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Decision 02-06-077 June 27, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion Into the Operations and Practices of Telmatch Telecommunications, Inc., (U 5715), to Determine Whether It Has Violated the Laws, Rules and Regulations Governing the Manner in which California Consumers are Billed for Telecommunication Services.	Investigation 99-09-001 (Filed September 2, 1999)

OPINION ORDERING REPARATIONS AND IMPOSING SANCTIONS

The Lustigman Firm, PC by Sheldon S. Lustigman, Attorney at Law, for Telmatch Telecommunications, Inc.; Heller, Ehrman, White & McAuliffe by Raymond Sheen, Michael Plimack, and David Brownstein, Attorneys at Law, for Telmatch Telecommunications; respondent.

Stephanie E. Krapf, Attorney at Law, for Pacific Bell; Elaine Lustig, Attorney at Law, and Jay Tresler, for GTE California, Incorporated; interested parties.

Carol A. Dumond, Attorney at Law, for Legal Division.

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1. Summary

This decision addresses the Commission's authority under Pub. Util. Code Section 451[1] to investigate allegations that a regulated utility has imposed unauthorized charges on consumers' telephone bills, a practice known as "cramming." This decision determines that Telmatch Telecommunications, Inc. (Telmatch) has engaged in cramming, that Telmatch should pay reparations and fines, and that Telmatch's operating authority should be revoked.

2. Procedural History

We issued the above-captioned Order Instituting Investigation (OII) into the operations and practices of Telmatch to determine whether Telmatch improperly billed California consumers for telecommunications services. The OII contained allegations made by Consumer Services Division (CSD) that Telmatch, through its billing agents, had been "cramming," that is, had imposed unauthorized charges on consumers' telephone bills. The OII found that good cause existed to believe that a high portion of Telmatch's revenues came from recurring monthly charges for a calling card that consumers did not authorize.

The OII ordered an accounting of Telmatch's revenue from local exchange carriers (LECs) and billing agents. On September 27, 1999, we held an initial evidentiary hearing for the purpose of allowing Telmatch, billing agents, CSD, and the two large LECs (Pacific Bell and GTE California Incorporated[2]) to present evidence on whether Telmatch had sufficient financial solvency to assure

[1] All statutory references are to the Pub. Util. Code unless otherwise stated.

[2] GTE California Incorporated has since changed its name to Verizon California.

compliance with any future order to provide reparations to the allegedly crammed consumers.

On October 22, 1999, we issued an Interim Decision (D.) 99-10-069, which ordered billing agents and LECs to submit to the Commission's fiscal office funds collected on behalf of Telmatch. On November 12, 1999, Telmatch filed a "Petition for Clarification" of D.99-10-069 on whether the amount that the LECs should submit to the Commission should exclude those amounts held back for the LECs' and billing agents' "…fees, reserves, customer refunds and the like… ." On the same day Telmatch also filed a Request for En Banc Hearing. In response to D.99-10-069, the Commission has received funds from several sources.[3]

On October 12, 13, and 14, 1999, a second evidentiary hearing was held to determine whether Telmatch violated the Pub. Util. Code by imposing a recurring monthly charge on consumers' telephone bills in connection with the company's calling card; whether Telmatch should be fined $500 or up to $20,000 per violation; and whether Telmatch should be ordered to pay reparations for charges for service that consumers did not authorize.

3. Telmatch's History as Geo Communications

Telmatch began its activity in California under a different name and different business structure. In light of later developments, it is important to briefly summarize the early California history of this company.

Geo Communications, LLC (Geo) filed an application for a Certificate of Public Convenience and Necessity (CPCN) on September 27, 1996. In support of its showing of technical competence, Geo stated that its personnel had experience

[3] Verizon California, Pacific Bell, and Clearworld Communications submitted checks for $53,311, $4,690.27, and $4,690.27, respectively.

in the telecommunications industry, and that no one associated with Geo had been associated with a nondominant interexchange carrier (NDIEC) which had filed for bankruptcy or gone out of business. Further, Geo provided profiles of its management personnel: George A. Mueller, III, chief executive officer and managing member; Dr. Howell J. Lynch, Jr., chief financial officer; Deborah I. Young, vice president of marketing and customer service; Jeffrey Bockmeyer, vice president of sales; Stacy Pilote, sales manager; Sheila D. Northcutt, management information director; and Kathleen K. Mueller-Engel,[4] customer service manager. The Articles of Organization attached to the application listed George A. Mueller, III as having a 99.00% interest in Geo and Kathleen K. Engel as having a 1.00% interest in Geo.

In D.96-12-055, the Commission granted Geo's request for a CPCN. On January 7, 1997, Geo filed Advice Letter (AL) No. 1, which contained Geo's Tariff Schedule applicable to California Intrastate InterLATA and IntraLATA Toll Interexchange Telephone Communications. On February 19, 1997, Geo filed AL No. 2, which requested a change in the corporate structure of Geo from a limited liability corporation to a regular business corporation to be known as Geo Communications, Inc. doing business as (dba) Telmatch. Also in AL No. 2, Geo represented that: "The new corporation has the same officers, directors, and shareholders as Geo Communications, LLC with the only difference being a change in the corporate designation from LLC to 'Inc.'." On November 25, 1998, Geo filed AL No. 3 which requested a "change in the corporate name of Geo to Telmatch Telecommunications, Inc." The stated purpose was "to avoid customer

[4] In its Articles of Incorporation, it appears that this same individual is listed as "Kathleen K. Engel."

confusion between the true corporate name and the business name…" No other change was requested in AL No. 3. On December 31, 1998, Telmatch Telecommunications, Inc. filed AL No. 4. which requested, among other things, "the correct corporate name" to be reflected on its tariff sheets.

4. Position of Consumer Services Division

CSD contends that Telmatch's customer solicitation methods violate the Pub. Util. Code. CSD notes that under § 451, all charges by a public utility must be just and reasonable, and CSD believes that it is neither just nor reasonable to charge consumers for services that they have not knowingly ordered.

4.1 Solicitation – The Sweepstakes Method

CSD states that Telmatch marketed a long distance calling card in California from 1997 to January 1998 using the name Benefits Plus. CSD alleges that Telmatch solicited consumers through a "sweepstakes method" by deploying entry boxes at locations such as fairgrounds. Additionally, CSD alleges that Telmatch enticed consumers to fill out a sweepstakes entry form with an invitation to win $25,000 cash or a new car. Further, CSD contends that Telmatch used the information on sweepstakes entry forms to charge consumers, through billing agents, a recurring charge of $4.33[5] for a calling card. The recurring charge generally appeared on a separate page on consumers' LEC telephone bill.

4.2 Entry Form and Consent

Although the reverse side of the contest entry form contains small print saying that a person who signs the form consents to receive a calling card, CSD

[5] CSD states that the $4.33 charge is composed of two components: a monthly minimum charge of $4.06 plus a Universal Service Fund charge of $0.27.

believes that a signature on the form does not constitute authorization to take telecommunications service from Telmatch. CSD states that the form emphasizes a consumer's opportunity to win a prize, whereas the terms and conditions associated with the calling card appear in small print on the back of the form. CSD also points out that the form is most clearly marked to serve as an entry to win cash or a car, and not as a request for a calling card.

