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Before The
Federal Trade Commission
Washington, D.C. 20580

FEDERAL TRADE COMMISSION
RECEIVED DOCUMENTS
JUN 4 1999
SECRETARY

Pay-Per-Call Rule	)	
16 C.F.R. Part 308	)	FTC File No. R611016

SUPPLEMENT TO THE RECORD

JACQUELENE MITCHELL
FOR THE
COALITION TO ENSURE RESPONSIBLE BILLING

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June 4, 1999

The Coalition to Ensure Responsible Billing ("CERB"), submits these supplementary comments in response to issues raised at the Federal Trade Commission ("Commission") forum on proposed changes to its pay-per-call rules, May 20-21, 1999 in Washington, D.C. As an initial matter, CERB notes that Eileen Harrington directed the participants not to present arguments on the Commission's jurisdiction during the forum. CERB thus uses this opportunity to note, for the Record, its desire to preserve its rights with regard to jurisdictional issues. As to the issues discussed during the forum, first, CERB urges that the Commission's proposed liability standard for unauthorized charges is unreasonably vague, and must be modified or the local telephone bill will cease to be a viable billing platform. Further, CERB rebuts arguments made during the forum that local exchange carriers ("LECs") should receive a special exemption from "should have known" liability for ancillary product charges that appear on the bill. LECs perform many of the same functions as billing clearinghouses, and thus should not be subject to a different level of liability. Second, CERB clarifies for the Record, that Bell Atlantic's planned bill blocking feature is intended only to block the charges of third parties from appearing on the bill, while Bell Atlantic specifically exempts its own ancillary services from blocking. CERB also submits into the Record evidence that demonstrates that consumers have been -- and could potentially continue to be -- crammed by LECs for LEC services. Third, CERB supplements the Record with evidence indicating that consumer inquiries related to charges on the local telephone bill have decreased, not increased as claimed by some participants during the forum. Fourth, CERB objects to arguments made during the forum that "billing name and address" or "BNA" information, supplied by the LECs, can be an effective tool for use in creating alternative billing platforms. BNA, as it is currently offered, is inadequate because it is slow, expensive, and incomplete. Finally, CERB argues that the "designated billing entity" provision in the proposed rule is flawed. That provision could result in billing clearinghouses losing their ability to perform customer inquiry service, a critical component of their businesses.

1. "Should Have Known" Liability

During the forum, many witnesses addressed the need to mitigate "should have known" liability under Section 308.17 of the proposed rule. As a general matter, CERB urges the Commission to recognize that an indeterminate liability standard could result in the end of third party billing, which serves tens of millions of consumers who prefer to be billed for telecommunications-related purchases on their local phone bills. Such a result would run counter to the Commission's mandate under TDDRA to, as Eileen Harrington noted, "ensure the integrity and vitality of pay-per-call and telephone-billed purchases." (Forum transcript at p.232).

Third party charges on consumers' local telephone bills are made possible in two ways: (1) by arrangements between LECs and the vendors with whom they have direct contracts; or (2) by arrangements between LECs and billing clearinghouses representing vendors who are often too small to enter into direct contracts with LECs. During the discussion, some witnesses urged the Commission not to apply "should have known" liability to LECs. While the sentiment at the Commission's forum indicated that an indeterminate liability standard could force LECs to cease billing third party charges, the same danger applies equally to clearinghouses. Relieving LECs of liability, as suggested by some at the forum, while maintaining liability for billing clearinghouses, risks driving clearinghouses out of business or causing them to refuse billing for legitimate new services. In the face of uncertain liability, clearinghouses will be hesitant to enter billing contracts for innovative new services that, while untested, are entirely legitimate and could provide valuable competitive services to consumers. This would result in even greater harm as it would deprive small, new competitors of access to consumers' local telephone bills at the very time that powerful LECs, which continue to control access to end users, will be able to leverage their market power in the local exchange to garner markets for a variety of new telecommunications services. Such a result is contrary to the broader Commission role also noted by Ms. Harrington that "protecting competition is a fundamental form of consumer protection." (Forum transcript at p. 233).

For that reason, CERB does not agree with those who argued that LECs should be treated differently from other billing entities in the application of "should have known" liability. The Commission instead should assign liability based on the function or functions that an entity performs.

Billing entities – both LECs and billing clearinghouses – perform several valuable consumer functions as they pre-screen vendors, reject charges for services that have not been approved, and moderate the actions of vendors through their contractual relationships. Potentially imposing liability on some entities while exempting others would create loopholes that could be exploited to the detriment of consumers. Further, imposing disparate liability would create a competitive advantage for those entities that perform the same function but do not bear the burden of complying with the rules. CERB's position is that "should have known" liability is too vague a standard to impose as an initial matter, but whatever standard the

Commission ultimately adopts should apply equally to all entities that perform the same function.

LECs and billing clearinghouses perform at least four parallel functions that help to protect consumers from cramming. CERB submits that where entities perform the same functions, it is unreasonable to treat them disparately under a Commission rule.

First, both LECs and billing clearinghouses perform thorough pre-screening of both the vendors and the products and services those vendors seek to place on the local telephone bill. Pre-screening includes a review of the marketing and promotional materials used to sell those products and services to consumers, as well as a review of the "text phrase" that will appear on consumers' bills, to ensure that it is not confusing or misleading. Vigorous pre-screening reduces the incidence of unauthorized charges being placed on the local telephone bill. Thus, these pre-screening efforts should be encouraged.

It bears emphasizing that, while billing clearinghouses are often the first line of defense against unaffiliated vendors, LECs also thoroughly screen those vendors. Furthermore, LECs are the first line of defense with regard to those vendors with whom the LECs have direct contracts. Here, the LECs' relationships with these vendors parallel the billing clearinghouses' relationships with their vendors. Both the LECs and the clearinghouses perform a consumer protection screening function, and both should be treated the same with regard to liability.

Second, to enforce these essential pre-screening functions, both LECs and clearinghouses provide a check against the charges for products and services submitted by vendors. When the vendors submit charges that are destined for consumers' telephone bills, it is critical to ensure that vendors' charges are allowed only for products and services that have been approved during the pre-screening process. This is achieved by employing software to reject charges for products and services whose text phrases have not been approved before these charges ever appear on consumers' telephone bills.

Both LECs and billing clearinghouses employ an enforcement mechanism to reject vendors' charges for products and services that have not been approved through the pre-screening process. LECs and clearinghouses can maintain lists and tables of active, approved text phrases and should not accept charges for products and services with text phrases that have not been approved during pre-screening. Although this process is not perfect, it is an important tool that LECs and billing clearinghouses can use to ensure that unscrupulous vendors do not bypass the pre-screening process.

Third, LECs, billing clearinghouses and vendors all perform an inquiry monitoring function. This function includes fielding telephone calls from consumers who need information about their bill or wish to lodge a complaint. Billing clearinghouses often serve as the primary point of contact to answer inquiries on behalf of their vendor clients, pursuant to their contracts with those vendors. In addition, because of their control over the consumer's local telephone bill, LECs answer calls from consumers who need information about a third-party charge and simply prefer to contact their local telephone company even though a separate toll-free number is supplied on the bill. In addition, vendors perform customer inquiry service in those cases where they have not contracted with a billing clearinghouse or a LEC to do so. Thus, LECs, billing clearinghouses and vendors all perform an inquiry function of some type, and furthermore they all may learn about potential or real service problems through performance of that function.

On a related note, CERB is compelled to respond to the suggestion of one witness, made during the forum, that billing clearinghouses should be subject to "should have known" liability because they provide inquiry service and in many cases decline to pass consumers down the line to the vendor. Communications Venture Services asserted that, by entering into arrangements where the billing clearinghouse agrees not to transfer a consumer telephone call to a vendor (this would be called a "hot transfer"), billing clearinghouses somehow take on a degree of knowledge and control that would subject them to "should have known" liability. As with some of the other functions noted above, LECs, as well as clearinghouses, often respond to consumer inquiries without passing the call along to the next party in the chain. LECs and clearinghouses do, however, pass along the information related to the consumer inquiry. For both LECs and clearinghouses, this practice is favorable to the consumer who does not wish to be passed along to resolve an inquiry.

Finally, both LECs and billing clearinghouses enter into direct contracts with vendors, and thus are in a position to moderate the behavior of those vendors to some degree. In short, both LECs and clearinghouses are capable of terminating -- and often do terminate -- contracts with vendors who do not uphold high standards of practice.

Not only do LECs and billing clearinghouses perform many of the same functions with regard to outside vendors, LECs also perform these functions with regard to their own affiliated services. In these cases, LECs perform the function of supplying the service, submitting the charge to the bill, and delivering the bill to the consumer. If consumers are to be protected equally from carelessness and misdeeds of *any* party that places charge on consumer bills --

including LECs -- LECs must be held to the same standard of liability for each of these functions as independent parties that perform the same functions.

