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MAIL DATE
April 21, 2003

Decision 03-04-062 April 17, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation of USP&C to determine whether it has violated Public Utilities Code Section 2889.9 by failing to provide Commission Staff with requested information and whether the Commission should order California telephone companies to cease providing billing and collection services to USP&C.	Investigation 99-10-024 (Filed October 21, 1999)

ORDER DENYING REHEARING OF DECISION (D.) 01-04-036

I. INTRODUCTION

We instituted this investigation into the billing and collection practices of USP&C on October 21, 1999. USP&C served as a billing agent for $51.5 million in billings to California customers from January, 1998 to June, 1999. Of the total amount billed by USP&C through Pacific Bell during this period, $27 million, or approximately 52% of the total, was refunded at the customer's request. The remaining $24.5 million was collected by USP&C and paid to the service providers, less the fees charged and retained by USP&C.

The evidence presented against USP&C at Commission hearings is summarized as follows: USP&C is a Delaware corporation with its principal place of business in Kansas City, Missouri. USP&C is an aggregator of billings for telecommunications-related services, and acts as a billing agent between these service providers and the California Local Exchange Carrier ("LEC"), such as Pacific Bell, who actually bills the customer. The LECs provide billing and collection services to billing agents such as USP&C pursuant to Commission-

approved tariffs, which require all transactions to be accurate and consistent. These tariff provisions obligate USP&C to submit only accurate and authorized charges to Pacific Bell.

Pacific Bell has a billing and collection services contract with its billing agents, such as USP&C, which states that the agreement may be terminated if Pacific Bell receives more than one complaint per 30,000 bills rendered, or if the billing agent's customer refund rate exceeds 15% of the total amount billed. From January to August, 1999, USP&C's customer refund rate always exceeded 15% of the total amount billed, ranging from 36.5% to 69.02%, with an average of 52% for the entire period. In December, 1999, Pacific Bell ceased to provide billing services to USP&C.

In terms of its relationship with various service providers, USP&C contracted with companies that conducted business under several different unregistered aliases and used up to four different names for identical services. For example, USP&C acted as a billing agent for Spring Telecom, Inc., which sold 800 number service under four different product names ("Call Mgr Plus," "Dial Plan," "Gateway Svc," and "Call Plan), as well as four different provider names ("Progressive Technologies," "Voiser Telecom," "Voice Processing Systems," and "United Voice").

A prehearing conference was held in this proceeding on December 1, 1999. Participants included USP&C, the Commission's Consumer Services Division ("CSD"), Pacific Bell, the Latino Issues Forum and the Greenlining Institute. On December 3, 1999, the Assigned Commissioner issued a scoping memo for the proceeding. On January 7, 2000, USP&C and CSD filed a joint motion seeking approval of a settlement agreement between them, covering only CSD's allegation that USP&C had violated Public Utilities Code Section 2889.9(f)[1] by failing for several months to provide Commission staff with

[1] Unless otherwise noted, all statutory citations are to the California Public Utilities Code.

requested information regarding billing and collection practices and the identity of the service providers USP&C billed for. On February 17, 2000, both CSD and USP&C filed motions stating that, as to matters not covered by the settlement, there were no disputed issues of material fact, and each party sought a judgment in its favor.

On April 11 and 12, 2000, the presiding officer conducted evidentiary hearings. Following the conclusion of hearings, all parties other than Pacific Bell filed initial briefs, and all parties filed reply briefs. A Presiding Officer's Decision ("POD") was issued on October 20, 2000, and USP&C, CSD and Pacific Bell each filed appeals of the POD.

On April 19, 2001, we issued D.01-04-036. The Decision approved the settlement agreement between USP&C and CSD and also found that USP&C violated Sections 2890(e)(2)(A)-(B) and imposed a $1.75 million fine for such violations. The Decision also ordered all California LECs to cease permanently providing USP&C billing and collection services. We also ordered USP&C to show cause why it (1) should not be required to disgorge all amounts retained from unauthorized billings, and (2) should not be fined for failing to comply with Sections 2889.9 and 2890.[2]

On May 3, 2001, USP&C filed a motion for partial stay of the payment of fines ordered in D.01-04-036. On May 24, 2001, we denied USP&C's motion for partial stay, finding that USP&C failed to demonstrate good cause for the issuance of a partial stay. To date, USP&C has not paid the fines assessed in D.01-04-036.

USP&C filed a timely application for rehearing of D.01-04-036 on May 23, 2001. CSD filed a response to USP&C's rehearing application on June 7, 2001.

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[2] Section 2890 has been amended since the issuance of D.01-04-036. All discussions of Section 2890 herein will reference Section 2890 as it existed at the time of the issuance of D.01-04-036.

We have reviewed all of the allegations raised in the rehearing application, and determine that cause does not exist for granting the application.

II. DISCUSSION

In its rehearing application, USP&C challenges D.01-04-036 on the following grounds: (1) the Commission lacks jurisdiction over interstate enhanced services, and its Decision is preempted by the FCC's Truth-in-Billing Guidelines; (2) the Commission committed legal error in its construction and application of Section 2890(e)(2)(A); (3) Findings of Fact 10 and 14 are not supported by substantial evidence; (4) the Decision would render Section 2890 unconstitutionally vague and ambiguous; (5) the Decision does not contain adequate findings and conclusions as required by Section 1705; (6) the Decision improperly committed legal error by holding that Section 2890 does not require scienter; (7) the Commission may not impose sanctions directly on USP&C; (8) the Decision's proposed fine has no basis in the record and contravenes constitutional proscriptions; (9) the Commission should, at most, adopt the Decision as an advisory ruling; and (10) the Decision's order to show cause is barred by the statute of limitations and statutory constraints. USP&C also requests oral argument on its rehearing application.

