

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

Office of the Ohio Consumers' Counsel,)	
)	Case No. 07-546-TP-CSS
Complainant,)	
)	
v.)	
)	
UMCC Holdings, Inc.)	
)	
Respondent.)	

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY
OR, IN THE ALTERNATIVE,
MOTION TO REOPEN THE PROCEEDING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential utility consumers, moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") for leave to file supplemental authority, in the form of this filing and the attached decision of the Iowa Utilities Board ("Iowa Board").¹ Alternatively, OCC moves for the PUCO to reopen the proceeding to allow for supplementation of authority, in the form of this filing and the attached Iowa Board decision.² These Motions and this proceeding are about protecting Ohio consumers from regulatory violations by a company that operated as a long-distance telecommunications carrier.

¹ Ohio Adm. Code 4901-1-12 and 4901-1-31.

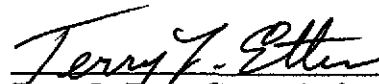
² Ohio Adm. Code 4901-1-12 and 4901-1-34.

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OCC wishes to provide the PUCO with updated information that was not available during the hearing or briefing phases, concerning an issue raised in OCC's testimony in this proceeding. The reasons for granting OCC's motions, including why good cause is shown to reopen under Ohio Adm. Code 4901-1-34(A), are further set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



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MEMORANDUM IN SUPPORT

On July 10, 2007, the Attorney Examiner issued an Entry that scheduled a prehearing conference or a hearing in this proceeding for August 16, 2007. The Entry directed OCC and UMCC Holdings, Inc. ("UMCC") to file testimony by August 9, 2007, pursuant to Ohio Adm. Code 4901-1-29. At the August 16, 2007 hearing, the Attorney Examiner set August 30, 2007 as the due date for briefs.³

On August 9, 2007, OCC filed the testimony of Senior Telecom Compliance Analyst Linda L. Pausch.⁴ Among other things, Ms. Pausch's testimony discussed a settlement agreement, filed with the Iowa Board, between the Iowa Office of Consumer Advocate ("Iowa Advocate") and UMCC concerning the Iowa Advocate's complaint cases against UMCC before the Iowa Board. Ms. Pausch's testimony stated, "On August

³ Tr. at 4-5.

⁴ At the hearing held in this proceeding on August 16, 2007, Ms. Pausch supplemented her testimony with information obtained in discovery and from the deposition of UMCC's president. Ms. Pausch's prefiled testimony, as supplemented at hearing, was admitted into evidence as OCC Exhibit 1. See Tr. at 10, UMCC had no representative or counsel present at the August 16 hearing.

6, 2007 the Advocate filed a settlement agreement and joint motion for approval of settlement agreement with UMCC. The settlement calls for assessment of a civil monetary penalty in the amount of \$15,000 and is subject to approval by the Board.”⁵ OCC filed its post-hearing brief on August 30, 2007.

OCC moves for leave to file supplemental authority in this proceeding. In the alternative, OCC moves to reopen this proceeding. Either way, OCC’s purpose with these motions is to bring to the Commission’s attention a September 4, 2007 decision by the Iowa Board rejecting the proposed settlement there and assessing a civil penalty in the amount of \$700,000 against UMCC.⁶ The Commission should have the most up-to-date information available for its deliberations in this matter.

Ohio Adm. Code 4901-1-31 states that “upon motion of any party or upon their own motion, [the PUCO may] permit or require the filing of briefs or memoranda at any time during a proceeding.”⁷ Since what OCC requests would, in essence, become part of OCC’s briefing of the issues, Ohio Adm. Code 4901-1-31 is a basis for allowing supplementation since it allows flexibility in scheduling briefs.

In the alternative, Ohio Adm. Code 4901-1-34 allows for the reopening of cases upon a showing of good cause. This rule provides:

(A) The commission, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion or upon motion of any person for good cause shown, reopen a proceeding at any time prior to the issuance of a final order.

(B) A motion to reopen a proceeding shall specifically set forth the purpose of the requested reopening. If the purpose is to permit the presentation of additional evidence, the motion shall specifically describe

⁵ OCC Ex. 1 at 12.

⁶ The Iowa Board’s order is attached as Exhibit A to this Motion.

⁷ Ohio Adm. Code 4901-1-31(A)

the nature and purpose of such evidence, and shall set forth facts showing why such evidence could not, with reasonable diligence, have been presented earlier in the proceeding.