Further, CSD states that Telmatch does not provide the consumer with a copy of the terms contained on the form. A person merely fills out the front of the form and drops it into a contest entry box. The contest entry box contains a message on it in large print that states: "No Purchase Necessary."

CSD also argues that consumers did not understand the nature and extent of charges associated with Telmatch's calling card. CSD contends that the majority of consumers who were billed by Telmatch and who have not complained to any agency most likely do not know that their telephone bill contains a recurring monthly charge imposed by Telmatch.

CSD interviewed several types of consumers: consumers identified by Telmatch as its customers,[6] consumers who complained to Pacific Bell, and consumers who complained to the Commission. In interviews with consumers identified by Telmatch as its "customers," CSD investigators asked consumers to review their telephone bills. CSD generally found that these consumers were unaware that Telmatch was billing them.

[6] In this decision we refer to persons billed by Telmatch as consumers. In its briefs, Telmatch has referred to such persons as its customers. Since we conclude that such persons never authorized Telmatch to provide service, we choose to use the term consumer instead of customer.

For instance, CSD investigator Linda Soriano testified that she interviewed 24 consumers identified by Telmatch. Of these, 22 persons stated that they did not know they were being billed by Telmatch, Benefits Plus or Consumer Access. (Soriano's declaration, Exhibit 11, summarizes her interviews.) Soriano stated that consumers expressed surprise and anger when they discovered on their telephone bills the charges imposed by Telmatch.

CSD investigator Steven Northrop interviewed a sampling of consumers who had complained to Pacific Bell about unauthorized charges attributable to Telmatch. Northrop testified that the majority of consumers said they did not know why they were being billed. (Northrop declarations, Exhibits 13 and 14, summarize his interviews.) In addition, Northrop interviewed consumers who had complained to the Commission. The majority of the consumers interviewed stated that their telephone bills contained unauthorized charges. (Northrop declaration, Exhibit 15.)

4.3 Pub. Util. Code § 2890

CSD believes that Telmatch has violated § 2890(b)[7] by imposing unauthorized charges on the telephone bills of consumers. CSD argues that Telmatch has violated § 2890(b) with each bill sent out since January 1, 1999, for

[7] Since initiation of this investigation, Section 2890 has been amended. The amendments are not material to this OII, and in this decision, we cite § 2890 as it existed at the time of Telmatch's activities which are the subject of this OII. Section 2890(b) states that:

> "A telephone bill, and a bill for noncommunications-related goods and services that is included in the same envelope as a telephone bill, may only contain charges for products or services, the purchase of which the subscriber has authorized." (Emphasis added.)

consumers who have not authorized the services and charges associated with Telmatch's calling card.

Additionally, CSD contends that Telmatch violated § 2890(a)[8] by billing for a "benefit" along with the calling card that is not "communications-related." Under § 2890(a), a telephone bill may not contain charges for noncommunications-related goods and services unless specifically permitted by the Commission. At the evidentiary hearing, a Telmatch witness (Dahl) testified that Telmatch's calling card also included benefits such as golf discounts and lawyer referral services. CSD argues that these "benefits" are not communications-related goods and services, and as such these charges may not be included in a telephone bill unless permitted by the Commission. The Commission has not granted Telmatch permission under § 2890(a), either generically or specifically, to include charges for "noncommunications-related goods and services" in subscribers' billing envelopes.

4.4 Restitution and Fines

CSD estimates that the amount Telmatch owes to Californians is at least $5.5 million. CSD contends that there are almost 60,000 California consumers who are currently being billed for the Telmatch calling card. Further, Telmatch solicited all of these consumers prior to January 1998, and thus Telmatch has charged these consumers for at least 20 months. CSD calculates that 60,000 consumers times $4.33/month times 20 months equals about $5.2 million. To this

[8] Section 2890(a) states that:

> "A telephone bill may only contain charges for communications-related goods and services, … [however] The Commission may permit a billing telephone company to include in the same envelope as a subscriber's telephone bill, a separate bill for noncommunications-related goods and services. …"

figure, CSD adds $300,000, based on the one-time activation fee ($4.96) paid by the consumer. CSD contends that the entire $5.5 million billed to Californians is the result of invalid "authorizations," and thus any revenues realized from the unlawful billings must be returned.[9]

5. Position of Telmatch

Telmatch makes two major arguments. First, Telmatch contends that CSD's case lacks a statutory basis. Telmatch believes that neither § 2890 nor § 451 applies to this case. Second, even if § 451 does apply, Telmatch asserts that CSD has failed to demonstrate that Telmatch crammed consumers.

Telmatch believes that § 2890 does not apply because the statute became effective on January 1, 1999, and the acts charged in the OII occurred prior to that date. As to § 451, Telmatch contends that the Commission has "limited its powers … to investigating rates that are too high." Telmatch concludes that "§ 451 is narrowly circumscribed to the regulation of rates, and therefore cannot serve as the basis for an investigation of alleged cramming." Assuming that § 451 is applicable, Telmatch argues that the record does not support a finding that cramming occurred since its marketing materials are clear and unambiguous.

Telmatch also argues that its rates are reasonable, relying upon the filed rate doctrine[10] and rates charged by other carriers. Telmatch also believes that CSD is impermissibly seeking class treatment for its claims. Telmatch believes

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[9] At hearing, Telmatch represented that it would cease billing California consumers until this OII was resolved.

[10] Telmatch contends that its rates are on file with both the Commission and the Federal Communications Commission. Telmatch argues that under the filed rate doctrine, tariffs exclusively control the rights and liabilities between parties. Hence, Telmatch believes that the filed rate doctrine precludes the Commission from finding that Telmatch's rates are unreasonable.

that the Commission should not treat as a class the consumers Telmatch charged for a calling card.

At the evidentiary hearing, Telmatch presented several witnesses. Nina Burslem, manager of consumer relations for Consumer Access,[11] testified that her responsibilities included the investigation and resolution of consumer complaints. Burslem described how consumer complaints were handled on Telmatch's behalf. Burslem also reviewed the consumer complaints investigated by CSD and she repeatedly testified that:

> "Telmatch received a completed application from [the consumer] … In this form [the consumer] certified, inter alia, that he/she was responsible for the listed home phone number, and that he/she had read, understood, and agreed to all terms, conditions and charges for the calling card, including the minimum charges."

Attached to Burslem's testimony were many of the forms filled out by consumers. Burslem also testified that a "welcome package" was mailed to consumers, that Telmatch has no consumer service representatives, and that the service representative a consumer would reach is a Consumer Access employee.

Raymond Sheen, one of Telmatch's attorneys, also testified concerning conversations with four consumers who were allegedly satisfied with Telmatch's calling card.[12] Ingrid Dahl, also an employee of Consumer Access, testified that she was responsible for organizing, verifying, and processing the applications that were received. The procedures included "reviewing each application to ensure that the name on the application matched the signature on the

[11] Consumer Access has overseen consumer relations and customer support for Telmatch pursuant to a contract since February 1997.

[12] Upon direct examination and cross-examination, Sheen testified that some of the consumers he interviewed did not recall signing up for a calling card.

application, to check the age of the applicant, and to review the application for completeness." Also received into evidence was a sample of approximately 85,000 sweepstakes entry cards from consumers nationwide.

