

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



February 2, 2005

Agenda ID # 4287  
Adjudicatory

TO: PARTIES OF RECORD IN INVESTIGATION 04-07-005

This is the draft decision of Administrative Law Judge (ALJ) Bushey. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ STEVEN KOTZ by ANGELA K. MINKIN

Angela K. Minkin, Chief  
Administrative Law Judge

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Attachment



Decision **DRAFT DECISION OF ALJ BUSHEY** (Mailed 2/2/2005)

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

Investigation on the Commission's own motion into the operations and practices of Vycera Communications, Inc. (U-5477) and its officers and primary shareholders, Derek M. Gietzen and Thalia R. Gietzen, to determine whether respondents have violated the laws, rules and regulations governing the manner in which California consumers are switched from one telephone carrier to another and billed for telephone products or services.

Investigation 04-07-005  
(Filed July 8, 2004)

**OPINION APPROVING SETTLEMENT AGREEMENT**

**1. Summary**

This decision approves a settlement agreement between the Commission's Consumer Protection and Safety Division (CPSD) and Vycera Communications, Inc., and its officers and primary shareholders (Vycera). The settlement agreement, which is attachment A to this decision, provides for numerous changes to Vycera's operations, enhanced CPSD oversight, and a substantial fine.

**2. Background**

The Commission issued this Order Instituting Investigation and Order to Show Cause (OII) regarding Vycera in response to consumer complaints that Vycera made unauthorized transfers of telephone service as well as billings for unordered services. Commission staff also provided the results of its

investigation, which showed that Vycera used an automated third-party verification method that failed to produce reliable verification of customers' orders. More seriously, staff suspected that some tape recordings that purported to verify orders had been altered.

On July 29, 2004, the assigned Administrative Law Judge (ALJ) directed the parties to meet and confer regarding issues in this proceeding, and to then file prehearing conference statements addressing the potential for mutual agreement on some or all issues in this proceeding. CPSD and Vycera each filed a prehearing conference statement indicating optimism that some issues could be resolved through agreement, but recommending that hearings be set. The prehearing conference statements included substantially similar proposed schedules.

The CPSD and Vycera participated in the prehearing conference on August 26, 2004. The issues and the proposed schedule were discussed. The parties pledged to mutually cooperate in providing discovery and attempting to resolve by agreement as many disputed factual and legal issues as possible prior to hearing.

On September 16, 2004, the assigned Commissioner and ALJ issued the scoping memo for this proceeding, which included a schedule submitting testimony and evidentiary hearings.

On January 5, 2005, the parties filed the settlement agreement, which resolves all outstanding issues in this proceeding.

### **3. Description of the Settlement Agreement**

The settlement agreement is a thorough, well-written, and clearly organized document. It systematically reviews all issues raised in the OII as well as others discovered during CPSD's investigation, and provides detailed

investigative background and specific factual and legal resolutions of each issue. For example, on the issue of automated third-party verification, the settlement agreement specifies the time period during which Vycera's independent third party verification company used the subscriber's telephone keypad "push button" responses to verify some, but not all, verification questions. The settlement agreement further includes the date on which Vycera directed its verification company to cease such practices, and Vycera's commitment to not use these procedures in the future.

The settlement agreement requires Vycera to pay a fine of \$200,000, but suspends \$100,000 of the fine during a three-year probationary period. If Vycera successfully completes the probationary period, then the \$100,000 is permanently suspended. A key feature of the probationary period is a limit on the number of consumer complaints by Vycera customers to the Commission.<sup>1</sup>

The settlement agreement also includes a discussion of restitution. The parties state that they have reviewed the complaints received by the Commission as well as Vycera's billing records. Based on this investigation, the parties are satisfied that Vycera has properly reversed charges, issued credits, or abandoned claims for payment where appropriate.

