Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135 and U-4314, and related entities (collectively "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers.	Investigation 02-06-003 (Filed June 6, 2002)

Christopher P. Witteman, for the Consumer Protection and Safety Division of the California Public Utilities Commission.
James W. McTarnaghan, Kathryn A. Fugere and Sarah E. Leeper, Steefel, Levit & Weiss, for Cingular Wireless, respondent.
Michael Shames and Lee Biddle, for Utility Consumers' Action Network, intervenor.

OPINION ORDERING PENALTIES AND REPARATIONS

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OPINION ORDERING PENALTIES AND REPARATIONS

1. Summary

The evidence establishes that at least as early as January 1, 2000 and continuing until May 1, 2002, when Cingular Wireless (Cingular) implemented a new, 15-day refund / return policy, its corporate policy and practice in California did not allow any "grace period" or trial of its wireless service. Furthermore, Cingular's corporate policy prohibited early termination of wireless service contracts unless the customer paid an early termination fee (ETF) of $150. Some Cingular agents imposed an additional ETF of as much as $400, which increased the total ETF to as much as $550. Given Cingular's own testimony that testing wireless service by using the phone is the best way for a customer to ascertain whether the service meets his or her needs, binding that customer in advance to a one or two-year contract constituted an unjust and unreasonable rule and resulted in inadequate, unjust, and unreasonable service in violation of Pub. Util. Code § 451.[1] This policy and practice also violated Decision (D.) 95-04-028, a prior Commission decision.

Cingular's corporate practice became even more egregious during 2001, when Cingular concedes it experienced significant network development growing pains. During 2001, Cingular's engineering department struggled to add coverage and capacity to keep pace with significant increases in customers and monthly usage, largely attributable to Cingular's successful advertising and

[1] Unless otherwise indicated, all subsequent citations to sections refer to the Public Utilities Code, and all subsequent citations to rules refer to the Rules of Practice and

Footnote continued on next page

marketing efforts. Cingular made no effort to disclose its network problems to customers by any means and, in spite of these problems, continued to prohibit returns/refunds and required ETFs for early cancellation of wireless service contracts. This disclosure failure violated §§ 451, 702 and 2896 and D.95-04-028.

We find that the totality of the evidence presented by Cingular, the Commission's Consumer Protection and Safety Division (CPSD) and intervenor Utility Consumers Action Network (UCAN) establishes that these violations were continuing ones, for which we fine Cingular $10,000 per day. The total penalty is $12,140,000.

We also order Cingular to reimburse customers who paid part or all of the ETF to Cingular or to one of Cingular's agents during this period. Because other proposed remedies are the subject of two industry-wide rulemakings that concern (1) consumer rights and protections for telecommunication customers, and (2) telecommunications service quality standards, we defer consideration and adoption of such remedies to those proceedings.

This proceeding is closed.

2. Overview

2.1 The OII

The Commission issued this order instituting investigation (OII or investigation) into Cingular's operations based on the Cingular Investigation Staff Report (Staff Report) and attachments to that report, all released concurrently with the OII and subsequently received at hearing as Exhibit 1. The

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Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations.

OII contends that preliminary investigation requires formal examination of whether Cingular's conduct during this period violated §§ 451, 702, 2896 and other law. This preliminary investigation was precipitated by the increase in the number of informal customer complaints to the Commission's Consumer Affairs Branch (CAB) about Cingular since 2000 and by declarations subsequently signed by 14 customers, by an email petition found on the internet and by the personal experience in late 2001 and early 2002 of CPSD's lead investigator and witness, Maricarmen Caceres (Caceres). The gravamen of the OII is this:

- Cingular pursued marketing and sales strategies, and required customers to sign contracts, none of which adequately disclosed the known limitations then existent in its network's coverage and capacity.
- In spite of these inadequately disclosed coverage and capacity problems, until May 1, 2002, Cingular had in place a no return/no refund policy, and its contracts required customers to pay an ETF of $150 per phone for cancellation of service; Cingular's agents' contracts often required payment of an additional, inadequately disclosed ETF of $150 per phone or more.
- Cingular "bundled" sales of wireless service and handsets in ways that violated a prior Commission decision and consumer protection laws found in California's Civil, Commercial and Business and Professions Codes.

The OII's Ordering Paragraph 1, which we have attached to this decision as Appendix 1, sets out the investigative charges. The OII also seeks determination of whether the Commission should impose various remedies, including reparations and fines.

2.2 Cingular's Business Organization and California Presence

As related in the OII, which quotes from Cingular's responses to the initial data requests attached to the Staff Report[2], Cingular is the name borne by a joint venture owned 60% by SBC Communications Inc. (SBC) and 40% by BellSouth Corporation (BellSouth). Each of these entities contributed most of its wireless subsidiaries in the United States to the joint venture – for SBC that includes subsidiaries acquired through merger with Pacific Bell Telesis Group. In California, accordingly, Cingular is the dba of the SBC subsidiary Pacific Bell Wireless, LLC (PBW), formed in July 1999. PBW is a Nevada corporation and has its principal place of business in Atlanta, Georgia. With respect to its public presence in this state, Cingular's October 26, 2001 data request response states: "In California, from approximately July 1999 to January 2000, PBW did business as 'Pacific Bell Wireless.' Since January 2000, PBW has done business as 'Cingular Wireless'." (Ex. 1, Attachment E.)

As also related in the OII, on November 2, 2001, Cingular registered with the Commission as a wireless carrier and received corporate identification number U-4314. The OII mentions two other corporate identification numbers, which the Staff Report links to Cingular as the dba of PBW: U-3060, a cellular carrier and U-4135, a cellular reseller. Both of these numbers originally were assigned to Pacific Bell Mobile Services. Cingular's October 26, 2001 data request response states that SBC also contributed Pacific Bell Mobile Services to the joint venture with BellSouth, and that PBW is the successor in interest to Pacific Bell Mobile Services.

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[2] In September 2001, when these data requests issued, CPSD was known as the Consumer Services Division, or CSD.

2.3 Brief Description of Cingular's Wireless Service

Cingular's October 26, 2001 data request response states that: "Cingular sells wireless personal communication services under a variety of service plans to individual and business customers. Cingular also sells the related handsets and accessories to these customers." (Ex. 1, Attachment E.) Cingular offers these services directly and also through an indirect distribution network consisting of agents and dealers. The indirect distribution network comprises exclusive agents, exclusive dealers, non-exclusive dealers and non-exclusive national retailers. The data request response reports that Cingular also sells wireless services, at wholesale, for resale to retail resellers who repackage and rebrand the services but that these sales account for no more than 5% of its business.

Cingular's wireless system uses the technology known as Global System for Mobile Communications (GSM), which the Staff Report describes as "a digital cellular radio network which allows one to connect his or her GSM-enabled phone to a laptop computer and send or receive e-mail, faxes, browse the Internet, and use other digital data features…" (Ex. 1 at p. 8.)

Worldwide, GSM operates in several different frequency ranges. Cingular operates the 1900 GSM system, a 1900-megahertz (MHz) frequency used in the United States and Canada. Other names for this service are PCS (or Personal Communication Services), PCS 1900 and DCS 1900.[3]

[3] According to the Staff Report, GSM 900, sometimes referred to merely as GSM, operates at 900 MHz in much of Europe and the rest of the world. GSM 1800, also called both PCN (or Personal Communication Network) and DCS 1800, operates at 1800 MHz, and its use is increasing in a number of countries including France, Germany, Switzerland, the United Kingdom and Russia.

3. Procedural Background

By ruling on August 6, 2002, the Assigned Commissioner provisionally confirmed the preliminary scoping memo set out in the ordering paragraphs of the OII. Subsequently, in the first interim opinion in this proceeding, Decision (D.) 02-10-061 (which granted Cingular's petition for modification of the OII but denied its motion to dismiss), the Commission modified the preliminary scoping memo in certain minor respects. D.02-12-048, the second interim opinion, granted Cingular's motion for an extension of the 12-month timeline for resolving adjudicatory proceedings and, under the authority of § 1701.2(d), extended the resolution deadline to October 17, 2003.

The administrative law judge (ALJ) held nine days of evidentiary hearings from April 1 through 11, 2003. Cingular, CPSD and intervenor UCAN each filed opening and reply briefs. Consistent with the scoping memo and its revisions, this proceeding was submitted on June 27. By ruling on July 10, the ALJ set aside submission to cure a defect in the record and thereafter, on July 11, 2003 resubmitted this proceeding. The ALJ's presiding officer's opinion (POD) mailed within the 60-day period thereafter, as § 1701.2(a) requires.

On October 9, CPSD, UCAN and Cingular each filed an appeal of the POD. On October 16, the Commission issued D.03-10-044, which extended the deadline for resolving this proceeding beyond October 17 to permit consideration of the appeals and to enable the Commission to hold oral argument. On October 24, each party filed a response to the appeals filed by the others. The Commission held oral argument on December 8.

In addition, after the POD mailed but prior to oral argument, the Commission received four motions for leave to file an amicus curiae brief. By rulings on October 31 and December 30, the ALJ granted the motions. The amici

curiae are: (1) the Cellular Carriers Association of California and Alpine PCS, Inc. (jointly, the CCAC); (2) the California Telephone Association, Pacific Bell Telephone Company (SBC California), Southern California Edison Company, Southern California Gas Company and San Diego Gas & Electric Company (collectively, the Joint Utilities); (3) The Wireless Consumers Alliance (WCA); and (4) jointly, the Utility Reform Network (TURN) and Consumers Union (CU). On January 5, 2004 Cingular filed a response to the WCA and TURN/CU briefs and CPSD filed a response to the TURN/CU brief.

4. Jurisdiction and Burden of Proof

4.1 Subject Matter Jurisdiction

D.02-10-061 rejects Cingular's arguments that the Commission lacks subject matter jurisdiction to undertake this investigation, concluding that (1) federal law does not preempt the field of wireless regulation, and (2) state law does not bar examination of the charges alleged in the ordering paragraphs.

4.1.1 Federal Preemption

We will not repeat here our federal preemption analysis. D.02-10-061 reviews the Omnibus Budget Reconciliation Act of 1993 (which amended § 332(c)(3)(A) of the Communications Act of 1934 to prohibit state regulation of terms of entry or rates charged by Commercial Mobile Service[4]) and the case law interpreting the sphere of regulation retained by the states. D.02-10-061 finds that "[t]he OII raises the kind of consumer protection matters that federal law permits the states to adjudicate and does not expressly or impliedly seek to

[4] Commercial Mobile Service, also known as Commercial Mobile Radio Service or CMRS, includes the wireless service that Cingular provides in California.

regulate wireless rates or terms of entry." (OII, Finding of Fact 3; see also Conclusion of Law 4.) Though Ordering Paragraph 1(e) also alleges violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)), no party pursued this theory at hearing and the briefs do not discuss it.

4.1.2 State Law Theories

The OII alleges violations of three Public Utilities Code statutes, §§ 451, 702 and 2896. It also alleges violations of D.95-04-028, in which the Commission removed a prohibition on the bundling of telephones and cellular service. These latter allegations include references to many consumer protection laws, including laws found in other California codes – the Song-Beverly Consumer Warranty Act and the Consumer Legal Remedies Act in the Civil Code, the Unfair Competition Law (UCL), which consists of the Unfair Business Practices Act (Bus. & Prof. Code § 17200 et seq.) and the False Advertising Act (Bus. & Prof. Code § 17500 et seq.) and Com. Code §§ 2314-2316.

D.02-10-061 rejects Cingular's contention that "the cited Public Utilities Code statutes are too vague to support an investigation into past utility behavior, on the one hand, or that they merely permit the Commission to fashion prospective relief, on the other." (*Id.* at p. 14.) In Section 6.1 of today's decision, we examine the parties' evidence in the context of established interpretations of these Public Utilities Code statutes. We also examine the allegations related to D.95-04-028.

Before leaving this subsection, however, we acknowledge the jurisdictional guidance provided by a recent decision of the California Court of Appeals, which specifically concerns the UCL. D.02-10-061 addresses, as follows, Cingular's claim that the Commission lacks subject matter jurisdiction over the

UCL and other cited consumer protection statutes outside the Public Utilities Code:

> We need not reach Cingular's arguments that we lack jurisdiction to enforce these statutes because, at a minimum, we may look to cases decided under them for guidance on the kinds of activities that have constituted consumer protection violations. Cingular provides no authority to the contrary. The parties' post-hearing briefs are the proper place to argue the correct use of these statutes in assessing evidence and fashioning appropriate relief, if any. (D.02-10-061, *slip op.* at p. 15.)

Greenlining Institute v PUC (103 Cal App 4th 1324 (2002); 2002 Cal App LEXIS 5066), which issued in November 2002 (approximately one month after D.02-10-061), directly addresses the "purely legal question whether the PUC has jurisdiction over [UCL] claims" and holds that we do not since "it is clear that the Legislature envisioned *enforcement* of UCL claims solely in the courts." (*Id.* 2002 Cal App LEXIS at *6 and *744, respectively, emphasis added.) Nonetheless, citing a 1971 decision of the California Supreme Court, the appeals court reiterates that we may consider such claims without adjudicating them, if we do so in furtherance of our jurisdiction:

> The PUC may, and indeed sometimes must, consider areas of law outside of its jurisdiction in fulfilling its duties. The *NCPA* court explained, "by considering antitrust issues, the Commission merely carries out its legislative mandate to determine whether the public convenience and necessity require a proposed development." (*Id.* at fn 10, citing *Northern California Power Agency v PU*C (*NCPA*) 5 Cal.3d 370, 378 (1971).)[5]

[5] The *NCPA* court annulled the Commission's decision granting a certificate of public convenience and necessity for construction and operation of a geothermal generating

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Thus, D.02-10-061 is not at odds with *Greenlining Institute v PUC*, since D.02-10-061 does not assert jurisdiction over UCL claims. However, in light of *Greenlining Institute v PUC,* we must reject recommendations by CPSD and UCAN that we order penalties that the UCL prescribes. If we lack jurisdiction to enforce the UCL, we cannot levy the penalties codified there. Our discussion of remedies, below, adheres to this jurisdictional limitation, which does not prevent the Commission from fashioning meaningful penalties under the Public Utilities Code where warranted.

We conclude that we are precluded from adjudicating the cited Civil Code provisions as well. Like the UCL, the Song-Beverly Consumer Warranty Act, which codifies an implied warranty of fitness by manufacturers, distributors and retailers of consumer goods sold at retail, requires the aggrieved consumer (or "retail seller" or "serviceman") to bring an "action" and describes what relief the "court" shall order if the consumer prevails. (See Civ. Code §§ 1794, 1794.2.) The Consumer Legal Remedies Act, which proscribes 17 different unfair acts and practices (the OII lists five of them) with respect to the sale or lease of consumer goods or services, likewise requires any "consumer" so damaged to bring an "action" for specified relief, including "any other relief that the court deems proper." (See Civ. Code §§ 1770, 1780.)

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plant, holding that the Commission failed to fully consider the public interest when it declined to consider federal antitrust matters raised by a project opponent. The Court stated that in considering this area of exclusive federal jurisdiction, "[the Commission's] task does not impinge upon the jurisdiction of the courts" because "[the Commission's] consideration of antitrust issues is for purposes quite different from those of the courts; it does not usurp their function." (*NCPA, supra,* p. 378.)

