

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>EVERCOM SYSTEMS, INC.,</p> <p style="padding-left: 100px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-06-40</p>
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**ORDER REGARDING MOTION TO COMPEL AND  
REQUEST FOR A PROTECTIVE ORDER**

(Issued March 29, 2007)

On March 9, 2007, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a motion to compel discovery. In it, the Consumer Advocate requested an order compelling Evercom Systems, Inc. (Evercom) to respond to data request no. 48. The data request seeks the billing contracts Evercom has with local exchange carriers (LECs) Qwest and AT&T and information and documentation regarding a notice of intent to cancel AT&T sent to Evercom and later rescinded.

On March 23, 2007,<sup>1</sup> Evercom filed a resistance to the Consumer Advocate's motion and a request for a protective order.

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<sup>1</sup> Counsel is reminded that responses to discovery motions must be filed within ten days of the filing of the motion. 199 IAC 7.15(5). This is different than responses to all other types of motions, which are due within 14 days of the date the motion is filed. 199 IAC 7.12. The violation is waived and the undersigned will consider the response filed by Evercom in ruling on the motion.

On March 26, 2007, Evercom filed an amended response to Data Request No. 48, an addendum to its resistance with an affidavit, a request for confidentiality of its amended response to Data Request No. 48, and a withdrawal of Evercom's attorney, Ms. Krista Tanner. The amended response to Data Request No. 48 answers most of the questions asked in the data response. However, Evercom did not provide the requested billing contracts with Qwest and AT&T, the documentation regarding AT&T's notice of intent to cancel, and the requested information regarding persons with knowledge of the answers to the data request. The Utilities Board (Board) will rule on the request for confidentiality in a separate order. For the purposes of this order, the undersigned administrative law judge will assume the Board will grant the request and will therefore treat Evercom's amended response as confidential.

On March 27, 2007, the Consumer Advocate filed a reply on the motion to compel.

### **The Consumer Advocate's position**

The Consumer Advocate argues that the subject matter of this case includes, among other things, Evercom's role in billing for fraudulent calls made by inmates. It argues that role necessarily included the contracts under which the LECs perform the billing role for Evercom, and the contracts are therefore within the subject matter of this action. Since the contracts are within the subject matter of the case, the Consumer Advocate argues they are discoverable under Iowa R. Civ. P. 1.503(1), which states that parties may obtain discovery of any matter that is relevant to the subject matter involved in the pending action.

The Consumer Advocate argues that Data Request No. 48 was prompted by statements Evercom made in its SEC Form 10-K, which show the importance of the LEC contracts to Evercom's operations and the involvement of the LECs in decisions about billing and service errors. The Consumer Advocate argues the contracts are relevant or potentially relevant in many ways. It argues that billings and collections go directly to profit, and the contracts may show or help to show the extent to which Evercom is profiting from unauthorized billings and will help explain what motivates Evercom. The Consumer Advocate argues the contracts will likely contain information regarding Evercom's state of knowledge regarding disputed or unauthorized billings and information regarding the volume or nature of disputed billings. The Consumer Advocate further argues the contracts may support a conclusion Evercom should have done more to prevent fraudulent billings or contain evidence regarding "hard sustain" collection practices. The Consumer Advocate argues in each of these ways, the contracts are relevant or potentially relevant to the issue of penalty.

The Consumer Advocate argues that the requested correspondence between AT&T and Evercom is within the subject matter of the action and relevant to it for all of the same reasons. The Consumer Advocate argues it may contain information or lead to information regarding any of the above matters.

The Consumer Advocate argues Evercom's arguments regarding confidentiality are without merit, and points out that Evercom and the Consumer Advocate have a confidentiality agreement in place. The Consumer Advocate further

argues Evercom's assertions of attorney-client privilege are without merit because the Consumer Advocate does not seek any communication between Evercom and its counsel or between AT&T and its counsel. Furthermore, the Consumer Advocate argues, if Evercom put otherwise privileged information in the correspondence with AT&T, or discussed otherwise privileged information with AT&T, the privilege was waived.

Unfortunately for the clarity of this order, Evercom has claimed its amended response to Data Request No. 48 as confidential and the Consumer Advocate's reply contains confidential information. On page 3 of its reply, the Consumer Advocate argues that the requested AT&T documents are relevant for a stated confidential reason. The Consumer Advocate further argues that Qwest acted as the billing agent on the calls billed to Mr. Silver and the contracts are therefore relevant.

