STATE OF CALIFORNIA EDMUND G. BROWN JR., *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

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TO PARTIES OF RECORD IN INVESTIGATION 11-05-028:

This is the proposed decision of Administrative Law Judge Bemesderfer. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's August 13, 2015 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ KAREN V. CLOPTON
Karen V. Clopton, Chief
Administrative Law Judge

KVC: avs

Attachment

Decision **PROPOSED DECISION OF ALJ BEMESDERFER** **(Mailed 7/14/2015)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of OSP Communications LLC and John Vogel, an individual, to determine whether OSP Communications LLC and John Vogel have violated the Laws, Rules and Regulations of this State in the Provision of Operator and Calling Card Services to California Consumers; and Whether the Billing Resource LLC, a Delaware Corporation, and The Billing Resource LLC d/b/a Integretel, a California Corporation should Refund and Disgorge All monies billed and collected on behalf of OSP Communications LLC.	Investigation 11-05-028 (Filed May 26, 2011)

DECISION DENYING MOTION OF THE SAFETY AND ENFORCEMENT DIVISION REQUESTING ORDER TO SHOW CAUSE AND GRANTING MOTION OF THE BILLING RESOURCE LLC TO RELEASE ESCROW FUNDS AND TO BE RELEASED AS A RELIEF RESPONDENT

Summary

We deny the motion of the Commission's Safety and Enforcement Division (SED) for an order to show cause why the Commission should not order The Billing Resource d/b/a Integretel, The Billing Resource LLC, (TBR), Pacific Bell Telephone Company d/b/a AT&T Communications of California (U1001C) (AT&T) and Verizon California, Inc. (U1002C) (Verizon) to issue refunds to customers who were billed for unauthorized charges placed on their phone bills by OSP Communications LLC (OSP) and impose penalties or other sanctions.

We also grant the motion of TBR to release to itself escrow funds in its possession and be discharged from this proceeding.

1. Background and Procedural History

OSP Communications LLC (OSP) is an alleged provider of collect call services in California and nationwide. OSP operated in California from approximately June 2007 through June 2009 and billed California consumers for purported collect calls totaling about $8.1 million, of which approximately $2.4 million has been refunded to California consumers who complained to OSP, its billing agents, or the Commission. During its operations, OSP used the billing and collection services of billing agents, The Billing Resource LLC d/b/a Integretel (Integretel or Old TBR) and The Billing Resource LLC (TBR or New TBR), to facilitate the placement of OSP's collect call charges onto California consumers' local telephone bills. Most of the California consumers charged for OSP's purported collect calls were subscribers of AT&T Communications of California (U1001C) (AT&T) and Verizon California, Inc. (U1002C) (Verizon).

On May 26, 2011, the Commission on its own motion issued an Order Instituting Investigation (OII), Investigation (I.) 11-05-028, to determine whether OSP caused unauthorized charges for collect calls to be placed on California consumers' local telephone bills. The practice of placing unauthorized charges on phone bills is known as "cramming" and is prohibited by Public Utilities (Pub. Util.) Code § 2980.3. The Commission also sought to determine whether OSP provided prepaid calling card service without Commission authorization. The Commission instituted the investigation based on Safety and Enforcement Division (SED's) Staff Report that presented, among other things, the following evidence:

- 12,857 cramming complaints collectively lodged to OSP's billing agents and the Commission concerning OSP's collect call charges;
- a high refund rate for OSP charges, averaging 35% and reaching as high as 53%;
- the inability of either AT&T or Verizon to match their internal call records (aka "switch records") with the call records OSP produced to its billing agents for billing and collection of the collect calls California consumers purportedly made through OSP; and
- TBR terminated its billing and collection services for OSP after investigating OSP's billings and finding that the billings and transactions processed by OSP were invalid and likely fraudulent.

From this evidence, SED inferred that OSP provided erroneous call records to its billing agents for its billings and consequently caused California consumers to be billed for collect calls that allegedly never took place in apparent violation of § 2890. In the OII, the Commission agreed with SED's inference and accordingly provided Respondents, OSP and Mr. Vogel an opportunity to appear before the Commission and show cause why they should not be fined nor have any other sanctions imposed as a result of the alleged cramming. (OII at 22-23.)

