

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations and practices of Vycera Communications, Inc. (U-5477) and its officers and primary shareholders, Derek M. Gietzen and Thalia R. Gietzen, to determine whether respondents have violated the laws, rules and regulations governing the manner in which California consumers are switched from one telephone carrier to another and billed for telephone products or services.

**FILED**  
**PUBLIC UTILITIES COMMISSION**  
**JULY 8, 2004**  
**SAN FRANCISCO**  
**I.04-07-005**

**ORDER INSTITUTING INVESTIGATION INTO THE OPERATIONS OF**  
**VYCERA COMMUNICATIONS INC.**

**I. INTRODUCTION**

Vycera Communications Inc. (Vycera) is a facilities-based competitive local exchange carrier based in San Diego, California. Vycera provides long distance, local, and local toll service. Vycera currently has approximately 18,000 local and local-toll customers in California (primarily Spanish-speaking), and a small number of long distance customers.

The Commission's Consumer Protection and Safety Division's ("CPSD") Utility Enforcement Unit ("Staff") has investigated hundreds of consumer complaints regarding slamming and cramming against Vycera. Staff alleges that Vycera has violated the regulations regarding how a consumer's intent to switch is verified, and that Vycera has engaged in the practice of billing consumers for products or services they did not authorize or request as well as other unfair and illegal business practices, described below.

Staff has found that Vycera did not thoroughly inform prospective customers of the nature and extent of the services being offered by its telemarketers, who typically falsely promise that a consumer's rates will be lower with Vycera, in violation of Public Utilities Code section 2889.5. Vycera did not properly establish the consumers' intent to make any changes to his or her telephone service by failing to obtain oral verification of the consumers' intent to switch, in violation of section 2889.5. Further, Vycera failed to explain all charges associated with that switch, by not providing notification to the consumer that his or her telephone service provider was changed. Staff also alleges that Vycera includes charges for "Line Pro/Cable Pro", a product that the customer did not authorize, in violation of section 2890. Staff alleges that Vycera may have provided Commission staff with copies of third-party verification tapes (TPV tapes) that have been illegally doctored. The Commission is concerned that Vycera's customers are primarily Spanish-speaking consumers, and that language barriers may prevent these consumers from resolving their complaints. Finally, the Commission is concerned that Mr. Derek Geitzen and Thalia Geitzen provided misleading answers to staff's data requests, by failing to reveal that they were formerly officers of Communication Telesystems International, Inc. (CTS).

## **II. SUMMARY OF STAFF ALLEGATIONS**

CPSD Staff has prepared a report and obtained consumer declarations documenting and supporting its investigation to date. The report and declarations are released today and shall be placed in the Commission's public formal file for this proceeding.

### **A. Company Background**

On June 11, 1995, Vycera (then called Genesis Communications International, Inc.) received a certificate of public convenience and necessity as an interexchange telecommunications services reseller from the California Public Utilities Commission in Decision (D.) 95-06-045. On February 23, 1996, Commission Decision (D.)96-02-072 granted Vycera/Genesis authority as a competitive local service reseller. On September 5, 2002, Genesis Communications International, Inc. changed its name to

Vycera Communications Inc. On October 3, 2002, the Commission in Decision (D.) 02-10-016 approved Vycera's application (A.) 02-06-022 to change its name from Genesis to Vycera, as a limited facilities-based competitive local exchange carrier. Vycera is owned and operated by its primary shareholders, President and CEO Derek M. Gietzen, and Vice-President and CFO Thalia R. Gietzen.

Vycera markets its services through the use of telephone solicitations, initiating the solicitation with Spanish-speaking consumers in Spanish and offering Vycera's services. Vycera contracts with FTL Communications to perform the third-party verifications required by section 2889.5.

