Advocate Ex. 4App.) In the letter, MCI stated it did not show any record of having received Qwest's notification of the requested change until August 19, 2005, told Mr. Steele that MCI would refund the \$36.83 payment for service in July, and told him the account was cancelled and reflected a zero balance. (Informal complaint file; Consumer Advocate Ex. 4App; Tr. 169.)

28. MCI witness Ms. Lichtenberg was the only witness with experience regarding the wholesale interactions between Qwest and MCI. (Tr. 50, 82-91, 104-5, 109-11, 120-9, 133-5, 147-51, 182-202, 217-21, 245, 262, 281, 285.) She was the only witness who participated in the collaboratives regarding Qwest's Section 271

long distance application and the meetings regarding the migration of customers from UNE platform to UNE loop. (Tr. 82-91, 104-5, 109-11, 120-9, 133-5, 147-51, 182-202, 217-21, 245, 248, 250, 262-5, 281, 285.) She was the only witness who participated in the development of the business rules for inter-carrier communication, including when Qwest would send rejects and jeopardy notices. (Tr. 82-91, 104-5, 109-11, 120-9, 133-5, 147-51, 182-202, 217-21, 281, 285.) While the fact that Mr. Keesler works for Qwest would ordinarily give his testimony regarding the meaning of Qwest's reject codes more weight, his lack of experience and Ms. Lichtenberg's extensive experience regarding wholesale interactions between the companies persuades the undersigned that Ms. Lichtenberg's testimony is more credible. (Tr. 50, 82-91, 120-9, 133-5, 147-51, 182-202, 217-21, 226, 248, 262-5, 280-1, 285.) Therefore, the undersigned finds the testimony of Ms. Lichtenberg on these issues to be more credible than that of Mr. Keesler and Mr. Bench. (Tr. 50, 82-91, 104-5, 109-11, 120-9, 133-5, 147-51, 182-202, 217-21, 248, 262-5, 280-1, 285.)

29. It was reasonable for MCI to rely on the business rules and systems developed during the Section 271 proceedings for electronic communication between Qwest and competing carriers. (Tr. 82-4, 120-9, 147-51, 160-2, 172-5, 182-202, 218-9, 245, 250-1, 255, 257, 281, 285; MCI Exs. JMR-106 through JMR-108, SL-108, SL-109.) It was reasonable for MCI to expect that Qwest's system would reject the order received from McLeod on June 28, 2005, to convert Mrs. Steele's account to McLeod, because Qwest had already entered the order in its system to change Mrs. Steele's service from MCI to Qwest on June 27, 2005. (Tr. 60-4, 73-4, 82-7, 120-9,

147-51, 172-5, 182-202, 219-21, 257, 262-5, 281, 285; MCI Exs. JMR-106 through JMR-108, SL-107, SL-108, SL-109.) It was reasonable for MCI to expect that Qwest's system would send a reject code 820 or 821 to MCI or McLeod in this situation. (Tr. 60-4, 73-4, 82-7, 120-9, 147-51, 172-5, 182-202, 219-21, 254-9, 262-5, 281, 285; MCI Exs. JMR-106 through JMR-108, SL-107, SL-108, SL-109.) It was reasonable for MCI to expect that, even if the Qwest system did not initially reject the June 28, 2005, order, it would have issued a jeopardy notice. (Tr. 60-4, 73-4, 82-4, 120-9, 147-51, 172-5, 182-202, 219-21, 254-9, 262-5, 281, 285; MCI Exs. JMR-106 through JMR-108, SL-107, SL-108, SL-109.)

30. There were apparently no other Iowa MCI customers who were adversely affected like Mrs. Steele, that is, who requested to switch from MCI and who were not switched when requested due to the platform conversion. (Tr. 189-90.) Across the region of both Qwest and another operating company, MCI migrated between 100,000 and 200,000 customers from UNE-P to UNE-L, and Mrs. Steele's case was the only problem of this type of which MCI is aware. (Tr. 189-90, 203, 251.)

31. The evidence in the record indicates that MCI engaged in reasonable planning for the platform conversion given the work involved and the timeframe available. (Tr. 105-7, 112-29, 133-5, 150, 172-5, 181-9, 195-8, 262, 264, 274; Consumer Advocate Ex. 23App.) The persuasive evidence shows that the suggestion by Consumer Advocate witness Mr. Bench that MCI could have manually reviewed all the line loss reports during the platform conversion was not realistic and

there is nothing to indicate it would have provided better results than the method chosen by MCI. (Tr. 105-7, 112-29, 133-5, 245-6, 251, 269-70.) The evidence also shows that, in order to implement Mr. Bench's suggestion that MCI develop new codes to electronically distinguish between legitimate line losses and those related to the conversion, MCI would have had to go to the change management committee at Qwest and all CLECs would have had to agree to the change, which would have taken longer than the time MCI had available to complete the conversion by the FCC-mandated deadline. (Tr. 202, 269-70.)

