

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

<p>IN RE:</p> <p>OFFICE OF CONSUMER ADVOCATE,</p> <p style="padding-left: 40px;">Complainant,</p> <p style="padding-left: 80px;">vs.</p> <p>THE OYP GROUP,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>DOCKET NO. C-08-58</p>
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ORDER DENYING PETITION FOR PROCEEDING TO CONSIDER CIVIL PENALTY

(Issued August 15, 2008)

On July 2, 2008, pursuant to Iowa Code §§ 476.3 and 476.103, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed with the Utilities Board (Board) a petition for a proceeding to consider a civil penalty for an alleged cramming violation committed by The OYP Group (OYP). Based upon the record assembled in the informal complaint proceeding, the events to date can be summarized as follows:

On May 30, 2008, Denise Smith of Kings Gate Insurance (Kings Gate) filed a complaint against OYP. Ms. Smith stated that OYP billed Kings Gate without authorization and when she called to dispute the charges, OYP played a recorded conversation between a Kings Gate employee and OYP, where the Kings Gate employee was saying "yes" to the questions asked. Ms. Smith stated that the

employee's name was Sarah and she was a temporary employee. Ms. Smith also stated that she sat next to Sarah during the telephone call with OYP and explicitly heard Sarah tell the telemarketer that she, Sarah, could not authorize any charges to the business. Ms. Smith further states that she believes that recording was altered because when she listened to the recording all she could hear were "yes" and "no" answers. Last, Ms. Smith states that overall she refutes the charges since the owner did not authorize the charges.

On June 2, 2008, Board staff sent a copy of the complaint to OYP and OYP responded on June 10, 2008. OYP stated that its procedure in its initial contact to any company or organization is to ask for the person who is authorized to make the purchasing decision for the company's advertising. OYP stated that the person in this case was Sarah Lindner, who stated that she had the authority to make the decisions for Kings Gate. OYP further stated that Ms. Lindner asked to receive an invoice for the \$399.95 charge, and that while OYP had a recording of the conversation which clearly represented the publication, pricing, billing, and invoicing of its product; OYP would accept Ms. Smith's explanation of the events and close the account with a zero balance. Although staff requested a copy of the recording of the conversation between the OYP representative and Kings Gate's employee, OYP did not provide a copy.

On June 23, 2008, Board staff issued a proposed resolution. Board staff concluded that the matter between Kings Gate and OYP was outside of the Board's jurisdiction. Board staff noted that Kings Gate received a direct invoice from OYP

and these charges were never billed to a telecommunications account as set out in Board rules. Staff concluded that no cramming had occurred.

On July 2, 2008, Consumer Advocate filed a petition for a proceeding to consider civil penalties. Consumer Advocate stated that the proposed resolution was incorrect. Consumer Advocate argued that "the statute and the rule both define change in service to include the 'addition ... of a telecommunications service for which a separate charge is made to a consumer account'" and that this definition does not limit the reach of the statute and rule to charges billed on the local telephone bill; rather, it generally references charges made "to a consumer account." Consumer Advocate argues that the charges OYP made to Kings Gate's account are within the meaning of the statute and the rule. Consumer Advocate further argues that the "charges in question were for 'yellow page listing' and that yellow page listings are among the 'essential facilities, services, features, functions and capabilities' of local exchange service." Consumer Advocate argues that "[t]he fact that yellow page listings have been unbundled and deregulated has no bearing on whether they are telecommunications service" and OYP's failure to provide the required verification is in violation of the statute. Last, Consumer Advocate argues that although full credit was issued, credit alone is insufficient as it is not a deterrent." Consumer Advocate states that "[s]ubject to hearing rights to which OYP is entitled under law, a civil monetary penalty should be assessed in order to secure future compliance with the statute."

DISCUSSION

Iowa Code § 476.3(1) states that "[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." The Board has previously determined that § 476.3(1) should be read together with Iowa Code § 476.103,¹ the statute prohibiting unauthorized changes in service. As the Board has said before, § 476.3(1) 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 concludes that there are no reasonable grounds to grant a formal proceeding to consider a civil penalty in this matter because, in this instance, this matter is outside of the Board's jurisdiction.

Although Kings Gate was solicited by telephone, every telephone solicitation that results in a charge on a consumer's account does not fall under the Board's jurisdiction. The statute states that a "change in service" includes "the addition of ... a telecommunications service for which a separate charge is made to a consumer account." Iowa Code § 476.103(2)"a." Thus, the first issue in this matter is whether

¹ Office of Consumer Advocate v. MCI Communications of Iowa, Inc., and Frontier Communications of Iowa, "Motion for Reconsideration," Docket No. C-06-281 (March 8, 2007).

OYP added a telecommunications service to a consumer account, resulting in a separate charge to that account, falling within purview of the Board's rules.

Consumer Advocate argues that "the statute and the rule both define change in service to include the 'addition ... of a telecommunications service for which a separate charge is made to a consumer account'" and that this definition does not limit the reach of the statute and rule to charges billed on the local telephone bill; rather, it generally references charges made "to a consumer account." Consumer Advocate's interpretation of the definition of "consumer account" in Iowa Code § 476.103 is too broad. If the Board were to take Consumer Advocate's definition as true, then any time a telemarketer called and solicited an individual or a company and placed a charge on any account as a result of that telemarketing call, regardless of what was being solicited, would fall under the jurisdiction of the Board. The Legislature did not intend for Iowa Code § 476.103 to apply to all telemarketing sales.

Iowa Code § 476.103 is intended to address a particular type of transaction, one that results in a charge on a customer's telephone bill. Telephone bills are typically multi-page documents that include numerous charges stated as separate line items. Many of the descriptions used are not entirely clear to all customers and the total amount due will often vary from month to month due to variations in the number and length of long distance calls. As a result, many customers do not review their telephone bill line-by-line, but instead just look at the total amount due and, if it seems reasonable, pay it. The result is that an incorrect or unauthorized charge on a telephone bill is less likely to be noticed, so the telephone bill becomes a relatively

fertile field for slammers and crammers. The Legislature gave the Board express jurisdiction to resolve consumer complaints involving their telephone bills in order to address this problem.

This case does not fit within the parameters of the statute. OYP's charges were billed on a separate statement, not on the customer's telephone bill. In the absence of other factors, this direct invoice removes the case from the Board's jurisdiction.

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 July 2, 2008, is denied as discussed in this order.

UTILITIES BOARD

/s/ John R. Norris

/s/ Krista K. Tanner

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Darrell Hanson

Dated at Des Moines, Iowa, this 15th day of August, 2008.