

Decision **DRAFT DECISION OF ALJ ECONOME** (Mailed 5/17/02)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Investigation into TALK AMERICA, INC.,  
formerly Talk.com Holding Corporation,  
formerly Tel-Save, Inc. (U-5289-C and U-5335-C)  
to determine whether it has violated the laws,  
rules, and regulations governing the manner in  
which California subscribers are switched from  
one presubscribed carrier to another.

Investigation 01-08-003  
(Filed August 2, 2001)

**Opinion Approving Settlement Agreement**

**I. Summary**

In this decision, we approve a settlement agreement entered into between the Commission's Consumer Services Division (CSD) and Talk America, Inc. (Talk or Respondent) with one minor modification.<sup>1</sup> Under the agreement, Talk will make various payments totaling \$1 million. Of this sum, \$ 374,800 is for consumer restitution, and \$625,200 constitutes a fine and related expenses for

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<sup>1</sup> Talk was also formerly known as Talk.com Holding Corp. and Tele-Save, Inc. The settlement agreement was filed on March 22, 2002, and is attached hereto as Appendix A. Also attached to the motion and settlement agreement are: (1) an unsigned copy of the fee agreement between Talk and the Settlement Claims Administrator which, according to § 2.1 of the proposed settlement, Talk will finalize no later than 10 days after the Commission issues its decision approving the settlement; and (2) the Settlement Claims Administration Plan. These two documents are attached to this decision as Appendices B and C, respectively.

distributing the restitution to eligible customers. Talk also admits to certain violations of the Public Utilities Code.

We make one minor modification to the settlement to ensure recourse against the Settlement Claims Administrator in the event of its misfeasance.

Applying the standards of Rule 51.1(e) of the Commission's Rules of Practice and Procedure (Rules), we find the settlement agreement, as modified, is reasonable in light of the whole record, consistent with the law and in the public interest. We will therefore approve it.

## **II. Allegations in the Order Instituting Investigation (OII)**

The OII alleges that in 1997, Talk contracted with America On Line, Inc. (AOL) for the exclusive right to market Talk's telephone service to AOL subscribers, and entered into a similar arrangement with Discover Credit Card Company (Discover). According to the OII, beginning in 1998, Talk mailed California consumers over 7.5 million promotional checks and signed up over 300,000 new subscribers as a result.

The OII alleges that (1) neither the marketing materials nor the checks thoroughly informed the subscriber of the nature and extent of Talk's service; (2) the promotional check and the written order form comprised the front and back of a single document; and (3) the terms on the written order were not fully explained and were printed in gray in less than 10-point type. The OII alleges that at times, the promotional materials identified the telephone service provider as "AOL Long Distance" instead of Talk Long Distance. AOL Long Distance is not a registered telephone service provider in California.

According to the OII, Talk also marketed promotional checks offering a "\$25 Instant Cashback Bonus Award from Discover Card and Talk" for

switching to Talk, and that many customers complained that such solicitation misled them into believing the check was a rebate from Discover.

The OII alleges Talk violated several provisions of the Public Utilities Code and a Commission decision including:

- changing customers' long distance carrier without their authorization by failing to thoroughly informing them of the nature and extent of the service being offered and the charges associated with the change and without proper verification. This practice, known as slamming, is unlawful under Pub. Util. Code § 2889.5;
- placing unauthorized charges on customers' bills by failing to thoroughly inform the subscriber of the nature and extent of its service by printing written orders on the same document as the promotional check in less than 10-point type and in gray, and by marketing services so that the name of the service provider was unclear (some customers believed they were authorizing AOL Long Distance, not Talk, to be their carrier.) This practice is unlawful under Pub. Util. Code § 2890(b) which provides that a telephone bill may only contain charges for products and services which the subscriber has authorized; and
- failing to comply with the Commission's consumer protection and information rules for competitive local carriers, including failing to provide (1) current rate information on the new carrier; (2) information regarding the terms and conditions of service with the new carrier; and (3) legible solicitations in at least 10-point type.<sup>2</sup>

### **III. Procedural Background**

The Commission scheduled evidentiary hearings for January 28 through February 5, 2002. On the first day of hearings, prior to their commencement, the parties informed the Assigned Commissioner and Administrative Law Judge

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<sup>2</sup> The Consumer Protection and Consumer Information Rules for Competitive Local Carriers are set forth in Appendix B to D.95-07-054, 60 CPUC2d 611, 646 – 651. D.98-07-020, which granted Talk its operating authority, required it to comply with these rules. (See Conclusion of Law 8, 1998 Cal. PUC LEXIS 551 at \* 18.)

