STATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. EVERCOM SYSTEMS, INC., Respondent.	DOCKET NO. FCU-06-40

ORDER AFFIRMING PROPOSED DECISION

(Issued March 14, 2008)

PROCEDURAL HISTORY

On March 30, 2006, Ken Silver filed a complaint with the Utilities Board (Board) alleging that Correctional Billing Services[1] had charged his business account $75 for collect calls that were not properly chargeable to his account. After the hearing, the Board's administrative law judge (ALJ) made findings of fact that can be summarized as follows.

Evercom provides inmate telephone service to over 2,900 correctional facilities across the United States, including the Bridewell Correctional Facility in Bethany, Missouri (Bridewell). (Proposed Decision at p. 61; Finding of Fact No. 1.) While

[1] Correctional Billing Services is a division of Evercom Systems, Inc. (Evercom). (Proposed Decision at p. 2.)

providing these services, Evercom has experienced glare fraud[2] in the past and has taken steps to prevent its occurrence. (Id.) Those steps include the development of proprietary software called dial tone detection and a policy of requesting that one-way, outbound-only central office trunks be provided at Evercom-served facilities, if they are available. (Id.) However, neither of these steps was in effect at Bridewell in January of 2006. (Proposed Decision at pp. 67-68; Finding of Fact No. 11.)

On January 25, 2006, Mr. Silver and his company, Quality Services Corporation, received the first of several recorded messages from Evercom telling him that collect calls exceeding $50 had been charged to his telephone number and that a block had been placed on his line to prevent further calls. (Proposed Decision at p. 62; Finding of Fact No. 2.) He was told to contact Evercom to have the block removed. Mr. Silver began trying to contact Evercom. He says he called immediately, received a fax number, and sent a fax message to Evercom, but Evercom's records show he initially called on January 30 and 31, 2006. (Id.) Either way, he explained to Evercom that all calls to his company go through a central operator and she had not received or accepted any collect calls from any correctional facility. He told Evercom the calls were not authorized and he wanted a refund of the charges and the calls stopped. (Id.)

On January 31, 2006, Evercom sent a letter to Mr. Silver's business, but it was addressed incorrectly and Mr. Silver did not receive it. (Proposed Decision at p. 63;

[2] "Glare fraud" is a scam by which inmates make calls from correctional facilities and cause the resulting charges to be assigned to a different telephone account.

Finding of Fact No. 2.) The letter, a form letter used by Evercom, said: "After 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." (Id.)

On February 10, 2006, Qwest Corporation (Qwest), Mr. Silver's local exchange carrier, sent a bill to Mr. Silver's company including charges of $78.21 on behalf of Evercom for five collect calls on January 24, 2006, from Bethany, Missouri. (Proposed Decision at p. 63; Finding of Fact No. 3.) Four of the charges were for 15-minute calls and one was for a 1-minute call. (Id.) It is undisputed that no one at Quality Services Corporation received or accepted any collect calls from the Bethany, Missouri, telephone number on January 24, 2006. (Proposed Decision at p. 64; Finding of Fact No. 4.)

On February 21, 2006, Mr. Silver called Evercom again to dispute the charges and tell Evercom he had sent another fax. (Proposed Decision at p. 64; Finding of Fact No. 5.) In the fax message, he said he was enclosing a copy of the prior fax and, because Evercom had not had the courtesy to reply to the fax and repeated calls had not resolved the matter, he was turning the matter over to the Iowa Attorney General.

On February 27, 2006, Mr. Silver again called Evercom requesting a response. Evercom told him that the charges had been sustained and no credit would be given. Mr. Silver submitted a complaint to the Iowa Attorney General's office that day. The

Attorney General's office referred the complaint to the Board on March 30, 2006. (Proposed Decision at p. 64; Finding of Fact No. 6.)

Subsequently, Evercom requested and received permission from the Bridewell facility to listen to the recordings of the calls that were billed to Mr. Silver's business. (Proposed Decision at p. 65; Finding of Fact No. 7.) On March 22, 2006, Evercom representatives listened to the recordings, determined the calls were the result of glare fraud, and issued a credit for the amount billed for the calls (but not for associated fees and charges) to Mr. Silver's business account. Evercom did not inform Mr. Silver of these actions at that time. (Id.)

