

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>EVERCOM SYSTEMS, INC.,</p> <p style="padding-left: 40px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-06-40</p>
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**ORDER DENYING REQUEST FOR INTERLOCUTORY REVIEW AND DENYING
REQUEST FOR STAY**

(Issued May 24, 2007)

On April 5, 2007, Evercom Systems, Inc. (Evercom), filed a request for interlocutory review of an order of the Utilities Board's (Board) Administrative Law Judge (ALJ) dated March 29, 2007, and request to stay the ALJ's order.

This filing arises out of an alleged cramming violation involving Evercom as the service provider of collect, pre-paid, and debit calling services and Mr. Ken Silver as the consumer.

BACKGROUND

On March 9, 2007, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a motion to compel discovery in this matter. In its motion, Consumer Advocate requested an order compelling Evercom to respond to

Data Request No. 48. Data Request No. 48 seeks the billing contracts with Qwest and AT&T/SBC, the documentation regarding AT&T's notice of intent to cancel its contract with Evercom, and AT&T's later rescission of that notice.

On March 23, 2007, Evercom filed a resistance to Consumer Advocate's motion and a request for a protective order.

On March 29, 2007, the Board's ALJ issued an order granting in part and denying in part Consumer Advocate's motion to compel. The ALJ reasoned that the contract between Evercom and Qwest was relevant and was within the realm of this subject matter. The ALJ stated that 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 for Evercom. The ALJ reasoned that since Qwest acted as the billing agent for the calls billed to the consumer, the contract between Evercom and Qwest is within the subject matter of this case and is discoverable.

The ALJ denied Consumer Advocate's request for the contracts between Evercom and AT&T, finding that Evercom's contract with AT&T had nothing to do with the relevant facility, calls billed to Iowa customers, or factors to be evaluated regarding a possible penalty. Therefore, the ALJ concluded the contracts between AT&T and Evercom were irrelevant and not likely to produce any discoverable evidence. However, the ALJ granted Consumer Advocate's request for AT&T's

notice of intent to cancel the contract and related documents because they related to a potentially similar type of case in another jurisdiction.

The ALJ granted in part and denied in part Evercom's request for protective order, reasoning that Consumer Advocate is not a competitor of Evercom¹ and Evercom did not make a particular demonstration of fact that dissemination to Consumer Advocate would be harmful to it. The ALJ ordered the parties to follow the terms of their protective agreement with regard to any information disclosed to Consumer Advocate pursuant to the ALJ's order.

The ALJ also ordered Evercom to provide to Consumer Advocate the names of persons with knowledge of the discoverable matters, as requested in question G of Data Request No. 48. Finally, the ALJ ordered the parties to comply with the previous requirement to engage in good faith efforts to resolve discovery disputes in compliance with 199 IAC 7.15 and stated that absent an extreme emergency, no further delays of any deadlines set in this case would be granted.

EVERCOM'S REQUEST FOR INTERLOCUTORY REVIEW

On April 5, 2007, Evercom filed a request for interlocutory review and request for stay of the ALJ's order granting in part and denying in part Evercom's request for protective order and of the ALJ's order requiring Evercom to answer Data Request No. 48.

¹ See Mediacom Iowa, LLC, v. City of Spencer, 682 N.W.2d 62 (Iowa 2004).

With regard to the procedural history of the discovery dispute, in short, Evercom states that Consumer Advocate issued Data Request No. 48 along with 10 other data requests. Evercom states it responded to those requests. Consumer Advocate sought supplemental responses to five of the data requests, including Data Request No. 48. Evercom states it amended its response to the Data Request No. 48, providing a full response to four of the seven subparts to the requests.

Evercom argues that granting interlocutory review at this time would provide an adequate remedy and preserving the issue until appeal would not adequately protect Evercom's interest. If reserved until an appeal of the final order, the confidential information required by Data Request No. 48 would already be disseminated to Consumer Advocate and that release could damage Evercom's commercial relationships with Qwest and AT&T.