(ALJ) that they had reached a settlement, and requested until February 27 to file their motion for Commission adoption of the proposed settlement. After receiving several extensions, the parties filed their motion on March 22, 2002.

Because of the proposed settlement, the evidentiary hearings did not commence. However, on January 28, upon stipulation of the parties, the ALJ received into evidence the direct testimony of both CSD and Talk.

The OII categorized this investigation as adjudicatory and set the matter for evidentiary hearings. The Scoping Memo confirmed this designation. Because the proposed settlement can resolve this proceeding, we determine that hearings are no longer necessary and our order today makes that change to the OII and Scoping Memo's determination.

#### **IV. The Proposed Settlement**

Under the proposed settlement, Talk will pay \$1 million in customer restitution, related expenses, and fines. Prior to the settlement being filed, Talk paid the Commission \$400,000 of this amount, which has been placed in an escrow account pending resolution of this investigation. According to the proposed settlement, once the Commission approves it, the Commission will distribute \$374,800 of these monies to the Settlement Claims Administrator for customer restitution (\$25 per consumer).<sup>3</sup> The parties agree there are approximately 14,992 "eligible consumers" to receive restitution.<sup>4</sup>

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<sup>3</sup> The settlement designates Rosenthal & Company LLC, 35 Leveroni Court, Suite 150, Novato, California 94949, as the Settlement Claims Administrator.

<sup>4</sup> The settlement agreement defines an "eligible consumer" as "those California consumers (whether an individual, person, or corporation) who were reported by the Commission Consumer Affairs Branch (CAB), or a local exchange carrier (LEC) (e.g., Pacific Bell or Verizon), as having complained that Talk or its agent switched or caused the LEC to switch without authorization the consumer's presubscribed local, toll

*Footnote continued on next page*

The settlement also earmarks \$625,200 as a fine and related expenses for distributing the restitution to consumers. Of this amount, within 10 days after the Commission adopts the settlement, Talk will pay a Settlement Claims Administrator \$40,000 to distribute the monies to “eligible consumers,” and will also pay \$60,000, which constitutes the first monthly installment of the fine. Talk will pay the balance of the fine within 6 months in monthly installments as follows. Within 30 days after the first installment payment, and before the end of each 30 day period following the due date of the immediately preceding installment payment, Talk will pay the Commission \$100,000 until the total of the monthly installment payments delivered to the Commission equals \$560,000.

The Settlement Claims Administrator will also report its monthly balance and disbursements to the Commission according to the terms of the settlement agreement and related documents. The Settlement Claims Administrator will return any monies it is unable to deliver to “eligible consumers” pursuant to the terms of the settlement to the Commission, and these monies will be deemed to escheat to the State of California and be deposited in the state’s General Fund.

In the proposed settlement, Talk also admits that it did not verify some customers’ decisions to change their telephone service to Talk by an independent

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or long distance telephone service provider to Talk; charged the consumer without authorization for telephone services; or engaged in abusive marketing operations and practices. ‘Unauthorized switching’ also means the following: (i) an unauthorized change of provider accomplished by using an underlying carrier’s CIC, which the LEC designated and recorded as a PIC dispute involving the underlying carrier but which the underlying carrier determined as a PIC dispute reported by an LEC or an underlying facilities-based provider, and involving Talk, its parent, agent, affiliate, or underlying facilities-based provider. An Eligible Consumer will be entitled to restitution for each telephone line(s) that was switched without authorization.”

third-party verification company, and therefore admits to violating Pub. Util. Code § 2889.5.

## V. Discussion

We find the proposed settlement, as modified, to be reasonable in light of the whole record, consistent with the law, and in the public interest and approve it.

We have recently stated that in reviewing settlements in telecommunications enforcement proceedings, the Commission is primarily concerned with protecting the public from unscrupulous practices by telecommunications carriers, obtaining refunds for customers where customers have suffered harm as a result of violations, and encouraging a robust telecommunications market free from unfair competition. (See *Coleman Enterprises, Inc.*, (Coleman) D.00-12-050, 2000 Cal.PUC LEXIS 1008 \*16.) The settlement meets these objectives.

First, the settlement will achieve customer refunds, or restitution, because approximately 14,492 customers will receive restitution of \$25 each, for a total of \$374,800. The individual restitution payment is in line with other restitution payments we have approved in recent years. (See Coleman, 2000 Cal. PUC LEXIS 1008 \*\*18-20; *Investigation of Brittan Communications International Corp.*, D.98-04-024, 79 CPUC2d 533, 536; *Investigation of L.D. Services, Inc.*, D.97-11-079, 77 CPUC2d 12, 13; *Investigation of Heartline Communications, Inc.*, D.96-12-031, 69 CPUC2d 584, 591.) While it is true that customers with larger restitution claims will not be able to pursue them under the settlement, Talk appears to be in the same situation as respondents in Coleman, i.e., it has been the subject of disciplinary proceedings in so many other jurisdictions that the total amount available for California appears to be limited.

