STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. AGORA SOLUTION, Respondent.	DOCKET NO. C-07-132

ORDER GRANTING LEAVE TO SUBMIT ADDITIONAL EXHIBITS AND DENYING REQUEST FOR RECONSIDERATION

(Issued August 6, 2007)

PROCEDURAL BACKGROUND

On June 27, 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 Agora Solution (Agora). The request arose out of an informal complaint in which Mr. Rick Rupp filed a complaint alleging Agora, a company that offers a voice mail service and a toll-free number to retrieve voice mails, placed an unauthorized charge onto his local telephone bill. Agora alleged that on January 7, 2007, Mrs. Mickey Rupp, Mr. Rupp's wife, placed an order for voice mail service. Mrs. Rupp denied ordering the service; Agora provided the Board with the personal information provided to Agora by Mrs. Rupp, which included her

name, address, gender, e-mail address, date of birth, billing telephone number, and IP address. Agora cancelled Mrs. Rupp's order and issued a credit for the charges billed, which was $16.66 plus tax. In the June 27, 2007, order, the Board concluded, pursuant to Iowa Code §§ 476.3 and 476.103, that there were no reasonable grounds for further investigation to consider civil penalties. The Board determined that the verification provided to Board staff by Agora was sufficient.

CONSUMER ADVOCATE'S MOTION TO RECONSIDER

On July 13, 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. Consumer Advocate first argued that the Board erroneously resolves disputed issues of fact before hearing evidence, in violation of the Federal and State due process clauses and Iowa Code § 476.103. Second, Consumer Advocate argued that the Board's June 27, 2007, order overlooks essential provisions of Iowa Code § 476.103 and 199 IAC 22.23. Third, Consumer Advocate argued that the Board's June 27, 2007, order erroneously requires Consumer Advocate to establish "reasonable grounds for further investigation" as a prerequisite for commencement of a contested case proceeding pursuant to Iowa Code § 476.103. Finally, Consumer Advocate argued that the procedural changes instituted August 1, 2006, with respect to petitions for proceedings to consider civil monetary penalties pursuant to Iowa Code § 476.103 were not justified with credible reasons sufficient to indicate a fair and rational basis for the change.

DISCUSSION

Consumer Advocate first argued that the Board erroneously resolves disputed issues of fact before hearing evidence in violation of the Federal and State due process clauses and Iowa Code §§ 476.103, 17A.2(5), and 17A.16(1). Consumer Advocate stated that Mr. and Mrs. Rupp denied placing an order with Agora and that since the company argued that the Rupps did place the order, a disputed issue of fact is created. Furthermore, Consumer Advocate argued that the Board's June 27, 2007, order credits Agora's version of the facts and discredits the Rupp's version of the facts. Consumer Advocate stated "[w]hen material facts are disputed, purported findings of fact are not reliable in advance of hearing. They violate due process. The statute therefore contemplates findings of fact and conclusions of law following hearing."

Consumer Advocate's arguments ignore the Board's process for handling consumer complaints involving alleged unauthorized changes in telecommunications services. The existing process allows the parties to present their facts and arguments and gives them the opportunity to respond to the opposing party before a proposed decision is issued. Thus, each side has the opportunity to appear and present its own case and to hear and dispute the other side's case, fully complying with the requirements of due process.

Specifically, when a customer submits a written complaint to the Board alleging an unauthorized change of service, the Board forwards the complaint to the company for a response. When a response is received, the Board will forward it to the complainant for a reply in appropriate circumstances. Board staff then prepares a

proposed resolution, which is provided to all the parties and invites them to provide any additional information they may believe to be relevant. The proposed resolution also notifies the parties of their right to request formal complaint proceedings before the Board, a request that will be granted if reasonable grounds for further investigation are shown. Finally, an aggrieved party may seek judicial review. These procedures compare favorably with the administrative procedures affirmed in Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

These procedures are more than adequate to satisfy due process requirements, particularly in light of the relatively small amounts at issue in most cases and the fact that the utility is prohibited from collecting on the amount during the time the matter is pending before the Board.[1] The process is quick and efficient, preserving the agency's fiscal and administrative resources and therefore serving the public interest.

