

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="text-align:center">Complainant,</p> <p style="text-align:center">vs.</p> <p>EVERCOM SYSTEMS, INC.,</p> <p style="text-align:center">Respondent.</p>	<p style="text-align:center">DOCKET NO. FCU-06-40</p>
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**PROPOSED DECISION**

(Issued December 6, 2007)

APPEARANCES:

MR. CRAIG F. GRAZIANO, attorney at law, 310 Maple Street, Des Moines, Iowa 50319, appearing on behalf of the Consumer Advocate Division of the Department of Justice.

MR. BRET A. DUBLINSKE and MR. JEFFREY J. ANDERSEN, attorneys at law, Dickinson, Mackaman, Tyler & Hagen, P.C., Suite 1600, 699 Walnut Street, Des Moines, Iowa 50309, appearing on behalf of Evercom Systems, Inc.

**STATEMENT OF THE CASE**

On March 30, 2006, Mr. Ken Silver filed a complaint with the Utilities Board (Board) alleging that Correctional Billing Services had charged him \$75 for collect calls that were incorrect. Mr. Silver stated he had tried to contact the company many times to resolve the situation, including sending a fax that explained all incoming calls

to his business number were answered by a central operator who did not accept the collect calls. Mr. Silver stated the fax was never answered and when he called the company he was put on hold and cut off. He further stated the company gave him a company address in Selma, Alabama, but would not give him a telephone number. When he called information for Selma, Mr. Silver stated he was told there was no listing for the company. He stated that Correctional Billing Services showed his telephone number as being at another address, which led him to believe the company was running some kind of scam instead of making an honest mistake. (Informal complaint file number C-06-84.)

Board staff investigated the complaint and forwarded it to Correctional Billing Services for response. On April 17, 2006, Evercom Systems, Inc. (Evercom) filed a response. Correctional Billing Services is a division of Evercom. Evercom stated that the collect calls in Mr. Silver's complaint came from the Bridewell Detention Center in Bethany, Missouri (Bridewell), and that Evercom is the inmate telephone service provider that handles the inmate collect calls for the facility. Evercom stated it uses an automated operator system that requires a positive action, such as pressing a designated number on a keypad, to accept the call. However, Evercom stated, in Mr. Silver's case, it had determined that the charges to Mr. Silver were the result of fraudulent activity by a third party. Evercom stated it had fully credited Mr. Silver for the calls and associated charges and placed a block on his telephone number to prevent future calls from any confinement facilities that Evercom serves.

Evercom recommended that Mr. Silver contact his local telephone company for an additional collect call block on his line because Evercom stated that sometimes Evercom's blocks can be released "due to technical reasons." (Informal complaint file number C-06-84.)

On April 19, 2006, Board staff issued a proposed resolution noting the credit issued by Evercom and the block it placed on Mr. Silver's telephone number. Staff also stated Evercom had explained that the collect calls were billed to Mr. Silver's account as a result of fraudulent activity by a third party. Staff referred to an explanation Evercom provided regarding the process some inmates use to complete calls without having the responsible person pay for the calls. Staff made no finding regarding whether Evercom violated a statute or Board rule. (Informal complaint file number C-06-84.)

The Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed a petition requesting the Board to commence a proceeding to consider a civil penalty for a cramming violation on May 2, 2006. Evercom filed a response in opposition to the Consumer Advocate's petition on June 12, 2006. On June 28, 2006, the Consumer Advocate filed a reply memorandum.

On July 13, 2006, the Board issued an order finding that there were reasonable grounds to warrant further investigation into the case, granting the Consumer Advocate's petition, docketing the case for formal proceeding, denying Evercom's request that the Consumer Advocate's petition be denied, and assigning

the case to the undersigned administrative law judge. In its order, the Board stated that "further investigation may clarify Evercom's role in billing for fraudulent calls made by inmates, the details of the scheme inmates may be using to make collect calls that are billed to someone other than the person actually receiving the call, and the extent to which Evercom may be able to prevent this kind of fraudulent billing in the future." The Board also stated that it "does not agree with Evercom that the statutory prohibition of unauthorized changes in services does not reach collect calls or calls made by inmates from confinement facilities."

Throughout this proceeding, the parties filed various motions and responses regarding discovery, confidentiality, and procedural issues, and these were ruled on in various orders. At the request of the parties, the procedural schedule was amended and the hearing date was postponed several times. These filings and orders are not discussed in this decision.

On April 16, 2007, the Consumer Advocate filed the prepared direct testimony and exhibits of Mr. Ken Silver, Mr. Patrick Allen, and Mr. David H. Bench, and a prehearing brief.

On May 7, 2007, Evercom filed the prepared testimony and exhibits of Mr. Curtis L. Hopfinger and Mr. John C. Oliver, and a prehearing brief.

The Consumer Advocate filed the prefiled rebuttal testimony of Mr. David H. Bench, supplemental exhibits, and a prehearing reply brief on May 29, 2007.

The hearing in the case was held on June 12, 2007. The Consumer Advocate was represented by its attorney, Mr. Craig Graziano. Mr. Silver, Mr. Allen, and Mr. Bench testified on behalf of the Consumer Advocate. Mr. Silver and Mr. Allen are Iowa telephone customers who were billed for Evercom calls from Bethany, Missouri. Mr. Bench is a consultant and certified master telecommunications engineer. (Tr. 61-3.) Consumer Advocate Exhibits 1 through 24, 26 through 26B, 28, 28A, 30 through 43A, 45 through 59, 61 (late-filed), KS-1 through KS-7, PA-1 through PA-4 (PA-4 was to be late-filed), and DB-1 through DB-3, were admitted. Evercom was represented by its attorneys, Mr. Bret Dublinske and Mr. Jeffrey Andersen. Mr. Oliver and Mr. Hopfinger testified on behalf of Evercom. Mr. Oliver is the manager of the Information Technology Automation and System Administrator for Securus Technologies, Inc. (Securus). (Tr. 161-2.) Evercom is a wholly owned subsidiary of the holding company, Securus.<sup>1</sup> (Tr. 231.) Mr. Hopfinger is the Director of Regulatory and Government Affairs for Securus. (Tr. 229.) Evercom Exhibits 101 through 113 (110 through 113 were late-filed) were admitted. Certain portions of the hearing were held in closed session. At the hearing, the parties agreed to file certain posthearing exhibits and briefs.

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<sup>1</sup> Evercom is one of Securus' operating companies that is licensed and certified to provide inmate telephone service in correctional institutions. (Tr. 231.) T-NETIX Telecommunications Services, Inc. (T-NETIX) is also a wholly owned subsidiary of Securus. (Tr. 231.) Evercom and T-NETIX are licensed, certified, and have approved tariffs in Iowa. (Tr. 231.)

On June 15, 2007, the parties filed a joint stipulation in lieu of filing late-filed Consumer Advocate Exhibit PA-4. On the same date, the Consumer Advocate filed a protective agreement executed by the parties and late-filed Consumer Advocate Exhibits DB-3 and 61. On June 19, 2007, Evercom filed late-filed Evercom Exhibits 110 through 113.

The Consumer Advocate filed a posthearing brief on July 27, 2007. Evercom filed a posthearing brief on August 21, 2007. The Consumer Advocate filed a posthearing reply brief on September 18, 2007, and a correction on September 19, 2007.

### **PRELIMINARY AND JURISDICTIONAL ISSUES**

Evercom argues there are several threshold legal issues that bar the Consumer Advocate's claims as a matter of law.

#### **The Docketing Question**

Evercom argues that this case should not have been docketed as a formal complaint proceeding and, if it were filed today, the Board would not docket it for formal proceedings. The Consumer Advocate argues that the argument is irrelevant because the case was docketed.

The undersigned administrative law judge will not speculate as to whether or not the Board would grant formal complaint proceedings for this case if presented with the case today. The fact is that the Board docketed the case and assigned it to the undersigned for hearing and decision.

**Rule 199 IAC 22.23 Change**

Evercom argues in a footnote that technically, the language in 199 IAC 22.23(2) prohibiting cramming was not in effect when the relevant facts, the assessment of charges to Mr. Silver's account on January 24, 2006, occurred. Evercom states that the amendments to the rule became effective on January 25, 2006. Evercom argues that Iowa Code § 476.103 (2007) does not itself prohibit cramming, and under the prior rule, unauthorized changes in service, including cramming, were not prohibited, citing the Polk County District Court ruling in Office of Consumer Advocate v. Iowa Utilities Board, "Ruling on Petition for Judicial Review," Case No. CV-5605 (March 2, 2006) (Kilaru Order).

The Consumer Advocate argues that the change to the rule is immaterial because the prior rule prohibited unauthorized changes, including cramming. Furthermore, argues the Consumer Advocate, the charges in question were not assessed or billed on January 24, 2006. Rather, they were assessed and billed on February 10, 2006.

Qwest Corporation (Qwest) sent a telephone bill dated February 10, 2006, to the Quality Service Corporation billing Mr. Silver's company \$78.21 on behalf of Evercom for five collect calls dated January 24, 2006, from Bethany, Missouri. (Tr. 22; Exhibit KS-7.) In this case, there were no actual collect calls to Mr. Silver's company on January 24, 2006, and Mr. Silver's company presumably received the telephone bill containing the unauthorized charges on approximately February 10,

2006. Therefore, a fair interpretation of the facts in this case is that the violation occurred after the effective date of the rule change.

Even if the contrary were true, Evercom's argument is unpersuasive. Although the undersigned has read the district court's decision in the Kilaru Order carefully and considered its rationale in reaching the decision on this issue, an unpublished district court ruling in another case is not binding on this case. See Iowa R. App. P. 6.14(5).

The undersigned finds the arguments by the Consumer Advocate on this issue to be the more persuasive.

Iowa Code § 476.103(4)(a) states that, "[i]n addition to any applicable civil penalty set out in section 476.51, a service provider who violates a provision of this section, a rule adopted pursuant to this section, or an order lawfully issued by the board pursuant to this section, is subject to a civil penalty." Since the legislature stated a provider who violated the statute could be penalized, it obviously believed the statute prohibited unauthorized changes in service.

Evercom's argument is based on a parsing of the statute and rule without examining them as a whole so that the true meaning of the statute and rule is lost. When looked at together and as a whole, it is clear that the statute and rule in effect prior to January 25, 2006, prohibited unauthorized changes in customers' telecommunications accounts. The point is: did the statute and rules in effect at the time provide fair warning to Evercom and other telecommunications service providers that slamming and cramming were prohibited? Clearly, they did. Particularly when

read with the title of the bill and statements of legislative intent upon enactment of the statute and the Board orders and notice of intended action adopting the rule, the language of the statute and rule made it clear to Evercom and the other telecommunications service providers that slamming and cramming were prohibited. There is no doubt that Evercom and the other telecommunications service providers were put on notice by the enactment of Iowa Code § 476.103 and the implementing Board rule that slamming and cramming were prohibited in Iowa.

The version of 199 IAC 22.23(2) in effect prior to January 25, 2006, was entitled "Prohibition of unauthorized changes in telecommunications service," and provided that no service provider could submit a preferred carrier change order to another service provider unless the change had been confirmed by one of the methods listed in the rule. The version of 199 IAC 22.23(2) in effect beginning on January 25, 2006, still entitled "Prohibition of unauthorized changes in telecommunications service," added the sentence that "unauthorized changes in telecommunications services, including but not limited to cramming and slamming, are prohibited," just after the subrule's title.

Evercom's suggestion that this later change in the rule by the Board shows the earlier version of the rule did not prohibit cramming is not persuasive. As argued by the Consumer Advocate, the Board stated in the rulemaking that it was merely clarifying the rule, not changing the law, when it adopted the change to rule 22.23(2). Also as argued by the Consumer Advocate, the Board merely inserted the words

explicitly prohibiting unauthorized changes into the rule that had already existed in the title of the rule.

Although the Legislature could have explicitly included the words "unauthorized changes in service are prohibited" in the statute, "we determine legislative intent from the words chosen by the legislature, not what it should or might have said." Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004). Although the rule in effect prior to January 25, 2006, could have been more clearly written, this does not mean that it did not prohibit slamming and cramming. The statute and rule in effect prior to January 25, 2006, when read together as a whole, were clear enough and provided fair notice to Evercom and other telephone service providers that unauthorized changes in service, including slamming and cramming, were prohibited.