Moreover, according to the settling parties, failing to reach a settlement could adversely affect Talk's restructuring of its debt burdens, and without this restructuring, Talk could have gone into bankruptcy or dissolution. Thus, achieving actual restitution for affected Californians sometime in 2002, as opposed to possible restitution at a later date had this case proceeded to a hearing, is beneficial for these customers. The settlement agreement also affords additional benefits for these customers because Talk has already paid in escrow the funds earmarked for restitution. Delaying restitution until after a hearing and Commission decision, as well as possible administrative appeals, would make it more difficult to locate some of the customers, because some of the complaints date from 1998, and locating customers grows more difficult as time passes.

In the settlement, Talk admits to failing to verify certain customers' consent, and the parties state in their motion that Talk has ceased to use solicitation checks, which is a major source for complaints of unauthorized switching and abusive marketing. Eliminating these activities from the marketplace will protect the public and free the telecommunications market from a source of unfair competition.

Talk has also agreed to a \$625,200 fine in compromise of the allegations against it. Given Talk's financial situation, and the fact that Talk states it would have pursued all administrative appeals of any adverse decision, this compromise is reasonable.

The proposed settlement relies on a Settlement Claims Administrator to distribute "restitution checks" to "eligible consumers" pursuant to the Settlement Claims Administration Plan. However, Section 2.4 of the settlement provides that Talk will have no duty or right to supervise or direct the Settlement Claims Administrator in implementing the Plan, and that CSD agrees not to hold Talk

liable for the Administrator's errors or omissions. The latter term of this section is troublesome and we reject it.

We need to ensure recourse against the Settlement Claims Administrator in the event of its misfeasance. Therefore, we approve the settlement provided that it is modified so that Talk shall be liable for any error or omission of the Settlement Claims Administrator that results in nonpayment to eligible consumers, and Talk can pursue appropriate relief against the Administrator.

In light of the above considerations, and the lack of opposition to the settlement agreement, we conclude the settlement is reasonable in light of the whole record, consistent with the law, and in the public interest and approve it as modified.

## **VI. Comments to the Draft Decision**

The draft decision of ALJ Econome was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure.

## **Findings of Fact**

1. The proposed settlement will achieve customer restitution because approximately 14,492 customers will receive restitution of \$25 each, for a total of \$374,800. The individual restitution payment is in line with other restitution payments we have approved in recent years.

2. The proposed settlement will protect the public and free the telecommunications market from a source of unfair competition.

3. We need to ensure that the Settlement Claims Administrator appropriately distributes the monies according to the Plan.



**Conclusions of Law**

1. Because the proposed settlement can resolve this proceeding, evidentiary hearings are no longer necessary and this order should change the determination originally made in the OII and Scoping Memo.
2. Section 2.4 of the proposed settlement is modified as set forth in Section V of this decision.
3. The proposed settlement, as modified, is reasonable in light of the whole record, consistent with the law, and in the public interest and therefore should be approved.
4. In order to achieve restitution to affected customers as soon as possible, this order should be effective immediately.

**O R D E R****IT IS ORDERED** that:

1. The Settlement Agreement between the Consumer Services Division (CSD) and Talk America, Inc. (Talk), filed with this Commission on March 22, 2002, attached hereto as Appendix A, and Appendices B (fee agreement) and C (Settlement Claims Administration Plan) to the settlement, are approved as modified by this decision.
2. Pacific Bell Telephone Company and Verizon California Inc. shall cooperate fully with CSD and other Commission staff to ensure that a complete and accurate list of “eligible consumers” of Talk, as defined by Section 7 of the Settlement Agreement, is provided on a timely basis to CSD.
3. Pursuant to Section 3.4 of the Settlement Agreement, billing agents and facilities-based providers shall cooperate with Talk to stop all billing, collecting, or demands for payment of which were caused by any alleged unauthorized switching of an “eligible consumer’s” local, toll, or long distance service.

4. Pursuant to Section 3.5 of the Settlement Agreement, bill collection services or credit reporting bureaus or agencies who are directed to do so by Talk, shall reverse, cancel, or purge any of their records pertaining to an “eligible consumer’s” nonpayment of outstanding debts owed to Talk, its parent corporation, or any affiliates that resulted from an alleged unauthorized switching of the “eligible consumers’” telephone service.