A. Preemption.

In its rehearing application, USP&C asserts that, because the billings at issue were submitted on behalf of interstate, enhanced service providers, the Commission's jurisdiction is preempted by the jurisdiction of the Federal Communications Commission ("FCC"). (See Rehearing App., pp. 18-20.) USP&C also asserts that, even where the Commission and the FCC have concurrent jurisdiction, the Commission's interpretation of Section 2890 is inconsistent with the FCC's Truth-in-Billing Guidelines (47 C.F.R. 64.2400 *et seq.*) ("Guidelines"), and is therefore preempted. (See Rehearing App., pp. 46-48.) These contentions lack merit.

The portion of the FCC Guidelines cited by USP&C states:

> Telephone bills shall be clearly organized, and must comply with the following requirements: (1) the name of the service provider associated with each charge must be clearly and conspicuously identified on the telephone bill. (47 CFR 64.2401(a)(1).)

Section 2890(e)(2)(B) similarly requires that the "name of the party responsible for generating the charge" appear on customers' telephone bills. Consistent with this excerpt from the FCC Guidelines, we have interpreted Section 2890 to require the name of the service provider to appear on bills. (See D.01-04-036, pp. 15-20, Finding of Fact 14.) Thus, there is no inconsistency between the portion of the Guidelines cited by USP&C and our interpretation of Section 2890(e)(2)(B).

USP&C cites another excerpt from the Guidelines for the proposition that the use of "carrier trade names" on customer bills is the only way to satisfy the requirements of the Guidelines. This portion of the Guidelines, issued by the FCC to clarify 47 CFR 64.2401(a)(1), states:

> We clarify, however, that this guideline may be satisfied by listing the carriers' trade name, rather than its precise corporate or corporate subsidiary name. That is, the carrier name on the telephone bill should be the name by which such company is known to its consumers for the provision of the respective service. (FCC 00-111, p. 5.) (Emphasis added.)

USP&C argues that the above-cited language is mandatory and requires that trade names be used to identify service providers on customers' bills. However, the use of the word "may," as opposed to the word "must" or "shall," indicates that the language is permissive instead of mandatory.[3] In addition, a reasonable interpretation of the second sentence cited above is that it defines a trade name as "the name by which such company is known to its customers for the

[3] Nothing in 47 CFR 64.2400 *et seq*. expressly requires the use of trade names, and apparently the FCC's clarification of 47 CFR 64.2401(a)(1) was issued in response to carrier inquiries as to whether trade names may be used on a telephone bill. (See FCC 00-111, p. 1.)

provision of the respective service." This Guideline simply identifies one way in which service providers may comply with the FCC's Truth-in-Billing Guidelines. Nothing in the clarification issued by the FCC requires the use of trade names as the sole method of complying with the Guidelines.[4]

Further, the use of "trade names" is not prohibited by D.01-04-036. A service provider may use a trade name on customer bills as long as the trade name is also the name of a natural person or partnership, a corporate name, or a registered fictitious business name. (D.01-04-036, p. 18.) The FCC has made clear that "states will be free to enact and enforce additional regulation consistent with the general guidelines and principles set forth in this Order." (FCC 99-72, p. 16.) In articulating the general principles underlying the Guidelines, the FCC stated: "The most glaring manifestations of consumer confusion may be the dramatic growth in the number of slamming and cramming complaints received by the Commission and the states." (FCC 99-72, p. 3.) Thus, even assuming that the requirements imposed by D.01-04-036 are in addition to the requirements contained in the FCC Guidelines, the Commission has been expressly authorized by the FCC to enforce additional requirements as long as they are consistent with the principles underlying the FCC Guidelines.

Accordingly, USP&C's allegations that the Commission is preempted by the FCC, and that our interpretation of Section 2890 is inconsistent with the FCC Guidelines, lack merit.

B. Construction and Application of Section 2890(e)(2)(A).

USP&C also alleges that the Commission committed legal error in its construction and application of Section 2890(e)(2)(A).[5] Specifically, USP&C

[4] It should be noted that USP&C did not use trade names on its bill pages. Both the Guidelines and Section 2890 require carriers to provide telephone bills that clearly and conspicuously identify the service provider. We expressly found that the names placed on bills by USP&C did not clearly identify the service provider responsible for generating the charge. (See D.01-04-036, p. 18.) In addition, we noted that the facts of this case would appear to violate the FCC's Truth-in-Billing Guidelines as well as Section 2890. (See D.01-04-036, p. 19.)

[5] USP&C also challenges our construction and application of Section 2890(e)(2)(B). This argument is discussed above in Section 1, and below in Section 3.

claims that our interpretation of Section 2890(e)(2)(A) to prohibit the type of "service brand names" used by USP&C to describe products/services was legally erroneous. (Rehearing App., pp. 25-31.) USP&C further argues that our determination that USP&C's "service brand names" were not clear and concise, as required by Section 2890, is not supported by substantial evidence. (Rehearing App., pp. 20-25.) These contentions lack merit.

Section 2890(e)(2)(A) requires that any person, corporation, or billing agent that charges subscribers for products or services on a telephone bill must include in the bill a "clear and concise description of the service, product, or other offering for which a charge has been imposed." USP&C utilized what it refers to as "service brand names" to describe the products/services on customer bills. These service brand names are based on the advertising materials that the service providers used when soliciting customers to purchase the relevant product/service.

In D.01-04-036, we determined that the service brand names used by USP&C reflect no hint at the nature of the product/service provided. (D.01-04-036, p. 11.) As an example, the Decision cites the name "PlanMgmt" as one of the service brand names used by USP&C to identify a product/service, and concludes that this service brand name does not suggest voicemail and "could reasonably be used to describe a wide variety of services." (D.01-04-036, pp. 11-12.) We rejected USP&C's contention that the use of these service brand names complies with Section 2890(e)(2)(A) because it clearly identifies the product/service to those who have reviewed the service provider's advertising materials. We noted that a clear and concise description must inform *all* customers "of the characteristics or qualities of the product or service so that they can determine whether or not it was authorized." (D.01-04-036, p. 12.) Finally, we determined that, by allowing the service providers for whom it bills to use and advertise numerous service brand names for the same product, the use of these service brand names does not achieve the product identification required under Section 2890(e)(2)(A). (D.01-04-036, pp. 14-15.)

