STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

June 21, 2004

TO: PARTIES OF RECORD IN CASE 02-07-044

This proceeding was filed on July 24, 2002, and is assigned to Commissioner Brown and Administrative Law Judge (ALJ) Walker. This is the decision of the Presiding Officer, ALJ Walker.

The Presiding Officer's Decision was originally issued on June 4, 2004. On June 18, 2004, defendant AOL Time Warner, Inc. (AOL), urged that three relatively minor changes be made to the text of the decision to more precisely describe terms of the AOL settlement. Those changes have been made in this corrected Presiding Officer's Decision, which issues as of today.

Any party to this adjudicatory proceeding may file and serve an Appeal of the Presiding Officer's Decision within 30 days of the date of issuance (i.e., the date of mailing) of this decision. In addition, any Commissioner may request review of the Presiding Officer's Decision by filing and serving a Request for Review within 30 days of the date of issuance.

Appeals and Requests for Review must set forth specifically the grounds on which the appellant or requestor believes the Presiding Officer's Decision to be unlawful or erroneous. The purpose of an Appeal or Request for Review is to alert the Commission to a potential error, so that the error may be corrected expeditiously by the Commission. Vague assertions as to the record or the law, without citation, may be accorded little weight.

Appeals and Requests for Review must be served on all parties and accompanied by a certificate of service. Any party may file and serve a Response to an Appeal or Request for Review no later than 15 days after the date the Appeal or Request for Review was filed. In cases of multiple Appeals or Requests for Review, the Response may be to all such filings and may be filed 15 days after the last such Appeal or Request for Review was filed. Replies to Responses are not permitted. (See, generally, Rule 8.2 of the Commission's Rules of Practice and Procedure.)

If no Appeal or Request for Review is filed within 30 days of the date of issuance of the Presiding Officer's Decision, the decision shall become the decision of the Commission. In this event, the Commission will designate a decision number and advise the parties by letter that the Presiding Officer's Decision has become the Commission's decision.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:avs

Attachment

ALJ/GEW-POD/avs

REVISED PRESIDING OFFICER'S DECISION OF ALJ WALKER
(Mailed 6/21/2004)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The Utility Consumers' Action Network, Complainant, vs. Pacific Bell Telephone Company and AOL-Time Warner, Inc., Defendants.	Case 02-07-044 (Filed July 24, 2002)

Michael Shames and Lee Biddle, Attorneys at Law, for Utility Consumers' Action Network, complainant.
Paul P. Strange, James B. Drimmer and Erinn R. W. Putzi, Attorneys at Law, for SBC California, defendant.
Steven P. Burke, Thomas W. Mitchell and John E. Villafranco, Attorneys at Law, for America Online, Inc., defendant.

OPINION APPROVING SETTLEMENTS INTENDED TO REDUCE DIAL-UP INTERNET TOLL CHARGES

TABLE OF CONTENTS

TITLE **PAGE**

1. Summary 2
2. Procedural History 3
3. Nature of the Complaint 4
4. SBC's Trial Refund Program 5
5. Jurisdictional Challenge by AOL 7
6. Proposed Settlement Between UCAN and SBC 10
7. Settlement Agreement Between AOL and UCAN 12
8. Prior Commission Cases 13
9. Discussion 18
10. Assignment of Proceeding 20

ORDER 23

EXHIBIT 1 Settlement Agreement
EXHIBIT 2 Advisory Notice
EXHIBIT 3 Settlement Agreement

OPINION APPROVING SETTLEMENTS INTENDED TO REDUCE DIAL-UP INTERNET TOLL CHARGES

1. Summary

We approve two settlement agreements that promise to dramatically reduce unintended telephone toll charges for thousands of Californians who use the America Online (AOL[1]) dial-up service to connect to the Internet. The charges occur when subscribers' computers dial an AOL access number that is a toll call instead of a toll-free call. In the first settlement, between the Utility Consumers' Action Network (UCAN) and SBC California (SBC or Pacific Bell[2]), SBC agrees to notify consumers when charges exceed $50 in dialing an AOL access number so that subscribers may correct the dial-up number. In the second settlement agreement, between UCAN and AOL, AOL intends to provide new subscribers with access numbers that are more likely to be toll-free numbers, according to the member's area code and first 3 digits of the dial-up location, thus reducing the risk that subscribers will select an access number outside of their local exchange area. In the first month of SBC's early warning program in April 2004, SBC notified 4,748 customers that their calls to an AOL access number exceeded $50 and urged those customers to change the access number if they intended the calls to be toll-free. This

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[1] AOL is America Online, Inc., the Internet service subsidiary of Time Warner, Inc.