With respect to violations against Respondents, OSP and Mr. Vogel, the Commission sought to determine through its investigation whether:

a. Respondents violated Pub. Util. Code § 2890 by causing charges to be placed on consumers' bills for products or services which the consumers did not request or authorize;

b. OSP violated Pub. Util. Code § 451 by placing unjust or unreasonable charges on consumers' telephone bills;

c. OSP violated Pub. Util. Code § 885 by offering prepaid calling cards in California without Commission authorization;

d. OSP violated Pub. Util. Code §§ 270, 431-435, 702, 739, 879, and 2881 for its failure to remit regulatory fees and surcharges on intrastate revenue for the prepaid calling cards; and

e. Mr. Vogel is an alter ego of Respondent, OSP or so directed and authorized the acts alleged by Staff, such that his personal liability is equitable and appropriate. (OII at 28.)

On August 8, 2011 OSP and Mr. Vogel filed a Response to the OII denying the allegations in the OII and Staff Report and alleging that any cramming that may have taken place may have been committed by TBR. Respondents also denied offering prepaid calling cards and claimed that OSP merely advertised its collect call services on prepaid calling cards. As part of the OII, in addition to Respondents, OSP and Mr. Vogel, the Commission also named OSP's billing agents, Integretel and TBR, as Relief Respondents to determine whether all of these Respondents should be ordered pursuant to §§ 734 and 2889.9 to return funds retained from any of OSP's alleged unauthorized billings, as well as to disgorge all proceeds retained from OSP's alleged unauthorized billings.

Specifically, the OII stated:

The Commission also considered whether, pursuant to §§ 701, 734, and 1702 of the Public Utilities Code, any of the following remedies were warranted:

a. Respondents, including Relief Respondents, be ordered to disgorge all profits obtained illegally, and pay reparations, restitution, and/or refunds, pursuant to Pub. Util. Code § 734, to California consumers in the total amount collected from them for OSP's collect call services and related charges, where consumers had not knowingly authorized the services or the amounts charged;

b. Respondents be fined pursuant to Pub. Util. Code §§ 2107 and 2108 for the above-described violations of the Public Utilities Code and related Orders, Decisions, Rules, directions, demands and requirements of this Commission; and/or;

c. Respondent, Vogel be permanently enjoined from billing customers, either directly or through an intermediary, by placing any charges on any telephone bill. This injunction would also run against any business or operation Respondent, Mr. Vogel currently owns or operates as well as any future endeavors. (OII at 29.)

To preserve the Commission's authority pursuant to § 734 to order refunds to aggrieved customers, the Commission ordered Integretel and TBR to place all monies they collected on behalf of OSP into an escrow or trust account pending resolution of I.11-05-028. TBR complied and placed the $1.1 million it had been holding as reserves into an escrow account.

In September 2007, Integretel filed a voluntary petition for a Chapter 11 Bankruptcy (United States Bankruptcy Court for the Northern District of California, San Jose Division, Case No. 07-52890-ASW.

On June 22, 2011, mCapital, LLC and CardinalPointe Capital Group, LLC (collectively "mCapital") filed a motion for party status. mCapital alleges that it has a direct financial interest in the outcome of this proceeding. It claims that it has rights in certain monies presently in possession of Relief Respondent TBR because those monies are the proceeds of OSP's accounts that mCapital allegedly purchased from OSP. On July 13, 2011, the Administrative Law Judge (ALJ) granted mCapital party status. In addition to this proceeding, mCapital has asserted the same claim regarding the approximately $1.1 million of OSP reserves being held by TBR in an escrow account in San Diego Superior Court, Case No. 37-2010-00100830-CU-BC-CTL, filed September 22, 2010.

mCapital sued OSP, Mr. Vogel, and TBR for, among other things, breach of contract relating to the OSP funds in TBR's possession. According to the complaint, the plaintiffs had previously purchased from OSP all of its telecommunications accounts and therefore allege that all of OSP's revenues belong to them. TBR denied owing any monies to mCapital with respect to OSP's funds it held in reserve. On February 29, 2012, the San Diego Superior Court entered a judgment for mCapital against OSP and Mr. Vogel in the amount of $2,399,988.28. The matter against TBR was submitted to arbitration and is still pending. The San Diego Superior Court stayed the rest of the action pending the outcome of the Commission's investigation.