The Consumer Advocate argues that all potentially relevant material is discoverable. It also argues that if there are trade secrets, as Evercom claims, they may justify a protective agreement, which the parties have previously executed, but they do not justify a complete refusal to provide the discovery. The Consumer Advocate argues the request is not burdensome and seeks only a small number of specific documents. The Consumer Advocate argues that Evercom's claim that production would unduly burden Evercom by adversely affecting its relationship with Qwest and AT&T is just another way of saying that Evercom and another company can create a privilege by agreeing to keep something secret, which lacks legal support.

### **Evercom's position**

Evercom argues that the billing contracts do not even remotely concern unauthorized billing, fraud perpetrated by inmates, or the steps Evercom has taken to prevent billing problems. Evercom argues that the subject matter of this suit is a simple allegation of cramming against Evercom and Evercom's assertion of inmate fraud. It argues the contracts Evercom has with the LECs are outside of the realm of this subject matter. Evercom argues it has never stated or insinuated that Qwest and AT&T had anything to do with the inmate's fraudulent activity that led to the billing of Mr. Silver. Further, argues Evercom, neither LEC was involved in any way in the system installed in the Bridewell facility or the fraud prevention measures taken at Bridewell.

Evercom argues the Consumer Advocate's sole claim of relevance is that the documents are relevant to the penalty issue. However, argues Evercom, the documents sought do not show or tend to show any of the factors set forth by the Board in determining penalty. They are irrelevant to Evercom's role in the alleged inmate fraud, Evercom's profit in the alleged fraud, or that Evercom could have prevented the alleged fraud. Evercom argues the documents requested have nothing to do with the system at Bridewell or whether Evercom could have done anything to prevent the inmate's billing fraud. It argues the contracts are merely contracts for the LEC to provide service to Evercom and have no relevance to penalty.

Evercom argues the documents pertaining to AT&T's notice of intent to cancel and subsequent rescission only concern a misunderstanding regarding Evercom's notice to AT&T of a settlement in a California case as it explained in its amended response to Data Request No. 48. It argues the documents do not involve Bridewell, do not contain any information pertaining to allegations of unauthorized billing by Evercom, and do not pertain to any billing arrangements for Iowa customers. Furthermore, Evercom argues, there was no finding of wrongdoing on the part of Evercom in the California settlement.

Evercom argues it has already furnished the Consumer Advocate with all the information pertinent to the California settlement. It argues the documents requested are solely involved with a notification issue between Evercom and AT&T as explained in its amended answer. Evercom argues the documents are confidential and outside the subject matter of this proceeding.

Evercom states that the Consumer Advocate argues that the contracts and AT&T documents "may" be relevant to a number of issues. However, Evercom argues, even taken together, this collection of speculative "mays" does not amount to subject matter relevance. Furthermore, it argues, it has already provided a litany of information on each of these topics.

Evercom argues the contracts and AT&T documents have nothing to do with Evercom's profits and Evercom has already provided the Consumer Advocate with complete financial statements and the regulatory complaints filed against it. Evercom argues the requested documents would not contain information regarding the volume

of disputed billings and it has already provided extensive information regarding the volume of disputed billings.

Evercom argues its motivation, state of knowledge, and collection practices cannot logically be reflected in the requested documents, and its only motivation evidenced is Evercom's desire to procure the services of the LEC. It also argues the requested documents do not contain any information regarding Evercom's collection practices. Evercom argues its preventative measures taken to prevent fraud have already been addressed in previous data requests and these irrelevant documents would add nothing to what the Consumer Advocate already has. Evercom further argues that Data Request No. 48 is irrelevant and overbroad in that the contracts it requests do not relate to the State of Iowa or the Bridewell Detention Center.

Finally, Evercom argues that Iowa courts have imposed a more restrictive relevance standard for the discovery of confidential trade secrets and Iowa R. Civ. P. 1.504(1) provides a valid basis for a court to prevent or restrict discovery even if the requested documents are held to be within the subject matter of this proceeding. Evercom argues the requested documents are confidential trade secrets within the meaning of Iowa Code § 550.2(4). It argues good cause exists to prevent the disclosure of this information because disclosure would cause annoyance and oppression and would strain Evercom's important relationship with AT&T and Qwest. It argues the harm posed by dissemination of the requested documents is both substantial and serious. Evercom argues the information sought is neither relevant nor necessary to the proper presentation of the Consumer Advocate's case.

Therefore, Evercom requests that the undersigned administrative law judge issue a protective order pursuant to Iowa R. Civ. P. 1.504(1) to prevent the discovery of this information and to protect Evercom from commercial damage in light of the lack of relevance or necessity.