6. Discussion

As a threshold issue, we address in Sections 6.1 to 6.1.3 of today's decision the scope of our authority under the various sections of the Pub. Util. Code that predicate this OII. We conclude that the statutes confer ample authority for us to determine the lawfulness of the solicitation and billing practices under investigation. We then, in section 6.2, analyze Telmatch's solicitation and billing practices, and we find those practices to constitute cramming, substantially as alleged in the OII. We also find, in section 6.3, that Telmatch did not enter into a contract with consumers; and we reject, in section 6.4, Telmatch's attempt to cloak its conduct under the filed rate doctrine. Finally, we impose sanctions (sections 6.5 to 6.5.3) and deal with pending requests and appeals (sections 6.6 to 6.7).

6.1 The Commission Has Authority to Redress The Imposition of Unauthorized Charges on Consumers' Telephone Bills

6.1.1 Pub. Util. Code § 451

The Commission has authority under § 451 to investigate allegations that a regulated entity has imposed unauthorized charges on consumers' telephone bills. Section 451 states that:

> "All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or 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.
>
> "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment,

> and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code**,** as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.
>
> "All rules made by public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."

Section 451 confers broad authority on the Commission to oversee the propriety of a utility's practices in establishing and performing service. Section 451 also contains a prospective element ("commodity…to be furnished" and "service..to be rendered") that is broad enough to encompass the means by which, e.g., the utility established new accounts. Thus, a utility that furnishes a product or renders a service not authorized by a consumer, and then demands a charge for the unauthorized product or service, has violated § 451, just as does a utility that delivers a false bill or furnishes a defective product.

Telmatch argues that courts have consistently interpreted § 451 to pertain to the "amount" of rates charged by utilities. Telmatch cites Troy Barnett v. Delta Lines, Inc., 137 Cal.App.3d 674, 683 (1982). In Barnett, an employee of a common carrier brought an action against the carrier alleging that it had shut down one of its divisions in violation of §§ 451, 491, and 851, thereby causing plaintiff's unemployment and loss of seniority. The Court held that no violation of § 451 occurred.

Telmatch reads too much into Barnett. There is no discussion in Barnett that limits the application of § 451 to addressing the "amount" of rates charged. When the court stated in Barnett that "[t]here are no allegations of unreasonable rates being charged," the court did not purport to limit the scope of § 451. The facts of Barnett have no relationship to the present case.

Telmatch also claims the Commission has "limited its powers" under § 451 to examining rates, citing three decisions for this proposition: Re Minimum Rate

Tariff 7-A, 32 CPUC2d 535, D.89-09-104 (1989), Laguna Hills Sanitation, Inc., 3 CPUC2d 63, D.91182 (1980), and Re PT&T Co., 2 CPUC2d 434, D.90919 (1979). Once again, these decisions do not support Telmatch's interpretation of § 451.

In Re Minimum Rate Tariff 7-A, the decision denies an application for rehearing and contains no discussion regarding § 451. Instead, the decision briefly discusses § 425.1, not § 451. Laguna Hills Sanitation, Inc. contains no discussion of § 451. Re PT&T Co. concerns an application for rehearing of a general rate case of Pacific Telephone and Telegraph Company. The decision contains only a parenthetical reference to § 451.

Contrary to Telmatch's assertions, a charge may be "unjust" under § 451 for many reasons. For example, we have seen disputes where the consumer indeed ordered a service but received service different from that ordered. We have also seen disputes where the service provided was allegedly of poor quality. Both of these disputes properly arise under § 451, yet neither of these situations concerns a dispute over whether the charge established by the Commission was too high, but instead concerns whether the charge was just and reasonable in light of the service requested and provided.

Recently, we have seen many disputes in which a consumer alleges that a telecommunications service provider has charged the consumer for services the consumer has never ordered. From the standpoint of § 451, it is immaterial whether the service provided was wrong, inadequate, or unauthorized. In each instance, the charge for such services would be unjust and unreasonable, and we see no basis in policy or the plain language of the statute for holding otherwise.

Thus, a utility violates § 451 by furnishing a product or service that consumers have not ordered or authorized.[13]

6.1.2. Pub. Util. Code § 761

Telmatch also asserts that CSD has characterized affected consumers as a class and that the Commission cannot take action because it would be "transforming [itself] into a court of general jurisdiction…." Further, Telmatch believes that the cramming allegations advanced by CSD require a factual inquiry on a consumer-by-consumer basis. Telmatch's attempt to characterize this case in a manner that limits this Commission's jurisdiction lacks merit. In this case, we are investigating Telmatch's practices, not the complaint of one or more consumers. Section 761 makes clear that the Commission may regulate utility practices.

Section 761 states that:

> "Whenever the Commission, after a hearing finds that the rules, practices, … of any public utility, … are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, … or methods to be observed, … or employed. … "

Under §761, the California Supreme Court has rejected prior claims that the Commission has limited jurisdiction to investigate the practices of utilities.[14]

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[13] We reached a similar conclusion in D.01-04-035 involving another carrier accused of cramming. In D.01-04-035, we stated that "Placing charges on a person's local telephone bill based on an invalid 'authorization' is unreasonable. Unreasonable practices are prohibited by § 451." (Id. at 27, *mimeo.*)

[14] *Cf.* General Telephone Company of California v. Public Utilities Commission, 34 Cal. 3d 817 (1983), where the California Supreme Court rejected the argument of General Telephone Company of California (GTE) that the Commission exceeded its powers in implementing a competitive bidding procedure. The Court rejected GTE's argument

Footnote continued on next page

Telmatch also offers no valid support for its theory that a consumer-by-consumer analysis is necessary.[15] Moreover, cramming may involve tens of thousands of consumers, and the amount of disputed charges per consumer in a cramming dispute is relatively small in comparison to the costs to investigate each dispute. It is both impractical and uneconomic for the Commission to set a standard that requires evidence of each affected consumer in a cramming investigation.

In order to protect the public from unscrupulous carriers that engage in cramming, we conclude the Commission is not required to make a factual inquiry of each affected consumer. Instead, an investigation into the practices of the respondent utility, which may include interviews with affected consumers, is

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that the "method of procuring … is none of the Commission's business, but a management decision beyond its power to regulate …." (Id. at 821.) Instead, the Court noted that the prior limited doctrine prohibiting the "invasion of management" has waned and that the Court has been "more willing to permit regulatory bodies to exercise powers not expressly stated in their mandate." (Id. at 825.)

[15] Telmatch misconstrues a California Supreme Court case, Mirkin v. Wasserman, 5 Cal. 4th 1082 (1993), to mean that the Commission must make a factual inquiry of each and every single consumer affected by Telmatch's practices. The question of law the Court addressed in Mirkin, was "whether plaintiffs, who cannot allege that they have actually read or heard the alleged misrepresentations, have pled a cause of action for deceit." (Id. at 1089, emphasis added.) The Court said that under the common law of deceit a cause of action based on misrepresentation must plead that the plaintiff "actually" relied on the misrepresentation. In Mirkin, defendant's demurrer was upheld because plaintiffs had not alleged "reliance" upon defendant's misrepresentations. This OII differs both factually and legally from Mirkin. In this OII, CSD has presented evidence that consumers relied on representations concerning a contest. Moreover, we are dealing with the Public Utilities Code, not the common law of deceit. As noted in the text, the Commission may investigate the practices of regulated carriers; unlike a trial court, the Commission's power to adjudicate is not limited to the resolution of particular disputes.

sufficient to determine if Telmatch's actions constitute an unjust or unreasonable practice, here cramming.[16]

6.1.3 Pub. Util. Code § 2890 (a),(b),(c)

Section 2890 became effective January 1, 1999, and thus only applies to acts that occurred on or after January 1, 1999. The plain language of § 2890(a)[17] states that a telephone bill may only contain charges for communications-related goods and services, unless the Commission has permitted other charges. Without such permission, the imposition of charges for noncommunications-related goods and services is a violation of § 2890(a).