[2] Because Pacific Bell Telephone Company is still the official name of the utility (SBC California is a "doing-business-as" name), we refer both to "SBC" and "Pacific Bell" in this decision, depending on the context of the reference.

proceeding is closed, without prejudice to refiling if AOL is unable to implement its 6-digit access number requirement by the end of 2005.

2. Procedural History

UCAN filed this action against SBC and AOL on July 24, 2002, alleging that many AOL Internet subscribers are being subjected to unauthorized toll charges on their telephone bills as a result of action or inaction of SBC and AOL. Specifically, UCAN alleged that one or both defendant companies reroute telephone calls of their subscribers from local dial-up numbers to toll numbers when customers attempt to connect to AOL. The complaint alleged that toll charges for such dial-up calls often mount to hundreds of dollars before customers receive their phone bills and learn that their Internet dial-up number was not toll-free.

SBC and AOL denied most of the allegations of the complaint. AOL stated that it supplies a list of dial-up numbers to its subscribers and repeatedly cautions subscribers to call their local telephone company to be sure the dial-up numbers they select are toll-free. SBC stated that toll charges for calls to an Internet Service Provider (ISP) like AOL should be borne by customers because customers have exclusive responsibility for selecting the access number to be dialed and the computer equipment that actually dials the number.

AOL on October 21, 2002, moved for a dismissal of the case against it on grounds that the Commission lacks jurisdiction over ISPs. Action on the motion was stayed when SBC announced that it would conduct a study that the parties hoped might lead to settlement. At the request of the parties, the Commission twice extended the statutory deadline for resolution of this case to accommodate the settlement discussions. A prehearing conference was conducted on June 4, 2003, followed by a

second prehearing conference on August 12, 2003, at which time the case was scheduled for hearing in April 2004.

On March 26, 2004, UCAN and SBC filed their proposed settlement agreement and jointly moved for Commission approval. AOL did not oppose settlement by the two other parties. Based on this development, the assigned Administrative Law Judge (ALJ) stayed the evidentiary hearing that had been scheduled for April 26-30, 2004, and, in its place, set a hearing on April 27, 2004, to take testimony on the proposed settlement. At the settlement hearing on April 27, AOL and UCAN announced that they too had reached settlement. Both Assigned Commissioner Geoffrey F. Brown and ALJ Glen Walker questioned the parties about their settlements, and the parties agreed to make certain changes and to submit their executed proposed settlement agreements to the Commission within 10 days. Both executed agreements had been received by May 13, 2004, at which time this case was deemed submitted for Commission decision.[3]

3. Nature of the Complaint

UCAN alleges that thousands of California residents each month open their SBC phone bills and discover charges of hundreds of dollars attributable to the use of dial-up access to their AOL Internet connection. In total, UCAN estimates, California customers are charged as much as $14 million annually for calls to ISP access phone numbers that they believed were toll-free calls, and the record suggests that the majority of these calls were to AOL.[4] According to UCAN, when customers complained to SBC

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[3] The Commission in Decision (D.) 04-04-054 extended the statutory deadline for final resolution of this case to December 31, 2004.

[4] AOL has approximately 3 million subscribers in California.

or AOL, they were told more often than not that nothing could be done, that the customer was solely responsible for selecting and using toll-free dial-up numbers, and that the customer was liable for toll charges when the dial-up number selected turns out not to be toll-free.

UCAN alleged that switching equipment operated by SBC "rerouted" telephone calls of its customers from local telephone numbers to toll numbers when customers attempted to dial up their ISPs. SBC not only denied this allegation but, in a prehearing conference on December 17, 2002, announced that it would conduct a trial refund program to shed light on why so many customers incurred toll charges when contacting their ISPs. Because all parties agreed that SBC's trial refund program could form the basis for settlement, the parties sought and obtained an extension of time for the evidentiary hearing.