### **B. Nature of Complaints**

Staff's report documents that the Commission's Consumer Affairs Branch received 43 complaints regarding Vycera in 2001, 34 in 2002, and 156 in 2003, for a total of 233 for the last three years. (See Table D of Staff's Report.) CPSD receives monthly Business Office Referral reports (BOR reports) from SBC, which document that SBC received approximately 11,000 "dial tone slams"<sup>1</sup> complaints attributable to Vycera in the last three years. (See Table A of Staff's Report.) SBC also provides the Commission with the number of monthly-recorded long distance slamming allegations, referred to as PIC disputes.<sup>2</sup> SBC received for approximately 10,000 PIC disputes attributable to Vycera in the last three years.

Consumers complain that Vycera's telemarketers do not thoroughly inform them of the nature and extent of the products or services being marketed, and often find that after purchase, the product or services they are being billed for are not consistent with the products or services described by the telemarketers. Typically, Vycera's

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<sup>1</sup> A "dial tone slam" is the industry term commonly used to refer to an allegation that a subscriber's local telephone service carrier was switched without the subscriber's authorization.

<sup>2</sup> A PIC dispute (Primary Interexchange Carrier dispute) is the terminology used by SBC referring to an allegation that a subscriber's long distance or local toll carrier was switched without the subscriber's authorization.

telemarketers falsely promise prospective customers that their rates will be lower with Vycera, although they are not. Consumers have also complained that Vycera sales representatives misrepresent themselves as representatives of the consumer's local telephone company; i.e., SBC or Verizon, and do not clearly state that they are calling on behalf of Vycera.

Staff's report indicates that Vycera's third-party verification company, FTL Communications, records a potential subscriber's name, and then in order to verify the subscriber's intent to switch, the subscriber is required to press #2 on the telephone to verify that the information provided by an automated voice (not a live person) is correct, and #4 to decline. The entire process is automated - Vycera does not verify the subscriber's intent to switch orally as required by section 2889.5(a)(3)(C), which states that the TPV company shall obtain and record the subscriber's "oral" confirmation. Furthermore, the option #4 (to decline) is not provided at every step of the automated verification process, but only after certain products or services are mentioned.

Staff requested third party verification tapes (TPV tapes) from Vycera for the consumers Staff interviewed. Staff alleges that Vycera provided TPV tapes to Staff that sound as if they have been doctored, or are functionally inaudible. Staff played the TPV tapes for 4 complainants, who after reviewing the TPV tapes provided written declarations documenting that the TPV tapes are not what they remembered as having heard during the verification process.

Staff's report documents that Vycera automatically includes an inside wire maintenance service called "Line Pro" or "Cable Pro", for a fee of \$2.99, without obtaining the subscriber's authorization for such a service, without offering the subscriber the option to decline this service, and without disclosing to the subscriber that the purchase of the service is not required. This practice has been documented by Staff's report and written declarations from consumers.

Consumers further allege that Vycera never provided them with any notice that their telephone service had been switched to Vycera, and that the first time they learned of the switch was when they opened their telephone bill.

Finally, it is of concern that, according to information obtained from Vycera's website and its application, Mr. Derek M. Gietzen was Vice President and General Manager, and Thalia R. Gietzen was Vice President and CFO, of a telephone company called Communication Telesystems International, Inc. In Decision 97-05-089, the Commission found that CTS had committed 39,200 unauthorized switches, fined CTS \$19.6 million, and suspended CTS' operating authority for 3 years. It concerns us that Vycera reported to Staff that "none of the officers and directors of Genesis have been officers of any other telecommunications company."

### **III. DISCUSSION**

Staff's allegations that Vycera has engaged in slamming and cramming California consumers cause us great concern. Public Utilities Code section 2889.5(a)(1) requires telephone corporations and their agents to thoroughly inform the subscriber of the nature and extent of the service offered, and section 2889.5(a)(2) specifically requires the telephone corporation to establish whether the subscriber (the customer name on the account) intends to make any change to the subscriber's telephone service and to explain any charges associated with that change. Public Utilities Code section 2889.5(a)(3) requires that all residential service order changes be verified by a third party verifier before any change in service is made, and that the subscriber's intent is obtained and recorded orally. Section 2889.5(a)(4) requires the telephone company to notify the subscriber within 14 days that his or her telephone service provider has been changed.

