

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">vs.</p> <p>MCI COMMUNICATIONS OF IOWA, INC., AND FRONTIER COMMUNICATIONS OF IOWA,</p> <p style="text-align:center">Respondents.</p>	<p style="text-align:center">DOCKET NO. C-06-281</p>
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ORDER DENYING REQUEST FOR RECONSIDERATION

(Issued April 2, 2007)

PROCEDURAL BACKGROUND

On February 16, 2007, the Utilities Board (Board) issued an "Order Denying Request for Proceeding to Consider Civil Penalty" in this docket. The Board denied a request filed by the Consumer Advocate Division of the Department of Justice (Consumer Advocate) for a proceeding to consider a civil penalty for an alleged slamming or cramming violation committed by MCI Communications of Iowa, Inc. (MCI), and Frontier Communications of Iowa (Frontier). The request for a proceeding to consider a civil penalty arose out of an informal complaint in which a consumer disputed charges from MCI that appeared on her bill from Frontier, her local telephone service provider. In the February 16, 2007, order, the Board concluded,

pursuant to Iowa Code §§ 476.103 and 476.3, that further investigation would not produce information that would support a finding of a slamming or cramming violation on the part of MCI or Frontier and, therefore, civil penalties would be inappropriate. The customer was credited in full for charges resulting from an inadvertent error in processing the customer's service order and Frontier acknowledged the error. Frontier offered an explanation of how the error resulted in the customer being charged by the wrong carrier at the wrong rates. In addition, Frontier states it has reviewed its system and cannot replicate the error. The Board found that any change in service providers made in this case was unsolicited, unintentional, temporary, and unlikely to recur. Office of Consumer Advocate v. MCI Communications of Iowa, Inc. and Frontier Communications of Iowa, "Order Denying Request for Proceeding to Consider Civil Penalty," Docket No. C-06-281 (February 16, 2007).

CONSUMER ADVOCATE'S MOTION TO RECONSIDER

A. Legal Background

On March 8, 2007, Consumer Advocate filed a request for reconsideration, asking the Board to reconsider its decision to deny the request for proceeding to consider civil penalty. In its request for reconsideration, Consumer Advocate gives a short analysis of Iowa Code § 476.3, quoting from the statute that "if the board determines the utility's response is inadequate and there appears to be any reasonable ground for investigating the complaint, the board must promptly initiate a formal proceeding." Iowa Code § 476.3.

Consumer Advocate then argues that § 476.103 can best be harmonized with § 476.3 by addressing the relationship between what Consumer Advocate terms an “administrative proceeding” for civil monetary penalty pursuant to § 476.103 and a “formal complaint proceeding” pursuant to § 476.3. Consumer Advocate states that there is no requirement that the Board have considered the complaint of an individual consumer seeking a credit prior to the time it considers a complaint from Consumer Advocate seeking civil monetary penalty, but as a practical matter, Consumer Advocate has “historically waited to commence a proceeding for civil monetary penalty under Code section 476.103.” Consumer Advocate further states that § 476.3 turns on whether there are reasonable grounds for investigating the complaint, while § 476.103 turns on whether assessment of a civil monetary penalty might serve the purpose for which the Legislature authorized a civil monetary penalty. Consumer Advocate asserts that the Board’s rules properly recognize the difference between a formal complaint proceeding, pursuant to § 476.3 and an administrative proceeding for civil monetary penalty. Consumer Advocate states that 199 IAC 6.5(1) reiterates the statutory provision that Consumer Advocate, if dissatisfied with a proposed informal complaint resolution, may request a formal proceeding and that a request for civil penalties in accordance with IAC 199 chapter 8 may also be filed at that time. Consumer Advocate’s point is that a request for civil monetary penalties may “alternatively be made in a different proceeding at a different time,” provided the request is made within 180 days of the date Consumer Advocate knew or should have known of the alleged violation.

B. Arguments

Consumer Advocate argues three main points: 1) there are reasonable grounds for further investigation in this matter; 2) the absence of “reasonable grounds for further investigation” is not a proper basis for rejecting a petition for a proceeding for civil monetary penalty; and 3) a violation appears in this case as a matter of law.