4. SBC's Trial Refund Program

As part of what was to be a six-month trial program, SBC on February 1, 2003, began offering a one-time credit of up to $500 to its customers who experienced toll charges as a result of contacting their ISP. The trial was discontinued after six weeks, by which time SBC had adjusted the accounts of 2,242 customers who had complained of ISP toll charges, eliminating $325,524 in toll charges.

During the trial program, SBC surveyed 172 customers. The survey showed that 65% of the customers used AOL as their Internet provider,[5] that 64% of the customers had themselves selected their dial-up access

[5] Of the 172 customers surveyed, 111 (65%) subscribed to AOL; 8 (4%) subscribed to SBC Yahoo; 7 (4%) subscribed to Earthlink, and 46 (27%) subscribed in fewer numbers to other ISPs.

numbers, that 84% had selected the access numbers from an on-line menu or directly from their ISP, and that 90% either had not verified that their access numbers were toll-free or did not know whether they had verified the numbers. Finally, when asked how the problem was fixed, 171 of the 172 customers surveyed said the toll charges stopped as a result of some action taken by their ISP or by the customer changing the dial-up access numbers.

In a motion to dismiss the complaint based primarily on the survey results, SBC told the Commission:

> The survey confirms, as SBC California expected, that the problem is due to customer error in programming their computer dialers. The problem is out of SBC California's hands. SBC California does not select the ISP, does not set up the dialer, does not provide the access numbers, and obviously cannot verify for the customer whether a certain number is local or toll without the customer making contact. SBC California provides the service requested by the customer. (SBC Motion to Dismiss, at 11 (May 19, 2003).)

Following a further extension of time to continue settlement discussions, SBC's motion to dismiss, as well as an accompanying motion to file the survey results under seal, were denied in ALJ rulings issued on August 14, 2003. On the motion to dismiss the complaint, the ALJ found that SBC had failed to establish an absence of triable issues of fact as to its practices and procedures with respect to subscribers' ISP service. On the issue of whether the survey data could be filed under seal, the ALJ ruled:

> SBC has shown little more than speculation as to the competitive harm that may result from disclosure of this data. That potential harm must be balanced against the public interest in the information. The public interest here is compelling. SBC's study shows some

> glimpse into the scale of the ISP toll call problem. It shows that the scale of the problem is perhaps larger than anyone realized. (ALJ Ruling Denying Pacific Bell's Motion to File Under Seal, at 6 (August 14, 2003).)

The ALJ's rulings on SBC's motion to dismiss and its motion to file survey results under seal have not been challenged by SBC.

5. Jurisdictional Challenge by AOL

While SBC's motions were under consideration, AOL pursued its motion to dismiss the complaint against it on grounds that the Commission does not have jurisdiction over ISPs like AOL because they are not public utilities. It noted that the Commission in the past has specifically disclaimed jurisdiction over ISPs. (*See, Broadband Report of California Public Utilities Commission in Compliance With the Mandates of Assembly Bill 1712,* at 28 (2002)), stating that Commission jurisdiction over local telephone companies for universal service purposes does not include jurisdiction or authority over Internet services, such as Internet access provided by ISPs; *see also, Davenport v. AT&T Communications of California, Inc.* (1999) D. 99-06-026 (Commission does not have jurisdiction over ISP service or rates).) AOL stated:

> The only tenable relationship or affiliation with a "public utility" in California for purposes of this proceeding is that some AOL subscribers in California use telephone lines to call AOL for the purpose of accessing its internet service…. This, however, does not subject AOL to the Commission's jurisdiction any more than it would subject any other person or entity to the Commission's jurisdiction by the mere receipt of a telephone call from a California resident. (AOL Motion to Dismiss, at 4-5 (October 21, 2002).)

While acknowledging that AOL is not a public utility, UCAN argued that the new "cramming" statutes, Pub. Util. Code §§ 2889.9 and

2890, give the Commission jurisdiction over a "non-public utility" that provides a product or service, charges for which appear on subscribers' phone bills. If those charges are unauthorized, the Commission is empowered to levy penalties under the provisions of Pub. Util. Code §§ 2102 through 2114 against such entities "as if the persons, corporations, or billing agents were a public utility." (Pub. Util. Code § 2889.9(b).) UCAN stated:

> At the heart of the complaint are customers who claim they called AOL at a number under the control of AOL which should have been free. Instead, at the precise time and duration of the call to AOL, their phone was in fact connected to a different, toll number. As a result, they received a charge on their phone bill to which they did not consent. Since they were dialing a number under the direction and control of AOL, if the complaints are verified through investigation, AOL would be in violation of section 2890. (UCAN Response, at 8 (November 15, 2002).)