Jurisdiction under the Commercial Code is less clear. Sections 2314-2316 of the Commercial Code govern the warranty of merchantability implied in contracts for the sale of goods. Other provisions of the Commercial Code, which govern the remedies of buyers and sellers, are not so limiting as the language in the Civil Code. For example, Com. Code § 1106(2), a general provision, states merely: "Any right or obligation declared by this code is enforceable by action unless the provision declaring it specifies a different and limited effect." Com. Code § 1201(1) defines "action" more broadly than do the Civil Code statutes; it states: "'Action' in the sense of a judicial proceeding, includes recoupment, counterclaim, setoff, suit in equity, and any other proceedings in which rights are determined."

In our discussion of the evidence in Section 6.1 of today's decision, we examine whether full and fair resolution of this OII requires us to look beyond the Public Utilities Code to consider these other consumer protection statutes.

4.1.3 Agency

In its briefs, Cingular essentially concedes that the law of agency applies to its relationships with its sales agents and states that it has never sought to shield itself from liability based upon the actions of any of its agents. However, Cingular then argues that UCAN and CPSD have not established wrongdoing by Cingular's agents and, moreover, that the OII does not put agent relations at issue.

We need not address at any length the latter challenge. Ordering Paragraph 1 of the OII clearly asserts jurisdiction over all of Cingular's "operations," including Cingular's advertising, marketing and selling of wireless services. As a corporation, Cingular conducts its operations through officers and employees as well as agents, dealers, and so on. Neither expressly nor implicitly

does the OII exclude from its scope Cingular's operations through agents.[6] Moreover, the OII's textual discussion of site visits, and the Staff Report on which it relies, also describe customers' experiences with Cingular's "sales agents and dealers." (OII, *slip op.* at p. 8.) Under the law of agency if Cingular's agents violate other laws, Cingular generally is responsible. (See Witkin, *Summary of California Law*, 9th Edition, Vol.2, §§ 41 et seq., §§ 75 et seq.)

4.2 Burden of Proof

All parties recognize that CPSD and UCAN have the burden to establish by a preponderance of the evidence that Cingular has committed the alleged violations. This is the usual standard in Commission adjudicatory proceedings such as this investigation.[7]

5. Summary of the Evidentiary Record

Below we consider the record created in the course of nine days of hearing. We describe the explosion in Cingular's California customer base beginning in early 2000 and the related capacity and coverage problems on its overburdened network, which Cingular failed to disclose to customers. We review the evidence on Cingular's intensive marketing during this period, its limited sales disclosures, and the content of its advertising. Finally we examine seven different data sources, which represent (or purport to represent) customer dissatisfaction with Cingular. In Section 6.1 of today's decision we discuss how

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[6] We do not purport to assert jurisdiction over Cingular's agents/dealers directly.

[7] See *In Re CTS*, D.97-05-089, (1997) 72 CPUC2d 621, 642, Conclusion of Law 1, 2; *In Re Qwest*, D.03-01-087, *slip op.* at pp. 8-9.

this evidence, on balance, establishes two violations of law and supports the penalties and reparations we discuss in Section 6.2.

5.1 Customer Growth and Network Development

The record reveals that Cingular's California customer base numbered approximately 3 million customers by late 2001 / early 2002. This represents nearly a doubling of customers over a two-year timeframe, since, as summarized in the prepared testimony of witness Michael W. Bennett (Bennett), Cingular's Executive Director – External Affairs, Cingular added approximately 1.5 million customers from January 2000 to the end of 2001. During this same period, the average minutes of use per customer more than doubled as well, from 258 minutes a month to 546 minutes a month. The rebuttal testimony of witness James Jacot (Jacot), Cingular's Regional Vice President, Network Operations for the West Region, documents that throughout most of 2001 much of Cingular's California service area failed to meet three internal performance targets: service denied (also referred to as blocked calls); lost calls (defined as customer perceived dropped calls); and switch congestion.

Cingular generally concedes that growth during this period led to network problems, particularly during 2001. The rebuttal testimony of witness Kathleen M. Lee (Lee), Cingular's Network Sales and Network Issues Manager for the West Region states: "Cingular acknowledges that it has had its share of growing pains from the unexpectedly large growth in customer base and minutes of use, during a relatively short period of time." (Ex. 402, p. 6.) Bennett's rebuttal testimony, focusing on usage, admits: "This extreme growth in minutes of usage did impact the sufficiency of Cingular's network." (Ex. 407, p. 4.)

Bennett's rebuttal contends, however: "Cingular did not sit idly by and ignore the impact this explosion of customer use had on its network." (*Ibid.*)

Cingular spent over $1.6 billion in California on network upgrades during this two-year period, adding 1700 cell sites and increasing its coverage area from 39,334 square miles to 61,099 square miles. According to Cingular's Jacot, about 50% of that sum was spent in 2002, about 30% in 2001 and about 20% in 2000.[8]

Jacot's rebuttal testimony admits that Cingular did not anticipate – or budget -- for the minutes of use growth that it actually experienced. His rebuttal states: "Although a company can estimate what the results of a marketing plan will produce, it is not always predictable or certain how popular a calling plan will turn out." (Ex. 401, p. 11.) By example, Jacot's rebuttal refers to "the college campus phenomenon," explaining that:

> …during the Fall of 2001, Cingular experienced a spike in MOUs [minutes of use] in non-peak hours (after 9:00 p.m.) on college campuses in California. We did not predict that college students living on campus would make multitudes of long distance phone calls after 9:00 p.m. using their wireless phones because it was cheaper than using their landline phone service. (*Ibid.*)

However, email correspondence within Cingular's engineering department establishes that at least as early as February 2001 some employees there were concerned about the network's ability to perform adequately in response to a marketing campaign referred to as "Spring Promotion," which would offer unlimited nights and weekends calling to rate plans costing $29.99

[8] Jacot's rebuttal testimony states that this capital expenditure represents "Cingular's response to an overtaxed system caused when Cingular's services proved to be much more popular than it was originally anticipated." His rebuttal specifically attributes capacity problems in late 2001 to the increase in minutes of use, stating that they "came as a result of changing customer usage patterns in our existing customer base, not from an increasing number of new customers." (Ex. 401, p. 10.)

per month or higher. A February 9, 2001 response to the marketing proposal states:

> …the short answer is that we have NO excess capacity. We have had nights and weekend rate plans for a while, but not with that kind of take rate. Our highest blocking is currently on Saturday. Increasing sales of this would simply make an existing problem worse." (Ex. 202, Attach. 3.)

The same author's further response anticipates switch congestion problems and also states:

> On the radio side, in some areas weekend traffic is already a problem. This promotion will cause a need of additional equipment. We are so far behind now in funding, that trying to estimate the amount and cost of this is not a good use of time. We are focusing on trying to catch up with the current situation…" (*Ibid*.)

A subsequent response from a different author, dated February 13, 2001, concludes that if traffic increases 5% in April and May and returns to normal in June, Cingular may "survive this promotion".[9] (Ex. 18, Attach. 21; Ex. 202, Attach. 4.)

Nonetheless, the record reflects that Cingular continued to advertise heavily in 2001. In fact, a moratorium on sales was out of the question, according to Jacot, who has been with Cingular since May 15, 2001. He testified:

> I don't believe that they have ever taken a moratorium on sales. They have certainly, in the time I've been here, moved to less

[9] The author writes: "With what little information we have about the details I am guardedly optimistic about our ability to survive this promotion if we watch and react swiftly and the lifespan of the free services is not too long." (Ex. 18, Attach. 21; Ex. 202, Attach. 4.)

> aggressive sales plans, less aggressive promotions in order not to overburden the network. But the difficulty of putting a moratorium on sales is your salespeople – agents and employees – all need to go somewhere where they can make sales and get commissions. You don't recover from that." (Tr. p. 948.)

Cingular's witness Ricardo Cruz (Cruz), currently President of Ronin Technology Partners, a wireless engineering and management-consulting firm,[10] examined network performance data from 2000 to 2002. His rebuttal testimony concludes that the capacity problem attributable to the growth in minutes of use "was largely confined to 2001 … and since that time, has continued to improve." (Ex. 400, p. 27.) Cruz's rebuttal quotes from the deposition transcript of CPSD's witness Robert Zicker (Zicker), an independent consultant in the telecommunications field.[11] In the cited portion of the transcript, Zicker acknowledges Cingular's performance improvements from 2001 to 2002.

Much of the extensive debate between these two expert witnesses, while interesting, is not material to decision of the issues raised by this OII. CPSD's witness Zicker and Cingular's witness Cruz focus on the technology of wireless communications, including the increasingly more powerful signal strengths necessary for outdoor, in-vehicle and in-building coverage, on the reasons for wireless communications failures, on differences between GSM and other

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[10] Cruz's rebuttal testimony relates his extensive experience in the wireless telecommunications industry since 1991, including the planning and design of digital networks such as GSM in the United States. That experience encompasses development and adoption, including technical trials, of the software tools used in network design.

[11] Zicker's opening testimony relates his 40-year experience in the telecommunications field, the last 12 within the cellular industry. He holds 46 patents covering cellular telephone systems, methods and apparatus.

wireless technologies and upon the details of Cingular's system, which was not originally designed for in-building coverage. They also address propagation maps used by radio frequency engineers and the usefulness of such maps to most customers. We discuss this latter issue in Section 5.3 of today's decision, together with other evidence on the kinds of measurement information generally available within the wireless industry.

In many respects Zicker and Cruz agree. For example, they agree that Cingular's system has various kinds of coverage holes, as do all wireless systems.[12] They differ as to the import of such coverage holes. At hearing, however, Zicker clarified that he was not contending that Cingular's network is inferior. He also testified: "I don't believe that I've ever stated any wrongdoing by Cingular except its lack of notification to its customers about the existence of these coverage holes." (Tr. p. 736.)

Zicker reiterated this point in the course of questioning about in-building coverage.

> Q. [Cingular counsel] Has Cingular ever denied that it didn't – that it didn't design, originally design, its own network to provide in-building coverage in the context of – in any of the

[12] These witnesses describe four kinds of coverage holes: no signal (e.g., no coverage or service denied); inadequate signal (where the signal is too weak to permit service); voice channel (where the number of channels is less than required to handle peak traffic); and interference (where one or more signals from other cell sites or users interrupt or degrade a user's conversation).

At hearing CPSD's witness Zicker confirmed that Cingular's network performance data showed improvements between 2001 and 2002 in each coverage hole area, and that other documents suggested further improvements should occur in 2003.

> testimony that you read in this proceeding by Cingular witnesses?
>
> A. [Zicker] In the testimony I've seen, no, Cingular has not denied, I have not seen any customer brochures that even addresses the issue of in-building coverage. (Tr. p. 746-7.)

Attachment 19 to the rebuttal testimony of UCAN's Shames includes a list of 19 company-owned and agent stores in which Cingular used signal enhancers at some time during 2001 or 2002. UCAN's opening brief argues that existing signal strength at these store locations was inadequate to supply in-building coverage and that the enhancers were supplied to mask this reality by creating a deceptive impression of good in-building coverage. However, UCAN's theory is unproven, since UCAN did not examine any Cingular witness about these devices at hearing.[13]

In his rebuttal testimony, Cingular's Bennett addresses the utility's response to its network problems as follows: "As soon as Cingular discovered the problems associated with the increased MOU, it went to great lengths to correct them." (Ex. 400, p. 30.) One issue upon which CPSD's Zicker and Cingular's Jacot and Cruz all agree, however, is that system infrastructure improvements take time to implement and, in some instances, may not be wholly within a carrier's control. Jacot's rebuttal discusses local regulatory obstacles to infrastructure development, such as municipal cell siting moratoria, which may occur while local telecommunications siting ordinances are developed, during

[13] Though Cingular's reply brief attempts to supply additional information regarding the purpose of the enhancers, this is an improper use of a post-hearing brief and must be disregarded.

the study of environmental impacts or because of protest by residents. Cingular has experienced such problems in both Northern and Southern California, and Jacot's rebuttal testimony includes a list of problem jurisdictions. Cruz testified: "It can take six months or longer to make the improvements, once a problem is identified." (Tr. p. 847.) Because of this lag time, Cruz suggested that network performance should be reviewed over a broad window of perhaps 18 months.

Data on customer turnover, or "churn," provides another perspective on the misfit between Cingular's customer growth and network development during this period, as well as the impact of the ETF. A market research study entitled "Profiling the Killer – Churn," which is attached to Caceres' reply testimony, shows a significant spike in customer contract cancellations (termed "deactivations") in months 13-16, after contract initiation, once the ETF on one-year contracts ceased to apply. (Ex. 3, Attach. 5.) The research points to network problems as a leading factor in customer-initiated service cancellations. Other market research in the record underscores the importance to consumers of network quality.

5.2 Marketing and Sales Practices

5.2.1 Store Design, Marketing Materials and Sales Disclosures

As noted previously, Cingular markets and sells wireless services directly, through its company-owned stores, and indirectly, via a statewide network of agents and dealers. Company-owned stores account for approximately 15% of the retail sales locations.

The rebuttal testimony of David B. Garver (Garver), Cingular's National Director of Marketing[14], describes this distribution network at some length.[15] Among other things, Garver's rebuttal testimony explains that Cingular promotes a consistent image for its exclusive agents so that all such agents' stores or kiosks have the same "look and feel," which "is accomplished through the fixtures that go into the store, as well as the store layout." (Ex. 406 at p. 3.)

Indeed, street view photographs by CPSD attached to Caceres' reply testimony show prominent display of the Cingular Wireless name and its "Cingular Jack" logo at both a company-owned store and agent stores in San Francisco. The agency disclosure, typically affixed to a glass window above the doorway, is not immediately apparent, by comparison. In the declaration that accompanies the photographs, CPSD's witness Richard C. Maniscalco, who visited 14 San Francisco bay area stores, states that company and agent stores were not readily distinguishable. Based on the common "look and feel," customers who did not notice the agency disclosure above the doorway (or wherever posted) would likely assume they were doing business directly with

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[14] Garver should be highly knowledgeable about these aspects of company policy, since sometime in 1999 he was promoted from Consumer Marketing Manager to Director of Marketing, with responsibility for the Los Angeles, San Diego and Las Vegas Markets and, in September 2000, was promoted again to Regional Vice President of Marketing—thus he was directly involved in Cingular's marketing activities in California during the 2000-2001 timeframe.

[15] According to Garver, Cingular has a business relationship with three kinds of agents/dealers. An exclusive agent sells Cingular's personal communication services and nothing else. An exclusive dealer sells only Cingular's wireless services, but may sell other types of products from the same location (an example is Affordable Portables). Non-exclusive dealers may sell the services of Cingular's competitors, such as Verizon Wireless and Sprint PCS (examples include Best Buy and Circuit City).

Cingular. Several customer witnesses describe purchasing service at what they thought was a Cingular store, only to discover later that it was not.[16]

Cingular communicates with its sales personnel, both employees and agents / dealers, through dated "Newsflashes" containing various categories of marketing information, such as promotions, rate plan information, sales scripts, and equipment pricing. Sometimes sales training or sales instructions are disseminated in this way. Caceres' Supplemental Report states that within the 3,066 pages of Newsflashes produced she found no:

> … instructional information about the limits of Cingular's coverage and system capacity, or any information about how the sales force should address these issues or disclose information pertaining to cellular coverage, network capacity or dead zones. (Ex. 2, p. 7.)