On March 31, 2006, Board staff sent a letter to Evercom enclosing Mr. Silver's complaint and requiring a response. On April 17, 2006, Evercom responded, saying it had determined the charges were the result of fraudulent activity and it had issued a credit for the call charges on March 22, 2006, and was issuing an additional credit for the associated fees and other charges on April 17, 2006. (Proposed Decision at p. 65; Finding of Fact No. 8.)

During this time period, Evercom and Qwest were also working to resolve a complaint from Mr. Patrick Allen, whose February 4, 2006, Qwest bill included charges of $106.35 for six Evercom collect calls dated January 21, 2006, from Bethany, Missouri. Evercom's responses to various contacts from the Allens lead the Allens to file a complaint with the Iowa Attorney General on February 24, 2006. That complaint was forwarded to the Board on March 3, 2006, and to Evercom on

March 6, 2006. Evercom reviewed the Allen calls on March 20, 2006, and issued a credit. (Proposed Decision at p. 66; Finding of Fact No. 10.)

Also during this general time period, on February 3, 2006, the warden of the Bridewell facility called Evercom and complained that there was a problem with the telephone system. The warden's call alerted Evercom that it needed to fix something; subsequent inspections showed the dial tone detection system was turned off. (Proposed Decision at p. 67; Finding of Fact No. 11.) On February 4, 2006, it was turned on to prevent glare fraud. (Id.) On February 6, 2006, Evercom contacted the local exchange carrier for the Bridewell facility and requested and received one-way, outbound-only trunks. (Proposed Decision at p. 68.) There was no charge for that change. Thus, both of these changes were easily made and were done at little or no cost to Evercom. (Id.)

On May 2, 2006, Consumer Advocate filed a petition for a proceeding to consider a civil penalty for a cramming violation associated with Mr. Silver's complaint. On July 13, 2006, the Board issued an order finding there were reasonable grounds for further investigation into the case, granting Consumer Advocate's petition, and assigning the matter to the ALJ. Discovery ensued and prepared direct testimony was filed. The hearing was held on June 12, 2007. Posthearing exhibits and briefs were filed, and on December 6, 2007, the ALJ issued a proposed decision finding, among other things, that Evercom's failure to ensure dial tone detection was turned on and its failure to order one-way trunks allowed the glare fraud to occur and the unauthorized charges to be billed to Mr. Silver's business account (and to the Allens' account). (Proposed Decision at p. 72; Finding of Fact No. 18.) The ALJ concluded these actions were sufficient to establish that Evercom committed a cramming violation and therefore violated Iowa Code § 476.103 and 199 IAC 22.23. (Proposed Decision at p. 74; Conclusion of Law No. 2.) She further concluded it was appropriate to assess a civil penalty in this case; after evaluating the statutory factors and the record evidence, she found a civil penalty in the amount of $2,500 to be appropriate. (Proposed Decision at pp. 74-75.)

On December 21, 2007, Evercom appealed the proposed decision to the Board, arguing that (1) the Board's rules did not prohibit cramming at the time the calls occurred; (2) a cramming violation requires an element of intent, which was not present in this case; (3) the proposed decision fails to recognize the type of company Evercom is, the type of service it provides, and the defense of superseding cause; and (4) the amount of the civil penalty is excessive, assuming one is justified at all. Evercom reserved the right to supplement its appeal, did not request the opportunity to file additional written argument, but requested oral argument.

On December 28, 2007, Evercom filed a supplement to its notice of appeal, generally repeating and expanding upon the arguments made in the document summarized above.

On January 4, 2008, Consumer Advocate filed a response to Evercom's appeal and a notice of cross appeal. Consumer Advocate responds to each of Evercom's assertions and, for its cross appeal, argues that each of the five calls billed to Mr. Silver is a separate violation, so the maximum possible civil penalty is

$50,000. The assessed civil penalty, $2,500, is only 5 percent of the maximum, according to Consumer Advocate. Moreover, Evercom had revenues of over $200 million in the first six months of 2006. Consumer Advocate concludes that the assessed penalty is insufficient and should be increased.

On January 18, 2008, Evercom filed a response to the cross appeal, arguing that the civil penalty is certainly not too small and that the ALJ relied on the wrong information when determining the amount. Consumer Advocate filed a reply on January 28, 2008, offering its arguments in favor of a larger civil penalty.