### **22.23(2) Definitions**

Evercom argues that the definitions of "telecommunications service" and "cramming" in 199 IAC 22.23(2) do not cover Evercom and its actions with respect to Mr. Silver. Evercom argues that the Consumer Advocate's allegations against Evercom do not fall within the rule's definitions because: (a) no product or service was added; and (b) Evercom facilitates collect calls which are outside the scope of the rule. Evercom further argues that the prohibition on unauthorized changes applies only to "telecommunications service" and that term as defined in subrule 22.23(1) is limited solely to "local exchange" service and "long distance" service.

Evercom argues it is neither a local exchange carrier nor a long distance carrier. Rather, Evercom argues, it is registered as an Alternate Operator Service in Iowa and is certificated as a Private Pay Telephone provider in Missouri. Therefore, Evercom argues, it does not fall within either of the two classes of service regulated by rule 22.23 and no claim pursuant to that rule may lie against Evercom.

The Consumer Advocate argues that the statute refutes Evercom's argument that the statute and rule do not prohibit unauthorized billings for collect calls. It argues that under the statute, if an added service results in a separate charge to a customer account, it is a cram, if unauthorized. The Consumer Advocate argues this makes sense when the targeted evil is unauthorized charges on telephone bills and is in accord with the common understanding of cramming and the definition in the rule. The Consumer Advocate argues that the Board has rejected Evercom's argument regarding collect calls in previous orders and the docketing order in this case. The Consumer Advocate also disputes Evercom's assertion that it did not provide a "telecommunications service" as defined by the statute and rule and argues that the definition turns on the type of service provided, not the classification of the provider. The Consumer Advocate argues that the definition in the statute and rule plainly includes long distance telephone service other than commercial mobile radio [wireless] service, which was the service that Evercom billed to Mr. Silver, i.e., five wireline collect calls from Bethany to Des Moines. Finally, the Consumer Advocate argues, it strains credulity for Evercom to suggest that it is not providing a

telecommunications service because Evercom describes itself as "the largest independent provider of inmate telecommunications services to correctional facilities ... in the United States and Canada." (Citing to exhibit 16B, p. 3.) The Consumer Advocate also argues that the FCC lists Evercom among the companies providing wireline long distance telephone service.

Evercom's arguments are unpersuasive. Iowa Code § 476.103 and 199 IAC 22.23 prohibit companies from causing unauthorized charges to be placed on a customer's telephone bill. That is what Evercom did in this case. Evercom was providing telecommunications services to the Bridewell facility and through the provision of this service, it caused Qwest to place the unauthorized charges on Mr. Silver's telephone bill. Although Evercom billed Mr. Silver's company for five collect calls, no collect calls were actually made to Mr. Silver's company. It does not matter what type of company Evercom is. The definitions in the rule cover Evercom and its actions in this case.

Furthermore, in the order docketing this case for formal proceedings, the Board stated that it did not agree with Evercom's position that the statute and rule do not reach collect calls or calls made by inmates from confinement facilities. The Board also ruled that unauthorized charges for collect calls are prohibited by the statute in Office of Consumer Advocate v. ILD Telecommunications, Inc., "Order Docketing for Formal Proceeding, Denying Motion to Dismiss, and Assigning to Administrative Law Judge," Docket No. FCU-06-39 (July 17, 2006) (ILD).

### **Jurisdiction over Interstate Calls**

Evercom argues that the Board lacks jurisdiction over interstate calls like those at issue in this case. Evercom argues that questions concerning the duties and liabilities of telephone companies with respect to interstate and international communications service, and the charges they impose, are governed solely by federal law. It argues that Congress has created a division of labor where states regulate intrastate calls and services and the Federal Communications Commission (FCC) and Federal Trade Commission regulate interstate and international calls and services. Therefore, Evercom argues, if a customer has a complaint regarding charges for an interstate or international call, the proper forum for such complaint is the FCC.

The Consumer Advocate disputes Evercom's argument that the Board lacks jurisdiction over interstate calls. It argues that Iowa Code § 476.103 generally extends to slamming and cramming without limitation. Therefore, argues the Consumer Advocate, Evercom's argument is one of federal preemption, and federal law does not preempt Iowa's cramming law.

The Board and the U.S. District Court for the Southern District of Iowa have already ruled adversely to Evercom's argument. ILD; OCMC v. Norris, 428 F.Supp. 930, 938 (S.D. Iowa 2006). The Board has jurisdiction over cramming complaints that involve interstate telephone calls, and it has jurisdiction over the complaint in this case. ILD; OCMC v. Norris, 428 F.Supp. 930, 938 (S.D. Iowa 2006). In addition, as

noted above, although Evercom caused Qwest to bill Mr. Silver's company for five interstate collect calls, no such calls were actually made to Mr. Silver's company.

**DID EVERCOM VIOLATE THE STATUTE AND RULE AND, IF SO, SHOULD A CIVIL PENALTY BE IMPOSED?**

**The Consumer Advocate's Initial Position**

The Consumer Advocate states that Iowa Code § 476.103(3) provides that "[t]he board shall adopt rules prohibiting an unauthorized change in telecommunications service," and the Board has done so at 199 IAC 22.23(2). The Consumer Advocate further states that a "change in service" is defined to include the "addition ... of a telecommunications service ... for which a separate charge is made to a customer account." (Citing to Iowa Code § 476.103(2)(a) and 199 IAC 22.23(1).) The Consumer Advocate states the evidence shows that Evercom placed four separate charges of \$17.30 and one of \$4.84 on the Qwest telephone bill to Mr. Silver d/b/a Quality Services. The Consumer Advocate further states that each of these charges was for a collect call from the Bridewell Detention Center in Bethany, Missouri. The Consumer Advocate argues that the evidence shows that none of the calls was received or accepted by Mr. Silver or anyone else at Quality Services. Therefore, argues the Consumer Advocate, each of the charges falls squarely within the prohibition.

The Consumer Advocate argues that a penalty should be imposed for the violation. It argues that the primary goal in interpreting a statute is to ascertain the Legislature's intent. The Consumer Advocate argues the adjudicator must consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied, seeking a result that will advance rather than defeat the statute's purpose.

The Consumer Advocate argues that Iowa Code § 476.103 is remedial and should therefore be broadly construed to effect its purpose. The Consumer Advocate argues the statute's purpose is clearly stated in the opening sentence as "to protect consumers from unauthorized changes in telecommunications service."

The Consumer Advocate argues that Evercom seeks to escape responsibility by claiming it was a victim of fraud by a third party. It argues that in such cases, the Board has looked at whether the company had the ability to prevent the fraud from victimizing customers. In this case, the Consumer Advocate argues, the Board stated in its order docketing the case that further investigation might clarify, among other things, the extent to which Evercom may be able to prevent this type of fraudulent billing in the future.

The Consumer Advocate argues that Evercom has been able to prevent the glare fraud that occurred in this case since 2003, when Evercom knew about both the problem and its solutions. The Consumer Advocate argues that as of January 24, 2006, the date of the calls billed to Mr. Silver's business, Evercom had not requested the local exchange carrier to provision one-way trunks to Bridewell and, evidently

through negligence, it had turned off the dial tone detection feature on its call processor. Therefore, argues the Consumer Advocate, neither preventative measure was in place. The Consumer Advocate argues that Evercom failed to do what it knew it needed to do to prevent glare fraud and it is no surprise the problem occurred. The Consumer Advocate argues that a civil penalty will advance the statute's goal by encouraging companies to see that such measures are in place in the future.

In addition, the Consumer Advocate argues, the statute seeks to encourage the prompt reversal of unauthorized charges and the resolution of consumer complaints without the involvement of the Board. It argues the legislature's intent appears to have been to encourage companies, when they receive legitimate complaints from customers, to promptly make the necessary corrections on their own. If they do so, the Board will not see a complaint.

The Consumer Advocate argues that in this case, Evercom sent a form letter on January 31, 2006, telling Mr. Silver that it had conducted a thorough investigation and found no problems at the facility, that the charges were valid, and that no credit would be issued. The Consumer Advocate argues that Mr. Silver repeatedly tried to obtain a satisfactory response without success, and it was only after he told Evercom he was filing a complaint with the state that Evercom reversed itself and issued a credit.

The Consumer Advocate argues the same sequence occurred in the Allen complaint. In that case, the Consumer Advocate argues, Evercom erroneously told the Allens there were no problems at Bridewell and the charges were therefore valid after Bridewell itself had told Evercom there were problems at the facility. The Consumer Advocate argues that Evercom reversed itself only after the Allens complained to state authorities. The Consumer Advocate argues that the same sequence occurred in several cases in other states.

The Consumer Advocate argues that Evercom's letter claiming it had conducted a thorough investigation was not true. The Consumer Advocate argues that a complete or thorough investigation would have demonstrated the merit of Mr. Silver's complaint. It argues a thorough investigation would have included a check to see whether problems had been reported at Bridewell. The Consumer Advocate argues that glare fraud attempts will tie up Evercom's system and prevent legitimate calls from going through, which was occurring at Bridewell on January 24, 2006. Therefore, it argues, there is circumstantial evidence that Evercom did know there were problems at Bridewell in late January 2006. The Consumer Advocate argues it is unlikely such serious problems would occur on Evercom's system without Evercom being notified. It argues that the fact that the Allens were told the same thing as Mr. Silver ten days after the Bridewell warden complained to Evercom shows that Evercom would sustain the charges despite the known presence of such problems at Bridewell and without checking out their potential relevance to the complaint under

consideration. Therefore, the Consumer Advocate argues, Evercom sends out its "thorough investigation" letters without making such checks.

The Consumer Advocate further argues that a thorough investigation would have included a check to see whether the lines to Bridewell had been provisioned with one-way trunks and whether dial tone detection was turned on. These answers, argues the Consumer Advocate, would have signaled the need to check out the possibility of glare fraud on Mr. Silver's complaint. The Consumer Advocate argues that glare has been a substantial concern at Evercom and it therefore should be checked out in a thorough investigation.

The Consumer Advocate further argues that a thorough investigation would have revealed multiple dialing attempts (shown in confidential exhibits) that should have alerted Evercom that glare was near the top of the list as a possible explanation in Mr. Silver's situation. It argues a thorough investigation would have included checking the local exchange and long distance carriers' records to see whether the calls actually went to the billed party, and such check, if it had been done, would have confirmed the merit in Mr. Silver's complaint.

The Consumer Advocate challenges Evercom's claim that it continued to investigate Mr. Silver's complaint. The Consumer Advocate argues Mr. Silver's testimony and Evercom's own customer call notes show there are no references to a continuing investigation after Mr. Silver's call on January 30, 2006. In addition, it argues, the January 31, 2006, letter did not tell Mr. Silver that Evercom was

continuing to investigate, but instead says Evercom had already investigated, the charges were valid, and Evercom would not issue any credits. The Consumer Advocate argues that if the matter were still under investigation when Mr. Silver called on February 21 and 27, 2006, Evercom would have mentioned that fact. Instead, Evercom told Mr. Silver that the charges would be sustained and no credit would be issued. The Consumer Advocate argues that the fact Mr. Silver filed a complaint with the Attorney General is further evidence there was no continuing investigation. The Consumer Advocate argues there is no documentary evidence of any continuing investigation between January 31 and March 22, 2006. The Consumer Advocate argues that Evercom opened a trouble ticket on March 22, 2006, concerning glare, but it was not entered at the time of its creation as a part of Evercom's record of the Silver complaint and it does not mention a credit. It argues the record does not reveal what happened on March 22, 2006, to cause Evercom to open the trouble ticket, and Evercom's only explanation was that one employee gave the file to another. The Consumer Advocate argues the fact the trouble ticket was opened on March 22, 2006, refutes Evercom's claim that there was a continuing investigation between January 31 and March 22, 2006.

The Consumer Advocate argues this is not a case in which the company advised the consumer it was continuing to investigate his complaint and he would receive a response in due course. Rather the Consumer Advocate argues, this is a case in which Evercom told Mr. Silver the investigation was conducted, its system

was functioning properly, the error was Mr. Silver's, and he needed to pay. The Consumer Advocate argues this is a case in which repeated inquiry by Mr. Silver left him with no effective alternative except to complain to the state.