On September 21, 2011 the ALJ held a prehearing conference (PHC) where the parties agreed upon a procedural schedule and the issues to be addressed in this proceeding. On September 29, 2011, the assigned Commissioner and ALJ issued a scoping memo adopting the issues set forth in the OII as those to be litigated through evidentiary hearings (EHs) on March 26-29, 2012. However, after all the parties indicated their interest in pursuing mediation, the ALJ delayed the EHs to allow the parties to negotiate and document a settlement. The parties did not submit testimony pursuant to the agreed-upon schedule in hopes of reaching an all-party settlement. On February 21, 2012, all of the parties, except Integretel (SED, OSP, Mr. Vogel, TBR, and mCapital) participated in mediation with an agreed-upon neutral mediator, ALJ Jean Vieth. Mediation was unsuccessful.

Subsequently, SED, Vogel and OSP began further settlement negotiations, which culminated in the execution of a settlement agreement (Settlement Agreement). TBR, AT&T and Verizon were not parties to the Settlement Agreement. On September 5, 2013, the Commission issued Decision (D.) 13-09-001 approving the Settlement Agreement, dismissing mCapital as a party, and leaving the proceeding open to determine the appropriate method for issuing the refunds ordered in the decision and to allow SED time to pursue recovery of sums held by third parties for the benefit of consumers harmed by the actions of respondents.

No further action was taken in this matter until February 2, 2015 when SED filed the motion to show cause which is the subject matter of this decision. AT&T, Verizon and TBR filed timely responses to the SED motion. TBR's response included a motion to release TBR's escrow funds to itself and to be released as a relief respondent pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure.

2. Discussion

2.1. SED's Motion for a Show Cause Order

SED advances two separate legal theories for holding the billing agents and the billing telephone companies liable for the amounts OSP allegedly crammed onto customer bills, vicarious liability and strict liability. Under a vicarious liability theory, TBR is liable for the crammed charges even though there is no finding of wrongdoing by TBR in this record, because it either knew or should have known that OSP was placing unauthorized charges on customer bills and profited from its handling of those charges on OSP's behalf. Under a strict liability theory, the billing telephone companies are liable under applicable

statutes and Commission rules that impose strict liability on them, no matter who placed the unauthorized charges on customer bills.

The problem with the vicarious liability theory is straightforward: in order to hold a secondary party liable for the wrongdoing of a primary party, there must be an adjudicated finding of wrongdoing by the primary party. Although SED's motion and the accompanying declaration of Victor Banuelos lay out in great detail the investigative findings that provided the basis for issuing the original OII, the Settlement Agreement disclaims any wrongdoing by either OSP or its owner and alter ego, John Vogel. In D.13-09-001 the Commission made no finding of wrongdoing by either OSP or Vogel; to the contrary, the Settlement Agreement approved in that decision is explicit that neither of them admits to any wrongdoing. In short, SED has not proven that OSP crammed customer phone bills nor has OSP admitted that it did. There being no proof of wrongdoing by the primary party (OSP or Vogel) there can be no vicarious liability on the part of a secondary party (Integretel or TBR).