Although Telmatch began billing consumers prior to January 1, 1999, this fact does not excuse non-compliance with § 2890(a) on or after January 1, 1999. In other words, Telmatch is not "grandfathered" by virtue of having started operations before the effective date of § 2890. Telmatch admits that the charge it imposed on consumers' telephone bills (which we have found to be unjust and unreasonable) included a fee for noncommunications-related benefits such as lawyer referrals and discounts on golf memberships. Regardless of whether the noncommunications-related benefit was actually ordered by the consumer, the Commission has not authorized Telmatch to include a charge for noncommunications-related goods or services on consumers' telephone bills. Thus, commencing January 1, 1999, Telmatch has violated § 2890(a).

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[16] Mirkin (note 15 above) is instructive in its reference to securities fraud cases in which the requirement of reliance may be presumed. Pursuant to the fraud-on-market doctrine under rule 10b-5 of the Securities and Exchange Commission, the Federal courts have "presumed" reliance as opposed to making a factual inquiry of each affected consumer. (Id., fn. 8 at p. 1101.)

[17] See note 8 above.

The plain language of § 2890(b)[18] states that a telephone bill may only contain charges authorized by the subscriber. CSD has also alleged, in the alternative to § 451, the charges imposed by Telmatch for a calling card violate § 2890(b). Under § 451, we have found that the charges imposed by Telmatch for its calling card are unjust and unreasonable. Consequently, we do not need to reach the issue of whether § 2890(b) was also violated.

Section 2890(c) prohibits the use of entry forms for sweepstakes as a method for offering telephone services. The record does not contain evidence that Telmatch solicited consumers using the sweepstakes method subsequent to the effective date of § 2890(c); absent such evidence, no violation of this section appears.

6.2 Telmatch's Solicitation and Subsequent Billing of Consumers Constituted Cramming

Having established the scope of our authority to resolve cramming allegations, we now address the allegations against Telmatch, and specifically whether Telmatch imposed unauthorized charges on telephone bills of California consumers. In analyzing this issue, we first describe a contest box, Exhibit 18, that Telmatch used to solicit consumers at places such as fairgrounds. (Attachment A to today's decision is a photocopy of Exhibit 18.)

Exhibit 18 contains text inviting consumers to "ENTER TO WIN" a contest. This text is prominently displayed in capital letters on all five of the different visible surfaces of the contest box.[19] Thus, from whatever angle a consumer sees the contest box, he or she sees an invitation to "ENTER TO WIN" either "$25,000

[18] See note 7 above.

[19] Four sides of box plus the top surface.

CASH" or a "CHOICE OF CAR." On two surfaces[20] of Exhibit 18 the only text appearing is the invitation to "ENTER TO WIN" either "$25,000 CASH" or a "CHOICE OF CAR." Exhibit 18 also contains a prominent graphic on the top surface of the box that conspicuously shows a Mercedes Benz. Under the car is text that states in prominent capital letters "THE FABULOUS NEW MERCEDES BENZ SLK." In the background of three surfaces (top, front, and back) of Exhibit 18 are graphics of hundred dollar bills.

On the left side of Exhibit 18 appears relatively small text that is not visible when the box is viewed from the front and that may be easily concealed if the left side of the box is placed against a wall. The text, which begins "NO PURCHASE NECESSARY TO ENTER OR WIN," provides some information about the contest but does not inform consumers that submission of an entry form will result in a recurring monthly charge on their phone bills. The last two lines on the top surface of Exhibit 18 refer to calling card charges. However, the language does not explain to consumers that filling out a form will result in Telmatch imposing charges on consumers' phone bills. Additionally, the text's font size is smaller than the other text announcing a contest.

Attached to the top surface of Exhibit 18 are forms for consumers to fill out, tear off, and deposit into a slit on the top surface of the box. (Attachment B to today's decision is a photocopy of the form.) The first line of the form states "WIN $25,000 CASH OR A NEW CAR." The second sentence (in smaller text) reads: "ENTRY & BENEFITS PLUS™ APPLICATION." Following are blank spaces for the consumer to provide personal information such as name, address, age and telephone number. Next to the "Home Phone" request appears a

[20] Right side and back of contest box.

highlighted statement that reads "REQUIRED." Next appears a request for a signature. The smallest print on the front of the entry form, which appears below the signature line, reads:

> "By signing, I certify that I am 18 years of age and responsible for the home phone # above. I further attest that I have read, understand and agree to all terms, conditions & charges listed on reverse."

Below this statement in larger and highlighted letters appears a notice that reads:

"NOTICE: YOUR TELEPHONE SERVICE WILL NOT CHANGE!!!
BENEFITS PLUS™ IS A CALLING CARD ONLY."

The reverse side of the entry form, which is difficult to read,[21] contains the following language:

> **"BENEFITS PLUS™DISCOUNT CALLING CARD TERMS"**
>
> "I want to receive a personalized **BENEFITS PLUS™** discount calling card sent to me at the address provided on reverse. I authorize **BENEFITS PLUS™** to bill all calling card usage at 25¢/minute or up to 20¢/day, whichever is greater. This minimum maintenance and/or all calling card charges will appear on the regular monthly phone bill from the phone company to my home phone listed on the reverse, along with a one time activation of only $4.96. Intl., intrastate/IntraLATA rates may vary. I understand that I may cancel at any time by calling **1-800-499-9899**. …"

In contrast to the barrage of text and graphic visual images inviting the consumer to "ENTER TO WIN," little language appears that describes the service offered or the associated charges. The language that does appear about the service is inconspicuous relative to the bold declarations of a contest and

[21] In order to read the information on the reverse side of the form, the consumer must tear off the entry form. If the consumer simply lifts up the entry form while attached to the contest box, the information appears upside down.

opportunity to win.[22] Telmatch's contest box buries information about calling card charges in small print. Both the prominent text and graphics communicate to the consumer clear and conspicuous notice of a contest and an invitation to enter such contest. The contest box does not reasonably inform consumers that filling out a form means that Telmatch will impose a recurring monthly fee on consumers' telephone bills. Our findings are based on the specific facts of the contest boxes and forms[23] used in this case; we do not make a per se determination that Telmatch crammed consumers simply because it used the sweepstakes method to solicit consumers. (Subsequent to January 1, 1999, by enacting § 2890(c), the California Legislature prohibited the use of sweepstakes to solicit consumers.)

In its appeal, Telmatch also refers to Exhibit 19 as evidence that consumers understood Telmatch's marketing materials. Exhibit 19 consists of 3 x 5-inch cards addressed to "$25,000 Cash or New Car Sweepstakes." Telmatch's counsel

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[22] In some instances, the language about service is ambiguous or misleading. One example is the following statement, which appears below the signature line on the entry form:

> "NOTICE: YOUR TELEPHONE SERVICE WILL NOT CHANGE!!! BENEFITS PLUS IS A CALLING CARD ONLY."