There is no evidence that Cingular's sales representatives and agents were instructed to advise customers about known, major network problems, such as limited in-building coverage or areas lacking coverage altogether. In some instances, however, customers state that sales personnel represented that given cities, towns, or even specific streets had coverage, when they did not. This was Caceres experience when she made eight different site visits, four each in San Francisco and Los Angeles.[17]

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[16] For example, when asked at deposition whether he knew whether he had done business with PBW or an agent, Mel Bator responded: "It looked exactly the same. It said 'Pac Bell' or 'Pacific Bell Wireless'. For all intents and purposes in my mind it looked like it was PacBell Wireless." (Ex. 6, Bator deposition, p. 20.)

[17] Customers complain that they were misled not only about local coverage but also about coverage out of state. Lara Buchanan states the sales agent told her and her husband that Cingular had coverage in the Palmdale / Lancaster area; when they returned to the store to complain about no coverage, the agent admitted some parts of

Footnote continued on next page

The record reveals that Cingular's in-store coverage maps, as well as customer brochures depicting coverage, portray continuous coverage over most of the San Diego, Los Angeles and San Francisco metropolitan areas and through much of the Central Valley and Sacramento. They make no distinction among outdoor, in-vehicle or in-building coverage. Ex. 41, a photograph of a large wall map displayed in stores, shows a large-type, highly visible "Coverage Legend" with three different color codes: "Current Coverage"; "Coverage Over Water"; and "Planned Coverage." By comparison, the small type service disclaimer is illegible in the photograph. Ex. 214, a customer brochure (not a photocopy) entitled "Never Pay Long Distance Again," includes a similar map of California and one of Washington. The legend for this map, however, includes a four-color code for four different existing or planned calling areas and below that the following disclaimer: "The coverage depicted on this map reflects *rate plan coverage* for rate plans available after January 1, 2002." (Ex. 214, emphasis added.) The brochure does not explain to the customer how a rate area and a coverage area differ. Shown Ex. 219 (which appears to be a photocopy of Ex. 214 but marked with Bates stamp numbers), Garver testified that it represents the kind of brochure sales personnel give to customers who ask to see coverage

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Lancaster had no service. (Ex. 1, Buchanan declaration.) Edward Drucker states that he and his wife were told they would have coverage virtually all the way from San Diego to St. Louis—but did not. (Ex. 200, Drucker declaration.) Teri Paulsen of Golden West Dental & Vision states that she activated 17 phones for her company after being assured company employees who traveled freeways in the Los Angeles metropolitan area, Sacramento and Las Vegas would have the same coverage that they did with AT&T. Significant problems occurred within the first week. (Ex. 5, Paulson declaration.)

maps, particularly if the store does not have a wall map. Jacot also referred to Ex. 214 as showing coverage.

Ex. 214 contains a second disclaimer, placed lower on the page in even smaller type, which repeats that the map does not show coverage:

> Map depicts rate areas only, *not coverage areas. Actual coverage areas different substantially from map graphics* and coverage may be affected by such things as terrain, weather, foliage, buildings and other construction, signal strength, customer equipment and other factors. Cingular does not guarantee coverage. Roaming charges and other charges will be billed based on the location of the site receiving and transmitting the call, not on the location of the subscriber. Extended Home Area [a rate plan] is serviced by a non-Cingular GSM Carrier. Any representations of wireless coverage are based on information prepare by a non-Cingular GSM Carrier and Cingular is not responsible for such representations. (*Ibid. emphasis added*.)

Cingular and its exclusive agents and dealers use these materials and other brochures which are contained in the record. Apparently others in the distribution network use them as well, since customers who purchased service from non-exclusive agents supplied some of the brochures to CPSD.

In response to questioning about what network performance information Cingular could supply to prospective customers, the utility's witness Cruz testified, "…I think what would be most appropriate is an estimation of where coverage may likely – where it's more likely to be expected." (Tr. p. 842.) He admitted that a rate map does not necessarily provide an accurate depiction of coverage, but stated that a correlation between rate areas and coverage areas exists.

The ALJ queried Cingular's Jacot about a hypothetical prospective customer who wanted to ensure, to the extent possible, the ability to use a handset within a vehicle along a given commute path every workday. She asked specifically what technical or engineering information that prospective customer would need to know in order to make an informed choice among wireless providers. Jacot responded:

> Well, first of all, they would obviously want to know, does the carrier provide coverage at all, you know, so they'd know if a signal was available.
>
> They would also want some information about the different handsets they could get and what kind of a – how well those handsets perform, particularly in an automobile.
>
> They might want information about car kits that are available so they know what kind of benefits they can get from having an external antenna mounted on the car.
>
> And then they would like to know what kind of performance -- network -- measured network performance, both in terms of power of signal and in terms of signal-to-interference ratio does the carrier exhibit on that road over the part of that road that they would like to use their phone.
>
> And then they would like to know what plans does the carrier have to provide technical improvements to the quality of the signal on that road in the future. (Tr. p. 951-2.)

Asked by the ALJ whether that information is available to a customer through Cingular, Jacot replied:

> Not all that information is available to point -- at the point of sale. They can get information through Customer Care if they would call in and ask about plans to -- you know, to build-out the road in the future. Specific signal-

> level information is not generally made available to customers. (*Id.* at p. 952.)

Jacot testified that specific-signal information is available to Cingular's salespeople and the salespeople employed by its agents, but he later admitted that detailed information actually must be obtained from radio frequency engineers within the company. Likewise, though customer service representatives have more information about network performance than that made available in stores, they must turn to radio frequency engineers for detailed information about the likelihood of coverage. Customer service representatives do not have access to the actual propagation maps that these engineers create to estimate (or predict) the probability of outdoor, in-vehicle and in-building coverage at a specific location or area.[18]

Asked by the ALJ what additional technical and engineering information Cingular could make available to customers at low cost in order to provide better information, Jacot testified:

> The difficulty is that the information is only relevant for a specific amount of time. It's a difficult process for the salespeople to keep abreast for all specific areas in the network over a long period of time about where coverage exists and where it doesn't; and so while the information is generally available for them to find out, having that information in mind or at hand at the time a specific customer comes in, asks a specific question about coverage in a specific area, generally is not something that they have -- have on top of their mind or knowledge or specific knowledge of. (*Id.* at p. 954.)

[18] Such maps typically predict signal sensitivity over 30-meter tracts (or "bins") in densely populated areas and over 100 meters in other areas.

This line of examination continued as follows:

> Q. [ALJ] If a customer were to explain to a salesperson, for example, that he or she had a particular reason to attempt to ascertain the likelihood of specific coverage, would the salesperson have means to gain further information?
>
> A. [Jacot] Not at the immediate -- I don't think they could at the immediate point of time, but they certainly could take the question from the customer, offer a promise to get back to the customer at a future date -- 24 hours, 48 hours, whatever -- and go back and either through the use of somebody like Kathleen Lee, who is there specifically to support the sales organization, or through -- or through contact back at the RF [radio frequency] engineers, gain the information and come back and provide a response. (*Id.* at pp. 954-5.)

5.2.2 Agent Contracts

Prior to May 1, 2002, the effective date of Cingular's new refund / return policy, agents and dealers sometimes charged customers an additional ETF. Sample contracts in the record incorporate agent / dealer ETFs of as much as $400. Garver's rebuttal testimony states, "[T]he contractual relationship between Cingular and its agents / dealers leaves them free to sell wireless equipment on their own account, at a price which they choose and on terms and condition which they establish." (Ex. 406, p. 4.) If the customer cancels service before the vesting of the activation commission, which Cingular pays agents / dealers for each new customer,

> … in many instances, the agent / dealer would lose its investment in the phone because they often resell the phones to customers at a significant discount from the price paid by the agent / dealer. The fee for cancellation for the equipment contract, was, in all likelihood, a means

> for the agent / dealer to recoup part of those losses. (*Id.* at p. 7.)

Thus, Garver's rebuttal testimony purports to focus, among other things "on the limited degree of business control" which Cingular has in its relationships with its agents and dealers. (*Id.* at p. 1.) However, review of Cingular's "Pro Forma Authorized Agency Agreement," attached to Garver's rebuttal testimony, indicates that Cingular holds a great deal of control over them. The agreement, prepared by Cingular and marked proprietary, expressly provides that the signatory owes Cingular "the fiduciary and other obligations of an agent to its principal" with respect to the selling of the "Authorized Cingular Services." (*Id.*, Attach. 1.) Cingular clearly chooses to exercise control in certain areas. For example, the agreement requires the signatory to provide Cingular with copies of any proposed marketing and advertising materials and to obtain advance written approval to use them. Other indicia of control include various compensation terms, such as the activation commission and advertising reimbursement, described in Section 5.3 of today's decision. Cingular also sets activation quotas for agents and dealers.

Most tellingly, once Cingular determined to implement its new ETF policy, effective May 1, 2002, it required agents and dealers to execute an "Amendment to Agency Agreement Re Phone Return Policy," which requires such entities to honor the new policy as of that date.

5.2.3 Wireless Handsets and Other Equipment

Garver's rebuttal testimony attempts to put some distance between Cingular and its agents / dealers with respect to sales of equipment such as wireless handsets. His rebuttal states: "Agent / dealers are not required to inform Cingular as to the terms and conditions pursuant to which they sell

wireless phones." (*Id.* at p. 6.) The rebuttal testimony explains that Cingular was aware that agents / dealers had various return policies which differed from Cingular's express no return / no refund policy--some allowing returns within three days, or seven days, or as much as 30 days, for example. As we recount above, Cingular also permitted its agents and dealers to charge an additional ETF to recoup both the commission forfeited by a customer's early contract termination and the cost of discounting phones.

The record provides limited information on exactly what types of wireless equipment Cingular's agents and dealers sold to customers over the timeframe at issue, which manufacturers' wireless phones (or what models) they carried, what the performance parameters of those phones were, what service and phone packages they offered or how those packages were priced.[19] Garver testified that Cingular encourages agents / dealers to buy wireless phones for resale from Cingular but that they may buy them from other suppliers. Caceres' reply testimony includes, in an attachment, several photocopied pages (two not entirely legible), of the box she received with her wireless handset, apparently a "Nokia 3390." Garver testified that these photocopies appeared to represent the typical box for equipment sold by exclusive agents. Both Cruz and Jacot testified

[19] Attachment 38 to Shames rebuttal testimony contains three pages of internal Cingular documents, marked with nonconsecutive Bates stamp numbers, which provide some information about handset prices and models effective in January and July 2002. One page is labeled "West Region Product Newsflash," the other two are not. While the pages appear to confirm Garver's testimony about agents' pricing policies, neither Garver nor any other Cingular witness was questioned about the information on these pages or how to interpret it. The record contains even less information for 2000 and 2001.

that the handset models Cingular offers are manufactured to appropriate GSM standards and checked for compliance.

5.3 Advertising

Cingular advertises in various media, including newspapers, radio and television. It also exercises substantial control over the advertising efforts of its agents/dealers. Cingular provides all exclusive agents with its written "Cooperative Advertising Program Guidelines," which set out content requirements. The rebuttal testimony of Cingular's witness Garver's includes a copy of these guidelines and states that similar guidelines are provided to exclusive and nonexclusive dealers. In addition, for every activation, Cingular pays $25.00 to the Exclusive Agent's co-op fund, which subsidizes the cost of agent advertising. Cingular does not monitor the ads directly but has contracted with Cooptium, Inc., an outside entity, to do so.

Many of the sample ads introduced into evidence in this proceeding list both company-owned and agent sales locations, but these ads typically do not distinguish them as such. While sample ads reference Cingular's $150 ETF, they do not advise potential customers that an additional ETF will apply. Asked to review the agent newspaper ad referred to in this proceeding as the "When-ever, Where-ever" ad (though its title is "Are you Wireless?"), Garver testified that the nine-line, small print disclosure at the bottom of the full page appeared to be the typical, legal wording Cingular used during 2001-2002. The $150 ETF reference appears in the second line. There is no mention that the ETF may be higher, only the statement, in the eighth line, that "[o]ther restrictions may apply." (Ex. 405, Attach. 3 [San Francisco Chronicle, April 2, 2002].)

One version of another newspaper ad, titled "Never pay long distance or roaming charges again," contains a somewhat different disclosure, again in small

type at the bottom of the page. This disclosure uses the convention of bold type subject titles throughout the disclosure text; in the second line, after the subject title "**Phone Return Policy/Early Termination Fee,**" is the following, underlined text: "no early termination fee if service cancelled within 15 days of purchase; a $150 early termination fee applies thereafter." The next to last line includes the phrase, "**Additional conditions and restrictions apply**." (*Id.*, Attach. 13 [San Francisco Chronicle, June 20, 2002]. Cingular's witness, Dr. Michael A. Kamins (Kamins), Associate Professor of Marketing, Marshall School of Business Administration at the University of Southern California,[20] was asked, hypothetically, whether such text was sufficient to advise consumers that agents might charge a higher ETF. He testified: "I don't know if there is confusion, but there is a potential for confusion, granted. Again, assuming that no other questions are asked [by the consumer]." (Tr. p. 1113.)

Cingular offered Kamins to counter CPSD's witness, Professor Anthony R. Pratkanis (Pratkanis), Professor of Psychology in the Department of Psychology, University of California, Santa Cruz,[21] whose prepared testimony concludes that Cingular's advertising and marketing materials promote a theme of unlimited

[20] Kamins' professional expertise includes strategic marketing and marketing research. He is the Director of the IBEAR International Business Consulting Project at USC, consults independently and has published research on such topics as two-sided advertising, price appeals in advertising, celebrity advertising, and rumor as a source of communication.

[21] Pratkanis is a social psychologist. His primary area of research and study is social influence and belief formation, including mass communications, deceptive advertising and economic fraud. He has published a large number of scholarly articles on these topics and is an editor and reviewer for various academic journals.

coverage and capacity that is deceptive, given the kinds of network problems described above.

Pratkanis' review focuses heavily upon the "When-ever, Where-ever" ad, which apparently ran in various newspapers in San Francisco, Los Angeles and San Diego over a two month period in the spring of 2002. He concludes that the ad is misleading because both the quoted language (which appears in a byline near the top of the page) and the four photographs above that byline (a beach volleyball game on an urban water front, a backpacker atop a summit, a yacht under sail, a rock climber approaching a ledge) communicate an impression of extensive coverage and capacity. He testified that this impression is reinforced by language in the three other ads attached to his prepared opening testimony and the selection of some thirty ads attached to his reply testimony – words and phrases such as "anytime minutes," "unlimited nationwide," "talk, talk, talk," in other words:

> …a whole series of words, phrases, and so forth, throughout the ads …. that convey that you can use your phone whatever [sic], wherever, any time, unlimited, static free, and so on … And whatever [sic], whenever is a – think of it as a label for all those words. (Tr. p. 1075.)