OCC meets these standards. The Iowa Board issued its decision 19 days after the PUCO's hearing was held, and five days after OCC filed its brief, in this proceeding. Thus, OCC was unable to present the Iowa Board's decision through either testimony or OCC's brief. In addition, the Commission has not issued a final order in this proceeding.

In a prior proceeding, the Commission found good cause for supplementing the record in order to provide additional facts that may have a direct bearing on the Commission's deliberations.⁸ In this instance, OCC is providing updated information concerning another case involving UMCC that was addressed in OCC's testimony.

OCC has shown good cause for supplementing its authority. Alternatively, the case should be reopened to allow for supplementation of authority. The Commission should grant OCC's motion, so that the Commission has before it the most up-to-date information needed to protect Ohio consumers.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



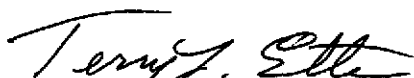
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⁸ See *In the Matter of the Complaint of Bill Stamatou v. First Communications*, Case No. 07-135-TP-CSS, Entry (September 5, 2007).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Motion for Leave to File Supplemental Authority or, in the Alternative, Motion to Reopen the Proceeding by the Office of the Ohio Consumers' Counsel was served via hand delivery or by first class mail, postage prepaid, to the persons identified below on this 1st day of November 2007.



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STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: OFFICE OF CONSUMER ADVOCATE, Complainant, vs. ULTIMATE MEDIUM COMMUNICATIONS CORPORATION AND UMCC HOLDINGS, INC., Respondents.	DOCKET NO. FCU-07-4
OFFICE OF CONSUMER ADVOCATE, Complainant, vs. ULTIMATE MEDIUM COMMUNICATIONS CORPORATION, Respondent.	DOCKET NO. FCU-07-5

**ORDER CONSOLIDATING DOCKETS, DENYING MOTION TO APPROVE
SETTLEMENT AGREEMENT, REJECTING SETTLEMENT AGREEMENT,
ENTERING JUDGMENT BY DEFAULT, ASSESSING CIVIL PENALTY, AND
DIRECTING OTHER CARRIERS NOT TO BILL**

(Issued September 4, 2007)

On March 13, 2007, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed with the Utilities Board (Board) a petition for a

proceeding to consider civil penalties for alleged slamming or cramming violations committed by Ultimate Medium Communications Corporation (Ultimate) and a motion to consolidate 67 informal complaint proceedings involving alleged violations.

Based upon the records assembled in those proceedings, it appeared that Ultimate or its parent company had recently acquired all or part of the customer service list of Buzz Telecom Corporation (Buzz), which had been the subject of prior Board action. (Specifically, it appeared that Ultimate sent bills to customers that said on December 1, 2006, UMCC Holdings, Inc. (UMCC), acquired the customers of Buzz and Business Options.) The Board had granted a default judgment against Buzz on January 30, 2007.

On February 2, 2007, Board staff sent a letter to UMCC notifying UMCC about the default judgment against Buzz and the action taken as a result, including civil penalties against Buzz and an order prohibiting other carriers from serving or billing for Buzz. The letter also outlined Iowa law regarding carrier registration requirements, carrier obligations when acquiring assets and customers from other providers, and included a copy of a carrier registration form and the applicable regulations. Board staff asked UMCC to complete and return the form within seven days of the date of the letter. UMCC has never responded to the letter or returned the form.

Subsequent to sending the letter, but also in February of 2007, the Board began receiving complaints from Iowa consumers stating that UMCC had changed

their designated long distance carrier without their consent (slamming) and billed them through their local telephone provider. The Board received at least 73 such complaints.

Pursuant to Board rules, staff forwarded each of the complaints to UMCC for response. UMCC did not respond to any of the 67 complaints that ultimately became the subject of Docket No. FCU-07-4. Staff's proposed resolutions for each of those dockets found that UMCC violated the Board's rules by failing to respond to the complaints and therefore found that UMCC had slammed each of the 67 complainants. Staff directed UMCC to immediately credit all charges to each customer's account and to close the accounts. Staff also prohibited UMCC from pursuing any collection activities in relation to these charges.

On March 13, 2007, Consumer Advocate filed the petition for civil penalties described in the first paragraph of this order. Ultimate did not file an answer to the petition. On April 24, 2007, the Board issued an order docketing the matter for formal proceedings, consolidating the 67 complaint files into Docket No. FCU-07-4, and ordering Ultimate to file a response to Consumer Advocate's petition within seven days of the date of the order.