In a ruling dated August 14, 2003, the ALJ denied the motion to dismiss. The ruling noted that the Legislature from time to time grants authority to the Commission over non-utility entities. (*See, e.g.*, Pub. Util. Code §§ 314(b) [inspection of holding company records], 394.1 [jurisdiction over energy service providers], 739.5 [jurisdiction over certain mobile home park rates].) The ruling also noted that Section 2111 of the Code grants the Commission the ability to enforce its authority over "[e]very corporation or person, other than a public utility and its officers, agents, or employees" which or who knowingly violates orders of the Commission or aids or abets a public utility in such violation.

Similarly, the ALJ ruled, Section 2889.9 grants limited jurisdiction to the Commission over non-utility persons or corporations that are

responsible for placing unauthorized charges on subscriber's telephone bills. Specifically, the statute provides:

> If the commission finds that a person or corporation or its billing agent that is a nonpublic utility, and is subject to the provisions of this section and Section 2890, has violated any requirement of this article, or knowingly provided false information to the commission on matters subject to this section and Section 2890, the commission may enforce Sections 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 21111, and 2114 against those persons, corporations, and billing agents as if the persons, corporations, or billing agents were a public utility.

Thus, pursuant to the jurisdiction given it in Sections 2889.9 and 2890, the Commission three years ago levied a fine of $1.75 million on a Kansas City aggregator of billings for telecommunications-related services such as voicemail. (Investigation of USP&C, D.01-04-036, rehearing denied, D.03-04-062.) Similarly, under the same jurisdictional authority, the Commission imposed fines and other sanctions against several billing companies that had caused unauthorized charges for telephone services to appear on subscribers' telephone bills in California. (Investigation of Coral Communications, D.01-04-035, vacated on other grounds, D.01-10-073.)

The ALJ Ruling held that whether a subscriber's dial-up call to the AOL Internet service can be deemed to be an unauthorized call under the provisions of Sections 2889.9 and 2890 is a question of fact to be decided based on the evidence. Similarly, the parties dispute whether AOL is an entity "responsible" for generating toll charges for such a call. Nevertheless, as to the jurisdictional issue of whether Sections 2889.9 and 2890 extend the Commission's jurisdiction to ISPs like AOL for complaints of this nature, the ALJ Ruling concluded that they do.

While AOL in this case has reserved the right to challenge the jurisdictional ruling of the ALJ before the full Commission, it does not do so at this time because of the settlement agreement it has reached with UCAN.

6. Proposed Settlement Between UCAN and SBC

The proposed settlement between UCAN and SBC is attached to and made part of this decision as Exhibit 1. Its major elements include the following:

- SBC will monitor the more than 500 AOL access numbers in California for toll charges incurred by SBC customers.

- When a customer's toll charges on an AOL access line exceed $50, SBC will on a one-time basis send a letter notifying the customer of the access charges and instructing the customer to correct the access number if it was intended to be toll-free. (A copy of the notice letter is attached to this decision as Exhibit 2.)

- The monitoring and notice program will continue for 18 months, by which time AOL plans to have in place a new procedure intended to better guide subscribers in using toll-free numbers to access the Internet.

At hearing, SBC stated that it had begun the program on April 1, 2004, and between that date and April 26 had already sent 4,748 letters to customers notifying them that their access charges had exceeded $50. The letter urges that if the customer intended these calls to be toll-free, the customer should call an SBC operator to determine if the access number is within the local calling area. If the number is not toll-free, the letter urges customers to change to a different access number either by contacting AOL or by manually changing the number on their computers.

SBC states that it is conducting a computer run on the AOL access numbers approximately every day and a half, and that letters to customers whose use exceeds $50 go out approximately one business day after SBC receives results of each computer run. In this way, customers are advised of the toll charges at a time when the toll charges are still relatively modest, rather than waiting until the monthly telephone bill is mailed, by which time many customers have incurred dial-up charges of several hundreds and even thousands of dollars. The prepared testimony in this case shows at least one customer whose toll charges for use of a dial-up access number totaled $2,800 by the time she received her telephone bill.