ANALYSIS

Evercom has four main issues on appeal, discussed below, followed by Consumer Advocate's cross-appeal.

1. Were the Board's rules prohibiting cramming in effect at the relevant time?

Evercom's arguments. Evercom claims that the relevant Board rule, 199 IAC 22.23, did not prohibit cramming at the time the calls in question occurred. The calls took place on January 24, 2006, but the Board's 2005 amendment to rule 22.23 became effective the next day, January 25, 2006.

Consumer Advocate's arguments. Consumer Advocate responds that the Board described its 2005 amendment as a clarification, not a change, of the Board's existing rule, citing <u>In re: Revised Rules for Telecommunications Providers</u>, "Order Initiating Rule Making," Docket No. RMU-05-6 (April 22, 2005), at page 3. Cleanup language is not indicative of an intent to change the basic requirements of the rule;

Doty v. Frontier Communications, Inc., 36 P.3d 250, 256 (Kan. 2001). Thus, the rule in effect on January 24, 2006, prohibited cramming, just as the rule that became effective on January 25, 2006, did.

Consumer Advocate also argues that the actual violation, the appearance of an unauthorized charge on Mr. Silver's telephone bill, did not occur until the bill was rendered on February 10, 2006, two weeks after the new rules became effective.

ALJ ruling. The ALJ discusses this issue at pages 7-10 of the proposed decision. Initially, the ALJ finds that the cram did not occur until the bill was sent on February 10, 2006, so the violation occurred after the rule change. (Proposed Decision at pp. 7-8.) Even if that were not the case, the ALJ goes on to say that in her opinion Iowa Code § 476.103(4)"a" and the statute and rule as a whole were sufficient to prohibit unauthorized changes in customer's telecommunications accounts prior to January 25, 2006, and the amendment to the rules was merely a clarification, not a change.

Board analysis. The Board agrees with the ALJ and Consumer Advocate that an act of cramming typically does not occur until the charges for the unauthorized service appear on a telephone bill. If these alleged calls had been assigned to Mr. Silver's account, but the fraud had been identified by Evercom and the charges reversed before a bill was rendered, then there would have been no cram, regardless of the date of the alleged calls. The final act that makes it a cram is the billing, which occurred on February 10, 2006.

Further, as the Board said when it revised its rules in 2005, it was merely clarifying that the rules already in existence prohibited unauthorized changes in service. It was not changing the meaning or effect of the rule. The Board's rules therefore prohibited cramming at the time the calls were allegedly made in this case. This provides an alternative basis for the Board's ruling on Evercom's first assertion of error.

On Evercom's first issue, the Board will affirm the ALJ's proposed decision.

2. Is intent required to establish a violation of § 476.103 and 199 IAC 22.23?

Evercom's arguments. Evercom argues that "a finding of liability on behalf of Evercom is only possible if no intent is required – that is, if cramming is a 'strict liability' offense. The Board has repeatedly held that it is not." (Notice of appeal at p. 5, ¶ 18.) Evercom argues that the rules allow the Board to determine a provider's potential liability and that the exercise of that discretion is contrary to a strict liability regime. (Supplement at unnumbered page 2.) Evercom argues that a reasonableness standard should be applied when determining liability, reflecting the Board's ability under the rules to decide whether a provider is liable when a slam or cram has occurred. (Id. at unnumbered page 3.)

Consumer Advocate's arguments. Consumer Advocate argues that the statute does not require intent to establish a violation and justify civil penalties. The Board rejected the intent requirement in a recent rule making, In re: Revisions to Rules Prohibiting Unauthorized Changes in Service, "Order Adopting Amendment and Providing Specific Statement of Principal Reasons for and Against the

Amendment" (May 14, 2007), at page 18, where the Board said 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."

Consumer Advocate also takes issue with Evercom's claim that its error was inadvertent. Consumer Advocate points out that Evercom knew of two measures that would have prevented glare fraud at Bridewell and had not implemented either one in January of 2006. Consumer Advocate argues that a person is presumed to intend the natural consequences of an act intentionally done[3] and asserts that Evercom's decision not to order one-way trunks at Bridewell was an intentional act with the natural consequence of allowing glare fraud to occur. Consumer Advocate argues that Evercom's approach to the glare problem appears to have been to wait and see if problems arose before checking to see if the known preventive measures were in place, which would be a conscious choice, not an inadvertent mistake.