5. Section 2.4 of the proposed settlement is modified as set forth in Section V of this decision.

6. This proceeding is closed.

This order is effective today.

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

**APPENDIX A****THE PARTIES' SETTLEMENT**

**Parties.** The following Parties enter into this Settlement of the Commission Order Instituting Investigation, I. 01-08-003, dated August 2, 2001, on this 22nd day of March 2002:

- The Consumer Services Division (CSD) of the California Public Utilities Commission (Commission); and
- Talk America, Inc. (U-5289-C and U-5535-C) (Talk or Respondent), formerly Talk.com Holding Corp. and Tel-Save, Inc.

**Background**

- In I. 01-08-003, CSD investigated inter alia whether Talk unlawfully:
  - Switched California consumers' presubscribed local, intraLATA, or interLATA telephone services to Talk;
  - Failed to verify customers' decisions to switch their telephone services, via an independent third-party verification company or otherwise in accordance with Section 2889.5;
  - Charged consumers for telephone services without their authorization; and/or
  - Engaged in misleading or abusive marketing practices and operations;
- Talk admits that it did not verify certain Eligible Consumers via an independent third-party verification company or otherwise in accordance with Section 2889.5, the Eligible Consumers' decisions to change their telephone services to Talk;
- Pursuant to the letter to CSD from Talk dated January 25, 2002, Talk and CSD mutually agreed to settle this matter instead of proceeding to hearing. Talk agreed to pay a total of \$1 million in fines, customer restitutions, and related expenses, and further promised to deliver on or about February 8, 2002, to CSD \$400,000;
- On or about February 11, 2002, Talk delivered a check for \$400,000 as described above, which was deposited into the Restitution Escrow Account;
- Talk will retain with CSD concurrence the Settlement Claims Administrator (SCA), Rosenthal & Company LLC, 35 Leveroni Ct Ste 150, Novato CA 94949, to process, mail, and account for the restitution provided to the Eligible Consumers, in accordance with the Fee Agreement and Settlement Claims Administration Plan; and

- The Parties mutually desire to reach a full and final settlement of I. 01-08-003, and thus avoid the time, expense, uncertainty, and inconvenience of an evidentiary hearing.

In consideration of the above and the mutual covenants contained in this Settlement, the Parties by themselves or their authorized representative(s) agree as follows.

## **Terms and Conditions**

### **1. Talk's payment obligations.**

1.1. Talk will pay the Commission over a 6-month period in monthly installments as provided below, a total of \$560,000.<sup>5</sup> Within 10 Days after the date of the Commission decision approving the Settlement, Talk will pay and deliver the following:

- 1.1.1. \$40,000 to the SCA pursuant to the Fee Agreement and as remuneration for the SCA's services as described in the Settlement Claims Administration Plan and the Settlement; and
- 1.1.2. \$60,000 to the Commission, to be paid concurrently with the above-described SCA payment and which will constitute the first of six monthly installment payments to be paid to the Commission as further described below.

1.2. Within each and every 30 Day period following the due date of Talk's first installment payment as described above, Talk will deliver to the Commission a bank check made payable to the order of the Commission, each in the amount of \$100,000, until Talk's monthly installment payments to the Commission accumulates to \$560,000, including the first installment payment to the Commission of \$60,000. As each installment payment is received, it will be deposited in the State's General Fund as a fine.

1.3. Talk waives any potential, residual, or current ownership, claim, interest, or title in or to any of the monthly installment payments when delivered to the Commission, except if this Settlement is rescinded as provided below.

### **2. The Settlement Claims Administration process**

2.1. Within 10 Days after the issuance date of the Commission decision approving this Settlement, Talk will retain the SCA to distribute the Restitution Monies to the Eligible Consumers according to the Settlement Claims Administration Plan. The Fee Agreement will provide that the SCA's total cost of services will be no more than \$40,000.

2.2. As soon as practicable after the Fee Agreement is executed, the Commission will disburse from the Restitution Escrow Account to the SCA the Restitution Monies, in the form of a bank

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<sup>5</sup> Each of Talk's payment should reference on face of the check this Settlement and the docket I.01-08-003 and be delivered to the following address: California Public Utilities Commission, Attention: Director of Fiscal and Administrative Services, 505 Van Ness Ave Rm 3000, San Francisco CA 94102-3298.

check made payable to the order of the SCA in the amount of \$374,800. Talk agrees that the remaining balance in the Restitution Escrow Account of \$25,200, including any interest accrued in the account, will be deposited into the General Fund of the State of California.

