

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135 and U-4314, and related entities (collectively "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers.

I. 02-06-003
(Filed June 6, 2002)

ORDER ADOPTING ALL PARTY SETTLEMENT**I. INTRODUCTION**

In this Order we adopt and approve the all-party settlement entered into between AT&T Mobility LLC aka Cingular Wireless (Cingular), Utility Consumer Action Network (UCAN), and the Commission's Consumer Protection and Safety Division (CPSD).¹ The all-party settlement creates a fair and reasonable refund plan for Cingular's customers and requires Cingular to pay the full penalty assessed in our decisions. It also resolves all pending litigation. We find this all-party settlement is in the public interest and is consistent with our decision in D.04-09-062.

In 2002 we initiated an investigation into Cingular and its practices regarding the imposition of Early Termination Fees (ETFs) on customers who cancelled due to lack of coverage. (I.02-06-003, p. 1.) In our decision in this proceeding, D.04-09-

¹ The settlement has been submitted under Article 12 of our Rules of Practice and Procedure. As this is an all-party settlement our procedural rules requiring notice, a settlement conference and comments are waived. All parties to this proceeding participated in the negotiation of the settlement agreement and support the settlement. The settlement is attached as Appendix A to this order.

062, we found that from 2000 to 2002, Cingular advertised and marketed its services heavily without disclosing its network coverage problems to customers. (D.04-09-062, Finding of Fact No. 4.) We concluded that Cingular’s advertising and coverage maps misled consumers into signing up for wireless service in areas where the cell phone did not work, and then imposed ETFs when the customer tried to cancel, allowing for no grace period to return the phone. (*Id.*, pp.67-69.) Our decision found that Cingular’s official no return/no refund ETF policy constituted an unfair business practice that failed to provide adequate, just and reasonable service to customers, in violation of California Public Utilities Code sections 451,702, 2896 and D.95-04-028. (*Id.*, Conclusion of Law No. 3.) We imposed a \$12.14 million fine on Cingular and ordered Cingular to refund all ETFs collected from January 2000 to April 2002. (*Id.*, Conclusions of Law Nos. 4 and 5.) Cingular paid this fine, which was deposited in an escrow account pending appeal. The refund plan that we ordered did not specify how the refund would be implemented, but instead ordered Cingular to “file a refund plan accomplishing the customer reparations”, and delegated to our Telecommunications Division (TD) the responsibility to “monitor implementation of the plan”. (*Id.*, p.67.)

Cingular challenged D.04-09-062 in California’s 4th District Court of Appeal. On June 20th, 2006, the 4th District Court of Appeal issued a ruling strongly supporting the Commission’s entire decision and denying all of Cingular’s court challenges. (*Pacific Bell Wireless, LLC v. Public Utilities Commission (2006) 140 Cal. App.4th 718.*) Cingular then sought review of the Court of Appeal’s decision before the California Supreme Court. The California Supreme Court summarily denied Cingular’s petition for review. (Cal Sup. Ct. Case No. S145516. Petition for Review denied on October 11, 2006.) Cingular then filed a petition for a writ of certiorari with the United States Supreme Court on March 9, 2007.

With respect to the refund plan and as noted above, we did not specify in D.04-09-062 how the ordered refund should be carried out, and delegated to TD the responsibility to “monitor implementation of the plan”. (D.04-09-062, p. 67.) About 60 days after we issued D.04-09-062, Cingular submitted a Restitution Plan to TD. In

January 2005, UCAN and CPSD jointly filed protests to Cingular's proposed plan. (Joint Comments and Recommendations of the Consumer Protection and Safety Division and Utility Consumers Action Network re Restitution Plan of Cingular Wireless, filed January 21, 2005.) CPSD and UCAN argued that Cingular's restitution plan is vague, unsubstantiated, misapplied D.04-09-062, and lacked the mechanisms needed for a "swift, efficient, and independent administration of refunds to customers who paid an ETF" to Cingular or its agents. (*Id.*, p.1.) Cingular's proposed Restitution Plan has remained in "limbo" pending the several appeals of the Commission's decisions.

II. DESCRIPTION OF THE PROPOSED SETTLEMENT

The proposed settlement resolves all outstanding issues relating to D.04-09-062 and creates a specific and equitable refund plan.

The settlement's key terms are as follows:

- The entire \$12.14 million penalty currently in the escrow account will go to the State's General Fund as a penalty.
- All accrued interest on the \$12.14 million penalty will be transferred to a Reparations Fund B account to pay refunds to those customers that may have paid additional ETFs to Cingular's agents.
- Cingular will fund Reparations Fund A to pay refunds to those customers who paid ETFs to Cingular or its agents. This is about \$18.5 million, which is the amount of ETFs shown in Cingular's current records of refunds due to customers who paid ETFs to Cingular or its agents.
- Cingular will mail claim forms to those customers that may have paid an additional ETF to a Cingular agent². The claim form does not require proof of payment (e.g., receipts, contract, etc.). A sample claim form is attached as Exhibit B to the settlement.
- A neutral Claims administrator will evaluate the claims and determine the amounts owed. Cingular will establish a second

² Cingular's agents typically charged an additional ETF penalty for early contract cancellation. However, many of Cingular's agents are no longer in business, and their customer records for the most part are not available. As a result, Cingular does not know whether or how much these customers paid in additional ETFs to a Cingular agent.

escrow account, Reparations Fund B, for these additional ETF payments made to Cingular's agents.