ALJ ruling. The ALJ addresses this issue at pages 53-54, finding that Evercom's lack of intent to cram Mr. Silver does not change the fact that Evercom caused charges to be placed on the telephone bill for Mr. Silver's business for calls that were not made, accepted, or authorized. The ALJ concludes that "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." (Proposed Decision at p. 53.)

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[3] Citing Estate of Tedrow v. Standard Life Ins. Co., 558 N.W.2d 195, 197 (Iowa 1997).

Board analysis. The correct interpretation of the statute and the Board's rules is that the law does not require a showing of intent to violate the statute or the rules in order to establish a violation, but a mere violation, without more, may not be sufficient to justify imposing civil penalties (and may not even be sufficient to justify formal complaint proceedings to consider imposing civil penalties, if there are no reasonable grounds for further investigation). The Board does not agree with Evercom that this makes slamming and cramming a "strict liability" offense. A strict liability statute is one which imposes a criminal sanction for an unlawful act without requiring a showing of criminal intent.[4] The Board's interpretation is that a violation may occur without a showing of intent (criminal or otherwise), but a mere violation will not always result in a civil penalty, let alone any criminal sanction. Applying this interpretation, it is not necessary for the Board (or the ALJ) to determine Evercom's intent before finding a cramming violation, if the evidence supports that result.

Here, the Board agrees with the ALJ that Evercom did not directly intend to cram the complainant, but that lack of intent is not relevant to the question of whether a cram occurred. The existence of a cram makes a credit to the customer's account appropriate. The question of intent comes into play in the second step of the analysis, determining whether any other remedial measures, such as civil penalties, are appropriate.

The Board rejects Evercom's second assertion of error in the proposed decision.

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[4] Black's Law Dictionary, p. 1275 (5th Ed. 1979).

3. Did the proposed decision fail to recognize relevant limitations and defenses asserted by Evercom?

Evercom's arguments. It is difficult to determine exactly what Evercom is arguing in its third assertion of error. The entire argument from the December 21, 2007, appeal is as follows:

> 19. The ALJ's third Conclusion of Law is that "As discussed in the body of this decision … the Board may levy a civil penalty if it finds a service provider violated the statute." This is erroneous because it fails to recognize the limitations on the type of service providers covered, the limitations on the type of calls covered, the need for intent or a pattern to trigger penalties, and the defenses such as superseding cause which were raised by Evercom and which apply even to strict liability claims. As a result, the ALJ's conclusion is erroneous under Iowa Code § 17A.19(10)(b),(d),(g),(h),(l),(m) and (n).

(Appeal at p. 5.) Evercom's supplement to its notice of appeal repeats this language and adds one alleged example of an error, but does not further clarify Evercom's arguments. For this reason, the Board will reject all of Evercom's third assertion of error, because the alleged errors were not precisely described, as required by 199 IAC 7.26(5)"d." In particular, the Board notes that Evercom's citations to the Iowa Code § 17A.19 standards for *judicial* review of agency decisions are irrelevant and unhelpful.

Notwithstanding this blanket denial of the third assertion of error, the Board will also address Evercom's specific allegations of error, to the extent they can be parsed out of the pleadings.

The only example from Evercom's supplement is the argument that the Board's rules are limited to "changes in telecommunications service" and "telecommunications service" is defined as local exchange or long distance service other than commercial mobile radio service. (Rule 22.23(2).) Evercom says it is an Alternative Operator Services provider (AOS) and claims it does not provide local or long distance service, only "certain processing and features relevant to the inmate environment between the correctional facility and the public switched telephone network." (Supplement at unnumbered page 6.) This is the only example Evercom provides to illustrate this alleged error, although it is possible that Evercom intends to include other allegations of error under this heading.

Consumer Advocate's arguments. In response, Consumer Advocate argues that Evercom's alleged status as an AOS provider is irrelevant because the statutory definition of "telecommunications service" turns on the service provided, not on the classification of the provider. The definition includes "long distance telephone service" (§ 476.103(2)"f" and 199 IAC 22.23(1)). The services billed on behalf of Evercom (or its affiliate) to Mr. Silver's business were for five wireline collect calls from a Bethany, Missouri, telephone number to a Des Moines telephone number. This is billing for a long distance telecommunications service, clearly satisfying the jurisdictional requirement.