The Consumer Advocate argues that Evercom's unauthorized billing was not promptly reversed and resolution was not achieved without Mr. Silver's having to involve the Board. Therefore, argues the Consumer Advocate, a civil penalty is needed to advance the remedial goal of the statute.

The Consumer Advocate argues that Evercom seeks to avoid a penalty by claiming that meritorious "deny all knowledge" complaints are virtually nonexistent in its experience. It argues that Evercom's claim it has billing accuracy that exceeds 99.9 percent is of questionable accuracy. The Consumer Advocate argues that Evercom's argument seeks to place on the Consumer Advocate the impossible burden of litigating in this case all "deny all knowledge" cases that consumers everywhere have asserted or could have asserted against Evercom. The Consumer Advocate argues this would expand the scope of the case to unmanageable proportions and defeat the purpose of the statute.

The Consumer Advocate argues that Iowa Code § 476.103 includes a "pattern requirement" for the relatively severe market-restricting actions authorized in § 476.103(5), but omits a "pattern" requirement for the civil penalties authorized in § 476.103(4). It argues that § 476.103(4) authorizes a civil penalty per violation, and states that each violation is a separate offense. The Consumer Advocate argues that

the statute thus requires no litigation of cases of alleged violation other than the case of the alleged violation on trial, and prescribes the civil penalty as the remedy of first resort.

The Consumer Advocate argues that even if this case is the only one in which Evercom has violated the Iowa statute, the penalty system established in the statute is sound. It argues that Evercom is not treated unjustly because it violated the statute, and the penalty is not great. The Consumer Advocate argues that if the company has generally been responsible, it has a reminder it needs to remain so. If not, the Consumer Advocate argues, the penalties will mount and serve as greater deterrence. The Consumer Advocate argues the public is protected, which is the goal of the statute.

The Consumer Advocate argues that civil penalties deter future violations if they are assessed. It argues that without imposition of the statutory penalties, the sanction against prohibited practices is weakened. It argues that a good deal of the enforcement potential of the statute is lost, including its "self-enforcing" or sentinel effect, if penalties are not imposed.

The Consumer Advocate argues that a civil penalty works to secure compliance both by the offending company and by other companies as well. It argues that without a penalty, companies that might be persuaded to comply will instead conclude that the statute has no teeth or effect and may be disregarded. Furthermore, argues the Consumer Advocate, market forces provide no such teeth or

effect when the prohibited practices, such as slamming, enhance a market participant's profits. It argues that without penalties, it is more profitable for companies to encourage or take no action to stop the prohibited practices.

The Consumer Advocate further argues that crediting customers when they complain and placing blocks on their lines do not provide a sufficient deterrent effect without penalties. It challenges Evercom's argument that it, along with Mr. Silver, was a victim of fraud. The Consumer Advocate argues that the remedial goal of the statute, to stop unauthorized charges on telephone bills, will not be realized if companies in a position to take necessary preventive action are allowed to escape responsibility for their failure to do so by claiming someone else is also responsible.

The Consumer Advocate argues that civil penalties will prompt appropriate action on the part of the industry generally, not just in the particular case and violation at issue. Therefore, civil penalties will advance the statutory purpose, and without them argues the Consumer Advocate, the beneficial effects sought by the legislature will not be achieved.

Finally, in determining the amount of the penalty to be issued, the Consumer Advocate argues the Board should consider all relevant factors as stated in Iowa Code § 476.103(4)(b). It argues that one such factor is the size of the company, and Evercom is a sizeable company. The Consumer Advocate argues that consolidated financial statements of Securus Technologies showed total revenue slightly in excess of \$200 million for the first six months of 2006, but notes there are no separate

financial statements for Evercom. The Consumer Advocate argues the penalty should be large enough to provide the company with an incentive to take such action as needed to prevent future violations. The Consumer Advocate further argues the penalty should be large enough to prevent other companies from committing future violations as well.

### **Evercom's Position**

Evercom argues that this is a case of third party fraud, that Evercom was not involved in the fraud, and that Evercom is one of the victims of the fraud. Evercom argues that it is harmed by the fraud and has taken a multitude of steps in a challenging environment, not all of which is within Evercom's control, to prevent fraud. Evercom argues those steps are not perfect. It further argues that when there are problems despite the preventative measures, Evercom takes them seriously. Evercom further argues that from the time Mr. Silver complained until he was fully refunded was less than 60 days. Evercom argues it is proud of its rapid resolution of this complicated matter and of its actions to innovate and stay ahead of the endless efforts convicted criminals make to defraud the system. Evercom argues the Consumer Advocate is persecuting it rather than prosecuting the real wrongdoers. Evercom argues that it has not violated any law and cannot be liable for civil penalties.

Evercom argues that inadvertent charges for interstate inmate calling where the customer has long been made whole do not support a claim under Iowa Code § 476.103, a full hearing, or civil penalties. It argues that the Board has long held that inadvertent error will not be deterred by civil penalties.

Evercom argues that Iowa law does not create liability for isolated, inadvertent errors. It argues the Board has established the following basic standard that remains in effect, with some further development:

Many slamming cases, like this one, appear to be the result of inadvertent errors that will not be deterred by civil penalties; in such cases the appropriate resolution is to make the customer whole (since the errors are clearly not the customer's) at the expense of the carrier that committed the errors. Consumer Advocate's proposal would amount to imposing a strict liability standard on all carriers for all unauthorized changes in service, even if there was no reasonable action the carrier could have implemented in order to avoid the unauthorized change. The Board does not believe that the Legislature intended to create a strict liability standard.

Office of Consumer Advocate v. Qwest Corporation, "Order Denying Petition for Proceeding to Impose Civil Penalties," Docket No. FCU-02-22 (April 16, 2003) (Qwest I).

Evercom argues that the Consumer Advocate continues to try to use complaints raised in other jurisdictions in Iowa cases. It argues this is improper for many reasons, including that neither the defendant nor the tribunal has access to all of the file or applicable facts and legal standards may vary from state to state. Evercom argues that the U.S. Supreme Court has held that in fixing the amount of punitive damages, only the wrongful conduct that occurred within the state where

damages occurred could be considered in determining the amount of punitive damages.<sup>2</sup> Evercom argues there is no reason the analysis should not apply in this case.

Evercom argues that the Board, in Office of Consumer Advocate v. MCI Communications of Iowa and Frontier Communications of Iowa, "Order Denying Request for Proceeding to Consider Civil Penalty," Docket No. C-06-281 (February 16, 2007) (Costerisan), found that the change in service providers made in the case was unsolicited, unintentional, temporary and unlikely to re-occur. It states the Board found it unlikely that further investigation would result in relevant information, the Board did not require any showing that Frontier had done all a carrier could do to prevent the error that occurred, did not require Frontier to create new remedial solutions to automatically protect against the human/computer errors that had occurred, and did not interfere with staff's determination that no slam had occurred. Evercom argues the Costerisan case is highly relevant to this case and shows that inadvertent errors in computer entry do not rise to a slam or cram.

Evercom argues that this case is also similar to Office of Consumer Advocate v. MCI, Inc., "Proposed Decision," Docket No. FCU-05-65 (February 20, 2007) (Steele).<sup>3</sup> Evercom argues that the Steele decision found that some reasonableness standard applies and providers are not required to take all conceivable steps to

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<sup>2</sup> BMW v. Gore, 517 U.S. 559 (1996).

<sup>3</sup> The Steele Proposed Decision became the final decision of the Board because it was not appealed. Iowa Code § 17A.15(3).

prevent errors; that at some point of expense or effort, preventative actions are "not realistic." Evercom states that the Steele decision found that the "case involved a one-time unfortunate convergence of events," and found there "was no slam or cram in this case within a fair interpretation and reasonable reading of" the statute and rule.

Evercom cites Iowa Code § 476.51 and Board rules at 199 IAC 8 in support of its position that the law prohibiting unauthorized changes is not a strict liability regime. It further argues the Board has never issued an order finding Evercom committed a slam or cram and giving the required warning under Iowa Code § 476.51. Evercom argues that 199 IAC 22.23 should be read with 199 IAC 8, and Board rule 8.1 is expressly limited to willful violations and the violation has to be intentional or knowing.

Evercom further argues the absence of strict liability is consistent with how analogous federal law has been interpreted. Evercom argues this makes sense because Iowa Code § 476.103(3) requires that Iowa's rules be consistent with federal rules and that Iowa Code § 476.103(6) requires election of remedies between a complaint at the FCC and a complaint at the Board. Evercom argues the Board conceded this point when it adopted 199 IAC 22.23 in In re: Unauthorized Changes in Telecommunications Service, "Order Commencing Rulemaking," Docket No. RMU-99-7 (July 23, 1999) ("the Board's rules must be consistent with regulations of the Federal Communications Commission"). Evercom argues that the federal rules regarding unauthorized changes in service only require verification and do not require

actual consent because actual consent "may be impossible to accomplish." Evercom further argues that although the Board has not cited federal cases in its orders, it is more than coincidence that its orders have in practice mirrored the standards in federal cases, such as looking for "pervasive patterns." Evercom argues that prior Board decisions have established the balance between consumer interests and business realities that the Board recognized in its most recent rulemaking on the subject in In re: Revisions to Rules Prohibiting Unauthorized Changes in Telecommunications Services, "Order Commencing Rulemaking," Docket No. RMU-06-8 (September 15, 2006). Evercom further argues that rare, unusual situations or convergences of one-time events weigh against finding a cram.

Evercom argues that prior Board cases show that a company need only take reasonable, realistic steps to prevent the problem, not all possible steps, and that a high success rate suggests no cram. Evercom also argues that the Board has not required extensive remedial commitments. It argues that initially sustaining charges or not refunding until after complaint is not automatically a violation and a delay in resolving the complaint is not automatically a violation. Evercom argues this makes sense because these cases are brought under rule 22.23, and billing issues, customer responsiveness, and timely refunds are nowhere in the definition of "unauthorized change of service" and are not within the scope of rule 22.23.

Evercom argues that applying these standards to the facts demonstrates conclusively that Evercom did not commit a cramming violation and is certainly not liable for civil penalties.

Evercom further argues that the Consumer Advocate's case boils down to two claims that are really side issues: that Evercom was not as fast as the Consumer Advocate would like in refunding Mr. Silver's charges and that Evercom did not do enough to prevent fraud. However, argues Evercom, neither of these claims supports the Consumer Advocate's case under rule 22.23.

Evercom argues that the relevant facts are largely undisputed and support Evercom's position. It argues that the correctional facility environment is a unique challenge for a provider of inmate calling services because inmates are willing to commit crimes, have plenty of time, and fraud attempts are frequent and ever changing. Evercom argues that the situation is complicated by the fact it does not have control over many elements of the environment. Evercom argues it works diligently to prevent fraud through innovations, training, and working with law enforcement. Evercom argues that its proprietary Call Access Manager (CAM) system installed in correctional facilities is automatically equipped with the ability to provide numerous features, many of which deter, prevent, trace, or investigate fraud of many types. In addition, Evercom argues, it monitors patterns in calling data to look for irregularities that might indicate fraud or other problems. Evercom argues that all of the features were available at all times after January 2005 at Bridewell,

although some are at the discretion of the facility and were not in use at Bridewell. Evercom argues that its fraud prevention steps represent a major and coordinated anti-fraud program that is overwhelmingly successful compared to the total volume of calls processed and considering the environment in which Evercom operates.

Evercom further argues that from January 2005 to January 2006, there were no complaints about fraudulent calls made from Bridewell in Iowa or anywhere else. It states that on January 21 and 24, 2006, a handful of calls got through fraud prevention, the calls to the Allens and to Mr. Silver's business. Evercom argues that on January 25, 2006, its automated system alerted Mr. Silver with an automated message and Evercom placed a block on his line to stop further calls. Evercom argues that Mr. Silver called Evercom in response to the alert and denied all knowledge of the calls and that Evercom's prompt remedial action stopped all further fraudulent calls involving Mr. Silver's number.

Evercom argues that the most common reasons a billed party will deny all knowledge of billed calls are that the party pushed the wrong button and doesn't recall it or that someone else at the address accepted the call. It argues that the first situation will result in a very short call and the second situation will usually involve multiple calls. Based on this pattern, Evercom states it has a policy of automatically refunding questioned charges under \$10 where the call was a one-time event. Evercom argues that sometimes knowledge is wrongly denied because the party regrets acceptance of the call due to the content of the call or its cost. At other times,

Evercom argues, the person is just trying to cheat the system and get something for nothing. Evercom argues that in the inmate environment, it cannot be presumed that everyone is honest and no one is trying to cheat the system.