2. Discriminatory Bill Blocking

During the forum, Bell Atlantic told the Commission that it plans to institute a blocking function whereby consumers may request that no charges from third parties be placed on their bills. CERB would like to clarify, for the Record, that Bell Atlantic plans to exempt from this blocking function its own ancillary services. (See attached letter.) Thus, a consumer could block third party charges for services such as caller ID or voice mail, but that consumer could not block Bell Atlantic from adding its own comparable services. The consumer thus is not protected from an unauthorized charge by Bell Atlantic. Moreover, this discriminatory bill blocking raises a serious competitive concern: when the consumer decides to order a service from a competing provider, he must call Bell Atlantic to have the block lifted. Consumers who order Bell Atlantic services will not have to overcome this hurdle. Further, when the consumer calls Bell Atlantic to request that the block be lifted, Bell Atlantic can solicit the consumer to buy the competing Bell Atlantic product. CERB urges the Commission to investigate this anticompetitive practice and to refrain from imposing any regulations that would endorse or help facilitate discriminatory bill blocking.

CERB further clarifies for the Record that, contrary to implications made during the Commission's forum, LECs are capable of committing marketing abuses, including cramming. PacBell is currently the subject of an inquiry by the California Public Utilities Commission (CPUC) as a result of a barrage of complaints that PacBell misled consumers and pressured them into buying add-on phone services that they did not want; and in 1986, PacBell was ordered to refund $63 million to consumers who were misled by its sales programs. (See attached Los Angeles Times article, Jan.16, 1999.) Further, in 1993, PacBell was fined $16.5 million by the CPUC for marketing abuses involving charges for unauthorized services. GTE has been the subject of similar complaints and in 1998 reached a $13.2 million settlement in an action arising from its alleged failure to accurately inform the CPUC about marketing abuses, which had originally led to a $3.2 million fine. (See attached California Public Utilities Commission Opinion, Dec. 17, 1999.) That fine was imposed for abuses such as charging non-English speaking consumers for optional services, such as call waiting or call forwarding, which the consumers did not order.

3. Complaint Levels Are Declining

CERB and the LECs have strong evidence to suggest that complaints about cramming are decreasing. During the forum, however, the Florida Public Service Commission and ACUTA suggested otherwise. CERB thus would like to supplement the Record with data gathered from the billing clearinghouses. Several billing clearinghouses submitted to CERB a comparison of the number of consumer calls received by their inquiry centers at the beginning of CERB's anticramming efforts (July, August and September of 1998), compared with the most recent months for which data is available (February, March and April of 1999). The CERB members reported declines of 30 to 75 percent in the number of consumer inquiries they received between those two time periods.

CERB would also like to add to the Record some of the factors which can account for a disparity of results in cramming statistics. First, assuming the desired statistic is whether complaints are presently rising or falling, it is critical to account for the time lag between when a charge is submitted to a bill and when an inquiry or complaint is recorded. Second, it is essential to distinguish between complaints and mere inquiries. Many entities, including some LECs, count every consumer call as a complaint. The import of this distinction is best illustrated by the extremely high volume of calls generated by the Federal Communications Commission's ("FCC's") universal service charges. Although there was a dramatic increase in the number of calls to inquire about those charges, which were confusing to many consumers, that increase did not reflect an increase in *complaints*. At the same time that industry anti-cramming initiatives are clearly working, greater public awareness of the problem sometimes generates increasing calls to billing entities and vendors. Many of these calls are resolved by simply explaining to a consumer the nature of a charge. These calls do not necessarily indicate an increase in unauthorized charges.

4. Availability of BNA

Some participants in the forum suggested that billing clearinghouses and vendors could use alternative billing platforms, rather than consumers' local telephone bills, by utilizing "billing name and address" or "BNA." For a variety of reasons, BNA is not a viable alternative to the LEC bill. First, it is prohibitively expensive. Second, it has limited practical value. One billing clearinghouse reports, for example, that BNA does not include unlisted numbers, which in some areas, can be a majority of households. Additionally, while clearinghouses have limited experience with BNA, we understand from the LECs that BNA's use is significantly restricted and cannot be shared with vendors. Third, the information is often outdated and does not always reflect actual numbers and addresses, which are constantly changing. Furthermore, even if billing clearinghouses or vendors were to use BNA, they would still suffer a competitive disadvantage compared with the LECs with whom vendors already (and will increasingly) compete in offering a variety of telecommunications-related services to consumers. Because LECs maintain the BNA databases, they have access to information that is more complete, less expensive, and more timely.

Finally, the discussion of whether BNA is viable misses the point: consumers prefer a consolidated telephone bill for all their telecommunications purchases. LECs often note this fact, and if unaffiliated providers are denied access to the bill, LECs will certainly market their "one-stop-shop" bill to the detriment of the myriad vendors who would have to send individual bills to consumers.

5. Multiple Billing Entities

CERB submits these brief supplementary comments on the "designated billing entity" provision in response to the corresponding agenda item, which was not discussed during the forum. In spite of testimony by LEC participants at the forum that they consider customer inquiry a burden they would like to avoid, it is the experience of CERB members that LECs strongly prefer to be the party that satisfies customers who inquire or complain about charges.

As CERB suggested in its comments, when a billing clearinghouse and a vendor contract for the clearinghouse to provide customer inquiry service for that vendor, the billing clearinghouse should also be the billing entity designated to receive and respond to all billing error notices related to charges by that vendor. The proposed rule provides that multiple billing entities "shall agree" among themselves to designate a single entity to receive and respond to billing error notices. Due to an imbalance of power, however, LECs could "negotiate" to win this role and thus would become the point of contact for all billing error notices.

LECs have an interest in becoming the point of contact. First, they can gain good will from customers by crediting a charge -- whether or not there was an actual error -- at no cost to themselves. Second, this good will inures to them when they attempt to sell their own competing products. Third, LECs may have an incentive to give automatic credits to customers who buy services from providers with whom the LECs directly compete. The costs of these credits undermines those competitive businesses. At the same time, LECs could be more judicious in meting out credits for customers who subscribe to LEC services.

In addition to these concerns, where a billing clearinghouse has contracted to perform customer service, consumers receive the best support through the clearinghouse. Clearinghouses have an interest in protecting their contracts with the LECs, and they have an incentive to treat consumers fairly. Clearinghouses also have the resources to field consumer inquiries quickly, efficiently, and in a consumer-friendly way. Moreover, whereas LECs have an interest in reversing charges regardless of the nature of the inquiry, and vendors have a financial interest in sustaining the charge, clearinghouses have more balanced interests and thus can operate as a neutral arbitrator between the vendor, the LECs, and the consumer.

Conclusion

CERB urges the Commission to consider the arguments presented herein, and in CERB's comments in this proceeding, and to protect consumers while avoiding actions that could harm the growth of competition in the telecommunications industry.

Respectfully submitted,

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June 4, 1999

5030613.3

Bell Atlantic Network Services
125 High Street, 5th Floor
Boston, MA 02110

Carrier Services

Bell Atlantic

April 21, 1999

Zero Plus Dialing, Inc.
Ms. Katherine Wogulis
7411 John Smith Dr., Suite 200
San Antonio, TX 78229

Dear Ms. Wogulis:

During 1998, Bell Atlantic recognized cramming as a serious problem and implemented several initiatives in an attempt to control the situation. In conjunction with the voluntary restrictions your company put in place, the overall affect has been a significant reduction in the number of cramming complaints. The purpose of this letter is to notify you of an additional measure Bell Atlantic is taking to further reduce the incidence of cramming.

Beginning in June 1999, Bell Atlantic will begin offering a Miscellaneous Billing Block. This customer-initiated option will be available to all classes of services for residence and business end user customers. If an end user customer selects this option, a billing restriction code will be placed on the customer's account that will exclude miscellaneous charges from being billed on their Bell Atlantic telephone bill. Miscellaneous charges submitted by Bell Atlantic and the end user's pre-selected long distance carrier will be billed irrespective of the billing block restriction code.

In an effort to reduce end-user complaints regarding the Universal Service Fund charges, Bell Atlantic strongly recommends that the USF charge be sent on the same billing file as the associated interstate product or service so both charges will appear on the same bill.

Concurrent with the implementation of this service, Bell Atlantic will require all carriers, clearinghouses and service providers submitting EMI Category 42-50 Miscellaneous Charge records to populate certain values in the EMI record. The attached specification documents the specific information required. It is very important that the indicator is set correctly to ensure appropriate billing. Any intentional misuse of this indicator will result in immediate suspension of Billing and Collections services.

