

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 NOS. FCU-03-21, FCU-05-53, FCU-05-65</p>
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ORDER REGARDING OBJECTION TO DIRECT ASSESSMENTS

(Issued March 14, 2007)

PROCEDURAL HISTORY AND SUMMARY

On January 26, 2007, MCI Communications Services Inc., d/b/a Verizon Business Services (Verizon), filed an objection¹ in these dockets pursuant to Iowa Code § 476.10 (2007) to certain direct assessments it received from the Utilities Board (Board) and the Consumer Advocate Division of the Department of Justice (Consumer Advocate). Section 476.10 provides that the Board may, at its discretion, allocate and charge its expenses directly attributable to a case to the person bringing the matter or to the persons participating in the matter. The statute also provides that the Board shall similarly assess the certified expenses of

¹ Verizon's objection uses a slightly different caption (apparently reflecting a corporate name change). For consistency of record-keeping, the Board has used the original caption form.

Consumer Advocate. These case-specific charges are commonly referred to as the Board's "direct assessment." All other expenses of the Board and Consumer Advocate are recovered through one of the "remainder" assessments, which may be industry-specific or general.

Section 476.10 goes on to provide that a person receiving an assessment from the Board must pay it within 30 days or file a written objection stating the grounds upon which the person claims the assessment is excessive, unreasonable, erroneous, unlawful, or invalid. Upon receipt of an objection, the Board "shall set the matter for hearing and issue its order in accordance with its findings in the proceeding."

Verizon has objected that the direct assessments associated with these dockets are excessive, unreasonable, and unlawful for various reasons.

On February 9, 2007, Consumer Advocate filed a response to the objection, responding to each Verizon argument and asserting that litigation is expensive but is the only available option when a company denies a violation and declines to settle.

SUMMARY OF THE INDIVIDUAL CASES

Verizon objects to the assessments for three slamming and cramming dockets, FCU-03-21 (Kilaru), FCU-05-53 (Putz/Anderson), and FCU-05-65 (Steele). The total direct assessment was \$55,127, broken down as follows:

<u>FCU-03-21 (Kilaru)</u>	
Board charges:	\$12,635
Consumer Advocate charges:	\$20,712
<u>FCU-05-53 (Putz/Anderson)</u>	
Board charges:	\$0
Consumer Advocate charges:	\$6,614
<u>FCU-05-65 (Steele)</u>	
Board charges:	\$2,524
Consumer Advocate charges:	\$12,642

The cases are at various stages. In the Kilaru case, the Board found that Verizon had committed an unauthorized change in the customer's service, but also found that a refund to the customer was a sufficient remedy and civil penalties were not appropriate. (The case involved a sales pitch that was either misleading or was misunderstood by the customer.) Consumer Advocate appealed the Board's decision not to award civil penalties to the district court and Verizon cross-appealed, arguing that the statute and the Board's rules at that time did not prohibit unauthorized changes in service. The district court agreed with Verizon and reversed the Board's finding that the company had violated the statute. Consumer Advocate and the Board have appealed the district court decision.

The Putz/Anderson case is a consolidation of two complaint dockets assigned to the Board's administrative law judge (ALJ). They have been stayed by the ALJ pending the outcome of the Kilaru appeal; if the district court decision is affirmed on appeal, then these cases will presumably be dismissed because at the

time of the action complained of the statute and rules did not prohibit the activities in question (according to the district court in the Kilaru case).

The Steele case is in process before the Board. The matter was assigned to the ALJ, who issued her proposed decision on February 19, 2007. Briefly, the case involves a customer who was trying to change from local service provided by MCI Communications Services Inc. (MCI) to Qwest. Unfortunately, the customer's change order was submitted at the same time that MCI was migrating all of its local customers from the ILEC's UNE-P wholesale service to another carrier's UNE-L wholesale service, as a result of a ruling of the Federal Communications Commission that the ILEC no longer has to sell the UNE-P service. MCI asserts that this mass migration of customers required that it temporarily suppress line loss reports while the conversion was taking place; unfortunately, the Steele's placed an order to move their local service from MCI to Qwest just before the mass migration, with a completion date after the migration. The order was suppressed and the mistake was not discovered until some time later. Out of 150,000 customers migrated, this was the only complaint, according to MCI.

VERIZON'S OBJECTIONS

Verizon raises slightly different objections to the assessment in each of the cases.

With respect to the Kilaru case, Verizon's basic objection is that the District Court issued a decision favorable to Verizon and it is "outrageous" to require that

Verizon pay the Board's and Consumer Advocate's costs on appeal when Verizon is the prevailing party. Verizon asserts this raises "serious due process problems" but cites no authority in support of its claim. Verizon goes on to argue that assessing costs regardless of outcome effectively allows Consumer Advocate to ensure a carrier will suffer some monetary loss simply by filing a claim, no matter how lacking in merit, concluding that "forcing a carrier who has not violated the law to pay a fine that would be substantially less than the costs of defense plus the costs of the enforcement agency **when the agency knows (or should know) the claim has no merit smacks of extortion....**" (Verizon objection at pages 3-4, emphasis added.)

Verizon also argues that Consumer Advocate unilaterally made the appeal necessary, so Verizon should be protected from bearing any Board or Consumer Advocate costs associated with the appeal. Finally, Verizon argues that the assessment, and particularly Consumer Advocate's share of the assessment, is excessive, noting that Consumer Advocate charged over 248 hours to this matter just for briefing and oral argument, compared to 97 hours billed by Verizon's local counsel.