ALJ ruling. Because Evercom's appeal is less than clear in this area, it is difficult to know which parts of the proposed decision are at issue here. The Board notes that the ALJ expressly rejected Evercom's "superseding cause" argument at pages 54-56 of the proposed decision, finding that the glare fraud was caused by

Evercom's failure to turn on its dial tone detection software and its failure to order one-way trunks for the Bridewell facility.

The ALJ addressed Evercom's definitional arguments at pages 10-12 of the proposed decision. After summarizing the arguments, the ALJ concludes:

> 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 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.

(Proposed Decision at p. 12.)

Board analysis. The Board agrees with the ALJ and Consumer Advocate on this point. Evercom billed Mr. Silver for long distance calls; hence, it was claiming to have provided a telecommunications service as defined in the statute and the rules. Moreover, Evercom's own statements describe the company as a "provider of inmate telecommunications services … ." (Ex. 16B, p. 3.) Evercom cannot claim to be a telecommunications carrier at some times, but deny that status at other times.

With respect to any other arguments Evercom may be attempting to raise with respect to the third conclusion of law in the proposed decision, Evercom has failed to raise them with sufficient specificity to preserve any error, if any error exists.

The Board will affirm the proposed decision with respect to Evercom's third allegation of error.

4. Was it appropriate to assess a civil penalty in this case?

Evercom's arguments. Evercom's fourth allegation of error is that it was not appropriate to assess a civil penalty in this case at all, and assuming a civil penalty is appropriate, $2,500 is too high. Evercom asserts that the proposed penalty is the largest penalty assessed by the Board against a carrier for an unauthorized change in service in a single docket, other than cases in which the carrier has defaulted. Evercom points to the numerous steps it has taken to prevent fraud, its good record regarding fraud complaints, the unique nature of the inmate calling services market, and its remedial efforts and concludes that a $2,500 civil penalty is excessive. (Appeal at pp. 5-6.)

In its supplement, Evercom expands on these arguments, adding an argument that much of the ALJ's reasoning is based on customer service issues. Evercom says that customer service is not a factor addressed by rule 22.23 or § 476.103. Evercom asserts that customer service issues are not relevant to cramming disputes. (Supplement at ¶ 20.)

Consumer Advocate's arguments. Consumer Advocate responds that the penalty is not too high, citing cases that emphasize the need for appropriate penalties to deter undesirable behavior. Consumer Advocate makes the point that while Evercom paints itself as a victim of inmate fraud in this case, the fact is that Evercom actually profits from glare fraud whenever a customer pays a bill that includes incorrect charges of this nature. Consumer Advocate does not say it in so many words, but appears to be arguing that Evercom may have some financial incentive to allow glare fraud to occur, so civil penalties are necessary to deter this behavior.

ALJ ruling. The ALJ addressed the amount of the civil penalty at pages 59-61 of the proposed decision and concluded that Evercom is a large company and some of its actions in this matter were unreasonable, tending to support a large civil penalty. At the same time, the ALJ recognized there were several mitigating factors, including Evercom's development of proprietary dial tone detection software, the quickness of Evercom's corrective response when the warden at Bridewell complained that something was wrong, and the lack of prior complaints to the Board concerning Evercom. The ALJ concluded that "[f]or all these reasons, it would not be appropriate to assess a large civil penalty. A civil penalty in the amount of $2,500 should be assessed against Evercom." (Proposed Decision at pp. 60-61.)

Board analysis. The ALJ properly considered all of the factors and the evidence and arrived at a reasonable civil penalty. In particular, the Board notes that Iowa Code § 476.103(4)"b" specifically provides that the factors the Board may consider in determining the amount of a civil penalty include the "remedial actions taken by the service provider, the nature of the conduct of the service provider, and any other relevant factors." Further, Iowa Code § 476.103(3)"e" reflects a state policy of encouraging service providers to resolve customer complaints without involvement of the Board. This requires that carriers provide a reasonable level of customer service when responding to customer inquiries regarding charges on their bills and it is appropriate for the ALJ and the Board to consider quality of customer service when considering the amount of civil penalties. In this case, Evercom's actions were not always consistent with a reasonable level of customer service.