Pratkanis conceded that he did not select these ads from the thousands of ads that Cingular offered to make available; rather, CPSD's counsel chose these ads for him. He testified that a broader review was unnecessary because any other ads would either reinforce the deception or would present other themes, but not remove the prior deception.

CPSD's witness Pratkanis also testified that he was unaware that other wireless carriers run ads highlighting words such as "anytime," though when shown three ads by other wireless carriers, he admitted that such words appear

in them (e.g., Verizon Wireless—"anytime minutes" and "unlimited night & weekend airtime minutes"; AT&T Wireless—"unlimited night & weekend minutes," "anytime minutes" and "nationwide long distance"; Sprint PCS—"anytime minutes," "unlimited PCS to PCS calling," "unlimited night and weekend minutes," and "nationwide long distance"). (Ex. 509, 510, 511.)

Questioned about the message that advertisers attempt to communicate, Cingular's witness Kamins testified that advertisers sometimes are unaware that their advertisements create consumer misperceptions. He explained:

> For instance, Alaska Airlines always advertised that they were a quality airline with a lot of leg room and good food. And what happened was that they ended up with a perception by consumers that they were overpriced. (Tr. p. 1104.)

Pressed to state whether he would deem the "When-ever, Where-ever" ad deceptive, Kamins testified that he would have to know whether the consumer's service expectation was unmet and, then, whether there was an intent to deceive. Upon further questioning, he agreed that the ad might be misleading: "If there's an intent to lead consumers down the wrong path and there's an inconsistency between expectations and performance, yes." (Tr. 1120-1121.) Intent was important to his assessment as a marketing consultant, Kamins testified, though he recognized that legal requirements might be different.

Kamins' prepared rebuttal testimony concludes that price and value are the primary themes running through Cingular's advertising and promotional materials, if one examines the totality of the ads. Kamins testified that his opinion relies upon content analysis of a larger group of ads than Pratkanis examined. Like CPSD's Pratkanis, he also reviewed market research data, including the responses of focus group participants and market research studies generated for Cingular by several market research entities. Kamins interprets the

market research data to show that while consumers rate good coverage as the most important attribute of wireless service, price is the attribute most important to them in distinguishing between brands. He testified:

> To make an analogy, safety may be the most important attribute that you have in airlines, but people don't decide which airline to fly on the basis of safety—most people don't, even though it's the most important attribute. What's critical is the distinguishing attribute between brands, and I've said before that's price. (Tr. p. 1134.)

Pratkanis' placed a different emphasis on the marketing research, testifying that he agreed with a statement he had read that "[c]overage is the ante to get into the game, and without that you're not in the game … And then, after that … some items that come up … oftentimes less important on their list of drivers, such as price, the color of the phone, what kind of phone you're going to get become quite important … for a specific decision." (Tr. p. 1054.)

The difference between these carefully nuanced expert opinions is rather subtle. Notably, Cingular's Kamins does not suggest that consumers opt for low price in disregard of known, poor performance. And CPSD's Pratkanis admits that price is an important motivational factor for consumers. The common ground between their opinions is this: Market research suggests that consumers either rank adequate coverage first or they do not rank it at all, because they take it as a given.

Thus, it is not surprising that focus group reactions to Cingular's advertising actually exhibit diverse consumer reactions and interpretations. For example, Pratkanis' opening prepared testimony and Kamins' rebuttal both include, as an attachment, what appears to be the same version of a newspaper ad from Cingular's Spiderman advertising campaign, which Cingular subjected

to focus group tests. The newspaper ad, which apparently ran to coincide with the May 2002 release of the Spiderman film, is titled "Never pay long distance or roaming again" and depicts Spiderman swinging from a map of the United States. A spider web, with its center in the center of the country, overlays the map and the Cingular jack logo overlays the center of the web. A subtitle below the map reads "Covering the entire country is now simple. Superhuman abilities not required." (Ex. 38, Attach. 5; Ex. 405, Attach. 4.) Late-filed Exhibit 51 contains 17 verbatim responses from focus group participants who were shown some kind of advertising from that campaign and asked about its main message. Most, though not all, mentioned the cartoon character. Some focused on the rate/price associations, some on the interconnection associations, some apparently made no associations, and one thought the ad was targeted at children.

There is no evidence that Cingular's advertising was patently false. The question we consider in Section 6.1 of today's decision is whether the inferences of broad coverage and the lack of express disclosure of agents' ETFs constitute violations of law.

5.4 Customers' Complaints

The customer complaint evidence draws from seven different sources. We review each of them below.

5.4.1 Customer Witnesses

The record includes 49 verified customer complaints against Cingular. Most are in the form of declarations executed under penalty of perjury, though two customers testified at hearing (Joanne Coxum, who did not submit a declaration, and Matt Zumstein, who appeared to give live reply testimony). These 49 verified complaints comprise the 14 customer declarations attached to

the Staff Report as well as declarations or testimony from another 35 customers, 13 of them produced by CPSD and 22 by UCAN. Cingular deposed approximately 25 of these customers. The deposition transcripts or excerpts from them are also in the record, as attachments to rebuttal testimony by witness Michelle Rodriguez (Rodriguez), a Customer Relations Specialist in Cingular's Office of the President, and to reply testimony by CPSD's witness Patricia Esule (Esule) and by witness Michael Shames (Shames), UCAN's Executive Director.[22] The deposition transcripts largely corroborate the declarations, as do the computerized customer service records, referred to as "Telegence notes," which Cingular produced for most of these customers.

These 49 customers all complain about unjust and unreasonable rules and practices or about the resultant unjust and unreasonable service. Appendix 2 to this decision summarizes the pertinent details of their complaints in matrix form. Appendix 3 indicates by month and year when 47 of the customers began to experience service problems (two customers did not provide dates). The timeframe is March 1999 through January 2003, though only two complaints cite service problems in the outlying years (one in 1999 and one in 2003.) Twenty complaints target 2001, 16 target 2000 and 9 target 2002.

Several of these customer witnesses originally signed up for service with PBW between 1996 and 1999, but complain that service seriously degraded at some point in 2001. Most of the rest complain of no service at all in the places where they intended to use their wireless phones or of extremely poor service, including spotty coverage and significant capacity problems ranging from

[22] Rodriguez states that some of UCAN's witnesses were not available for deposition or did not show for scheduled depositions.

routinely dropped calls to frequent network busy signals. Some customers reviewed and relied upon the maps available in stores and marketing brochures, which, as we have seen, suggest wide, unbroken service areas in much of California, including the major metropolitan areas. Other customers explained to sales agents exactly why and where they intended to use wireless service, and were assured that Cingular could provide the coverage they needed.

CPSD's Zicker testified that he had participated in focus groups where people exhibited little understanding of wireless technology but "expected their wireless phone to work wherever they were, whenever they wanted it to." (Tr. p. 749.) Nevertheless, more than a dozen of these customer witnesses expressly recognize that wireless service is far from perfect. Many base their expectations on their own experiences with other carriers or their observations of other wireless users. Some, who switched to Cingular from a competitor in order to take advantage of a more attractive rate plan offer, returned to their former carriers as soon as they could get out of Cingular's contract.

Many customer witnesses report being told they would have to pay an ETF if they cancelled. A few had ETF payments reimbursed after lodging an informal complaint with this Commission. More than a dozen customer witnesses decided to wait out the contract period rather than pay the more costly ETF. Some accepted Cingular's offer of a monthly service charge credit or some other credit in return for service retention, an offer that often was not made until the customer made an informal complaint. Some customers decided against cancellation after being told that Cingular would soon be installing new cellular towers or other infrastructure to improve service quality in a given area. Some were told that upgrading their phone would remedy their service problems but

afterwards found themselves bound to a new one or two year contract (and an ETF) without any real service quality gains. Other customers canceled their service contracts and waged disputes with Cingular or its agents, sometimes for months, over the ETF and other charges such as activation fees and wireless phone costs, or had their disputed accounts sent to collection agencies.

Caceres provides another sworn account. Her Supplemental Report describes her unsuccessful efforts in February 2002 to cancel the contract for service she had signed three weeks earlier. Since her only use of the handset was a single call from the Commission's Los Angles offices, which resulted in a fast busy signal, the minutes of use on her account could not have been high. She reports that Cingular's customer service representative advised her to contact the store where she had purchased the handset and service. An employee there told her that "they had a no return policy and that I would be required to pay the early termination fee and any equipment charges. The employee further explained that it would be best if I found another individual to take over my contract so I would not be assessed any cancellation fees." (Ex. 2, p. 8.) This advice is consistent with the directives governing cancellation in Cingular's on-line "Ask Jack" program, a policies and procedures guide for customer service representatives appended to Caceres' reply testimony as Attachment 1.

The record reflects that the contract policy effective in California prior to May 2002 (no return/no refund/ETF), while standard within the Western Region, was by no means a national standard. In fact, as Attachment 3 to Caceres' reply testimony shows, Cingular's other regions had more customer-friendly policies, with return periods varying from three days to 30. Moreover, some of these other regions permitted returns regardless of the minutes of use on the customer's account, and some waived other fees besides the ETF.

Despite the written policy prohibiting refunds and imposing an ETF for early contract cancellation in the Western Region, Maureen Cook, Manager in Cingular's Office of the President (OOP), testified that Cingular actually followed a less onerous, "de facto" policy. According to Cook, the de facto policy allowed ETF waivers for customers with low usage who cancelled within the first 15 days of the contract period.[23] While the record reflects that such waivers did occur, it also suggests that Cingular defined low usage very narrowly, which would have reduced customer eligibility. As Esule points out, dropped calls and redials increase usage. So do frequent calls to customer service to report ongoing service problems. The reply testimony of CPSD's Esule's reviews the allegedly high usage of some of the customer witnesses and finds that when translated into average minutes per month or per day, the usage does not appear to be significant.[24]

Even if a de facto policy existed, there is no evidence that it actually benefited a large number of aggrieved customers. Several factors suggest the contrary. First, customers were not advised of the de facto policy at the time of sale. Therefore, only those customers who ignored (or for some reason were

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[23] Cook testified that during 2000-2001, approximately 37,000 Cingular customers cancelled their service (or "deactivated") within the first 15 days and that 97% of them did not pay the full ETF, although some paid a prorated amount or some other portion of it, including an agent's ETF. On redirect Cook clarified that the 97% figure also includes about 3,000 "write-offs," which elsewhere she explained is the term given to accounts 90 days in arrears for nonpayment. Cingular sends write-offs to a collection agency.

[24] For example, Teri Paulson's company's business usage (17 phones recording a total of 14,703 minutes over two months) averages 432 minutes per phone per month or 14 minutes per phone per day.

unaware of) Cingular's express, written ETF and no return / no refund policy would have called to request contract cancellation, particularly within 15 days. Second, Cingular concedes that not every customer ostensibly eligible for the ETF waiver received a waiver offer, given the number of different customer service representatives (some 1500) it employs. Third, many customers who attempted to cancel did so after 15 days—contacting Cingular in spite of the no return / no refund / ETF policy because of accumulated frustration with the poor quality of the service they had experienced. Fourth, the record contains compelling evidence that customer retention was paramount for Cingular, and large-scale contract cancellation is inconsistent with customer retention.

Cingular's corporate materials illustrate the importance of its customer retention policy. The "Ask Jack" program overview states: "All Customer Care Representatives handle calls from customers who request cancellation of service. It is every representative's responsibility to save customers by aggressively identifying issues and providing solutions, which reduce churn." (Ex. 3, Attach. 1, p. 1.) Among the save strategies that customer witnesses report are phone exchanges and upgrades tied to execution of a new service contract and assurances about forthcoming infrastructure improvements. Either easily could, and in some reported cases did, keep a customer under contract beyond 15 days.

Another document entitled "Cingular Promise: Return Policy," which appears to be an internal document generated just before the new, 15-day return policy took effect in May 2002, explains that the no return / no refund / ETF policy "… was agreed upon by all West GMs [general managers]. It makes the sale final and reduces churn. The idea is to sell to the right customer." (*Id.*, Attach. 3, p. (23)0710.) As we have already seen, churn was a problem for Cingular, and

the company commissioned marketing studies to assess the reasons for it. Though one might assume that selling to the "right customer" should be coupled with a policy of providing potential customers with sufficient information about network coverage to make the right choice, the evidence reveals that it was not.

Our review of the record notes the financial mitigation Cingular extended to a number of customer witnesses, often after the customer lodged a complaint. Cingular's mitigation measures include offering credits toward monthly service charges. We consider the impact of such mitigation in Section 6.2 of today's decision. However, mitigation does not negate the problems attributable to Cingular's no return/no refund/ETF policy and its disclosure failures; to the contrary, in certain cases it validates the complainants' allegations.

5.4.2 Informal Complaints to CAB

Between January 1998 and October 2002, CAB received over 1,000 informal complaints by letter or email about one or more of the issues raised in this OII, according to Caceres and CPSD's other primary witness in this area, Janeen Long (Long).[25] These informal complaints number either 1,057 (CPSD's contention) or 1,049 (Cingular's contention).[26] The nominal difference results

[25] The OII reports receipt of over 3,117 complaints since January 1, 2000. Caceres' Supplemental Report states that as of August 15, 2002, the complaint number had increased to 3,257. Upon review of these complaints, however, Caceres determined that only 811, or roughly one quarter, were related to the issues raised by the OII. Long located several hundred "related" complaints in addition to the 811.

[26] CPSD interviewed some of the CAB complainants and invited 27 of them to appear as witnesses in this proceeding, either by declaration under penalty of perjury to be used at hearing in lieu of testimony or by agreeing to testify in person. The parties' informal complaint totals include these 27 witnesses.

from the use of different categorization measures and other assessments by Long and Cingular's Cook, and by others working with them. Cingular contends that these numbers are still too high by about 300 because they should not include complaints made before January 1, 2000 or after June 6, 2002, the date the OII issued. CPSD responds that the OII specifically charged it to continue investigating complaints. Cingular also contends that the existence of informal complaints like these cannot be deemed proof of utility wrongdoing.

Long presents several matrices in her prepared testimony (opening and reply) that indicate the subject of an informal complaint, such as coverage problems (e.g., no reception), capacity problems (e.g., dropped calls), concerns about the ETF, or misrepresentation. The prepared rebuttal of Cingular's Cook also includes a matrix, which adds information such as the minutes of use accrued prior to cancellation of the contract and whether Cingular ultimately waived the ETF or offered the customers other credits. Cook's testimony stresses that Cingular waived nearly $118,000 in ETF charges and awarded more than $50,000 in other credits to these 1,000 + customers who sent informal complaints to CAB. She calculates that of the approximately 900 of these customers who cancelled their service, ultimately only 117 were charged the full ETF by Cingular and another 167, a partial ETF. Again, Cingular reports no information about the agents' ETF charges, and review of the matrix shows that some customers waited out part of the contract to avoid this additional ETF.

We agree with Cingular that absent corroborating information such as may be gleaned by further investigation to assess the credibility of the complainant and the nature and circumstances of the grievance alleged, an informal complaint to CAB should not be accorded the same weight as a declaration or affidavit, since an informal complaint is not a sworn statement.