2.3. Within 10 Days or less after all the Parties have executed this Settlement, CSD will request the LECs, Pacific Bell and Verizon, to provide the names and mailing addresses of the Eligible Consumers. After receiving and reviewing the Eligible Consumer data, CSD will forward it to the SCA for the mailing of the Restitution Checks to the Eligible Consumers.

2.4. Talk will have no duty or right to supervise or otherwise direct or control the SCA in the implementation of the Settlement Claims Administration Plan. CSD agrees not to hold Talk responsible or liable for any errors or omissions of the SCA.

### **3. Eligible Consumers and Restitution Monies**

3.1. The Parties agree that the total number of Eligible Consumers is approximately 14,992, subject to correction based on miscoding, unavailable mailing addresses, duplications, or other unanticipated circumstances.

3.2. Within 30 Days after receiving the names and mailing addresses of the Eligible Consumers, the SCA will mail each Eligible Consumer in an envelope with the SCA's return address stated, via USPS first class mail, a Restitution Check drawn on the Restitution Account; that is made payable to the order of the Eligible Consumer in the amount of \$25. Each Restitution Check will expire within 90 days after the date printed on the check. With each Restitution Check mailed, the SCA will include a CSD drafted statement explaining the purpose of the Restitution Check. Talk may comment on the CSD statement before it is provided to the SCA.

3.3. If a Restitution Check is undeliverable for whatever reason or the Eligible Consumer fails to endorse and deposit or cash the Restitution Check within 90 Days after its date, the SCA will cancel that Restitution Check.

3.4. Within 10 Days after the date of issuance of the Commission decision adopting this Settlement, Talk will cease, or cause to cease (e.g., direct Billing Agents and facilities-based providers to stop) all billing, collecting, or demanding payment of telephone billings, service fees, or balances that result from or was caused by any alleged unauthorized switching of an Eligible Consumer's local, toll, or long distance telephone services.

3.5. Talk will also direct appropriate bill collection services or credit reporting bureaus or agencies to reverse, cancel, and/or purge any of their records pertaining to an Eligible Consumer's nonpayment of past or present outstanding debts owed to Talk, its parent corporation, or any affiliates that resulted from an alleged unauthorized switching of the Eligible Consumer's telephone services.

### **4. Remittances to the Commission.**

4.1. Within 120 Days after the date of mailing of the last Restitution Check, the SCA will deliver a bank check drawn on the Restitution Account and made payable to the order of the Commission in an amount corresponding to the total of all Restitution Monies that were canceled or undeliverable to Eligible Consumers. These monies will be deemed to escheat to the State of California and deposited into the General Fund of the State.

4.2. At the same time when remitting the undeliverable Restitution Monies, the SCA will report the following to the Commission, which will be made a part of the record in this proceeding:

- A statement of the monthly balance in the Restitution Account beginning with the date when it was established and up to and including the date of the SCA's final remittance to the Commission;
- A statement by month of the total Restitution Checks and the amount of Restitution Monies:
  - Mailed;
  - Deposited or cashed;
  - Returned as undeliverable; or
  - Expired; and
- The total amount of Restitution Monies money remitted to the Commission because of undeliverable, canceled, or expired Restitution Checks.

## **5. Enforcement**

5.1. A material breach of this Settlement will constitute a violation of the Commission order adopting the Settlement, e.g., a failure to pay any of the monthly installment payments on the due dates prescribed by this Settlement. A material breach or any violation of a California Public Utilities statute or a Commission decision, order, regulation, or other regulatory authority of the Commission, will warrant instituting enforcement or compliance proceedings against Talk. In any such action, CSD will document its allegations and carry the burden of proof.

5.2. On the date when Talk delivers to the Commission its last and sixth monthly installment payment as described in Paragraph 1.2 above, each Party to this proceeding and the Commission in adopting this Settlement, mutually releases and will be deemed to have mutually released each other Party from any and all liabilities, claims, or expenses of any nature whatsoever, whether known or unknown, foreseen or unforeseen, arising from, relating to, or in any manner connected with any and all acts, conduct, or omissions referenced, discussed, mentioned, stated, described in the CSD Declarations pertaining to this docket, I. 01-08-003.

5.3. The Commission has primary jurisdiction over any interpretation, enforcement, or remedies pertaining to this Settlement. No Party may bring an action pertaining to this Settlement in any local, state, federal court, or administrative agency without first having exhausted its administrative remedies at the Commission.

5.4. This Settlement will be governed by and interpreted according to California law and Commission rules and regulations.