The statement that "YOUR TELEPHONE SERVICE WILL NOT CHANGE!!!" is not accurate. The consumer's telephone service will in fact change. Telmatch's calling card is a telecommunications service. After filling out an entry form, Telmatch charges the consumer a new fee on his or her telephone bill.

[23] Our discussion refers to the form contained in Exhibit 18. Exhibit 16 and Exhibit 26 contain a form that differs from the form contained in Exhibit 18. The form in Exhibits 16 and 26 includes a phrase about requesting a calling card, but we still find that the predominant impression of text and graphics communicates an invitation to enter a contest. Consequently, Exhibits 16 and 26 share the fundamental defect of Exhibit 18 and are ineffective to secure authorization for Telmatch's calling card service.

referred to these cards as mail-in entries. In its appeal, Telmatch suggests that consumers read and understood Telmatch's marketing material because they mailed in these entries. However, at the evidentiary hearing, Telmatch offered no testimony on the origin of these cards. We could speculate that Telmatch's contest was advertised in a contest newsletter or similar website which generated these mail-in entries. Absent any testimony by the entrants or testimony from Telmatch as to the origin of these cards, we assign little weight to Exhibit 19. There is nothing about Exhibit 19 that causes us to modify our above findings regarding Telmatch's contest boxes and forms.

We conclude that Telmatch's marketing materials induced consumers to enter a contest by the emphasis on a chance to win cash or a car.[24] Further, the completion and submission of a form by consumers did not authorize Telmatch to impose charges on consumers' telephone bills. Thus, Telmatch violated § 451 by imposing unauthorized charges on consumers' telephone bills.

[24] Although it is not necessary to rely on CSD's interviews concerning consumer complaints, the documented complaints confirm that many consumers did not interpret Telmatch's marketing materials as authorization to impose charges on their phone bills for a calling card.

6.3 Contract Law

In resolving this case, we rely on our statutory authority over regulated utilities; we do not need to rely on contract law. However, in response to references made to contract law, we discuss basic principles. Generally, contract formation problems lend themselves to the offer-acceptance model; to determine whether there was a valid contract, we look for an offer followed by a matching acceptance. (1 Witkin, Summary of Cal. Law (9th ed. 2000) Contracts §128, p.153.) To establish mutual assent under this paradigm, the first party must show that it prepared a valid offer for the other party; that the first party then communicated the offer to the second party; and that the second party then accepted the offer. (Id.)

The issue is whether Telmatch's marketing materials communicate a valid offer. Absent a valid offer there is nothing for the consumer to accept. Under contract law, an offer is a definite, conditional promise, manifesting the intent to enter a legally binding, final agreement. (14 Cal. Jur. 3d (Rev 1999) Part I, Contracts § 51, p. 277.) Moreover, to constitute a definite offer, explicit language should specify the terms and conditions of the service. (Id. at 278.)

In reviewing the communications contained on the contest box under this standard, we find that Telmatch invited consumers to enter a contest but did not "manifest an intent" to make an offer for a calling card. We base our finding on the repeated use of terms like "Enter to Win," "No Purchase Necessary." No language appears on the contest box or on the front of the entry form that constitutes a conditional promise by Telmatch that manifests an intent to enter a legally binding, final agreement regarding a calling card. Some language appears on the backside of the forms that lists specific terms; however, the location of the language and the surrounding circumstances (communications inviting the consumer to win, etc.) precludes a finding that Telmatch made

"manifest" an intent to enter into a binding agreement. Rather, the intent Telmatch manifested was an invitation to the consumer to enter a contest by filling out a form.[25] Thus, even under contract law, we would conclude that Telmatch has imposed unauthorized charges on consumers' telephone bills.[26]

6.4 Filed Rate Doctrine

We reject Telmatch's filed rate doctrine defense and also its reliance upon the charges of other carriers (see note 6 above and accompanying text.) This case concerns Telmatch's conduct in soliciting consumers, not the amount of Telmatch's rates. Nothing in the filed rate doctrine allows a carrier to impose charges that are not authorized by consumers, regardless of whether or not the charges are tariffed or no higher than the charges of competing carriers.

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[25] Although not advanced by any party, we consider and reject the arguments that the language on the reverse side of the entry form constituted an offer made by the consumer to Telmatch or that by depositing the form into the contest box the consumer intended to communicate an offer to Telmatch. The design of the contest box and corroborating statements made to CSD show that consumers did not request or plan to receive a calling card. Further, the actions taken by consumers were consistent with entering a contest, not requesting a calling card.

[26] We need not pursue contract law further since neither of the parties place weight on its application to this case. However, we observe that in addition to contract formation issues, other defenses in contract law exist such as (1) mistake induced by the other party and (2) misrepresentation. Relevant to the first defense, the record shows that consumers were acting under the mistake that they were entering a contest (not signing up for a service), Telmatch's conduct (design of contest box) caused the mistake, Telmatch had reason to be aware of the mistake and the mistake was material. (14 Cal. Jur. 3d (Rev 1999) Part 1, Contracts, § 88., pp. 336-337.) Relevant to the second defense, Telmatch made representations (contained on the contest box) to consumers about the nature of the instrument signed (an entry form as opposed to an offer to take service) that was materially false, and the reliance of consumers was objectively reasonable.

6.5 Sanctions

In D.98-12-075, the Commission developed principles that it would consider in setting an appropriate fine to impose in the enforcement of affiliate transaction rules. The principles developed in D.98-12-075 distill numerous Commission decisions concerning fines in a wide range of cases. Thus, we look to these principles in determining the level of fine.

Reparations should be distinguished from fines. Reparations are not fines and conceptually should not be included in setting the amount of a fine. Reparations are refunds of excessive or discriminatory amounts collected by a public utility. (Section 734.) The purpose of reparations is to return unlawfully collected funds to the victim. Accordingly, the statute requires that all reparation amounts be paid to the victims.

6.5.1 Reparations

We agree with CSD that consumers should receive reparation for all monies collected by Telmatch. Based on the record, we find that CSD's estimate of $5.5 million reasonably approximates the amount owed California consumers. We order Telmatch to submit within thirty days this amount (less any amounts submitted to the Commission by agents and LECs on Telmatch's behalf as ordered by D.99-10-069 and modified in Section 6.6 of today's decision) to the Manager of the Commission's Fiscal Office by certified check payable to California Public Utilities Commission. Telmatch is also afforded the opportunity to contest the calculation of the amount owed by filing within 10 days of the mailing date of this order a petition to modify the amount Telmatch must submit to the Commission. Telmatch's petition must contain detailed records and documentation showing (1) how much California consumers have

been billed on its behalf, and (2) how much has been refunded to consumers.[27] Telmatch must also respond within five days to all data requests issued by Commission staff concerning Telmatch's petition if one is filed. Failure to timely reply will constitute grounds for denying the petition.

Within 45 days of the effective date of this order, CSD shall submit for approval a reparation plan for making restitution to customers. Such plan should make reasonable efforts to identify affected consumers and also minimize administrative costs. This proceeding should remain open for approval of a restitution plan.

