

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="padding-left: 100px;">Complainant,</p> <p style="padding-left: 100px;">vs.</p> <p>AT&T COMMUNICATIONS OF THE MIDWEST, INC.,</p> <p style="padding-left: 100px;">Respondent.</p>	<p style="text-align:right">DOCKET NO. FCU-08-9 (C-06-402)</p>
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**ORDER DOCKETING REQUEST FOR FORMAL PROCEEDINGS AND
ASSIGNING TO ADMINISTRATIVE LAW JUDGE**

(Issued May 23, 2008)

PROCEDURAL BACKGROUND

On December 21, 2007, the Utilities Board (Board) issued an "Order Denying Request for Proceeding to Consider Civil Penalty" in this docket. The Board denied a request filed by the Consumer Advocate Division of the Department of Justice (Consumer Advocate) for a proceeding to consider a civil penalty for an alleged cramming violation committed by AT&T Communications of the Midwest, Inc. (AT&T). The request for a proceeding to consider a civil penalty arose out of an informal complaint in which Maggie Bates filed a complaint with the Board on behalf of her mother and father, Nancy and James Bates, regarding AT&T charges for long distance service on her parents' telephone bill. In the December 21 order, the Board

concluded that there were no reasonable grounds to grant a formal proceeding for further investigation because, based on the informal record, although AT&T failed to disconnect the long distance telephone service previously authorized by Bates, AT&T did not charge the Bates for an added or deleted product or service as stated in the definition of cramming in Board subrule 22.23(1). Board staff noted that the consumer had been credited for the charges accrued during the time period that AT&T failed to disconnect the telephone service. On February 8, 2008, the Board, for the procedural purpose of granting further reconsideration, granted Consumer Advocate's motion for reconsideration. This order addresses the merits of Consumer Advocate's request.

**CONSUMER ADVOCATE'S MOTION TO RECONSIDER
AND RESPONSE TO AT&T'S MOTION**

On January 10, 2008, Consumer Advocate filed a motion for reconsideration, asking the Board to reconsider its decision to deny the request for proceeding to consider civil penalties. In its motion, Consumer Advocate makes five arguments.

First, Consumer Advocate argues that the Board's December 21, 2007, order overlooks relevant textual provisions in Iowa Code § 476.103. Consumer Advocate asserts that its petition for proceeding to consider a civil penalty alleges that "AT&T billed the Bates for nine months of service following termination of service, even though it provided no service, then refused to credit six of the nine months' unauthorized charges." (Motion for Reconsideration at 1-2.) Consumer Advocate

states that the ruling is divorced from the statutory text and the statutory and regulatory text is written so as to reach "the addition ... of a telecommunications service ... *for which a separate charge is made to a consumer account.*" (Quoting Consumer Advocate, quoting Iowa Code § 476.103(2)(a).) (Emphasis in original.) Consumer Advocate further states that "[o]n the facts here alleged, AT&T bills its long distance service in monthly increments. In the language of the statute and rule, each month's service is therefore 'the addition ... of a telecommunications service ... for which a separate charge is made to a consumer account.'" (Motion for Reconsideration at 3.)

Second, Consumer Advocate argues that the Board's December 21, 2007, order is inconsistent with the Board's order dated April 18, 2006, Office of Consumer Advocate v. AT&T Communications of the Midwest, Inc., Docket No. FCU-06-27, and the inconsistency is not justified with credible reasons sufficient to indicate a fair and rational basis for the change, in violation of Iowa Code § 17A.19(1)(h). Consumer Advocate states that the facts are materially the same and that Docket No. FCU-06-27 did not look to the company's defaults, but to the merits. In Docket No. FCU-06-27, Board staff summarized the facts and concluded that there were reasonable grounds for further investigation. This case, according to Consumer Advocate, is substantially similar. Therefore, the order refusing to docket here on the basis of the company's initial default is neither reasonable nor rational, according to Consumer Advocate.