Subsequent to the implementation of the Miscellaneous Billing Block, a new CARE data element will be implemented to provide notification when a Bell Atlantic customer has chosen this option. Bell Atlantic expects this new data element and the appropriate TCSI codes to be defined by the Ordering and Billing Forum (OBF) in May and implemented later in 1999. In addition, a new Bell Atlantic product is being developed to provide listings of customers that have the Miscellaneous Billing Block on their account. More detailed information and availability of these enhancements will be provided in a subsequent letter.

As you know, cramming is an industry problem that is impacting all of us, but especially our mutual customers. Bell Atlantic requests your continued support and cooperation in our efforts to eliminate this problem and avert further regulatory requirements.

Please contact Sharon Foye of my staff on (703) 645-1262 or your account manager if you have any questions.

Sincerely,

K. A. Lavalla

Kristover Lavalla
Director – Billing & Collections Account Management
Bell Atlantic – Carrier Services

Attachments

CC: Marie Dwyer
Sharon Foye

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1999 WL 2121140
(Publication page references are not available for this document.)

Los Angeles Times

Saturday, January 16, 1999

Metro Desk

4 Probes Reportedly Focus on PacBell Sales Tactics Utilities: The phone company denies that it pressures employees to push services customers don't want.

ELIZABETH DOUGLASS
TIMES STAFF WRITER

Pacific Bell's aggressive sales pitches and advertising are under investigation by state regulators and at least three district attorney's offices acting on complaints that the company's methods are deceptive and a form of fraud, according to sources familiar with the probes.

Investigations underway in Alameda, Monterey and San Mateo counties mirror an ongoing inquiry by the **California** Public Utilities Commission, which regulates phone and energy companies. PUC hearings on the case are set to begin Thursday.

Hundreds of customers have complained that the San Francisco-based phone company is using misleading advertising and sales tactics to pressure them into buying packages of add-on phone services that they don't need or want.

None of the district attorney's offices involved would confirm the investigations. And a PacBell spokesman said the company has no knowledge of any district attorney investigations into PacBell "for any reason." But sources familiar with the probes say the inquiries involve PacBell's highly successful push to boost sales of special phone equipment, inside wire repair plans, caller ID and other phone features.

PacBell, which San Antonio-based SBC Communications acquired in 1997, has adopted aggressive sales programs and quotas that result in employees selling customers voice-mail or three-way calling for fax and computer lines and pressuring them to sign up for services they say they can't afford, employees and customers told The Times.

In addition, many customers have complained to the PUC that features were added to their bills even though they repeatedly rejected the sales pitches.

Service Representatives Allege 'Cramming'

PacBell's employees--motivated by fear of missing sales goals or by eagerness to win bonuses--are increasingly resorting to underhanded selling, including "cramming," the practice of adding charges to a phone bill without the customer's permission, according to many service representatives who asked not to be named.

Company officials deny that the new sales efforts mislead customers and dismiss the notion that the incentive plans lead to unethical sales.

"I'm not looking to make quick sales to customers, because it will hurt us long-term," said Michael Kaufman, president of PacBell's consumer marketing group.

Kaufman said that the company does not tolerate unethical actions and that it has fired several employees for improper sales methods.

As the state's largest phone company, PacBell--with more than 16 million business and residential phone lines--provides local service to the majority of Californians. Each month, the company's sales representatives handle 3.5 million customer calls dealing with everything from billing problems to phone book orders.

But according to company documents obtained by The Times, service representatives are required to push for orders and read lengthy sales scripts--regardless of the purpose of the call.

"I want Pacific Bell to succeed, because I want my job, but the way they are going about it is totally unethical," said PacBell employee Ramona Givens, who has worked for the company 20 years, the last 10 as a service representative. "We're not explaining all the services, and customers are not understanding what they're getting."

Under PUC rules, phone companies are required to provide customers with complete explanations of service options and are barred from providing misleading information. The PUC has the power to assess fines and order refunds.

Sources said the district attorneys have begun looking into complaints against PacBell as potential violations of consumer protection laws related to deceptive marketing and advertising.

This is not the first time the company has been accused of marketing abuses. In 1986, state regulators ordered PacBell to refund $63 million to customers misled by sales programs.

The potential damage to **PacBell** from the current investigations could extend beyond customer refunds. Any formal rebuke of its methods would probably damage **SBC's** standing with regulators, who are reviewing its pending merger with Chicago-based phone company **Ameritech** as well as its request for permission to expand into the long-distance business.

PacBell representatives are required--under threat of being fired or disciplined--to first offer a package that costs $24.95 per month and includes voice-mail, caller ID and nine other features ranging from call waiting to repeat dialing and priority ringing, sources say.

If the customer declines the first offer, employees are required to counter the person's objections and then "fall back" to progressively smaller bundles of service. If the customer declines all those offers, employees must try to sell a phone or individual calling services, PacBell sales documents show.

Dave Mitchell, a computer programmer in Dublin, **Calif.,** said a PacBell telemarketer called him in October to offer a service package.

"I told them no repeatedly, and they kept saying, 'How about this? How about that?' and on and on and on," he said. When the telemarketer told Mitchell that he would get the services free for a month anyway, he replied, "Fine."

He said he later received a bill--with the extra charges--and was forced to call the company to have the issue resolved.

Internal PacBell documents show that the incentive plans give employees credit for all features sold, even if the transactions are later disputed or the items removed. High sales totals are rewarded with cash bonuses, trips, television sets and other prizes, according to employees and company documents.

Employees Appeal to Watchdog Group

One PacBell employee said that in a single day she removed 14 calling features, two caller IDs and one voice-mail. "All of those customers said that they never ordered any of that," said the service representative, who asked not to be identified. "I had one lady cuss me out and hang up on me."

In a "plea for help" letter to a consumer watchdog group, 29 PacBell service representatives expressed discomfort with the intense pressure to sell.

"These changes are all directed to making Pacific Bell much more profitable--but this profitability comes at the expense of customer service and service representatives' personal ethics," the letter states.

Inquiry Has a Familiar Ring

PacBell acknowledges that it wants to increase orders and that it sometimes promotes certain products. But Kaufman said employees are merely required to offer those products and are not punished for failing to meet sales quotas.

"Customers may not know what they need, and I think we owe them the right to know what's available and if there's a big discount," Kaufman said.

PacBell has tacitly acknowledged the rise in feature disconnects. In internal documents obtained by The Times labeled "Save Our Products," the company instructs employees to talk customers out of canceling add-on services, even if they say they never ordered them in the first place.

Bob Curry of San Luis Obispo said that in June he placed an order for call waiting. But weeks later, he said, he received a caller ID phone and an extra charge on his PacBell bill.

"I said, 'All I want is call waiting,' and they kept saying, 'Well, that's part of Package A or Package B,' " Curry said. "I got a bill with about 15 things on it that I didn't want or need."

The current investigations are reminiscent of the 1986 case in which state regulators found PacBell guilty of marketing abuses and ordered the company to halt its telemarketing and sales incentive programs and distribute refunds.

At the time, PacBell blamed any misdeeds on rogue sales representatives. The PUC's cease-and-desist order was lifted in 1990, though PacBell did not reinstate any incentive-based sales programs for several more years.

But fliers noting similarities between the old and new marketing cases have begun circulating within PacBell: "Coming soon to a state near you: cease and desist--the sequel. Feel the agony of sticking it to seniors. See the PUC do an investigation. Hear the company ring up those refunds."

Many employees fear that they again will shoulder the blame if PacBell is found guilty of any misconduct.

(BEGIN TEXT OF INFOBOX / INFOGRAPHIC)

Calling for

Complaints

Pacific Bell customers with phone service complaints can call the company at (800) 310-2355, or the **California** Public Utilities Commission at (800) 649-7570.

---- INDEX REFERENCES ----

COMPANY (TICKER): SBC Communications Inc. (SBC)

KEY WORDS: PACIFIC BELL; TELEPHONE SALES; TELEPHONE INDUSTRY -- **CALIFORNIA;** CUSTOMER SERVICE; INVESTIGATIONS; COMPLAINTS; DISTRICT ATTORNEYS; **CALIFORNIA** PUBLIC UTILITIES COMMISSION

NEWS SUBJECT: Marketing; Metro Section; World Equity Index (MRK MTR WEI)

NEWS CATEGORY: INFOBOX

INDUSTRY: Telephone Systems; Regional Telephone Systems; Telecommunications, All (TLS RTL TEL)

GOVERNMENT: State Government (STE)

REGION: **California** (CA)

Investigation on the Commission's own motion into the operations, marketing and sales practices of GTE California to determine whether the Commission was misled or supplied incomplete information in connection with assessing the extent of abusive marketing by GTE California's foreign Language Assistance Center; whether any rules, regulations or statutes enforced by the Commission have been violated by GTE California; and to review whether previously ordered redress to consumers and other corrective measures for prior marketing abuses were adequate.
Investigation 98-02-025
Decision 98-12-084
California Public Utilities Commission
December 17, 1998

*1 OPINION APPROVING MODIFIED ALL-PARTY SETTLEMENT AGREEMENT

Before Bilas, President, and Conlon, Knight, Jr., Duque and Neeper, Commissioners.