The Commission's legal determination as to what type of description satisfies the requirements of Section 2890(e)(2)(A) is entitled to a strong presumption of validity, and the Commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes. (See *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 410.) In addition, a remedial consumer protection statute is construed in favor of accomplishing its protective purpose. (See, e.g., *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 314; *Ford Dealers v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 356.) Our determination that Section 2890(e)(2)(A) requires more than merely lifting a service brand name from a service provider's advertising materials comports with the consumer protection goals underlying Section 2890.

USP&C further alleges that our determination that USP&C's service brand names were not clear and concise, as required by Section 2890, is not supported by substantial evidence. (Rehearing App., pp. 20-25.) Parties may challenge a Commission decision on the ground that the decision is not supported by "substantial evidence in light of the whole record" pursuant to Section 1757(a)(4). In reviewing Commission decisions, courts generally limit their review to a determination of whether the agency's decision is supported under the substantial evidence test. (*Strumsky v. San Diego Co. Emp. Retirement Assn.* (1974) 11 Cal.3d 28, 35.) In such cases, the reviewing court does not reweigh the evidence or exercise its independent judgment to draw conclusions from the record, but instead focuses on whether the Commission's conclusions are reasonably supported. Conflicts of evidence are to be resolved in favor of the findings of the administrative agency, and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test. (*Molina v. Munro* (1956) 145 Cal.App.2d 601, 604.) Moreover, if findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record,

and it will not be reversed. (See, e.g., *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 187; *People v. Lane* (1956) 144 Cal.App.2d 87, 89.)

In this proceeding, the Commission weighed all of the evidence submitted by all parties, including USP&C and CSD, in reaching its conclusion that the service brand names used by USP&C to identify products/services on customer bills were not "clear and concise" as required by Section 2890. As noted above, this factual determination is entitled to substantial deference as long as it is supported by inferences reasonably drawn from the record. We reasonably concluded that, because only those customers who had reviewed USP&C's advertising materials would understand the nature of the product/service appearing on their telephone bill, USP&C's use of service brand names does not comply with its obligation to provide *all* customers with an accurate description of the product/service. As such, USP&C's allegation of legal error lacks merit.

C. Findings of Fact 10 and 14.

USP&C next argues that Findings of Fact 10 and 14 are not supported by substantial evidence. (See Rehearing App., pp. 31-32, 42-43.) Finding of Fact 10 concludes that USP&C's "service brand names" are meaningless to customers that had not reviewed the service provider's advertising materials. Finding of Fact 14 states that USP&C is not the party "responsible for generating the charge" within the meaning of Section 2890(e)(2)(B). These allegations of legal error by USP&C lack merit.

The standard for determining whether a Commission decision is supported by substantial evidence is discussed in detail in Section 2, above. As long as the Commission's decision is supported by inferences that may be reasonably drawn from the record, the Commission's decision should be upheld. (See, e.g., *Lorimore*, *supra*, 232 Cal.App.2d at 187; *Lane*, *supra*, 144 Cal.App.2d at 89.)

With respect to Finding of Fact 10, our determination that USP&C's "service brand names" are meaningless to customers that had not reviewed the

service provider's advertising materials is supported by substantial evidence.[6] Section 2890(e)(2)(B) requires that bills contain the name of the party responsible for generating the charge. The relevant FCC Guidelines provide that "the name of the service provider associated with each charge must be clearly and conspicuously identified on the telephone bill." (See 47 CFR 64.2001(a)(1).) In D.01-04-036, we found that a billing agent complies with this portion of Section 2890 if it utilizes the name of a natural person or partnership, a corporate name, or a registered fictitious business name. We expressly found that "[m]ultiple, unregistered aliases provide little information about identity." (D.01-04-036, 20.)

The undisputed evidence in this proceeding establishes that the names of service providers that USP&C listed on the bills it submitted to LECs were *not* the actual names of a company or corporation, a naturalized person or partnership, or a registered California fictitious business name. (See D.01-04-036, p. 18.) CSD testified that it conducted a search of the California Secretary of State's records and found that none of the "service brand names" used by USP&C to identify service providers were registered as California business names. (*Id.*) The evidence also demonstrates that the service providers with whom USP&C had billing and collections contracts used multiple unregistered aliases, and often provided exactly the same services under many different names. (*Id.*) USP&C admits that the names were merely "service brand names" that were taken from the service provider's advertising materials, and thus only a consumer familiar

[6] USP&C asserts that it complied with Section 2890(e)(2)(B) by listing the "advertised" name of the service provider, as identified on the service provider's advertising or promotional materials, on the billings it submitted to LECs. USP&C claims that this is an reasonable method of identifying a service provider because, presumably, the customer has received these advertising materials and recognizes the service provider according to the name listed on such materials. However, as noted above, USP&C's customer refund rates ranged as high as 69% in particular months (D.01-04-036, p. 7), and USP&C's argument only makes sense to the extent that customers actually received these promotional materials. The fact that, on average, over half of USP&C's Pacific Bell billings had to be refunded suggests that many of these billings were unauthorized, and casts substantial doubt upon whether these customers actually received these promotional materials. In any event, we have an overriding obligation to protect *all* California consumers, not just those who may have received USP&C's promotional materials.

with the service provider's advertising materials would understand which service provider generated the charge. (Rehearing App., p. 31.)[7]

Consistent with the consumer-oriented goals of Section 2890, we concluded that a service provider name listed on a bill must be the name of a natural person or partnership, a corporate name, or a registered fictitious business name, and not merely an unregistered alias. (D.01-04-036, p. 18.) A remedial consumer protection statute is construed in favor of accomplishing its protective purpose. (See, e.g., *Lungren*, *supra*, 14 Cal.4th at 314; *Ford Dealers*, *supra*, 32 Cal.3d at 356.) Thus, construing Section 2890 broadly, and drawing reasonable inferences from the record, we properly concluded that the use of unregistered aliases, drawn from service providers' promotional materials, to identify service providers on customer bills violates Section 2890(e)(2)(B).[8]

