

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**07-22-13
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July 22, 2013

Agenda ID #12256
Adjudicatory

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

This is the proposed decision of Administrative Law Judge (ALJ) Karl J. Bemederfer. This item is targeted to appear on Agenda No. 3321 for the Commission's September 5, 2013 Business Meeting, but may appear on a later agenda. Interested persons may monitor the Business Meeting agendas, which are posted on the Commission's website 10 days before each Business Meeting, for notice of when this item may be heard. The Commission may act on the item at that time, or it may hold an item to a later agenda.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

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

KVC:gd2

Attachment

Decision **PROPOSED DECISION OF ALJ BEMESDERFER** (Mailed 7/22/2013)**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 APPROVING SETTLEMENT AGREEMENT**1. Summary**

We approve a settlement agreement (Settlement Agreement) by and among the Safety and Enforcement Division (SED) of the Commission¹ and Respondents, OSP Communications, LLC, its successor, affiliates, and assigns (OSP), and OSP's Owner and President, John Vogel (Vogel), an individual, (hereinafter "Respondents"), (all of the forenamed collectively "Joint Parties"),

¹ Formerly known as the Consumer Protection and Safety Division.

which has been executed by SED and named Respondents, OSP and Mr. Vogel. (A true and correct fully-executed copy of the Settlement Agreement is attached hereto as Attachment A.)

2. Background and Procedural History

Operator Services Provider (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),² 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, Inc. (AT&T) or Verizon California, Inc. (Verizon).

On May 26, 2011, the Commission on its own motion issued an Order Instituting Investigation (OII), (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

² While both billing agents share a common business name because TBR purchased the assets of Integretel in Integretel's Bankruptcy proceeding, they are both separate and distinct business entities.

known as “cramming” and is prohibited by Public Utilities (P.U.) 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 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.)

³ Hereinafter, all section references are to the Public Utilities Code unless otherwise specified.

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

- a. Respondents violated P.U. 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 P.U. Code § 451 by placing unjust or unreasonable charges on consumers' telephone bills;
- c. OSP violated P.U. Code § 885 by offering prepaid calling cards in California without Commission authorization;
- d. OSP violated P.U. 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 will consider whether, pursuant to §§ 701, 734, and 1702 of the Public Utilities Code, any of the following remedies are warranted:

- a. Respondents, including Relief Respondents, be ordered to disgorge all profits obtained illegally, and pay reparations, restitution, and/or refunds, pursuant to P.U. 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 P.U. 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. TBR contends that Integretel is still holding significant reserves relating to OSP, amounting to approximately \$1.2 million. 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. To the best of Joint Parties' knowledge, that case is still pending.

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,⁴ (SED, OSP, Mr. Vogel, TBR, and mCapital) participated in mediation with an agreed-upon neutral mediator, Jean Vieth. At that time, the parties did not reach an all-party settlement. Subsequently, Joint Parties began to engage in further settlement negotiations, which culminated in the execution of the Settlement Agreement. The Settlement Agreement was filed in _____.

In its comments on the Settlement Agreement, mCapital alleges (with supporting documentation) that neither Mr. Vogel nor OSP is financially capable of performing its promises to make the payments required by the Settlement Agreement. In particular, mCapital points out that on February 5, 2013 Mr. Vogel filed a voluntary petition under Chapter 11 of Title 11 of the United States Bankruptcy Code. His bankruptcy filing states that he has a monthly income of -\$3,700, \$1,200 in cash, and liabilities that exceed his assets by more than \$2 million. On those facts, it is clear that Mr. Vogel has no ability to make any payment under the Settlement Agreement. Mr. Vogel lists OSP as an asset in his bankruptcy filing but attributes no value to it. mCapital further points out that OSP ceased operations in 2009 and that mCapital has a perfected judgment lien against Mr. Vogel and OSP for \$2.4 million. Thus, mCapital concludes OSP

⁴ While Integretel's Bankruptcy Trustee has responded to SED's data requests, the Trustee has indicated to SED that Integretel does not wish to participate in this proceeding.

has no ability to make the payments it promises to make in the Settlement Agreement.

