

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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<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>QWEST CORPORATION,</p> <p style="padding-left: 100px;">Respondent.</p>	<p style="text-align:center">DOCKET NO. C-06-168</p>
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**ORDER DENYING PETITION FOR PROCEEDING TO CONSIDER CIVIL PENALTY**

(Issued June 14, 2007)

**PROCEDURAL BACKGROUND**

On October 4, 2006, 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 Qwest Corporation (Qwest), for an alleged cramming in violation of Iowa Code § 476.103. On October 26, 2006, and May 2, 2007, Qwest filed responses to Consumer Advocate's petition.

**INFORMAL COMPLAINT PROCEEDING**

On August 14, 2006, Mike Mellody filed a complaint with Board staff regarding a trouble isolation charge that appeared on his telephone bill for telephone service for his daughter. Mr. Mellody stated that Qwest did not advise him that there would be a

trouble isolation charge when he called Qwest to repair the phone service at his daughter's residence in May 2006.

On August 15, 2006, Board staff sent a copy of the complaint to Qwest and Qwest responded on September 7, 2006. Qwest stated that on May 18, 2006, Mr. Mellody called Qwest to repair phone service at his daughter's residence. In response, Qwest dispatched a technician on May 19, 2006. Qwest stated that at the time Mr. Mellody called Qwest to repair his daughter's phone service, information regarding the trouble isolation charge would have been quoted verbatim from a script to him and the information about the trouble isolation charge typically is quoted to every customer that calls into the repair department by either the automated response service or the representative. Qwest further stated that on May 19, 2006, a technician tested the line at the network interface box and determined that there was no problem with the line between the central office and the network interface box. Qwest stated that at that time the technician attempted to contact Mr. Mellody, however, the contact information was incorrect and Mr. Mellody could not be contacted about the technician's findings.

Qwest stated that on May 20, 2006, it sent another technician out to test the line at the network interface box, and the technician found no trouble. Once again, the technician was unable to contact Mr. Mellody. Qwest stated that the technician sent to Mr. Mellody's daughter's residence should have then caused the charge to be removed from the repair ticket, as no trouble was found on the network interface box.

Because the technician failed to remove the charge from the repair ticket, the charge appeared on Mr. Mellody's bill. Qwest stated that the technician who worked on the daughter's telephone line had recently been transferred from Arizona and made the error by following procedures he was trained to use in Arizona. Furthermore, Qwest stated that the technician's error would be used for future training and discipline purposes. Finally, Qwest stated that on August 4, 2006, the charge was adjusted and the balance cleared on Mr. Mellody's final account.

On September 25, 2006, Board staff issued a proposed resolution. Staff noted that Qwest, in an effort to bring this matter to resolution applied an \$85 credit to Mr. Mellody's bill, and removed the charges from collection. Staff found that no further action was necessary at that time.

On October 4, 2006, Consumer Advocate filed a petition for proceeding to consider civil penalty. Consumer Advocate stated that the Board staff's proposed resolution was incorrect. Consumer Advocate stated that based on Mr. Mellody's complaint and the absence of any effective response, a violation should have been found. Consumer Advocate further stated that Qwest admitted the charge was unauthorized by stating it should have been removed or never charged by the technician and a civil monetary penalty should be assessed in order to secure future compliance with the statute.

On October 26, 2006, Qwest responded to Consumer Advocate's petition. Qwest stated that Board staff's proposed resolution was correct. Qwest further

stated that it responded to Mr. Mellody's complaints about his daughter's phone service, explaining that the technicians who responded to Mr. Mellody's trouble report had tested and investigated his service on two separate days, but were unable to contact Mr. Mellody prior to completing the requested repair because the contact number in their records was invalid. Furthermore, Qwest argued that pursuant to Board rules, "[c]ramming does not include telecommunications services that are initiated or requested by the customer" and that both Mr. Mellody and Consumer Advocate admitted that Mr. Mellody asked Qwest to repair his daughter's telephone service and that request precludes any cause of action for cramming. Qwest further stated that it credited the entire amount of the bill because it failed to follow its own internal procedures and staff properly concluded that there was no need for any further action.

