

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="padding-left: 40px;">Complainant,</p> <p style="text-align:center">vs.</p> <p>MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. C-06-277</p>
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ORDER DENYING REQUEST FOR RECONSIDERATION

(Issued May 14, 2007)

PROCEDURAL BACKGROUND

On April 6, 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 cramming violation committed by McLeodUSA Telecommunications Services, Inc. (McLeodUSA). The request for a proceeding to consider a civil penalty arose out of an informal complaint in which Mr. Eddie Atkinson, a customer of McLeodUSA, disputed a \$95 "trouble charge" that appeared on his telephone bill. In the April 6 order, the Board concluded, pursuant to Iowa Code §§ 476.3 and 476.103, that further investigation would not produce information that would justify imposing a civil

penalty. Board staff noted that McLeodUSA fully credited the consumer for the charges that were the subject of the complaint, and the Board agreed with staff that at most a miscommunication occurred between the consumer and McLeodUSA.¹ The Board concluded, based upon the correspondence between Board staff and the parties, that Mr. Atkinson initiated or requested the service from McLeodUSA that led to the \$95 trouble charge. Mr. Atkinson indicated that he was informed of the possibility of a service charge of up to \$95 and that he still requested the service call. He indicated that he understood he would be charged only if the service technician entered his home.² McLeodUSA acknowledged that there may have been a miscommunication with Mr. Atkinson and says it is taking steps to address potential future communication issues.³

CONSUMER ADVOCATE'S MOTION TO RECONSIDER

On April 25, 2007, Consumer Advocate filed a motion for reconsideration, asking the Board to reconsider its decision to deny the request for proceeding to consider civil penalty. In its motion, Consumer Advocate argues that the Board's April 6, 2007, order contains errors.

Consumer Advocate argues that the Board's April 6 order misinterprets the meaning of the statutory prohibition. Consumer Advocate states that the April 6 order

¹See December 20, 2006, Proposed Resolution.

²The script used by McLeodUSA said that an isolation fee of "up to" \$95 "may" apply if a technician is dispatched and no trouble is found in the company facilities. In fact, the tariff requires a full \$95 charge in these circumstances.

³Office of Consumer Advocate v. McLeodUSA Telecommunications Services, Inc., "Order Denying Request for Proceeding to Consider Civil Penalty," Docket No. C-06-277 (April 6, 2007).

"acknowledges the facts may be as Atkinson claims (p. 4). It properly refuses to speculate regarding the facts. It concludes, however, even if Atkinson's allegations are true, there was no violation." (Motion to reconsider at 2.) Consumer Advocate asserts that this reasoning is incorrect as a matter of law and that "[t]here is no doubt the \$95 trouble charge was separately charged to Atkinson's account. The question is whether the 'change in service' was authorized." (Id.)

Consumer Advocate's second argument is that the April 6 order misperceives the remedial potential of civil penalties. Consumer Advocate asserts that the "[l]egislative intent, as expressed in the language used in the statute, is clear in encouraging providers to resolve consumer complaints without the involvement of the Board" and "is clear in encouraging providers to make 'prompt' reversals of unauthorized changes in service." Consumer Advocate argues that McLeodUSA failed because Mr. Atkinson had no success "attempting to secure a waiver." (Motion to reconsider at 3-4.)

Consumer Advocate further argues that McLeodUSA makes no statement in its response or elsewhere that it has worked with its customer service representatives or taken other steps to address future potential miscommunications. (Id.)

Consumer Advocate asserts that "having the penalty potentially available for a violation but not assessing it frustrates rather than accomplishes the statutory purpose" (Motion to reconsider at 5) and that "civil penalties are intended to secure compliance not only from the company whose conduct occasioned the enforcement actions but also from other companies." (Id.)

Last, Consumer Advocate argues that the Board has substantial resources and devotes substantial resources to telephone complaints, but nine years following the enactment of the statute prohibiting unauthorized changes in service, the complaints continue. (Motion to reconsider at 6.) Consumer Advocate asserts that the law favors settlement of controversies and that the settlements it has entered into in this area "commonly contain penalties small enough not to create a hardship for the companies but nevertheless sufficient to advance the goal of the statute . . . " (Motion to reconsider at 7.)

DISCUSSION

Iowa Code § 476.3(1) states "[i]f the consumer advocate determines the public utility's response to the complaint is inadequate, the consumer advocate may file a petition with the board which shall promptly initiate a formal proceeding *if the board determines that there is any reasonable ground for investigating the complaint.*" (Emphasis added.) The Board has previously determined that § 476.3 should be read together with Iowa Code § 476.103,⁴ the statute prohibiting unauthorized changes in service. As the Board has said before, § 476.3 requires that the Board grant a petition for a formal proceeding any time the Board determines there is any reasonable ground for doing so. Thus, the Board only denies petitions for formal proceedings when there are no reasonable grounds for further investigation.

⁴ 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).

By applying this standard to complaints of unauthorized changes in service pursuant to § 476.103, the Board is able to use its limited resources in the most efficient manner. The alternative would be to grant formal proceedings every time Consumer Advocate asked for them, even if the Board found the request unreasonable, which would be a waste of resources.

