

**ATTACHMENT A**

**SETTLEMENT AGREEMENT**

The Consumer Protection and Safety Division of the California Public Utilities Commission (CPSD), Vycera Communications, Inc. (Vycera), and Derek and Thalia Gietzen (the Gietzens) (collectively, the Parties) hereby agree upon the following terms for the settlement of the California Public Utilities Commission's (CPUC) Order Instituting Investigation (OII) I.04-07-005.

**I. CPUC JURISDICTION**

Vycera is a regulated telecommunications carrier located in San Diego, California, and provides interstate and intrastate telecommunication services to consumers living in California. Vycera has tariffs on file with the CPUC for the provision of both interstate and intrastate services. Derek and Thalia Gietzen are officers and directors of Vycera. The CPUC has jurisdiction over the claims and issues raised in the OII pursuant to California Public Utilities Code sections 701 and 702.

**II. STIPULATED FACTS**

The Parties stipulate to the following facts as the basis for the Settlement Agreement:

**A. Background Facts**

1. Vycera (fka Genesis Communications International, Inc.) received its certificate of public convenience and necessity (CPCN) as an interexchange telecommunications carrier on June 11, 1995.
2. On February 23, 1996, CPUC Decision (D.) 96-02-072 granted Vycera authority as a competitive local exchange service reseller.
3. Vycera is operated by Derek and Thalia Gietzen, who serve as officers and directors of the company and are its primary shareholders.
4. Derek and Thalia Gietzen formerly worked for Communications Telesystems International, Inc.

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(CTS) before founding Vycera in 1994. The Gietzens' former employment with CTS was revealed by them to the CPUC in the company's 1995 application (A.) 95-03-061 for a CPCN and in the company's 1995 petition (A.) 95-04-044 Petition for Authority to provide competitive local exchange service.

5. Vycera markets its services to consumers in California primarily through sales representatives who "telemarket" the company's services. Some of the sales representatives are employees of Vycera's wholly-owned Mexican subsidiary, Televas, and others are employed by third-party telemarketing companies.
6. At all times, Vycera has utilized the services of an independent third party verification company to verify sales orders for services and to maintain recordings of such verifications.
7. In late October 2002, Vycera changed the focus of its service offerings to consumers. Whereas Vycera formerly focused primarily on selling long distance service, Vycera now began focusing primarily on selling local service with bundled long distance service offerings.
8. Shortly after making this change in the focus of its service offerings, Vycera began to experience an increase in customer service calls and customer bad debt. At the same time, the CPUC's Consumer Affairs Branch (CAB) began receiving a number of complaints about Vycera from consumers.
9. In response to the consumer complaints received by CAB, CPSD began an investigation that led to the production of a written Investigative Report describing the various consumer complaints made against Vycera.
10. On July 8, 2004, the CPUC issued I.04-07-005, instituting this proceeding and defining the scope of the issues to be further investigated and resolved.
11. Vycera has cooperated with the CPSD to complete such investigation and to demonstrate the policies, procedures and measures it has undertaken to address the issues and concerns identified in the Investigative Report and the OII. This has included exchanges of

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data requests and responses, an inspection of Vycera's facilities, operations and financial status by representatives of the CPSD, and meetings of the parties.

### **B. Disposition of Specific Issues**

#### Representations Regarding Economic Savings

1. One of the allegations made by some consumers about Vycera to CAB was that Vycera did not deliver to such consumers the economic savings promised to such consumers by Vycera's sales representatives.
2. Vycera acknowledges that misrepresenting service pricing constitutes a wrongful business practice that should be prevented.
3. Vycera has taken measures and instituted policies to prevent its sales representatives from misrepresenting the pricing of its services to consumers. These include: (a) multi-session training programs, and periodic "refresher" training courses for its sales representatives; (b) consolidating sales into the company's Mexican subsidiary's sales office and a limited number of third-party telemarketing offices in close proximity to the Mexican border that can be monitored by Vycera, with such monitoring capability incorporated as a term and condition in each contract between Vycera and the third-party telemarketing companies; (c) developing approved sales "scripts" on which the sales representatives are trained and with which the sales representatives are required to comply; (d) use of a Sales Quality Assurance Group, which reports up a separate line of authority within the company from the sales and marketing personnel, to randomly monitor sales calls in order to ensure compliance with the law and with the approved sales "scripts"; (e) implementation of a Sales Follow Up Group, which pre-screens all purported sales reported by sales representatives to ensure that the consumer understands the nature of the services being offered, states that they are authorized to order telephone services for the phone

