

Decision 11-05-008 May 5, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's own motion into the operations and practices of Americatel Corporation (U5918C), to determine whether it has violated the laws, rules, and regulations governing the way in which consumers are billed for products or services, by billing consumers for dial-around long distance monthly service without authorization.

Investigation 10-02-003
(Filed February 4, 2010)

DECISION APPROVING SETTLEMENT AGREEMENT

1. Summary

This decision approves an all-party settlement agreement (Settlement Agreement) entered into by Americatel Corporation (Americatel) and the Commission's Consumer Protection and Safety Division (CPSD). Americatel and CPSD (collectively "Settling Parties") are the only parties and reflect the different interests affected by this proceeding. The Settlement Agreement¹ establishes facts jointly agreed to by the Settling Parties. The terms and conditions of settlement represent a compromise of the Settling Parties respective litigation positions.

¹ The Settlement Agreement is attached hereto as Attachment A.

An Order Instituting Investigation (OII) was issued on February 4, 2010 to determine whether Americatel, or its agents, had violated Public Utilities Code § 2890 or any Commission rule, regulation, order, requirement, or state law, by billing consumers for dial-around long distance monthly service without consumers' authorization, and by applying incorrect rates on consumers' phone bills. The Settling Parties dispute their respective rights and liabilities arising out of the OII but mutually decided to settle the matter "to avoid the delay, expense, uncertainty, and inconvenience of protracted litigation."² The Settlement Agreement provides for Americatel to assure all appropriate credits have been issued, make numerous operational improvements, and to make a settlement payment of \$503,000 to the State of California General Fund.

2. Background³

Americatel Corporation (Americatel) is a Delaware corporation with offices in Maryland. Currently, the company is primarily held and controlled by Platinum Equity, a Delaware holding company with headquarters in Beverly Hills, California.

In December 1997, the Commission granted Americatel a certificate of public convenience and necessity (CPCN) to be a switchless reseller of inter-Local Access and Transport Area (LATA) telecommunications services and to provide intra-LATA services offered by communications carriers in California.⁴

² Settlement Agreement (Attachment A) at 4:9-12.

³ The facts set forth are based on a combination of jointly stipulated facts and jointly submitted undisputed direct testimony. Each individual witness's testimony is identified by exhibit number in Attachment B.

⁴ Decision (D.) 97-12-128.

In addition, the Federal Communications Commission (FCC) has authorized Americatel to provide interstate and international services and intrastate long distance services throughout the United States. From the time it began to provide telephone services in California, Americatel has not been the subject of any other enforcement proceeding in California, or the subject of any informal inquiry of consequence at the FCC.⁵

Americatel primarily works with Hispanic customers seeking telephone connections to Central and South America.⁶ The company provides a dial-around service where customers place long distance calls by dialing an access code (10-10-123).⁷ Customers may choose between different rate plans, including plans with no monthly fees, or plans with a monthly fee and reduced per-minute rates.⁸ Monthly fees, assessed regardless of whether the customer places any telephone calls, are billed through local telephone companies and appear as a line item on the customer's local bill, including any usage in accordance with their selected plan.⁹ Americatel's service does not require the customer to change its preferred interexchange carrier.¹⁰

Following an executive search and review of the principals' resumes, Americatel decided to engage a third-party vendor to market its services.¹¹ On

⁵ Settlement Agreement at 2:19-23.

⁶ Testimony of Robert Felgar (Felgar Testimony) at 2:9-11.

⁷ Testimony of Nermin Selimic (Selimic Testimony) at 1.

⁸ *Ibid.*

⁹ *Id.* at 1-2.

¹⁰ Settlement Agreement at 2:11-18.

¹¹ Felgar Testimony at 4-5.