In a related argument, USP&C claims that our interpretation of Section 2890(e)(2)(B) constitutes legal error by requiring that service providers be identified by a comprehensible name on customer bills, and that USP&C's use of "service brand names" fails to comply with this requirement. (See Rehearing App., pp. 45-46.) USP&C claims that the Commission impermissibly inserted

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[7] USP&C attempts to recast its assertion that Finding of Fact 10 is not supported by substantial evidence by claiming, in a separate section of its rehearing application, that the Commission failed to weigh evidence and argument favorable to USP&C on the issue of industry practice. (See Rehearing App., pp. 32-34.) Regardless of how USP&C characterizes the issue, the same standard applies. Commission decisions will be upheld as long as they are supported by substantial evidence in light of the whole record, and reviewing courts do not reweigh evidence or exercise independent judgment to draw conclusions from the record. (See Section 1757(a)(4); see also *Strumsky*, *supra*, 11 Cal.3d at 35.) Conflicts of evidence are resolved in favor of the Commission, and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test. (*Molina*, *supra*, 145 Cal.App.2d at 604.)

USP&C clearly disagrees with our conclusions regarding its "service brand names" and industry practice. However, USP&C's rehearing application fails to provide a basis for its assertion that we disregarded the evidence and argument submitted by USP&C as to these issues. The fact that we reached conclusions contrary to some of the evidence submitted by USP&C does not mean that we failed to consider such evidence.

[8] USP&C asserts that CSD was required to, but did not, conduct surveys and studies to determine whether its "service brand names," or unregistered aliases, were more confusing to consumers than the name of a natural person or partnership, a corporate name, or a registered fictitious business name. (Rehearing App., p. 31.) This assertion lacks merit for two reasons. First, USP&C conceded during the proceedings that only those consumers with access to the service provider's promotional materials would understand the service provider's identity. Second, whether particular language is deceptive or misleading can often be determined without expert testimony or consumer surveys. (See, e.g., *People v. Dollar Rent-A-Car Systems* (1989) 211 Cal.App.3d 119, 131; *Podolsky v. First Healthcare* (1996) 50 Cal.App.4th 632, 649.)

new requirements into Section 2890, and that this violates USP&C's due process rights. This argument lacks merit because, in D.01-04-036, the Commission merely interpreted and construed the language in Section 2890 requiring the name of the party responsible for generating the charge to appear on customers' telephone bills. The Commission's legal determination as to what type of name satisfies this requirement is entitled to a strong presumption of validity, and the Commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes. (See *Greyhound*, *supra*, 68 Cal.2d at 410.)

With respect to Finding of Fact 14, USP&C's argument is based on the contention that it is USP&C, and not Spring Telecom, Inc., as an example, which directs Pacific Bell and other LECs to place a charge on a customer's bill. Based on this logic, USP&C concludes that, as long as its name is on the customer's bill, there is no violation of Section 2890(e)(2)(B). USP&C cites no authority in support of its interpretation of Section 2890(e)(2)(B), other than the text of the section itself.[9]

USP&C claims that it "generates" charges by generating bill pages and delivering them to Pacific Bell, who in turn delivers the bills to its customers. The Decision, instead, finds that the party that generates the charge is the service provider for whom USP&C provides billing and collection services – in other words, the party that generates the charge is the one who purports to have sold a product or service to a consumer. Our interpretation of Section 2890(e)(2)(B) is consistent with FCC Guidelines that require the "service provider" name to appear on customer's bills. (See 47 C.F.R. 64.2001(a)(1).) Moreover, USP&C is primarily a billing aggregator for other companies, and there is nothing in the record to suggest that USP&C actually provides any services to end-users.

[9] USP&C has the burden to demonstrate the specific grounds upon which it considers the Decision to be unlawful, and vague assertions as to the record or the law, without citation, may be afforded little weight. (See Public Utilities Code Section 1732; see also Rule 86.1; Cal. Code Regs., Tit. 20, Sec. 86.1.)

Accordingly, it is difficult to understand how USP&C can "generate a charge" within the meaning of Section 2890(e)(2)(B) when its primary function is to pass through bills from its service provider clients to LECs.

The Decision recognizes that USP&C is required to have its name on the bill, not because it is the party generating the charge, but because USP&C's name and address must appear on the bill so that consumers may inquire into or dispute the charge. (D.01-04-036, p. 17.) Section 2890(e)(2)(B) is not vague or inconsistent on this point. If one company generates the charge, and another company passes the charge through from the service provider to the LEC, both companies must be listed on the bill. Again, USP&C's argument fails because the Commission is entitled to deference in its interpretation of the statutes it is charged with implementing, and its interpretation of the Public Utilities Code should not be disturbed on review "unless it fails to bear a reasonable relation to statutory purposes and language." (See *Greyhound*, *supra*, 68 Cal.2d at 410-11 (citations omitted); see also *Pacific Bell v. Public Utilities Commission* (2000) 79 Cal.App.4th 269, 283.)

Thus, under the substantial evidence test applied by the courts, which defers to the Commission's findings as long as they are reasonable and sufficiently supported, Findings of Fact 10 and 14 are supported by substantial evidence.

D. Vague and Ambiguous.

USP&C asserts that our construction and interpretation of Section 2890 renders the statute unconstitutionally vague and ambiguous. According to USP&C, if the Commission interprets Section 2890 in a manner permitting it to find that USP&C's "text phrases" were not clear, or that USP&C failed to list the name and telephone number of the party responsible for generating the charge, this amounts to a construction of Section 2890 that is unconstitutionally vague and ambiguous. (See Rehearing App., pp. 48-52.) This assertion lacks merit.