On May 6, 2013, mCapital filed a motion to withdraw party status, stating that they no longer wished to pursue claims against Mr. Vogel and OSP before the California Public Utilities Commission (CPUC or Commission). The motion is unopposed.

3. Summary of the Settlement Terms

The Joint Parties have agreed that the proposed Settlement Agreement is intended to fully resolve all issues raised in the OII with respect to Respondents, OSP and Mr. Vogel. By voluntarily entering into this Settlement Agreement, Respondents deny engaging in unfair, fraudulent, or unlawful business practices. Without admitting fault, Respondents recognize that erroneous charges may have been billed to California consumers on behalf of OSP.

The proposed Settlement Agreement has 11 key components as follows:

1. Mr. Vogel agrees to personally pay \$100,000 for erroneous billing of California consumers for collect call charges that SED alleges were neither authorized nor received during the period of June 1, 2007 through June 3, 2009. The first payment, in the amount of \$20,000, will be paid within 90 days of the Commission's approval of the Settlement Agreement. Mr. Vogel will pay the balance of \$80,000 at the rate of \$10,000 per month for the next eight months. The payment is an agreed amount to compensate for the pecuniary loss alleged in the OII. (Settlement Agreement, Paragraph 34.)
2. OSP agrees to disgorge all profits for collect call charges that California consumers alleged were neither authorized nor received during the period June 1, 2007 through June 3, 2009. (Settlement Agreement, Paragraph 36.)

3. OSP agrees to make full reparation to California consumers for \$5,700,000 (\$8.1 million billed less \$2.4 million already refunded to California consumers) billed to consumers for collect call charges that were alleged to be neither authorized nor received during the period of June 1, 2007 through June 3, 2009. Reparations will be made by OSP through the issuance of refunds to California consumers and will be completed within six months after the Commission issues a decision adopting a refund methodology. (Settlement Agreement, Paragraph 37.)
4. The parties acknowledge that the Commission will determine the appropriate method for issuing refunds to California consumers at a later time in this proceeding. (Settlement Agreement, Paragraph 38.)
5. OSP agrees that it will fully cooperate with all necessary parties involved in effectuating the refunds to California consumers. (Settlement Agreement, Paragraph 39.)
6. Respondents OSP and Mr. Vogel release, remise, and forever relinquish any and all interest in any and all money, funds, or revenues collected on behalf of OSP by Integretel and TBR. (Settlement Agreement, Paragraph 40.)
7. OSP further stipulates that all such funds referenced in Paragraph 37 of the Settlement Agreement include the amounts held in reserve by Integretel of \$1.2 million and TBR of \$1.1 million and should be remitted back to California consumers as part of OSP's agreement to make full reparation to California consumers. The parties acknowledge that the Commission will determine the appropriate method for issuing refunds held by Integretel and TBR to California consumers at a later time in this proceeding. (Settlement Agreement, Paragraph 41.)
8. Respondents, OSP and Mr. Vogel and SED acknowledge that some California consumers that were allegedly wrongfully or erroneously charged for OSP's services may receive refunds from Verizon for those charges as part of the global settlement reached in *Moore et. al v. Verizon et al*, Case No. 09-CV-1823 SBA (United States District Court for the Northern District of