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number in question, and have been provided with all necessary information regarding the terms of sale; (f) use of an independent automated Third Party Verification system that obtains recordings of the subscriber's oral verification of the sale and complies with FCC regulations; and (g) provision of a "Savings and Satisfaction Guaranty" program, which consumers can use if they believe Vycera's services and pricing are not competitive with those of other telecommunications providers available to the consumer.

Representations Regarding Affiliation With Local Phone Companies

4. One of the allegations made by some consumers about Vycera to CAB was that Vycera's sales representatives stated during sales calls that Vycera was affiliated with local phone companies, such as Pacific Bell/SBC or Verizon.
5. Vycera acknowledges that misrepresenting an affiliation with another telecommunications carrier constitutes a wrongful business practice that should be prevented.
6. Vycera has taken measures and instituted policies to prevent its sales representatives from misrepresenting that Vycera is affiliated with any other telecommunications provider. These measures include the measures described in section II (B)(3), above.

Use of a Partially "Push Button Response" TPV System

7. At all times, Vycera has used an independent Third Party Verification (TPV) company to obtain recorded verification of a subscriber's intent to switch his or her service to Vycera.
8. For a period of time in 2003 and 2004, the independent TPV provider, with Vycera's consent, used a system in which some, but not all, of the verification information collected from subscribers was obtained in the form of the subscriber's telephone keypad "push button" response to verification questions, instead of recording exclusively oral responses.

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9. Copies of these partially push button response TPV recordings were sent to CAB periodically by Vycera during 2003 and early 2004.
10. CPSD sent a letter to Vycera's regulatory counsel, Swidler, Berlin, Shereff Friedman, LLP, dated March 4, 2004, directing Vycera to stop using a push button response TPV system because the practice does not conform with PU Code section 2889.5(a)(3)(C), which requires that the subscriber's intent is obtained and recorded orally. The letter was received by Vycera on March 16, 2004.
11. On March 16, 2004, upon receipt of the letter from CPSD, Vycera directed its independent TPV provider to stop using the partially push button response system, and to switch over to obtaining exclusively oral subscriber responses to verification questions. Vycera's TPV provider switched over to an exclusively oral response system that same day.
12. Vycera's independent TPV provider continues to use an automated TPV system that records exclusively oral verifications of a subscriber's intent to switch service providers and complies with FCC regulations, including providing the option for a subscriber to exit the automated system and speak with a live person if the subscriber has any questions.

Vycera's Provision of Partially Inaudible TPV  
Recordings To CAB

13. Vycera, upon inquiry from CAB, provides CAB with copies of the TPV recordings made in connection with sales of service to consumers. Some of the TPV recordings provided to CAB were partially inaudible.
14. Vycera's independent TPV provider records and stores subscribers' responses to verification questions in an electronic data sound file format, and transmits such files to Vycera, which likewise maintains such materials in electronic data sound file format.
15. During the period of time in question, CAB was not technologically equipped to receive and access electronic data sound files. Therefore, in order to provide copies of the TPV recordings to CAB,

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Vycera's practice was to retrieve the data sound files from its computer system through the company's internal telephone system, play the data sound files through the speaker on an office telephone, and make a cassette recording from the phone output on a hand-held tape recorder. This procedure, understandably, sometimes resulted in degradation of the sound quality of the recordings provided by the company to CAB.

16. CAB is now equipped to receive and access electronic data sound files. Therefore, Vycera can now electronically transmit TPV recordings to CAB upon request.
17. Additionally, the scripted verification statements and questions used by Vycera's independent TPV provider and played to subscribers consist of independent segments that were grouped together and played to the subscriber in different combinations depending on the nature and content of the sale being confirmed. Because different segments were recorded at different times, the volume, sound quality, voice inflection, etc. of different segments sometimes varied.
18. In order to achieve more consistent and integrated sound quality of the TPV recordings, Vycera's independent TPV provider will re-record each of the segments used in all of the verification statements and questions played to subscribers as part of the TPV process using the same speakers, recording equipment, volume level, etc.