On April 9, 2007, Consumer Advocate filed a petition for formal proceedings involving three other complaint files. On May 3, 2007, the Board issued an order docketing the matter for formal proceedings, consolidating the three files into Docket No. FCU-07-5, and directing Ultimate to file a response to Consumer Advocate's

petition within seven days of the date of the order. In the body of the order, the Board noted Ultimate's failure to respond to earlier Board and staff communications and explained that Ultimate should provide a complete response to the allegations. Ultimate was specifically cautioned that no extensions would be granted.

On June 5, 2007, Consumer Advocate filed an application for entry of judgment by default against Ultimate. On June 15, 2007, Consumer Advocate filed a withdrawal of its application for default judgment, saying that on June 8, 2007, Scott Wilson, UMCC President, sent Consumer Advocate a letter stating that Ultimate is a Delaware Corporation, does not have any customers in the State of Iowa, and it has not contacted or invoiced any resident or business in the State of Iowa for telecommunications services. As a result of Mr. Wilson's letter, Consumer Advocate withdrew its application for entry of default judgment against Ultimate, saying it would be in the public interest to give UMCC and Ultimate full opportunity to defend themselves.

Also on June 15, 2007, Consumer Advocate filed with the Board an amended petition for a proceeding to consider civil penalties for alleged cramming violations committed by UMCC and Ultimate. Consumer Advocate asserts that in each of the complaint files involved in these dockets, UMCC placed unauthorized charges on Iowa consumers' local telephone bills in violation of Iowa Code § 476.103 (2007). Consumer Advocate also asserts that UMCC violated 199 IAC 22.23(2)"e," which requires companies to provide specified notices to the Board and affected customers

regarding the planned acquisition of part or all of another company's customer base.

The proceeding was identified as Docket No. FCU-07-4.

On July 6, 2007, the Board issued an order granting Consumer Advocate's amended petition for a proceeding to consider civil penalties against UMCC and Ultimate. Again, the Board ordered that the UMCC and Ultimate file a response to Consumer Advocate's petition within seven days of the date of the order. No response has been filed.

On August 6, 2007, Consumer Advocate, UMCC, and Ultimate submitted a joint motion for approval of a settlement agreement contained in the motion. The proposed settlement agreement purports to address all issues in the docket and includes a monetary penalty in the amount of \$15,000, which is to be paid within 30 days of the date of a Board order approving the settlement.

On August 14, 2007, the parties filed an amendment to the settlement agreement and joint motion for approval of settlement agreement to include Docket No. FCU-07-5 and file numbers C-07-135, C-07-137, and C-07-145. The Board will approve the amendment only to the extent that it seeks consolidation of Docket Nos. FCU-07-4 and FCU-07-5.

The Board has reviewed the settlement agreement and will reject it. UMCC and Ultimate have failed to respond to the Board and its staff at every stage of these proceedings and the Board will not overlook these failures. First, as noted above, Board staff sent UMCC a letter on February 2, 2007, notifying UMCC of Iowa's laws

regarding registration and carrier obligations when acquiring assets and customers from other carriers. Staff included the registration form with the letter and asked that UMCC complete and return the form within seven days. UMCC did not respond to the staff letter and still has not registered with the Board, as required by 199 IAC 22.23.

When the Board began to receive complaints from Iowa customers about UMCC, alleging UMCC had slammed the customers, staff forwarded the complaints to UMCC for response. UMCC did not respond to a single complaint.

When the Board docketed Consumer Advocate's original petition for a proceeding to consider civil penalties, the Board gave the respondent seven days to file a response to the petition. No such response has ever been filed.

When the Board docketed Consumer Advocate's amended petition, to add UMCC as a respondent, the Board again gave UMCC seven days to file a response to Consumer Advocate's amended petition. Again, no such response has ever been filed.

In summary, UMCC and Ultimate did not respond to staff's inquiries in the informal complaint dockets, in violation of 199 IAC 6.8(2); did not register with the Board, as required by 199 IAC 22.23(3); did not follow Board rules regarding transfer of customers, see 199 IAC 22.23(2)"e"; and failed to file any response to Consumer Advocate's petition or amended petition, as required by Board orders. The last of these violations, by itself, justifies entry of default judgment against UMCC and

Ultimate, and the Board therefore finds that UMCC and Ultimate have committed an unauthorized change of service in each of the 70 consolidated complaints; in violation of Iowa Code § 476.103 and 199 IAC 22.23(2).