BY THE COMMISSION:

Summary

This investigation was opened to determine whether GTE California Incorporated (GTEC), its General Counsel, Kenneth K. Okel (Okel), or its Regulatory Affairs Director, P. Kevin Payne (Payne), misled or supplied incomplete information in connection with abusive marketing practices at GTEC's foreign Language Assistance Center in 1992. These same abuses were addressed in Resolution (Res.) T-15404, and remedies including customer refunds and specific conditions to restore customers affected by this abuse were ordered. However, documents discovered in subsequent lawsuits by GTEC employees and recent investigations of these practices provided probable cause to believe that the marketing abuses disclosed by GTEC in 1992 may have occurred over a longer period of time and involved upper management, making the 1993 remedies inadequate. We opened this investigation to explore these issues and whether such acts constitute a breach of ethical rules, Rule 1 of the Commission's Rules of Practice and Procedure, or other rules, regulations or statutes, and whether redress ordered in Res. T-15404 is adequate.

The following five parties participated in this proceeding by conducting discovery and attending three prehearing conferences (PHCs): the Commission's Consumer Services Division (CSD, staff), the Greenlining Institute and the Latino Issues Forum (Intervenors participating jointly), individually named respondents Okel, Payne, and respondent GTEC. The assigned Commissioner was present at all PHCs.

On September 9, 1998, the five parties jointly filed a motion to approve a proposed settlement agreement. They indicate that they have reached an agreement in which GTEC will make a civil payment of $13 million. This amount includes the $3.2 million imposed in 1993 and paid by GTEC to non-profit community groups in the affected service territory. Of the remaining $9.8 million, GTEC will pay $4.85 million to a Commission Telecommunications Consumer Protection Fund (Fund) and $100,000 to the Commission fiscal office as reimbursement for Commission costs. GTEC will pay the remaining $4.85 million to the General Fund of the State of California in three annual installments of $1.62 million, $1.62 million, and $1.61 million.

We conclude that this settlement agreement meets all requirements, except one, of Rule 51(e) of the Commission's Rules of Practice and Procedure and other criteria established for the approval of settlements in Re San Diego Gas and Electric Company (1992), 46 CPUC2d 538 and the Diablo Canyon Settlement (1988), 30 CPUC2d 222. We find the settlement is reasonable in light of the entire record and in the public interest. We read the settlement as intending the $4.85 million and other costs of the settlement to be funded by shareholders rather than ratepayers. As to the applicable law, we find that the $4.85 million Fund proposed by the parties is distinguishable from the situations presented in two recent cases, Re Long Distance Direct, Inc. Decision 98-03-071 (the "LDDI" case: propriety of depositing settlement monies into trust fund administered by District Attorneys Association) and Assembly of the State of California v. Public Utilities Commission (1995) 12 Cal4th 87 (Assembly: customer refunds may not be diverted to other purposes).

*2 However, because the express terms for administration of the Fund may create administrative and legal problems, based on the Commission's experiences, and because many details are unspecified, we cannot conclude that the administration of the Fund will not violate applicable law. Therefore, we modify the proposed settlement agreement, subject to ratification by the parties, to revise certain administration terms and to establish a mechanism whereby the parties and the Commission staff may later develop the administrative and operative details of the Fund in a manner that eliminates the Commission's concerns. (Appendix A, pp. 5-6)

We also modify the proposed settlement agreement to clarify the purpose of the Fund and avoid any confusion between the Fund in this proceeding and the prior resolution. (Appendix A, p. 5)

We grant the joint party motion upon the condition that the parties ratify the modifications attached to this opinion as Appendix A.

Procedural History

Three Prehearing Conferences (PHCs) were held in this proceeding: May 12, 27, and July 24, 1998. Parties filed prehearing conference statements prior to each PHC. At the first PHC, Intervenors' joint motion to intervene was granted to allow Intervenors to represent the interest of those non-English speaking customers potentially affected by the alleged marketing abuses. At the second PHC, the motion to strike Intervenors' second and third versions of the second prehearing conference statement by GTEC, CSD, Payne and Okel was granted because the statements divulged substantial portions of the confidential settlement negotiations.

On June 1, 1998, Intervenors filed a Notice of Intent to Claim Compensation. No response to this notice was filed. A ruling addressing this notice was issued on July 27.

On June 29, 1998, GTEC, CSD, Payne and Okel filed a joint motion to approve their proposed settlement agreement which was timely opposed by Intervenors. (This agreement is moot since it was subsequently revised to include all five parties and additional terms.)

On July 6 and 7, 1998, Intervenors filed a motion to compel discovery against each of the four other parties, GTEC, CSD, Payne and Okel. Each of the responding parties timely opposed these motions. On July 27, these motions were granted in part and denied in part.

On July 27, 1998, the assigned Commissioner issued a scoping memo which designated the Presiding Officer, category, ex parte rule and schedule for this proceeding. The target submission date was the first week in October, with a specific date to be set at the evidentiary hearing. However, no hearings were held. Therefore, the submission date was not set.

On September 9, 1998, all parties filed a joint motion to approve a settlement agreement. This motion is herein granted provided the parties ratify our modifications.

Resolution T-15404 Provided Remedies for Marketing Abuses in 1989-92

In 1993, after the Commission issued a decision fining Pacific Bell $16.5 million and ordering reparation for marketing abuses involving charges for unauthorized services, GTEC voluntarily disclosed to the Commission that it had also discovered similar marketing abuses. Upon its own investigation, GTEC had discovered that the sales staff at its foreign Language Assistance Center charged non-English speaking subscribers for optional services, such as call waiting or call forwarding, which the customer did not order. Because GTEC voluntarily made these disclosures and represented that they were complete, the matter was processed informally. We fashioned reparations and other corrective remedies according to the information GTEC provided. We ordered GTEC to identify and refund to customers any unapproved charges, and train its relevant employees in product knowledge, proper marketing of competitive services and ethics. We ordered GTEC to distribute $3.2 million among local groups within the Hispanic community for the purpose of telecommunications education and to report the names of recipients and amounts of contributions above its normal contributions. We imposed no punitive fines against GTEC.

OII Issued To Investigate Whether Prior Remedies Are Adequate

*3 On April 30, 1997, an article in the "Wall Street Journal" reported that GTEC employees attempted to conceal the scope of the 1992 marketing abuses and may have destroyed documents. The source of these allegations was a pleading in a civil suit by GTEC employees who had been fired after the abuses were disclosed. (Castillo et al. vs. GTEC, Los Angeles County Superior Court, Civil No. SC015891.) In response, GTEC retained former California Supreme Court Chief Justice Malcolm Lucas, two former United States Attorneys and a former Federal Bureau of Investigation agent to conduct an independent investigation of the allegations ("the Lucas team"). The Lucas team conducted its investigation from May to October 1997 culminating in a written report to GTEC which was provided to the Commission.

Immediately after the newspaper article, CSD also began an investigation. The staff investigation team was comprised of Commission employees and an outside investigator. In addition to investigating allegations, this staff team attended depositions of key witnesses in the civil lawsuit. The staff team presented its final report to the Commission, the "Report Of The Consumer Services Division Investigation Into GTEC's 1992 Marketing Abuse Allegations" (Staff Report) with its request to investigate. The Staff Report incorporates witness statements contained in the Lucas Report.

These two reports established probable cause to open this proceeding.

Settlement Agreement Imposes Additional Remedies for Alleged Marketing Abuses

On September 9, 1998, rather than pursue litigation to obtain a Commission decision on the disputed issues, the five parties filed a joint motion to approve an all-party settlement agreement. The parties, relying on discovery before and during this proceeding, represent that all issues in this proceeding are resolved in the agreement.

The settlement agreement provides for additional remedies for alleged marketing abuses. In addition to the $3.2 million estimated in 1993 to be paid to local community groups in areas affected by marketing abuse, the parties in this proceeding propose that GTEC will pay $4.85 million to a Commission Telecommunications Consumer Protection Fund, $4.85 million to the General Fund in three annual installments and $100,000 to reimburse the Commission costs of pursuing this proceeding.

Pursuant to the proposed settlement agreement, the purpose of the Fund is to protect and educate limited-English speaking and non-English speaking communities. However, it does not clearly specify that the potentially affected customers were only those involved in marketing by the foreign Language Assistance Center.