### **Analysis**

Discovery procedures applicable in civil actions are available to the parties in contested cases before the Board. Iowa Code § 17A.13 (2007). "The rules providing for discovery and inspection shall be liberally construed and shall be enforced to provide the parties with access to all relevant facts. Discovery shall be conducted in good faith, and responses to discovery requests, however made, shall fairly address and meet the substance of the request." Iowa R. Civ. P. 1.501(2). "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Iowa R. Civ. P. 1.503(1). "It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Iowa R. Civ. P. 1.503(1). "As this rule makes clear, a party is entitled to discover any information that is not privileged and that is relevant to the subject matter of the lawsuit. [citation omitted.] Relevancy to the subject matter of the lawsuit is broader than relevancy to the precise issues in the pleadings because the rule allows discovery of inadmissible information as long as it leads to the discovery of admissible evidence. [citation omitted.] In this connection,

the court has recognized that there is no true privilege against discovery of trade secrets or other confidential information. ... The court has also recognized that a trade secret must and should be disclosed if the disclosure is relevant and necessary to the proper presentation of a plaintiff's or defendant's case. [citation omitted.] The catch is to secure the right of one litigant to get relevant and necessary information and to protect the other litigant from disclosing secrets which are not relevant and necessary, especially where the action is between competitors." Mediacom Iowa, LLC, v. City of Spencer, 682 N.W.2d 62, 66 (Iowa 2004) (Mediacom).

Iowa R. Civ. P. 1.504(1) states that upon motion and for good cause, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. The court may order that a trade secret or other confidential commercial information not be disclosed or that it be disclosed only in a designated way. Iowa R. Civ. P. 1.504(1). Before issuing a protective order, the court must determine whether the information constitutes a trade secret or other confidential commercial information and must then determine whether good cause has been shown for the protective order. Mediacom, at 67. To establish good cause, the requesting party must make a particular demonstration of fact, as opposed to stereotypical and conclusory statements. Mediacom, at 68. The court should evaluate whether the harm posed by dissemination is substantial and serious; the order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest. Mediacom, at 68. These three criteria "strike a balance between the policy favoring

discovery and free expression on one side and a party's interest in avoiding commercial damage and preventing an abuse of discovery on the other." Mediacom, at 68 (quoting In re Halkin, 598 F.2d 176, 191 (D.C.Cir. 1979)).

The undersigned finds the Consumer Advocate's arguments regarding the relevance of the Qwest contract to be more persuasive than those of Evercom. Qwest acted as the billing agent on the calls billed to Mr. Silver. As the Consumer Advocate argued, the subject matter of this case includes Evercom's role in billing for fraudulent calls made by inmates, and that role necessarily includes the contracts under which Qwest performed the billing role for Evercom. Since Qwest acted as the billing agent for the calls billed to Mr. Silver, the contract between Evercom and Qwest is within the subject matter of this case and is discoverable. Evercom must provide the requested billing contract between Evercom and Qwest to the Consumer Advocate.

However, the undersigned finds Evercom's arguments regarding the relevance of the AT&T contract to be more persuasive than those of the Consumer Advocate. It appears that Evercom's contract with AT&T has nothing to do with the Bridewell facility, calls billed to Iowa customers, or factors to be evaluated regarding a possible penalty. The undersigned accepts as true Evercom's assertions that it has provided discovery to the Consumer Advocate that is directly relevant to these issues in answers to other data requests. Given this, the undersigned finds Evercom's arguments that the AT&T contract is irrelevant to the subject matter of this case, including the factors related to penalty, to be persuasive. However, Evercom's

arguments regarding confidentiality do not provide any persuasive reason to prevent discovery of the requested information, and those arguments are not the basis for this decision. Since it does not appear that Evercom's contract with AT&T relates to the subject matter of this case, Evercom is not required to provide it to the Consumer Advocate.

In its amended response to Data Request no. 48, Evercom answered most of the Consumer Advocate's questions regarding AT&T's notice of intent to cancel and its rescission, but did not provide the requested documentation to support the answers and did not provide the names of persons with knowledge of the answers. The undersigned finds the Consumer Advocate's arguments regarding relevance of the requested information to be more persuasive than that of Evercom, primarily because of the confidential argument contained on page 3 of the Consumer Advocate's reply on motion. The requested documents may provide information relevant to the subject matter of this proceeding. Evercom must provide the documents requested in question F of Data Request No. 48 to the Consumer Advocate. The undersigned notes that the Consumer Advocate clarified that it is not seeking communications between Evercom and its lawyers in the data request.

