

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

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<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>GLOBALYP.NET,</p> <p style="padding-left: 100px;">Respondent.</p>	<p style="text-align:right">DOCKET NO. FCU-08-7 (C-07-66)</p>
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**ORDER DOCKETING REQUEST FOR FORMAL PROCEEDINGS AND  
ASSIGNING TO ADMINISTRATIVE LAW JUDGE**

(Issued June 27, 2008)

**PROCEDURAL BACKGROUND**

On December 26, 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 GlobalYP.net (Global). The request for a proceeding to consider a civil penalty arose out of an informal complaint in which Mr. Douglas Coonrad filed a complaint with Board staff against Global for placing unauthorized charges on the local telephone bill at his business, The Coonrad Law Firm.

In the December 26, 2007, order, the Board concluded, pursuant to Iowa Code §§ 476.3 and 476.103, that there were no reasonable grounds for further investigation because, as it appeared in the informal record, an employee of the consumer accepted an offer by Global for a 15-day free trial of Global's services and that employee then canceled within the 15-day free trial period, but the cancellation was not processed due to a technical error. Consequently, the Board concluded that the change to add the service was authorized and the failure to cancel the service was a normal billing dispute, not a cramming violation.

#### **CONSUMER ADVOCATE'S MOTION TO RECONSIDER**

On January 15, 2008, Consumer Advocate filed a motion for reconsideration, asking the Board to reconsider its decision to deny Consumer Advocate's request for a proceeding to consider a civil penalty. Consumer Advocate submitted nine arguments in its motion for reconsideration. For Consumer Advocate's arguments in Sections II, VIII, and IX of its motion, the Board will adopt its discussion in In re: Office of Consumer Advocate v. Cordia Communications, "Order Granting Leave to Submit Additional Exhibits and Denying Request for Reconsideration," Docket No. C-07-134 (August 10, 2007).

In Section I of its motion for reconsideration, Consumer Advocate argues that the Board's December 26 order overlooks the factual allegation that the verification recording submitted by Global is not an accurate reproduction of the "verification" portion of the call. Consumer Advocate states that the Board's order concludes that

"Christina Shriver, 'accepted the offer by Global for a 15-day free trial offer ...'" and that "[t]his conclusion is based on a voice recording provided by GlobalYP, questionably referred to in the order as a 'third party verification' or 'TPV'." (Motion for Reconsideration at 1.) The thrust of the argument is that Consumer Advocate believes the Board's order overlooks the fact the authenticity of the recording is disputed. (Motion for Reconsideration at 2.) Furthermore, Consumer Advocate states that these allegations are material and need to be addressed. Also, Consumer Advocate states that if the allegations are true, there was no acceptance of the free trial offer and "no authorization of anything." (Id.)

Consumer Advocate next argues that "the Board's December 26 order erroneously concludes that a company's billing after cancellation is a 'billing dispute' beyond the reach of the statute." (Motion for Reconsideration at 5.) Consumer Advocate states that this is a broad legal ruling which leaves lowans without the protection of Iowa Code § 476.103. Consumer Advocate further states that 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." Last, Consumer Advocate states "the statute contains no carve-out for 'billing disputes.' The term 'billing dispute' does not appear in the statute" and the term "change in service" is defined in the statute in inclusive, not exclusive, terms. (Motion for Reconsideration at 8-9.)

In Section IV, Consumer Advocate argues that the Board's December 26 order erroneously concludes that "technical" violations are beyond the reach of the statute. Consumer Advocate asserts that the Board's statement in this section effectively requires Consumer Advocate to prove an intentional violation and there is no such requirement in the statute.<sup>1</sup>

Consumer Advocate next argues that the December 26 order erroneously requires Consumer Advocate to prove a "pattern" of violations in order to secure a penalty. Consumer Advocate states that § 476.103(4) does not contain a pattern requirement for the civil monetary penalties authorized in subsection 4 and if the General Assembly had intended to include a pattern requirement in subsection 4, it would have done so. (Motion for Reconsideration at 12.)

In Section VI, Consumer Advocate argues that the Board's order overlooks the fact that despite repeated protests, Global failed for months to stop the unauthorized charges and that §§ 476.103(3)"e" and "f" explicitly reflect a public policy goal that companies "resolve customer complaints without the involvement of the board" and that they "promptly reverse unauthorized changes in service." (Motion for Reconsideration at 14.)

In Section VII, Consumer Advocate argues that the Board's December 26 order overlooks the fact that an authorization for a free trial is not an authorization for

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<sup>1</sup> The Board's December 26, 2007, order at p. 5 states "[a]lthough there were unauthorized charges on Mr. Coonrad's telephone bill, those charges were a result of a technical error in processing the cancellation of Global's service, not an attempt by Global to add unauthorized services."

a billable service. Consumer Advocate states that there was no authorization to bill unless and until the consumer decided to continue the service beyond the 15-day free trial period. Consumer Advocate argues that "[n]othing in the record remotely suggests the consumer decided to continue." (Motion for Reconsideration at 15.)

### **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 Iowa Code § 476.103,<sup>2</sup> 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. The Board believes there are reasonable grounds for further investigation and will grant Consumer Advocate's motion for reconsideration.

The key questions in this matter are when the change of service occurred and if that change of service was authorized by the consumer. Based on the record to

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<sup>2</sup> 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).

date and under the terms of Global's offer, it appears the consumer may never have authorized a change of service and that the consumer may only have agreed to a process for deciding whether to authorize a change of service at a later date. These allegations are sufficient to establish reasonable grounds for further investigation. The Board has reconsidered its December 26, 2007, order, and will now grant Consumer Advocate's request for formal complaint proceedings.

**ORDERING CLAUSE**

**IT IS THEREFORE ORDERED:**

The "Petition for Proceeding to Consider Civil Penalty" filed by the Consumer Advocate Division of the Department of Justice on March 15, 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-07-66 is docketed for formal proceedings and identified as Docket No. FCU-08-7.

**UTILITIES BOARD**

/s/ John R. Norris

/s/ Darrell Hanson

**DISSENT**

I respectfully dissent from my colleagues' 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. 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. In fact, in this very docket, the Board held the change in service here was authorized and that Global's failure to cancel was a normal billing dispute, not a cramming violation.

By reversing itself with no explanation, the majority has changed the Board's position on what it considers to be an unauthorized change in service. The Board has previously held that a failure to disconnect 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 (December 21, 2007). In doing so, the Board stated:

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. This 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 (December 6, 2007); Voss v. Uni-Tel Communications, “Order Denying Petition for Formal Proceeding,” pp. 8-9, Docket No. C-07-228 (December 10, 2007).

By docketing this proceeding, the majority has reversed prior decisions regarding what constitute a cram under Iowa Code § 476.103 and Board rule 22.23 in violation of 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." In this case, the majority has simply reversed course, without explanation.

The Iowa Administrative Code also requires that agencies follow their own rules. See Iowa Code 17A.19(10)"g." 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).

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.

Therefore, for the reasons set forth above, I respectfully dissent. In addition, I renew the request made in Docket No. FCU-08-9 that the Board initiate a rule making proceeding so that it can address cramming issues in a thoughtful manner and 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 27<sup>th</sup> day of June, 2008.