Data Request Nos. 48 A, F, and G

Data Request No. 48 seeks the billing contracts Evercom has with Qwest and AT&T/SBC. Evercom asserts that Data Request No. 48 A is outside the scope of the subject matter because the Qwest contract does not concern unauthorized billing, fraud perpetrated by inmates, or the steps Evercom has taken to prevent billing problems. Evercom states that the request is irrelevant and overbroad. Evercom also asserts that the contracts requested are confidential trade secrets under Iowa Rule of Civil Procedure 1.504 and are protected by a confidentiality agreement.

Data Request No. 48 F relates to requests 48 B through 48 E, which seek information concerning AT&T's notification to Evercom of its intent to cancel billing on behalf of Evercom and AT&T's subsequent rescission of the notice. Evercom asserts that the request is irrelevant and outside the subject matter of the dispute under Iowa Rule of Civil Procedure 1.503. Evercom further argues that 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 California.

Data Request No. 48 G seeks the name and business address of each person with knowledge of the responses to requests 48 A through 48 E. Evercom argues that the request is irrelevant, outside the subject matter of the proceeding, and a confidential trade secret.

Error on which request for interlocutory review is based

Evercom asserts that the ALJ erred in concluding that the Qwest contract is relevant and discoverable. Evercom claims that the Qwest contract would have no relevance to fraudulent calls by inmates or Evercom's role in billing for such calls. Evercom also asserts that the Qwest contract is irrelevant because Evercom has never asserted or insinuated that Qwest had any active role in billing the consumer and because Evercom's billing practices are not reflected in the agreement between Qwest and Evercom. Finally, Evercom asserts that the ALJ erred because the Qwest contract does not relate to the facility in question.

Evercom asserts that the ALJ erred in concluding that the documents concerning AT&T's notice of intent to cancel and subsequent rescission are relevant. Evercom argues that the documents requested in Data Request No. 48 F are logically irrelevant because the ALJ ruled that the underlying contract between Evercom and AT&T is irrelevant. Evercom reasons that if the contract itself is irrelevant to the subject matter of this proceeding, then so is correspondence that is solely concerned with the status of that contract.

Finally, Evercom argues that the ALJ erred in its order that Evercom must provide the names of person with knowledge of the Qwest-Evercom billing contract with respect to Data Request No. 48 subparts B through E. Evercom claims that the information requested is outside the subject matter of this proceeding and is not discoverable.

CONSUMER ADVOCATE'S RESPONSE

Consumer Advocate opposes the request for interlocutory review but does not resist the granting of a temporary stay provided the stay is narrowly confined to the discovery ruling dated March 28, 2007. Also on April 18, 2007, Consumer Advocate filed a resistance to Evercom's request for interlocutory appeal. Consumer Advocate argues that the Board's April 9, 2007, order correctly compels production of the Qwest contract, the information regarding AT&T's threatened termination of the AT&T contract, and the interlocutory review should be denied.

ANALYSIS

Rule 199 IAC 7.25 provides that upon written request of a party or on its own motion, the Board may review an interlocutory order of the presiding officer. In determining whether to review an interlocutory order, the Board may consider the extent to which granting the interlocutory appeal would expedite final resolution of the case and the extent to which review of the interlocutory order by the Board at the time it reviews the proposed decision would provide an adequate remedy.²

The decision of whether to entertain an interlocutory appeal from an order issued by an ALJ is discretionary. The Board has stated that it does not want to encourage the filing of interlocutory appeals, but understands that certain situations require intervention to serve the interests of justice. Re: Office of Consumer Advocate v. Qwest Corporation and MCI WorldCom Communications, Inc., Docket No. FCU-02-5, "Order Affirming Administrative Law Judge Decision and Denying Request for Hearing," issued September 13, 2002. The Board has considered these factors and concludes that it will deny Evercom's request for interlocutory review of the ALJ's order. Granting Evercom's request would not expedite final resolution of this proceeding in a meaningful way. Having assigned this case to the ALJ, the Board is reluctant to interfere with the proceedings absent a compelling reason to do so; in this case, no compelling reason has been shown.

² 199 IAC 7.25.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

"Respondent's Request for Interlocutory Review and Emergency Request for Stay" filed by Evercom Systems, Inc., on April 5, 2007, is denied.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper _____
Executive Secretary

Dated at Des Moines, Iowa, this 24th day of May, 2007.