- California). OSP may reduce the \$5,700,000 reparations amount it owes by the amount of refunds issued to California consumers by Verizon for OSP's charges as part of the global settlement. (Settlement Agreement, Paragraph 42.)
9. Respondents, OSP and Mr. Vogel and SED acknowledge that some California consumers that were allegedly wrongfully or erroneously charged for OSP's services may receive refunds from AT&T for those charges as part of a potential global settlement in *Nwabueze et. al v. AT&T et al*, Case No. 09-CV-1529 SI (United States District Court for the Northern District of California). OSP may reduce the \$5,700,000 reparations amount it owes by the amount of refunds issued to California consumers by AT&T for OSP's charges, if the parties in *Nwabueze et. al. v. AT&T et al.* reach and the Court adopts a global settlement similar to the one in *Moore et. al v. Verizon et al*, Case No. 09-CV-1823 SBA. (Settlement Agreement, Paragraph 43.)
 10. OSP agrees to pay a penalty of \$2,785,400 to the State of California General Fund for billing California consumers for collect call charges that were neither authorized nor received during the period of June 1, 2007 through June 3, 2009. Payments shall be in the form of a cashier's check made payable to the Commission. An initial payment of \$130,400 is due and payable within 90 days after the Commission issues a decision adopting this Settlement Agreement. Fifty-nine (59) additional monthly payments in the amount of \$45,000 are due and payable beginning 30 days after the initial payment. (Settlement Agreement, Paragraph 44.)
 11. Respondents agree not to conduct any telecommunications business in the state of California for a period of 25 years from the date the Commission approves this Settlement Agreement, including but not limited to the submission of any charges, directly or indirectly, to be billed to California consumers through a telephone bill. (Settlement Agreement, Paragraph 45.)

4. Discussion

Rule 12.1 of the Commission's Rules of Practice and Procedure requires that a settlement be "reasonable in light of the whole record, consistent with law, and in the public interest." (Rule 12.1 (d).) The Commission favors the settlement of disputes. (*See, e.g.,* D.07-05-060.) "This policy supports many goals, including reducing the expense of litigation, conserving scarce Commission resources, and allowing parties to reduce the risk that litigation will produce unacceptable results. The policy favoring settlements weighs against the Commission's alteration of uncontested settlements...As long as a settlement is reasonable in light of the whole record, consistent with the law, and in the public interest, it should normally be adopted without alteration." (D.07-05-060, *mimeo*, at 6.) The proposed Settlement Agreement meets these criteria and should be adopted without modification.

4.1. The Settlement is Reasonable in Light of the Whole Record

The proposed settlement is reasonable if it saves the Commission significant expenses and use of its resources, when compared to the risk, expense, complexity, and likely duration of further proceedings, while still protecting the public interest.⁵

Generally, the parties' evaluation should carry material weight in the Commission's review of a settlement.⁶

⁵ *In re Southern California Gas Company* (1999) D.00-09-034, 2000 Cal. PUC LEXIS 694, at *29.

⁶ *See id.*, at *31.

In addition to the scoping memo and other rulings by the ALJ, the record includes the OII, SED's Staff Report, Respondents' (OSP and Mr. Vogel) Responses to the OII's allegations and data requests, Responses of AT&T, Verizon, and TBR to Ordering Paragraph 6 regarding an accounting of OSP charges to California consumers, mCapital's motion for party status, Motions of AT&T, Verizon, and TBR for confidential treatment of OSP accounting data and Oppositions to those motions by SED and mCapital, and the September 21, 2011 PHC transcript. The parties' evaluation of the issues leading to settlement is based on these documents as well as several data request responses from OSP, Mr. Vogel, TBR, AT&T, and Verizon. The Settlement Agreement also provides sufficient information to enable the Commission to (1) implement the provisions, terms, and conditions of the settlement, and (2) discharge its future regulatory obligations with respect to the parties and their interests.

The settlement avoids the expenditure of Commission resources that would otherwise have been necessary if the parties had chosen to litigate this matter. SED alleged that OSP and Mr. Vogel crammed California consumers over \$8.1 million dollars by fabricating call records that they submitted to their billing agents, who then submitted the charges to AT&T and Verizon for billing on their subscribers' local telephone bills. OSP and Mr. Vogel had denied the allegations in the OII and claimed that their billing agent, TBR, may have been responsible for the cramming of California consumers. The settlement avoids significant expense and resources of the parties by resolving the cramming issues and providing California consumers with a remedy for the unauthorized or erroneous billing of OSP's charges that may have occurred.