Automatic Inclusion of Inside  
Wire Maintenance Program

19. During 2003, Vycera included in its service packages offered and sold to consumers an inside wire maintenance program known as "Line Pro." Although Vycera disclosed, in its sales scripts and welcome packages, the fact that the inside wire maintenance program was being included in the service packages being sold, and although the majority of the consumers subscribing to Vycera's services already had an inside wire maintenance program through their pre-existing carriers that normally would have been migrated to Vycera with the customer's local service, Vycera did

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not disclose to consumers that they could decline to subscribe to the inside wire maintenance program.

20. Vycera acknowledges that PU Code section 2890 requires Vycera to provide to consumers to whom service is being offered notice that they may decline service elements such as inside wire maintenance programs as part of a new service offering.
21. Vycera has changed its practice regarding the provision of an inside wire maintenance program. Vycera no longer automatically includes an inside wire maintenance program as part of the service packages offered to consumers. Instead, Vycera subscribers are enrolled in an inside wire maintenance program only where: (a) an inside wire maintenance program migrates over to Vycera with a subscriber because the subscriber was already enrolled in such a program with his or her previous provider (because Vycera has neither the authority nor the ability to alter an “as is” migration from a telecom carrier); or (b) the subscriber contacts Vycera’s customer service office and requests to subscribe to such a program.

Written Notice of Change In Service Provider

22. In connection with the CPSD’s investigation in this matter, some of the consumers interviewed stated that they had not received written notice from Vycera that their telephone service had been switched to Vycera. Vycera does not dispute that some consumers have made such allegations to the CPSD; PU Code section 2889.5(a) requires that Vycera notify the subscriber by mail that the subscriber’s service provider has been changed.
23. Vycera has a printed “welcome package” that is provided to all new subscribers and, among other things, notifies consumers that their service has been switched to Vycera. In order to ensure that all new subscribers receive such notice, Vycera includes the printed welcome package materials in the first billing statements sent to consumers on the first billing cycle following enrollment of the subscriber with Vycera. Vycera’s billing cycles are on the 5<sup>th</sup>, 10<sup>th</sup>, 15<sup>th</sup>, 20<sup>th</sup>, 25<sup>th</sup> and month end (either the 28<sup>th</sup>, 30<sup>th</sup> or 31<sup>st</sup>).

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Derek and Thalia Gietzen's Former Employment With CTS

24. Derek and Thalia Gietzen are officers, directors and principal shareholders of Vycera.
25. Derek and Thalia Gietzen were formerly employed by CTS. The Gietzens left CTS in early 1994, prior to forming Vycera (then known as Genesis Communications International, Inc.). Neither Derek nor Thalia Gietzen were part of the CTS control group.
26. The Gietzens' former employment by CTS was disclosed to the CPUC in the company's 1995 application (A.) 95-03-061 for a CPCN and in the company's 1995 petition (A.) 95-04-044 Petition for Authority to provide competitive local exchange service.
27. In CPSD's first data request to Vycera dated December 12, 2001, CPSD asked the company to identify any officer or directors who previously had been officers or directors of any other telecommunications company. Vycera's response, which was prepared and submitted by Vycera's outside regulatory counsel, Swidler, Berlin, Shereff, Friedman, LLP, to the CPSD data request did not state that the Gietzens formerly had been employed by CTS.
28. Vycera and the Gietzens have now clarified for the CPSD the nature of their former employment by CTS.

Acceptance of Service Offers From Unauthorized Persons

29. Some consumers made allegations to CAB that Vycera accepted service change orders from persons in the subscriber of record's household who were not authorized to switch telephone service providers.
30. Vycera acknowledges that PU Code section 2889.5 requires the company to determine whether the persons from whom it takes and processes a service order is authorized to switch service providers for the telephone number to which service is being provided. However, Vycera does not receive the name of the subscriber of record for a particular phone number until after a PIC request is processed. Therefore, this information is not available to Vycera at the time of sale.