First, Consumer Advocate argues that there are reasonable grounds for further relief. In its initial petition for proceeding to consider civil penalties, Consumer Advocate states:

Investigation is needed to determine whether there is some other legitimate and authorized basis for the disputed charges, as MCI appears to be claiming... The Terms of any contract between Frontier and MCI do not appear in the file. MCI does not identify any basis or source for its claim ‘[r]eseller companies have 14 days to add telephone numbers to their resale account or the telephone number will bill MNS random charges.’ MCI does not explain how or on what basis, if at all, the reseller’s failure to add a telephone number to its resale account within 14 days supplies MCI with any authorization for billings to the consumer by MCI, let alone at exorbitant rates. Each of these matters requires investigation. Such investigation will enable the Board to determine more precisely what happened and hence to decide whether either or both companies violated the statute.¹

Consumer Advocate asserts that the questions advanced in its petition remain unanswered and, under § 476.3, when the Board finds a company’s response inadequate, the Board is required to commence a formal proceeding, if it determines there are reasonable grounds for further investigation.

¹ Consumer Advocate v. MCI Communications, Inc., and Frontier Communications of Iowa, “Petition for Proceeding to Consider Civil Monetary Penalty,” Docket No. C-06-281 (December 21, 2006).

Next, Consumer Advocate argues that the absence of reasonable grounds for further investigation is not a proper basis for rejecting a proceeding for civil monetary penalty. Consumer Advocate asserts that some cases can be resolved, and violations can be found, based on the informal record. Consumer Advocate asserts that in slamming and cramming cases like this, there may be no need for further investigation; however, there is still a need for civil monetary penalties. Consumer Advocate further states that § 476.103 addresses the subject of “slamming” and “cramming” explicitly and references simply “an administrative proceeding to imposed a civil penalty under this section.”² Consumer Advocate asserts that in order to commence a proceeding under this section, the Board is not required to establish a need for further investigation, only “notice and opportunity for hearing,” pursuant to § 476.103(4). Consumer Advocate asserts that the statute and the rules properly recognize the propriety of conducting proceedings for civil monetary penalties even when formal complaint proceedings are not conducted. For example, the 180-day time period for commencing a penalty proceeding is tolled during the pendency of the informal complaint proceeding. Finally, Consumer Advocate asserts that transporting the “reasonable grounds for further investigation” criterion of § 476.3 to § 476.103 would cripple law enforcement by causing the Board to reject enforcement proceedings in cases in which violations appear and that “reasonable grounds for further investigation” is not a proper criterion to be considered in determining whether to assess a civil monetary penalty.

² Id.

Consumer Advocate's third argument is that a violation appears in this case as a matter of law. Consumer Advocate asserts that § 476.103(3) does not require a finding of "slamming" or "cramming," but directs the Board to "prohibit unauthorized changes in telecommunications service, including but not limited to slamming and cramming." 199 IAC 22.23(2). Consumer Advocate asserts that the key definition in the statute and the rule is an unauthorized "change of service," and that the charges that appeared on the consumer's bill in this case were not billed by MCI as wholesaler for Frontier, but by MCI as a retail service provider. Further, Consumer Advocate argues that as a matter of law, an unauthorized "designation of a new provider"³ and a "change in service"⁴ occurred, as the consumer selected only Frontier, not MCI, as her preferred long distance carrier.

DISCUSSION

A. Legal Background.

The controlling statute in this case is Iowa Code § 476.103, entitled "Unauthorized change in service." Section 476.103 prohibits the unauthorized change of telecommunications service, sometimes referred to as "slamming" or "cramming," and vests the Board with the authority to determine whether the imposition of civil penalties will deter future violations. Iowa Code § 476.103(3).

³ Id.

⁴ Id.

Board rule 22.23 also prohibits “unauthorized changes in telecommunications service, including but not limited to cramming and slamming... .”

Section 476.103 requires the Board to “adopt rules prohibiting an unauthorized change in telecommunications service... .” This includes but is not limited to a provision encouraging service providers to resolve customer complaints without involvement of the Board;⁵ procedures for a customer, service provider, or Consumer Advocate to submit to the Board complaints of unauthorized changes in service;⁶ and a provision to impose civil penalties.⁷ The Board has read this statute in accordance with § 476.3, which gives the Board general authority concerning customer complaints against utility companies.