Without admitting fault, OSP and Mr. Vogel agree to disgorge all profits for collect call charges that California consumers alleged were neither authorized nor received during the entire period OSP operated (from approximately June 1, 2007 through June 3, 2009) and to relinquish any claim or rights to the millions of dollars in reserves currently held by OSP's billing agents, TBR and Integretel, in favor of California consumers. (Settlement Agreement, Paragraph 36.)

Significantly, OSP agrees to make full reparation to California consumers for \$5,700,000 (\$8.1 million billed less \$2.4 million already refunded to California consumers) and to pay a penalty of \$2,785,400. In addition, Mr. Vogel personally agrees to pay \$100,000 to compensate for the unauthorized or erroneous billing alleged in the OII. Moreover, Respondents agree not to conduct any telecommunications business in California, including but not limited to the submission of any charges, directly or indirectly, to be billed to California consumers through a telephone bill, for the next 25 years.

The reasonableness of the Settlement Agreement has to be considered in the light of evidence supplied by mCapital demonstrating that neither Mr. Vogel nor OSP is able to make the payments called for in the Settlement Agreement. Simply put, if we accept that Mr. Vogel and OSP are insolvent, is the Settlement Agreement still reasonable? We reluctantly conclude that it is. First, as we note above, the settlement avoids significant potential litigation costs. More important, it removes impediments to the recovery of \$2.1 million held by the billing aggregators for the benefit of the crammed customers. While such a recovery is a far cry from full reimbursement and the payment of a substantial fine, it is still a significant amount and we would be remiss if we did not take reasonable steps to secure it. Seen in that light, approval of the Settlement Agreement is a reasonable step.

Together, the aforementioned settlement terms provide a net public benefit by achieving a partial recovery for the crammed customers and preventing OSP and Mr. Vogel from operating any telecommunications business in California for a substantial period. Thus, the Settlement Agreement is reasonable in light of the whole record.

4.2. The Settlement is Consistent with the Law

The parties represent that they are not aware of any inconsistency between the terms of the proposed Settlement Agreement and any applicable laws or regulations, including, without limitation, law and precedent governing the imposition of fines. Pursuant to § 2107, the Commission is authorized to levy a wide range of fines:

Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than twenty thousand dollars (\$20,000) for each offense.

In determining an appropriate fine for established violations, the Commission examines various criteria:

- (1) the degree of harm to the regulatory process;
- (2) the number and scope of violations;
- (3) the utility's actions to prevent violations;
- (4) the utility's actions to detect violations;
- (5) the utility's actions to disclose and rectify violations;
- (6) the need for deterrence;
- (7) the degree of wrongdoing;

- (8) consistency with precedent; and
- (9) the public interest.⁷

The parties each took these criteria into consideration in negotiating the proposed amount of the fine; but, consistent with their differing views on the facts regarding the alleged violations, the parties' views with respect to potentially mitigating or aggravating facts and circumstances underlying the appropriate application of these criteria in this case also differ substantially. In Respondents' view, the agreed fine level is at the higher end of the range of reasonableness; in SED's view it is at the lower end of that range. Both parties acknowledge, however, that if this case were to go to hearing, a fine adopted by the Commission might be significantly higher or lower than the level to which they have agreed.

Indeed, examination of similar cases involving cramming allegations reveals a considerable range of approved fines. Most notably, in D.01-04-035, the Commission found that Coral Communications Inc. (Coral) placed nearly \$6 million of unauthorized charges on local telephone bills of over 250,000 California consumers' telephone bills. Coral based these charges on misleading sweepstakes entry forms and used billing agents to get the billings on local telephone bills. Coral also converted the billings into cash by selling its accounts receivable to financing firms called "factors." The Local Exchange Carriers (LECs), billing agents, and factors all retained portions of the improperly billed amounts for their fees and charges, as well as for reserves for customer refunds. After two days of EHs, the Commission ordered Coral to

⁷ D.98-12-075, 84 CPUC2d 155, 188-90.

issue full refunds of all charges assessed by Coral, to pay a \$5.1 million fine, and prohibited Coral from billing, directly or indirectly, any Californian. As an equitable remedy, the Commission also required Coral's billing agents and factors to disgorge proceeds retained from the illegal Coral billings because these entities failed in their duty to ascertain the validity of Coral's billings.