However, Cingular's own evidence, such as Cook's matrix and the Telegence notes provided for a subset of the informal complaints, verify some of the pertinent facts alleged in them, such as the nature of the customer's concerns, the response provided by Cingular or its agents, and the corresponding dates. Evaluated in this way, these informal complaints tend to corroborate the sworn testimony of the customer witnesses. We need not address the parties' disagreement over the total number of "related" informal complaints, as our penalty calculation in Section 6.2 of today's decision is not assessed on a per customer basis.

5.4.3 UCAN Complaint Database

The 22 customer witnesses UCAN produced were drawn from 74 complaints.[27] The other 52 complaints, like the informal CAB complaints, are unverified. The complainants' names and contact information, and the specifics of their grievances (which repeat the coverage and capacity issues described above), were all made available to Cingular. The fact that some of the complaints were lodged with UCAN after Shames appeared in a televised news story about the Commission's issuance of this OII does not render the complaints suspect per se, though Cingular appears to suggest it should. More importantly, while Cingular challenges some of the details asserted by the complainants, it does not seriously undermine their basic allegations. While we do not accord these complaints the same weight as sworn testimony, we find them generally credible

[27] At times UCAN's prepared testimony refers to 145 complaints, but elsewhere states that upon review, only 75 were found to allege issues related to this OII. In response to Cingular's challenge that two of the complaints still concern issues unrelated to the OII, the reply testimony of UCAN's Associate Director, Jodi Beebe, concedes that one was incorrectly categorized, making the actual total 74.

and again observe that they tend to corroborate the sworn evidence offered by the customer witnesses.

5.4.4 UCAN's Deadzone Project

UCAN argues that its Deadzone Project provides additional proof of Cingular's coverage and capacity problems. Beebe's opening prepared testimony states that this "interactive" database that UCAN maintains "allows cellular customers in the San Diego area to submit the name of their service provider and where they have experienced dead zones in service coverage." (Ex. 200, p. 5.) UCAN reports that from August 31 to September 29, 2002, Cingular subscribers reported 487 dead zones, more than for any other carrier and about 200 more than the second ranked carrier. Cingular's Rodriguez, challenging the usefulness of the database, testified that when she pulled up UCAN's website on the Internet, she was able to enter her address in the Sierra Nevada foothills into the Deadzone Project database. Though Rodriquez testified that she does not have Cingular coverage at home, neither does she live in San Diego. While no doubt some (and possibly most) of the entries in the database represent San Diego area dead zones, we give little weight to the database in this proceeding.

5.4.5 Complaints to the Attorney General's Office

Attachment 6 to Long's reply testimony contains copies of letters and emails, some with attachments, complaining about Cingular that 12 different customers sent to the California Attorney General's Office. These complaints bear dates between November 2001 and February 2003. Three of the 12 customers also wrote to the Commission, but only one of them appears in the tallies of CAB complaints discussed above. Since the record contains no evidence

that directly corroborates the 11 new complaints, Cingular argues that these unverified allegations have no evidentiary value.

We disagree. We recognize that CPSD did not reveal these complaints until it distributed its reply testimony two weeks before hearing, and we do not know whether the Attorney General disclosed these complaints to Cingular before that time. We do not condone "sandbagging"; the obvious fairness issues aside, it tends to undermine useful record development, which actually disadvantages all parties. CPSD should have ensured that Cingular was aware of these complaints in order to permit timely and useful investigation of them. However, we note that over half of the complaint letters are addressed to Cingular, list Cingular as a recipient of a copy or attach copies of prior correspondence with Cingular—on balance, this suggests that Cingular knew or should have known that many of these customers were extremely dissatisfied. Nonetheless, Cingular provided no vindicating evidence at hearing with respect to these customers.

5.4.6 Cingular's Cross Streets Records

CPSD argues that some 144,000 "trouble tickets" generated by Cingular's Cross Streets software program beginning in early 2000 constitute another source of complaints and evidence Cingular's violation of law. Cingular's customer service representatives have been using this computer program since the first quarter of 2000 to create an electronic record, termed a trouble ticket, when a customer calls about network coverage and capacity problems such as no service, dropped calls or a continuous system busy signal. These calls come in on Cingular's "611" or "800"numbers, which provide a direct line to the customer service department. If a customer service representative is able to resolve a problem by providing information to the customer, the trouble

ticket is closed. Otherwise it is referred elsewhere within the utility until resolved (this is termed an escalation).

Attachment 6 to the opening testimony of CPSD's Long, titled "Cross Streets Query Results," contains a sample printout from Cross Streets that includes the following information for each trouble ticket in the sample: trouble ticket status, identification number, customer's phone number, date/time and nature of problem reported, location, phone manufacturer, etc. Long's opening testimony aptly describes Cross Streets as a "bridge between Customer Service and the Network Engineering Department, enabling customers to be informed about dead spots, areas of no coverage, and closest working and planned cell sites..." and also providing network engineers with real time reports about actual network problems. (Ex. 8, p. 11.) The rebuttal testimony of Cingular's witness Kathleen M. Lee (Lee), Cingular's Network Sales and Network Issues Manager for the West Region, explains that Cross Streets permits Cingular:

> to disseminate the information concerning each trouble ticket to the RF [radio frequency] engineering teams for explanation and/or resolution. The explanation and/or response is then uploaded by my team into the Cross Streets program so that CSRs [customer care representatives] have access to that information to relay to the customer. (Ex. 402, p. 5.)

Cingular strongly contests CPSD's characterization of these 144,000 plus trouble tickets as individual customer complaints for which the utility should be penalized. CPSD concedes that these trouble tickets have not been reviewed to eliminate duplication (which may occur when a customer makes

more than one call about the same problem, for example).[28] Cingular also argues that it would be both unfair and counterproductive for the Commission to levy a penalty for use of a tool with such clearly beneficial customer service applications.

Again, because we do not assess a penalty on a per customer basis, we need not address these contentions. As Cingular admits, one purpose of the software is to track network problems, and even a cursory review of the Cross Street printouts in the record indicates that many trouble tickets report network coverage and capacity problems of the kind described in other evidence.

5.4.7 Internet Petition Signatories

The Staff Report claims that 4,953 electronic signatures to a petition on an Internet website provide another credible source of complaints against Cingular. CPSD has included a printout of the petition, entitled "Cingular Wireless: Petition for Better Service" as Attachment G to the Staff Report. The petition purports to express the views of "the paying citizens of not just California, but ALL paying customers of Cingular Wireless" and the electronic signature portion appears to permit four entries: name, comments, a "yes" or "no" response to the question, "Are You Satisfied With Cingular Wireless?" and

[28] Attachment 10 to Long's reply testimony is an index of 83,127 trouble tickets CPSD received from Cingular after the initial installment of 132,960. A note at the end of the attachment states: "Of the 83,127 number the total number of trouble tickets for 'no service', 'dropped calls' and 'fast busy' is 11,453." (Ex. 9, Attach. 10, p. 8.) In other words, about 14% of the second group of trouble tickets concern OII-related issues**.** The evidence indicates that, with one exception, the initial group of trouble tickets all concern OII-related issues (the exception being about voicemail).

a text response to the question, "What Do You Want Cingular To Do?" (Ex. 1, Attach. G.)

While many of the comments briefly refer to the kinds of network coverage and capacity problems we have already seen, without more they do not establish a nexus between such problems and Cingular's no return/no refund/ETF and limited disclosure policies. Other comments have nothing at all to do with wireless service but instead include obscenities, sexual innuendo, and political commentary.

Also troubling is the relative anonymity of all of these electronic signatures. Some include only first names and none includes information (email addresses, telephone numbers, etc.) that permits even rudimentary verification that the signatories are or were Cingular customers in California. While some of the signatories may in fact have signed to register genuine concerns,[29] we have no choice but to assign very little evidentiary weight to the petition.

6. Discussion

6.1 Violation of the Public Utilities Code and D.95-04-028

Having summarized the voluminous record, we now address whether this record establishes, by a preponderance of evidence, that Cingular has violated the law.

6.1.1 Section 451 -- Just and Reasonable Service Mandate

The OII's Ordering Paragraph 1(a) and 1(b) assert, respectively, that Cingular violated § 451 by failing to comply with that statute's service mandate

[29] Cingular specifically attributes capacity problems in late 2001 to increased long distance calling at college campuses in California, and we note that a number of the petition signatories complain about network service at such locations.

and by establishing unreasonable rules. Section 451 requires that all public utilities not only charge just and reasonable rates but also "furnish and maintain adequate, efficient, just, and reasonable service … necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public." Section 451 further requires that the rules "affecting or pertaining to … service to the public shall be just and reasonable."

A review of decisions spanning several decades[30] reveals that, as relevant here, the Commission has interpreted § 451's reasonable service mandate to require, for example, that utilities provide accurate consumer information by a readily accessible means, refrain from misleading or potentially misleading marketing practices, and ensure their representatives assist customers by providing meaningful information about products and services.[31]

We find that the record in this proceeding establishes a corporate pattern and practice that resulted in unreasonable customer service in violation

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[30] Cingular's opening brief argues that in light of D.02-10-061's modification of the OII's Ordering Paragraph 1(c), the Commission may not consider its own precedents, that is, those prior decisions interpreting § 451. As originally worded, Ordering Paragraph 1(c) alleged that Cingular violated § 451 because it "failed to comply with standards" which are "described in previous Commission decisions" and in § 2896. D.02-10-061 struck the vague reference to "previous Commission decisions" in the charging paragraph. The vague reference suggested the existence of distinct rules, but did not identify them and therefore lacked the specificity required to allow Cingular to mount a defense to the charge.

[31] See *Higginbotham v. Pacific Bell*, D.02-08-069, 2002 Cal. PUC LEXIS 487 [ceasing white pages publication of local call pricing information, including toll call prefixes, unreasonable under § 451]; *UCAN v. Pacific Bell*, D.01-09-058, 2001 Cal. PUC LEXIS 914**,** ltd rehrg D.02-02-027, [misleading or potentially misleading marketing tactics unreasonable under § 451]; *First Financial v. Pacific Bell*, D.98-06-014, 1998 Cal. PUC LEXIS 489 [§ 451 requires utility to disclose to business customers all service options that meet customers' needs]; *National Communications Center Corp. v. PT&T Co.*, D.91784, (1980) 3 CPUC2d 672 [utility owes customers responsibility to provide all available and accurate information customers require to make intelligent choice between similar services where choice exists]; *H.V.Welker Inc. v. PT&T Co*, D.75807, (1969) 69 CPUC 579 [utility has duty to ensure its representatives inform business customers of options available to meet customers' needs].

of § 451 for the period January 2000 until May 2002,[32] when Cingular adopted a 15-day return/cancellation policy and abandoned its prior official policy. That policy required customers to pay an ETF if they wished to cancel their contracts before the expiration of the typically one- or two-year contract terms that Cingular offered. That policy was unjust, and therefore unreasonable, because customers were unable to determine whether they would be able to use Cingular's wireless service in the ways they desired until they attempted to make or receive calls—and no customer could do this without first signing a contract for service.[33]

Cingular concedes that its ETF was designed to avoid churn. Thus, in pursuit of market share, Cingular's prior official policy effectively trapped

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[32] Though the OII, which issued on June 6, 2002 does not clearly dictate the specific timeframe subject to investigation, it states that the issues "arise from past behavior." (OII p. 13.)

In fact, the preponderance of the evidence indicates that Cingular's network problems began to increase in 2000, concurrent with the rise that year in customer complaints. The OII relates that the Commission's Legal Division and CPSD jointly sent Cingular a cease and desist letter on September 28, 2001, approximately ten months before this OII issued, which asserted receipt of a large number of informal complaints against Cingular in 2000. As we note above, the declarations and sworn testimony from the 49 customer witnesses, who as a group are the source of the most credible individual complaints against Cingular, include 16 complaints in 2000 and 20 in 2001, but only one in 1999. Nine of the complaints allege problems in 2002, six of them in June and thereafter.

[33] Our finding is narrow and turns on the absence of any trial period, which we conclude was unjust and unreasonable, given the totality of the record. We do not find, for example, that a 15-day trial provides consumers with sufficient time to reasonably assess whether a wireless service is adequate for their purposes. As we explain in Section 6.2.4, we defer such determination to the pending, generic proceeding which is considering that issue.

customers into contracts for service regardless of whether Cingular could provide the coverage or capacity these customers sought. This is the crux of Cingular's violation of § 451. We focus upon the conditions under which Cingular imposed the ETF, resulting in an unjust rule and constituting unreasonable service. Our investigation does not seek, either directly or indirectly, to regulate Cingular's rates. We make no findings on whether imposition of an ETF is unreasonable per se. Neither do we make any findings about what amount, if any, constitutes a reasonable or unreasonable ETF.

All of the expert witnesses in this proceeding testified that wireless service cannot be guaranteed, given the physics of radio energy. Hilly or mountaineous terrain, large structures and thick walls may all prevent a wireless system from functioning at a particular location, as may other obstacles, natural and made-made. Cingular's Jacot testified that considering these vagaries, using the phone is the best way to determine if a wireless carrier can provide the service one requires. Thus, on this basis alone we could find that Cingular's prior official ETF policy was unjust—without even considering the state of Cingular's GSM infrastructure development at that time.

Other evidence in the record, on balance, reinforces our assessment that Cingular's no return/no refund/ETF policy was an unjust rule, and that application of this unjust rule resulted in unjust and unreasonable service, which violated § 451. As we discuss in Section 5 of today's decision (and discuss further in the subsection immediately following this one), Cingular knowingly created and pursued advertising, marketing and sales strategies that sought to secure market share by building Cingular's subscriber base and encouraging increases in minutes of use per customer regardless of the ability of Cingular's expanding GSM system to deliver service.

Caceres and the customer witnesses provide firsthand, verified statements and sworn testimony about the frustrations they experienced as customers of Cingular. These witnesses' stories are not equally specific nor do they relate equally egregious facts, but they are largely credible. Considering the totality of the evidence, we conclude that these customers' experiences were not unique but that many other customers were discovering, only after signing up with Cingular, that Cingular's service did not meet their needs. Cingular certainly knew from customers' complaints, what it already knew from its own engineers, that the demands on the Cingular system were far surpassing the system's ability to meet those demands. Instead of allowing new customers a "grace period," Cingular deliberately spurred demand that it could not meet, while continuing to impose its no return/no refund/ETF policy. Cingular's apparent hope was that these customers would prefer to put up with continued frustrations rather than incur an ETF of $150 (or more). The imposition of such fees under these circumstances was unjust and unreasonable.

Cingular argues that the complaint numbers need to be considered in the context of total customers, and that since its customer base expanded so greatly between 2000 and 2001, it is not surprising that the number of complaints also increased. Cingular calculates, for example, that the informal complaints to the Commission represent "a complaint rate measured only in the thousandths of a percentage point" and suggests that this measure indicates an enviable performance record. (Cingular opening brief, p. 8.)

It is a practical impossibility to interview all, or even a small fraction, of the customers of a large utility such as Cingular. The question for us here is whether the experience of the complaining customers is broadly symptomatic of Cingular's practice and the conditions on Cingular's system during the period

covered by the investigation. We find that it is. The growth that Cingular strove for and achieved occurred in each of California's major metropolitan areas, though it was not limited to them. Cingular adopted promotional policies for system-wide use in California and imposed its no return/no refund/ETF policy on a system-wide basis. The coverage and capacity problems likewise appear to be general. Cingular has provided no evidence that these problems were isolated and local. Neither has Cingular offered any persuasive evidence that the "silent majority" of its customers should be understood as indicating that Cingular's rules and practices were reasonable and resulted in reasonable service.