February 1, 2008, Americatel and Bravo Marketing, Inc. (Bravo), a recently formed Florida corporation, entered a marketing agreement which required Bravo, *inter alia*, to “promote and market Americatel’s Calling Plans to consumers at public events and through face-to-face contacts.”¹² The agreement contained provisions that required Bravo to comply with state and federal laws, including that each customer had to execute a Letter of Authorization on Americatel’s form or complete a sales call with Americatel’s call center.¹³ Bravo was to be paid a commission for each sale, but no commission would be paid if the customer cancelled within a specified period.¹⁴ The agreement also provided for Bravo’s indemnification of any Americatel losses as a result of fraudulent sales, failure of Bravo personnel to comply with Americatel’s Authorized Sales Procedures, or other errors in the sales process.¹⁵

Bravo started to sell Americatel services in March 2008, but sales increased significantly in April and May following its sales presence at some large street festivals.¹⁶ Americatel executives attended two or three of these festivals and observed Bravo employees selling Americatel’s services in compliance with the agreement.¹⁷ Bravo may have employed at least one subcontractor in California in May 2008.¹⁸ Shortly thereafter, the Commission’s Consumer Affairs Branch

¹² Felgar Testimony at 5:21-24.

¹³ Testimony of William R. Schulte (Schulte Testimony) at 10.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Felgar Testimony at 8:5-16.

¹⁸ *Id.* at 8:20-23.

(CAB) began receiving a large number of complaints alleging unauthorized charges by Americatel.

In late July 2008, CAB notified CPSD that it had received a significant increase in what it characterized as “cramming” complaints, i.e., the placement of unauthorized charges on a customer’s bill, against Americatel. Following a data request to Americatel, its general counsel, Robert Felgar, sent a letter on July 31, 2008 notifying the Commission that it had received an unusual volume of complaints from consumers who claimed to have been enrolled in one of Americatel’s plans without their authorization.¹⁹ Felgar said that Americatel had observed its own rise in complaints, had already initiated its own investigation, and intended to make all complaining consumers whole. Felgar attributed the surge in complaints to “some breakdown in the systems and procedures of one of Americatel’s third party vendors.”²⁰

Americatel subsequently determined that Bravo committed widespread fraud on many Americatel customers by forging Letters of Authorization (LOA).²¹ Americatel had received thousands of LOAs from Bravo, although at some point Bravo started providing electronic copies of the LOAs and ceased providing hard copies. Americatel terminated its marketing agreement with Bravo in June 2008, although the effective date stretched into July. It did not bill customers signed by Bravo in July 2008 or thereafter and commenced providing credits to every customer Bravo had signed up, although some customers

¹⁹ Staff Report, Attachment G to Attachment E-2, Americatel’s Data Response.

²⁰ Investigative Report on Americatel Corporation (Staff Report), December 2009 at 9.

²¹ Schulte Testimony at 12.

appeared to be legitimate in that they used and paid for the services.²²

Americatel eventually fired its Vice President for marketing, although it uncovered no evidence he financially benefitted from Bravo's scam.²³

CPSD continued its investigation into Americatel's activities and issued an Investigative Report in December 2009 (Staff Report) that concluded Americatel had violated Pub. Util. Code §2890(a)²⁴ and §451.²⁵ The Staff Report made preliminary findings that Americatel had "crammed" 61,097 California consumers as a result of Bravo's forgery of LOAs, of which more than 71% occurred during May and June 2008. CPSD also faulted Americatel for failure to perform adequate due diligence in selecting Bravo and in monitoring its marketing activities. It is undisputed that Americatel cooperated with the investigation and that it refunded a total of \$1.5 million to California customers, and a total of \$1.9 million nationwide. CPSD disputed that the refunds were complete and claimed that not all customers entitled to refunds had received them, and that some billing occurred after cancellation was requested.

In addition, CPSD discovered that Americatel had also issued approximately \$2 million in refunds during 2008 to about 300,000 California customers due to two billing errors. In August 2008, Americatel's billing system

²² *Id.* at 14.

²³ Felgar Testimony at 18:19-22.

²⁴ Pub. Util. Code §2890(a), "A telephone bill may only contain charges for products or services, the purchase of which the subscriber has authorized."

