

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

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| <p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE, Complainant,</p> <p style="text-align:center">vs.</p> <p>NATIONWIDE VOICE MESSAGING, INC., Respondent.</p> | <p>DOCKET NO. C-07-51</p> |
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**ORDER DENYING REQUEST FOR PROCEEDING
TO CONSIDER CIVIL PENALTY**

(Issued May 15, 2007)

PROCEDURAL BACKGROUND

On March 22, 2007, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) petitioned the Utilities Board (Board) to commence an administrative proceeding to impose a civil penalty on Nationwide Voice Messaging, Inc. (Nationwide), for an alleged cramming in violation of Iowa Code § 476.103. On April 30, 2007, Nationwide filed a response to Consumer Advocate's petition.

INFORMAL COMPLAINT PROCEEDING

On February 2, 2007, Mr. Brian Payne filed a complaint alleging that Nationwide placed unauthorized charges onto his local telephone bill. The charges

were assessed to his fax line for voice mail service. Mr. Payne stated that neither he nor his wife had ever ordered or had need of voice mail service for their fax line.

On February 5, 2007, Board staff sent a copy of the complaint to Nationwide. Nationwide responded on February 26, 2007. Nationwide described its services as providing customers with a toll-free number and personal voice mailbox for the purposes of receiving and storing an unlimited number of voice messages for a flat monthly fee. Nationwide stated that the voice messages are retrievable through audio e-mails and through the toll-free number. Furthermore, Nationwide stated that after the first free 30 days of service, a monthly fee of \$13.22 would automatically be charged and the customer could cancel at any time without incurring additional charges, except for the one-time, non-refundable set-up fee of \$15.74.

Also in its February 26, 2007, letter, Nationwide indicated that authorization was obtained through a letter of agency (LOA) completed over the Internet and listed the Internet protocol address (IP). Nationwide also enclosed a printout of the LOA with the information acquired on February 4, 2006. The LOA contained the name of Mr. Payne's wife, Dawn, her birth date, and an e-mail address. The LOA also contained Mr. Payne's post office box address and mother's maiden name. The LOA also indicated that clicking the "Submit Now" button confirmed that the customer understood and approved of the terms and conditions of the offer and the customer acknowledged that the charges would appear on his or her local telephone bill. Nationwide also stated that its reliance on a customer's electronic signature was sanctioned and written into law when the Uniform Electronic Transactions Act and the

Electronic Signatures in Global and National Transactions Act were enacted in 1999 and 2000, respectively. Nationwide further stated that all orders it receives for voice mail service are manually reviewed for completeness and validity. Nationwide stated that after the order was reviewed, Nationwide sent an e-mail confirmation to the e-mail address provided in the LOA on February 9, 2006. Nationwide stated that the e-mail sent gave the option to cancel within 72 hours of the e-mail date and time without incurring any charges, including the one-time set-up fee.

On February 28, 2007, Board staff forwarded Nationwide's response and the LOA printout to Mr. Payne and requested his response. Mr. Payne did not respond to staff's letter or to a subsequent e-mail. On March 19, 2007, Board staff issued a proposed resolution concluding that cramming did not take place because the LOA contained acceptable proof of authorization to bill for voice mail service. On March 20, 2007, Mr. Payne returned staff's message indicating that he believed the matter was resolved by the full credit.

On March 22, 2007, Consumer Advocate filed a petition for a proceeding to consider a civil penalty. Consumer Advocate stated that Board staff did not address the reason that Mrs. Payne would have ordered voice mail service on a fax line and added that there is no reason for doing so. Furthermore, Consumer Advocate stated that the post office box on the LOA was for Mr. Payne, not Mrs. Payne, and was discontinued in November 2006. Last, Consumer Advocate stated that the mother's maiden name, as requested on the LOA, pertained to Mr. Payne, not Mrs. Payne. Consumer Advocate stated that the proceeding to consider a civil penalty would

afford Nationwide notice and an opportunity for hearing to determine whether Nationwide committed a cramming violation and, if applicable, consider a penalty in an amount designed to deter future violations.

On April 30, 2007, Nationwide filed a response to Consumer Advocate's petition for proceeding to consider civil penalty. Nationwide stated that Consumer Advocate misunderstood how the voice messaging service worked. Nationwide stated that the service operates through the toll-free number and those that wish to contact the customer do so through the toll-free number. Furthermore, the customer can access the voice mail account from any location through the toll-free number. Nationwide stated the number that the customer provided in the LOA was for billing purposes only and, therefore, may logically be a voice or fax line. Nationwide stated that it is incorrect for Consumer Advocate to argue that the charges were unauthorized because the LOA contained authorizing language and an electronic signature.

On May 8, 2007, Consumer Advocate filed a reply memorandum to Nationwide's response. Consumer Advocate argues that Nationwide offered no plausible basis for discrediting Mrs. Payne. Consumer Advocate further argues that Nationwide's statement that the fax number is used for billing purposes only illustrates the unusual character of Nationwide's service; it does not discredit Mrs. Payne's expected testimony that she did not complete the order. Consumer Advocate stated that Nationwide did not respond to the additional factual allegations noted in paragraph 4 of the petition, namely, that the post office box address was an

address for Mr. Payne, not Mrs. Payne, that Mrs. Payne did not know how to spell the maiden name of her husband's mother, and the fact that Nationwide had an IP address does not prove Mrs. Payne completed the order. Furthermore, Consumer Advocate argues that the Uniform Electronic Transactions Act (UETA) cited by Nationwide does not support its position and that "an electronic record or electronic signature is attributable to a person if it was the act of the person." (Consumer Advocates Reply Memo at 2.) Consumer Advocate also argues that the UETA does not contain an exemption from the anti-cramming law. Last, Consumer Advocate argues that Nationwide's allegation that Mr. Payne indicated he was satisfied with a refund is not germane. Consumer Advocate stated that Nationwide's allegation does not support a claim that Nationwide complied with the statute nor does it supply a reason why a civil penalty should not be assessed.