USP&C cites three cases, *McMurtry v. Board of Medical Examiners* (1960) 180 Cal.App.2d 760, 766, *Morrison v. State Board of Educ.* (1969) 1

Cal.3d 214, 233, and *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, 622, in support of its argument that the Commission has unconstitutionally construed Section 2890. These cases stand for the general, and uncontroversial, proposition that statutes must be definite enough to provide an intelligible standard of conduct for activities that are required or proscribed by law. However, in this instance, USP&C does not challenge the constitutionality of Section 2890 on its face. Rather, USP&C challenges only our interpretation of Section 2890.

In the present case, we properly and reasonably interpreted Section 2890 to require that the name of the service provider appear on customer bills, and to require clarity in terms of the "text phrases" utilized by USP&C. This construction is consistent with the consumer protection goals underlying Section 2890.

USP&C also insists that it is entitled to a "broad" interpretation of Section 2890. (Rehearing App., p. 52.) This contention also lacks merit. There is no requirement that a Public Utilities Code section that contemplates a fine be read "narrowly" or "broadly" against the party alleging the violations of the statute. The standard here, as in all Commission cases, is that when the statutory language is unambiguous, we can determine the intent from the plain meaning of the language itself. (See *Carlton Browne & Co. v. Superior Court* (1989) 210 Cal.App.3d 35, 40; *People v. Superior Court of Santa Clara County* (1984) 150 Cal.App.3d 486, 488.) If anything, Section 2890 should be construed in favor of accomplishing its consumer protection purpose. (See, e.g., *Lungren*, *supra*, 14 Cal.4th at 314; *Ford Dealers*, *supra*, 32 Cal.3d at 356.) In addition, as noted above, even USP&C does not claim that the statutory language is ambiguous on its face.

Thus, the Commission's construction and interpretation of Section 2890 is not unconstitutionally vague or ambiguous.

E. Section 1705.

In its rehearing application, USP&C alleges that the Decision does not contain adequate findings and conclusions as required by Section 1705. Specifically, USP&C claims that we failed to make findings as to issues related to FCC jurisdiction, statutory construction, preemption by federal law, and alleged unconstitutionality of the Commission's interpretation of Section 2890. (Rehearing App., pp. 53-55.) These contentions are without merit.

Section 1705 provides that Commission decisions shall contain findings of fact and conclusions of law on all issues material to the order or decision. (Pub. Util. Code, §1705; see also Pub. Util. Code §1757, subd. (a)(3).) The California Supreme Court has observed that findings of fact and conclusions of law by the Commission are intended to assist the court in ascertaining the principles relied on by the Commission so that a court may determine whether the Commission acted arbitrarily. (*California Manufacturers Ass'n v. Public Utilities Com.* (1979) 24 Cal.3d 251, 258-59.) For example, the California Supreme Court has held that the findings of fact and conclusions of law by the Commission were adequate if they disposed of all issues necessary and relevant to the Commission's decision to sanction a company on the grounds that service was used for illegal purposes. (*Goldin v. Public Utilities Commission* (1979) 23 Cal.3d 638, 670.) Additionally, findings and conclusions are meant to assist the parties in preparing for rehearing or court review. (*California Manufacturers Ass'n. v. Public Utilities Com.*, *supra*, 24 Cal.3d at pp. 258-259.)

As a general matter, we made sufficient findings of fact and conclusions of law to dispose of the material issue in the proceeding, namely whether USP&C's billing and collections practices violated Section 2890. The findings and conclusions in D.01-04-036 are more than adequate to assist a court in reviewing this Decision and to assist the parties in preparing for rehearing or court review. The Decision clearly articulates what the material issues were and on what basis the Commission reached its conclusion. For example, Finding of

Fact Number 2 describes the requirement in Pacific Bell's tariff that "each billing and collection customer submit only accurate billings that are consistent with the service requested by and provided to the end-user." Finding of Fact 3 recites the language in Pacific Bell's billing and collection agreement with USP&C that permits Pacific Bell to terminate its relationship with UCP&C if customer refund rates exceed 15% of the total amount billed, and Findings of Fact 4 and 5 note that USP&C's customer refund rates always far exceeded 15% as to Pacific Bell. Finding of Fact 20 concludes that an average customer refund rate of 52% with Pacific Bell and 48% with GTE is substantial evidence of widespread violations of Section 2890.

In addition, Findings of Fact 6-13 specifically deal with the "service brand names" used by USP&C in violation of its obligation to provide customers with a clear and concise description of the services charged on their phone bills. Finding of Fact 15 states that, despite repeated warnings by Pacific Bell, USP&C was either unable or unwilling to take the steps necessary to reduce its customer refund rate to an acceptable level, and Finding of Fact 16 concludes that USP&C either knew or should have known that the billings it presented to Pacific Bell failed to comply with Section 2890. Finding of Fact 17 provides that the FCC's Truth-in-Billing regulations do not address multiple trade names and multiple service names for the same provider and the same service.

The conclusions of law recited in D.01-04-036 are also consistent with the requirements of Section 1705. Conclusions of Law 1-7 analyze the meaning of the term "service brand name," as used by USP&C, as well as the specific billing requirements of Section 2890. Conclusions of Law 11-12 address our authority to order California LECs to cease providing billing and collection services to USP&C and to impose fines on USP&C in order to safeguard the rights of consumers and enforce the provisions of Sections 2889.9 and 2890. Finally, Conclusions of Law 13-15 address the justification for imposing a fine of $1.75 million on USP&C.

Contrary to USP&C's assertion, Section 1705 does not require the Commission to make express legal and factual findings as to each and every issue or sub-issue raised by a party to a Commission proceeding. Rather, Section 1705 requires sufficient findings and conclusions in order to assist the court in ascertaining the principles relied on by the Commission, determine whether the Commission acted arbitrarily, and assist the parties in preparing for rehearing or court review. D.01-04-036 amply complies with these requirements. Thus, given that the relevant issue in this proceeding is whether USP&C conformed its conduct to the requirements of Section 2890, the Commission made all material findings of fact and conclusions of law consistent with the requirements of Section 1705.