Jerry Flynn, state regulatory executive director for SBC, testified that SBC is spending approximately $6,000 a month to conduct the early warning program but that the company expects to reduce that cost through increased automation. He stated that all of SBC's more than 6,000 service representatives have been notified of the program so that they can respond to customer inquiries.

As its part of the settlement agreement, UCAN agrees to dismiss its complaint against SBC and not to bring further legal action against the company based on toll charges incurred by dial-up AOL customers. UCAN also agrees to withdraw an earlier motion for sanctions against SBC.

Our order today approving the settlement requires SBC to notify the Commission and UCAN at least 60 days before discontinuing the early notice program. The Commission at that time, on its own motion, can assess whether further proceedings are necessary.

7. Settlement Agreement Between AOL and UCAN

The proposed settlement between UCAN and AOL is attached to and made part of this decision as Exhibit 3. Its major elements include the following:

- AOL agrees to use best efforts to implement a program in which new subscribers are asked to give both the area code and first 3 digits of the telephone (the local exchange prefix) that they intend to use for dial-up service. This in turn will enable AOL to provide access numbers more likely to be within a subscriber's toll-free local calling area. New subscribers today are asked to state their 3-digit area code, and the resulting access numbers that are offered include, in most cases, both toll and toll-free numbers within or near that area code.

- AOL agrees to revise the message on its access screen to more explicitly urge new subscribers to check with their local telephone company to be sure that all of the access numbers they select are toll-free. (New subscribers are asked to select up to three access numbers so that if the first number is busy, the call can be rolled over to the second and third numbers.) AOL will also revise its "Welcome to AOL" message to repeat the warning. In its testimony, AOL asserted that it already delivers such a warning to subscribers at least six different times, but it acknowledged that some subscribers do not take the time to call their local phone company and confirm that their dial-up numbers are toll-free.

- AOL agrees that if it has not implemented a 6-digit sign-up program by the end of 2005, it will deposit $75,000 to a consumer education fund to be approved by the Commission. UCAN reserves the right to refile its complaint if AOL is unable to meet its commitment.

- AOL will make quarterly reports to the Commission on its progress in developing a new feature in its access number selection software that uses both an AOL member's 3-digit area code and 3-digit local exchange, and it will promptly share access number information with SBC so that SBC will have a current list of AOL access numbers in California.

In prepared testimony, AOL asserts that it has for months been seeking to overcome technical difficulties to introduce a 6-digit sign-up requirement for new subscribers, and it hopes to have such a program in place soon after the end of this year. UCAN's prepared testimony claimed that another ISP service (SBC Yahoo) that matches its dial-up access numbers to the first 6 digits of a subscriber's telephone number experiences few incidents of toll charge complaints.

For its part in the settlement agreement, UCAN agrees to withdraw its complaint against AOL, without prejudice to later refiling if necessary, and not to assert new claims against AOL related to dial-up access charges. UCAN also withdraws an earlier motion for sanctions against AOL.

8. Prior Commission Cases

As early as 1998, the Commission recognized that customers were incurring toll charges on their telephone bills as a result of connecting to their Internet provider. On March 2, 1998, the Commission issued a consumer advisory entitled "How to Avoid Unexpected Toll Charges on Your Phone Bill When You Access the Internet." The advisory stated:

> [O]ur Consumer Affairs Branch wants you to know that it has received numerous complaints from customers with very large and unexpected telephone bills from their local phone company for calls they assumed were local, and therefore free.

> In most instances, consumers either received incorrect information from their Internet service provider about the number to use to access the Internet, or assumed the calls were local because they did not have to dial a "1" first. (In many parts of California, it is not necessary to enter the number "1" before dialing certain toll calls.)
>
> While a local number may be provided and stored in your computer's dial-up program, a problem can also arise if the number is busy and your computer dials an alternate number. If the alternate number is also not a local number, you will end up paying toll charges.

On December 7, 2000, the Commission dealt with the complaint of a consumer who alleged that he had been charged $741 for calls to his ISP when previous calls to the same number had been toll-free. (*Mitchell v. Pacific Bell* (2000) D.00-12-010.) The customer alleged that a split in the existing area code had caused the access number to become a toll call. The Commission found that the area code split had not caused the problem and concluded instead that:

> Complainant simply programmed his computer to dial-up an ISP outside his local calling area, resulting in a local toll call whenever he accessed the Internet. Pacific Bell should not be held liable for its customers' selection of Internet service providers outside their local calling area. (D.00-12-010, at 2-3.)