²⁵ Pub. Util. Code §451, "All charges demanded or received by any public utility...for any product or commodity furnished...or any service to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful."

applied a default 100%, rather than 11.4%, of July 2008 revenue for its Universal Service Fund (USF) rate.²⁶ The error was promptly caught and reversed resulting in \$1.8 million in refunds. In October 2008, another human error resulted in select call charges to 2,665 customers for one of its dial-around plans using erroneous per minute rates.²⁷ The error, which led to \$70,134.93 in overcharges to the impacted customers, was promptly discovered and reversed.²⁸

The Staff Report asked the Commission to open an Order Instituting Investigation (OII) into Americatel's actions, and if the Commission found that violations had occurred as described, CPSD recommended that penalties and other sanctions be imposed.

3. Procedural History

On February 4, 2010, the Commission opened this OII into the operations and practices of Americatel to determine whether Americatel violated the laws, rules and regulations governing the way in which consumers are billed for products or services, by billing customers for dial-around long distance monthly service without authorization, and by applying incorrect rates to customers' phone bills.

At the May 7, 2010 prehearing conference, the procedural schedule was discussed and developed. The Assigned Commissioner's Ruling and Scoping Memo was issued on May 21, 2010 and ordered CPSD's Opening Testimony to be served by July 26, 2010 and Reply Testimony by September 29, 2010.

²⁶ Selimic Testimony at 11.

²⁷ *Id.* at 12-13.

Americatel's Rebuttal Testimony was to be served by September 7. Both parties timely served testimony as described in detail below.

In addition, the parties had extensive discussions about discovery during September 2010, and initially requested an extension of the discovery period which was granted. However, the parties also explored settlement negotiations and decided in late September 2010 to submit the disputes to the Commission's alternative dispute resolution (ADR) program for mediation. This voluntary ADR program provides a neutral ALJ and offers several dispute resolution methods as an effective tool in some instances to help protect the public interest and conserve litigation resources.

At the request of the parties, ALJ Darling issued a ruling on October 4, 2010 that postponed the evidentiary hearings, and otherwise postponed the schedule of the proceeding, in order to accommodate ADR. In late October, the parties were successful in reaching a mediated settlement of all issues in the proceeding. They requested sufficient time to develop and execute a Settlement Agreement to reflect this resolution. On January 11, 2011, the Settling Parties filed a Joint Motion For Approval of Settlement Agreement. No responses to the motion have been filed. On March 25, 2011, the ALJ issued a ruling ordering the Settling Parties to identify the testimony they sought to have admitted to the record. The parties complied on March 29, 2011.

4. The Testimony and Motion to Admit

The parties reached settlement before the start of evidentiary hearings in this proceeding and, as a consequence, the testimony of the parties has

²⁸ Staff Report at 20.

not yet been made a part of the record. On July 26, 2010, CPSD served Opening Testimony of Nora Y. Gatchalian (public version) and Testimony of Nora Y. Gatchalian (confidential version). Ms. Gatchalian is a Public Utilities Regulatory Analyst V and the author of the Staff Report for CPSD. On September 7, 2010, Americatel served prepared Rebuttal Testimony by the following:

- Testimony of Robert Felgar. Mr. Felgar is General Counsel for Americatel.
- Testimony of Nermin Selimic. Mr. Selimic is Executive Vice President of Marketing and Business Development for Americatel.
- Testimony of William R. Schulte. Mr. Schulte is offered as an expert, formerly head of the predecessor division to CPSD, hired to evaluate Americatel's culpability in this proceeding, including an analysis of CPSD's investigation.

CPSD served Reply Testimony from Ms. Gatchalian (confidential version) on September 29, 2010. CPSD did not serve the "confidential" versions of Ms. Gatchalian's Opening or Reply testimony under seal, nor did it file any Motion to File Testimony Under Seal.

On March 29, 2011, the Settling Parties filed a joint motion for admission of public versions of the testimony, solely for purposes of consideration of the proposed settlement. They requested admission of the testimony by Nermin Selimic, William R. Schulte, and Robert Felgar submitted by Americatel. They also asked for admission of the opening testimony of Nora Gatchalian including CPSD's Supplemental Staff Report and Ms. Gatchalian's rebuttal testimony including attachments 1 and 3. No opposition to the request was filed. The Settling Parties' motion is granted as set forth in Attachment B. The record in

this proceeding shall consist of all filed documents, including the Staff Report, and the testimony identified in Attachment B. The matter is submitted as of April 1, 2011.