6.5.2 Fines

The purpose of a fine is to go beyond victim reparations and to effectively deter further violations by this perpetrator or others. For this reason, fines are paid to the State of California, rather than to victims.

Effective deterrence creates an incentive for public utilities to avoid violations. Deterrence is particularly important for violations which could result in harm widespread or severe harm. The two general factors used by the Commission in setting fines are (1) severity of the offense and (2) conduct of the utility. Fines should be set in proportion to the violation.

The severity of the offense includes several considerations. Economic harm reflects the expense that was imposed upon the victims as well as any unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in establishing the fine. Compliance with Commission directives is required of all California public utilities:

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[27] Witness Burslem testified that Telmatch keeps records indefinitely. (R.T. 5/543, Telmatch/Burslem.)

> "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees." (Section 702.)

Such compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, is considered a severe offense.

D.98-12-075 also states that the number of the violations is a factor in determining severity. A series of temporally distinct violations can suggest an ongoing compliance deficiency that the public utility should have addressed after the first instance. Similarly, a widespread violation that affects a large number of consumers constitutes a more severe offense than one that is limited in scope. For a "continuing offense," § 2108 counts each day as a separate offense.

D.98-12-075 also recognizes the important role of the public utility's conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation. The public utility is responsible for the acts of all its officers, agents, and employees:

> "In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his [or her] official duties or employment, shall in every case be the act, omission, or failure of such public utility." (Section 2109.)

D.98-12-075 also weighs the utility's actions to prevent a violation. Prudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives. This includes becoming familiar with applicable laws and regulations, and most critically, reviewing its own operations regularly to ensure full compliance. In evaluating the utility's efforts

to ensure compliance, the Commission will consider the utility's past record of compliance with Commission directives.

The utility's actions to detect a violation are also a factor. The Commission expects utilities to diligently monitor their activities. Where utilities have failed, for whatever reason, to meet this standard, the Commission will continue to hold the utility responsible for its actions. Deliberate, as opposed to inadvertent, wrongdoing will be considered an aggravating factor. The Commission will also look at management's conduct during the period in which the violation occurred to ascertain the level and extent of involvement in or tolerance of the offense by management personnel. The Commission will scrutinize attempts by management to attribute wrongdoing to rogue employees. Managers will be considered, absent clear evidence to the contrary, to have condoned day-to-day actions by employees and agents under their supervision.

Prompt reporting of violations furthers the public interest by allowing for expeditious correction. For this reason, steps taken by a public utility to promptly and cooperatively report and correct violations may be favorably considered in assessing any fine.

The financial resources of the utility are another factor to consider. Effective deterrence requires that the Commission recognize the financial resources of the public utility in setting a fine that balances the need for deterrence with the constitutional limitations on excessive fines. Some California utilities are among the largest corporations in the United States while others are extremely modest, one-person operations. The Commission intends to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.

The Commission will also apply a totality-of-the-circumstances test in furtherance of the public interest. Setting a fine at a level that effectively deters

further unlawful conduct by the subject utility and others requires that the Commission specifically tailor the package of sanctions, including any fine, to the unique facts of the case. The Commission will review facts that tend to mitigate the degree of wrongdoing, as well as any facts which exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.

We now apply these principles to the present case. Telmatch has violated § 451 by imposing on consumers' phone bills a monthly charge for a calling card not authorized by consumers. The severity of the offense is great. Although the actual dollar amount per consumer is relatively small, the number of consumers affected is large. In economic terms, the unlawful benefit gained by Telmatch is approximately $5.5 million. Telmatch's acknowledgment of wrongdoing is minimal; Telmatch takes the untenable position that its marketing efforts are clear and unambiguous despite repeated complaints from consumers that the billed services were not ordered. The record shows that Telmatch took no steps, absent new legislation, to change its conduct. Rather than prevent future incidents of consumer complaints, Telmatch adopted a caveat emptor approach to dealing with California consumers and continued to solicit consumers with representations of chances to win cash or a car.

Section 2108 provides that the Commission may, in the case of a continuing violation, treat each day's continuance as a separate and distinct violation. Prior to the issuance of this OII, Telmatch billed consumers in violation of § 451 for approximately 20 months or 600 days. Telmatch has violated § 2890(a) by including charges for noncommunications-related goods on consumers' telephone bills for approximately nine months (number of months elapsed from January 1, 1999 to when OII was issued on September 2, 1999) or 270 days. In all, we calculate that Telmatch has committed 870 distinct offenses.

Pursuant to § 2107, we could assess a fine between $500 and $20,000 per violation for a total fine between $435,000 (870 violations times $500 per violation) and $17.4 million (870 violations times $20,000 per violation). Given Telmatch's size it is unrealistic to impose the maximum fine. In light of the totality-of-the-circumstances, we impose a fine of $2,000 per violation for a total fine of $1.74 million. We will direct the Commission's General Counsel to take all reasonable steps to collect this fine. All fines collected will be deposited in the State's General Fund.

In addition, the history of the respondent, described in section 3 of today's decision, raises the possibility of other violations. Commission records show George A. Mueller, III as having a 99.00% interest in Telmatch and Kathleen K. Mueller-Engel as having a 1.00% interest in Telmatch. At hearing, it was stated that Edward Miller[28] was the owner of Telmatch. Commission records do not show any valid transfer of control. Further, Telmatch's application for a CPCN was granted in December 1996, but the record in this proceeding shows that almost all of Telmatch's operations were contracted out, as opposed to the company being run by the individuals set forth in the CPCN application. We are concerned that the CPCN application may have contained material misrepresentations. We issued a CPCN based on representations concerning the expertise of individuals that would provide service. Additionally, the different set of characters operating Telmatch raises the possibility that Geo Communications was used as a shell corporation to cover the unauthorized operations of Telmatch. Consequently, we will also direct the General Counsel to

[28] Although prepared testimony was served for Miller, he did not testify at hearing. Miller's testimony was not accepted into evidence.

explore the liability of Telmatch's principals and pursue such relief against them as may be appropriate in any proper forum.

6.5.3 Operating Authority

Based on Telmatch's conduct as discussed herein, we conclude that Telmatch is unfit to operate in California. On April 22, 2002, we revoked Telmatch's authority in Resolution T-16647.[29] By this decision, we will make Telmatch's revocation permanent. We also order all LECs and billing agents to immediately and permanently cease doing business with Telmatch.

6.6 Other Matters

We deal here with two pending requests by Telmatch. First, Telmatch's petition dated November 12, 1999, seeks clarification concerning Ordering Paragraph 2 of D.99-10-069. Telmatch asks whether the amount LECs must submit to Commission, pursuant to Ordering Paragraph 2, should exclude "any amounts held back for the LECs' and USBI's fees, reserves, customer refunds and the like."