As proposed by the parties, the Fund will be administered by the Commission staff or through trustees appointed by the Commissioners under a trust agreement to be developed by the Commission General Counsel, Executive Director and industry divisions. This agreement will be approved by the Commission upon completion. Intervenors and CSD will comment on the trust agreement. The Fund will promote the same consumer protection, educational and policy objective recognized as the basis for community payments ordered in Resolution T-15404, including promoting greater customer and community awareness regarding telecommunications technology. All parties agree that establishing this Fund is in the public interest.

*4 In addition to a total $13 million monetary payment, a senior GTEC executive will attend the Commission meeting where the proposed settlement will be considered to receive the Commission's comments. After the ex parte ban is lifted, GTEC executives will personally express to each Commissioner GTEC's commitment to the highest standards of conduct and apologize for the actions which led to the opening of this proceeding.

The proposed settlement purports to toll the time limits on adjudicatory proceedings set by Senate Bill (SB) 960 from August 7, 1998 until the Commission renders a decision on the settlement. This provision is moot since this proceeding is completed within the 12-month deadline set by SB 960.

The settlement agreement purports to toll the deadlines for filing written testimony in this proceeding and to suspend discovery until the settlement is reviewed. This is the correct status of this proceeding prior to the decision herein addressing the proposed settlement agreement.

Rule 51.1(e) and Commission Case Law Set Standards for Approval of All-Party Settlements

Rule 51.1(e) of the Commission's Rules of Practice and Procedure requires that any settlement must be: (1) reasonable in light of the entire record; (2) in the public interest; and (3) consistent with applicable law. Commission case law reflects criteria developed for the approval of all-party settlement agreements. In Re San Diego Gas and Electric (SDG&E) (1992) 46 CPUC2d 538, the Commission established a four-part test for approval of all-party settlements. Under this test the agreement must:

1. command the unanimous sponsorship of all active parties in the proceeding;

2. have parties which are fairly reflective of the affected interests;

3. not propose terms which contravene statutory provisions or prior Commission decisions; and

4. convey sufficient information to permit the Commission to discharge its future regulatory obligations regarding the parties and their interests.

(Ibid., at page 550-4.)

In past Commission proceedings, the Commission has also considered the following criteria when evaluating the fairness and reasonableness of an all-party settlement: (1) the strength of the party's case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent to which discovery has been completed so that the opposing parties can gauge the strength and weakness of all parties' positions; (5) the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of any class members to the proposed settlement. (Re Edison (1992) 48 CPUC2d 352, 361-2 and Re Diablo Canyon (1988) 30 CPUC2d 189, 222.)

Other factors which have been considered to test the reasonableness of a settlement are: (1) whether the settlement negotiations are conducted at arm's length and without collusion; (2) whether the major issues are addressed in the settlement; (3) whether segments of any class are treated differently in the settlement; and (4) the adequacy of representation. (Ibid.)

The Settlement Agreement is Reasonable in Light of the Entire Record

*5 In their motion to approve the proposed settlement agreement, the parties describe the record in this proceeding as extensive and highly disputed. Both GTEC and staff conducted extensive investigations interviewing dozens of potential witnesses and reviewing numerous documents. Both CSD and the Lucas team produced written reports which were distributed to all parties and the Commissioners upon the outset of this proceeding.

Both reports conclude that the information provided to the Commission in 1992 regarding marketing abuse was incomplete because GTEC wrongfully informed the Commission that the abuses were short-term in duration and discovered through "routine quality control procedures." Contrary to GTEC's representations, both reports contend that there is evidence which indicates the marketing abuses sporadically occurred beginning in 1989, rather than 1992, and were discovered through non-routine monitoring of customer calls, rather than routine monitoring.

The reports also contend that a document submitted to the Commission, the "Zepeda Report," was materially altered prior to its submission to the Commission staff during the 1992-1993 investigation, with no indication given to the Commission of the omissions.

Respondents Payne and Okel had no opportunity to respond to either report prior to the reports being submitted to the Commission. However, during this proceeding, all respondents deny the allegations in these reports.

In addition to the investigation reports, the parties have supplied legal argument in support of their positions, engaged in discovery, and participated in three PHCs. This creates an existing record of pleadings and argument which will likely not vary from the oral testimony of witnesses if hearings are held. The task remaining, if the proposed settlement is not approved, is to resolve the many disputed facts and points of law. However, settlement of all issues in this proceeding is a reasonable resolution of these disputes for the reasons below.

Sponsored by All Parties

At the beginning of this proceeding, four parties entered into a settlement agreement. The motion to adopt the initial four-party settlement agreement was opposed by Intervenors. After a ruling granting in part Intervenors' Motion To Compel Discovery, all parties returned to settlement negotiations and reached an all-party settlement agreement prior to the hearing. The proposed settlement agreement is sponsored by all five parties, as evidenced by the signatures of their respective counsel on the settlement agreement.

Reflects All Affected Interests

The interests affected in this proceeding are GTEC, Okel, Payne, the Commission and customers subject to marketing abuse in 1989-92. Each of these interests is represented by competent, experienced counsel in this proceeding. Each counsel has described the interest of its client in three pre-hearing conference statements, three prehearing conferences and other discovery pleadings. Counsel have argued in their respective client's best interest at every opportunity in this proceeding.

*6 Likewise, the settlement agreement reflects the respective interests of each of the five parties. GTEC's interest is reflected by not requiring that the company admit guilt and by not joining additional company executives as respondents. The individually named respondents' interests are reflected by not imposing fines, penalties or other punitive sanctions. CSD's interest in enforcing Commission rules and regulations and providing additional redress to the Commission and to customers is met by the civil payment and the condition of a personal apology to Commissioners by senior GTEC executives. Intervenors' interest is reflected by payment to a special consumer education fund to repair any harm to customers potentially aggrieved by the alleged marketing abuse.

Includes Government Participation

CSD is a party in this proceeding specifically charged with the responsibility of prosecuting the violation of Commission rules and statutes to protect the interest of the Commission and the public. Only the enforcement staff of the Commission can negotiate a settlement with a utility involving Rule 1 violations. (Application of Pacific Gas and Electric (1997) 179 PUR4th 485, 506.) CSD also has the role of protecting the interests of all California consumers. In this case CSD's role included assuring that the relief provided to affected customers does not adversely impact all other GTEC customers.

Is Based Upon Arms Length Negotiations

The parties' participation during the proceeding shows no evidence of collusion or undue influence of one party by another. Each party has aggressively represented its own interest. For example, at the First PHC, respondents raised numerous potential procedural motions. GTEC raised the possibility of filing a motion to disqualify the Commission as an inappropriate forum for review of allegations in this proceeding, based upon its contention that exculpating documents presented to the staff are now missing. Respondents Payne and Okel indicated the possibility of filing a motion to challenge the sufficiency of the OII based upon the alleged failure to notify respondents of the context of the violations and sanctions. Later during the proceeding, after GTEC, Payne, Okel and CSD entered into a settlement agreement, Intervenors aggressively opposed the motion to approve the four-party agreement. In addition, Intervenors filed four discovery motions, one against each remaining party, which each responding party vigorously opposed. Thus, each party in this proceeding has participated in a manner consistent with advocating its independent interest without undue influence or collusion.

Adequate Discovery was Conducted

All parties have engaged in substantial discovery of all issues in this proceeding. CSD began its investigation after the April 1997 Wall Street Journal article. Intervenor engaged in discovery from the time its intervention was granted at the first PHC on May 12, 1998. The parties represent that they have adequate information upon which to gauge each other's strengths and weaknesses and to negotiate a settlement agreement on all issues.

Avoids Likely Litigation Risk, Expense, Complexity and Duration of Hearings

*7 The parties have major factual and legal disputes in this proceeding. For example, all parties dispute the factual liability of the respondents, GTEC denying liability and CSD and Intervenors alleging liability exists. Intervenors, GTEC and CSD dispute whether restitution under Resolution T-15404 is adequate, Intervenors contending it is inadequate and GTEC and CSD contending it is adequate. GTEC and CSD dispute whether any violations are "continuing" under Public Utilities (PU) Code § 2108. CSD says they do and GTEC says they do not. Each of these parties has strengths and weaknesses in their respective positions. These factual and legal disputes create a litigation risk for each party since the outcome of each dispute is uncertain.

In addition, the number and magnitude of issues disputed in this proceeding indicate that any hearing will be lengthy and expensive for all parties. For example, the Staff Report and the Lucas Report both conclude that the "Zepeda Report" was materially altered prior to being sent to the Commission for review during the 1992-1993 investigation. However, GTEC disputes any wrongful intent by any of its acts and alleges Commission staff had independent knowledge of GTEC's acts, which staff disputes. Respondents Payne and Okel deny engaging in unethical conduct in violation of Rule 1 and believe they will prevail if litigation in this proceeding is completed. Moreover, the Lucas report indicates that evidence on the issue of intent and knowledge is not conclusive.