Evercom must provide the names of persons with knowledge requested in question G of Data Request No. 48 to the Consumer Advocate with respect to the billing contract Evercom has with Qwest and with respect to questions B-E of Data Request No. 48.

For the purpose of evaluating whether a protective order should be granted pursuant to Iowa R. Civ. P. 1.504(1), the undersigned will assume that the requested information is a trade secret or other confidential commercial information within the meaning of the rule. The undersigned notes that the Consumer Advocate is not a competitor of Evercom. Evercom has not made a particular demonstration of fact that dissemination to the Consumer Advocate would be harmful to it as required by Mediacom. The undersigned finds Evercom's argument regarding harm from dissemination of the requested information to be unpersuasive regarding dissemination to the Consumer Advocate so long as the protective agreement between Evercom and the Consumer Advocate remains in effect and is followed. The undersigned finds Evercom's argument regarding harm from dissemination to the general public to be persuasive. Therefore, the undersigned will require that the parties follow the terms of their protective agreement with regard to any information disclosed to the Consumer Advocate pursuant to this order. However, Evercom is not entitled to an order preventing disclosure of the requested information to the Consumer Advocate pursuant to Iowa R. Civ. P. 1.504.

**The timeliness issue**

In its resistance, Evercom provided a procedural history of the discovery in this case and relevant orders. Evercom stated that the Consumer Advocate initiated discovery on August 9, 2006. Evercom further stated that on October 4, 2006, the undersigned issued the first procedural order, which stated that the Consumer Advocate could issue follow-up discovery to Data Request Nos. 12, 13, and 14 by

November 28, 2006. The order also stated that the Consumer Advocate's remaining data requests will all be follow-up to answers received from Evercom and the Consumer Advocate will not initiate any new lines of discovery. Evercom further stated that, at the request of the Consumer Advocate, the undersigned issued an order on January 4, 2007, extending all deadlines by 90 days. Evercom stated that the Consumer Advocate filed its motion to compel over four months after the Consumer Advocate received Evercom's response to Data Request No. 48.

In its reply, the Consumer Advocate stated under the October 4 and January 4 procedural orders, both Data Request No. 48 and this motion to compel are timely. The Consumer Advocate stated that Data Request 48, a follow-up to an earlier data request, was sent to Evercom on October 6, 2006, well within the timeframe in the order. The Consumer Advocate further stated that the current motion to compel was filed in accordance with the modified procedural schedule set forth in the January 4 order.

The undersigned administrative law judge is concerned with the length of time discovery is taking in this case, the apparent lack of cooperation between the parties in working out discovery disputes between themselves in conformance with the requirements of 199 IAC 7.15, and the number of delays that have been requested and granted in this case. The Board issued its order assigning this case to the undersigned on July 13, 2006. At the request of either both parties or the Consumer Advocate, the undersigned delayed setting the original procedural schedule and amended it once set. The reasons the parties have given for requesting the multiple

delays have related to the parties' conduct of discovery. The undersigned is concerned that the Consumer Advocate did not file its motion to compel for four months after receiving Evercom's original response to Data Request No. 48. The undersigned is also concerned that Evercom did not file its amended answer to Data Request No. 48 until March 26, 2007, after the Consumer Advocate filed its motion to compel.

The parties have a procedural schedule with extremely generous timeframes. There is no reason they cannot complete discovery and file prepared testimony in conformance with the current procedural schedule and be prepared to go to hearing on June 12, 2007. Therefore, the parties are put on notice that absent extreme emergency, no further delays of any deadlines set in this case will be granted.

**IT IS THEREFORE ORDERED:**

1. The motion to compel filed by the Consumer Advocate on March 9, 2007, is granted in part and denied in part as discussed in the body of this order. Evercom must provide the documents and answers to the Consumer Advocate within seven days of the date of issuance of this order.
2. The request for a protective order filed by Evercom on March 23, 2007, is granted in part and denied in part as discussed in the body of this order.
3. The parties are ordered to comply with the requirement to engage in good faith efforts to resolve discovery disputes in compliance with 199 IAC 7.15.
4. Absent extreme emergency, no further delays of any deadlines set in this case will be granted.

5. A hearing for the presentation of evidence and the cross-examination of witnesses will be held in the Board Hearing Room, 350 Maple Street, Des Moines, Iowa, on Tuesday, June 12, 2007, beginning at 9 a.m.

**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 29<sup>th</sup> day of March, 2007.