Given this experience, Evercom argues, when a customer denies all knowledge of a call or calls, Evercom checks to see how long the billed calls lasted and if there have been multiple calls to the same line. Evercom states it also checks to ensure there are no problems with the call verification or billing systems. Evercom argues that these steps resolve the large majority of all "deny all knowledge" claims and there is no evidence that this approach is unreasonable. Evercom argues that it performed this investigation in Mr. Silver's case and it showed nothing unusual. Evercom argues that the length of the calls on Mr. Silver's bill lasted long enough to suggest they were not erroneously answered and there were multiple calls to the same address. It argues these are strong indicators that the calls were legitimate and the customer is either mistaken or trying to game the system. Therefore, Evercom argues, after the normal investigation, it sent its standard letter to Mr. Silver on January 31, 2006. Evercom argues it did not lie when it said its investigation was thorough because it was methodical, systematic, and logical.

Evercom argues its customer notes show Mr. Silver spoke with Evercom customer service representatives on January 30, January 31, February 21, and February 27. Evercom argues it told Mr. Silver it would continue to investigate, no one challenged Mr. Silver when he said he would not pay his bill, and Evercom did

not try to collect on the account. Evercom argues there was nothing improper or inaccurate about the conversations with Mr. Silver.

Evercom further argues that when a customer continues to deny all knowledge, as Mr. Silver did, it routinely continues to investigate. Evercom argues it requested the call recordings, but the Bridewell facility had control of the recordings and it took time to retrieve them. Evercom argues it fortuitously received additional information a week after Mr. Silver called when the Bridewell warden reported several concerns regarding incoming calls, outgoing lines being tied up, and suspected fraud. Evercom argues this was a major break in the investigation, and for the first time on February 3, 2006, it provided a red flag that glare fraud was being conducted at Bridewell.

Evercom argues that glare fraud is rare and is a significant concern when it occurs. Evercom argues it developed proprietary software called dial tone detection that absolutely prevents known forms of glare fraud from occurring. Evercom argues that once the specific concerns of the warden were known, it immediately checked the dial tone detection settings and determined that dial tone detection was turned off. Evercom states dial tone detection was promptly turned back on after this discovery. In addition, Evercom states, it requested that Bridewell's local exchange carrier convert the existing two-way trunks to one-way trunks at about the same time. Evercom states that although one-way trunks prevent most glare fraud, dial tone detection provides better protection against glare with fewer opportunities for errors.

Evercom states that adding one-way trunks served as a backup approach to preventing glare fraud and also limited problems of busy circuits due to unsuccessful glare attempts from outside callers. Evercom argues these remedial steps immediately resolved the fraud vulnerability at Bridewell and the problem could not be recreated thereafter.

Evercom argues that even knowing glare fraud had been possible at Bridewell did not prove that any or all of the disputed calls, including those billed to Mr. Silver, were the result of glare fraud. Evercom argues it did not know when dial tone detection was first turned off and it had no way of knowing whether Mr. Silver's calls were part of the glare fraud. Evercom argues that there were several reasons it was reasonable for Evercom to not immediately assume the calls were the result of glare fraud: the calls were "legitimate" in length, there were multiple calls billed to a single number, and the calls were billed to a long distance number. Evercom argues that paying attention to these facts was prudent on its part in the inmate calling environment. Evercom argues that the only way to know if the calls billed to Mr. Silver were the result of glare fraud was to listen to the call recordings. It argues that obtaining the recordings is a last resort used infrequently because it is inconvenient for the correctional facility. However, Evercom argues, it continued to work with Bridewell and obtained the call recordings on March 22, 2006. It argues that the recordings showed indicators of glare activity and upon determination that the calls were the result of glare fraud, Evercom immediately issued a credit to Mr. Silver.

Evercom argues this was the first day Evercom could have conclusively established that Mr. Silver's charges were not legitimate.

Evercom argues that the entire time from when Mr. Silver called Evercom to the final determination and credit was less than 60 days. Evercom also argues it issued the credits before Evercom had been contacted by the Board, the Consumer Advocate, or the Iowa Attorney General. Evercom argues there is no fixed rule in Iowa on how long it can take to resolve a consumer complaint, and the Consumer Advocate's complaint that Evercom took too long to resolve Mr. Silver's complaint is frivolous.

Evercom argues that the only plausible explanation for the situation is that an Evercom service technician was doing unrelated work on the system and needed to turn off dial tone detection for diagnostic reasons and then inadvertently forgot to turn it back on. Evercom argues that such an error is highly unusual. Evercom argues that its witnesses, Mr. Oliver and Mr. Hopfinger, were not aware of this happening before and there is no evidence of any such error happening since. Evercom argues that as a backstop against this happening again, Evercom equipped Bridewell with one-way trunks and this is now standard on new installations. Evercom argues it now specifically trains its technicians to make sure they turn dial tone detection back on and Mr. Hopfinger followed up with technicians' supervisors to ensure they learned from the Bridewell situation.

Evercom argues it continues to diligently work to prevent fraud of all types, including glare fraud. It argues it has strong financial and correctional facility customer relationship incentives to do so. Evercom argues it loses money on glare fraud calls. It argues that glare results in complaints that become a concern for the facility, as was expressed by the Bridewell warden. Evercom also argues that its data must be secure and reliable since it may be called on as evidence in criminal matters.

Evercom further argues that all fraud prevention involves trade-offs in cost, process, and other resources for Evercom and the correctional facilities. Some facilities choose not to implement certain available features that deter fraud. Evercom also argues it is not in control of all fraud prevention aspects at correctional facilities and it would be unjust to hold Evercom liable when so many aspects of fraud prevention are beyond its control. Evercom argues that despite these limitations, it has had great success in preventing fraud and complaints of all kinds. It argues that through aggressive fraud prevention, strong relationships with facilities and law enforcement, and good customer service, it has seen a strikingly small number of complaints over time. Evercom argues there was no wrongdoing by Evercom in Mr. Silver's case, much less any intentional wrongdoing. Evercom argues that a very isolated, complicated event occurred and Evercom took immediate and successful steps to stop further charges to Mr. Silver. Evercom argues it investigated as quickly as it could and issued a credit on the first day it could access the relevant call

recordings. Evercom argues it promptly solved the underlying problem and took additional steps to prevent further occurrences. Evercom argues this meets and arguably exceeds what the law requires.

Evercom argues that there is no dispute that third party fraud occurred and Evercom was not involved in committing the fraud. Therefore, Evercom argues, the creation of erroneous charges to Mr. Silver was not intentional or willful, and Evercom did not even have any knowledge until after the fact. Evercom argues the doctrine of superseding cause applies to this alleged violation of statutory and regulatory law. Evercom argues that its inadvertent error in leaving dial tone detection turned off at most "furnished a condition" by which fraud was possible, but it was still the subsequent intervening third party fraud that was the direct cause of Mr. Silver's charges. Evercom argues that although the Board has not specifically cited to this doctrine, the Board and the administrative law judge have engaged in similar analysis in the Steele and Costerisan orders. Evercom argues that each case held MCI did not commit a cram and the same should hold true in this case for Evercom.

Evercom argues that because none of the usual levels of culpability are present, that is, intentional, willful, or knowing, the only way Evercom can be held liable for cramming is if culpability does not matter and strict liability applies. However, Evercom argues, this is not the case. Evercom argues that this case is nearly identical to Costerisan, which the Board refused to docket, and the best evidence in this case is that a technician made an inadvertent and isolated error in

working with a computer and as a result, erroneous charges were created for a customer as the result of third party fraud. Evercom argues under numerous Board holdings, there is no liability established on these facts.

Evercom argues that under the Board's prior cases, some level of intent to slam or cram is required to find liability for slamming or cramming. It argues there is a reasonableness standard for finding liability that is not just used for determining whether to impose a civil penalty. Furthermore, argues Evercom, absent intent, there can be no penalties awarded.

Evercom argues the Board has suggested the possibility of one exception to the need to show intent for a cram. For example, it argues, in the Evercom docketing order, the Board suggested it may be relevant to investigate what steps Evercom had taken to prevent fraud, implying that some level of reckless indifference to fraud might satisfy the "willfulness" standard of 199 IAC 8. However, Evercom argues, the evidence shows that Evercom takes numerous steps to prevent fraud and is successful in doing so. Evercom disputes the Consumer Advocate's argument that its efforts were insufficient because fraud occurred at Bridewell for a few days in January 2006. Evercom argues there is no requirement for perfection, and the Board has adopted a requirement that Evercom take "reasonable" and "realistic" steps to prevent fraud and error, not all conceivable steps. Evercom argues that the fact it did not use one-way trunks at Bridewell is not sufficient to find a cram. It argues there were legitimate reasons why one-way trunks are problematic and dial tone detection

is superior to one-way trunks. Evercom argues it developed dial tone detection because it cared about fraud. It argues that between January 2005 and January 2006, Bridewell had two-way trunks and there were no glare fraud incidents. Evercom argues the use of two-way trunks was not unreasonable, particularly when there are problems with one-way trunks and when dial tone detection is capable of completely blocking glare.

Evercom argues that the real proof is in the overall results, not one isolated incident. It argues its approach to fraud and error prevention has been overwhelmingly successful. It argues that Evercom has only had three complaints that turned out to be glare fraud in Iowa over a multi-year period. It argues that it has, on average, approximately two complaints of any kind per state per year, despite processing hundreds of millions of telephone calls. It argues that it has been able to find only 215 possible reports of glare fraud in a time period that involved over three million calls. It argues this suggests that Evercom successfully prevents glare on 99.99992 percent of the calls it processes. Evercom argues that the Consumer Advocate's argument that this is not good enough is unreasonable. Evercom argues no system is perfect and this was not a legal violation. It argues the Board's rules on service quality do not require perfection and strict liability is not practical or reasonable in the complex world of telecommunications. Evercom argues that human errors happen and they should not all be considered legal claims. It argues that rare, isolated errors as a matter of law do not rise to the level of a cram.

Evercom argues the Board should not be in the position of telling providers precisely how to engineer their networks and should not therefore tell Evercom it has to use one-way trunks. It argues that if the Board concluded that the only way Evercom could avoid liability in Iowa is to provision a one-way trunk between Bridewell and the local exchange carrier office in Bethany, Missouri, such a result would violate the Commerce Clause of the United States Constitution. Despite these arguments, Evercom states that it has already provisioned one-way trunking for Bridewell so the only remedial step suggested by the Consumer Advocate is already a moot point. Evercom argues that the Board did not require proof of all the remedial steps the telecommunications carrier had taken in Costerisan, in which the Board found no slam or cram occurred. It argues that the alleged error in this case is nearly identical in nature to that in Costerisan, and there is no defensible distinction that should result in a different outcome in this case.

Evercom argues the only other issue raised by the Consumer Advocate is whether it took too long to resolve Mr. Silver's complaint. Evercom argues there is no fixed rule in Iowa on how long it can take to resolve a customer complaint. Evercom argues the entire process took only 60 days, a reasonable period of time. Evercom further argues that once it had access to all the relevant information needed to determine Mr. Silver should not have been charged, i.e. the call records, it resolved the complaint and credited Mr. Silver's account within hours, on the same day

Evercom heard the call recordings. Evercom argues the Consumer Advocate cannot point to a single Board case that requires faster resolution than that to avoid liability.

In summary, Evercom argues, there is no basis for finding a cram in this case, which legally precludes the issuance of civil penalties. Even if it did not, argues Evercom, this is the type of isolated, rare, inadvertent error that the Board has repeatedly found cannot be addressed by civil penalties. Evercom argues it already takes substantial steps to remedy glare fraud, civil penalties would provide no incentive, and there were no intentional, willful or reckless bad acts for penalties to deter. Evercom argues the Consumer Advocate's claims are without merit. Evercom argues that it first alerted Mr. Silver within 24 hours of the first calls charged to his business number, and if it were trying to defraud Mr. Silver or other customers, it would not call them and let them know that charges are being assessed to their telephone numbers. Evercom argues this is a strong and undisputed sign that Evercom is acting in good faith.