On November 7, 2006, Consumer Advocate responded in a reply memorandum. Consumer Advocate stated that Qwest's argument in its answer to Consumer Advocate's petition mischaracterizes the facts and misreads the law. Consumer Advocate stated that nothing in the complaint indicates that Mr. Mellody authorized a trouble isolation charge and, that as a matter of law, the action prohibited by the statute is "an unauthorized change in telecommunications service," which would include Qwest's trouble isolation charge in this case. Furthermore, Consumer Advocate stated that under the statute, the relevant unit of service is thus

determined by the bill. If an added service generates a separate charge on the bill, it is, if unauthorized, a cram.

### **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,<sup>1</sup> 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. The Board concludes that there are no reasonable grounds to grant a formal proceeding to consider a civil penalty in this matter, because further investigation cannot reasonably be expected to result in any Board action.

Based on the informal record, on May 18, 2006, Mr. Mellody called Qwest to request repair of his daughter's telephone service. According to Mr. Mellody, Qwest did not advise him that a trouble isolation charge might apply.

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<sup>1</sup> 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).

Board rules define cramming as "[t]he addition or deletion of a product or service for which a separate charge is made to a telecommunications customer's account without the verified consent of the affected customer." 199 IAC 22.23(1). Board rules also state that "[c]ramming does not include telecommunications services that are initiated or requested by the customer." (Id.) Based on the informal record, it is clear and undisputed that Mr. Mellody initiated the service call by Qwest when he ordered repair of his daughter's telephone service. The Board also believes that although Qwest may have made an error in not informing Mr. Mellody of the trouble isolation charge, it is only reasonable to conclude Mr. Mellody would have authorized the service call even if the Qwest representative had read the required script because he wanted his daughter's telephone line repaired. Therefore, the Board does not believe there are any reasonable grounds within this set of facts to warrant further investigation, because there is no reasonable likelihood that civil penalties would be assessed.

Consumer Advocate stated in its petition its belief that staff's proposed resolution found no cram because of the credit issued to Mr. Mellody by Qwest and that Qwest only credited the charge after receiving Mr. Mellody's complaint to the Board. Consumer Advocate stated in its reply memorandum that nothing in the complaint indicated that Mr. Mellody authorized a trouble isolation charge, and as a matter of law, the term used in the statute is "an unauthorized change in telecommunications service." Furthermore, Consumer Advocate stated that under

the statute, the relevant unit of service is determined by the bill and if an added service generates a separate charge on the bill, it is, if unauthorized, a cram. The Board does not believe Consumer Advocate's arguments present issues for the Board that create reasonable grounds for further review.

Iowa Code § 476.2 states, "[t]he board shall have broad general powers to effect the purposes of this chapter notwithstanding the fact that certain specific powers are hereinafter set forth." The purpose of Iowa Code chapter 476 is to regulate public utilities, and the purpose of §§ 476.3 and 476.103 is to regulate unauthorized changes in telephone service through the Board's existing complaint procedures. Iowa Code § 476.2 gives the Board discretion to interpret and determine how its rules will be applied. The Board has concluded that Iowa Code §§ 476.3, 476.103, and Board rule 22.23 do not call for a strict liability standard in regards to unauthorized changes in telephone service. This is what Consumer Advocate argues for in its reply memorandum, but that position has been considered and rejected.

Under Consumer Advocate's approach, every single alleged cramming case would be the subject of a civil penalty proceeding, regardless of the facts. Many slamming and cramming cases, as in this set of facts, appear to be the result of inadvertent errors, at most, that will not be deterred by civil penalties. In such cases, the appropriate resolution is to make the customer whole at the expense of the carrier that appears to have committed the error. Board staff has determined in this case, and Qwest has confirmed, that the technician working on Mr. Mellody's

daughter's telephone line committed an error. Qwest has credited the customer and corrected the mistake. As stated above, the Board does not believe that these circumstances create any reasonable grounds for further proceeding to consider civil penalty.

**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 October 4, 2006, is denied as discussed in the Order.

**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 14<sup>th</sup> day of June, 2007.