- Under the plan, all customers who entered into contracts with Cingular, whether directly with Cingular or through an agent, from January 1, 2000 to April 30, 2002, and who paid an ETF, will receive a refund.

III. THE PROPOSED ALL PARTY SETTLEMENT IS FAIR AND REASONABLE

The settlement agreement allows Cingular to transfer interest that has accrued in the penalty escrow account to the Restitution Plan. Cingular is required to implement a simplified Restitution Plan that will compensate former customers that paid ETFs to Cingular and additional ETFs to Cingular's agents. CPSD and UCAN have argued that the Restitution Plan submitted to TD would have made it difficult for Cingular's former customers to obtain refunds and would have made it much more likely that many of these customers would not receive a refund. CPSD and UCAN believe that Cingular's initial Restitution Plan was inadequate because (1) it shortened the refund time period in a way that was inconsistent with D.04-09-062; (2) it lacked support for its methodology in the form of data relating to numbers of customers; (3) it claimed ignorance of the numbers of affected customers that may have paid an illegal ETF to a Cingular agent, and lacked an acceptable mechanism for finding those customers; (4) it lacked an independent claims administrator to adjudicate disputed claims; (5) and it created issues, such as requiring customer receipts even where Cingular had records of ETFs paid. (Joint Comments and Recommendations of the Consumer Protection and Safety Division and Utility Consumers Action Network re Restitution Plan of Cingular Wireless, p.2.)

We do not have to address these protests as it is clear that the refund plan agreed to in the proposed settlement resolves all of CPSD's and UCAN's concerns. A review of the proposed settlement reveals a plan that will return refunds to Cingular's customers quickly and fairly. The settlement agreement also proposes that Cingular will begin the refund process immediately and in a manner that both CPSD and UCAN

support. The proposed settlement is consistent with our intent set forth in D.04-09-062³. We note that the plan covers the entire period addressed in this decision. We expect the refund plan to be implemented quickly by Cingular.

We also agree with Cingular, CPSD and UCAN that the transfer of the accrued interest in the penalty escrow account to Reparations Fund B is a fair and balanced trade-off for the adoption of a simplified refund plan which will quickly return ETFs to Cingular's former customers. The amount of the penalty which will go to the General Fund remains at \$12.14 million, which we believe is the right amount in light of Cingular's conduct.

IV. THE PROPOSED ALL PARTY SETTLEMENT AGREEMENT IS ADOPTED AND APPROVED

Our review of the record in this proceeding leads us to conclude that the proposed all-party settlement agreement is reasonable, fair and equitable. We find it to be consistent with the law and in the public interest. In approving this settlement, it is not our intent to modify any of the findings, conclusions or ordering paragraphs of D.04-09-062, other than Ordering Paragraphs 1 and 4 of D.04-09-062 and D.04-12-058 (Order Modifying and Denying Rehearing of D.04-09-062), and then only to the extent necessary to implement the specific refund plan set forth in the settlement.

FINDINGS OF FACT

1. The proposed settlement agreement is supported by all active parties.
2. The supporting parties fairly reflect the affected consumer, service provider and state agency interests.
3. The proposed settlement agreement will resolve all pending litigation here at the Commission and at the U.S. Supreme Court.

CONCLUSIONS OF LAW

³D.04-09-062, p.67. We stated: "Cingular shall return, with interest, any sums received for early cancellation of contracts entered into between January 1, 2000 and April 30, 2002, to the customers who paid those sums." We further stated that "Cingular is responsible for its agents' ETF collections." (*Ibid.*)

1. The proposed settlement agreement is consistent with the law and prior Commission decisions, and in light of the entire record in this proceeding, is in the public interest.

2. The proposed settlement agreement fully meets our guidelines for all party settlement proposals as stated in SDG&E (1992) 42 CPUC2d 538.

ORDERING PARAGRAPHS

1. The all party settlement agreement attached to this decision as Appendix A is adopted and approved.

2. The Ordering Paragraphs of D.04-09-062 are hereby modified as necessary to permit the implementation of the Settlement Agreement. Specifically,

a. Ordering Paragraph 1 of D.04-09-062 is modified to allow accrued interest on the \$12.14 million penalty in the escrow account to be used to pay refunds as provided in the Settlement Agreement through Reparations Fund B.

b. Ordering Paragraph 4 is modified to require Cingular to file a report within six months of the effective date of this decision on the amount of remaining funds in Reparations Fund A and/or Fund B which can not be paid to former Cingular customers. After reviewing this report, the Commission will determine how these remaining funds shall be distributed or otherwise utilized.

This order is effective today.

Dated _____, at San Francisco, California.

[I0206003 Appendix A \(Exhibit A&B\) Settlement Agreement](#)