The *Mitchell* case was an informal "Expedited Complaint Procedure" (ECP) case. While it is not binding as precedent pursuant to Rule 13.2(i) of the Rules of Practice and Procedure, it and other ECP cases are noted here primarily to indicate the prior history of these matters before the Commission.

Since the *Mitchell* decision, the Commission has found against the telephone company and in favor of consumers in virtually every complaint

alleging unauthorized toll charges for calls to ISP access numbers that the consumers thought were local calls.

In *Higginbotham v. Pacific Bell* (2002) D.02-08-069, the Commission consolidated five complaint cases and found that when Pacific Bell in the year 2000 eliminated local and toll prefix information in the front of its white pages, it unreasonably restricted the means by which subscribers could determine whether an ISP access number was a local call or a toll call. In the five consolidated cases,[6] the Commission found that the subscribers had sought unsuccessfully to check ISP access numbers against local toll prefix information that was no longer in the white pages. The Commission in D.02-08-069 required Pacific Bell to resume publication of local and toll prefix information and directed removal of the toll charges in dispute.

In *Byrnes v. Pacific Bell* (2002) D.02-11-060, another ECP case, the Commission on much the same reasoning required removal of toll charges of $585 against the complainant, concluding:

> The facts presented here indicate a serious problem in regard to automatic direct-dialed calls from a computer to an ISP. Because the dial-up is automatic, the user is not alerted to the possibility that the dial-up number is a local toll call rather than a local call….
>
> Pacific Bell's argument that complainant's recourse is with his ISP has no merit. Pacific Bell has made it difficult, inconvenient, and impracticable to get accurate information distinguishing local calls from local toll

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[6] *Higginbotham v. Pacific Bell,* Case (C.) 01-03-028; *Klepper v. Pacific Bell,* C. 01-05-059; *Goldberg v. Pacific Bell,* C. 01-05-068; *Chamberlin v. Pacific Bell,* C. 01-07-023; *Joseph v. Pacific Bell,* C.01-11-008.

> calls. This information, which at one time was provided in its telephone book, has been deleted from the telephone books with the notation to call the operator. But, as we have found, calling the operator often results in misinformation. (*Byrnes, supra,* at 3.)

In three recent ECP cases, the Commission followed the reasoning in *Higginbotham* and *Byrnes* to order Pacific Bell to remove ISP toll charges of $435 against complainant Ellen Shing (D.03-04-012), $389 against complainant Michael Klein (D.03-04-013), and $314 against complainant Robert Rycerski (D.03-04-014). Pacific Bell sought rehearing of these decisions on grounds that the complainants had not alleged that they tried to obtain prefix information from local directory white pages. Similarly, Pacific Bell disputed a conclusion in those decisions that it had the technical expertise to fix the problem.

In its rehearing decisions, the Commission agreed with Pacific Bell that the record in these three cases did not support conclusions that the complainants were disadvantaged by the absence of information in the white pages or that Pacific Bell had technical expertise to fix the problem. Nevertheless, we affirmed the results of those decisions, concluding that complainants had shown by a preponderance of evidence that they had taken reasonable steps to be sure that their ISP access number was a toll-free call. We held:

> [T]he problem experienced by Complainant is not unique and the Commission has received numerous similar complaints. Because both the phone companies and the ISPs are the entities that stand to benefit when a customer is billed for a local toll call instead of a local call when accessing his or her ISP, the Commission believes the responsibility for remedying the situation lies with the phone companies and the ISPs. They are the beneficiaries of the customers' dollars for dial-up

> Internet access. Individual customers that the Commission finds to be credible in terms of whether they correctly programmed their computers to dial local numbers should not be held responsible for this situation, which appears to be beyond their ability to control or prevent.
>
> Moreover, a telecommunications carrier, like other public utilities, is obliged to provide reasonable service. As demands on the telecommunications system change over time, the carrier must adapt to meet those demands reasonably. SBC has not shown that it has taken reasonable steps to advise customers, such as the Complainant, of unusual toll usage for Internet access purposes or how to prevent such an occurrence. Accordingly, we reject SBC's argument that Complainant should be required to pay for the local toll calls in dispute, where we have found it credible that Complainant took all reasonable steps to avoid dialing a local toll number. (*Shing v. SBC Pacific Bell* (2003) D. 03-09-024, at 4-5.)