Third, Consumer Advocate argues that the Board's December 21 order overlooks the fact that AT&T refused to credit most of the disputed charges "until after the consumer involved the Board." (Motion for Reconsideration at 8.) Consumer Advocate stated the complaint alleged that "[a]fter much difficulty" and "after talking to two AT&T customer service representatives," the Bates were able to receive credit "for only three of the nine months of unauthorized billings." (Motion for Reconsideration at 8.) Consumer Advocate further states that the statute explicitly reflects a public policy goal that companies "resolve customer complaints without involvement of the board" and that they "promptly reverse unauthorized changes in service." (Motion for Reconsideration at 8-9.)

Fourth, Consumer Advocate argues that the December 21 order erroneously requires it to establish "reasonable grounds for further investigation" as a prerequisite for commencement of a contested case proceeding pursuant to § 476.103.

Last, Consumer Advocate argues the procedural changes instituted August 1, 2006, with respect to petitions for proceedings to consider civil monetary penalties pursuant to § 476.103 were not justified with credible reasons sufficient to indicate a fair and rational basis for the change, in violation of § 17A.19(10)(h).

On January 28, 2008, Consumer Advocate filed a reply to AT&T's response to Consumer Advocate's motion for reconsideration. Consumer Advocate's reply is substantially similar to its initial motion; therefore, the Board will not summarize the arguments for a second time in this order.

**AT&T's RESPONSE TO
CONSUMER ADVOCATE'S MOTION TO RECONSIDER**

On January 24, 2008, AT&T filed a response to Consumer Advocate's motion for reconsideration.

With respect to the argument that the Board's decision in this docket is not consistent with a prior Board decision, AT&T argues that a default judgment followed by a settlement does not create a binding precedent and that by "merely citing to Docket FCU-06-27 and summarily asserting that unidentified 'facts' are 'materially' the same, the OCA asks the Board to reconsider its decision here" and "[a]s a legal matter this request, *on its face*, provides insufficient evidence for the Board to do anything other than reject the Motion." (Emphasis in the original.) (AT&T's Response at 2.)

AT&T also argues that Consumer Advocate's citation to the Administrative Procedure Act in Iowa Code chapter 17 is inapplicable in this context. Even assuming it is applicable in this context, Consumer Advocate has "failed to identify any substantial right that belongs to OCA that has been prejudiced by the decision" and "[u]nder the law, OCA has no vested or substantial right in civil penalties." (AT&T Response at 3.)

AT&T further argues that its conduct does not fit within the definition of "change in service" as contemplated by the Iowa Code. AT&T states that its conduct was not of the nature contemplated by § 476.103 and "[a]s between the multiple authorized carriers involved in the Bates' telephone service, the facts reveal that an

alleged disconnection notice initiated by the customer, if sent, never made it to its intended target," which AT&T claims is "a far cry from AT&T secretly acting against the will of the Bates to designate itself as the Bates' provider and include charges for its service on their bill." (AT&T Response at 5.)

Last, AT&T argues that Consumer Advocate's citation of Massachusetts v. EPA, 127 S.Ct. 1438, 1462-63, is inapplicable here. AT&T asserts that in the aforementioned case the "EPA chose to exercise a forbearance standard instead of examining the relevant statute and facts, under which it could have chosen not to hold a proceeding based on that statute's requirement." (AT&T Response at 6.) AT&T states that is not the case here, where "the Board refused to act based on its analysis of the facts as applied to the applicable statute and rule" and "[t]hus, the Board's decision is not 'divorced from the statutory text'" as Consumer Advocate suggests, but rather, "OCA disagrees with the application of the law to the particular facts — it [Consumer Advocate] wants to broaden the reach of the statutory definition to sweep in every billing dispute or clerical error." (AT&T Response at 6.)

DISCUSSION

Iowa Code § 476.3(1) states "[i]f the consumer advocate determines the public utility's response to the complaint is inadequate, the consumer advocate may file a petition with the board which shall promptly initiate a formal proceeding *if the board determines that there is any reasonable ground for investigating the complaint.*" (Emphasis added.) The Board has previously determined that § 476.3 should be

read together with § 476.103,¹ the statute prohibiting unauthorized changes in service. As the Board has said before, § 476.3 requires that the Board grant a petition for a formal proceeding any time the Board determines there is any reasonable ground for doing so. Thus, the Board only denies petitions for formal proceedings when there are no reasonable grounds for further investigation.