For these reasons, the ALJ's consideration of Mr. Silver's customer service experience with Evercom appears to be proper. In that connection, it is worth noting that Evercom asserted on at least two occasions that it had conducted a "thorough investigation" and concluded the charges were valid, yet it never listened to the recordings of the calls in question until March 22, 2006, almost two months after Mr. Silver's initial complaint to Evercom and six weeks after the warden's complaint caused Evercom to discover that its glare fraud prevention measures were not in place and to take steps to implement them. The call recordings made it so obvious that glare fraud had occurred that Evercom processed credits to the Silver account that same day. It is difficult to square the notion of a "thorough investigation" with the failure to pursue this simple, and effective, line of inquiry, either in response to the multiple customer complaints or in response to the warden's complaint.

The Board will affirm the proposed order with respect to Evercom's fourth allegation of error, based upon the discussion above and its own consideration of the relevant factors, detailed in the following section of this order.

5. Consumer Advocate's cross appeal

Consumer Advocate's arguments. Consumer Advocate filed a cross-appeal of the proposed order, arguing the civil penalty of $2,500 is too low. Consumer Advocate argues that five calls were billed to the Silver business account and each call is a separate offense. The maximum authorized penalty is $10,000 per offense, or $50,000 total, according to Consumer Advocate. Evercom's consolidated financial statements show total revenue for the first six months of 2006 in excess of $200 million (separate financial statements for Evercom alone are not available), so a penalty of only $2,500, only 5 percent of the maximum amount, will have virtually no impact on Evercom and is not sufficient to provide an incentive to avoid future violations.

Evercom's arguments. Evercom responds that it should not be penalized at all for what it characterizes as an isolated and inadvertent computer input error. Evercom also argues that Consumer Advocate's reliance on consideration of the size of the company is improper; for an Iowa complaint and an Iowa penalty, the Board should consider only the size, scope, and finances of Evercom's Iowa operations.[5] Further, Evercom argues that the use of revenues is misleading; the more relevant measure would be net income.[6] Finally, Evercom argues that use of consolidated financials that include revenues from Evercom's affiliates is even more misleading.[7]

Apart from the "size of company" factor, Evercom analyzes the other factors in § 476.103(4)"b" as follows: First, the gravity of the violation is minimal because it was inadvertent, involved only $74, and was caused primarily by third-party fraud.

Second, Evercom has little history of these problems. It receives about two complaints per year per state of any kind, valid or invalid. There is no history of

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[5] Evercom does not indicate what these numbers might be.
[6] Again, Evercom does not indicate what that number might be.
[7] Again, Evercom does not indicate what the non-consolidated financials for Evercom might show.

complaints regarding the Bridewell facility and no evidence of a pattern or practice regarding glare fraud in Iowa.

Third, Evercom took appropriate remedial actions. Mr. Silver was credited less than 60 days after the fraudulent calls took place, "and on the first day Evercom could possibly have determined with certainty that the calls were fraudulent." (Response at p. 2.) Moreover, Evercom has reviewed the case with the supervisors of its computer technicians to ensure they are trained to avoid leaving the dial tone detection setting in the wrong position.

Consumer Advocate's reply. Consumer Advocate replies that Iowa Code § 476.103(4)"b" authorizes the Board to consider "the size of the service provider" and does not limit this consideration to Iowa operations or in any other way. The purpose of the penalty is to influence company behavior and that will only be achieved if the size of the company is considered. Consumer Advocate argues that revenues are more relevant than net income because large companies may show losses but still have revenues and still need to be penalized.

With respect to the use of a consolidated financial statement, Consumer Advocate notes that Evercom does not have separate financial statements and the consolidated statements do not separately state the finances of the affiliated entities.

ALJ ruling. The ALJ ruling on this issue was described in connection with Evercom's fourth issue on appeal, above, and will not be repeated here.

Board analysis. The Board agrees with the ALJ's analysis that Evercom committed a cram and compounded the issue with poor investigation of the complaint and misleading responses to the customer, implying it had completed a level of investigation that had not occurred. These factors would tend to justify assessment of a civil penalty at or near the high end of the permissible range. At the same time, it is fair to conclude that Evercom did not intend to cram Mr. Silver and Evercom ultimately took reasonable steps to prevent a recurrence of the problem. These factors argue against imposition of the maximum penalty. This leaves the question of how much the penalty should be.