Most recently, in D.11-10-017, the Commission approved an all-party settlement resolving allegations of cramming in an investigation (I.10-06-013) instituted by the Commission on its own motion against Legacy Long Distance International, Inc. (Legacy). Legacy provided local and long distance services, including operator services, to Customer-Owned Pay Telephone (COPT) service providers, inmate facilities, and to hotels, motels, and other hospitality locations. Legacy's billing agent and the Commission collectively received 1,392 complaints of unauthorized charges for Legacy's services appearing on their phone bills. SED alleged Legacy violated § 2890 by placing unauthorized charges (collect calls that did not occur, unauthorized third-party calls, calls that did not connect well, rejected collect calls, and collect calls left on answering machines) on California consumers' local telephone bills. As a result of the settlement, Legacy denied any intentional wrongdoing, but admitted that it had double-billed for approximately 5,700 calls to California customers. Legacy agreed to provide refunds for the double-billed calls that had not already been removed from consumers' phone bills and to pay a penalty of \$215,000.

In D.11-05-008, the Commission approved an all-party settlement wherein Americatel Corporation (Americatel) agreed to pay a fine of \$503,000 and to make changes to its operations systems. The parties reached the settlement after the Commission instituted OII (I.10-02-003) alleging that Americatel had crammed 61,097 California customers in the amount of \$1.5 million as a result of

the forgery of Letters of Authorization by Americatel's marketing agent, Bravo Marketing of Florida. In addition, Americatel issued approximately \$2 million in refunds to about 300,000 California customers due to two billing errors. The settlement was reached after the parties participated in two days of mediation with a neutral ALJ.

In D.02-07-034, after five days of EHs, the Commission fined Accutel Communications, Inc. \$1,520,000 (\$760,000 of which was suspended) for cramming in violation of P.U. Code §§ 451 and 2890, slamming in violation of P.U. Code § 2889.5, and failing to meet tariffing, notice, and recordkeeping requirements set forth in General Order (GO) 96-A and GO 104-A.

In D.02-06-077, after three days of EHs, the Commission found that Telmatch Telcommunications, Inc. (Telmatch) crammed \$5.5 million of recurring monthly charges on consumers' telephone bills in connection with the company's calling card. The Commission rejected Telmatch's claim that consumers authorized Telmatch's monthly recurring charges by filling out a sweepstakes form. The Commission ordered Telmatch to pay \$5.5 million in reparations (less any amounts already submitted to the Commission on Telmatch's behalf by its billing agents and LECs), to pay a fine of \$1.74 million, and to cease operating in California.

In D.02-06-073, which concerned allegations that Talk America, Inc. signed up over 300,000 new subscribers and solicited subscriptions from over 7 million other California consumers through the use of promotional checks and marketing materials that did not properly inform the consumers of the nature and extent of Talk America's service, and through written order forms that were not fully explained and were printed in gray with less than 10-point type, the Commission approved a settlement under which Talk America paid a fine of

\$625,000 and agreed to distribute an additional \$374,800 in restitution through \$25 payments to each of the 14,992 eligible consumers.

Given the aforementioned penalty ranges, the circumstances of this case, and the other attributes of the proposed Settlement Agreement, the parties submit that a fine in the amount of \$2,785,400 is appropriate. Moreover, under the proposed Settlement Agreement, OSP has agreed to make full reparations to the extent that aggrieved consumers have not already received redress. As discussed above, Mr. Vogel has promised to pay \$100,000 to address the cramming alleged in the OII. Additionally, OSP and Mr. Vogel will be prevented from conducting any telecommunications business in California for the next 25 years and will relinquish any claims or rights to any monies collected on OSP's behalf by its billing agents, TBR and Integretel, in favor of California consumers. Accordingly, the fine that would be imposed under the proposed Settlement Agreement is consistent with precedent and the policies underlying the determinations of appropriate fine levels in particular cases.