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31. In order to confirm that person from whom Vycera accepts a service order is authorized to switch service providers, Vycera now takes the following measures: (a) the sales representatives ask the person with whom they speak whether they are at least 18 years of age and authorized to make decisions regarding provision of telephone services for the phone number that was called—this is a mandatory element of the Vycera sales scripts; (b) Vycera’s Sales Quality Group randomly monitors sales calls to ensure compliance by the sales representatives with this mandatory element; (c) Vycera’s Sales Follow Up Group repeats the inquiry as to the person’s age and authorization before connecting the person to the independent TPV service; and (d) one of the verification questions in the TPV process that the consumer must orally affirm is whether he or she is at least 18 years of age and authorized to make decisions regarding provision of telephone service for the phone number called—if the person does not respond affirmatively, the sale is not processed.

**III. ACKNOWLEDGEMENT OF PROBLEMS AND NEED FOR PREVENTATIVE MEASURES**

Vycera acknowledges that the complaints asserted by some consumers with CAB raise serious concerns that warrant investigation and action by the CPSD to ensure compliance with the law and to protect consumer welfare. Vycera acknowledges and recognizes that the practices alleged in the consumer complaints and identified in the OII – such as misrepresentation of service pricing or affiliation with local phone companies, failure to obtain oral confirmation of service orders, “cramming” of services, failure to provide written notification of change in service providers, or processing service orders from unauthorized individuals – describe improper practices that should not occur and for which preventive measures should be taken. Vycera confirms that it has instituted and will maintain measures and policies designed to prevent such improper practices. The parties have entered into this Settlement Agreement to affect a final compromise and settlement of these contested matters pending before the CPUC.

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Respondents agree to pay a penalty in the amount of two hundred thousand dollars (\$200,000). The Parties agree that this amount is fair and reasonable in light of the totality of the circumstances, including: (a) the relatively modest number of consumer complaints in relation to the number of sales transactions; (b) the lack of significant economic harm to any consumers; (c) the fact that Vycera has instituted, at substantial operational expense, measures and policies designed to prevent the problems and address the concerns raised in the OII, as described above; (d) the lack of any prior disciplinary record against Vycera or its officers or directors; (e) Vycera's good faith cooperation with and assistance to the CPSD in connection with the investigation of this matter; (f) the absence of any evidence of intentional wrongdoing; and (g) the size and financial condition of the company.

Payment of one hundred thousand dollars (\$100,000) of the fine will be suspended during the three-year probationary period discussed in section VI, below. At the conclusion of the three-year probationary period, the suspended portion of the fine shall be excused so long as Vycera has achieved good faith compliance with the terms of this Settlement Agreement. The Administrative Law Judge Division and/or Administrative Law Judge Bushey will retain jurisdiction over this matter to determine and rule upon any disputes that may arise concerning compliance with this Settlement Agreement.

The non-suspended one hundred thousand dollars (\$100,000) of the fine will be paid by Vycera to the State General Fund in equal quarterly installments over the three-year probation period.

**V. RESTITUTION**

Based on the parties' review of the CAB complaints and Vycera's billing records, the parties believe that Vycera has properly reversed charges, issued credits, or abandoned claim for payment where appropriate. In the event that any disputes arise concerning whether any additional charge reversal, credits or abandonment of claims are appropriate that the parties cannot resolve among themselves, such disputes shall be referred to Administrative Law Judge Division and/or ALJ Bushey for determination.

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**VI. PROBATION**

Vycera will be subject to a probationary period of three years from the effective date of this Settlement Agreement to ensure compliance with the agreement. During the probationary period, Vycera will be subject to the Quality Assurance oversight procedures described in section VII, below.

**VII. QUALITY ASSURANCE**

During the 3-year probationary period described in section VI, above, the CPSD will review and monitor any consumer complaints received by CAB against Vycera on a quarterly basis.

If, during the probationary period, more than a permissible number of complaints per quarter are filed against Vycera that are then determined to be valid and that involve the claims and issues raised in this proceeding, then for each such valid complaint in excess of the permissible number per quarter, Vycera shall pay a fine of \$500 payable to the State General Fund. However, so long as Vycera pays any such fines, the receipt of valid complaints in excess of the permissible per quarter number shall not constitute a violation of the Settlement Agreement causing the suspended portion of the fine referenced in section IV, above, to no longer be suspended or eventually excused.

The permissible number of complaints per quarter shall be tied to the number of sales made by Vycera per quarter in California. Initially, and based on estimated sales of 6,000 to 7,000 per quarter, the permissible number of valid complaints per quarter shall be 4. For every additional 2,000 sales per quarter in excess of 7,000 made by Vycera, the permissible number of valid complaints per quarter for purposes of this provision shall be increased by 1.