With respect to the Putz/Anderson cases, Verizon asserts that the Consumer Advocate charges are excessive and unreasonable, as Consumer Advocate has invested over \$6,000 in the case, which has not yet gone to hearing, with a maximum penalty of \$10,000. Verizon argues the charges are out of proportion to

the nature of the case. At the very least, Verizon asks that the Board await final resolution before deciding how to assess the costs of this case.

With respect to the Steele case, Verizon again argues the charges are excessive and unreasonable. This time, Verizon argues the merits of the case, insisting that there was no slam, no cram, and no reason to award civil penalties. Again, Verizon argues that at the very least the Board should suspend this invoice until a final order has been issued by the Board in this matter.

CONSUMER ADVOCATE'S RESPONSE

In its response, Consumer Advocate notes that Iowa Code § 476.10 is a cost recovery statute and the expenses Consumer Advocate has charged are the expenses it has incurred in the performance of its duties in these three cases involving Verizon. The direct assessment is therefore within the authorization contained in the statute.

As a general response, Consumer Advocate states that when a company denies a violation and declines to settle, the only means available to Consumer Advocate to advance its position is to proceed with litigation. This involves, among other things, investigation and discovery, which sometimes involves discovery disputes and "company strategies that increase the burden on Consumer Advocate." (Response at page 3.) Direct assessment properly places the cost of such strategies on the companies that engage in them, and thereby discourages the use of such strategies, according to Consumer Advocate.

Consumer Advocate responds to Verizon's objection to the Kilaru case by pointing out that the district court decision in favor of the company has been appealed, so "it therefore cannot be said with finality that MCI has been vindicated." (Response at page 4.)

More generally, Consumer Advocate argues § 476.10 is not a traditional fee-shifting statute under which the prevailing party should not pay; instead, it is a funding mechanism to enable the Board and Consumer Advocate to fulfill the duties assigned to them by statute. As a result, the direct assessment under §§ 476.10 and 475A.6 (Consumer Advocate's counterpart to the assessment statute) is not dependent upon the outcome of the case.

Consumer Advocate concludes that the assessment is not excessive, unreasonable, erroneous, unlawful, or invalid, so the objection should be overruled.

ANALYSIS AND DECISION

The Board agrees with Consumer Advocate that § 476.10 is a funding statute, not a fee-recovery statute. Thus, in cases like these, where Verizon is the only party with the financial resources to pay, it is permissible under the statute to charge all of the Board's and Consumer Advocate's expenses to Verizon. However, that result is not required; the direct assessment is discretionary. The statute begins: "In order to carry out the duties imposed upon it by law, the board may, ***at its discretion***, allocate and charge directly the expenses attributable to its

duties to the person bringing a proceeding before the board or to persons participating in matters before the board." (§ 476.10, emphasis added.)

Thus, the question is really whether the Board should exercise its discretion to assess these costs in a different manner. The Board has analyzed the options and concludes that for most contested cases before the agency the most appropriate course of action is direct assessment to the cost-causing party or parties, billing the matter as it proceeds, with adjustments at the end if necessary. This approach properly recovers the agency's costs from the cost-causer in most cases and can be fine-tuned when necessary or appropriate.

The alternative would be to adopt a standard practice of delaying the billing of the Board's costs until the matter is resolved by the Board. It is clear that the Legislature did not intend delayed billing to be the only approach, as § 476.10 specifically authorizes the Board to make direct assessments "from time to time during [the] progress [of a matter]." Nonetheless, there are some types of dockets that may appropriately be held for billing until they are concluded, and the Board concludes that the Putz/Anderson and Steele cases fall within this category because of the district court ruling in the Kilaru case. If that ruling is affirmed on appeal, then it appears likely that the Putz/Anderson and Steele cases will have to be dismissed and it would be inappropriate to directly assess the costs of those cases to the company in those circumstances. For this reason, and based on the unusual facts of these cases, the Board will grant Verizon the minimum relief it has requested for these

cases and will withdraw the assessment issued to date and defer billing of the Board's costs² for these cases until they are concluded at the agency level. If the matters are concluded in a manner that makes direct assessment appropriate, Verizon will have the right to file a new objection at that time, if it believes an objection is appropriate.

The Kilaru case is already concluded at the agency level and is on appeal. Having considered the various alternatives, the Board concludes that as a general rule the agency costs incurred in connection with judicial review proceedings and other court proceedings should be recovered through the remainder assessment, rather than direct assessment. Judicial review proceedings generally result in a published opinion that affects most or all of the utilities in a particular industry, so it is appropriate to spread the agency's costs to the entire industry. In most cases, this means the costs will be assessed through the industry-specific assessment, but in some cases the general remainder assessment may be more appropriate (a challenge to the Board's procedural rules, for instance, might be considered to affect all industries).

The Board will therefore cancel the direct assessment to Verizon that is associated with the Kilaru appeal and move that balance to the telephone industry remainder assessment. This gives Verizon the relief it requests with respect to this

² The Board understands that Consumer Advocate will adjust its billing in these cases in the same manner as the Board, making it unnecessary for the Board to consider Consumer Advocate's charges separately.

assessment, so no hearing or further action is necessary on this part of Verizon's objection.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Objection To Direct Assessments" filed by MCI Communications Services Inc., d/b/a Verizon Business Services, on January 26, 2007, is granted as described in this order. The Board's direct assessment dated December 27, 2006, and associated with the judicial review of the Board's decision in Kilaru v. MCI, Inc., Docket No. FCU-03-21, is canceled and the Board's costs are to be collected through the telephone industry remainder assessment. The Board's direct assessment dated December 27, 2006, and associated with OCA vs. MCI, Inc., Docket Nos. FCU-05-53 and FCU-05-56, is canceled and the determination of how those costs will be assessed is deferred until the consolidated cases are completed at the agency level.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 14th day of March, 2007.