### **The Consumer Advocate's Responsive Position**

The Consumer Advocate challenges Evercom's argument that its error was inadvertent. The Consumer Advocate argues that Evercom had long known of two measures that would have prevented the problem and had not effectively implemented either one at Bridewell. The Consumer Advocate argues that there was nothing inadvertent about Evercom's adopting a policy that called for provisioning of one-way trunks at new installations and omitted existing installations. It further

argues there was nothing inadvertent when Evercom moved existing equipment from the old facility location to the new Bridewell facility rather than installing new equipment. The Consumer Advocate argues that a person is presumed to intend the natural consequences of an act intentionally done. It argues the natural consequence of limiting the preventive policy to new installations is precisely what occurred, that customers were billed for unauthorized charges the policy was supposed to prevent.

The Consumer Advocate further argues that Evercom's failure to see that dial tone detection was turned on at Bridewell in January 2006 was at least negligent. It argues that Mr. Oliver did not testify he was unaware of such an error ever happening before, as Evercom claimed in its brief, but rather that such an error had happened "maybe once or twice" before, that he knew of. The Consumer Advocate argues another plausible explanation for the fact that dial tone detection was not turned on in January 2006 was that it had never been turned on at Bridewell. It argues that the fact there were no complaints prior to January 2006 could mean that inmates did not previously know how to accomplish the scam, rather than that dial tone detection had previously been turned on.

The Consumer Advocate argues that Evercom's approach to the glare problem was to wait and see if problems arose before making sure the known preventive measures were in place. It argues this was a conscious choice, not an inadvertent mistake. The Consumer Advocate argues it was a choice that poses

known risks that consumers like Mr. Silver will be harmed once inmates figure out the system as configured is susceptible to fraud. The Consumer Advocate argues that Evercom has incentives to wait and see whether problems arose and address them if and after they occurred. The Consumer Advocate argues that Evercom loses money only when the billed customers mount successful challenges to the resulting unauthorized bills, not necessarily on all glare fraud calls. It argues that, as the Court found in the Verity<sup>4</sup> case, many consumers simply pay bills and do not challenge them due to lack of time or energy or because they fear damage to their credit ratings. The Consumer Advocate argues that Evercom's position requires consumers to first suffer harm and then to find and implement a solution to avoid being injured again. The Consumer Advocate argues that the financial incentives are therefore not such that Evercom will implement the necessary solutions in time to protect consumers like Mr. Silver.

The Consumer Advocate argues that it would be different if Evercom had policies in place for effective investigations and prompt credits when warranted. If those had been in place, the Consumer Advocate argues that Mr. Silver would not have filed his complaint. The Consumer Advocate argues that no one is suggesting Evercom must presume that everyone is honest and no one is trying to cheat the system. However, argues the Consumer Advocate, it is equally improper for

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<sup>4</sup> Federal Trade Commission v. Verity International, Ltd., 124 F.Supp. 2d 193, 203 n. 58 (S.D.N.Y. 2000), affirmed in relevant part, 443 F. 3d 48 (2<sup>nd</sup> Cir. 2006), cert. denied, 127 S.Ct. 1868 (2007) (Verity).

Evercom to presume a complaining customer is dishonest. The Consumer Advocate argues the need to discriminate between legitimate and illegitimate complaints heightens the need for effective investigation.

The Consumer Advocate states that Evercom assumed since there were multiple calls and they were for some length, the calls were not fraudulent and were properly billed to Mr. Silver in spite of his complaint. The Consumer Advocate argues this case illustrates the fallacy of this assumption. The Consumer Advocate argues that, contrary to Evercom's assumption, it is logical to think that once parties know how to accomplish a fraud, they would make use of their knowledge on multiple occasions and for calls of some length. The Consumer Advocate argues the fact the number was long distance did not stop the fraud from occurring and long distance calls are not necessarily more difficult with automatic redialing capabilities.

The Consumer Advocate argues the evidence does not support Evercom's claim that the truth about Mr. Silver's complaint was very difficult to ascertain and that short of hearing the call recordings, it had no way of knowing whether the calls had been properly billed. The Consumer Advocate argues that Evercom's own call records, had it checked them, would have demonstrated the likely merit in Mr. Silver's complaint and that records from the local exchange carrier would have confirmed the fact there was no connection to Mr. Silver's telephone.

The Consumer Advocate argues that Evercom's records present another problem. The Consumer Advocate states that Evercom's system generates call records showing calls supposedly placed over the publicly switched telephone network (PSTN), when in fact no such calls took place. The Consumer Advocate also states that Evercom's system then sends billing instructions to local exchange carriers who, in turn, send unauthorized billings to consumers on Evercom's behalf.

The Consumer Advocate argues the evidence does not support Evercom's claim that it "routinely continues to investigate" when a customer continues to complain. It argues that Evercom opened a new ticket on March 22, 2006.

The Consumer Advocate also challenges Evercom's claim that it has had great success in preventing fraud and complaints of all kinds. The Consumer Advocate's argument on this issue is set forth above in its initial position. The Consumer Advocate argues that a history of prior violations, if there is one, is only relevant on the amount of the penalty.

The Consumer Advocate argues that each of Evercom's arguments as to why its admittedly unauthorized charges in this case should escape prohibition under the statute lack merit. The Consumer Advocate challenges Evercom's argument that intent to violate is a necessary element of a violation or a necessary prerequisite for assessment of a civil penalty. The Consumer Advocate argues the statute refutes the argument. It argues the legislature knows how to include an intent or willfulness requirement in a statute or how to establish a two-tiered penalty structure for

intentional and unintentional violations, such as that in Iowa Code § 476.51.

However, the Consumer Advocate argues, Iowa Code § 476.103(4) contains no intent to violate or willfulness requirement. The Consumer Advocate argues that if the Legislature had wanted to limit exposure to civil penalties under § 476.103(4) to intentional violations, it would have done so.

The Consumer Advocate further argues that there is no reference to, and no incorporation of, Iowa Code § 476.51 in § 476.103(4), so it does not apply to this case. The Consumer Advocate argues that 199 IAC 8 implements Iowa Code § 476.51, not § 476.103, and is therefore inapplicable to this case.

The Consumer Advocate argues that the Board has previously rejected Evercom's argument in In re: Revisions to Rules Prohibiting Unauthorized Changes in Telecommunications Service, "Order Adopting Amendment and Providing Specific Statement of Principal Reasons For and Against the Amendment," Docket No. RMU-06-8 (May 14, 2007), in which the Board stated that the "suggestion that the board amend 199 IAC 22.23(5)"a" to provide that civil penalties will be assessed only in cases where a party commits an intentional violation is ... contrary to previous Board decisions;" and in Office of Consumer Advocate v. Quest Corp. et.al., "Order Docketing Complaint, Requiring Additional Information, and Assigning to Administrative Law Judge," Docket No. FCU-02-5 (May 14, 2002), in which the Board stated that the rule "does not require any particular intent on the part of the slamming entity."

The Consumer Advocate challenges Evercom's argument that Iowa Code § 476.103(4) applies only after the Board gives it written notice of a specific violation and only when Evercom violates the same requirement a second time. The Consumer Advocate argues this requirement is present only in Iowa Code § 476.51 and not in § 476.103(4).

The Consumer Advocate states that Evercom's argument that proof of a pattern of violations is a necessary element of the violation, or a necessary prerequisite for assessment of a civil penalty, is refuted by the statute. The Consumer Advocate argues that Iowa Code § 476.103(4) authorizes a civil penalty of not more than \$10,000 per violation, and it states that each violation is a separate offense. In addition, the Consumer Advocate argues that § 476.103(5) authorizes more serious sanctions if and when a "pattern" of violations is established. The Consumer Advocate argues that if the Legislature had meant to include a "pattern" requirement in § 476.103(4), it would have done so.

The Consumer Advocate states that Evercom's position that the statute requires Iowa law to reflect federal law fails to account for the state's power and duty of independence in interpreting its own law. The Consumer Advocate argues that Iowa Code § 476.103 only requires that Board rules include provisions consistent with federal regulations regarding procedures for verification. It argues that is as far as the congruence provided for in the statute goes. The Consumer Advocate argues the Iowa statute does not incorporate federal law and it defines its own terms and

prescribes its own remedies, in each instance without reference to federal law.

Among other things, argues the Consumer Advocate, it omits the willfulness and pattern requirements that Evercom seeks to inject. The Consumer Advocate argues that the goal of interpreting the statute is to give effect to the purpose and intent of the Legislature. It argues that legislative intent is determined by what the Legislature said, not by what it did not say or might have said. Finally, it argues, consumers are best protected by interpreting the statute as written.

The Consumer Advocate argues that Evercom's argument that the statute does not provide for strict liability and therefore absolves it from responsibility for what it terms an accident is immaterial. The Consumer Advocate argues the strict liability argument seeks to inject the intent to violate or willfulness requirement that the Legislature chose not to include in the statute. The Consumer Advocate argues that companies commonly advance straw-man arguments that the Consumer Advocate's efforts to enforce the statute would impose strict liability on them. The Consumer Advocate argues that Evercom's failure to configure its system properly was a combination of intentional and negligent acts. Therefore, it argues there is no need in this case to reach the question of strict liability.

Alternatively, the Consumer Advocate argues that the Board has erroneously rejected a strict liability standard under the statute. It argues that the Iowa Supreme Court held a water pollution statute with essentially the same language as § 476.103

called for strict liability.<sup>5</sup> It argues that, as the Court explained in Miller, a statute calls for strict liability when a determination as to whether the statute is violated is not grounded on fault. The Consumer Advocate argues that the designation of strict liability thus reflects the nature of the proof required for finding a violation, and does not mean a penalty must be assessed in every case of violation. It argues that holding carriers liable for both inadvertent and intentional unauthorized changes will reduce the overall incidence of slamming and cramming because it will make all carriers more vigilant and give them an incentive to correct errors in a speedy and efficient manner, and that innocent mistakes will be taken into consideration when they occur.

The Consumer Advocate challenges Evercom's argument that the fraudulent activities of the inmate and outside partner were a superseding cause that absolves it from responsibility for the unauthorized charges in this case. The Consumer Advocate argues that proximate cause presents the question of whether the policy of the law will impose responsibility for consequences that have been produced by an actor's conduct, and that an intervening act may relieve the actor of liability only if the intervening act was not reasonably foreseeable.

The Consumer Advocate argues that the policy of the law would not be furthered by absolving Evercom of responsibility for billings of the type at issue in this case. It argues that the unauthorized charges of the type billed to Mr. Silver were both foreseeable and foreseen. It argues Evercom was well aware of the ability of

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<sup>5</sup> Miller v. DeCoster, 596 N.W.2d 898 (Iowa 1999) (Miller).

inmates and outside partners to perpetrate glare fraud and was aware of what it needed to do to prevent it. The Consumer Advocate argues that Evercom simply did not do so. The Consumer Advocate argues that under the authorities cited by Evercom, there was no superseding cause.

The Consumer Advocate challenges Evercom's argument that the Consumer Advocate's position would require Evercom to use one-way trunks between Bridewell and the local exchange carrier, which would violate the Commerce Clause of the U.S. Constitution because both entities are in Missouri. The Consumer Advocate states Evercom's argument mischaracterizes the Consumer Advocate's position. The Consumer Advocate states its position is that Evercom violated the statute and a penalty is needed if the goal of the statute is to be realized. The Consumer Advocate agrees with Evercom that the Board should not tell providers how to engineer their networks. It argues that civil penalties effectively place upon the industry the responsibility to identify and correct the problems in whatever ways the industry elects. The Consumer Advocate argues the one-way trunk issue was not a prescribed corrective action that it asked the Board to order. It argues the one-way trunk issue was contained in Evercom's response to a discovery request asking Evercom to describe each preventative and remedial measure Evercom has taken in an effort to address glare fraud.

The Consumer Advocate argues the fact that Evercom was aware of both the problem and the solution and the fact that it failed to implement the solution negates

any claim the problem was beyond Evercom's control. Therefore, argues the Consumer Advocate, it supports the need for a penalty. It further argues that the nature of the corrective action remains at Evercom's election.

The Consumer Advocate states it provided the reasons why a civil penalty would advance public policy in its opening brief. It summarizes those reasons as a means of deterring future violations, of making companies more attuned to the needs of consumers, and of making companies less likely to take actions that would result in unauthorized billings to consumers.