We recognize that there is evidence that Cingular waived part or all of its ETF (which did not include its agents' ETF) for an undetermined number of customers who happened to attempt to cancel their contracts within the first 15 days. We have already pointed out, in Section 5.3 of today's decision, some of the flaws with Cingular's assertion that this so-call "de facto policy" broadly supplanted its official policy. While these waivers do not negate the official policy, in Section 6.2 of today's decision we consider to what extent Cingular's waiver of some ETFs, or its other financial concessions to some customers, should be considered a mitigating factor and should reduce the penalty for violation of § 451.

In finding Cingular's ETF policy unreasonable, we also find its agents' and dealers' ETF policies unreasonable, and we hold Cingular accountable for those policies in accordance with the law of agency. Not only does the record as a whole establish that Cingular exercises substantial control over its agents and dealers when it chooses to, but Cingular's briefs concede that the law of agency governs its relations with its agents and dealers.

6.1.2 Section 451/Section 2896 – Required Disclosure

Ordering Paragraph 1(c) of the OII asserts that Cingular failed to provide adequate information to customers about its service, in violation of § 451 and § 2896. As relevant here, § 2896(a) requires all telephone corporations (including wireless carriers and resellers) to provide customers with "[s]ufficient information upon which to make informed choices among telecommunications services and providers."

In D.02-02-027, which granted limited rehearing of D.01-09-058, the underlying decision in *UCAN v. Pacific Bell, supra,* the Commission found no need to address definitely whether § 2896 is self-executing or "may only be implemented through rules adopted by the Commission." (D.02-02-027, *slip op.* at p. 7.) D.02-02-027 cites legislative history indicating the author's intent to codify minimum customer service standards, some already required by the Commission. The decision states:

> While section 2896 provides a statutory basis for the Commission's requirements regarding the prospective remedies imposed by [D.01-09-058], we need not rely upon section 2896 alone to impose penalties. When misleading or potentially misleading information is provided to customers regarding optional services, such practices clearly violate section 451's mandate that telecommunications carriers provide reasonable service. (D.02-02-027, s*lip op.* at p. 8.)

In fact, as we discuss in the preceding subsection, the Commission has long-required all public utilities—not solely telecommunications utilities—to provide enough information to customers to enable them to make informed choices about utility service.

We do not need to address Ordering Paragraph 1(f), which asserts that Cingular failed to establish statewide service quality standards in violation

of § 2896(c), since neither CPSD nor UCAN pursued this charge at hearing or in the briefs. In our pending rulemaking, R.02-12-004, filed on December 5, 2002, we are reviewing whether the Commission should revise the service quality standards which govern telecommunications carriers, and if so, how.

The record on disclosure establishes that Cingular provided very little information to potential customers in its advertising or marketing materials, or via its sales agents, that could assist such customers in assessing Cingular's coverage and capacity capabilities. CPSD and UCAN go further; they argue that both in advertising and at the point of sale, Cingular and/or its agents misleadingly portrayed the capabilities of Cingular's network.

As Section 5.2 of today's decision discusses, the maps Cingular placed in brochures and stores are not particularly helpful, since they are rate area maps, not coverage maps. In other words, they show where Cingular's rate plan applies and thereby strongly suggest concurrent coverage, but they do not identify known areas within those rate areas where coverage is problematic or nonexistent. Furthermore, Caceres and some customer witnesses report receiving coverage assurances from agents that proved to be erroneous. There is no evidence that Cingular provided sales people with training about coverage or supplied them with up-to-date coverage information in any systematic way. In fact, Cingular admits that any information more specific than the maps generally is unavailable at the point of sale. It must be obtained from customer service representatives, and even they do not have ready access to the information necessary to predict the actual likelihood of coverage at a given address, but must contact radio frequency engineers for it.

Were Cingular's disclosure practices a violation of law? Weighing evidence on the recognized imperfections in wireless systems generally against

evidence of the scope of Cingular's known network problems in 2001, including its inability to meet its own internal measurement standards at times, we find that Cingular's coverage disclosures were insufficient to permit customers to make informed choices about whether to contract for its service.[34] This failure does not meet the just and reasonable service mandate of § 451, and cannot meet an objective interpretation of the duty owed to customers under § 2896(a). We calculate the penalty impact of this violation in Section 6.2 of today's decision.

We do not reach the same conclusion for 2000 or 2002, however. The evidence of network problems in 2000, on balance, is less comprehensive and therefore less compelling; and in 2002, Cingular's network showed measurable improvement. Regardless, we think the evidence as a whole militates for clearer, more accurate customer disclosures on a prospective basis. The Commission may order prospective remedies in an adjudicatory proceeding even though it does not find a violation of existing law. Section 761, in relevant part, authorizes the Commission, after hearing, to revise "the rules, practices … or service of any public utility" and "by order or rule, [to] fix … the rules, practices … [or] service … to be observed … or employed."[35] We discuss such remedies further in Section 6.2 of today's decision.

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[34] We derive this conclusion from the totality of the record reviewed in previous sections of this decision. This record includes the marked spike in customer deactivations attributable to customers who initiated service between January and April 2001, and the steady number of customer complaints throughout 2002, including 20 of the 49 customer witnesses, many CAB complaints and numerous Cross Streets "trouble tickets."

[35] Cf. § 490(a), relied upon in *Greenlining v. Pacific Bell*, D.01-04-037, 2001 Cal. PUC LEXIS 384, which authorizes the Commission to revise tariff schedules "as it finds expedient."

CPSD and UCAN also argue that Cingular routinely failed to disclose its agents' ETFs to customers. Clearly, the newspaper ads we examine in Section 5.4 of today's decision do not disclose the existence of an agents' ETF, let alone the amount of that ETF, though they do provide notice that unidentified conditions/restrictions may apply in addition to Cingular's ETF. The evidence establishes that neither Cingular nor its agents attempted to spell out the full, potential cost of handset and service packages in advertising: Was this a violation of existing law? Kamins admitted that some customers might be confused. The sworn statements of customers, to the effect that they did not realize they had contracted with a Cingular agent until they tried to cancel their contracts and learned of the additional ETF, certainly suggests that some customers were confused. The confusion underscores the success of Cingular's "look and feel" marketing efforts and logo-driven advertising. It also suggests, however, that these customers did not read the contracts they were provided, since the contracts in the record not only require a customer's signature, but require the customer to initial the portion that discloses the applicable ETF.

We conclude that while Cingular's ETF disclosures could have been clearer, they do not violate existing law. The contracts contained sufficiently detailed disclosures, and customers had the opportunity to decline to execute the contracts. We reiterate our opinion that Cingular's legal culpability stems from imposing the ETF (and permitting its agents to impose an ETF) from day one of the contract period—that is, without providing any trial period. Nonetheless, considering the expert opinion in the record on the potential for confusion, as well as evidence that some confusion may have occurred, we believe clearer disclosures are warranted, both in advertising and at the point of sale, and should be ordered prospectively.

Likewise, we are not persuaded that the coverage implications in the newspaper advertising or other marketing brochures introduced in the record support a finding that Cingular and its agents engaged in systematic deceptive marketing and advertising practices. Certainly some of the ads, particularly the "Where-ever, When-ever" ad, suggest that Cingular's network could provide better coverage and capacity than many customers experienced. But this ad, run by a Cingular agent, appeared in newspapers in 2002, when Cingular's internal service quality measurements showed marked improvements over 2001. The ads touting "anytime minutes" and the like use language that has become common parlance for competitive rate plans offered by the wireless industry generally, not only by Cingular. Thus, in determining whether advertising utilizes puffery or outright deception, interpretation is key, and the focus group evidence in the record reflects that consumers formulate differing interpretations, just as experts do. We do not find that Cingular or its agents crossed the line and violated these statutes. Again, given a reasonable trial period, consumers who determined that Cingular's service did not live up to the advertised claims would have had a simple remedy—they could have cancelled service.

As we discuss in Section 6.1.1, the violation we find there centers on Cingular's failure to offer any trial period at all for the period from January 2000 through April 30, 2002. (In fact until May 1, 2002, Cingular's official policy expressly prohibited returns or refunds once the contract was signed.) The violation we find in this section turns on the deficiencies in Cingular's disclosures to customers, given known network problems in 2002 in conjunction with the continuing ETF policy.

6.1.3 Section 451/D.95-04-028 – Bundling Decision Compliance

Ordering Paragraphs 1(d) and 1(e) of the OII assert that Cingular violated § 451, §702 (which requires all public utilities to comply with Commission orders and rules) and Ordering Paragraph 1(5) of D.95-04-028 (which permits bundling of wireless service and equipment as long as "[p]roviders conform to all applicable California and federal consumer protection and below-cost pricing laws"). The OII ties the asserted violations of D.95-04-028 to allegations that Cingular violated the Song-Beverly Consumer Warranty Act, the Consumer Legal Remedies Act, the UCL and Com. Code §§ 2314-2316.

The record developed in this investigation provides insufficient evidence to support allegations by CPSD and UCAN that Cingular and its agents/dealers sold ineffective or defective wireless phones. The evidence on this issue is confined to the statements of some customer witnesses that Cingular's sales agents advised them to upgrade their handsets to get better service but that after the upgrades, service did not improve. These statements alone do not prove faulty handsets. Customers who have additional evidence may pursue equipment issues in court under applicable consumer protection statutes, if they choose to do so.

As discussed in Section 4.1 of today's decision, appellate court precedent holds that we lack jurisdiction to adjudicate the UCL or impose its penalties. We conclude, similarly, that we cannot adjudicate the Song-Beverly Consumer Warranty Act or the Consumer Legal Remedies Act or impose remedies those acts provide. Moreover, since the record fails to establish that Cingular and its agents sold faulty wireless equipment, further review of the Song-Beverly Consumer Warranty Act, the Consumer Legal Remedies Act or the

UCL cannot usefully inform our assessment of Cingular's culpability for poor service or disclosure failures under §§ 451 and 2896. We may examine such issues directly under §§ 451 and 2896, and in this decision we do so. The subsections above explain why we find Cingular's imposition of an ETF without any "grace period" to violate §§ 451 and 2896. By violating these statutes, which codify basic consumer protection principles, Cingular also has violated Ordering Paragraph 1(5) of D.95-04-028.

Finally, given the lack of evidence that Cingular and its agents sold ineffective or defective wireless equipment, we have no need to consider the implied warranty provisions in Com. Code §§ 2314-2316.

6.1.4 Other Issues

In their briefs, both CPSD and UCAN argue that Cingular has violated Bus. and Prof. Code § 17026.1(b), which requires cellular phone retailers to post signs advising that the phones may be purchased separately from service.[36] CPSD and UCAN also argue that Cingular's ETF constitutes an illegal liquidated damages charge under Civ. Code § 1671. Since the OII's Ordering

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[36] Bus. and Prof. Code § 17026.1(b) provides:

> (b) In each retail location, all retailers of cellular telephones shall post a large conspicuous sign, in lettering no smaller than 36-point type, that states the following: "Activation of any cellular telephone is not required and the advertised price of any cellular telephone is not contingent upon activation, acceptance, or denial of cellular service by any cellular provider."
>
> The sign shall be prominently displayed and visible to consumers and located in that area in each retail location where cellular telephones are displayed and purchased.

Paragraphs cannot reasonably be interpreted to provide notice of either allegation, we do not address these issues further. Either party could have sought to modify the OII and/or the Assigned Commissioner's scoping memo to include such charges, explaining the Commission's subject matter jurisdiction and the factual basis for the proposed amendment. Neither did so. Advancing new legal theories in briefs, after submission of the evidentiary record, is improper. Such tactics are not only unfair to defendants, because they do not provide adequate notice and an opportunity to prepare a defense, but they hinder the Commission's ability to ensure full and fair record development, which is necessary to sound decision making.

6.2 Remedies

6.2.1 Penalties

Having found Cingular in violation of law, § 2107 requires that we order a monetary penalty. The statute sets forth the parameters for maximum and minimum penalties as follows:

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

The monetary range mandated by § 2107 applies here, since the Public Utilities Code does not specify some other penalty for the violations we have found. Section 2108 provides, in relevant part, that "in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

We have found that from January 1, 2000 to April 30, 2002, Cingular's official ETF policy, which prohibited returns or refunds and required an ETF, was unjust and unreasonable and thereby failed to provide adequate, just and reasonable service to customers, in violation of § 451 and D.95-04-028. We also have found that Cingular's failure to disclose known network problems to customers during 2001 constituted violations of §§ 451, 702, 2896 and D.95-04-028 and rendered its official ETF policy even more egregious. Both violations constitute continuing offenses during the relevant time periods. Considering the record as a whole, we find that the penalty for each violation should be calculated on a daily basis.

As the Commission has stated before, "The primary purpose of imposing fines is to prevent future violations by the wrongdoer and to deter others from engaging in similar violations. Fines should, therefore, be set at a level within the range permitted by § 2107 that is sufficient to achieve the objective of deterrence without being excessive in light of the offending utility's financial resources." (*UCAN v Pacific Bell*, *supra*, *slip op.* at p. 80.)

In determining the size of the penalty, where one is levied, the Commission has held that the size of the fine should be proportionate to the severity of the offense and has applied the criteria adopted in D.98-12-075, which issued in the *Affiliate Enforcement Rulemaking.* These criteria include: (1) the severity of the offense; (2) the conduct of the utility (before, during and after the offense); (3) the financial resources of the utility; (4) the totality of the circumstances related to the violation; and (5) the role of precedent.

Severity of the offense includes the physical or economic harm caused to the victims or to the integrity of the regulatory process, unlawful benefits gained by the utility, and the number of violations. The conduct of the utility

includes the utility's actions to prevent the violation, detect the violation, and disclose and rectify the violation. With respect to the financial resources of the utility, the Commission considers both the need for deterrence and constitutional limitations on excessive fines. Consideration of the totality of the circumstances requires the Commission to look at the unique facts of each case, which may mitigate or exacerbate the degree of wrongdoing, in the furtherance of the public interest.

When we apply these criteria to the evidence in this proceeding, we find, first, that both violations are extremely serious. They each represent an ongoing corporate practice that failed to provide adequate, just and reasonable service to customers, both those who purchased service for personal purposes and those who purchased service for business use. Between January 2000 and April 30, 2002, this corporate practice harmed a large number of customers, inconveniencing them all, causing monetary losses for many and obliging some to deal with collection and credit rating agencies. We cannot determine the total number of customers harmed, but the evidence establishes that this number was not limited to some proportion of the 1.5 million customers Cingular added between early 2000 and the end of 2001. The evidence indicates that some number of additional customers who had established service before 2000 were also injured when they were persuaded to "upgrade" to new, fixed term contracts subject to ETFs.