Evercom argues the ALJ committed various errors when considering the size of Evercom for purposes of determining the proper amount of the civil penalty. The Board is not persuaded by Evercom's argument that only Evercom's Iowa financials should be considered in determining the amount of the penalty. The statute authorizes the Board to consider the size of the service provider when determining the appropriate amount of a penalty. (§ 476.103(4)"b.") The purpose of this factor is to balance the need for a large enough penalty to get a company's attention with the need to avoid an excessive penalty for a small company. From that standpoint, it is the size of the overall company that matters, not just the size of its Iowa operations, in order to make the civil penalty effective as a deterrent. A very large company with small Iowa operations might not be deterred by a civil penalty based upon the size of its Iowa operations alone. Moreover, Evercom's arguments might have been more persuasive if Evercom had provided the information that it believed the Board should be considering.

For these reasons, the Board rejects Evercom's argument that the ALJ committed error by considering Evercom's consolidated financials. First, Evercom can hardly be heard to complain about this when it did not offer Iowa-specific information for consideration. Second, the purpose of the statute is best served by considering the size of the overall entity, not just a single subsidiary.

Thus, the statutory factors to be considered when determining the appropriate amount of a civil penalty can be applied to this case as follows:

1. Size of service provider: The available financial statements show that Evercom is a substantial company. By its own statement, it is the largest independent provider of inmate telecommunications service to correctional facilities in the United States and Canada. (Ex. 16B, p. 3.) This factor supports a relatively large civil penalty, in order to get the company's attention and deter future violations.

2. Gravity of the violation: The amount at issue is not particularly large (about $75), but the company's failure to take steps to prevent glare fraud when it could have done so at little or no cost is significant. This factor could support almost any size of civil penalty.

3. History of prior violations: Evercom's record in Iowa is relatively clean. This factor supports a relatively small civil penalty, in recognition of the company's record.

4. Remedial actions taken: Evercom's initial reaction to the customer complaint was unsatisfactory. It asserted it had conducted a

"thorough investigation" and concluded the customer was lying and the charges were valid, even though it had not checked its own call records or the call recordings available at Bridewell, either of which would have caused a reasonable investigator to conclude glare fraud had probably take place.[8] Evercom then repeated variations on this inadequate response to all subsequent customers inquiries, if it responded at all. Even now, Evercom claims it credited Mr. Silver's account "on the first day Evercom could possibly have determined with certainty that the calls were fraudulent," (Response at p. 2) ignoring the fact that Evercom knew on February 4, 2006, that its glare fraud protection at Bridewell was turned off, but it did not credit Mr. Silver's account until March 22, 2006, over 6 weeks later. These actions would tend to support a larger civil penalty.

Other actions tend to support a smaller penalty. For example, once Evercom listened to the call recordings it credited the customer account the same day. When it found its dial tone detection system was turned off, it turned it back on that same day or the next. In other words, once it finally acknowledged the problem, Evercom fixed it. Overall, this factor could support almost any size civil penalty.

[8] The call records would have shown numerous call attempts in a short time, consistent with glare fraud; the recordings were, in the end, the basis on which Evercom concluded glare fraud had occurred.

5. The nature of the conduct of the service provider: In this case, the significant conduct occurred after the calls were made. Thus, this factor was largely considered above and will not be repeated here.

6. Other relevant factors: The Board does not find any other factors it should consider in this case.

These are all just factors to be considered. They are not a formula and do not yield a mathematically precise result. Having considered the factors, the Board concludes that on balance, Consumer Advocate has not shown the ALJ's proposed civil penalty of $2,500 to be too low. The Board will affirm the proposed order on Consumer Advocate's cross-appeal.

ORDERING CLAUSES

IT IS THEREFORE ORDERED:

The "Proposed Decision" issued in this matter on December 6, 2007, is affirmed. All allegations of error are rejected as described in the body of this order.

UTILITIES BOARD

/s/ John R. Norris

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Darrell Hanson

Dated at Des Moines, Iowa, this 14th day of March, 2008.