DISCUSSION

Iowa Code § 476.3(1) states that "[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." The Board has previously determined that § 476.3 should be read together with Iowa Code § 476.103,¹ the statute prohibiting unauthorized changes in

¹ 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).

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. The Board concludes that there are not any reasonable grounds to grant a formal proceeding to consider a civil penalty in this matter.

Consumer Advocate stated that Nationwide did not address the reason that Mrs. Payne would order voice mail over a fax line. The Board believes that Nationwide addressed this when it explained in its April 23, 2007, letter that its voice mail operates through a toll-free number and those who wish to contact the customer do so through the toll-free number. Nationwide also stated that the telephone number that the customer provided was for billing purposes only and could be a fax line. The Board finds this explanation to be sufficient. Although Consumer Advocate argued in its reply memorandum that this only "illustrates the unusual character of Nationwide's service" (Consumer Advocate reply memo at 2), the Board believes Nationwide directly addresses the statements made by Consumer Advocate in its petition for proceeding to consider civil penalty and its reply memorandum.

Nationwide would not know, and the Board would not expect it to know, the internal thought process of Mrs. Payne in deciding to order voice mail services or using a fax number for the purpose of creating an account for voice mail service. Consumer Advocate may think finding out the internal thought process of Mrs. Payne is a reason to grant a formal proceeding, however, the Board believes that the LOA

verification provided by Nationwide is sufficient evidence that Mr. or Mrs. Payne authorized the services provided by Nationwide, which would include the use of the fax line as the billing telephone number.

Consumer Advocate next argues that the information contained in the LOA was incorrect. Consumer Advocate stated that Mr. Payne's mother's maiden name was used in the LOA, not Mrs. Payne's mother's maiden name, and Mrs. Payne did not know how to spell her husband's mother's maiden name, and last, the fact that Nationwide had an IP address does not prove Mrs. Payne completed the order.

The Board believes the primary issue is whether the information contained in the LOA was insufficient to prove that Mr. or Mrs. Payne authorized the change in service provided by Nationwide. The Board believes that the post office box address is irrelevant. As stated by Consumer Advocate in its reply memorandum, the order was received in February 2006 and the post office box addressed contained in the order was still in use in February 2006.²

Consumer Advocate asserts that if this matter is set for hearing, Mrs. Payne will testify that she did not know how to spell the maiden name of her husband's mother, which appears on the LOA as one form of verification. It appears Consumer Advocate believes that this testimony would raise significant doubts about the validity of the LOA. No one disputes that the name on the LOA is, in fact, the maiden name of Mr. Payne's mother. By itself, this is a strong indication that the LOA is authentic;

² Consumer Advocate concedes this point. See Office of Consumer Advocate v. Nationwide Voice Messaging, Inc., "Reply Memorandum," Docket C-07-51 (May 8, 2007).

when this correct information is combined with the correct name of Mrs. Payne, the correct post office box address, the correct date of Mrs. Payne's birthday, a correct e-mail address, and a correct telephone number, it is reasonable to conclude the LOA is authentic; and proposed testimony regarding spelling ability is insufficient to establish reasonable grounds for further investigation.

Consumer Advocate also argues that an IP address does not prove that Mrs. Payne completed the order. The Board does not believe this fact is meaningful against the facts expressed in the previous paragraph. The Board understands that an IP address does not prove that Mrs. Payne completed the order, however, based upon all the facts put together and lack of counter-information, the informal record would suggest that Mrs. Payne authorized the service provided by Nationwide.

Consumer Advocate next argues that the UETA, cited by Nationwide, does not support Nationwide's position. Consumer Advocate stated that the UETA provides: "an electronic record or electronic signature is attributable to a person if it was the act of that person." Iowa Code § 554D.111(1) (2007). Consumer Advocate argues that if the Payne's allegations are true, there is no electronic record or electronic signature attributable to them. However, Consumer Advocate does not quote the rest of Iowa Code § 554D.111(1), which states "[t]he act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable." Here, the detailed, correct information on the LOA suggests that the Payne's may have ordered voice mail service from Nationwide.

Moreover, in its response to Consumer Advocate, Nationwide provided Board staff with the LOA containing personal information of Mrs. Payne. Also, Nationwide's registration page states that "by submitting the order, the consumer confirms that he/she: (1) has the authority to incur the charge on his/her local telephone bill; (2) understands and approves of the terms and conditions for provision of the services; and (3) acknowledges that after the first free 30 days of service, a monthly fee of \$13.22 will automatically be charged to his/her local telephone bill." Furthermore, an e-mail confirmation is sent to each activating customer. In this case, these facts, including the undisputed facts in the previous paragraphs, do not establish reasonable grounds for further investigation of this case.

Consumer Advocate argues that a civil monetary penalty should be assessed in order to secure future compliance with the statute and a credit alone is insufficient for this purpose. (Consumer Advocate's Petition for Proceeding to Consider Civil Penalty at 4.) The Board disagrees with Consumer Advocate. In this instance, the Board believes that this matter was appropriately resolved with a proposed finding that there was no unauthorized change in service, so there is no violation to be deterred by civil penalties. Therefore, the Board will deny Consumer Advocate's request for formal proceeding to consider civil penalties.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Petition for Proceeding to Consider Civil Penalty" filed by the Consumer Advocate Division of the Department of Justice on March 22, 2007, is denied as discussed in this order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Margaret Munson
Executive Secretary, Deputy

/s/ Krista K. Tanner

Dated at Des Moines, Iowa, this 15th day of May, 2007.