

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>CORDIA COMMUNICATIONS CORP.,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>DOCKET NO. C-07-134</p>
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**ORDER GRANTING LEAVE TO SUBMIT ADDITIONAL EXHIBITS
AND DENYING REQUEST FOR RECONSIDERATION**

(Issued August 10, 2007)

BACKGROUND

On June 29, 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 on April 9, 2007, by the Consumer Advocate Division of the Department of Justice (Consumer Advocate) for a proceeding to consider a civil penalty for an alleged slamming violation committed by Cordia Communications Corp. (Cordia). The request arose out of a complaint filed on March 1, 2007, by Mr. Duane Richards, who stated that he received a call from a telemarketer claiming he was a representative of Qwest Corporation (Qwest). Mr. Richards said that the telemarketer told him four times that he was a Qwest representative and that Qwest

could help him save money on his telephone bill. Mr. Richards said that he only agreed to change his long distance service because he thought he was speaking to a Qwest representative.

In the June 29, 2007, order, the Board concluded that there were no reasonable grounds for further investigation and that Cordia's third-party verification (TPV) was sufficient and left "no room for further investigation." Furthermore, the Board concluded that despite Mr. Richard's indication that the Cordia representative said he was from Qwest, it was clear that a reasonable customer should have understood from the TPV that Cordia was the carrier involved in the sales pitch. The TPV provided by Cordia made it clear on at least six occasions that Mr. Richards' service was to be transferred to Cordia.

CONSUMER ADVOCATE'S MOTION TO RECONSIDER

On July 17, 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 June 29, 2007, order erroneously resolves disputed issues of fact before hearing the evidence, in violation of the due process clauses of the federal and state constitutions and of Iowa Code §§ 476.103(4), 17A.2(5), and 17A.16(1). Consumer Advocate stated that its April 9, 2007, petition for proceeding to consider civil penalties alleged that a representative of Cordia misrepresented four times that the telemarketer was with

Qwest. Furthermore, Consumer Advocate stated that its petition alleged that the TPV provided by Cordia was "doctored" and not an accurate reproduction of the conversation that actually occurred. Consumer Advocate argued that the Board's June 29, 2007, order effectively concludes that the telemarketer did not misrepresent he was with Qwest and the recording was not altered, effectively crediting Cordia's version of the facts and discrediting Mr. Richards' version. Consumer Advocate states that when material facts are disputed, purported findings of fact are not reliable in advance of hearing and due process is violated.

Second, Consumer Advocate argues that the Board's June 29, 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. Consumer Advocate states that the Board's June 29, 2007, order offers two new reasons for injecting a "reasonable grounds for further investigation" requirement into Iowa Code § 476.103. Furthermore, Consumer Advocate states that the facts are not presently available to the Board; that the Board's order does not say these allegations fail to state a claim; and the Board's order states the allegations are not true without having heard the evidence.

Third, Consumer Advocate argues that the procedural changes instituted August 1, 2006, with respect to petitions for proceedings to consider civil 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 states that the Board has injected a second layer of informal staff review every time Consumer Advocate files a petition for proceeding to consider civil penalty. Consumer Advocate states that it does not believe that the reasoning justifies the inconsistency between prior and present practice, and the Board does not give credible reasons sufficient to indicate a fair and rational basis for the inconsistency. Furthermore, Consumer Advocate states that it believes it is inefficient to have two layers of informal staff review; that the change prejudiced the rights of the consumers generally and the public generally; and finally, the change spawned *ex parte* communications between Board staff and the telephone company's lawyer.

DISCUSSION

Consumer Advocate's first argument is 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 says that its April 9, 2007, petition for proceeding to consider civil penalties alleged that a representative of Cordia misrepresented four times that the telemarketer was with Qwest. Furthermore, Consumer Advocate stated that its petition alleged that the TPV provided by Cordia was "doctored" and not an accurate reproduction of the conversation that actually occurred. Consumer Advocate argued that the Board's June 29, 2007, order effectively concludes that the

telemarketer did not misrepresent he was with Qwest and the recording was not altered, crediting Cordia's version of the facts and discrediting Mr. Richards' version.

Consumer Advocate's arguments ignore the Board's process for handling consumer complaints involving alleged unauthorized changes in telecommunications services; creating a record that includes the facts the parties believe to be relevant. 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 where necessary, 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 forwards it to the complainant for a reply if there is any reason to do so. 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 of these 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 or to his telephone service. 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, as in this case). This is typically an easily documented dispute that turns on the contents of the verification, rather 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 and TPV's provide a useful and efficient means for the parties to communicate their cases to the Board in these

¹ The amount at issue in this case was \$71.

types of cases because of the existence of a form of independent 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.

Consumer Advocate also alleges the Board's procedures violate Iowa Code §§ 17A.2(5) and 17A.16(1). Section 17A.2(5) is the definition of "contested case" while § 17A.16(1) describes the requirements for a decision in a contested case. Consumer Advocate's argument, in essence, is that the Board has resolved disputed issues of fact before holding a hearing. This argument misses the point of the Board's procedures and ignores the nature of the dispute before the Board. The amount at issue in these cases is typically small, \$71 in this case, and complaints involving charges of less than \$30 are common. The public interest favors an inexpensive and efficient process for resolving those matters, which means a full-blown, trial-type evidentiary hearing with unlimited discovery, sworn testimony from live witnesses, unlimited cross-examination, full transcription, multiple briefs, and so forth, simply is not required or appropriate in every single case. The procedures the Board uses, previously described in this order, provide a sufficient hearing to satisfy

the requirements of due process and of Iowa's contested case statutes, especially when the full panoply of a trial-type hearing is available whenever any reasonable grounds for that procedure is shown, pursuant to § 476.3.

This concern for efficient proceedings is particularly important in cases like these, in which the full cost of the proceeding is charged to the utility industry and, ultimately, the customer of those utilities. Iowa Code § 476.10 provides that the regulatory expenses of the Board and Consumer Advocate are to be paid by the regulated utilities. Expenses in a particular proceeding may be charged to the utility that is party to that proceeding, to the industry that provides the service at issue (i.e., the telephone, gas, or electric utilities in general), or to all regulated utilities in Iowa, depending on the circumstances. The combined expenses of the Board and Consumer Advocate for a case with a formal hearing can easily exceed \$10,000, all payable by the utilities and their customers, regardless of the final outcome; it is not a prudent use of limited resources to expend that much on every \$100 complaint. More efficient procedures used by the Board in this case can be used. Consumer Advocate's arguments alleging a failure to meet the contested case requirements of chapter 17A are rejected.

Next, Consumer Advocate argues 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, "Order Denying Motion for Reconsideration," Docket No. C-06-281 (April 2, 2007), and refers Consumer Advocate back to that order, along with the discussion earlier in this order.

Last, Consumer Advocate argues 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 states 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 it is more efficient to review and process these cases as described above. Many of these 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. The Consumer Advocate Division of the Department of Justice's "Request for Leave to Submit Additional Exhibits in Support of Motion for Reconsideration" in File No. C-07-134, filed on July 19, 2007, is granted.

2. The "Motion for Reconsideration" filed in this matter by the Consumer Advocate Division of the Department of Justice on July 17, 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 10th day of August, 2007.