The record in this case suggests that while some complaints about toll charges for ISP connections are made to this Commission, the great majority of such complaints involving AOL go to SBC and AOL. According to UCAN, its data requests to AOL produced "hundreds of pages" of complaints by customers who alleged that they did not dial the access numbers for which they were billed. UCAN states that SBC produced records of 165 informal complaints about such billing since the time this complaint was filed. UCAN itself states that it received 30 complaints (including one by a Commission telecommunications supervisor) in the past three years. UCAN states that, in light of SBC's subsequent survey that uncovered more than 2,000 such incidents in just six weeks, "it is clear that these…records represent the tip of the iceberg" of complaints about ISP toll charges. (UCAN direct testimony, at 17.)

9. Discussion

We commend the parties for reaching settlements that hold great promise for reducing the alarming number of incidents in which California consumers open their monthly telephone bills and discover that they have been charged hundreds of dollars for dial-up access to the Internet that they thought would be free. The record in this case is replete with horror stories of consumers who, thinking they were making toll-free calls to the Internet, continued using the connection for several hours each day before receiving their telephone bill.

In the first month of its new program to monitor toll charges for AOL subscribers who used a dial-up access number, SBC sent letters to nearly 5,000 customers warning that toll charges for the access number had exceeded $50. The record shows that these customers had incurred toll charges totaling more than $300,000. While not all of this amount is being billed to customers (some telephone plans forgive local toll charges), it is clear that most of these charges will come as an unpleasant surprise to consumers signing up for Internet access.

Because they will receive early warning that their AOL dial-up number is not toll free, most of these customers will be able to switch to an Internet dial-up number that is toll free, as they probably intended in the first place, and cap their Internet toll charges before the charges get out of hand.

Meanwhile, in its settlement, AOL is seeking to further reduce the problem of unexpected toll charges for Internet calls. By requiring new subscribers to enter their area code and the 3-prefix local exchange number of their telephone, AOL will be able to provide a list of access numbers tailored to both the area code and prefix, and thus more likely to be toll

free. New subscribers today supply only their area code, and the resulting list of access numbers frequently includes both toll-free numbers and toll numbers. AOL has agreed to have the 6-number program in place within 18 months. If it fails to do so, AOL has agreed to pay $75,000 into a consumer education fund and to be subject to a renewed complaint by UCAN.

Moreover, AOL has agreed to post more explicit warnings to subscribers to call their local telephone company to be sure that their AOL access numbers are toll-free. In California, customers of SBC can without charge dial "O" and ask the operator to confirm that up to three numbers are local calls, rather than toll calls. AOL will make quarterly reports to this Commission stating its progress in reducing the number of subscribers who unintentionally incur toll charges in their dial-up calls.

At hearing, AOL said that the steps that SBC and AOL are taking in this case, along with the increasing number of subscribers who are switching to high-speed DSL and cable access (where access to the Internet is through a permanent rather than dial-up connection), should significantly reduce the number of complaints of dial-up charges.

Since this complaint case was brought against only two defendants – SBC and AOL – other California local exchange companies and other ISPs are unaffected. Nevertheless, since SBC is the largest telephone company in California and AOL appears to have the largest share of Internet dial-up subscribers in the state (approximately 3 million), we would expect other telephone companies and other ISPs to note these efforts and review their own practices to avoid unintended toll charges for their subscribers.

Toward that end, our order today directs the Commission's Executive Director to serve by electronic mail a Notice of Availability of

this decision on all certificated California local exchange service providers. The Notice of Availability is to briefly summarize this decision and provide a link to the decision on the Commission's website.

The proposed settlements here were made in compliance with Rule 51 of the Rules of Practice and Procedure. The parties have submitted sufficient information for the Commission to weigh the terms of the settlements. At hearing on April 27, 2004, the Commission received into evidence testimony of each of the parties, and the settling parties were questioned both by the Assigned Commissioner and the ALJ. There have been no objections to the settlements.