CONCLUSIONS OF LAW

1. As discussed above, Iowa Code § 476.103 and the version of 199 IAC 22.23 in effect during the events at issue in this case, when read together as a whole, prohibited unauthorized changes in telecommunications service, including slamming and cramming.

2. As discussed above, there was no slam or cram in this case within a fair interpretation and reasonable reading of Iowa Code § 476.103 and 199 IAC 22.23.

3. When the Board receives a customer complaint, the applicable Board rule requires that a copy of the complaint will be forwarded to the alleged unauthorized service provider and the company shall file a response to the complaint within 10 days of the date the complaint was forwarded. 199 IAC 6.8. MCI failed to respond to the complaint as required and only responded after Board staff had

issued a proposed resolution finding by default that MCI had slammed Mrs. Steele (based on the facts as known at the time). The undersigned notes that the Board recently issued a judgment by default in the amount of \$10,000 to a company for failure to respond in an informal complaint proceeding and to a Board order requiring response. In re: Office of Consumer Advocate v. International Satellite Communications, Docket No. FCU-06-44, "Order Granting Motion for Default Judgment and Ordering Payment of Default Judgment" (October 5, 2006) (ISC Order). In the ISC Order, the Board stated that "failure to respond to Board inquiries and orders is a serious violation," and "the degree to which a party participates in the Board's investigation of informal complaints and responds to Board orders is an important factor in determining the size of the penalty for a violation." The Board found the maximum penalty was warranted because the company showed "a disregard for the process by its complete lack of response." In this case, the reason given by MCI for the failure to respond during the informal complaint investigation does not excuse MCI's behavior in the least. If MCI had not promptly responded soon after receiving the default proposed resolution, or if it did not appear that MCI's failure to respond was a one-time failure, a civil penalty would be warranted. MCI is hereby placed on notice that its failure to timely respond to future Board staff investigations of informal customer complaints could result in the imposition of civil penalties pursuant to Iowa Code § 476.51 and other applicable statutes.

4. Iowa Code § 476.103(4)(a) states that the Board may levy a civil penalty if it finds a service provider violated the statute, a Board rule, or a Board

order issued pursuant to the section. This section requires the Board to exercise its discretion when determining whether to impose a civil penalty. Consumer Advocate v. Qwest, FCU-02-22, "Order Granting Request for Leave to Amend and Denying Request for Reconsideration," p. 3 (May 28, 2003).

5. Iowa Code § 476.103 and 199 IAC 22.23 do not require any particular intent on the part of the slamming entity. Consumer Advocate v. Qwest and MCI WorldCom Communications, Inc., FCU-02-5, "Order Docketing Complaint, Requiring Additional Information, and Assigning to Administrative Law Judge," p. 6 (May 14, 2002). However, the Board has also stated that many slamming cases "appear to be the result of inadvertent errors that will not be deterred by civil penalties; in such cases, the appropriate resolution is to make the customer whole (since the errors are clearly not the customer's) at the expense of the carrier that committed the errors." Consumer Advocate v. Qwest, FCU-02-22, "Order Denying Petition for Proceeding to Impose Civil Penalties," p. 5 (April 16, 2003).

6. As discussed above, since MCI did not commit a slam or a cram within a reasonable reading of the meaning and intent of Iowa Code § 467.103 and 199 IAC 22.23, no civil penalty is warranted in this case.

7. As discussed above, even if the behavior in this case is viewed as a slam or cram because of the result to the customer, given the unique circumstances of this case, it would not be appropriate to impose a civil penalty. Consumer Advocate v. Qwest, FCU-02-22, "Order Denying Petition for Proceeding to Impose Civil Penalties" (April 16, 2003).

IT IS THEREFORE ORDERED:

1. The motion to dismiss filed by MCI on July 6, 2006, is denied for the reasons given in the body of this decision.
2. Within 10 days of the date of this order, MCI must refund either the entire \$39.70 it billed Mrs. Steele on July 22, 2005, for telephone service for the period June 22 through July 21, 2005, or a prorated amount billed for service between July 7 and July 21, 2005. In the letter enclosing this amount, MCI must apologize to the Steeles for any inconvenience they experienced due to the circumstances of this case.
3. Motions and objections not previously granted or sustained are overruled. Arguments in the briefs, motions, and made at hearing that are not specifically addressed in this order are rejected, either as not supported by the evidence or the law, or as not being of sufficient persuasiveness to warrant comment.
4. No civil penalty is assessed.

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 20th day of February, 2007.