Assuming that, for the reasons just stated, the level of the fine is consistent with applicable law, we again need to ask whether this conclusion is altered by the fact that Mr. Vogel and OSP appear to be unable to make the payments called for in the Settlement Agreement. And again, we reluctantly conclude that the fact of the parties' inability to pay does not render the Settlement Agreement inconsistent with law. The amount of reparations and the size of the fine are commensurate with the seriousness of the Respondents' conduct. We believe it is important to impose these payment obligations even if collection is problematic.

4.3. The Settlement will Promote Important Public Interests

Aside from enabling the avoidance of unnecessary expenditures of Commission and private litigation resources, the proposed Settlement Agreement would promote a number of overarching public policy concerns with respect to cramming. First, the settlement would ensure that California consumers billed for OSP's purported collect call service would receive partial reparation. Second, it would ensure that consumers who may not have been aware of prior erroneous billings are provided a fair opportunity to obtain refunds of any payments made for unauthorized OSP charges through the potential global settlements in the civil class action lawsuits against AT&T and Verizon. Third, the settlement would prevent future cramming by Respondents, whether inadvertent or not, by prohibiting them from conducting any telecommunications business in California for 25 years. Finally, the settlement would promote adherence by OSP and other public utilities to both the letter and spirit of applicable law and regulations by imposing a substantial fine.

4.3.1. Rule 1 Violation

The schedules filed by Mr. Vogel in his bankruptcy make it apparent that in representing to the Commission during the negotiations that led to the Settlement Agreement that he and OSP had the ability to make the payments called for therein, Mr. Vogel was intentionally misleading the Commission. Far from being able to pay \$100,000 toward reimbursing the victims of his cramming scheme, Mr. Vogel was insolvent in both the balance sheet sense (his liabilities vastly exceed his assets) and in the income statement sense (he was unable to meet his debts as they came due with, by his own admission, a negative monthly

income.) Representing that he can make payments called for in the settlement when he cannot do so is a blatant violation of Commission Rule 1:

Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due the Commission, members of the Commission and its Administrative Law Judges; *and never to mislead the Commission or its staff by an artifice or false statement of fact or law.* (Emphasis supplied.)

Violations of Rule 1 are punishable by sanctions including fines. In the Settlement Agreement, OSP agrees to pay a substantial fine and Mr. Vogel and OSP are barred from participating in the telecommunications business in California for 25 years. Any further sanctions for a Rule 1 violation are in addition to the sanctions agreed to in the Settlement Agreement. After consideration of the magnitude of Mr. Vogel's deception, we conclude that an additional fine of \$100,000 is appropriate.

Moreover, we believe that SED needs to adopt revised procedures to ascertain at a much earlier point in its investigation and through independent due diligence whether or not a respondent has the means to pay restitution and/or penalties that might be imposed as part of a settlement. SED should also explore options for securing control over a respondent's assets at the earliest possible point in an investigation. Such options might include, for example, seeking an order from the Superior Court freezing a respondent's assets simultaneously with the issuance of an OII. Another step toward the same end might be developing an expedited "show cause" process to stop cramming as

soon as it is suspected, perhaps in the form of a “stop billing” order issued by the Director of SED.

Although we approve this Settlement Agreement, we are keenly aware that customers are unlikely to realize the full reparations set forth in the agreement. We strongly encourage SED to adopt aggressive and timely protocols to prevent service providers from billing unauthorized charges in the first place and, should any such billings occur, to promptly secure dependable reparations for all wrongfully billed customers.

5. 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. Given the Settlement Agreement discussed herein, the evidentiary determination is changed to state that no evidentiary hearings are necessary.

6. 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 _____.

7. Assignment of Proceeding

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

Findings of Fact

1. The Settlement Agreement is the product of arms-length negotiation among the parties.
2. Each of the terms of the Settlement Agreement is the result of compromise.
3. Mr. Vogel did not negotiate in good faith and intentionally misled Commission staff regarding the ability and willingness of Respondents to make the payments called for in the Settlement Agreement.