5.5. According to Rule 51.8, the Commission adoption of this Settlement is binding on all Parties to this proceeding. This Settlement will constitute no approval, disposition of, or precedent regarding any legal principle or issue of law or fact in this proceeding or in any future proceeding.

5.6. After the Commission adopts this Settlement and when Talk has paid and delivered to the Commission all the monthly installment payments described in this Settlement, CSD agrees to

initiate no administrative proceedings or any other claim or action against Talk with regard to any act, conduct, or omission alleged, referenced, discussed, or described in the CSD Declarations pertaining to this docket, I.00-01-018. However, this Paragraph will not apply if Talk either before or after the Commission adopts this Settlement materially fails to fulfill any of its monthly installment payment obligations described in this Settlement. CSD may provide information or otherwise co-operate to the extent requested by a law enforcement agency or a court of law.

5.7. The Parties agree that they will not file any application for rehearing of any Commission decision or order that adopts the Settlement, or take any other action in any way inconsistent with fully supporting this Settlement.

5.8. The Parties will jointly request that the Commission order full cooperation from the pertinent Billing Agents, Underlying Facilities Based Providers, LECs, and any other Persons or Corporations that are necessary to implementing this Settlement.

## **6. Execution of Settlement**

6.1. This Settlement is subject to approval and adoption by the Commission. The Parties agree to execute or furnish any other additional information, documents, and/or testimony, or take any other action, that the Commission or CSD may request, as necessary to implement the Joint Motion and Settlement.

6.2. This Settlement may be executed in any number of counterparts and by different Parties hereto in separate counterparts, with the same effect as if all Parties had signed the same document. All such counterparts will be deemed an original and will together constitute the same Settlement. This Settlement is the entire agreement among the Parties, which cannot be amended or modified without the express written consent of all the Parties.

6.3. This Settlement is not severable. If pursuant to Rule 51.7 the Commission modifies any provision of this Settlement, all the Parties must consent to such change. If the modifications are not acceptable to one or more of the Parties, then the Settlement is deemed rescinded. A Party will be deemed to have consented to the Commission modification unless within 15 Days following the date of issuance of the Commission proposed modification(s), that Party notifies in writing the other Party and files with the Commission its objection to the modification(s).

6.4. Each Party represents that it has investigated the facts and law pertaining to the matters described in this Settlement. No Party has relied or presently relies upon any oral or written statement, promise, or representation by any other Party, except as specifically set forth in this Settlement.

6.5. This Settlement will be binding upon the respective Parties, their successors, assignees, executors, administrators, parent companies, subsidiary companies, affiliates, divisions, units, officers, directors, and ten-percent-or-greater shareholders.

6.6. The Parties acknowledge and stipulate that this Settlement is fair and not the result of any fraud, duress, or undue influence by any other Party. Each Party hereby states that it has read and fully understands its rights, privileges, and duties under this Settlement. Moreover, each

Party has had its respective attorney or other authorized person review the terms of this Settlement. By executing this Settlement each Party declares that the provisions herein are adequate, reasonable, and mutually agreed upon; and that they are entering this Settlement freely and voluntarily.

## **7. Definitions**

- “Billing Agent” means any other clearinghouse or billing aggregator that has been or is billing and collecting on behalf of Talk in California.
- “BTN” means the Billing Telephone Number of the consumer’s telephone line that is billed for telephone services and any other telephone line of the consumer billed under the same BTN, as provisioned by Talk.
- “CAB” means the Consumer Affairs Branch of the California Public Utilities Commission.
- “CIC” means Carrier Identification Code.
- “CSD” means, the Consumer Services Division of the California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102-3298.
- “Corporation” means a corporation, a company, an association, or a joint stock association.
- “CPCN” means those Certificates of Public Necessity and Convenience granted by the Commission and held by Talk under the following corporate identification numbers: U-5289-C and U-5535-C.
- “CSD Declarations” means those Declarations of Stephanie Amato, Stephen Northrop, and/or Dao Phan, including the attachments thereto, as made a part of the record of evidence in this proceeding;
- “Day” means a calendar day unless otherwise stated.
- “Eligible Consumer” means those California consumers (whether an individual, person, or corporation) who were reported by the Commission Consumer Affairs Branch (CAB), or a local exchange carrier (LEC) (e.g., Pacific Bell or Verizon), as having complained that Talk or its agent switched or caused the LEC to switch without authorization the consumer’s presubscribed local, toll or long distance telephone service provider to Talk; charged the consumer without authorization for telephone services; or engaged in abusive marketing operations or practices. “Unauthorized switching” also means the following: (i) an unauthorized change of provider accomplished by using an underlying carrier’s CIC, which the LEC designated and recorded as a PIC dispute involving the underlying carrier but which the underlying carrier determined as a PIC dispute involving Talk, its parent, agent, or affiliate; or (ii) consumer complaint of a PIC dispute reported by an LEC or an underlying facilities- based provider, and involving Talk, its parent, agent, affiliate, or



underlying facilities-based provider. An Eligible Consumer will be entitled to restitution for each telephone line(s) that was switched without authorization.