Pursuant to Rule 51.1, we conclude that the proposed settlement between UCAN and SBC and the proposed settlement between UCAN and AOL are reasonable in light of the whole record, consistent with the law, and in the public interest.

10. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Glen Walker is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Thousands of SBC customers in California are being subjected to toll charges on their telephone bills when they use an AOL access number to connect to the Internet.

2. UCAN filed this complaint against SBC and AOL alleging that those companies through their action or inaction were responsible for unauthorized toll charges pursuant to Pub. Util. Code §§ 2889.9 and 2890.

3. To determine the cause of these unintended toll charges, SBC on February 1, 2003, began a trial program offering a one-time credit of up to

$500 to its customers who experienced toll charges as a result of contacting their ISP.

4. The SBC trial program was discontinued after six weeks, by which time SBC had adjusted the accounts of 2,242 customers who had complained of ISP toll charges, eliminating $325,524 in toll charges.

5. During the trial program, SBC surveyed 172 customers and learned that 65% of the customers used AOL as their ISP; that 64% of the customers had themselves selected their dial-up access numbers; that 84% had selected the access numbers from an on-line menu or directly from their ISP; and that 90% either had not verified that their access numbers were toll-free or did not know whether they had verified the numbers.

6. Of the 172 customers surveyed by SBC, 171 said the toll charges stopped as a result of some action taken by their ISP or by the customer changing the dial-up numbers.

7. AOL reserves the right to appeal the ALJ Ruling of August 14, 2003, regarding jurisdiction, but does not do so at this time because of its proposed settlement agreement with UCAN.

8. Under the proposed settlement agreement between UCAN and SBC, SBC agrees to monitor the more than 500 AOL access numbers in California and notify customers when their AOL access numbers exceed more than $50 in toll charges, instructing the customers to correct their access numbers if those numbers were intended to be toll-free.

9. In the first month of the SBC program, between April 1 and April 26, 2004, SBC sent 4,748 letters to customers notifying them that their AOL access charges had exceeded $50.

10. Under the proposed settlement agreement between UCAN and AOL, AOL agrees to use best efforts to begin asking new subscribers to

give both their area code and first 3 digits of their telephone numbers that they intend to use for dial-up service to AOL. Use of both the area code and first 3 digits of a telephone number will enable AOL to provide a list of AOL access numbers more likely to be toll-free.

11. AOL in its proposed settlement agreement agrees that if it has not implemented a 6-digit sign-up program by the end of 2005, it will deposit $75,000 to a consumer education fund to be approved by the Commission.

12. The Commission has dealt with numerous complaints by consumers contesting toll charges for calls to an ISP access number and, in most of these cases, has found against the telephone company and in favor of consumers.

Conclusions of Law

1. The proposed settlement agreement between UCAN and SBC is reasonable in light of the whole record, consistent with the law, and in the public interest. It should be approved.

2. The proposed settlement agreement between UCAN and AOL is reasonable in light of the whole record, consistent with the law, and in the public interest. It should be approved.

3. UCAN's motion for sanctions against SBC and AOL is withdrawn.

4. C.02-07-044 should be closed, without prejudice to refiling if AOL is unable to implement a 6-digit access number requirement by the end of 2005.

5. Because of the public interest in promptly implementing these settlements, today's order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The proposed settlement agreement between the Utility Consumers' Action Network (UCAN) and SBC California (SBC), attached hereto and made part hereof as Exhibit 1, is approved.

2. The proposed settlement agreement between UCAN and America Online, Inc. (AOL), attached hereto and made part hereof as Exhibit 3, is approved.

3. SBC shall notify the Director of the Commission's Telecommunications Division and UCAN, in writing, at least 60 days prior to terminating its early warning program for AOL access numbers in California.

4. AOL shall notify the Director of the Commission's Telecommunications Division, in writing, on a quarterly basis, of AOL's progress in implementing a 6-digit access number identifier system.

5. The Commission's Executive Director shall serve by electronic mail a Notice of Availability of this decision on all certificated California local exchange service providers. The Notice of Availability shall briefly summarize this decision and provide a link to the decision on the Commission's website.

6. Case 02-07-044 is closed, without prejudice to refiling by UCAN if AOL is unable to implement a 6-digit access number identifier system by the end of 2005.

This order is effective today.

Dated _____, at San Francisco, California.

Walker Pres Ofcr Decision Exhibits 1-3