

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 Pacific Bell Wireless LLC, dba Cingular Wireless (Cingular), Utility Consumer Action Network (UCAN), and the Commission's Consumer Protection and Safety Division (CPSD). The settlement is attached as Appendix A to this order. The all-party settlement resolves the remaining legal challenges to Decision (D.) 04-09-062, and it creates a fair and reasonable refund plan for Cingular's customers. 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.04-09-062, 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 is in an escrow account pending appeal. With the interest earned, the escrow account now totals over \$12.9 million. 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 left it to our Telecommunications Division (TD) to "monitor implementation of the plan". (*Id.*, p.67.)

Cingular challenged D.04-09-062 in California's 4<sup>th</sup> District Court of Appeal. On June 20<sup>th</sup>, 2006, the 4<sup>th</sup> 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 this District Court of Appeals 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 has indicated an intent to file an appeal of the 4<sup>th</sup> District Court's decision to the United States Supreme Court. In its request to the Supreme Court, Cingular has asked the Court for an extension of time to file its appeal pending our consideration of this all-party settlement of the matter. The Supreme Court has assigned a docket number to Cingular's appeal and granted Cingular an extension until March 9, 2007 to file its appeal.

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 left it to TD to "monitor implementation of the plan". (D.04-09-062, p. 67.) About 60 days after we issued

D.04-09-062, Cingular delivered a Restitution Plan to TD. In January 2005, UCAN and CPSD jointly filed comments and recommendations opposing 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 completion of the appeal process. To date, no refunds have been paid to the victims of Cingular's former ETF policy. The refund plan is essentially the only major issue remaining in this case. The refund plan and all remaining issues are resolved by the proposed all-party settlement.

## II. DESCRIPTION OF THE PROPOSED SETTLEMENT

The proposed settlement agreement is essentially a global settlement of all outstanding issues relating to D.04-09-062 and creates a more specific and equitable refund plan. By approving this settlement, Cingular will forego all further legal challenges, will withdraw its pending Petition to Modify D.04-09-062, and will refund money to consumers in an equitable and expeditious way.

The refund plan is as follows:

- XXX million of the of the \$12.9 million penalty currently in the escrow account will go to the State's General Fund as a penalty.
- The remaining XXX million from the escrow account will be transferred to a Reparations Fund A account.
- Cingular will put about XXXXXXXXXXXXXXXXXXXX, plus the XXX, into the Reparations Fund A to pay refunds to those customers who paid ETFs directly to Cingular. This equals approximately XXXXXX, which is the aggregate amount of ETFs that Cingular must refund to customers who paid ETFs directly to Cingular. All Cingular customers who paid ETFs are to receive refunds from Reparations Fund A.

- If a customer cannot be located, the money will instead go the California Telecommunications Consumer Protection Fund, as a *cy pres* remedy.
- Cingular will mail claims forms to those customers that may have paid an additional ETF to a Cingular agent<sup>1</sup>. 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 escrow account, Reparations Fund B, for payments made to Cingular's agents, and begin paying refunds in accordance with Paragraph 5 of the settlement agreement, after the Claims Administrator has identified the additional ETF amounts claimed by this group in excess of the ETFs paid directly to Cingular.
- Under the plan, all of the 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. In addition, Cingular will refund any additional ETF amounts paid to Cingular agents, if the customer returns the claim form.

### **III. THE PROPOSED ALL PARTY SETTLEMENT IS FAIR AND REASONABLE**

The major trade-off presented by this agreement is an approximate XXX reduction in the fine previously imposed on Cingular in return for a Restitution Plan that will compensate all customers who were affected by Cingular's then existing ETF practices. CPSD and UCAN have argued that Cingular's Restitution Plan submitted to TD, which was not approved, would have made it difficult for its victimized ETF customers to obtain refunds and would have made it much more likely that many of these customers would get nothing. CPSD and UCAN believe that Cingular's initial Restitution Plan is inadequate in many respects: (1) it shortened the refund time period in

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<sup>1</sup> 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.

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; (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 resolve these claims because the refund plan described 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. Our review also concludes that the proposed settlement is consistent with our intent set forth in D.04-09-062.<sup>2</sup> We note that the plan covers the entire period addressed in this decision. By using the mechanism of *cy pres* relief, the settlement also ensures that Cingular disgorges all of the ETF monies it received. The *cy pres* relief ensures that refunds that cannot be delivered to customers will instead go to an established consumer protection trust fund.

We also agree with Cingular, CPSD and UCAN that the lowered fine is a fair and balanced trade-off for withdrawing further legal challenges and for the adoption of a reasonable, equitable, and efficient refund plan. The amount of the penalty which will go to the General Fund is XXXXX, which we believe is an acceptable amount in light of Cingular's conduct and our past Commission precedents regarding penalties. We also note that although the settlement lowers the penalty we imposed to XXXXXXX, \_\_\_\_\_

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<sup>2</sup> D.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.*)



Ordering Paragraph 1 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. We approve lowering the actual fine imposed on Cingular to XXX, recognizing that the sum XXXXXXXXXXXX or more will be available to pay restitution to the aggrieved Cingular customers and that Cingular will refund additional ETFs collected by its agents which were not received by Cingular.

The proposed decision in this matter was not sent out for comment because this decision adopts an all party settlement which is uncontested. (See Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure.)

**FINDING OF FACT:**

1. All parties to this proceeding support the settlement agreement and recommend its adoption by the Commission. The supporting parties fairly reflect the affected consumer, service provider and state agency interests.
2. The settlement agreement is in the public interest because it enables a fair, reasonable and expeditious refund plan for affected Cingular customers, which was one primary purpose of D.04-09-062.
3. No party requests an evidentiary hearing on any material issue of fact, and the settlement agreement resolves for all parties all pending litigation.
4. Reduction of the initial penalty assessed against Cingular is fair and reasonable given Cingular's agreement to refund additional ETFs collected by its agents which were not received by Cingular. A reduced XXXXX fine is a significant penalty consistent with the intent of D.04-09-062 to impose a significant penalty upon Cingular.
5. The settlement agreement requires all refunds contemplated in D.04-09-062 to be made to customers and has does not change the final Cingular bills, including rates, as ordered in D.04-09-062.
6. Cingular has paid \$12.14 million dollars into an escrow account as required by Ordering Paragraph 1 of D.04-09-062, and with interest this amount has grown to almost \$13 million.

**CONCLUSION OF LAW:**

1. The Restitution Plan set forth in the all party settlement is fair, reasonable, and equitable and is consistent with prior Commission decisions.

2. The settlement agreement proposed by all parties is consistent with the law, and in light of the entire record in this proceeding, is in the public interest. No term of the settlement agreement contravenes statutory provisions or prior Commission decisions.

**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. The \$12.14 million penalty imposed by Ordering Paragraph 1 of D.04-09-062 is hereby modified to require Cingular to pay a penalty of XXX to the State of California General Fund. This XXXXX shall be paid from the \$12.14 million Cingular has already paid. The remaining dollars paid into this escrow account, approximately XXXXX, shall be used to pay reparations to the aggrieved Cingular customers receiving refunds from Reparations Fund A.
- b. The Restitution Plan set forth in the settlement shall be implemented immediately.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

# APPENDIX A

## SETTLEMENT AGREEMENT

**[PROPRIETARY]**

# **EXHIBIT A**

**[PROPRIETARY]**

# **EXHIBIT B**

**[PROPRIETARY]**