- “Fee Agreement” means that contract between Talk and the SCA for the performance of settlement claims administration services as described in the Settlement Claims Administration Plan and the Settlement (Exhibit 2)
- “Joint Motion” means the All Parties Joint Motion for Commission Adoption of the Attached Settlement signed by the attorneys for the Parties, and filed at the Commission with this Settlement attached.
- “Paragraph” means a numbered provision of this Settlement.
- “Party” means CSD or Talk; “Parties” means collectively CSD and Talk; and both terms “Party” and “Parties” also include with regard to CSD any director, principal, investigator, attorney, or other Commission present or former employee; and with regard to Talk, any present or former employee, officer, director, stockholder, agent, sub-agent, principal, representative, corporate parent or subsidiary, affiliate, successor, attorney, or assigns.
- “Person” means an individual, a firm, and/or a copartnership.
- “PIC” means Primary Interexchange Carrier.
- “Restitution Escrow Account” means that interest bearing bank account established by the Commission for the deposit of the Restitution Monies paid by Talk to the Commission on or about February 11, 2002.
- “Restitution Account” means that bank account established by the SCA for the holding of the Restitution Monies disbursed by the Commission from the Restitution Escrow Account, for distribution to the Eligible Consumers.
- “Restitution Check” means a bank check in the amount of \$25 drawn on the Restitution Account by the SCA and made payable to the order of an Eligible Consumer.
- “Restitution Monies” means those monies paid by the Commission to the SCA for deposit into the Restitution Account.
- “Rule” means a provision of the Commission Rules of Practice and Procedure, unless otherwise stated.
- “Section” means a section of the California Public Utilities Code, unless otherwise stated.
- “Settlement Claims Administrator” (SCA) means Rosenthal & Company LLC, 35 Leveroni Ct Ste 150, Novato CA 94949, retained by Talk with CSD’s concurrence to

process, administer, and mail the Restitution Checks to the Eligible Consumers according to this Settlement and the Settlement Claims Administration Plan.

- “Settlement Claims Administration Plan” means the written description of the SCA’s duties and responsibilities for distributing the Restitution Monies to the Eligible Consumers (Exhibit 3).
- “Telephone Corporation” means every corporation or person owning, controlling, operating, or managing any telephone line for compensation within California, and includes a reseller of telephone services.
- “USPS” means the United States Postal Service.

**8. Conclusion**

The undersigned hereby acknowledge and covenant that they have been duly authorized to execute this Settlement on behalf of their respective principals and that such execution is made within the course and scope of their respective agency and/or employment. The Parties hereto have caused this Settlement to be duly executed by their respective authorized representative(s) as of the date hereof.

CONSUMER SERVICES DIVISION,

By: /s/ RICHARD W. CLARK      Date: 3/22/02

Richard W. Clark  
Director

/s/ CLEVELAND W. LEE      Date: 3/22/02

Cleveland W. Lee  
Attorney for the Consumer Services Division

TALK AMERICA, INC.,

By: /s/ ALOYSIUS T. LAWN IV      Date: March 22, 2002

Aloysius T. Lawn IV  
Executive Vice President and General Counsel

/s/ THOMAS J. MACBRIDE JR.      Date: 3/22/02

Thomas J. MacBride Jr.  
Attorney for Talk America, Inc.

**(END OF APPENDIX A)**

**APPENDIX B****Fee Agreement**

This Fee Agreement is between Talk America, Inc. and the Settlement Claims Administrator (“SCA”), Rosenthal & Company LLC, of 35 Leveroni Court, Suite 150, Novato, CA 94949, which incorporates by reference the Settlement that the Parties of record filed in proceeding, I.01-08-003. All capitalized terms used herein have the same meaning as defined in Paragraph 7 of the Settlement, “Definitions.”

Within 10 Days after the date of the Commission decision approving the Settlement, Talk will pay and deliver to the SCA a bank check made payable to the order of the SCA in the amount of \$40,000. The \$40,000 constitutes the full and complete remuneration for the SCA’s services in processing, mailing, and/or accounting for the Restitution Checks to Eligible Consumers according to the attached Settlement Claims Administration Plan and the Settlement. It is anticipated that the number of checks issued will be approximately 15,000.