Consumer Advocate is correct that §§ 476.3 and 476.103 should be harmonized, as they both apply to the present case; § 476.3 generally concerning the complaint against MCI and Frontier and § 476.103 concerning the question of whether the allegedly unauthorized change in service requires civil penalties. However, the Board disagrees with the synthesis that Consumer Advocate creates between §§ 476.103 and 476.3. Consumer Advocate asserts that “there is no requirement in section § 476.103 that the Board have considered the complaint of an individual consumer seeking a credit prior to the time it considers a complaint from Consumer Advocate seeking a civil monetary penalty” and says that Consumer

⁵ Iowa Code § 476.103(3)"e."

⁶ Iowa Code § 476.103(3)"g."

⁷ Iowa Code § 476.103(4).

Advocate has historically waited to commence a proceeding for civil monetary penalty until the Board had completed the informal complaint resolution process under Iowa Code § 476.3. Essentially, Consumer Advocate argues that the purpose of § 476.3 is to grant a formal proceeding “if there appears to be any reasonable ground for further investigation...,” while § 476.103 is for the granting of an administrative proceeding⁸ to determine whether civil penalties should be imposed.

The granting of a proceeding to consider civil penalty and the granting of a formal proceeding to further investigate should not be separated in this manner. Although chapter 8 of the Board’s rules allow a request for civil monetary penalties to be made up to 180 days of the date Consumer Advocate knew or should have known of the alleged violation, and the 180-day period is tolled during the informal complaint proceeding,⁹ the statute does not require or contemplate a separate hearing. In a practical sense, a request for proceeding to consider civil penalties in a particular case should normally be brought at the same time the Board initiates a formal proceeding for further investigation, and often a request for proceeding to consider civil penalty is the reason a formal proceeding is initiated. This allows the Board to further investigate the facts that underlie the potential violation, it allows the parties an opportunity to submit evidence, and it lets the Board determine whether the public

⁸ Office of Consumer Advocate v. MCI Communications of Iowa, Inc., and Frontier Communications of Iowa, “Motion for Reconsideration” Docket No. C-06-281 (March 8, 2007).

⁹ 199 IAC 8.2.

would be served by, and the company deterred by, assessing civil penalties, all in a single proceeding.

Further, the Board disagrees with the notion that § 476.103 always requires an administrative proceeding, but § 476.3 may not. The section of the Iowa Code that controls whether a complaint is set for formal proceeding and the standard for the Board's decision on that question is contained in § 476.3. Section 476.103 does not require that there should be a separate administrative proceeding for civil penalties in individual complaint cases involving unauthorized changes in service and the Board has chosen to read § 476.103 together with § 476.3 in cases that start with an individual customer complaint. This promotes administrative efficiency and, because the standard in § 476.3 is relatively easy to meet, no party is harmed by this decision. Section 476.3 requires that the Board grant a request for formal proceedings if the Board finds "any reasonable ground for investigating the complaint." Thus, formal proceedings are denied only when there are no reasonable grounds for holding them.

This analysis illustrates the rationale for not separating §§ 476.3 and 476.103. If they were considered as two separate standards, then it could be argued in some cases that § 476.103 requires a formal hearing even though there are no reasonable

grounds for doing so, such that the standard of § 476.3 is not met. This would be an absurd result, which can be avoided by considering the two statutes together.¹⁰

B. There are No Reasonable Grounds for Further Investigation.

Consumer Advocate asserts there are reasonable grounds for further investigation.¹¹ The Board, under § 476.2, exercises broad general powers to effect the purposes of the laws it administers.¹² Part of the Board's broad general power to administer those statutes allows the Board to process customer complaints through informal proceedings. Iowa Code § 476.3 provides, in relevant part, that "the board shall grant a request for formal complaint proceeding whenever the board determines there are reasonable grounds for investigating a complaint...,"¹³ clearly contemplating that informal proceedings may be adequate in some cases.