The Commission has received numerous consumer complaints alleging that subscribers did not authorize the change of their telephone service to Vycera, or that Vycera did not explain the nature and extent of the products or services being sold, or misrepresented the name of its company so that consumers did not know they were dealing with Vycera, in violation of section 2889.5(a)(1). In many cases, consumers report that Vycera obtained authorization from an individual who was not the subscriber, and not authorized by the subscriber to make changes, in violation of section 2889.5(a)(2). In many cases, consumers did not receive any notification from Vycera

that their telephone service provider had been switched, in violation of section 2889.5(a)(4).

If Staff's allegations are true that Vycera obtains and records verification data through a series of automated options involving pressing the number #2 or #4 to accept or decline, this does not constitute "oral" confirmation by the subscriber, and is a violation of Public Utilities Code section 2889.5(a)(3)(C). Moreover, section 2889.5(a)(3)(C) requires telephone corporations to make the record of the subscriber's confirmation available to the subscriber "upon request", so that the subscriber can verify that the consent was indeed given. Failure to record this information orally severely limits the ability of the subscriber to verify that he or she was actually informed and consented to the switch, because the TPV tapes only reveal a series of "beeps" or tones in response to a computerized voice, which provides no way to identify the consumer's voice. This also limits Staff's ability to verify the consumer's complaint by preventing Staff from being able to determine whether the subscriber was informed of the nature and extent of the services, and consented to the switch.

The Commission's Rule 1 of its Rules of Practice and Procedure requires that regulated companies provide truthful information to the Commission. If Vycera provided verification recordings that have been doctored or altered in any way for the purpose of deceiving the Commission, this is a severe violation and will not be treated lightly. Also, if Vycera has provided intentionally false information to Staff regarding the history and background of its President and CEO Derek M. Gietzen and Vice President and CFO Thalia R. Gietzen, this will be considered a violation of the Commission's Rule 1.

Public Utilities Code section 2890(a) states that a telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized. If Staff's allegations are true that Vycera has included a charge for Line Pro/Cable Pro or any other unauthorized charge without informing the subscriber and obtaining authorization for the product or service, this constitutes a violation of Section 2890.

Therefore **IT IS ORDERED** that:

1. An investigation on the Commission's own motion is hereby instituted into the operations of Vycera Communications, Inc., and Derek M. Gietzen and Thalia R. Gietzen, (Respondents), to determine whether:

Respondents violated P.U. Code section 2889.5 by switching subscribers' long distance, local toll, or local service provider without the subscribers' authorization, by failing to thoroughly explain the nature and extent of the services being offered, by failing to notify the consumer of the change in service provider, or by failing to obtain and record oral confirmation of the subscriber's intent to change his or her service provider;

Respondents violated P.U. Code section 2890 by placing charges on a subscriber's telephone bill for products or services, the purchase of which the subscriber has not authorized;

Respondents violated P.U. code section 451, which requires all charges by public utilities to be just and reasonable, by switching subscribers' long distance service provider without the subscribers' authorization; and by placing charges on a subscribers' telephone bill for products or services, the purchase of which the subscriber has not authorized;

Respondents violated P.U. Code section 532, which requires that no public utility shall charge a different compensation for any service other than the compensation specified in its tariffs, by charging non-customers for its products or services;<sup>3</sup>

Respondents violated Rule 1 of the Public Utilities Rules of Practice and Procedure, by providing third-party verification tapes to the Commission that have been doctored or altered in some way for the purpose of deceiving the Commission, or by

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<sup>3</sup> See, e.g., 68 CPUC 2d 242, 1996 Cal.PUC LEXIS 963, \*13, (The respondent was found liable for a tariff violation because its tariffs allow it to bill only "customers"; respondent was unable to demonstrate that a slamming victim was a customer because the victim had never ordered service from respondent and was in fact a customer of another carrier.)