F. Scienter.

USP&C next alleges that the Commission erred in not implying a mens rea or scienter requirement in its construction and application of Section 2890. USP&C implicitly concedes that the plain language of Section 2890 contains no such requirement. (Rehearing App., pp. 55-59.) In D.01-04-036, we expressly found that "no mental state is found in the plain words of the statute [Section 2890], and we need not add such a requirement." (D.01-04-036, p. 10, fn. 4.) However, USP&C argues that we must imply a mens rea or scienter requirement in our interpretation of Section 2890 in order to impose substantial fines. This argument lacks merit.

USP&C cites *People v. Simon* (1995) 9 Cal.4th 493, for the proposition that the Commission must prove "evil intent" before imposing a large penalty on USP&C. (Rehearing App., p. 56.) *People v. Simon* involved a California Corporations Code section that criminalizes the fraudulent sale or purchase of securities. It does not deal with administrative law, the Public Utilities Code, or the Commission's consumer protection obligations and responsibilities, and in no way requires a showing of scienter or mens rea before the Commission may impose a penalty under Section 2890. Indeed, none of the cases cited by USP&C create or imply a mens rea requirement in Section 2890.

The only relevant case, not cited by USP&C in its rehearing application, is our decision in *Communication Telesystems International*, D.97-10-063, 1997 Cal. PUC LEXIS 912, in which the Commission held that Section 2889.5, the anti-slamming statute, was a strict liability statute that does not require a showing of mens rea.

USP&C cites *Morissette v. United States*, 342 U.S. 246 (1952), for the proposition that public welfare and safety offenses do not require a showing of mens rea, whereas statutes that are not designed to protect public welfare and safety require scienter or mens rea before substantial fines may be imposed. USP&C characterizes Section 2890 as the latter, rather than the former, and suggests that any violation of Section 2890 by USP&C was merely "technical." (Rehearing App., p. 56.) However, USP&C pointedly ignores another statement in *Morissette*, in which the Supreme Court characterized public welfare offenses as those that impair "the efficiency of controls deemed essential to the order as presently constituted," and that such conduct justifies sanctions without a showing of "evil intent." (*Morissette*, 342 U.S. at 256.) While USP&C concedes that Section 2890 is designed to protect consumers, it also attempts to downplay the importance of Section 2890 as a public welfare measure. (Rehearing App., p. 57.) This argument is unpersuasive, as Section 2890 is designed to protect consumers from precisely the type of rampant, inappropriate billing and collections practices perpetrated by USP&C.

As will be discussed below in Sections 7 and 8, we have the authority to impose penalties on USP&C pursuant to Sections 701, 2107, 2108 and 2890. None of these sections suggest that we must find that USP&C acted with "evil intent" before imposing sanctions, and as such USP&C's argument to the contrary lacks merit.[10]

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[10] Even if a showing of scienter was required, it is reasonable to infer scienter or mens rea simply from USP&C's extraordinarily high customer refund rates. (See D.01-04-036, p. 7.) As noted above, USP&C's average customer refund rate for Pacific Bell averaged 52% from January, 1998 to August, 1999. The fact that USP&C was forced to refund *more than half* of all its Pacific Bell billings provides substantial evidence of widespread violations, calls into

G. Commission's Authority to Directly Impose Fines.

USP&C claims that the Commission lacks the authority to directly impose fines on USP&C, but rather must seek to enforce any fines in superior court. (Rehearing App., pp. 59-64.) Contrary to USP&C's argument, we have the authority to directly levy fines or penalties pursuant to Sections 701, 2107, 2108 and 2889.9(b).[11] Section 701 authorizes the Commission to do all things necessary and convenient in the exercise of its power and jurisdiction. Section 2889.9(b) provides that, if we find that a billing agent has violated any requirement of this article, we may enforce Sections 2107 and 2108, among others, against such billing agents. Section 2107 provides that a public utility may be fined between $500 and $20,000 for each violation of the Public Utilities Code, and Section 2108 states that every violation of the Public Utilities Code constitutes a separate and distinct offense.

USP&C's argument that Section 2104 requires the Commission to seek fines in superior court, rather than imposing fines directly, is directly contradicted by recent Commission decisions and by denials of petitions for writ of review, challenging the Commission's authority to directly impose fines. The plain language of Section 2104 refers to "actions to *recover* penalties." (Pub. Util. § 2104 (emphasis added).) Thus, we have interpreted Section 2104 to apply to the "recovery" of penalties, rather than to the imposition of penalties. (See, e.g., *Strawberry Property Owners Assoc. v. Conlin Strawberry Water Co.*, D.00-03-023, (2000) 2000 Cal. PUC Lexis 127, *6-*7, and cases cited therein.)

In 1993, the Legislature enacted Senate Bill ("SB") 485, which amended Public Utilities Code Section 2107 to increase the amount of fines that

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question the validity of all of USP&C's billings, and constitutes ample justification to infer scienter. (See D.01-04-036, pp. 25, 36, Finding of Fact 20.) In its rehearing application, USP&C does not dispute the accuracy of these customer refund rates.

[11] In its rehearing application, USP&C alleges that the Decision fails to address USP&C's argument that the Commission cannot directly fine USP&C. This allegation is inaccurate, as Conclusion of Law 11, p. 38, specifically states that the Commission is authorized to require billing agents to pay a fine to the State of California. The Decision also cites Sections 2107 and 2889.9(b) in support of our authority directly to impose fines on USP&C. (D.01-04-036, pp. 22-23.)

may be imposed on public utilities. (See Stats. 1993, ch. 221, § 12, p. 1462.) The legislative history for SB 485 expressly acknowledges that the Commission "has broad authority *to levy* appropriate fines in the course of its business," and cites Section 701 as the basis of this authority. (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1 (emphasis added).) The legislative history notes that this broad authority has been "supplemented by additional specific fine authority" of a specified dollar amount, as set forth in Section 2107. (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1.) Further, a bill analysis explicitly states that SB 485 "would increase the fines the Public Utilities Commission *can levy* against public utilities. . . ." (Senate Committee on Energy and Public Utilities, Analysis of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as heard on April 20, 1993, p. 1 (emphasis added).)