In D.01-04-035, we also investigated allegation of cramming by another carrier, Coral Communications, Inc., and addressed this particular issue. We concluded that California law provides that where an agent or assignee is in possession of funds that belong to a third party, the agent or assignee must turn

[29] In Resolution T-16647, we revoked Telmatch's Certificates of Public Conveniences and Necessity (CPCN) for failure to comply with Decision 93-05-010, Ordering Paragraph 4, which states that the Commission will consider the revocation of competitive carriers that are more than 90 days late in filing annual reports and remitting surcharges. In Resolution T-16647, after the Commission's Telecommunication Division made unsuccessful attempts to locate Telmatch and determine its status, we revoked Telmatch's CPCN for inactivity on its part, not delinquency.

over the funds. (Id., mimeo. at p. 52.) In this instance, consumers have a superior interest over third parties to the amounts "held back." Consequently, we deny Telmatch's petition for clarification of Ordering Paragraph 2 of D.99-10-069.

Second, on November 12, 1999, Telmatch filed a Request for En Banc Hearing. Telmatch contends that the seriousness of the allegations by CSD and the gravity of the remedies and fines sought by CSD warrant an en banc hearing before the full Commission. We deny the request. Today's decision is primarily based upon the factual findings we make concerning the marketing materials and methods used by Telmatch to solicit consumers. Telmatch does not dispute that it used the sweepstakes method, nor does it object to the receipt into evidence of the entry forms it used for soliciting consumers. Based on the evidence and law, we see no merit to the positions advocated by Telmatch, and therefore see no enlightenment to be gained from hearing Telmatch argue them.

6.7 Appeals

The Commission mailed the Presiding Officer's Decision (POD) on October 12, 2000. Telmatch and CSD both timely filed appeals to the POD.

Telmatch's appeal challenges the Commission's authority under § 451 by repeating argument contained in Telmatch's briefs. The POD extensively addressed Telmatch's statutory argument, however, we have rearranged text so that § 451 issues are addressed earlier in the decision. For clarity, we have also made some editorial changes.

Telmatch's appeal asserts that the following statement in the POD is wrong: "In contrast to the barrage of text and graphic visual images inviting the consumer to 'ENTER TO WIN,' no language appears on any of the surfaces of the contest box or the front of the form that clearly describes the service offered or the associated charges." (POD at p. 14.) In support, Telmatch quotes the last two

lines of text on the top surface of Exhibit 18. We modify the POD to acknowledge the text identified by Telmatch.

Telmatch also asserts that the POD erroneously considered only one of two entry forms that Telmatch used. We modify the POD to acknowledge the second form.

Telmatch also argues that the POD misapplied the law to the facts. Telmatch disagrees that its marketing materials were misleading. Telmatch also dismisses evidence of consumer complaints as hearsay. We reject these arguments, but make minor clarifying edits to address Telmatch's concerns.

Telmatch also cites as error a statement in the POD concerning its marketing materials and consumers' beliefs concerning those materials. Telmatch believes that there is no evidentiary basis upon which to conclude that all consumers were actually misled. Further, Telmatch argues that the POD does not identify a single benchmark that Telmatch or any other carrier could have consulted to determine that use of particular text or graphics would subject it to reparations and fines. In support, Telmatch also refers to cross-examination of a CSD witness for the proposition that "a person with adequate English skills who read the entry form would know they were signing up for a calling card." In response, we have modified the POD to emphasize that our analysis is focused upon Telmatch's practices and representations not the consumer's state of mind.

Specifically, the POD made a factual inquiry into whether Telmatch's representations constituted an invitation to enter a sweepstakes or an offer of service. This is primarily a factual question. In reaching the determination that Telmatch's representations constituted an invitation to enter a contest, we made findings about the text and graphics of Telmatch's marketing materials. For instance, we observed graphics of hundred dollar bills and Mercedes Benz automobiles. Neither of these items communicates information about a calling

card service or associated charges; instead these items refer to contest prizes. Relying upon such graphics and explicit text about chances to win money or a car, we find that Telmatch's representations invited readers to enter a sweepstakes.

We will also modify the POD by eliminating language in the POD concerning a legal sufficiency requirement. As indicated, the import of Telmatch's representations is a factual inquiry.

Lastly, Telmatch's concerns about a benchmark is misplaced. This is not a case where a service solicitation was marginally deficient; instead, by design almost nothing about the solicitation suggested the provision of utility service.

Telmatch also challenges the POD's remedies and fines. We disagree; the findings and conclusions support the remedies and fines imposed. No changes to the POD in this regard are necessary.

CSD believes sufficient information exists for the Commission to make a finding that an unauthorized transfer of control occurred. We agree that Commission records indicate that an unauthorized transfer of control occurred; however, neither the OII nor CSD raised this allegation before the close of the evidentiary record. As a result, Telmatch was not given notice and an opportunity to be heard. However overwhelming the facts may be, respondents are entitled to notice and a fair hearing.

CSD believes the POD is overly specific in directing the General Counsel regarding collection efforts. We modify the POD to provide more leeway to the General Counsel in choosing collection strategies.

CSD also suggests that the Commission delegate to Telmatch the task of orchestrating reparations through the use of an independent claims administrator. CSD's proposal raises concerns about the independence of the claims administrator if Telmatch has responsibility for orchestrating reparations.

CSD's proposal lacks sufficient oversight. We will modify the POD's ordering paragraphs to require CSD to submit a reparation plan.

HBS Billing Services Company (HBS) and Billing Information Concepts, Inc., now known as Billing Concepts, Inc. (BCI), filed a petition to intervene and an appeal on November 13, 2000. The appeal addresses modifications the POD proposed to Ordering Paragraph 1 of D.99-10-069 to require billing agents to submit to the Commission all fees collected on behalf of Telmatch. Given that HBS and BCI are directly affected by the modification, the petition to intervene should be granted.

HBS and BCI contend on appeal that an order to return fees collected for processing is an inequitable result because billing agents acted in good faith and had no knowledge of or responsibility for the improper activities of Telmatch. HBS and BCI also contend, among other things, (1) that no sound public policy exists for requiring billing agents to return fees associated with monies unlawfully collected from ratepayers, and (2) they did not aid or abet the violations of Telmatch and therefore are not subject to the reparations imposed by the Commission.

We disagree with HBS and BCI's public policy argument. In D.01-04-035, we addressed this issue at length and reached the opposite conclusion. However, no notice was given that the Commission would seek recovery of fees collected by HBS or BCI. Consequently, we will not modify Ordering Paragraph 1 of D.99-10-069 as proposed in the POD. As to monies still in the possession of LECs and not yet submitted to billing agents, all such funds should be deposited with the Commission as ordered in Ordering Paragraph 2 of D.99-10-069. We make no finding on the proprietary of the activities of HBS and BCI; we simply conclude that, at this stage of the proceeding against Telmatch, it is inappropriate to begin an investigation into the activities of HBS and BCI.

Findings of Fact

1. Telmatch marketed a long distance calling card in California from 1997 to January 1998 using the name Benefits Plus.

2. Telmatch solicited consumers through a "sweepstakes method" that used contest boxes that were set up at locations such as fairgrounds.

3. The plain language and graphics contained on the contest box and entry form invite the consumer to "ENTER TO WIN" a contest.

4. Telmatch's contest box contains text inviting consumers to "ENTER TO WIN" that is prominently displayed in capital letters on all five of the different visible surfaces of the contest box.

5. From whatever angle a consumer sees Telmatch's contest box, he or she sees an invitation to "ENTER TO WIN" either "$25,000 CASH" or a "CHOICE OF CAR."

6. The entry form's visual emphasis, transmitted via background graphics that depict images of one-hundred dollar bills and a Mercedez Benz, is on a prize.