The Staff and Lucas Reports include the interviews of numerous potential witnesses and numerous documents attached to each report which would undoubtedly be the subject of extensive cross-examination in any hearing.

GTEC and staff indicated during the PHCs that some documents may be proprietary. In responses to discovery, GTEC has raised the attorney-client privilege. Any hearings may be constantly interrupted by objections that documents and testimony are proprietary, confidential, or privileged given the types of internal documents generally presented to prove or disprove "knowledge" and "intent." The necessary resolution of such objections will extend any evidentiary hearing.

Intervenors wish to reserve their right to further discovery should the settlement agreement not be approved. Thus, some delay in the conduct of any hearing can be anticipated.

Since matters of ethics and misconduct are the central focus of this proceedings, the parties would undoubtedly request an extensive briefing period. In addition, any party may appeal any final Commission decision in this proceeding. Thus, post-hearing events may create more expense for all parties and delay any relief for the affected customers.

Resolves Major Issues

In the order instituting this proceeding, we ordered the parties to address the following issues:

1. Whether marketing abuses at GTEC's foreign Language Assistance Center occurred over a longer period of time than originally disclosed to this Commission by GTEC;

***8** 2. Whether GTEC employees provided misleading information to the Commission;

3. Whether the conduct of respondents Okel and Payne constituted violations of Rule One of the Commission's Rules of Practice and Procedure and/ or contempt;

4. Whether inaccurate information was also provided by GTEC to key California Legislators and Legislative committee consultants, in addition to the Commission's President and staff, to portray that the temporal scope of the marketing abuse was confined to a relatively short period just before disclosure of the matter by GTEC to the governmental entities;

5. Whether employees and officers at levels above that of respondents Okel and Payne knew in 1992 and 1993 that the Commission was supplied with incomplete information;

6. Whether, prior to the Wall Street Journal article in April 1997, higher utility management knew from discovery and pleadings filed in the 1995 Castillo lawsuit that there was potential for the conclusion that the Commission had been supplied inaccurate and incomplete information about the duration and scope of the marketing abuses;

7. If so, when did GTEC management become (or should have become) aware of the information before coming to the Commission;

8. If there are violations proven, whether appropriate sanctions under Public Utilities (PU) Code §§ 2107, 2108 and 2113 should be imposed against GTEC and whether respondents Okel and Payne should be found in contempt pursuant to PU

Code §§ 2108 and 2113;

9. Whether existing measures adopted in Resolution T-15404 are adequate;

10. If not, whether additional means of addressing the harm to consumers and the State of California should be adopted; and

11. Whether additional individual respondents should be joined in this proceeding.

After adequate discovery, the parties represent that their respective answers to the questions above differ. They propose to settle all issues to avoid having the Commission resolve these differences. Because the parties propose a settlement, there will be no findings of fact regarding the above issues. Instead, findings of fact will be made regarding the adequacy of the proposed settlement agreement, leaving these questions unanswered. However, the purpose of the inquiry in this proceeding is to provide, if warranted, additional redress to the Commission and relief to customers for additional marketing abuses. Without resolving the factual and legal disputes, the proposed settlement agreement provides such remedies. Thus, the agreement achieves the same purpose as we intended in this proceeding without the expense and delay of evidentiary hearings.

Remedy Only for Aggrieved Customers is Reasonable

GTEC's marketing abuses occurred only at its foreign Language Assistance Center in Thousand Oaks, California. Thus, only limited English and non-English speaking customers using this center were directly affected. It is reasonable to derive a remedy only for these customers to eradicate the abuses. Therefore, providing funds to educate limited English and non-English speaking customers only in the potentially -affected service area is reasonable.

Amount of Civil Payment is Reasonable

*9 The civil payment of $13.2 million in this proceeding is comparable with the amount of Pacific Bell's payment of $16.5 million in 1987 for similar acts of marketing abuse. (Re Pacific Bell (1987) 27 CPUC 2d 1, 36-49.) Therefore, the total payment by GTEC in the proposed settlement agreement is reasonable.

The Settlement Agreement Serves the Public Interest

The public interest is served by providing additional relief to customers for any additional time of, and increase in company involvement in marketing abuses. The $9.8 million additional payment by GTEC to close this proceeding without hearings will serve to expedite relief to potentially aggrieved customers, which is in the public interest. The payment of $4.85 million to a consumer education fund serves to repair any additional injury to the public. In addition, approving the settlement agreement avoids the delay and expense of hearings. This conserves the resources of all parties.

Permits Future Discharge of Regulatory Duties

As the parties point out, the record in this proceeding provides ample background of the issues, positions of parties and other matters underlying the settlement agreement.

Moreover, the terms of the proposed settlement agreement do not in any way hinder the ability of the Commission to discharge its future regulatory obligations with respect to the parties. In addition, the agreement directs GTEC to perform certain acts: pay specific amounts of money, attend a specific Commission Conference and meet with individual Commissioners within a specified time. The performance of these obligations is easily monitored, easily identified if not performed and not connected with the Commission's discharge of regulatory duties toward the parties in the future.

The Settlement Agreement is Partly Consistent with Applicable Law

In past cases, we have approved settlement agreements containing terms similar to those in this proceeding for the payment of funds without the admission of guilt where Rule 1 ethical violations are alleged. (Application of Pacific Gas and Electric Co., 179 P.U.R. 4th at 507; Re Heartline Communications, Inc., 1996 CPUC2d, D.96-12-031.)

We have also expressly held that the Commission has authority under Section 701 to designate funds for the purpose of protecting the public interest. (Re

Facilities-based Cellular Carriers, 57 CPUC2d 250, 12 (1994); Re Investigation Into Facilities-based Cellular Carriers and Their Practices, Operations and Conduct In Connection With Their Siting of Towers, 51 CPUC2d20, 8 (1993); Re Pacific Bell, 27 CPUC2d 1 (1987); and Re Pacific Bell, 29 CPUC2d 486 (1988).)

The parties point out that the Fund to be established by the proposed settlement agreement in this proceeding is distinguishable from situations presented in two recently issued decisions addressing the issue of designating funds for a specific public purpose.

In the LDDI case, the Commission amended a settlement agreement between CSD and an applicant to pay the proposed funds into the General Fund of the State of California, rather than a Consumer Protection Trust Fund named in the agreement. However, unlike the instant case, LDDI questioned whether funds derived from fines and penalties could be paid to a general consumer protection trust fund overseen by the California District Attorney's Association. We concluded in that decision:

***10** "LDDI also has agreed to pay $45,000, in quarterly installments of $3,000, to the Consumer Protection Trust Fund, a highly worthwhile consumer protection fund administered by the state's District Attorneys Association.

"On this record, however, we are not persuaded that the Commission has authority to direct payment of a so-called 'settlement fee' in the manner described in the settlement agreement. The Commission has authority to levy fines and penalties against the utilities it oversees. [FN1] We have recognized that, in accordance with legislative policy expressed in Public Utilities Code (PU Code) §§ 2100 and 2104, penalties assessed under these provisions must be deposited in the General Fund. (See TURN v. Pacific Bell (1994) 54 CPUC2d 122.) Similarly, we have authority to require refunds to consumers pursuant to PU Code § 453.5. It is settled, however, that such refunds must be disbursed to ratepayers or, through escheat, to the General Fund." (Code Civ. Proc., § 1519.5; see, generally, Assembly v. Public Utilities Commission (1995) 12 Cal.4th 87.)

FN1 See, e.g., PU Code §§ 2100, 2107, 2111, 2115.

"At our request, the parties here have addressed the question of the $45,000 payment by changing the recipient from a CSD-directed trust to a specific consumer protection trust. CSD argues that such a disbursement is authorized under our broad range of powers described in PU Code § 701. However, simply calling the payment a 'settlement fee,' instead of calling it a fine or penalty, may not be sufficient in our view to overcome those provisions of the Code that require us to direct such payments to the General Fund. As the Supreme Court noted in reference to ratepayer refunds, "acceptance of the premise that section 453.5 applies only when the commission chooses to call its actions 'refunds' would permit the commission, by a simple ipse dixit, to avoid the statute in every case." (Calif. Mfrs. Assn. v. Public Utilities Com (1979) 24 Cal.3d 836, 847.)

"We do not, by this decision, preclude contributions in cases like this to the Consumer Protection Trust Fund, which we regard as a highly commendable objective. We simply find that, on this record, we are not persuaded that the method of disbursement set forth in the amended settlement agreement is an appropriate outcome." (LDDI, Supra. pp. 2-3.)

The purpose of the Fund in this proceeding is not to penalize GTEC. It is a remedy for harm suffered by victims of GTEC's alleged marketing practices.