Moreover, that legislative history also supports our interpretation of Section 2104 that the Commission is only required to go to court to collect, rather to impose, a fine; that is, to collect an unpaid fine. As stated in the legislative history, "[t]he [Commission] must go to the Superior Court *to collect any fines which are levied*." (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1 (emphasis added).)

USP&C points out that, at one time, we interpreted Section 2104 as requiring a court action to impose penalties, rather than the Commission possessing the independent authority to assess fines. (See, e.g., *DiMaggio v. Pacific Bell*, D.92-03-031 (1992) 43 Cal.P.U.C.2d 392, 395.) However, "'an administrative agency may change its interpretation of a statute, rejecting an old construction and adopting a new.'" (*Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1326, quoting *Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1269.) Moreover, "'even when an agency adopts a new interpretation of a statute and rejects an old, a court must continue to apply a deferential standard of review.'" (*Hudson v. Board of Administration*, *supra*, at p.

1326, quoting *Henning*, *supra*, at p. 1270; see also *Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 484.)

As early as 1990, we interpreted Section 2104 to apply to the "recovery" of penalties, rather than to the imposition of penalties. Thus, we have the authority to impose penalties for violations of the Public Utilities Code or Commission decisions, but must recover or collect unpaid penalties through a superior court action. (See *Vortel Communications, Inc. v. Advanced Communications Technology, Inc., et al.* (1990) 1990 Cal.P.U.C LEXIS 673 at p. *17; see also *Re Southern California Water Company*, D.91-04-022 (1991) 39 Cal.P.U.C.2d 507, 516.)

USP&C cites several Commission decisions in support of its allegation that Commission needs to go to superior court to impose a fine. (Rehearing App., pp. 62-63, citing *DiMaggio v. Pacific Bell*, D.92-03-031 (1992) 43 Cal.P.U.C.2d 392, 395; *TURN v. Pacific Tel. & Tel. Co.*, D.82-03-070 (1982) 8 Cal.P.U.C.2d 356, 359; and *General Telephone Co.*, D.85334 (1976) 79 Cal.P.U.C. 313, 327.) USP&C's reliance on these cases is misplaced. In *Re Communications TeleSystems International*, D.97-10-063 (1997) 76 Cal.P.U.C.2d 212, we specifically overruled the language in *DiMaggio v. Pacific Bell*, *supra*, that suggests that the Commission cannot levy fines. (*Re Communications TeleSystems International*, *supra*, at pp. 220, 224, fn. 7.) Our disapproval of the interpretation of Section 2104 in *DiMaggio v. Pacific Bell* in effect overruled any prior cases that may have held that the Commission cannot directly levy fines.

Finally, there have been several Commission decisions imposing penalties that have been appealed, in whole or in part, on the basis of our authority directly to impose fines. In each of these cases, a petition for writ of review has been summarily denied by the Court of Appeal. (See, e.g., *Futurenet, Inc. v. Public Utilities Commission*, petition denied June 7, 2000, B137208; *Conlin-Strawberry Water Co., Inc. v. Public Utilities Commission*, petition denied July

26, 2001, F035333 [Commission's authority to impose penalties was the sole issue presented to the court]; *Southern California Edison Co. v. Public Utilities Commission*, petition denied Feb. 28, 2002, B156189.) Although a summary denial does not have precedential effect, it is considered to be a "decision on the merits" for res judicata purposes. (See *People v. Western Air Lines, Inc.*(1954) 42 Cal.2d 621, 630-631; *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905.) In light of *Pacific Bell v. Public Utilities Commission*, 79 Cal.App.4th 269, 272 (2000), in which the Court held that review is discretionary if petitioner fails to present a convincing argument that the Commission's decision should be annulled, it can be presumed that the writs denied indicate the reviewing courts found no legal error.

For all of the foregoing reasons, the Commission has the authority to impose fines directly on USP&C without proceeding to superior court.

H. Justification for $1.75 Million Fine.

USP&C next asserts that the penalty imposed by D.01-04-036 violates state and federal constitutional proscriptions against excessive fines. (Rehearing App., pp. 70-71 (citing *BMW of North America v. Gore*, 517 U.S. 559, 579-80 (1996); *U.S. v. Bajakajian*, 524 U.S. 321, 334 (1998).) This assertion lacks merit. *BMW v. Gore* addressed constitutional limitations on punitive damages, addressing civil penalties only for purposes of comparing the difference between a punitive damage award and civil penalties based on the same conduct. The guidelines it sets forth do not apply to civil penalties. (*People ex rel Lockyer v. Fremont Life Ins. Co.* (2002), 104 Cal.App.4th 508.) Section 2107 gave USP&C clear notice that it could be fined up to $20,000 for each violation of the Code, and Section 2890 clearly prohibits the type of misconduct USP&C has committed. Thus, the Code provided clear notice of the potential severity of the penalty. (See *Niebel v. Trans World Assurance Co.* (9th Cir. 1997) 108 F.3d 1123, 1131.) Even if the proportionality guidelines set forth in *BMW* applied here, it cannot

reasonably be argued that the fine was so disproportionate to the misconduct as to violate the Excessive Fines Clause of the Eighth Amendment.