4.1. Gatchalian Opening Testimony

Ms. Gatchalian's (public) opening testimony consisted of affirming her authorship of the Staff Report which was filed with the OII and provision of a supplemental report that detailed CPSD interviews with some California customers who claimed not to have received a promised refund and included a data response from Americatele. CPSD concluded that Americatele had not made all necessary credits or refunds and made findings and recommendations to impose special conditions on Americatele to improve compliance with §2890(a) and address the issues in the supplemental report. The confidential version included an attachment to Americatele's data response which identified customer inquiries made between March and December 2009 and included customer specific information.

4.2. Felgar Testimony

Mr. Felgar's testimony included sponsorship of several data responses by Americatele which described the qualifications of the company's former sales executive (Mr. Krauss) who hired Bravo, the company's due diligence prior to retaining Bravo, essential provisions to the marketing agreement to assure that Bravo complied with state and federal law and to eliminate any incentive for fraudulent sales, Americatele's activities monitoring Bravo, actions taken to determine Bravo's fraud, the nature of the fraud, actions taken to issue credits and refunds to make customers whole, and other actions by Americatele in response to the fraud. Mr. Felgar asserted that Americatele exercised due

diligence, reacted properly, provided consumers with full credit even if they did not complain, and voluntarily disclosed the problem to the Commission.

4.3. Selimic Testimony

Mr. Selimic's (public) testimony included sponsorship of several data responses by Americatel, a description of Americatel's services and marketing practices, its positive relationship with regulators, dispute of CPSD's "cramming" description, an account of Americatel's due diligence in hiring Mr. Krauss, an explanation of how Americatel worked with Bravo and responded to the discovery of fraud, an itemized discussion of several customer credits at issue, adoption of a new billing system to avoid future billing problems, an explanation for some credit delays, agreement with CPSD's recommendations for corrective measures to prevent future billing errors, denial of any financial benefit to Americatel from the billing errors, and dispute over CPSD's recommended audit of the credits given. Attached to the Selimic testimony was a Report on Tariff Compliance for Americatel issued by the Florida Public Service Commission in 2007. The confidential version included documentation of Americatel's follow-up on specific customer complaints.

4.4. Schulte Testimony

Mr. Schulte's testimony included his opinion that the Staff Report was flawed because it (a) failed to include evidence of mitigation and the existence of exculpatory facts and/or evidence, (b) shaded facts to support the Staff Report's conclusions, (c) ignored evidence of Americatel's due diligence before retaining Bravo, including placement of certain provisions in the marketing agreement, and (d) excluded facts about monitoring of Bravo's marketing activities. In addition, he asserted that (a) one time billing errors cannot legally be characterized as "cramming," (b) CPSD's own limited telephone survey of

18 customers is insufficient to support the Staff's supplemental conclusions, (c) AmeriCatel responded promptly to customer complaints under the circumstances, (d) AmeriCatel appropriately investigated the actions of both Bravo and its own employees, (e) AmeriCatel had suspended use of face-to-face marketing, (f) AmeriCatel had already integrated several CPSD recommendations into its operating protocols, and (g) no fines or sanctions should be imposed.

4.5. Gatchalian Reply Testimony

Ms. Gatchalian's (public) reply testimony responds to the testimony of AmeriCatel's witnesses. For example, Ms. Gatchalian defends the conclusions of the Staff Report and supplemental report, and disputes legal and factual conclusions of the AmeriCatel witnesses. Testimony at pages 12 - 23 includes references to customer home telephone numbers which have been redacted pursuant to Commission practice. The testimony also includes two of four attachments: (1) data responses by AmeriCatel, and (3) AmeriCatel letter to CAB. The confidential version of her testimony included attachments: (2) copies of consumer complaints filed with CAB and (4) a CD-ROM containing AT&T billing statements for numerous AmeriCatel customers from May through July 2010.