In the December 21, 2007, order, the Board found no reasonable grounds to hold a proceeding to consider a civil penalty. In its motion for reconsideration, Consumer Advocate submits numerous arguments requesting the Board reconsider its order denying Consumer Advocate's petition for proceeding to consider civil penalty. The Board has considered each of Consumer Advocate's arguments and now finds grounds to rescind its initial order and grant formal proceedings.

With regard to Consumer Advocate's arguments in sections IV and V, the Board will adopt its discussion in Office of Consumer Advocate v. Cordia Communications Corp., "Order Granting Leave to Submit Additional Exhibits and Denying Request for Reconsideration," Docket No. C-07-134 (August 10, 2007).

There is a question about whether the facts of this complaint match up with Iowa Code § 476.103; however, the Board will grant Consumer Advocate's motion for reconsideration because there is a question regarding the cancellation of the Bates' long distance telephone service, the facts underlying AT&T's failure to cancel that service, and whether that failure to cancel equals a violation of Iowa Code § 476.103.

¹ Office of Consumer Advocate v. MCI Communications of Iowa, Inc., and Frontier Communications of Iowa, "Order Denying Request for Reconsideration," Docket No. C-06-281 (April 2, 2007).

The Board has questions about the applicability of § 476.103 where a consumer has initially authorized services, because the key component in § 476.103 is authorization. Furthermore, the potential assessment of civil penalties on a company that admits to making a clerical error and has refunded any overcharges to the consumer may not be the type of unauthorized change in service envisioned by the Legislature, when it enacted § 476.103. These are issues that merit further investigation in this docket, along with any other issues that might arise as the matter develops.

With regard to section II of Consumer Advocate's motion, the Board does not believe the facts are materially the same in this case as the case cited by Consumer Advocate and therefore will not reconsider its December 21, 2007, order on that basis. The case cited by Consumer Advocate was settled, so the Board never had the opportunity to fully consider all of the facts and circumstances and reach a decision.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The "Motion for Reconsideration" filed in this matter by the Consumer Advocate Division of the Department of Justice on January 10, 2008, is granted. This matter is assigned to the Board's administrative law judge, Amy Christensen, for

further proceedings under the Board's rules. File No. C-06-402 is docketed for formal proceedings and identified as Docket No. FCU-08-9.

UTILITIES BOARD

/s/ John R. Norris

/s/ Darrell Hanson

DISSENT

I respectfully dissent from my colleague's order granting reconsideration. The question in this docket concerns the applicability of § 476.103 where a consumer has initially authorized services, later cancels those services, and a dispute arises between the carrier and the consumer. As the majority has stated above, a key component of § 476.103 is authorization and this docket presents questions regarding the beginning and ending points for "authorization" in unauthorized changes in service. The Legislature's intent in creating Iowa Code § 476.103 was aimed at protecting consumers from unauthorized changes in service or unauthorized charges by requiring companies to prove verification of authorization. The Board has consistently held, and I agree, that situations such as the one at issue here were not what the Iowa Legislature intended to protect under Iowa Code § 476.103. The majority's opinion in this docket opens the door for a flood of cases that are unrelated to the Board's verification requirements.

My concern with the majority's opinion, however, is not limited to the fact that it is legally incorrect. I am also concerned that, with this decision, the majority seems to suggest that the Board change its position on what it considers to be an unauthorized change in service. In Office of Consumer Advocate v. AT&T Communications of the Midwest, Inc., the Board held that a failure to disconnect long distance telephone service does not rise to the level of cramming. See Office of Consumer Advocate v. AT&T Communications of the Midwest, Inc., "Order Denying Petition for Proceeding to Consider Civil Penalty," pp. 6-7, Docket No. C-06-402 (Dec. 21, 2007). In support of its finding, the Board held:

Board rule 22.23(1) defines cramming as "the addition or deletion of a product or service for which a separate charge is made to a telecommunication customer's account without the verified consent of the affected customer." The Board concludes that there are no reasonable grounds to grant formal proceeding to further investigate this matter, because, as it appears in the informal record, AT&T failed to disconnect the long distance telephone service authorized by the Bates, not charge the Bates for an added or deleted product as stated in the definition of cramming in Board rule 22.23(1).