USP&C also argues that the fines imposed by D.01-04-036 have no basis in the record. (Rehearing App., pp. 64-70.) To the contrary, the record in this case establishes that, from January to August, 1999, USP&C's customer refund rate for Pacific Bell always exceeded 15% of the total amount billed, ranging from 36.5% to 69.02%, with an average of 52% for the entire period. This extraordinarily high customer refund rate was sufficient to cause Pacific Bell to terminate its billing relationship with USP&C in December, 1999. USP&C's customer refund rate with GTE, at 48%, was also inexplicably high. As the Decision notes, the sheer volume of refunds calls into serious question the validity of the $51 million worth of charges billed to California by USP&C, and constitutes substantial evidence of widespread violations of Section 2890(b). (D.01-04-036, pp. 25, 36, Finding of Fact 36.) The Decision also finds that, despite repeated warnings by Pacific Bell, USP&C was either unwilling or unable to take the steps necessary to reduce its customer refund rate to an acceptable level, and that USP&C has demonstrated that it cannot conform its conduct to the requirements for billing agents under the Public Utilities Code. (D.01-04-036, p. 36, Findings of Fact 15, 19.) Given this extensive record of billing misconduct, the fine is not disproportionate and is amply supported by the record.

The imposition of a $1.75 million fine on USP&C is also necessary to deter future misconduct, both by USP&C and by similarly situated billing agents in California. Given USP&C's record of inappropriate and illegal billing practices, the size of the California market, and the company's considerable resources (as the Decision notes, USP&C did over $14 million of billing and collection business in 1999 through Pacific Bell alone, and the Decision finds that USP&C is a going concern with significant financial resources), the fine amount reflects our determination of an amount sufficient to deter further misconduct of this type by USP&C, and other billing agents, in California.

I. Advisory Ruling.

USP&C argues that we should, at most, adopt D.01-04-036 as an advisory ruling to be applied only prospectively because the Decision contains matters of first impression for the Commission and imposes new standards and guidelines. USP&C asserts that it is being used as a "guinea pig" for the Commission's initial examination and interpretation of Section 2890. (Rehearing App., p. 71.) These contentions lack merit.

There is no rule that requires the Commission to give USP&C a "free pass" on its misconduct simply because it happened to be involved in one of the Commission's first proceedings involving Section 2890. Indeed, USP&C cites no authority in support of its argument that D.01-04-036 should be implemented only as an advisory ruling. As stated earlier, as the party seeking rehearing, USP&C has the burden to demonstrate the specific grounds upon which it considers the Decision to be unlawful, and vague assertions as to the record or the law, without citation, may be afforded little weight. (See Public Utilities Code Section 1732; see also Rule 86.1; Cal. Code Regs., Tit. 20, Sec. 86.1.)

Contrary to USP&C's contention, our interpretation of Section 2890 in D.01-04-036 does not impose any new or different requirements on the billing industry, other than the requirements already contained in the plain language of Section 2890. Section 2890(b) provides that telephone bills may only contain charges for products or services authorized by the subscriber. Section 2890(c) states that written orders and solicitation materials must be unambiguous and legible. Section 2890(e)(1) requires that each person, billing agent or corporation that generates a charge on a subscriber's telephone bill must be clearly identified. Section 2890(e)(2)(A) provides that bills must contain a clear and concise description of the service or product for which a charge has been imposed. Finally, Section 2890(e)(2)(B) states that bills must contain information about how to resolve disputed charges and that the name of the party responsible for generating the charge must also appear on the bill. The requirements of Section

2890 are clear and plain, USP&C was on notice of these requirements, and USP&C has produced no authority for the proposition that D.01-04-036 should be adopted only as an advisory ruling.

J. Order to Show Cause.

USP&C asserts that the Commission's order to show cause, issued as part of D.01-04-036, is barred by the statute of limitations. USP&C cites California Code of Civil Procedure Section 340 for the proposition that an action upon a statute or penalty or forfeiture must be brought within one year, and then notes that the conduct at issue in this proceeding occurred in 1998-99. This allegation is without merit because the order to show cause does not contemplate initiating a new Commission proceeding. Rather, the order to show cause is part of I.99-10-024, an ongoing Commission proceeding, which was initiated by the Commission on October 21, 1999, well within the statute of limitations requirements of California Code of Civil Procedure Section 340.

USP&C further argues that Sections 2889.9 and 2890 do not authorize the Commission to require the disgorgement of all funds obtained from California customers and retained by USP&C for reserves, in payment of fees, or for any other purpose. (See Rehearing App., p. 73; D.01-04-036, p. 30.) Our authority to impose fines and penalties for violations of Sections 2889.9 and 2890 is well-established. (See Sections 7 and 8, above.) However, it should be noted that nothing in D.01-04-036 requires the disgorgement of funds by USP&C. The Decision merely notes that the sheer volume of the refunds paid out to customers by USP&C calls into serious question the validity of the $51 million worth of charges billed to California customers by USP&C. (D.01-04-036, p. 25.) Because CSD has not yet shown what fraction, if any, of the funds collected by USP&C from California customers remains in USP&C's possession (D.01-04-036, p. 26), the Decision contemplates further inquiry into this issue in the form of an order to show cause. Accordingly, this argument is premature, since we have not ordered any disgorgement of funds by USP&C.

K. Oral Argument.

USP&C requests oral argument regarding the issues raised in its rehearing application. Rule 86.3 of the Commission's Rules of Practice and Procedure specifies that oral argument will be considered if the application "demonstrates that oral argument will materially assist the Commission in resolving the application, and . . . raises issues of major significance for the Commission." (Cal. Code of Regs., Tit. 20, § 86.3.) In this instance, there is ample evidence in the record and transcripts from all parties regarding USP&C's conduct and practices. We have a full understanding of the record. There are no legal issues requiring further briefing, whether oral or in writing. Additionally, there is no finding that we have departed from existing Commission precedent without adequate explanation. Accordingly, USP&C's request for oral argument should be denied.

III. CONCLUSION

Rehearing is denied because no legal error has been demonstrated.

IT IS THEREFORE ORDERED that:

1. Rehearing of D.01-04-036 is denied.
2. Parties to this proceeding are directed to comply with the requirements of D.01-04-036, including the assessment of fines and the order to show cause.

This order is effective today.

Dated April 17, 2003, at San Francisco, California.

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

Commissioner Carl. W. Wood,
being necessarily absent, did not participate.

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