5. The Settlement Agreement

As part of the Commission's voluntary ADR program, the Settling Parties participated in two days of mediation on October 26-27, 2010 with a neutral ALJ and reached a resolution of the matter. The Settlement Agreement is an all-party settlement and represents a compromise of the litigation positions of the Settling

Parties.²⁹ It does not represent agreement or endorsement of disputed facts or law, nor constitute any precedent in this or future proceeding. No protest or comment was filed in response to the Joint Motion.

The Settling Parties agreed that Americatel would make numerous operational improvements. The operational improvements are in the following areas: (1) procedures for marketing and new customers; (2) customer service; (3) pre-screening of marketing vendors; (4) billing procedures; and (5) use of Letters of Authorization. The operational improvements are set forth in more detail in Attachment A, to the Settlement Agreement attached to this decision. They include a dedicated customer service toll-free number with bi-lingual representatives, improved employee training, and improved pre-screening of marketing vendors.

In addition, Americatel must make a settlement payment to the State of California General Fund in the amount of \$503,000. The settlement amount shall be paid as set forth in the Settlement Agreement within 30 days of the issuance of a final non-appealable decision by the Commission approving the Settlement Agreement without material change.³⁰

²⁹ Joint Motion at 3.

³⁰ Paragraph 13 of the Settlement Agreement provides that Americatel shall pay \$43,000 within 30 days after the effective date of the Settlement, i.e., the date of the Commission's approval of the Settlement Agreement. Thereafter, Americatel shall make monthly payments in the amount of \$20,000 each for the following 23 months, resulting in a total payment of \$503,000.

6. Discussion

The Commission has a long, well-established policy of supporting the resolution of disputed matters through settlement.³¹ In doing so, the Commission has acknowledged that settlements advance several important goals, such as reducing the time and expense of litigation, conserving scarce Commission resources, and allowing the parties to reduce risks associated with litigation.³²

6.1. Standard of Review

We review this uncontested settlement pursuant to Rule 12.1(d) which provides that, prior to approval, the Commission must find a settlement “reasonable in light of the whole record, consistent with the law, and in the public interest.” Initially, we note that the circumstances of the settlement, particularly its endorsement by all parties, generally support its adoption. We find the Settlement Agreement meets the criteria for a settlement pursuant to Rule 12.1(d), and discuss each of these three criteria below.

6.2. Reasonable in Light of the Whole Record

In assessing settlements, the Commission considers all of the settlement provisions. In light of strong public policy favoring settlements, the Commission will not base its conclusions on whether any single provision is the optimal result, but rather, “whether the settlement as a whole produces a just and reasonable outcome.”³³

³¹ See, e.g., D.05-03-022, at 8-9.

³² D.05-11-005, at 16.

³³ D.05-11-005, at 16.

The Settling Parties have engaged in extensive discovery, including written data requests, and both CPSD and Americatel prepared and served testimony supporting their litigation positions. The record also shows that both parties voluntarily participated in mediation and the Settlement Agreement was reached after substantial give-and-take between the parties which occurred over two days.

CPSD, which represents consumer interests, initiated the investigation of Americatel and recommended the Commission launch the OII. It submitted a voluminous Staff Report that detailed its investigation of numerous complaints against Americatel and concluded there were substantial violations of §2890(a) and §451. In a supplemental report on Americatel's credits and refunds to customers, CPSD also concluded that Americatel had failed to make all customers whole. Americatel vigorously disputed several key aspects of CPSD's investigation, findings and recommendations in its rebuttal testimony and exhibits. It argued no fines or sanctions were appropriate, but agreed to make some operational changes.

Thus, the Settlement Agreement was reached after careful analysis of the positions of the affected parties. An examination of the complete record demonstrates that each of the Settling Parties made significant concessions to resolve the issues in this proceeding in a manner that reflects a reasonable compromise among their respective litigation positions.

In particular, Americatel agreed to numerous operational changes, some of which it had already implemented. These include much better screening and more direct oversight of its telemarketers, enhanced training for its customer service and billing employees, bilingual customer service representatives, and regular trend analysis of customer inquiries to quickly identify problems. These

changes will significantly reduce the likelihood of a “rogue” telemarketing agent defrauding Americatel’s customers, minimize billing errors, and substantially improve customer service.