7. Telmatch's entry form informs consumers that their "phone service will not change."

8. In order to read the information on the reverse side of the entry form the consumer must tear off the form. If the consumer lifts up an entry form attached to a contest box, the information on the reverse side of the entry form appears upside down.

9. The reverse side of the entry form, while attached to the contest box, is difficult to read.

10. Telmatch used the requested information from the entry forms to charge consumers, through billing agents, a recurring charge of $4.33 per month for a calling card.

11. The recurring charges that Telmatch imposed on consumers' telephone bills did not contain a reference to a calling card.

12. The recurring charges that Telmatch imposed on consumers' telephone bills included a charge for noncommunications-related goods and services such as golf discounts and lawyer referral services.

13. Telmatch has not received authority from the Commission to impose charges on consumers' phone bills for noncommunications-related goods and services.

14. Telmatch has no consumer service representatives.

15. Consumer Access employees acted as Telmatch's customer service representatives.

16. Telmatch's application for a certificate of public convenience and necessity listed the names of experienced individuals for marketing and sales.

17. The unlawful benefit gained by Telmatch and the amount owed to California consumers as reparation is approximately $5.5 million.

18. The unlawful benefit gained in dollar amounts per consumer is relatively small, but the number of consumers affected, approximately 60,000, is large.

19. Prior to the issuance of this OII, Telmatch billed consumers for approximately 20 months or 600 days.

20. Telmatch included charges for noncommunications-related goods on consumers' telephone bills for approximately nine months (number of months elapsed from January 1, 1999 to when OII was issued on September 2, 1999) or 270 days.

21. Commission records show George A. Mueller, III as having a 99.00% interest in Telmatch and Kathleen K. Engel has having a 1.00% interest in Telmatch.

22. At hearing, Edward Miller was identified as the owner of Telmatch. Commission records do not show any valid transfer of ownership control from Mueller to Miller.

23. No enlightenment will be gained from holding an en banc hearing.

24. Telmatch induced consumers to enter a contest.

25. Telmatch's contest box does not reasonably inform consumers that they are signing up for a telephone service or that they will be charged a recurring monthly fee on their telephone bills.

26. No language appears on the contest box or on the front of the entry form that manifests an intent or constitutes a conditional promise by Telmatch to enter into a legally binding, final agreement regarding a calling card.

27. The text and graphics on the contest box and entry form do not constitute a valid offer for a telecommunications service.

28. The text and graphics on the contest box and entry form do not communicate to the consumer an offer of a telecommunications service.

29. By filling out an entry form, consumers were entering a contest and not authorizing Telmatch to impose charges on their telephone bills.

30. Telmatch imposed unauthorized charges on consumers' telephone bills.

Conclusions of Law

1. Under § 451, charges for a product or a service that the consumer has not authorized are unreasonable.

2. Section 451 authorizes the Commission to investigate a regulated entity that has imposed unauthorized charges on consumers' telephone bills.

3. A charge may be deemed unjust for many reasons.

4. A utility that furnishes a product or renders a service not authorized by a consumer and then demands a charge has violated § 451.

5. Under § 451, the charges imposed by Telmatch for its calling card are unjust and unreasonable.

6. Telmatch has violated § 451 by imposing on consumers' phone bills a monthly charge for a calling card not authorized by consumers.

7. Telmatch is not "grandfathered" with respect to the provision of § 2890 by virtue of having started operations before the effective date of the statute.

8. Subsequent to January 1, 1999, Telmatch violated § 2890(a) by imposing charges on consumers' telephone bills for a "benefit" that is not communications-related.

9. Telmatch has violated § 2890(a) by including charges for noncommunications-related goods on consumers' telephone bills for approximately nine months (number of months elapsed from January 1, 1999 to when OII was issued September 2, 1999) or 270 days.

10. Fines should be imposed on Telmatch.

11. Telmatch's operating authority should be revoked.

12. The Commission has a duty to investigate the practices of utilities it regulates.

13. Under § 761, the Commission may regulate utility practices.

14. A sampling of consumers and an investigation into the practices of a respondent utility are sufficient to determine if the utility's actions constitute an unjust or unreasonable practice.

15. The filed rate doctrine does not permit a carrier to impose charges on telephone bills for services or products that are not authorized by consumers.

16. Telmatch has committed 870 distinct offenses.

17. Pursuant to § 2107, the Commission could assess a fine between $500 and $20,000 per violation for a total fine between $435,000 (870 violations times $500 per violation) and $17.4 million (870 violations times $20,000 per violation).

18. A fine of $2,000 per day for a total of $1.74 million should be imposed.

19. Consumers should be refunded all monies collected by Telmatch.

20. Telmatch is unfit to operate in California.

21. All funds held by LECs should immediately be deposited with the Commission.

22. Telmatch's Request for En Banc Hearing should be denied.

23. Telmatch's request to modify Ordering Paragraph 1 of D.99-10-069 should be denied.

24. The motion of HBS Billing Services Company and Billing Concepts, Inc. to intervene should be granted.

25. This order should be made effective immediately.

O R D E R

IT IS ORDERED that:

1. The operating authority of Telmatch Communications, Inc. (Telmatch) is permanently revoked. Telmatch shall immediately cease doing business in the State of California. The Commission's General counsel shall take steps to serve this order on all relevant billing agents and local exchange carriers (LECs) to ensure that Telmatch is no longer operating in California.

2. Within thirty days of the effective date of this order, Telmatch shall submit as reparation to the Manager of the Commission's Fiscal Office a certified check payable to California Public Utilities Commission in the amount of $5.5 million less any amounts already submitted to the Commission on Telmatch's behalf by its billing agents and LECs as ordered by Decision (D.) 99-10-069.

3. Telmatch may contest the calculation of the amount owed consumers by filing within 10 days of the date of issuance of this order a petition to modify the amount owed. Telmatch's petition must contain detailed records showing

(1) how much California consumers have been billed on its behalf, and (2) how much has been refunded to consumers. In the event Telmatch files a petition to modify the amount owed consumers, Telmatch must also:

- respond within five days to all data requests issued by Commission's Telecommunications Division concerning such petition; and
- concurrently submit to the Manager of the Commission's Fiscal Office a certified check payable to California Public Utilities Commission in an amount Telmatch calculates is the difference between (1) how much California consumers have been billed on its behalf and (2) how much has been refunded to consumers.

The petition authorized by this ordering paragraph is limited to calculation errors and is not a vehicle for challenging the Commission's determination that consumers have not authorized Telmatch to impose a monthly recurring charge on their phone bills.

4. Telmatch shall pay a fine of $1.74 million.

5. The Commission's General Counsel shall take all reasonable steps to collect the fine imposed by this order. All fines collected will be deposited in the State's General Fund.

6. Telmatch's petition for clarification of D.99-10-069 is denied.

7. Telmatch's request for an en banc hearing is denied.

8. The motion of HBS and BCI to intervene is granted.

9. Within 45 days of the effective date of this order, CSD shall submit for approval a reparation plan for making restitution to affected consumers. Such plan should make reasonable efforts to identify affected consumers as well as minimize administrative costs.

10. This proceeding shall remain open for approval of a reparation plan.

This order is effective today.

Dated June 27, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

ATTACHMENT A

Attachments A & B to I9909001