#### **4. Evaluation of the Settlement Agreement**

The proposed settlement agreement is an uncontested "all-party" settlement. The Commission applies two complementary standards to evaluate such agreements. The first standard, set forth in Rule 51.1(e) of the

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<sup>1</sup> Section VII of the Settlement Agreement does not specify who shall determine whether a filed complaint is "valid." We interpret the agreement to designate the Consumer Affairs Branch to make this determination.

Commission's Rules of Practice and Procedure and applicable to both contested and uncontested agreements, requires that the "settlement is reasonable in light of the whole record, consistent with law, and in the public interest." The second standard applies to all-party settlements, and requires that all active parties support the proposed settlement, the parties fairly represent all affected interests, no settlement term contravenes statutory provisions or prior Commission decisions, and settlement documentation provides the Commission with sufficient information to permit it to discharge its future regulatory obligations. *San Diego Gas & Electric*, 46 CPUC 2d 538 (1992).

We turn first to the Rule 51.1(e) standards. The settlement agreement is reasonable in light of the whole record because it specifically addresses and resolves each factual and legal allegation made by CPSD. The settlement agreement brings Vycera into compliance with applicable regulations, includes an investigation and analysis of the need for restitution, requires a three-year probation period, and provides for a substantial fine.

The settlement agreement is consistent with law because it will require Vycera to comply with applicable law and regulation. The settlement agreement provides for enhanced CPSD oversight and financial penalties to ensure Vycera's continued compliance.

The settlement agreement is in the public interest because it will allow consumers' access to a provider of competitive local telecommunications services that is in full compliance with applicable law and regulations. Consequently, we conclude that the settlement agreement meets the Rule 51.1 standards.

The standards for all-party settlements are also met. CPSD and Vycera are the only parties to this proceeding. CPSD represents the interests of consumers and the regulatory process, while Vycera represents its own interests. As noted, above, the settlement is consistent with the law and the high-quality settlement

documentation provides the Commission with sufficient information to permit it to discharge its future regulatory obligations.

The settlement agreement reflects a painstaking and aggressive investigation and analysis by CPSD. It also shows Vycera's willingness to reform and comply with law and Commission regulation. The settlement agreement also sets clear standards for future operations with continued enhanced oversight and financial incentives for compliance.

Therefore, the settlement agreement satisfies the Commission's requirements for settlements under Rule 51 and the all-party settlement standards. Accordingly, we will approve it.

## **5. Categorization and Need for Hearings**

On September 16, 2004, the Assigned Commissioner and ALJ issued a scoping memo confirming the preliminary categorization of the proceeding as adjudicatory. The record of the proceeding provides sufficient information for us to evaluate whether the settlement agreement meets our standards for approval. No hearing is necessary.

## **6. Comments on Draft Decision**

The draft decision of the assigned administrative law judge (ALJ) was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on \_\_\_\_\_ and reply comments were filed on \_\_\_\_\_.

## **7. Assignment of Proceeding**

Geoffrey F. Brown is the Assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

**Findings of Fact**

1. The Commission initiated this proceeding in response to consumer complaints and CPSD's investigation.
2. Vycera entered into a settlement agreement with CPSD, which thoroughly addressed and resolved all issues in this proceeding.
3. No hearing is necessary.

**Conclusions of Law**

1. The settlement agreement is an uncontested agreement as defined in Rule 51(f) and it satisfies the requirements of Rule 51.1(e).
2. The settlement agreement is reasonable in consideration of the whole record, consistent with law, and in the public interest.
3. The settlement agreement is supported by all active parties. These parties fairly represent all affected interests. In addition, no settlement term contravenes statutory provisions or prior Commission decisions, and the settlement documentation provides the Commission with sufficient information to permit it to discharge its future regulatory obligations.
4. The settlement agreement should be adopted.
5. This decision should be effective immediately.

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

1. The settlement agreement between the Consumer Protection and Safety Division and Vycera Communications Inc., and its officers and primary shareholders, is approved and adopted. The parties shall comply with all provisions of the settlement agreement, which is set forth as Attachment A to this decision.



2. Hearings are not necessary.
3. This proceeding is closed.

This order is effective today.

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

[Bushey Attachment A](#)