The Consumer Advocate notes Evercom's argument that violations in other states cannot be considered in determining the amount of a civil penalty in Iowa, citing BMW v. Gore. The Consumer Advocate states it does not contend to the contrary. The Consumer Advocate states the reason it offered excerpts from several complaint files in other states was not to secure a larger penalty in Iowa. Rather, it states, it offered the evidence to illustrate that Evercom has on other occasions advised consumers that after a "thorough" investigation, their complaints have been denied, only to reverse itself when consumers have invoked state complaint processes. This was done, it argues, to show more persuasively the inadequacy of Evercom's allegedly thorough investigation processes and its lack of promptness in issuing credits when warranted. The Consumer Advocate argues that the fact violations were alleged to have occurred in other states does not exempt Evercom from a penalty for violations in Iowa.

The Consumer Advocate argues that Evercom's argument that some aspects of fraud control are beyond its control is beside the point. In this case, it argues, fraud prevention was within Evercom's control. The Consumer Advocate argues that the statute was violated and a civil penalty should be assessed.

### **Analysis**

Iowa Code § 476.103 is entitled "Unauthorized change in service – civil penalty." Iowa Code § 476.103(1) provides that the Board may adopt rules to protect consumers from unauthorized changes in telecommunications service. Iowa Code § 476.103(2) provides that a "change in service" means "the designation of a new provider of a telecommunications service to a consumer, including the initial selection of a service provider, and includes the addition or deletion of a telecommunications service for which a separate charge is made to a consumer account."

Iowa Code § 476.103(3) provides that the Board shall adopt rules prohibiting unauthorized changes in telecommunications service and the rules shall be consistent with FCC regulations regarding procedures for verification of customer authorization for a change in service. The paragraph also states a number of specific requirements that must be included in the rules, some of which relate to the verification procedures.

Iowa Code § 476.103(4)(a) states that, "[i]n addition to any applicable civil penalty set out in section 476.51, a service provider who violates a provision of this section, a rule adopted pursuant to this section, or an order lawfully issued by the

board pursuant to this section, is subject to a civil penalty, which after notice and opportunity for hearing, may be levied by the board, of not more than ten thousand dollars per violation. Each violation is a separate offense." Iowa Code § 476.103(4)(b) lists the factors the Board is to consider when assessing a civil penalty. The section states that in determining the size of the penalty, the Board may consider the size of the service provider, the gravity of the violation, any history of prior violations by the service provider, remedial actions taken by the service provider, the nature of the service provider's conduct, and any other relevant factors. Iowa Code § 476.103(5) provides that the Board may impose additional sanctions if a service provider has shown a pattern of violation of the rules adopted pursuant to the section.

Unauthorized change of a customer's telephone service provider is commonly called "slamming," which is defined in the Board's rule as: "the designation of a new provider of a telecommunications service to a customer, including the initial selection of a service provider, without the verified consent of the customer." 199 IAC 22.23(1). The unauthorized addition or deletion of a telecommunications service for which a separate charge is made to a consumer account is commonly called "cramming," which is defined in the Board's rules as: "the 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). Rule 22.23(2), entitled "Prohibition of unauthorized changes in

telecommunications service," states that "Unauthorized changes in telecommunications service, including but not limited to slamming and cramming, are prohibited." Subrule 22.23(2)"a"(5), in discussing records that telecommunications carriers must maintain to show customer authorization for changes in service that result in additional charges to existing accounts, refers to when "the additional charge is for one or more specific telephone calls."

In this case, there is no question that a cramming violation occurred and that Evercom violated Iowa Code § 476.103 and 199 IAC 22.23. Office of Consumer Advocate v. Directory Billing, LLC, Docket No. C-07-183, "Order Denying Petition for Proceeding to Consider Civil Penalty and Denying Motion for Reconsideration Filed By Respondent" (August 15, 2007); Consumer Advocate v. Qwest and MCI WorldCom Communications, Inc., Docket No. FCU-02-5, "Order Docketing Complaint, Requiring Additional Information, and Assigning to Administrative Law Judge" (May 14, 2002). Iowa Code § 476.103 and 199 IAC 22.23 do not require any particular intent on the part of the slamming entity. Consumer Advocate v. Qwest and MCI WorldCom Communications, Inc., Docket No. FCU-02-5, "Order Docketing Complaint, Requiring Additional Information, and Assigning to Administrative Law Judge" (May 14, 2002); In re: Revisions to Rules Prohibiting Unauthorized Changes in Telecommunications Service, "Order Adopting Amendment and Providing Specific Statement of Principal Reasons For and Against the Amendment," Docket No. RMU-06-8 (May 14, 2007). Contrary to Evercom's argument, this case was not

brought under Iowa Code § 476.51 or 199 IAC 8, so any intent or willfulness and prior notice of violation of the same rule requirements in them do not apply to this case, since there are no such requirements in Iowa Code § 476.103 or 199 IAC 22.23.

Although Evercom did not intend to cram Mr. Silver or the Allens, this does not change the fact that Evercom caused charges to be placed on the telephone bills of Mr. Silver's business and the Allens' residence for telephone calls that they neither made nor accepted and which were not even actually made to their telephone numbers. Evercom's lack of intent is more relevant to the issue of civil penalties rather than to the question of whether there was a violation of the statute and rule. Office of Consumer Advocate v. Directory Billing, LLC, Docket No. C-07-183, "Order Denying Petition for Proceeding to Consider Civil Penalty and Denying Motion for Reconsideration Filed By Respondent" (August 15, 2007).

Evercom is incorrect when it argues that the cramming statute and rule require something more than the individual calls that were billed to Mr. Silver, such as a pattern of violations. Iowa Code § 476.103(4) and (5); 199 IAC 22.23(1), 22.23(2)"a," and 22.23(2)"a"(5); In re: Revisions to Rules Prohibiting Unauthorized Changes in Telecommunications Service, "Order Adopting Amendment and Providing Specific Statement of Principal Reasons For and Against the Amendment," Docket No. RMU-06-8, p.18 n. 10 (May 14, 2007). Evercom is also incorrect when it argues that Iowa Code § 476.103 must be consistent with federal law. The only requirement for

consistency is that the rules regarding procedures for verification of customer authorization for changes in service must be consistent with FCC regulations. Iowa Code § 476.103(3).

Evercom's arguments that it should escape liability because it was the victim of fraud and that the actions of the inmate and his partner were a superseding cause of the cram are unpersuasive. Evercom designed its system to handle inmate calls. It learned of glare fraud in 2003 and developed the dial tone detection feature to eliminate glare fraud in 2003. Although there were two reasonable methods that could have been implemented to prevent glare fraud at Bridewell, according to Evercom's own evidence, Evercom chose not to request one-way trunks from the local exchange carrier for Bridewell and its technician forgot to turn dial tone detection back on after maintenance. Evercom created the situation that allowed glare fraud to occur. Furthermore, even though the inmate and his partner committed the glare fraud, Evercom was the company that billed Mr. Silver and the Allens for the unauthorized charges. This was the cram. There was no superseding cause.

Evercom argues that this case is similar to the Costerisan and Steele cases, and it should not be liable for a cramming violation because the situation in this case was a rare, unusual event that is unlikely to reoccur. This argument is not persuasive. There are very important differences between this case and the other two. In Costerisan, the Board found there were no reasonable grounds for further investigation under the specific circumstances, which included that the customer had

been fully credited for charges resulting from an inadvertent error in processing the customer's service order and the carrier had reviewed its system and could not replicate the error, so that no system changes could be made that would clearly prevent a recurrence. In denying formal proceedings, the Board found that "any change in service providers made in this case was unsolicited, unintentional, temporary, and unlikely to recur." Costerisan, p. 8.

In Steele, the carrier was required by the FCC to perform a complicated, one-time platform conversion during a limited period of time. It was in the context of this situation that the carrier reasonably relied on business rules for communication with another carrier, and the mistake that led to the slamming complaint was due to miscommunication between the two carriers. The situation could not reoccur because the platform conversion was a one-time event.

In this case, Evercom designed its inmate call processor systems. These systems include numerous features to deter inmate fraud. However, without dial tone detection turned on, none of these features can prevent glare fraud. According to Evercom's own evidence, dial tone detection, when it is turned on, is 100 percent effective at preventing glare fraud. However, in this case, Evercom failed to ensure that dial tone detection was turned on at Bridewell. According to Mr. Oliver, Evercom had not done a system-wide check to ensure dial tone detection was turned on at facilities that used it since 2003. At least as Evercom was best able to determine, Evercom's technician forgot to turn dial tone detection back on after doing

maintenance at Bridewell. Evercom did not know when this happened or how long dial tone detection had been turned off at Bridewell. According to Evercom's own evidence, the other possible, although imperfect, solution to prevent glare fraud is to order one-way trunks for a facility from the local exchange carrier. However, Evercom did not do this at Bridewell. The Bridewell system was installed in January 2005. Evercom began its policy to request one-way trunks, if available, in February 2005. Turning on dial tone detection and using one-way trunks are both easily implemented software solutions that can be done at minimal cost.

Given that Evercom was relying solely on dial tone detection to prevent glare fraud at Bridewell prior to February 2006, and given that Evercom's system apparently had no way to prevent unauthorized billings once glare fraud occurred, it was unreasonable for Evercom not to have some method of checking to ensure that dial tone detection was turned on at all times at the facility. If dial tone detection must be turned off for maintenance, which is a system that Evercom designed, it was unreasonable for Evercom not to have some method or methods to check to ensure technicians had turned dial tone detection back on after maintenance. Given how critical it is that dial tone detection is turned on at appropriate facilities, including Bridewell, it was unreasonable for Evercom not to keep better track of when dial tone detection was turned on and turned off at Bridewell.

Furthermore, this situation is not a one-time event that will not occur again. As Evercom's own witnesses pointed out, one-way trunks are an imperfect solution and

sometimes a local exchange carrier will change the settings without notifying Evercom. Evercom's maintenance personnel will continue to have to turn dial tone detection off for maintenance. Although failure to turn dial tone detection back on after maintenance is unusual, Evercom witness Mr. Oliver testified he knew of one or two other instances in which it had occurred. Evercom has not yet implemented an automated solution, although its witness Mr. Oliver testified they were going to start working on such a solution. He also testified he did not know when this would happen or whether it would be deemed necessary by Evercom. Evercom has not implemented any system to check on dial tone detection settings on a regular basis or to double check that technicians have turned on dial tone detection after maintenance. Evercom witness Mr. Hopfinger testified he had spoken with the technician's supervisors as a result of this case and told them Evercom needed to be cautious of glare fraud. The actions Evercom took to improve its system as a result of this case to prevent the same problem's recurrence were clearly inadequate and incomplete.

In addition, Evercom's treatment of Mr. Silver and the Allens was unreasonable, other than its use of the customer alert and call block system, which prevented further calls and unauthorized billings and is an important mitigating factor as discussed below. The undersigned agrees with the Consumer Advocate that Evercom did not thoroughly investigate its system at Bridewell as a result of the complaints from Mr. Silver or the Allens. Once the warden alerted Evercom and

Evercom found that dial tone detection had been turned off at Bridewell, it was unreasonable for Evercom to act as it did in handling the complaints. The complaints involved alleged calls on dates shortly before the warden's call on February 3, 2006. Under the circumstances, in February, it was unreasonable for Evercom's customer service representatives not to tell Mr. Silver and the Allens that their complaints would be investigated, that they did not have to pay the disputed charges during the investigation, and that Evercom would get back to them. It was unreasonable for Evercom to send the letters sustaining the charges in February and unreasonable to tell Mr. Silver and the Allens it was sustaining the charges when they called in February. Evercom cannot claim credit for continuing to investigate when it does not tell the customer that it is doing so and instead tells the customer its system was correctly functioning (when it had not been) and that the charges would be sustained and no credit would be given. Since the call recordings are kept as electronic files, the undersigned finds it difficult to believe Evercom's argument that it was difficult to retrieve the call recordings in Mr. Silver's case. It was unreasonable for Evercom not to tell Mr. Silver that on March 22, 2006, it had determined glare fraud was the cause of his billings. It was unreasonable for Evercom not to tell Mr. Silver that it had credited his account on March 22, 2006. It was unreasonable for Evercom not to reverse the associated charges for fees and taxes until after Board staff contacted Evercom. Although the Consumer Advocate did not prove Evercom credited Mr.

Silver's account only after contact from Board staff, it did prove this pattern in the case of the Allens.