Second, regarding Cingular's conduct, Cingular's briefs reiterate that it has done nothing wrong and that its network problems since 2000 constitute normal growing pains. But the evidence illustrates that during this period, Cingular's primary motivation in California, preventing churn in order to build market share, overshadowed its fundamental statutory duty to operate by just

and reasonable rules in order to provide adequate, just and reasonable service. Cingular cannot show that its waiver of its own ETF, or part of that ETF, for perhaps 30,000 to 35,000 customers who happened to complain about service within the first 15 days, or its offer of service charge credits and the like to other customers, adequately redressed the harm its official ETF policy caused. As we discuss in Section 5.3 of today's decision, among other things, Cingular cannot show that this "de facto" waiver policy was communicated effectively to customer sales representatives or to customers, or was applied in a uniform, nondiscriminatory manner. Regardless, Cingular admits that it generally did not waive ETFs for customers after 15 days' time. Moreover, the sporadic waiver of Cingular's own ETF did not affect its agents' ETF, which Cingular asserts that it could not waive.

Third, the record does not reflect what portion of Cingular's revenues from January 2000 through April 2002 is attributable to its official ETF policy, and we have no means to estimate the sum. The record does reflect that some customers paid an ETF or part of an ETF; the record also reflects that some customers decided it would cost them less to pay monthly service charges until the contract term expired. The record also reflects that for year-end 2002, Cingular reported corporate revenues of $14,746,000,000. Nationwide, Cingular had approximately 22 million customers at that time. Thus, the nearly three million in California represented about 14% of Cingular's customer base, and most likely were the source of about 14% of its revenues.

Regarding the remaining criteria for assessing penalties (totality of the circumstances and precedent), several recent Commission decisions that impose a sizeable penalty on a major telecommunications utility are instructive. *In re Qwest Communications* imposes a fine of $20,340,000 for 8,362 separately

established slamming and cramming offenses perpetrated on utility customers ($5000 for each slamming offense and $500 for each cramming offense). (D.02-10-059, rehrg denied D.03-01-087.) In another proceeding, a consolidation of *In re Pacific Bell, Pacific Bell Internet Services and SBC Advanced Solution*s (I.02-01-024) with a complaint against Pacific Bell (C.02-01-007), the Commission adopted the parties' proposed settlement, which included a penalty of $27 million for an estimated 30,000 to 70,000 offenses related to DSL billing and reporting errors. The Commission noted, "if Respondents were penalized $500 for each offense, the total penalty would equate to 54,000 offenses, well within the range indicated." (D.02-10-073, *slip op.* at p. 15.)

UCAN v. Pacific Bell, the marketing abuse decision referenced *supra*, closely mirrors this proceeding in that it finds two continuing violations based upon an ongoing corporate practice over about two years, rather than specifically enumerated offenses. The rehearing decision, which reduces the total penalty by shortening the applicable period but does not alter the daily fine, orders a penalty of $15,225,000, calculated at $17,500 per day for each offense, for a total of $35,000 per day. (D02-02-027, *slip op.* at p. 15.) The Commission determined that Pacific Bell's unlawful conduct was particularly egregious because it concerned the marketing of basic telephone services to captive residential customers, including immigrant and low income Lifeline customers and because the conduct closely resembled marketing improprieties for which the Commission had fined Pacific Bell $16,500,000 in 1986.[37]

[37] See D.86-05-072, (1986) 21 CPUC2d 182.

UCAN v. Pacific Bell provides a very useful precedent. Considering Cingular's somewhat lower California revenues and the fact that, unlike *UCAN v. Pacific Bell,* we are not presented with a history of prior violations, we conclude that a somewhat lower daily penalty is appropriate under the facts established in this proceeding. We find that a total penalty of $12,140,000 is warranted considering the totality of the circumstances, which we relate in Section 5 of today's decision. We calculate the penalty as follows:

- For the period January 1, 2000 to April 30, 2002 (849 days), $10,000 per day, or $8,490,000.
- For the period January 1, 2001 to December 31, 2001 (365 days), an additional $10,000 per day, or $3,650,000.

Cingular shall pay this penalty, $12,140,000, to the State of California General Fund within 45 days after the date this decision is mailed to the service list. Proof of payment shall be filed and served on the service list and shall be provided to the Executive Director within five days of payment.

6.2.2 Reparations

Considering the passage of time and the complicated facts, we cannot fashion additional remedies to both identify and make whole all customers who would have cancelled Cingular's service within 15 days if such an option had been disclosed to them at the time they contracted for service. However, we can devise measures to limit Cingular's unjust enrichment from the partial or full ETF payments it received for contract cancellations prior to May 1, 2002, the effective date of its present policy. Cingular shall return, with interest, any sums received for early cancellation of contracts entered into between January 1, 2000 and April 30, 2002, to the customers who paid those sums. Cingular shall also review ETF receipts for contract cancellations beginning May 1, 2002, and shall determine if any sums were paid for contract cancellations from day 1 through

day 15 of the contract period. If so, such sums shall be reimbursed, with interest, to the customers who paid them. Likewise, since Cingular is responsible for its agents' ETF collections, it shall also reimburse customers for ETF payments to agents prior to May 1, 2002 and for any improper ETF collections after May 1, 2002.

We direct Cingular, within 75 days of the mailing of this decision, to file a refund plan for accomplishing these customer reparations, to serve this compliance filing on the service list, and to provide a copy to the Director of the Commission's Telecommunications Division so that the Division may monitor implementation of the plan. Cingular shall undertake in good faith to locate all persons entitled to reparations. The refund plan shall include the methodology for locating such customers (for example, use of an independent claims administrator or an internet-based locator service) and an estimate of the amount of reparations due. Any unpaid reparations shall escheat to the State of California General Fund.

6.2.3 Useful Service Disclosures

In Section 5.2 of today's decision, we describe the rate area maps that Cingular includes in its stores, marketing brochures and other advertising. These maps provide little useful information to customers—and no information about the relative likelihood of outdoor, in-vehicle and in-building coverage. The record reveals that Cingular (like all wireless carriers) has detailed engineering information that can predict, typically with 95% accuracy, the likelihood that these services will be available. Cingular collects some of the data itself but also uses other entities, such as drive test companies, to collect and verify data.

Cingular's engineering maps, such as Attachments 4 through 13 of Ex. 17, generally show cell locations, use color-codes to depict predicted coverage and include a legend that specifies the radio frequency sensitivities of each color-code. Cingular also has extensive data on other service issues, like the frequency of dropped calls. The record of this proceeding demonstrates that wireless providers such as Cingular know much more about the coverage and capacity of their own networks—and about the networks of their competitors—than they care to share with the public.

In fact, a customer has no ready means to obtain accurate, detailed coverage and capacity information. Information of this kind is unavailable to customers at the point of sale, either directly or through sales agents. Our review of the record in this proceeding persuades us that customers should have access to more information than they can obtain at present. While the existence of a trial service period provides a necessary and basic element of consumer protection, the trial is not free if a dissatisfied customer incurs various fixed charges or penalties. A trial does not protect customers from the out-of-pocket expenses of associated activation fees, for example.[38] If customers had better information, they could better assess whether to risk the trial.

CPSD and UCAN argue that the Commission should order Cingular to make its engineering maps available to customers over the Internet. Cingular contends that such a requirement would be unfair and would cause it

[38] Customer witness Coxum, who contracted for service in late August 2002 but returned her phone and cancelled service only a few days later, spent several months contesting the activation fee. She testified that she did not object to paying for the limited airtime used and that once the $35 activation fee was waived, she paid the balance of the bill.

competitive harm, since no other wireless carriers must disclose their engineering maps. Cingular also contends that the maps would be difficult for many customers to interpret and would require detailed, complex disclaimers. However, the back-of-the-envelope estimate prepared by Cingular's witness Cruz suggests it could take a relatively modest $1,510,000 to develop and maintain a software system to create and constantly update the maps for all six Cingular regions. Cruz said this estimate, which represents a company-wide, national cost, is inadequate for budgeting purposes, since among other things, third-party software license fees could be much higher than the $300,000 he factored into his calculation. Cruz's estimate anticipates a six-month lead-time to develop the software system.

This record does not supply a comprehensive assessment of the range of methods for disseminating useful coverage and capacity information, the comparative utility costs and the associated timelines. There is no analysis, in additions, of whether disseminating engineering maps poses increased security risks. There is no consideration of whether maps—color-coded to show likely outdoor, in-vehicle and in-building coverage but without specific radio frequency disclosures or cell site location demarcations—could be produced to satisfy consumers' informational needs without jeopardizing utilities' competitive concerns. There also is no discussion of whether UCAN's proposal to establish a 1-800 number for customer coverage information would provide a more inexpensive and user-friendly alternative.

Having found certain of Cingular's rules and practices to be inadequate, § 761 authorizes us to prescribe new rules and practices to replace those we have rejected. However, a generic rulemaking, R.02-12-004, the Telecommunications Service Quality Rulemaking, presently is examining service

quality standards for all telecommunications carriers, including wireless providers. Therefore, we will defer resolution of the prospective standards for customer notification of coverage and capacity to that pending proceeding. We anticipate a solution applicable to all wireless providers, which will provide consumers with the information they need to make an informed choice among those providers.[39]

6.2.4 Other Remedies

Likewise, we have no need to duplicate the scope of Commission decisionmaking in R.00-02-004, the Consumer Bill of Rights and Consumer Protection Rules proceeding, which was opened to examine a number of consumer protection requirements for application to all telecommunications providers, including wireless providers. In response to the record developed in that rulemaking, the Commission recently adopted General Order (GO) 168, entitled "Rules Governing Telecommunications Consumer Protection." (D.04-05-057.) Rule 2 addresses marketing practices. Among other things, Rule 2 prohibits any offers to customers that are untrue, deceptive or misleading and requires that contacts and certain other documentation be written in a minimum of 10-point type. Rule 3 governs service initiation and changes. With respect to contract cancellation, Rule 3 provides that subscribers may cancel without termination fees or penalties within 30 days after service is initiated. Rule 3 does

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[39] The March 7, 2003, *Assigned Commissioner And Administrative Law Judge's Ruling Denying In Part And Granting In Part Motion To Suspend* asks for comments on existing service quality standards and also states, "Parties may also comment on service quality issues not addressed in Exhibit A or the OIR." (Ruling, *slip op.* at p. 4.) UCAN, among other parties, has filed comments urging the examination of wireless coverage and capacity issues.

not relieve the subscriber from usage fees or recurring charges prior to cancellation.

7. Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner and Jean Vieth is the assigned ALJ in this proceeding.

8. Appeals of POD and Briefs of the Amici Curiae

The appeals and the briefs of the amici curiae fall into three groups. Cingular argues that the POD is factually and legally erroneous and must be rejected in its entirety. Two of the amicus briefs, filed by the CCAC and the Joint Utilities, side with Cingular, though CCAC and the Joint Utilities purport to take no position on the facts unique to this proceeding.

In their "limited appeals" of the POD, CPSD and UCAN argue that the POD is too conservative in its analysis and its reach. These parties urge the Commission, after reweighing the evidence, to find additional violations. UCAN contends that the Commission should find Cingular's failure to disclose network problems was recurring during the entire period at issue, not just 2001, and should sanction Cingular for inaccurately advising specific customers that network improvements would soon be in place to solve various coverage and capacity problems. CPSD contends the Commission should assess the record against the requirements of the UCL and other consumer protection laws discussed in Section 4.1.2. UCAN and CPSD both contend that the Commission should find Cingular engaged in deceptive advertising. UCAN proposes the Commission order $4,850,000 more in penalties; CPSD does not seek additional penalties, but argues the record would support an increase, should the Commission choose to order a greater fine.

The two other amicus briefs, filed by CWA and TURN/CU, support the POD. They argue that the POD's legal and policy analysis is correct and urge the Commission to adopt the POD.

We examine several major contentions more closely below. We do not address the federal preemption arguments raised in Cingular's appeal and CCAC's brief, since we have previously reviewed and rejected the arguments these pleadings reiterate. (See Section 4.1.1 of this decision, which references our interim opinion in this proceeding, D.02-10-061). Under the theories Cingular and CCAC advance, the federal prohibition on state regulation of wireless providers' rates or terms of entry would prevent any meaningful exercise of the consumer protection authority reserved to the states.

8.1 § 451 Challenges

Cingular and the aligned amici curiae base their primary challenge on the POD's allegedly unprecedented reliance upon § 451 as a basis for levying penalties and ordering reparations. Cingular and these amici contend that § 451's just and reasonable service mandate is constitutionally too vague to support such remedies or reparations unless linked to violation of other, more specific law, whether statute, rule or tariff. (See Section 6.1.1 of this decision, which quotes the relevant portions of § 451.) They also argue that Cingular had no notice, actual or constructive, that its behavior might run afoul of § 451.

As the amicus brief of TURN/CU points out, the void for vagueness argument appears to conflict with the position Cingular and other wireless carriers have advanced in R.00-02-004, the pending Consumer Bill of Rights and Consumer Protection Rules proceeding. In that rulemaking, they have opposed the adoption of detailed consumer protection rules, arguing that existing general

rules provide sufficient regulatory control, in conjunction with market forces and voluntary efforts by the wireless industry.

Apart from the apparent conflict between Cingular's position here and in R.00-02-004, the void for vagueness challenge is without merit. The Commission rejected a similar challenge in *Carey v. PG&E*, D.99-04-029, 1999 Cal. PUC LEXIS 215. In that case, a complaint filed after an explosion at a multi-unit apartment building, the Commission found the utility had violated § 451's safe service obligation by following an internal company policy of authorizing fumigation contractors, rather than trained utility employees, to terminate natural gas service as part of building fumigation projects. The Commission's rationale in *Carey* is apt here and we quote it in pertinent part:

> Section 451's mandate that a utility provide "reasonable service, instrumentalities, equipment and facilities" as necessary to promote the public safety is constitutional and not violative of due process. (fn omitted) There are no cases directly involving the constitutionality of Section 451, but California courts have found similar terms under comparable statutory schemes constitutional. The instant case is analogous to Chodur v. Edmonds (1995) 174 Cal.App.2d 565. In Chodur, the Court of Appeal held that the term "dishonest dealing" in Bus. & Prof. Code 10177(j) was not unconstitutionally vague. *Id.* at 570. While lacking an exact definition to cover every circumstance, the Court of Appeal explained that the term "dishonest dealing" still possessed "a common understanding." *Id.* The Court of Appeal also noted that "'[i]t would be almost impossible to draft a statute which would specifically set forth every conceivable act which might be defined as being dishonest.'" *Id.*; quoting Wayne v. Bureau of Private Investigators and Adjusters (1962) 201 Cal.App.2d 427, 440.
>
> Similarly, it would be virtually impossible to draft Section 451 to specifically set forth every conceivable service, instrumentality and facility which might be defined as "reasonable" and

> necessary to promote the public safety. That the terms are incapable of precise definition given the variety of circumstances likewise does not make Section 451 void for vagueness, either on its face or in application to the instant case. The terms "reasonable service, instrumentalities, equipment and facilities" are not without a definition, standard or common understanding among utilities. Commission cases reviewing utility conduct frequently require that the conduct meet a standard of reasonableness. For example, in ratesetting proceedings, the disallowance of utility expenses, whether from contracts, accidents, or other sources are reviewed under a reasonableness standard. *See* Re Southern California Edison Company (1994) 53 CPUC2d 452, 464.
>
> Accordingly, Section 451's mandate that a utility provide "reasonable service, instrumentalities, equipment and facilities" is not an unconstitutionally vague standard with which to assess a fine or penalty. (*Carey*, slip. op. at pp. 13-14.)