The Board disagrees with Consumer Advocate regarding the need for further investigation of this matter. During the informal review the Board determined that further investigation would not produce information that would support a finding of a punishable slamming or cramming violation and that assessing civil penalties would not be a deterrence based on the facts gathered during the informal investigation.¹⁴

¹⁰ See State v. Allison, 576 N.W.2d 371 (In determining legislative intent, court may look to prior statutory enactments for guidance); State of Iowa v. Rickett, 2003 WL 2266923 (Statutes will be interpreted in a manner to avoid absurd results); Iowa Grocery Industry Ass'n v. City of Des Moines, 2006 WL 958669 (Supreme Court attempts to interpret statutes and ordinances in a manner so as to render them harmonious).

¹¹ In its petition, OCA stated: "Investigation is needed to determine whether there is some other legitimate and authorized basis for the disputed charges, as MCI appears to be claiming...."

¹² § 476.2(1) (2007).

¹³ Iowa Code § 476.3.

¹⁴ The customer was credited in full for charges resulting from an inadvertent error in processing the customer's service order. Frontier acknowledged the error and offered a plausible explanation of how the error resulted in the customer being charged by the wrong carrier at the wrong rates. Also,

C. The Absence of Reasonable Grounds for Further Investigation is a Proper Basis for Rejecting a Petition for a Proceeding to Consider Civil Monetary Penalty.

Next, Consumer Advocate argues that the absence of “reasonable grounds for further investigation” is not a proper basis for rejecting a petition for proceeding for civil monetary penalty. Essentially, Consumer Advocate argues that even if there is no need for a formal proceeding to further investigate whether a slam or a cram was committed, civil monetary penalties should be imposed because Iowa Code § 476.103 does not explicitly call for reasonable grounds to further investigate in order to assess civil penalties, but only “notice and opportunity for hearing.”¹⁵

The Board disagrees with Consumer Advocate. Under Consumer Advocate’s approach, every single alleged slamming and cramming case would be the subject of a civil penalty proceeding, regardless of the facts. This would not be an efficient use of the limited resources available to the Board and the parties and would render much of the Board’s informal process meaningless, contrary to the legislative intent reflected in § 476.103(3)“e” and “g.”

Many slamming and cramming cases, including this case, are the result of inadvertent errors that will not be efficiently 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.

Frontier explained that it has reviewed its system and cannot replicate the error, so no system changes can be made that will clearly prevent a recurrence. The Board found that any change in service providers made in this case was unsolicited, unintentional, temporary, and unlikely to recur.

¹⁵Iowa Code § 476.103(4).

Consumer Advocate's proposal would amount to imposing a strict liability standard on all carriers for all unauthorized charges in service, even if there was no reasonable action the carrier could have implemented in order to avoid the unauthorized change. The Board does not believe that the Legislature intended to create a strict liability standard.

D. There is No Violation as a Matter of Law.

Consumer Advocate's third argument is that a violation appears in this case as a matter of law. Consumer Advocate is correct in stating that § 476.103(3) does not require a finding of "slamming" or "cramming," but directs the Board to prohibit "unauthorized changes in telecommunications service, including but not limited to slamming and cramming." Iowa Code § 476.103; 199 IAC 22.23(2). Consumer Advocate asserts that the key definition in the statute and the rule is an unauthorized "change of service." Consumer Advocate argues that the charges that appeared on the consumer's bill were not billed by MCI as wholesaler for Frontier, but by MCI as a retail provider and Frontier as a billing agent. Further, Consumer Advocate argues that as a matter of law, an unauthorized "designation" of a new provider and a "change in service" occurred, as the consumer selected only Frontier, not MCI.

The Board does not agree that there has been a violation that justifies civil penalties. The facts gathered during the informal review show that the billing was the result of an inadvertent mistake that cannot be replicated. Many violations of the Iowa Code § 476.103 and 199 IAC 22.23 are the result of inadvertent errors that will not be usefully deterred by civil penalties. It does not matter if it is a slam or a cram

or any other type of violation. To say that Frontier and MCI violated § 476.103 and 199 IAC 22.23 as a matter of law makes the Board's informal review of the facts and circumstances meaningless because civil penalties would be addressed regardless of the underlying facts, which is contrary to the intent of the Legislature in creating the statute.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Motion for Reconsideration" filed by the Consumer Advocate Division of the Department of Justice on March 8, 2007, is denied as discussed in the Order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 2nd day of April, 2007.