SED's strict liability theory fares no better. AT&T and Verizon can't be held liable, strictly or otherwise, for accusations; they can only be held liable for proven or admitted violations. In the absence of proven or admitted violations, neither of these parties can be required to pay anything.[1]

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[1] Contrary to SED's arguments, Pub. Util. Code § 2890 does not make billing telephone companies strictly liable for unauthorized charges. This section distinguishes between *a billing telephone company and an entity responsible for generating a charge on a telephone bill*:

> If an entity responsible for generating a charge on a telephone bill receives a complaint from a subscriber that the subscriber did not authorize the purchase of the product or service associated with that charge, the entity, not later than 30 days from the date on which the complaint was received, shall verify the

Footnote continued on next page

To summarize, in the absence of proven or admitted violations, neither the billing agents nor the billing telephone companies are liable for the charges that OSP allegedly placed on subscribers' bills. In view of this conclusion, we find it unnecessary to address other defenses advanced by the respondents such as denial of due process, laches and conflict with settlements reached in federal class actions.

2.1. TBR's Motion to Release Escrow Funds to Itself and to be Released as a Relief Respondent

TBR advances multiple reasons to justify its motion for return of the escrow funds and release from this proceeding. In view of our determination that TBR is not liable for the alleged cramming by OSP, we will grant the motion for release from this action as a relief respondent.

> subscriber's authorization of that charge or undertake to resolve the billing dispute to the subscriber's satisfaction.

In other words, the obligation to refund an unauthorized charge is imposed on the party that generated the charge, in this case OSP, rather than on the billing telephone company. In 2006, we updated and clarified our rules in D.06-03-013 and required billing telephone companies to provide refunds of unauthorized charges but only in response to customer complaints. Thus neither Section 2890 nor the 2006 revision of our rules imposes strict liability on billing telephone companies. In 2010, when we adopted Rule 10 of General Order 168, we imposed a form of strict liability on billing telephone companies. D.10-10-034 states in part that billing telephone companies have "an affirmative duty to investigate Subscriber allegations of unauthorized billings and where there are reasonable grounds of concern that a pattern of unauthorized charges may have occurred, to take the initiative to determine whether other subscribers may have been subjected to unauthorized charges…." The Rule goes to state that "The Billing Telephone Corporation is ultimately responsible for refunding all unauthorized charges collected from its Subscribers, including those Subscribers who may have mistakenly paid the unauthorized charges and not requested a refund." But this Rule was adopted in October 2010 and applies from that date forward; the alleged cramming incidents in this case took place between June 2007 and June 2009.

With regard to the disposition of the escrow funds, we note first of all that as between TBR and OSP, TBR has the better claim to be the owner of the funds. Paragraph 7 of the Master Services Agreement (MSA) between OSP and TBR[2] provides TBR with an "irrevocable right of offset against proceeds received from [Local Exchange Carriers] to otherwise be forwarded to [OSP], which arise in connection with any message billed on behalf of [OSP] by TBR**….[OSP] agrees that it shall not be deemed to have ownership or title to funds constituting such proceeds, reserves, holdbacks, or true-up…"** Other provisions of the MSA provide for reservation of funds for the protection of TBR against withholding by the billing telephone companies,[3] authorize TBR to withhold any funds necessary to fund a reserve for unbillables and uncollectables,[4] and include an indemnification of TBR by OSP "against all obligations, liabilities, claims, demands, losses, damages, costs or expenses, including attorneys' fees, arising out of or relating to….(ii)…[TBR's] costs of responding to governmental inquiries and subpoenas; (iii) the Billing Transactions processed by TBR in accordance with the terms of this Agreement."[5]

In prepared testimony submitted in this proceeding in December 2011, Nelson Gross, TBR's billing manager, stated that TBR has spent in excess of $150,000 in legal fees to preserve and protect the escrow funds; over $50,000 in legal fees cooperating with the Commission prior to issuance of the OII;

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[2] Master Services Agreement dated as of October 9, 2008 by and between The Billing Resource LLC, a Delaware limited liability corporation (TBR) and OSP Communications LLC, a Nevada limited liability corporation (Client).

[3] Schedule II, Paragraph 4.

[4] Schedule II, Paragraph 5.

[5] Paragraph 11.

approximately $284,000 participating in this proceeding; paid approximately $900,000 in refunds to OSP's California customers; and contributed $5.5 million to the settlement of two nationwide class actions against OSP relating to the placement of unauthorized charges on customer bills of AT&T and Verizon. [6] The MSA permits TBR to offset funds in its possession against all such expenses, including the funds in the escrow.