Further, imposing additional procedural steps on these matters would be unlikely to materially enhance the fairness and reliability of the existing process. The inquiry in these cases is typically straightforward. The customer alleges an unauthorized change has been made in his account. The company responds by providing the records it relies upon to establish that the change was authorized. The customer has the opportunity to review the information provided by the company (typically a recording made by an independent third party of a conversation during which the customer verifies a request to change his or her service). This is typically an easily documented dispute that turns on the contents of the verification, rather

[1] The amount at issue in this case was $16.66 plus tax.

than any judgment of witness veracity. As the Mathews court said, "[t]o be sure, credibility and veracity may be a factor in the [final decision] in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions." 424 U.S. at 344. Written submissions provide a useful and efficient means for the parties to communicate their cases to the Board in these types of cases because of the existence (or lack) of a form of verification specified in the Board's rules.

Finally, the Board's procedures allow for a full trial-type hearing in every case in which a party is able to show any reasonable ground for holding such a hearing, pursuant to § 476.3. This provides the ultimate procedural backstop for the "rare exceptions" referred to by the Mathews court. Thus, the Board's procedures are fully compliant with the requirements of due process and Consumer Advocate's assertions to the contrary are incorrect.

Second, Consumer Advocate argued that the Board's June 27, 2007, order overlooks essential provisions of Iowa Code § 476.103 and 199 IAC 22.23. The crux of Consumer Advocate's argument is that if the charge was unauthorized, it violated the statute (Iowa Code § 476.103) and the rule (199 IAC 22.23). Also, Consumer Advocate said that the Board overlooked the fact that the form supplied by Agora was blank.

The Board has already addressed these Consumer Advocate arguments in its order of June 27, 2007. The complete response provided by Agora shows that on January 7, 2007, it received substantial and specific information indicating that Mrs. Rupp was ordering service, including her name, address, gender, e-mail address,

date of birth, billing telephone number, and IP address. Consumer Advocate's exclusive focus on a sample form ignores all of this information.

Third, Consumer Advocate argued that the Board's June 27, 2007, order erroneously requires Consumer Advocate to establish "reasonable grounds for further investigation" as a prerequisite for commencement of a contested case proceeding pursuant to Iowa Code § 476.103. The Board has previously discussed this issue in 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), and refers Consumer Advocate back to that order, along with the discussion earlier in this order.

Last, Consumer Advocate argued that the procedural changes instituted August 1, 2006, with respect to petitions for proceedings to consider civil monetary penalties pursuant to Iowa Code § 476.103 were not justified with credible reasons sufficient to indicate a fair and rational basis for the change. Consumer Advocate stated that it believed that it is inefficient to have two layers of informal staff review, "especially when the purpose of the OCA's petitions is to secure consideration of civil penalties." *Consumer Advocate's Motion for Reconsideration* (p. 7).

The Board believes that it is more efficient to have an informal staff review as described above. Many of the slamming and cramming cases can be disposed of quickly with little expenditure of resources. During staff's informal review, a record is made and usually the telephone company reimburses the consumer. Consumer Advocate argued that having informal staff review has spawned *ex parte* communications between the Board staff and the telephone company's lawyers. The

ex parte communications that Consumer Advocate is referencing in the present case was a mistake caused by the party in question. Staff did not solicit the communication and this is not a policy that is encouraged by the Board.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

1. Consumer Advocate's "Request for Leave to Submit Additional Exhibits in Support of Motion for Reconsideration" in File No. C-07-132, filed on July 13, 2007, is granted.

2. The "Motion for Reconsideration" filed in this matter by the Consumer Advocate Division of the Department of Justice on July 13, 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 6th day of August, 2007.