The Assembly case involved customer refunds diverted to update the telecommunication infrastructure for schools and libraries. However, the proposed settlement agreement in the instant proceeding does not involve customer refunds in any way.

Unlike the two prior cases above, one important issue in this proceeding is whether prior restitution and consumer education ordered in 1992 is adequate relief for those customers potentially affected by the alleged marketing abuse. In Resolution T-15404, the Commission ordered GTEC to pay the estimated $3.2 million to Hispanic community groups within the affected service territory to specifically provide consumer education regarding telecommunications services. The parties in this proceeding agree that this remedy is inadequate and should be supplemented. The aggrieved customers will directly benefit from the creation of a supplemental educational fund.

***11** The Commission has previously found that designating funds for the specific benefit of consumers is in the public interest. (Re Joint Application of Pacific Bell Telesis Group and SBC Communications, Inc., D. 97-03-067 (Pacific Telesis case).) In the Pacific Telesis case the Commission upheld its prior determination that all ratepayers benefit from a Community Technology Fund of $34 million intended to address universal service goals and provide underserved communities access to advanced telecommunications services.

For the foregoing reasons, the establishment of a Telecommunications Consumer Protection Fund (Fund) to finance remedial customer education to remedy the potential harm to customers affected by GTEC's alleged marketing practices at its foreign Language Assistance Center does not contravene prior Commission or court decisions. The Commission has legal authority to approve such an equitable remedy.

Modifications to the Proposed Settlement Agreement

In order to more accurately characterize the $3.2 million GTEC previously paid to community groups for consumer education, we clarify that the money was intended to promote telecommunications education as a remedy for the LAC marketing abuses.

Because the purpose of the Fund is not clear in the proposed settlement agreement, we clarify that it is intended to educate non-English speaking customers only in the potentially affected service area. (Appendix A, p.5)

The Commission's experience in administering consumer protection and public purpose programs funds has resulted in much hindsight wisdom. Based upon the legal and administrative issues the Commission continues to address, we seek further refinements from the parties in the Fund administration language. To provide guidance to the parties, we identify at least three possible scenarios under which to administer the Fund in this proceeding.

The first scenario and the Commission's preference is that the parties submit a proposal that identifies to whom the fund should be distributed and for what purpose and target groups. This proposal would provide for complete distribution of the Fund and would not require establishing Commission run administration of the Fund.

Should the first scenario not be possible, as a second scenario, the Commission continues to prefer a model in which the Commission does not directly engage in the administration of such a fund due to the additional Commission expense, staff time and potential state employee personnel issues involved. The Commission prefers that the utility, or an outside party, establish and administer the Fund, with limited oversight by the Commission and periodic reporting to the Commission regarding the accomplishment of Fund distribution goals, the budget, grants and administrative costs.

Alternatively and less desirable, is a third scenario under which the utility would retain the funds, the Commission would appoint a purely advisory board to expeditiously review the proposals for grants and recommend to the Commission meritorious grantees. The Commission would select the grantee(s) and direct the utility to distribute the funds accordingly.

***12** By revising the language originally proposed by the parties which requires that the Commission administer the Fund, and replacing it with language allowing the terms of administration to be developed in the future, we intend to avoid the legal and administrative difficulties which the Commission has encountered with other consumer protection and public purpose Funds. This modification will allow the parties to participate in the process with Commission staff to attempt to set mutually agreeable terms to administer the Fund.

Accordingly, we modify the proposed settlement agreement to remove language regarding the administration of the Fund and adopt the existing process for the approval of Resolutions to involve the parties to this proceeding in establishing how the Fund will be administered. The parties and the staff will discuss at meetings noticed by the staff to the parties terms of administration of the Fund. (Appendix A, p. 6). After discussions between the parties and the staff, the staff will present a Resolution to the Commission for approval after the proposed Resolution is presented to the parties for written comment.

With the above changes, we approve the modified settlement agreement, provided the parties in this proceeding ratify the changes within 45 days after the effective date of this order. Should the parties not timely ratify the changes, the proposed settlement agreement is rejected.

Findings of Fact

1. On February 19, 1998, the Commission issued an order to investigate the operations, marketing and sales practices of GTE California to determine whether the Commission was misled or supplied incomplete information in connection with assessing the extent of abusive marketing by GTEC at its foreign Language Assistance Center; whether any rules, regulations or statutes enforced by the Commission have been violated by GTEC, Kenneth K. Okel or P. Kevin Payne, executives of GTEC; and whether previously ordered redress to consumers and other corrective measures for prior marketing abuses were adequate.

2. A noticed settlement conference was held on May 19, 1998. Settlement negotiations were conducted between May and September 1998.

3. On September 9, 1998, the five parties in this proceeding, GTEC, Okel, Payne, CSD, and Greenlining Institute/Latino Issues Forum filed a joint motion to approve their settlement agreement.

4. The settlement agreement reflects the various interests in this proceeding, that is GTEC, Okel and Payne's denial of guilt, CSD's interest in obtaining compliance with Commission regulation and further relief, and Greenlining/Latino Issues Forum's interest in obtaining additional relief for any non-English speaking customers affected by the alleged marketing abuses.

5. The settlement agreement is sponsored by all parties and resolves all issues.

6. All parties are represented by competent counsel, one of which represents a government agency.

7. The proposed settlement agreement is based upon arms length, good faith negotiations and adequate discovery.

*13 8. Any hearings in this proceeding would likely be complex, expensive, protracted and place each party at risk regarding the outcome of its position on the facts and law related to this case.

9. Neither the proposed nor modified settlement agreement disburse customer refunds.

10. The terms of the proposed settlement agreement are reasonable, except those terms regarding the administration of the Fund. It is reasonable to modify this language to allow the parties and Commission staff to derive these terms in the future so that the settlement agreement may be conditionally approved, subject to ratification by the parties within 45 days after the effective date of the order in this proceeding.

11. The payment by GTEC of $13.2 million agreed by the parties in this proceeding includes elements to: 1) provide reparations to aggrieved customers; 2) deter future wrongful behavior; and 3) remedy any harm by providing consumer education.

12. Neither the proposed nor modified settlement agreement has terms which limit the Commission's future discharge of regulatory duties toward the parties in this proceeding.

Conclusions of Law

1. Respondents GTEC, Kenneth K. Okel, and P. Kevin Payne do not admit the allegations against them in this proceeding.

2. The proposed and modified settlement agreements resolve all issues between all parties in this proceeding.

3. The proposed all-party settlement agreement is reasonable in light of the entire record and in the public interest. However, the Commission continues to encounter legal and administrative concerns in administering various consumer protection and public purpose Funds. Therefore, the proposed language designating administration of the Fund by the Commission should be modified to allow the terms for administering the Fund to be determined in the future. The parties and Commission staff should meet to discuss these administrative terms and staff should present terms for Commission approval by preparing a draft Resolution.

4. The modified settlement agreement is consistent with applicable law.

5. The motion to approve the settlement agreement should be granted, subject to the parties' written ratification of the modifications we herein make, within 45 days from the effective date of the order in this proceeding.

6. In order to assure prompt compliance with the terms of the modified settlement agreement and to quickly obtain the benefits of the modified settlement agreement for California consumers, this order should be made effective immediately.

ORDER

IT IS ORDERED that:

1. The motion to approve the settlement agreement attached as Appendix A is granted provided the parties ratify the modifications herein within 45 days after the effective date of this order. The parties may ratify the modifications herein by filing with the Commission Docket Office and serving upon the service list an agreement to ratify the modifications in this decision.

2. GTE California Incorporated is not authorized to increase its rates to reflect the costs of funding, implementing or administering the approved settlement agreement.

*14 3. Should the parties fail to timely ratify the modifications herein, the proposed settlement agreement is rejected.

4. Should the parties timely ratify the modifications in writing as directed herein, this proceeding is closed.

This order is effective today.

Dated December 17, 1998, at San Francisco, California.

APPENDIX A

ALL-PARTY SETTLEMENT AGREEMENT RESOLVING I.98-02-025

This settlement agreement is the final and complete expression of the agreement entered into by and between the Consumer Services Division ("CSD") of the California Public Utilities Commission ("CPUC" or the "Commission"), GTE California ("GTEC" or the "Company"), and its employees, managers, agents, predecessors and successors in interest, if any; Kenneth K. Okel; P. Kevin Payne, The Greelining Institute ("Greelining"), and Latino Issues Forum ("LIF"); which collectively are the "Settling Parties" to this Agreement.