The SCA will serve as the fiduciary of the Eligible Consumers in establishing, managing, and controlling respectively the Restitution Account. The SCA will perform any local, State or Federal tax-reporting obligation, if any that may result from establishing and/or maintaining the Restitution Account. Talk will pay any local, State, or Federal taxes, if any, that may result from the SCA establishing and maintaining the Restitution Account.

The undersigned hereby acknowledge and covenant that they have been duly authorized to execute this Settlement on behalf of their respective principals and that such execution is made within the course and scope of their respective agency and/or employment.

ROSENTHAL & COMPANY LLC

\_\_\_\_\_ Date: \_\_\_\_\_

TALK AMERICA, INC.

\_\_\_\_\_ Date: \_\_\_\_\_

**(END OF APPENDIX B)**

## APPENDIX C

### SETTLEMENT CLAIMS ADMINISTRATION PLAN

This Settlement Claims Administration Plan (Plan) describes the duties and obligations of the Settlement Claims Administrator (SCA), Rosenthal & Company LLC, 35 Leveroni Ct Ste 150 Novato CA 94949, in the processing, mailing, and reporting of the Restitution Checks provided to Eligible Consumers according to the Settlement filed by the Parties of record in I.01-08-003. All capitalized terms used herein will have the same meaning as specified in the Settlement Paragraph 7, "Definitions."

1. **The SCA's Compensation.** The Parties agree that within 10 Days after the date when the Commission adopts the Settlement, Talk will pay the SCA \$40,000 for performance of the services described in this Plan and in the Settlement.
2. **Eligible Consumers Records.** Within 10 Days or less after all the Parties have executed the Settlement, CSD will ask the LECs, Pacific Bell and Verizon, for the names and mailing addresses of the Eligible Consumers. After its receipt, CSD will forward these names and addresses to the SCA for the mailing of the Restitution Checks to the Eligible Consumers. The SCA will maintain the Eligible Consumers names and addresses in strict confidence; use them only in accordance with this Plan and the Settlement; and after fully and completely implementing this Plan return them to CSD without keeping any copy thereof.
3. **Disbursement of the Restitution Monies to the SCA.** As soon as practicable after the contract between Talk and the SCA is executed, the Commission will disburse from the Restitution Escrow Account to the SCA the Restitution Monies, in the form of a bank check made payable to the order of the SCA in the amount of \$374,800. The SCA will hold the \$374,800 in a Restitution Account until its distribution to the Eligible Consumers. The SCA will act as a fiduciary of the Restitution Monies on behalf of the Eligible Consumers.
4. **Distribution of Restitution.** The SCA will distribute the Restitution Checks by mailing via first class mail in a prepaid stamped envelope addressed to an Eligible Consumer, a bank check drawn on the Restitution Account and made payable to the order of the of an Eligible Consumer in the amount of \$25. A CSD statement explaining the purpose of the Restitution Check will be included in the envelope. Before mailing the Restitution Checks, the SCA will verify the Eligible Consumers' current mailing addresses with the National Change of Address Systems or by other reasonable means of updating such address. Each Restitution Check will become void if not cashed or deposited within 90 Days after the date of the Check.

5. **Undeliverable and Expired Restitution Checks.** The SCA will cancel any Restitution Check not deposited or cashed within the 90 Days after the date of the Check; or which are mailed but returned as undeliverable for whatever reason (e.g., no current address available). The Restitution Monies represented by such undeliverable or expired Restitution Checks, and including any interest accrued in the Restitution Account, will escheat to the State of California. Within 120 Days after the last Restitution Check is mailed, the SCA will remit this amount to the Commission in a check drawn on the Restitution Account and made payable to the order of the Commission.
6. **Reports to the Commission.** The SCA will report to the Commission according to the Settlement the following:
  - The opening and closing balances of the Restitution Account;
  - The number and date of the mailings of the Restitution Checks to the Eligible Consumers;
  - The number of Restitution Checks undeliverable or expired; and
  - The amount of Restitution Monies remitted to the Commission because of undeliverable or expired Restitution Checks.
7. **Tax Reporting.** The SCA will perform any local, State, or Federal tax-reporting obligation, if any that may result from establishing and maintaining the Restitution Account. Talk will pay any local, State, or Federal taxes, if any, that may result from the SCA establishing and maintaining the Restitution Account.
8. **Questions in Implementation.** Any questions regarding implementation of this Plan unaddressed here or by the Settlement should be directed to CSD, Dao Phan, telephone: (415) 703-2604, or alternatively, the attorney for CSD, Cleveland W. Lee, telephone number: (415) 703-1792.

(END OF APPENDIX C)