For all these reasons, it is clear that Evercom violated Iowa Code § 476.103 and 199 IAC 22.23 when it caused unauthorized charges for the five alleged collect calls from Bethany, Missouri, to be placed on Mr. Silver's telephone bill. It is also clear that it is appropriate to assess a civil penalty. A civil penalty will tell Evercom that it is important to pursue additional actions to improve its system as Mr. Oliver testified was started. A civil penalty will be an incentive for Evercom to take other appropriate actions to prevent this situation from recurring, such as instituting a double-check on maintenance personnel who have turned dial tone detection off and regularly checking its systems to ensure dial tone detection is turned on at facilities when it should be. A civil penalty will be an incentive for Evercom to keep better track of when dial tone detection is turned on and turned off at its appropriate facilities. A civil penalty will be an incentive for Evercom to improve its customer service practices to more effectively investigate and better communicate with customers who complain, particularly when there had been a problem known to Evercom and the customer's complaint was correct, such as happened in this case.

Iowa Code § 476.103(4)(a) states that the Board may levy a civil penalty if it finds a service provider violated the statute, a Board rule, or a Board order issued pursuant to the section. This section requires the Board to exercise its discretion when determining whether to impose a civil penalty. Consumer Advocate v. Qwest,

Docket No. FCU-02-22, "Order Granting Request for Leave to Amend and Denying Request for Reconsideration," p. 3 (May 28, 2003). The statute provides that in determining the amount of the penalty, the Board may consider the size of the company, the gravity of the violation, any history of prior violations, remedial actions taken by the company, the nature of the conduct of the company, and any other relevant factors. Iowa Code § 476.103(4)(b).

Evercom is a large company and some of its actions were unreasonable as discussed above. However, there are several mitigating factors that are very important to consider. Evercom recognized the existence of glare fraud and created an extremely effective method to prevent it, when it is turned on. Evercom has an automated alert system that functioned correctly in this case and alerted Mr. Silver that calls had been billed to his account. Evercom's system also functioned correctly and placed a block on his account that prevented further calls and unauthorized billings. Evercom takes fraud in general seriously, including glare fraud, and has designed its system with many features that prevent or deter fraud or that minimize its effects on consumers. Once the warden called Evercom and alerted it to the problem, Evercom quickly discovered the problem, turned dial tone detection back on, and ordered one-way, outbound only trunks from the local exchange carrier. Finally, the undersigned is not aware of a prior complaint to the Board against Evercom and it appears that the problem that occurred in this case was limited to Mr. Silver and the Allens. For all these reasons, it would not be appropriate to assess a

large penalty. A civil penalty in the amount of \$2,500 should be assessed against Evercom.

Evercom is hereby put on notice that additional cramming violations may subject it to penalties under Iowa Code § 476.51 as well as § 476.103.

### **FINDINGS OF FACT**

1. Evercom provides inmate telephone service in over 2900 correctional facilities across the United States, including the Bridewell Correctional Facility in Bethany, Missouri. (Tr. 231, 238, 351; Exhibits 16A, 16B, 18, 52, 106, 107.) Evercom first determined it had experienced glare fraud at an Evercom-served correctional facility in 2003. (Tr. 164, 166; Exhibit 30A.) Evercom is very concerned with glare fraud and has taken steps to prevent its occurrence and minimize its costs since it was discovered. (Tr. 164-7, 170-1, 180-1; Exhibits 15A, 31, 32, 32A, 47.) In 2003, Evercom developed proprietary software called dial tone detection, which it uses to prevent glare fraud. (Tr. 171, 177-8, 180-1, 194-6, 199-200, 205-7, 210-223; Exhibits 15A, 31, 32A, 47.) Beginning in February 2005, Evercom's policy has been to request that one-way, outbound-only central office trunks be provisioned at Evercom-served facilities if one-way trunks are available from the local exchange carrier serving the facility. (Exhibits 31, 32, 32A, 47, 52.) The Bridewell system was installed prior to the implementation of this policy. (Exhibit 32.) Evercom installed the equipment for its system at the new Bridewell facility in January 2005 and began processing calls for the Bridewell facility in March 2005. (Tr. 206; Exhibit 52.)

2. On January 25, 2006, Mr. Silver and his company, Quality Services Corporation, received the first of several recorded messages from Evercom telling Mr. Silver that collect calls exceeding \$50 had been charged to his telephone number, that a block had been placed on his line so additional calls could not be made to the line, and telling him to contact the company with questions or to have the block removed. (Tr. 23, 29, 254-5, 302-4, 353, 357-8.) Although Mr. Silver does not remember that Evercom told him a block had been placed on his line, it is reasonable to believe this was done because it is an Evercom system practice and no further charges for such calls were added to Mr. Silver's account. (Tr. 29-30, 254-5, 302-4, 357.) After receiving each message from Evercom, Mr. Silver called Evercom back to tell Evercom the calls were not authorized and he wanted the charges to be refunded and the calls stopped. (Tr. 23; Exhibits 2D, KS-1, KS-3.) Evercom records show Mr. Silver initially called on January 30 and 31, 2006, although the first call record says Mr. Silver stated he had called the previous week and received a fax number, sent something to Evercom's head office, and had received no response. (Tr. 358; Exhibits 2D, KS-3.) Mr. Silver also sent a facsimile (fax) message to Evercom but received no response. (Tr. 23, 24; Exhibits KS-1, KS-3, KS-4.) Mr. Silver does not remember the date he sent the fax message, which stated that all of the company's "incoming daytime calls go through a central operator [and] she has not received nor accepted any collect calls from any correctional facility." (Exhibit KS-4; Tr. 22-4.) The call record for January 30, 2006, also stated that Mr. Silver

claimed he was submitting the complaint to the state attorney's office. (Exhibit 2D.)

When Mr. Silver spoke with Evercom on January 30, the Evercom representative told him the company would investigate and get back to him and it would take 15 days for investigation. (Tr. 33-4; Exhibits 2D, KS-3.) However, Mr. Silver received no response. (Tr. 33-4.) Correctional Billing Services, a division of Evercom, sent a letter dated January 31, 2006, to "Quality Service," but did not send it to the correct address, so Mr. Silver did not receive it. (Tr. 24, 33-4; Exhibit KS-5.) The letter stated: "After a thorough investigation, no equipment problems or other billing failures that would result in inaccurate charges were found at the correctional facility where the calls originated. Therefore, no credits will be issued to your account for these particular telephone calls. You may wish to consult with your employees, family members, or others who have had access to this telephone on the dates the calls were accepted to determine who might have accepted the calls." (Exhibit KS-5.) Even if Mr. Silver had received the letter, it did not tell him that if he still disputed the charges, he could call and Evercom would investigate further. (Exhibit KS-5.)

3. Qwest sent a telephone bill dated February 10, 2006, to the Quality Service Corporation billing Mr. Silver's company \$78.21 on behalf of Evercom for five collect calls dated January 24, 2006, from Bethany, Missouri. (Tr. 22; Exhibit KS-2.) Four of the charges were for 15-minute calls and one was for a one-minute call. (Exhibit KS-2.)

4. It is an undisputed fact that no one from the Quality Services Corporation, including Mr. Silver, received or accepted any collect calls from the Bethany, Missouri, number shown on the Qwest bill on January 24, 2006. (Tr. 22, 26-7, 238; Exhibits 3B, KS-7.)

5. On February 21, 2006, Mr. Silver again called Evercom to dispute the charges, tell Evercom he had sent another fax message, and tell Evercom he would not pay for the charges. (Tr. 24-25; Exhibits 2D, KS-3, KS-6.) In the fax message, Mr. Silver stated he was enclosing a copy of a prior fax in regard to incorrect charges to his business telephone, that Evercom had not had the courtesy to reply to the fax, that repeated calls had not resolved the matter, and that he was turning the matter over to the Iowa Attorney General. (Tr. 24-5; Exhibits KS-3, KS-6.)

6. On February 27, 2006, Mr. Silver again called Evercom requesting a response, and Evercom told him that the charges had been sustained and no credit would be given. (Tr. 25, 335; Exhibits 2D, KS-3.) Although Evercom witness Mr. Hopfinger testified that standard practice would be that the customer service representative would have told Mr. Silver Evercom would continue to investigate, there is nothing in the call record that shows this was done in this case. (Tr. 369-71; Exhibit 2D.) Mr. Silver submitted a complaint to the Iowa Attorney General on February 27, 2006. (Tr. 25; informal complaint file.) The Attorney General did not refer Mr. Silver's complaint to the Board until March 30, 2006. (informal complaint file.)

7. Without telling Mr. Silver that it was doing so, Evercom requested permission from the Bridewell facility to listen to recordings of the calls that had been billed to Mr. Silver's business. (Tr. 25-26, 335-7; Exhibit 42.) On March 22, 2006, Evercom staff listened to the recordings of the calls, determined the calls were the result of glare fraud, and issued a credit for the amount billed for the calls (but not associated fees and charges) to Mr. Silver's Quality Service account. (Tr. 247, 250, 336-7; Exhibits 26, 26B, 42A; informal complaint file.) Evercom did not tell Mr. Silver of this action and did not tell him it had issued a credit to his account. (Tr. 26, 337.)

8. On March 31, 2006, Board staff sent a letter to Correctional Billing Services, a division of Evercom, enclosing Mr. Silver's complaint and requiring a response. (Informal complaint file.) On April 17, 2006, Evercom filed a response stating that it had determined the charges to Mr. Silver's account were the result of fraudulent activity, that it had issued a credit for the call charges to Mr. Silver's account on March 22, 2006, and that it had issued an additional credit for the associated fees and charges on April 17, 2006. (informal complaint file.)

9. The charges appearing on Mr. Silver's February 2006 telephone bill were the result of fraudulent activity perpetrated by an inmate at the Bridewell Detention Center in Bethany, Missouri, and an unknown third party located outside the correctional institution. (Tr. 238, 245-7.) The type of fraudulent activity the inmate and the outside third party engaged in was glare fraud. (Tr. 238, 245-7.)

Neither Evercom nor any of its employees participated in the glare fraud that resulted in the charges billed to Mr. Silver. (Tr. 238-9.)

10. Qwest sent Mr. Patrick Allen a telephone bill dated February 4, 2006, charging him \$106.35 for six Evercom collect calls dated January 21, 2006, from Bethany, Missouri. (Tr. 38; Exhibits PA-1, PA-2.) Three of the charges were for 15-minute calls, two were for 11-minute calls, and one was for a nine-minute call. (Exhibit PS-2.) On February 10, 2006, Mrs. Allen called Evercom and stated the calls were billed to a fax line and they had never accepted calls from a facility. (Exhibits PA-1, 28A.) On February 14, 2006, the account notes show Evercom sustained the charges, there were no problems at the facility, and Evercom mailed a letter. (Exhibit 28A.) Also on February 14, the Allens called Evercom, who told them an investigation would take 7-10 days and to call back. (Exhibits PA-1, 28A.) Evercom did not tell the Allens it was going to sustain the charges. (Exhibits PA-1, 28A.) On February 21, 2006, the Allens called again to find out the results of the investigation and Evercom told them it would be at least February 24 before a response could be expected. (Exhibits PA-1, 28A.) On February 24, 2006, Mrs. Allen called Evercom, who told her the charges had been sustained on February 14, 2006. (Exhibits PA-1, 28A.) Mrs. Allen called again on February 25, continued to dispute the charges, and requested a telephone number to call. (Exhibits PA-1, 28A.) Evercom told her to fax her concerns and gave her the disputes fax number. (Exhibits PA-1, 28A.) On February 24, 2006, the Allens filed a complaint with the Iowa Attorney General.

(Exhibit PA-1.) On March 3, 2006, the Attorney General referred the complaint to the Board. (Exhibit PA-1.) On March 6, 2006, Board staff sent a letter to Evercom requesting a response to the complaint. (Informal complaint file number RC-06-38.) Evercom's account notes dated March 20, 2006, state that Evercom staff had the calls downloaded, listened to them, and issued a credit. (Exhibit 28A.) On March 23, 2006, Evercom filed a response with the Board stating it had determined the charges to the Allens' account were the result of fraudulent activity and it had issued a credit and placed a block on the account. (Exhibit PA-3.)