Conclusions of Law

1. The Settlement Agreement is reasonable in light of the record as a whole.
2. The Settlement Agreement does not violate any laws or prior Commission decisions.
3. The Settlement Agreement taken as a whole is in the public interest.
4. The Settlement Agreement meets the criteria for approval of settlements in Rule 12(1)(d).
5. The Settlement Agreement should be approved.
6. Mr. Vogel violated Rule 1 of the Commission's Rules of Practice and Procedure.
7. Hearings are not necessary.

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement by and among the Safety and Enforcement Division of the Commission and Respondents, OSP Communications, LLC, its successor, affiliates, and assigns, and John Vogel is approved.

2. John Vogel shall personally pay \$100,000 for erroneous billing of California consumers for collect call charges that Consumer Protection and Safety Division alleges were neither authorized nor received during the period of June 1, 2007 through June 3, 2009. Payment shall be made on the schedule and in the manner set out in Paragraph 34 of the Settlement Agreement.

3. OSP Communications, LLC shall disgorge all profits for collect call charges that California consumers alleged were neither authorized nor received during the period June 1, 2007 through June 3, 2009.

4. OSP Communications, LLC shall make full reparation to California consumers of \$8.1 million for collect call charges that were allegedly neither authorized nor received during the period of June 1, 2007 through June 3, 2009, of which \$2.4 million has already been refunded. Such refunds shall be paid within six months of the date on which the Commission sets a refund methodology.

5. OSP Communications, LLC and John Vogel acknowledge that the Commission will determine the appropriate method for issuing refunds at a later point in this proceeding.

6. OSP Communications, LLC will fully cooperate with the Commission and all necessary parties in issuing refunds to California consumers.

7. OSP Communications, LLC (OSP), John Vogel, and Safety and Enforcement Division acknowledge that some consumers allegedly wrongfully or erroneously charged for OSP/s services may receive refunds from Verizon for those charges as part of the global settlement reached in *Moore et al vs. Verizon et al*, Case No. 09-CV-1823 SBA (United States District Court for the Northern District of California). OSP may reduce the \$5,700,000 net reparations amount it

owes by the amount of refunds issued to California consumers by Verizon for OSP's charges as part of the global settlement.

8. OSP Communications, LLC (OSP), John Vogel, and Safety and Enforcement Division acknowledge that some California consumers allegedly wrongfully or erroneously charged for OSP/s services may receive refunds from AT&T for those charges as part of a potential global settlement in *Nwabueze et al vs. AT&T et al*, Case No. 09-CV-1529 SI (United States District Court for the Northern District of California). OSP may reduce the \$5,700,000 net reparations amount it owes by the amount of refunds issued to California consumers by AT&T for OSP's charges if the parties in *Nwabueze et al vs. AT&T et al* adopt a global settlement similar to the one in *Moore et al vs. Verizon et al*.

9. OSP shall pay a penalty of \$2,785,400 to the State of California General Fund for billing California consumers for collect call that charges were neither authorized nor received during the period June 1, 2007 through June 3, 2009. Payment shall be made on the schedule and in the manner set out in Paragraph 44 of the Settlement Agreement.

10. John Vogel shall pay a penalty of \$100,000 to the State of California General Fund for violating Rule 1 of the Commission's Rules of Practice and Procedure. The payment of this additional \$100,000 shall be made on the same schedule and in the same manner set out in Paragraph 34 of the Settlement Agreement, so that total payments equal \$200,000.

11. Neither OSP Communications, LLC nor JohnVogel shall conduct any telecommunications business in the state of California for a period of 25 years from the date of this decision including, but not limited to the submission of any charges, directly or indirectly, to be billed to California consumers through a telephone bill.

12. The motion of mCapital, LLC and Cardinal Pointe Capital Group, LLC for withdrawal of party status is granted.

13. The hearing determination is changed to no hearings necessary.

14. Investigation 11-05-028 remains open to determine the appropriate method for issuing the refunds ordered herein.

This order is effective today.

Dated _____, at San Francisco, California.