Iowa Code § 476.103(4)"a" gives the Board the authority to assess civil penalties against telecommunications service providers that commit unauthorized changes in service in Iowa:

In 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.

Here, UMCC and Ultimate had their opportunity to seek a hearing, but that opportunity was lost when they failed to file an answer or otherwise respond in a timely manner to the Board's docketing orders.

Consumer Advocate, UMCC, and Ultimate have negotiated a settlement that includes civil penalties in the sum of \$15,000. That is less than \$215 per violation. The Board finds that this sum is insufficient penalty for 70 separate violations, even if one were to ignore UMCC's and Ultimate's other violations (failure to respond to staff in the complaint files, failure to register, failure to follow rules regarding transfer of customers, and failure to follow Board orders). In the absence of any evidence supporting a contrary result, the Board will assess civil penalties for slamming in the

full amount permitted by law, \$10,000 per violation, for a total civil penalty of \$700,000.

Further, § 476.103(5) provides in relevant part as follows:

If the board determines, after notice and opportunity for hearing, that a service provider has shown a pattern of violations of the rules adopted pursuant to this section, the board may by order do any of the following:

a. Prohibit any other service provider from billing charges to residents of Iowa on behalf of the service provider determined to have engaged in such a pattern of violations.

The Board finds that in this case, 70 violations are sufficient to establish a pattern of violations. Accordingly, the Board will prohibit any other service provider from billing charges to residents of Iowa on behalf of UMCC or Ultimate.

The Board understands that UMCC and Ultimate were communicating with Consumer Advocate while this matter was pending and they may have thought that filing an answer was unnecessary as long as they were talking. However, UMCC and Ultimate knew, or should have known, that the Board is a body that is separate and independent from Consumer Advocate. When the Board orders that a response to a petition is to be filed, or when the Board's rules require that a company respond to the Board's staff, those requirements are not satisfied by negotiating with Consumer Advocate. Parties in the position of UMCC and Ultimate choose to ignore the Board's orders and its rules at their own peril.

Further, the Board also understands that Consumer Advocate, UMCC, and Ultimate negotiated their proposed settlement agreement in good faith and they may

believe the negotiated amount is reasonable, based on facts and circumstances they know but have not shared with the Board. The Board reminds all parties to proceedings before it that, pursuant to 199 IAC 7.18, the Board "will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with the law, and in the public interest." The parties to a proposed settlement must include sufficient information with their joint motion for approval of the settlement, on the record, to allow the Board to evaluate the settlement and make the necessary findings.

IT IS THEREFORE ORDERED:

1. The "Settlement Agreement and Joint Motion for Approval of Settlement Agreement" filed in this docket on August 6, 2007, and as amended on August 14, 2007, is rejected, except that the amendment of August 14, 2007, is approved only to the extent that it seeks consolidation of Docket Nos. FCU-07-4 and FCU-07-5.
2. Judgment by default is granted against UMCC Holdings, Inc., and Ultimate Medium Communications Corporation in Docket Nos. FCU-07-4 and FCU-07-5.
3. Pursuant to Iowa Code § 476.103(4), UMCC Holdings, Inc., and Ultimate Medium Communications Corporation, jointly and separately, are assessed a total civil penalty in the amount of \$700,000. Payment, in the form of a check made payable to the Iowa Utilities Board, should be forwarded to the Executive Secretary of the Iowa Utilities Board at 350 Maple Street, Des Moines, Iowa 50319-0069.

Payment is due within 35 days of the date of this order. The docket numbers listed on this order shall be listed on the check or in the accompanying correspondence.

4. All service providers operating in Iowa will continue to be prohibited from billing charges to residents of Iowa on behalf of UMCC Holdings, Inc., or Ultimate Medium Communications Corporation. A copy of this order will be mailed to each certificated local exchange service provider in Iowa. Any service provider that believes it is unable to comply with this prohibition within a reasonable time must notify the Board of its inability and request appropriate relief from this prohibition.

5. All certificated local exchange providers are prohibited from providing exchange access services to UMCC Holdings, Inc., or Ultimate Medium Communications Corporation. Any certificated local exchange provider that believes it is unable to comply with this prohibition within a reasonable time must notify the Board of its inability and request appropriate relief from this prohibition.

UTILITIES BOARD

/s/ John R. Norris

/s/ Curtis W. Stamp

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Krista K. Tanner

Dated at Des Moines, Iowa, this 4th day of September, 2007.