11. On February 3, 2006, the warden of the Bridewell facility called Evercom and complained that there was a problem with the telephone system, that there may be fraud, and that they were getting a lot of "all circuits busy" messages. (Tr. 293-4, 324, 332-4; Exhibits 26, 26A.) When the warden alerted Evercom of the problem, Evercom's employees noted on the trouble ticket that calls look like 15-minute calls but the inmates talked much longer. (Exhibit 26A.) The warden's call alerted Evercom that it needed to fix something and Evercom dispatched a technician to Bridewell and did remote testing of the Bridewell system. (Tr. 293-4, 324-5, 332-4; Exhibit 26A.) Evercom discovered that dial tone detection was turned off at the Bridewell facility. (Tr. 293-4, 324-5, 332-4; Exhibit 26A.) On February 4, 2006, Evercom configured its call processor at the Bridewell facility to turn on dial tone detection before allowing outbound calls. (Tr. 55, 171-2, 207, 324-5, 332-4; Exhibits 26A, 31, 41, 45, 46.) This was done to prevent glare fraud. (Tr. 208, 332-4; Exhibit

26A.) Evercom contacted the local exchange carrier for the Bridewell facility in early February 2006 and had its central office trunks provisioned with one-way, outbound-only class of service on February 6, 2006. (Tr. 55, 197, 208, 225, 325; Exhibits 26A, 31.) Prior to this, the Bridewell facility had two-way trunks. (Tr. 208, 225, 325.) Provision of one-way, outbound only trunks was done to prevent circuits from being busy so that inmates could make legitimate outbound calls and to assist with the prevention of glare fraud. (Tr. 207-8, 320-1, 333; Exhibits 26A, 31, 40, 47.) The local exchange carrier did not charge Evercom for changing the trunks to one-way, outgoing-only. (Exhibit 45.) Both enabling the dial tone detection feature and changing the trunks were software changes that were easily made and done at minimal cost to Evercom. (Tr. 319-25; Exhibits 26A, 45, 46.)

12. Dial tone detection was not turned on at the Bridewell facility on January 21 and 24, 2006. (Tr. 171-2, 196, 205-6, 209-11, 223-5.) If dial tone detection is turned on, it is completely effective in preventing glare fraud. (Tr. 210, 220.)

13. Evercom cannot determine for certain when dial tone detection was installed at the Bridewell facility. (Tr. 205-7.) It was turned on starting in January 2005 at the new facility and probably prior to that time at the old facility. (Tr. 324.) It is reasonable to believe that dial tone detection had been turned on at Bridewell prior to the third week of January in 2006, for several reasons. (Tr. 196-7, 205-7, 223-5, 324.) As far as Mr. Oliver knows, there were no glare fraud problems at Bridewell

prior to the third week of January in 2006, which is a sign that dial tone detection was turned on. (Tr. 196, 205, 223-5.) Dial tone detection was a feature on Evercom's system at the time Bridewell was moved to a new facility in January 2005, and dial tone detection is turned on by default in Evercom's set-up of any new equipment. (Tr. 196, 205-6, 324.) Evercom ships its systems with dial tone detection turned on so that during installation it has to be a conscious decision to turn it off if that is intended. (Tr. 339-40.) For dial tone detection to be turned off at Bridewell, it had to have been turned off after installation at some period of time, most likely during maintenance. (Tr. 196, 214-15.) This is what Mr. Oliver believes happened at Bridewell. (Tr. 209-11.) Mr. Hopfinger does not know why dial tone detection was turned off at Bridewell. (Tr. 324.) The main reason for turning dial tone detection off during maintenance is to test a line with a problem to see whether the problem is due to either: a) something on Evercom's side of the system; or b) something on the local exchange carrier's (LEC) system. (Tr. 197.) Mr. Oliver testified this procedure is a fairly common practice. (Tr. 197.) Mr. Oliver and Mr. Hopfinger testified that it is very unusual for a technician to fail to turn dial tone detection back on after maintenance as was done at Bridewell. (Tr. 197, 340.) Mr. Oliver testified that he knows of only one or two other instances when dial tone detection was accidentally left off at an Evercom facility. (Tr. 215.) In some Evercom facilities, dial tone detection is intentionally left turned off permanently because of the particular equipment used in the telephone system at the facility. (Tr. 198-200, 211-12.) However, this was not

the case at Bridewell. (Tr. 199-200, 211-12.) It is therefore important that the Evercom system have the ability to allow the dial tone detection feature to be turned off. (Tr. 218-19, 338.) Evercom does not know when dial tone detection was turned off at Bridewell. (Tr. 214.) It was turned off at Bridewell at some unknown time prior to the third week of January, 2006. (Tr. 209-15, 324.) Evercom learned that dial tone detection had been inadvertently turned off at Bridewell after the Bridewell warden contacted Evercom on February 3, 2006. (Tr. 324.)

14. Even if Evercom uses one-way outbound-only trunks for inmate telephone lines, it still needs at least one two-way trunk to a facility for its internal purposes. (Tr. 171, 193, 197-8, 202-3, 241.) Inmates would not have access to that trunk. (Tr. 198.) Mr. Oliver testified that if Evercom orders one-way trunks during an initial order of telephone lines to a facility, and it orders a two-way trunk for its internal purposes, it is very difficult to get the LEC to provision the order correctly. (Tr. 203.) He further testified that even when the LEC sets the trunks to outbound-only, it sometimes rolls back the trunks to two-way when upgrading its switches without notifying Evercom. (Tr. 171.) For these reasons, Mr. Oliver testified, one-way trunks are an imperfect solution. (Tr. 171.)

15. Prior to February 2006, Evercom had never asked the LEC to provide one-way trunks from Bridewell. (Tr. 208.) Mr. Oliver testified the reason was because they did not need the feature to prevent glare. (Tr. 209.)

16. The parties attack the expertise of opposing witnesses, but all witnesses have sufficient experience and expertise regarding the matters on which they testified. (Tr. 44-6, 52, 54-5, 61-68, 161-3, 229-31, 241, 244, 246.) However, the undersigned gives more weight to Mr. Oliver's testimony regarding Evercom's internal inmate call processing system because of his knowledge of the system. (Tr. 161-71.) Mr. Bench did not inspect Evercom's internal system at Bridewell and his expertise relates to the public side of the system. (Tr. 55.) Mr. Bench's opinion that the two ways to prevent glare fraud at Bridewell are dial tone detection and one-way trunks was based on answers to data requests by Evercom that stated the same thing, and therefore, the undersigned finds his testimony on this point persuasive and credible. (Tr. 50-4, 72; Exhibit 31.)

17. Evercom's call processor systems have numerous features available to deter inmate fraud or to minimize its adverse effects on customers. (Tr. 186-91, 239-41, 304-18.) Some of the features help to make glare fraud more difficult or minimize its costs to consumers and some have nothing to do with glare fraud. (Tr. 167-70, 239, 304-18.) These features are separate and distinct from dial tone detection and one-way trunks. (Tr. 239-41, 304-18.) The features used at any particular correctional facility vary according to the particular circumstances at the facility, the facility's choice of which features to use, and the contract Evercom has with the facility. (Tr. 239-40, 349-50.) Some of these features were in place at Bridewell on January 24, 2006, and some were not. (Tr. 239-40, 304-18.) The features that were

in place were installed when the system was installed at the new Bridewell facility in approximately January 2005. (Tr. 305-6.) The customer alert and call blocking to Mr. Silver's account after the fraudulent calls were made was one of the fraud mitigation features in place, and it prevented further fraudulent charges to his account. (Tr. 239-40, 254-5, 302-4.) However, without dial tone detection being turned on at Bridewell, none of these features can prevent glare fraud, and they did not do so at Bridewell on January 21 and 24, 2006. (Tr. 72-4, 253-5.)

18. Evercom's failure to ensure that dial tone detection was turned on at the Bridewell facility and its failure to order one-way outbound-only trunks from the local exchange carrier allowed the glare fraud to occur and the unauthorized charges to be billed to Mr. Silver's business account and to the Allens' account. (Tr. 50-5, 72-4, 164-7, 170-2, 177-8, 180-1, 194-200, 205-25, 238-9, 245-7, 253-5, 293-4, 319-25, 332-4; Exhibits 15A, 26, 26A, 26B, 31, 32, 32A, 40, 41, 45, 46, 47, 52.) As long as dial tone detection is turned on and one-way outbound-only trunks are provisioned at the Bridewell facility, it appears that this has solved the problem of glare fraud at Bridewell. (Tr. 220-3; Exhibit 47.)

19. When asked whether Evercom had done anything as a result of this case to improve its system so technicians could not leave the dial tone detection turned off, Mr. Oliver testified that it had not, but that they had discussed some measures they could take to check on a routine basis to make sure that the settings are correct. (Tr. 213.) Mr. Oliver testified they were going to start automating a

process that would go through all Evercom's systems with the same type of service as Bridewell where this could happen and run a check to make sure that dial tone detection is on. (Tr. 213.) He testified they had not yet decided on a time frame or when this would be done. (Tr. 213.) Mr. Oliver testified he did not know when Evercom would have such a system in place and whether it would be deemed necessary, and stated that it was not his decision. (Tr. 216.) He testified that in 2003 Evercom checked its whole system looking for sites with the problem and made sure all settings were correct. (Tr. 213-4.) However, he does not believe that Evercom has done this since 2003. (Tr. 214.) When asked whether Evercom was checking the Bridewell facility more often since the complaint to make sure dial tone detection is turned on, Mr. Oliver testified he was confident that Evercom technical support personnel, who are the persons who turn it on and off, were paying attention to it. (Tr. 214.) When asked whether Evercom had taken any action to prevent the type of human error that occurred in this case, that is, that a remote technician could turn off dial tone detection and then forget to turn it back on, Mr. Hopfinger testified that Mr. Oliver indicated Evercom was looking at this. (Tr. 337.) He also testified they have training for their technicians and all technicians are trained to turn dial tone detection back on. (Tr. 337.) Mr. Hopfinger testified that since this issue has come up, he has had conversations with the supervisors of the technicians indicating Evercom needed to be cautious of these glare fraud issues. (Tr. 338-9.) Mr. Hopfinger testified that a systematic solution had not been put in place yet because Evercom must be cautious

that the solution does not cause greater problems, since there are several cases where Evercom does not want dial tone detection turned on at a particular facility. (Tr. 338-41.) Therefore, he testified, Evercom does not want an automated system that automatically turns on dial tone detection without some form of checks and balances. (Tr. 338-9.)

### **CONCLUSIONS OF LAW**

1. As discussed in the body of this decision, Iowa Code § 476.103 and 199 IAC 22.23 prohibit unauthorized changes in telecommunications service, including slamming and cramming.
2. As discussed in the body of this decision, a cramming violation occurred and Evercom violated Iowa Code § 476.103 and 199 IAC 22.23.
3. As discussed in the body of this decision, Iowa Code § 476.103(4)(a) states that the Board may levy a civil penalty if it finds a service provider violated the statute, a Board rule, or a Board order issued pursuant to the section, and the Board is to exercise its discretion when determining whether to impose a civil penalty. Consumer Advocate v. Qwest, Docket No. FCU-02-22, "Order Granting Request for Leave to Amend and Denying Request for Reconsideration," p. 3 (May 28, 2003).
4. As discussed in the body of this decision, it is appropriate to issue a civil penalty in this case, although it would not be appropriate to assess a large civil penalty.

**IT IS THEREFORE ORDERED:**

1. Pursuant to Iowa Code § 476.103, a civil penalty in the amount of \$2,500 is assessed against Evercom Systems, Inc. Payment in the form of a check made payable to the Iowa Utilities Board shall be forwarded to the Executive Secretary of the Iowa Utilities Board at 350 Maple Street, Des Moines, Iowa 50319-0069. Payment is due within 30 days of the date of this order. The docket number listed on this order shall be listed on the check or in the accompanying correspondence.

2. Motions and objections not previously granted or sustained are overruled. Arguments in the briefs, motions, and made at hearing that are not specifically addressed in this order are rejected, either as not supported by the evidence or the law, or as not being of sufficient persuasiveness to warrant comment.

**UTILITIES BOARD**

/s/ Amy L. Christensen  
Amy L. Christensen  
Administrative Law Judge

ATTEST:

/s/ Margaret Munson  
Executive Secretary, Deputy

Dated at Des Moines, Iowa, this 6<sup>th</sup> day of December, 2007.