Id. The Board's decision is in keeping with the Board's broader rulings that routine billing disputes are outside the scope of Iowa Code § 476.103 and its prohibition on unauthorized changes of service. See Office of Consumer Advocate v. McLeodUSA Telecommunications Services, Inc., "Order Denying Request for Proceeding to Consider Civil Penalty," pp. 4-6, Docket No. C-06-277 (April 6, 2007); Office of Consumer Advocate v. Qwest Corp., "Order Denying Petition for Proceeding to

Consider Civil Penalty," pp. 6-8, Docket No. C-06-168 (June 14, 2007); Office of Consumer Advocate v. McLeodUSA Telecommunications Services, Inc., "Order Denying Petition for Proceeding to Consider Civil Penalty," p. 5, Docket No. C-06-393 (Dec. 6, 2007); Voss v. Uni-Tel Communications, "Order Denying Petition for Formal Proceeding," pp. 8-9, Docket No. C-07-228 (Dec. 10, 2007).

By docketing this proceeding, the majority is signaling that it intends to reverse the Board's prior decisions regarding what constitutes a cram under Iowa Code § 476.103 and Board rule 22.23. If that is, in fact, where the majority is headed, then I believe there are more appropriate avenues to pursue. The first, but less preferable, option is for the Board to docket the proceeding but, given the gravity of reversing precedent, the Board should keep and hear the case itself rather than assign the case to the ALJ. Departing from precedent is not only a serious policy decision, but also one that must be done carefully in order to comply with Iowa law. The Iowa Administrative Code requires that agency decisions be consistent with precedent, unless the agency justifies the inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency. See Iowa Code § 17A.19(10)(h).

For both legal and practical reasons, however, the better option is to deny the petition for formal proceedings and consider the conduct at issue here in a separate rule making proceeding. This is the better option because, even if the majority wants to reverse existing precedent, it is unlikely that it can

unless it amends Board rules. Designating a failure to disconnect service as a cram requires more than changing the Board's interpretation of an existing rule; it requires a rule change. There is currently nothing in the Board's existing rules that give companies notice that a failure to timely cancel a customer's service could be considered a cram. As the Iowa Supreme Court recently reminded the Board,

[O]ne of the purposes of rulemaking is to express the policy of an agency in a rule in order to give any affected persons fair notice of the law before they engage in conduct, which may be governed by those rules. ... Making policy by ad hoc decisions on a case-by-case basis is contrary to legislative intent of Iowa Code section 17A.3(c) [sic].

Office of Consumer Advocate v. Iowa Utilities Board, 744 N.W.2d 640, 646 (Iowa 2008) (citations omitted). By expanding the definition of what constitutes a cram, beyond what is prescribed in Board rules, the majority is making policy by ad hoc decisions on a case-by-case basis contrary to Iowa law – precisely the same action for which this Board was admonished just months ago from the Iowa Supreme Court.

Finally, as a practical matter, it is unlikely docketing this petition will resolve the issue the majority wants to address. We know that nearly all of these types of complaints settle. Of the hundreds of cramming and slamming complaints that have been filed by the Consumer Advocate since 2002, I am only aware of four cases that have proceeded to a full evidentiary hearing. The rest have settled. Given this history, it is highly unlikely that either the ALJ or Board will have the opportunity to

have this issue fully developed with evidence and legal briefings as is necessary when contemplating a change in law. Because it is unlikely to go hearing, all that is likely to be accomplished by docketing this complaint is confusion regarding the Board's cramming rules, but with no final resolution.

In summary, I dissent from the majority's opinion because it violates Iowa Code § 17A.19(10)(h), which requires that, if the Board departs from precedent, it must justify the inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency and because it violates Iowa Code § 17A.19(10)(g), which requires that the Board follow its own rules. I understand my colleagues' desire to address consumer issues, however, as stated above, there are ways to address these issues that are both practical and within the bounds of the law. While I cannot say that I would agree that the Board's cramming rules should be expanded to include a failure to disconnect, I would agree that the Board's cramming rules are outdated and do not address other serious harms to consumers. Accordingly, I would support the initiating of a rulemaking docket to address cramming issues that would allow the Board to carefully craft its policy as contemplated by Iowa law.

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

Dated at Des Moines, Iowa, this 23rd day of May, 2008.