In its April 6, 2007, order, the Board found no reasonable grounds to hold a proceeding to consider a civil penalty. Consumer Advocate argues the Board's April 6 order contains errors and the Board should reconsider its denial of Consumer Advocate's petition for proceeding to consider civil penalties.

Consumer Advocate argues that the April 6 order misinterprets the meaning of the statutory prohibition of § 476.103, that the Board's reasoning is incorrect as a matter of law, and that a hearing to consider civil penalties is required in this case. The Board disagrees with Consumer Advocate's analysis of the facts and with its interpretation of the law.

As far as the facts of this case are concerned, the Board has found no reasonable grounds for granting a proceeding to consider civil penalty based on the undisputed actions of Mr. Atkinson, rather than disbelief of the claims made by Mr. Atkinson. Subrule 199 IAC 22.23(1) states "[c]ramming does not include telecommunications services that are initiated or requested by the customer." Based on the information in the record, the Board found Mr. Atkinson initiated the service

call and authorized a service technician to come to his house, knowing that a \$95 service charge was possible.⁵

Consumer Advocate states that Mr. Atkinson's "ostensible authorization for the change in service ... was induced by the misrepresentation that no charge would ensue unless the technician had to enter his home." (Consumer Advocate's motion for reconsideration at 3.) The Board does not agree. The record shows, at most, that a misunderstanding occurred between Mr. Atkinson and McLeodUSA with regard to the precise terms and conditions as to when the \$95 trouble charge would apply, but he nonetheless authorized a service call knowing there could be a charge.

In essence, Consumer Advocate's argument is that Mr. Atkinson authorized a service call when he thought a \$95 charge was possible, but he would not have authorized the call if he knew it was certain to apply. The Board finds this is not a reasonable interpretation of the record; Mr. Atkinson's telephone service was unsatisfactory and he needed a service call. It is only reasonable to conclude he would have authorized the service call even if the McLeodUSA script had been more precise, because he needed to determine why his service was unsatisfactory. The undisputed facts in this case do not establish reasonable grounds for further investigation of this case.

The Board also disagrees with Consumer Advocate's interpretation of the law. Consumer Advocate argues that civil penalties should be assessed because only the

⁵See October 19, 2006, letter from Eddie Atkinson.

actual imposition of civil penalties will deter future violations. (Motion to reconsider at 5.) In fact, Consumer Advocate goes so far as to allege that a failure to assess a civil penalty in this case "frustrates rather than accomplishes the statutory purpose." (Id.)

Consumer Advocate's argument is unsupported by the language of § 476.103. If the Board were to accept Consumer Advocate's argument, then the Board would have to hold a hearing to consider civil penalties in every case in which an unauthorized change in service is alleged, so that it could be certain of assessing a penalty in every case in which a violation occurred. That outcome is not required by the statute. Section 476.103(4)"a" provides, in relevant part, that a service provider that violates the statute or a Board rule "is subject to a civil penalty, which, after notice and hearing, may be levied by the Board" (Emphasis added.) Use of the word "may" confers a power on the Board, but not a duty. Iowa Code § 4.1(30). The statute confers civil penalty authority on the Board, which must be exercised with discretion, after notice and opportunity for hearing. Adopting Consumer Advocate's view would amount to re-writing the statute, replacing "may" with "shall." The Legislature can make that change, if appropriate, but the Board cannot.

Moreover, Consumer Advocate's own actions, as described in this motion, demonstrate that Consumer Advocate does not really believe a hearing is required in every case involving an alleged unauthorized change in service. Instead, Consumer Advocate describes its own process as one in which it "does not seek a penalty in every case of alleged violation," but instead "sifts through the cases . . . using an informed discretion of its own . . ." so that "[i]n a typical month, [Consumer Advocate]

seeks a penalty in only a handful of cases." (Motion for reconsideration at 7.) Thus, Consumer Advocate's own actions recognize that a hearing to consider the possibility of civil penalties is not required in every case involving an alleged unauthorized change in service; it is appropriate in some cases but not in others.

In light of this need to sift through the cases to decide which ones should be set for hearing, the next question is how to sift, or screen, the cases. Consumer Advocate says it uses "an informed discretion of its own" (*id.*), but, as stated previously, the Board has concluded that § 476.103 should be read in harmony with its general authority to consider and resolve complaints pursuant to § 476.3. That statute creates the process used by the Board for all customer complaints, starting with an informal investigation by means of written submissions and a proposed resolution by Board staff, the details of which are set out in 199 IAC 6. If the customer, the public utility, or Consumer Advocate is dissatisfied with the proposed resolution, a petition for formal complaint proceedings may be filed. That petition must be granted "if the board determines that there is any reasonable ground for investigating the complaint," see § 476.3(1). Thus, all reasonable cases can be set for hearing and only those petitions that lack any reasonable basis for further relief will be denied. Over the years, this has proven to be an efficient means of allocating the agency's limited resources in order to serve the public interest and the interests of the customer, the public utility, and Consumer Advocate. In the end, some test must be used to determine which cases should be set for hearing and which ones

should not; for the reasons described above, the test approved by the Legislature in § 476.3 for complaint cases in general is an appropriate one for use in the context of § 476.103, as well.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Motion for Reconsideration" filed in this matter by the Consumer Advocate Division of the Department of Justice on April 25, 2007, is denied.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Krista K. Tanner

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