Like the Commission in *Carey*, the POD recognizes that application of § 451's "reasonable service" requirement involves fact-specific analysis. The Commission is an expert trier of fact (unlike a jury) and uniquely qualified to undertake such review. It is impossible to list or otherwise identify every utility action or omission that might fall afoul of § 451 and the law does not require the Commission to do so.

The record of this investigation reveals a corporate operating practice that objectively resulted in unjust and unreasonable customer service. It is undisputed that Cingular (and its agents) imposed an ETF for early termination of one- and two-year contracts—and thus, did not allow customers any trial—even though Cingular recognized that using the phone was the most effective way for customers to determine whether Cingular's service met their needs. The critical importance of a trial is underscored by the record's comprehensive

showing that Cingular did not provide customers with alternative, readily accessible and accurate means to assess the adequacy of service. At hearing, for example, Cingular admitted that the maps and brochures provided to customers who asked about coverage were actually rate area maps, not coverage maps, and did not accurately depict coverage. As a result of the aggregate effect of these multiple factors, many customers were trapped into unsatisfactory wireless service contracts or had to pay to be relieved from them.

At oral argument, Cingular suggested that the ETF provisions governing its one- and two-year contract plans were not unfair because customers had the option of choosing a prepaid plan instead. (Tr. pp. 1448-1449.) The record is silent on such a prepaid option and Cingular's marketing of it. Moreover, the existence of such an option, without a full and clear explanation of the coverage issues that might incline a customer to prefer that option over Cingular's contract plans, does not mitigate the objective unfairness of the contract plans, viewed in terms of the record as a whole.

Yet, in spite of the extensive record (on which it allegedly takes no position), CCAC contends that Cingular's conduct never "was so objectively improper that it fairly could be deemed to have put Cingular on notice" that such conduct might be sanctioned. (CCAC amicus brief, pp. 3-4.) The Joint Utilities (who likewise purport to take no position on the extensive record) go even further, asserting that "the POD represents a serious misuse of regulatory power" and that "if the Commission were to approve the POD, every utility subject to the Commission's jurisdiction will be subject to huge monetary penalties for conduct that the utility at the time had no reason to believe—or even to suspect–was prohibited." (Joint Utilities amicus brief, p.2.) These contentions ignore the guidance provided by *Carey* and the numerous other

Commission decisions cited in Section 6.1.1. No utility, whether one operating in a more traditional, tariffed environment, or one operating in a partially deregulated environment, should expect to be insulated from the obligation to treat its customers fairly.

Cingular also contends that neither the September, 2001 cease and desist letter nor the June, 2002 OII provide actual notice that Cingular's ETF policy might be held unreasonable for lack of a trial or "grace period." We disagree. Both documents clearly constitute notice that the Commission was receiving consumer complaints about Cingular's imposition of an ETF, and that the complaints put at issue the legality of the practice. As Cingular admits, the ETF was imposed without any "grace period" until May 1, 2002, when Cingular revised its corporate policy to permit a 15-day trial during which service could be cancelled and a phone could be returned without incurring an ETF. Thus until Cingular changed its ETF policy in 2002, Cingular's imposition of an ETF necessarily meant imposition of an ETF without a trial.

8.2 § 2896 Challenges

Cingular and the aligned amici challenge the POD's finding that during 2001, Cingular's lack of disclosure of known network problems, coupled with aggressive advertising and marketing, violated §§ 451 and 2896. They assert that the POD does not define what Cingular should have disclosed, that the POD misconstrues evidence on the status of Cingular's network in 2001, and that the record contains little comparative information on the performance of Cingular's wireless competitors during 2001. On the basis of these assertions, they conclude that the POD's analysis is fatally flawed.

These assertions ignore the fact that the record clearly illustrates the kinds of coverage information customers need and undisputedly establishes that

Cingular chose not to provide that information (see Sections 5.2.1 and 5.4); instead Cingular pursued customer growth that its network often could not accommodate.

UCAN succinctly notes:

> Cingular's voluminous appeal obscures one key fact about the POD: Each and every violation found in the POD is fundamentally based on Cingular's own admissions about the limited information it provides to customers, its own admission about the state of its network, and it own admission about specific choices Cingular made about treating customers in California. (UCAN Response to Cingular Appeal, p. 1.)

The contention that the POD should have identified specific disclosure requirements is not well taken, given the pendency of the two, generic rulemakings to which the POD properly defers, R.00-02-004 (the Consumer Bill of Rights and Consumer Protection Rules proceeding) and R.02-12-004 (the Telecommunications Service Quality Rulemaking).

With respect to network problems during 2001, Cingular attempts to discount its own admission that it failed to meet internal measurement standards for dropped calls, etc. during part of that year, and argues such evidence cannot support a penalty. However, Cingular's arguments are misplaced, since the POD does not base the penalty on that evidence, alone. A more comprehensive review of the record identifies numerous examples of network problems, derived from multiple, credible sources. While Cingular's network problems spanned the entire review period (see, for example, Appendix 3), the record as a whole demonstrates that these problems spiked in 2001. We agree, however, that Finding of Fact 3 could better summarize this evidence, which includes witness testimony, customer complaints, market research prepared for Cingular, internal communications between Cingular employees, and Cingular's admitted inability

to meet its own internal measurement targets during parts of 2001. We have revised the finding to avoid any inference that the penalty is based primarily on failure to meet internal measurement standards.

Cingular faults the evidentiary record for a lack of comparative data. Cingular's contention misses two critical points, however. First, the Commission issued this OII to examine Cingular operations, practices and conduct based on probable cause that Cingular's activities were not in compliance with law. The activities of other wireless carriers, whether lawful or unlawful, are not determinative of this OII. Second, Cingular was not barred from offering comparative evidence in its defense during the hearings. In fact, when Cingular introduced copies of competitors' newspaper advertisements during its cross-examination of CPSD's witness Pratkanis, the ALJ overruled objections to use of these documents and subsequently received them in evidence as Ex. 509, Ex. 510 and Ex. 511.

8.3 Miscellaneous Corrections

We have corrected several clerical errors identified by CPSD and have revised the text of the POD in several places to make the text clearer and more complete. In response to UCAN's request, we have revised the reparations discussion and associated ordering paragraph, etc., to make the language more precise. We decline to reweigh the evidentiary record as CPSD and UCAN request.

Findings of Fact

1. From January 1, 2000 through April 30, 2002, Cingular's official corporate policy in California prohibited refunds or returns after execution of a contract for service and imposed an ETF of $150 for early contract cancellation; some of

Cingular's agents imposed an additional ETF of as much as $400, which increased the total ETF to as much as $550.

2. Cingular concedes that the best way for a customer to assess whether wireless service meets that customer's needs is to use the phone.

3. Cingular's customer growth and an increase in minutes of use per customer between January 2000 and the end of 2001 led to ongoing network coverage and capacity problems during that period and into 2002. The record as a whole demonstrates that these problems were greatest during 2001.

4. In spite of known network problems, in 2001 Cingular advertised and marketed its services heavily without disclosing its network problems to customers and without modifying its official no return/no refund/ETF policy.

5. At the point of sale, customers cannot obtain detailed coverage and capacity information, including the likelihood of outdoor, in-vehicle or in-building coverage at a given location or within a larger area, since Cingular's sales agents do not have such information and Cingular's maps show rate areas, not coverage areas.

6. Cingular's customer service representatives do not have ready access to detailed coverage and capacity information, including the likelihood of outdoor, in-vehicle or in-building coverage but must contact radio frequency engineers to obtain it, which takes a day or two at a minimum.

7. Cingular's capital investment in its California infrastructure between 2000 and 2002 continued to lag behind infrastructure needs. Cingular invested $1.9 billion, but only 20% was spent in 2000, 30% in 2001 and the final 50%, in 2002.

8. Cingular promotes a consistent image for its exclusive agents so that all such agents' stores or kiosks have the same "look and feel." Cingular permits

agents and dealers to use its "Cingular Jack" logo and other brand identification in advertising and marketing materials.

9. Once Cingular determined to implement its new ETF policy, effective May 1, 2002, it required agents and dealers to execute an "Amendment to Agency Agreement Re Phone Return Policy," which requires such entities to honor the new policy as of that date.

10. Cingular concedes that the law of agency applies to its relationships with its sales agents.

11. Caceres and the customer witnesses provide firsthand, verified statements and sworn testimony about problems with Cingular's service. These witnesses' stories are not equally specific nor do they relate equally egregious facts, but they are largely credible.

12. Cingular's evidence lends credibility to and, in some cases, validates, portions of other, albeit unverified, data sources offered by CPSD and UCAN to document customer dissatisfaction with Cingular.

13. Cingular waived part or all of its ETF (which did not include its agents' ETF) for an undetermined number of customers who happened to attempt to cancel their contracts within the first 15 days, but the record includes little persuasive evidence that most eligible customers benefited from this policy.

14. The record includes no persuasive evidence that Cingular and its agents sold ineffective or defective wireless equipment.

15. Reparation of ETF payments to customers who can be identified will help to make them whole and will limit Cingular's unjust enrichment from ETF receipts.

16. Wireless service cannot be guaranteed, given the physics of radio energy, but Cingular (like all wireless carriers) has detailed engineering information that

can predict the likelihood of outdoor, in-vehicle and in-building coverage, typically with 95% accuracy.

17. This record does not supply a comprehensive assessment of the range of methods for disseminating useful coverage and capacity information, the comparative utility costs and the associated timelines. These issues should be considered R.02-12-004, the Telecommunications Service Quality rulemaking.

18. Some customers were confused by the disclosures in Cingular's advertising and marketing. D.04-05-057, the recent interim decision in R.00-02-004, the Consumer Bill of Rights and Consumer Protection Rules proceeding, requires that certain documentation use a minimum of 10-point type.

19. A 15-day ETF policy, such as Cingular's present policy, may not provide sufficient time for many consumers to reasonably test a provider's service, particularly considering the lack of information about coverage and capacity available to consumers. D.04-05-057, the recent interim decision in R.00-02-004, the Consumer Bill of Rights and Consumer Protection Rules proceeding, requires that wireless providers (and other telecommunications carriers) permit subscribers to cancel service without termination fees or penalties within 30 days after the service is initiated.

Conclusions of Law

1. The record establishes, by a preponderance of the evidence, that Cingular has committed the violations described in Conclusions of Law 2 and 3.

2. From January 1, 2000 to April 30, 2002, Cingular's official no return/no refund/ETF policy constituted an unfair rule resulting in a corporate pattern and practice that failed to provide adequate, just, and reasonable service to customers, in violation of § 451 and D.95-04-028.

3. During 2001, Cingular's corporate pattern and practice of failing to disclose known network problems to customers resulted in a failure to provide adequate, just, and reasonable service, in violation of § 451, 702, 2896 and D.95-04-028.

4. Pursuant to §§ 2107 and 2108 and Commission precedent, for the violations of law for the period January 1, 2000 to April 30, 2002 (849 days), Cingular should pay a penalty of $10,000 per day, or $8,490,000.

5. Pursuant to §§ 2107 and 2108 and Commission precedent, for the violations of law for the period January 1, 2001 to December 31, 2001 (365 days), Cingular should pay a penalty of $10,000 per day, or $3,650,000.

6. Under the law of agency, Cingular is legally responsible for ETFs charged by its agents between January 1, 2000 and April 30, 2002.

7. In order to avoid unjust enrichment to Cingular and provide reasonable reparation to as many deserving customers as possible, Cingular should be required to reimburse, with interest, those customers who paid Cingular or its agents partial or full ETFs for early cancellations of contracts entered into between January 1, 2000 and April 30, 2002. Cingular also should be required to reimburse, with interest, any customers who paid Cingular or its agents partial or full ETFs after April 30, 2002 for early contract cancellations that occurred between day 1 and day 15 of the contract period. Cingular should prepare and file a refund plan in conformance with today's decision.

8. Binding judicial precedent holds that the Commission lacks jurisdiction to adjudicate the UCL in the Business and Professions Code; accordingly, the Commission lacks jurisdiction to order remedies under the UCL.

9. Because the Song-Beverly Consumer Warranty Act and the Consumer Legal Remedies Act, both codified in the Civil Code, require aggrieved persons

to bring actions in the courts for redress, we lack jurisdiction to adjudicate them or order remedies under them.

10. Since the record does not establish that Cingular or its agents sold faulty wireless equipment, we need not resolve whether the Commission has jurisdiction to adjudicate the implied warranty provisions in Com. Code § 2314-2316.

11. Since the record does not establish that Cingular or its agents sold faulty wireless equipment, and since we can assess Cingular's culpability for imposing an unjust and unreasonable ETF and for disclosure failures under §§ 451 and 2896, we do not need to inform our decision making by considering the Song-Beverly Consumer Warranty Act, the Consumer Legal Remedies Act or the UCL. Our decision not to consider those acts does not violate *Northern California Power Agency v PUC*, 5 Cal.3d 370 (1971).

12. Since the OII's Ordering Paragraphs cannot reasonably be interpreted to provide notice to Cingular of charges under Bus. and Prof. Code 17026.1(b) or Civ. Code § 1671, we disregard these arguments in the parties' briefs.

13. In order to protect customers, provide certainty to the parties and promote an efficient use of the resources of the parties and of the Commission, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. For the two violations of law found herein, Cingular Wireless (Cingular) shall pay a penalty of $12,140,000 to the State of California General Fund within 45 days after the date this decision is mailed to the service list. Proof of payment shall be filed and served on the service list and shall be provided to the Executive

Director of the California Public Utilities Commission (Commission) within 5 days of payment.

2. Within 75 days of date the date this decision is mailed to the service list, Cingular shall file a refund plan for accomplishing customer reparations, as further described in Ordering Paragraph 3. The refund plan shall estimate the total refunds due and shall describe the methodology for locating all customers (including prior customers) eligible for reparations. The refund plan shall be served on the service list for this proceeding and a copy shall be provided to the Director of the Commission's Telecommunications Division so that the Division may monitor implementation of the plan.

3. The goal of the refund plan described in Ordering Paragraph 2 shall be to:

(a) return, with interest, any sums received for early cancellation of contracts entered into between January 1, 2000 and April 30, 2002, to the customers who paid those sums to Cingular or to Cingular's sales agents; and

(b) review early termination fee (ETF) receipts for contract cancellations beginning May 1, 2002, and determine if any sums were paid for contract cancellations within day 1 and day 15 of the contract period. If so, such sums shall be reimbursed, with interest, to the customers who paid them to Cingular or to Cingular's sales agents.

(c) Interest due shall be calculated at the rate of prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13.

4. Any unpaid reparations shall escheat to the State of California General Fund.

5. Rulemaking (R.) 02-12-004, the Commission's review of service quality standards for all telecommunications carriers, including wireless providers, shall examine options to provide wireless consumers with the kinds of coverage and

capacity information sufficient to enable them to make informed choices among wireless providers.

6. Cingular shall revise its corporate policies and practices in California regarding marketing, advertising and, service initiation and change, to conform to the rules adopted in R.00-02-004, the Commission's consumer bill of rights and consumer protection rules proceeding.

7. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.