WHEREAS, on February 19, 1998, on its own motion, the Commission issued an Order Instituting Investigation ("OII") opening I.98-02-025 to determine whether GTEC misled or supplied incomplete information to the Commission in connection with the Commission's efforts to determine the extent of improper marketing practices at GTEC's Language Assistance Center ("LAC") during 1989- 92;

WHEREAS, this OII also opened the issue of whether all customers affected by the improper marketing techniques had been adequately redressed;

WHEREAS, GTEC, CSD, Kevin Payne, and Kenneth K. Okel are parties to I.98-02- 025 ("this proceeding");

WHEREAS, on March 6, 1998, Greelining and LIF filed a Notice of Intention to participate and Motion for Leave to Intervene in this proceeding;

WHEREAS, on May 12, 1998, the Administrative Law Judge assigned to this proceeding recognized Greenlining and LIF as intervening parties in this proceeding;

WHEREAS, GTEC has taken the following actions to address and resolve the concerns of the Commission which led to the initiation of this proceeding;

a) GTEC paid restitution of approximately $2 million to all customers affected by the improper marketing practices at the LAC;

b) GTEC paid $3.2 million to community groups to promote telecommunications education as a penalty for the LAC marketing abuses;

c) GTEC determined based on an independent survey conducted by an outside consulting firm that the marketing abuses at the LAC did not extend to any other GTEC marketing center. In 1993, the former Commission Advisory and Compliance Division ("CACD"), approved the consultant's methodology;

d) The CPUC retained (at GTEC's expense) Professors Alan L. Olmstead and Jerome Suran to review GTEC's marketing programs. Professor Olmstead and Professor Suran submitted reports in 1994, 1996 and 1998 recommending changes and praising the Company's implementation of their recommended changes. Their most recent report, completed March 8, 1998, described many positive ways in which GTEC improved its marketing policies and concluded that problems of the type which occurred at the LAC are not likely to recur;

***15** e) GTEC engaged retired California Supreme Court Chief Justice Malcolm Lucas to investigate allegations raised in an employment discrimination lawsuit and the press that certain GTEC employees had misled or supplied incomplete information to the Commission during the 1992-93 investigation of marketing abuses at the LAC. GTEC gave Chief Justice Lucas full and unfettered access to all information, documents, and witnesses he deemed relevant to the issues under review. Chief Justice Lucas issued a report on October 20, 1997, followed by two supplemental reports amending or supplementing the conclusions made in the Lucas Report. GTEC provided copies of the Lucas Report to the CSD and individual Commissioners, briefed each Commissioner and senior Commission staff, and issued a press release apologizing to the Commission and the public for the Company's conduct during the 1992-93 investigation;

f) GTEC conducted ethics training for all its regulatory personnel who have contact with the Commission;

WHEREAS, the CSD has taken the following actions in recognition of the importance of this proceeding;

a) CSD retained its own outside investigator, who prepared a report on the subject of the proceeding;

b) CSD's investigator sought documents, conducted interviews, and attended depositions in a related employment discrimination case. GTEC cooperated with the CSD in its investigation, including making available to CSD's investigator all documents and interview reports collected and prepared by the Lucas team, and asking deposition questions on CSD's behalf in the employment discrimination lawsuit;

WHEREAS, all parties recognize that Resolution T-15404 ordered GTEC to pay restitution to affected customers of the LAC marketing abuses from 1989-92. Resolution T-15404 also ordered that an amount equal to the total refunds to customers, but not less than $3.2 million, must be paid to community groups to promote telecommunications education.

WHEREAS, all the parties agree that the marketing abuses did not extend beyond the LAC, that neither the CSD investigation, nor the Lucas investigation, nor the independent survey conducted of other customer service centers, nor the on- going monitoring by Professors Alan L. Olmstead and Jerome Suran found any evidence of any post-1992 marketing abuses at the LAC or any other GTEC customer contact facility;

WHEREAS, GTEC and the CSD have a good faith disagreement concerning the applicability of various statutes and Commission rules to the determination of GTEC's liability, if any, in this proceeding and agree it would be in the best interests of all the parties to avoid lengthy litigation of this matter;

WHEREAS, P. Kevin Payne and Kenneth Okel deny that they ever engaged in conduct in violation of Rule 1 of the Commission's Rules of Practice and Procedure;

WHEREAS, GTEC and CSD, on the one hand, have a good faith disagreement with Greenlining and LIF, on the other hand, regarding the adequacy of GTEC's prior restitution payments under Resolution T-15404;

***16** WHEREAS, based on these disagreements, all parties now agree that a portion of this civil settlement should be paid to establish a Telecommunications Consumer Protection Fund (the "Fund") for consumer protection and education of limited English speaking and non-English speaking communities potentially affected by GTEC's alleged 1989-92 marketing abuses by the LAC. The Fund will be administered under future terms and conditions after collaboration of the parties in this proceeding and the Commission staff. The Commission staff will present the terms for Commission approval under the existing procedures for Commission resolutions;

WHEREAS, the Fund is intended to promote consumer protection and educational objectives, by financing customer education to remedy the potential harm to customers affected by GTEC's alleged marketing practices at its foreign Language Assistance Center;

WHEREAS, all parties agree that establishing the Fund is in the public interest;

WHEREAS, the CSD believes this settlement is in the public interest, and that GTEC's forthright acceptance of responsibility in this proceeding is a model for other regulated utilities;

NOW, THEREFORE, in consideration of the foregoing, and of the mutual promises hereinafter made, and intending legally to be bound, all parties, by their authorized representatives, hereby agree and contract as follows:

1. All parties agree that this settlement fully and finally resolves the liability of all respondents in this proceeding (GTEC, Kenneth K. Okel and P. Kevin Payne, hereafter the "Named Parties"), on all issues raised in the OII and any other issues related to the 1989-92 marketing abuses, the Commission's 1992-93 investigation of those abuses, and the CSD's 1997 investigation of GTEC's conduct during and subsequent to the original CACD investigation.

2. This matter shall be resolved with no admission of liability by any of the Named parties.

3. All parties pledge their full support to this settlement and waive any right to a hearing on any of the factual or legal issues resolved by this settlement agreement. All the parties agree that a hearing is not necessary for the Commission to evaluate this settlement.

4. Upon approval of this settlement the Commission will close this proceeding as to all named and unnamed parties.

5. GTEC shall pay a civil settlement of $13 million (including the $3.2 million previously paid, leaving a balance of $9.8 million) as follows:

a) $4.85 million payable to the Commission for remittance to the General Fund of the State of California, in three annual installments of $1.62 million per year in the first two years, and $1.61 million in the third year.

b) $4.85 million payable in three annual installments of $1.62 million per year in the first two years, and $1.61 million in the third year shall be used for a Telecommunications Consumer Protection Fund to be wholly administered under terms to be set in the future as described herein above.

*17 c) $100,000 payable to the CPUC Fiscal Office no later than twenty (20) business days following the Commission's approval of this Settlement Agreement and closure of this proceeding, as reimbursement for the CSD's investigative and other costs.

6. At the Commission meeting at which this Settlement Agreement is discussed and voted upon, a senior GTE executive will attend to receive the comments of the Commissioners.

7. No later than sixty (60) days following Commission approval of this Settlement Agreement and the lifting of the ex parte ban, a senior GTE executive will visit each Commissioner to express further the Company's commitment to the highest standards of conduct in its dealings with the Commission, and to apologize for the Company's actions which led the Commission to open this proceeding.

8. Pursuant to Rule 51.8 of the Commission's Rules of Practice and Procedure this settlement will not be precedential. Its approval will not constitute CPUC endorsement of any position taken by the parties on issues of law and fact during the course of this proceeding. Nor will approval of this settlement constrain any of the parties as to positions they may wish to take on similar questions of law, fact or policy in other pending or future Commission proceedings. This settlement will not be admissible in evidence by or against any of the Named Parties in any present or future Commission proceeding or in any other legal proceeding.

9. The Settling Parties agree not to publicize this Settlement Agreement or issue any press release concerning this Settlement Agreement prior to final Commission approval of the settlement, and any press releases issued by the parties or other statements shall express full support for this settlement.

10. This Settlement Agreement constitutes the entire agreement between all the parties to this proceeding. There are no other agreements or understandings with respect to the subject matter of this Settlement Agreement. Any and all prior discussions, agreements, or understandings, whether oral or in writing, are merged into and subsumed by this Settlement Agreement.

11. All the parties agreed to withdraw any and all data requests or other discovery requests in the Memorandum of Understanding executed on August 7, 1998. If this settlement or some alternate settlement is not adopted by the Commission concluding this proceeding, then all parties reserve their rights to renew reasonable data requests relevant to the issues that remain open in the proceeding.

12. As a result of this Settlement Agreement being before the Commission, the parties agree to toll all time periods set by Senate Bill 960 from August 7, 1998, until the date that the Commission renders a decision on the settlement.

(END OF APPENDIX A)

1998 WL 988442 (Cal.P.U.C.)

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