providing false information regarding the background and history of its officers;

Respondents violated P.U. Code section 702 by violating P.U. Code sections 451, 532, 2889.5 and 2890; section 702 requires every public utility to obey and comply with every order, decision, direction or rule of the Commission and to do everything necessary or proper to secure the compliance by its agents;

Respondents should be ordered to pay reparations pursuant to P.U. Code section 734; and whether respondents should be ordered to cease and desist from any unlawful operations and practices, or have special conditions and restrictions imposed on it;

Respondents should be fined pursuant to P.U. Code sections 2107 and 2108 for violations of the P.U. Code or other order, decision, rule, direction, demand or requirement of the Commission.

2. To facilitate the completion of this investigation, and consistent with the provisions of section 314, respondents are ordered to preserve until further order by the Commission all consumer account records, verification tapes, PIC dispute records, and consumer complaints involving California consumers.

3. SBC and Verizon are ordered to cooperate with Staff in its investigation. They are each ordered to retain all Customer Account Record Exchange (CARE) records that indicated Respondents have lost a customer due to a disputed interLATA or intraLATA PIC change.

4. Staff's report includes slamming and cramming complaint information for Respondents that SBC and Verizon have identified as proprietary pursuant to P.U. Code section 583. Staff's declarations also include documents obtained from Vycera, which Vycera has designated proprietary information. This information is relevant to the airing of the issues in this proceeding and is hereby made public.

5. A full hearing on the allegations set forth in this OII, Staff's report and accompanying consumer declarations, and any additional information which staff wishes

to advance that is germane to the issues in the proceeding, shall be held on a date to be set at the Commission's hearing room, 505 Van Ness Avenue, San Francisco, 94102.

6. The Staff shall continue discovery and continue to investigate the operations of Respondents. Any additional information that Staff wishes to advance, as part of its direct showing in this proceeding, shall be provided to the Respondents in advance of any hearings in accordance with the schedule directed by the assigned Administrative Law Judge. Staff need only respond to discovery requests directed at Staff's investigation of the Respondent and staff's prepared testimony offered in this proceeding.

7. Staff shall monitor consumer complaints made against Respondents. We expect Staff to bring additional evidence of any alleged harmful business practices by Respondents to our attention (e.g. new types of violations). Staff may propose to amend the OII to add additional respondents or to raise additional charges. Any such proposal shall be presented to the Commission in the form of a motion to amend the OII and shall be supported by a Staff declaration supporting the proposed amendments or additional named respondents.

8. This ordering paragraph suffices for the "preliminary scoping memo" required by Rule 6 (c) of the Commission's Rules of Practice and Procedure. This proceeding is categorized as an adjudicatory proceeding and will be set for evidentiary hearing. The issues of this proceeding are framed in the above order. A prehearing conference shall be scheduled for the purpose of setting a schedule for this proceeding including dates for the exchange of additional written testimony, determining which of the Staff's witnesses will need to testify, and addressing discovery issues. This order, as to categorization of this proceeding, can be appealed under the procedures in Rule 6.4. Any person filing a response to this order instituting investigation shall state in the response any objections to the order regarding the need for hearings, issues to be considered, or proposed schedule. However, objections must be confined to jurisdictional issues that could nullify any eventual Commission decision on the merits of

the alleged violations, and not on factual assertions that are the subject of evidentiary hearings.

Service of this order on Respondents will be effectuated by personally serving a copy of the order and Staff's report and accompanying declarations on the Respondents' designated agent for service in California:

Attn: Tess Sartell  
Capitol Corporate Services, Inc.  
455 Capitol Mall, Suite 217  
Sacramento, CA 95814

This order is effective today.

Dated July 8, 2004, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
CARL W. WOOD  
LORETTA M. LYNCH  
GEOFFREY F. BROWN  
SUSAN P. KENNEDY  
Commissioners