Based on the foregoing, the Settlement Agreement addresses the issues in the proceeding in a reasonable manner in light of the record as a whole.

6.3. Consistent With the Law

The Settlement Agreement is consistent with the law and precedent. It does not contravene any statute or Commission decision or rule. Americatel does not contest the Commission’s jurisdiction over their operations and accept that fraudulent marketing practices are prohibited and billing errors must be immediately corrected. The Settlement Agreement also provides for Americatel to make a substantial payment of \$503,000 which is within the range of authorized penalties of \$500 to \$20,000 per offense authorized by §2107 which could have been imposed for violation of Commission rules.

6.4. In the Public Interest

The Settlement Agreement is in the public interest and in the interest of Americatel’s customers who will be better protected and better served as a result of the terms and conditions of the Settlement Agreement. Furthermore, the substantial fine imposed on Americatel serves as a warning and future deterrent to Americatel and all re-sellers of inter-LATA services that they must carefully scrutinize their marketing agents and billing systems.

The Settlement Agreement is consistent with the Commission’s well-established policy of supporting the resolution of disputed matters through settlement, reflects a reasonable compromise between the Settling Parties’ positions, and will avoid the time, expense and uncertainty of evidentiary hearings and further litigation. Accordingly, the Settlement Agreement is in the

public interest and should be adopted by the Commission without material change.

Based on the foregoing, we approve the Settlement Agreement as proposed.

7. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Melanie M. Darling is the assigned ALJ in this proceeding

8. Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code and Rule 14.6(c)(2) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

Findings of Fact

1. On January 11, 2011, Americatel and CPSD filed a joint motion requesting the Commission to adopt a settlement agreement entitled "Settlement Agreement in the Above-Referenced Order Instituting Investigation."
2. All parties have agreed to settle this proceeding.
3. All issues in this proceeding are encompassed by, and resolved in, the Settlement Agreement.
4. The parties to the Settlement Agreement are all of the active parties in this proceeding.
5. The parties reflect the affected interests.
6. No term of the Settlement Agreement contravenes statutory provisions or prior Commission decisions.

7. The Settlement Agreement conveys to the Commission sufficient information to permit it to discharge its future regulatory obligations with respect to the parties and their interests.

8. The Settlement Agreement is reasonable in light of the record, is consistent with the law, and is in the public interest.

9. The operational actions set forth in Attachment A to the Settlement Agreement are reasonable.

10. The \$503,000 payment by Americatele to the State of California is reasonable.

Conclusions of Law

1. The Settlement Agreement fully resolves and settles all disputed issues among the parties concerning the Order Instituting Investigation on Americatele Corporation.

2. The Settlement Agreement we approve is reasonable in light of the whole record, consistent with law, and in the public interest.

3. The Settlement Agreement should be approved.

4. This decision should be effective today so that the Settlement Agreement may be implemented expeditiously.

5. I.10-02-003 should be closed.

O R D E R

IT IS ORDERED that:

1. The Joint Motion of the Consumer Protection and Safety Division and Americatele Corporation For Acceptance of Prepared Testimony For Purposes of Supporting Settlement Agreement is granted.

2. The Consumer Protection and Safety Division and Americatel Corporation Settlement Agreement set forth in Attachment A to this decision is approved.

3. Within 30 days of today's date, Americatel Corporation shall make a payment of \$43,000 to the Commission. Thereafter, for a total of 23 months, Americatel Corporation shall make monthly payments of \$20,000 to the Commission, due no later than the 10th day of each month in compliance with this decision.

4. Americatel Corporation shall immediately initiate implementation of all the operational changes identified in Exhibit A of the Settlement Agreement, if it has not otherwise done so. Full implementation shall occur within a reasonable period of time.

5. Investigation 10-02-003 is closed.

This order is effective today.

Dated May 5, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK FERRON
Commissioners

[D1105008 Attachments A-B](#)