In the event that CPSD believes that the number of complaints in any given quarter exceeds the permissible number of complaints as set forth above, Vycera will be provided with copies of any materials relating to such complaints afforded a full and fair opportunity to review and respond to any complaints and contest the validity of the allegations contained therein, consistent with General Order 168, Part 5.

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Any disputes regarding the validity of a complaint shall be referred to Administrative Law Judge Bushey, or the Administrative Law Judge Division, for final determination.

### **VIII. SYSTEM ENHANCEMENTS**

Vycera acknowledges and confirms that it has instituted, at significant expense, and will maintain numerous policies and procedures designed to ensure customer satisfaction, increase customer retention, address proactively potential areas of misunderstanding or complaint, and prevent the occurrence of the types problems identified in the OII that were the subject of the CPSD's investigation in this matter.

These include:

- Extensive sales representative and customer service personnel training, including periodic refresher training, including regulatory compliance training.
- Provision of sales scripts covering all required topics to be included in sales calls.
- Random monitoring of sales calls by a Sales Quality Assurance group.
- Geographic consolidation of sales calls centers to facilitate monitoring.
- No longer automatically including an inside wire maintenance program, or other optional non-call related service features, in service packages offered to consumers as requested by CPSD.
- Provision of a Sales and Satisfaction Guaranty program to subscribers to ensure their satisfaction with the company's service rates.
- Institution of a Sales Follow Up Group designed to ensure consumer understanding of the service packages and confirm subscriber intent to enroll with the company before connecting the consumer to an independent TPV system.
- Use of an independent automated TPV provider that complies with FCC regulations to confirm subscriber intent to switch service to Vycera and that provides

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consumers with opportunity to transfer back to a live person during the confirmation call.

- At the CPSD's request, elimination of the former push button response portion of the TPV process in favor of a system that records the subscriber's wholly oral verification of intent to switch service to Vycera.
- At the CPSD's request, re-recording of the TPV provider's automated verification question and comment voice segments to achieve uniformity of voice quality, volume and clarity.

### IX. CONTINUING JURISDICTION OF THE ALJ DIVISION

This Settlement Agreement represents and constitutes the full and final resolution of the OII and the issues, claims and matters addressed therein. The Settlement Agreement shall become effective when it is fully-executed and duly approved by the CPUC. The Parties consent to the continuing jurisdiction of the Administrative Law Judge Division or the currently-assigned ALJ Bushey to determine any subsequent issues or concerns that may arise concerning compliance with, performance under or enforcement of the settlement agreement. The Parties agree to meet and confer and attempt to resolve all disputes between themselves before bringing an issue to an ALJ for determination.

### X. MISCELLANEOUS

1. Authority to Execute. The undersigned acknowledge and covenant that they have been duly authorized to execute this Agreement on behalf of their respective principals and that such execution is made within the course and scope of their respective agency or employment.
2. Entire Agreement. The Parties expressly acknowledge that the consideration recited in this Agreement is the sole and only consideration of this Agreement, and that no representations, promises, or inducements have been made by the Parties or any director, officer, employee, or agent thereof, other than as set forth expressly in this Agreement.

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3. No Waiver or Modification. This Agreement constitutes the entire agreement between the Parties and no terms herein may be waived, modified or amended except in a writing signed by both Parties.
  
4. Choice of Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of California and the rules, regulations and General Orders of the California Public Utilities Commission.
  
5. Execution in Counterparts. This Agreement may be executed by any of the Parties in counterparts with the same effect as if all Parties had signed one and the same documents. All such counterparts shall be deemed to be an original and shall together constitute on and the same Agreement. A signature transmitted by facsimile shall be regarded as an original signature.

Dated: \_\_\_\_\_, 2004

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Richard W. Clark  
California Public Utilities Commission  
Director, Consumer Protection and Safety  
Division

Dated: \_\_\_\_\_, 2004

\_\_\_\_\_  
Vycera Communications, Inc.  
Derek Gietzen  
President and CEO

Dated: \_\_\_\_\_, 2004

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Vycera Communications, Inc.  
Thalia Gietzen