Notwithstanding that TBR's claim on the escrow funds is superior to OSP's, we could order TBR to pay refunds to the crammed customers. But here we encounter the difficulty that the escrow funds relate not only to California residents but include funds obtained from residents of other states. As detailed in the prepared Rebuttal Testimony of Nelson Gross, dated January 10, 2012, 66.9085% of the escrow funds, or $735,993.50, is earmarked for administration of refunds to OSP customers outside the State of California.[7] Ordering those funds applied to refund claims of California customers--or allowing them to escheat to the State of California in the event that qualifying customers cannot be found--creates a windfall for California customers at the expense of customers in other states. Assuming the truth of the statements in the Gross declaration, the balance of the escrow funds, approximately $364,000, is less than the amount that TBR has spent on legal fees preserving the escrow and participating in this proceeding, expenses that are clearly reimbursable to it under the MSA and which, in any case, should be returned to it as a matter of equity. Even SED

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[6] Prepared Direct Testimony of Nelson Gross on Behalf of The Billing Resource LLC (December 6, 2011) at 8-11.

[7] Prepared Rebuttal Testimony of Nelson Gross on behalf of The Billing Resource LLC (January 10, 2012) at 2.

concedes that TBR acting on its own first identified suspicious billings by OSP, promptly investigated them, and terminated its relationship with OSP when it determined that OSP could not validate the charges. Punishing TBR by denying it a partial recovery of its expenses incurred in protecting the escrow and participating in this proceeding is both unfair and counter-productive.

In furtherance of this conclusion, we take notice of two federal class actions involving OSP each of which resulted in the creation of funds to reimburse crammed customers, *Nwahueze v. AT&T Inc.*, No. C09-1529SI, 2011 U. S. Dist. LEXIS 8506, p.*49 (January 29, 2011) and *Moore v. Verizon Communications Inc. et al* Case no. 09 CV 1823 (N.D, Cal). The plaintiff classes in these cases include all California customers of AT&T and Verizon to whom refunds might be due as a result of OSP's cramming activities. But even with sophisticated class notification procedures adopted in the federal cases, the passage of time has almost certainly made reimbursement to the originally crammed customers difficult or impossible due to death, change of residence and the well-documented migration pattern from landlines to wireless devices.

Considering that two-thirds of the escrow funds relate to non-California residents; that identifying California customers who qualify for refunds is difficult to impossible at this date; that two federal class actions to the settlement of which TBR contributed $5.5 million have already distributed refunds to qualifying class members; that TBR took prompt and effective action on its own to stop OSP from cramming unauthorized charges on the phone bills of AT&T and Verizon customers; and that TBR incurred substantial legal expense protecting the escrow and participating in this proceeding, we conclude that release of the escrow funds to TBR is the appropriate course.

3. Proceeding Category and Need for Hearing

The OII categorized this Investigation as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings.

Because of the settlement between ORA and Respondents, the evidentiary determination was changed to state that no evidentiary hearings are necessary.

4. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure.

Comments were filed on _____, and reply comments were filed on _____ by _____.

5. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Karl J. Bemesderfer is the ALJ in this proceeding.

Findings of Fact

1. Cramming of customer telephone bills has neither been admitted by nor proven against any respondent in the proceeding.
2. Funds in the escrow belong to TBR.

Conclusions of Law

1. In the absence of proven or admitted wrongdoing by a primary party, a secondary party cannot be held vicariously liable.
2. TBR and Integretel are not liable for the alleged cramming by OSP.
3. AT&T and Verizon are not liable for the alleged cramming by OSP.

O R D E R

IT IS ORDERED that:

1. The motion of the Safety and Enforcement Division for an Order to Show Cause is denied.

2. The motion of The Billing Resource to have escrow funds released to it and to be released from this proceeding as a Relief Respondent is granted.

3. Investigation 11-05-028 is closed.

This order is effective today.

Dated _____, at San Francisco, California.