Decision 02-05-045 May 16, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of FirstWorld SoCal (U-5733-C) to Withdraw From Local Exchange Service in Selected Rate Centers.	Application 01-05-023 (Filed May 9, 2001)

OPINION

I. Summary

In this application, FirstWorld SoCal (Applicant) requests authorization to withdraw from the provision of local exchange service, and to transfer its customers to the customer's choice of carrier. We find that Applicant effectively withdrew from providing service to its customers, without prior Commission authorization, through the use of false and misleading notices and unauthorized service interruptions, in violation of General Order (GO) 96-A, Section XIV, Pub. Util. Code § 702, and its tariffs. By this order, we approve Applicant's request to withdraw from providing local exchange service, and impose a $24,000 fine.

II. Background

In Decision (D.) 97-02-038, the Commission authorized Applicant, a California corporation, to provide facilities-based and resold local exchange and interexchange service. Applicant has provided local exchange service since 1998. By this application, it requests authority to discontinue offering local exchange service, and to relinquish its Certificate of Public Convenience and Necessity (CPCN).

III. Representations of Applicant

Applicant stated, in its application as originally filed, that its local exchange operations in 49 of its 54 rate centers (selected rate centers) were unprofitable. Therefore, Applicant requested authorization to withdraw from providing local exchange service in the selected rate centers. Applicant intended to continue providing service in its five other rate centers.

Applicant provided written notice to its affected customers on April 3, 2001, at the same time it filed an advice letter to discontinue providing interexchange service.[1] The notice stated that effective May 15, 2001, Applicant would no longer be providing local exchange service in the customers' area. Applicant enclosed a list of other providers in the area and offered its service representatives' help to assist in the transition. On May 15, 2001, after this application was filed, Applicant provided a second written notice. The notice was identical to the first except that it changed the date of discontinuance to June 16, 2001 and provided a different list of potential providers.

As of the filing date of this application, May 9, 2001, 427 of Applicant's 651 affected customers had pending orders with other carriers. By July 16, 2001, only

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[1] On April 3, 2001, Applicant filed Advice Letter 63 requesting authority to withdraw from providing local exchange and interexchange service to customers in 49 of its 54 rate centers. Interexchange carriers are allowed to file an advice letter to withdraw from providing interexchange service. However, local exchange carriers are required to file an application to withdraw from providing local exchange service. Therefore, on April 16, 2001, Applicant supplemented Advice Letter 63 by Advice Letter 63-A that revised the filing to address only interexchange service.

nine customers remained in the selected rate centers. Of these, three were scheduled to start service with a new carrier on July 17, 2001. Three other remaining customers had initial difficulties with their new carriers. Applicant continued service to these three customers until the problems were resolved. Applicant said that the three remaining customers, after receiving two written notices and numerous phone calls, had their service suspended (except 911 and 611) for part of a day, on or about June 28, 2001. Upon the temporary suspension, Applicant notified these customers that once they called back with a service order from another carrier, it would reinstate full service until their chosen carrier could install their service. These three customers then placed orders with other carriers, and Applicant restored service until their new carriers could provide service.

Applicant, the only local exchange service provider to the Block at Orange (Block), a continuous multi-tenant property, terminated its service contract with the property owner. On May 25, 2001, all of Applicant's 251 customers at the Block were transitioned to Pacific Bell.

On August 28, 2001, Applicant modified its application. By the modification, Applicant sought to discontinue local exchange service to the 49 customers in its five remaining rate centers as well. However, Applicant proposed to continue offering service to large business customers who order service in at least 10 rate centers, and who make at least a two year service commitment (multi-location customers).

On August 31, 2001, Applicant mailed a notice to its remaining customers, except for multi-location customers. The notice indicated that it would discontinue service effective September 30, 2001. It also included the following statement:

> "Pursuant to an application on file with the California Public Utilities Commission, this letter is to notify you that due to certain economic and market conditions, effective September 30, 2001, FirstWorld will no longer be providing services in your area, including local exchange and/or toll services. On August 28, 2001 FirstWorld filed an application requesting approval from the California Public Utilities Commission to discontinue providing basic services in your area. FirstWorld's application is still pending at the Commission."

After the filing of Applicant's first modification, its only remaining customer, a multi-location customer, notified Applicant that it was going out of business and would terminate its service on October 31, 2001. The customer asked to be released from its service agreement. Applicant agreed to do so. On October 3, 2001, Applicant modified its application a second time requesting authority to discontinue offering local exchange service, and to relinquish its CPCN. In sum, Applicant wishes to completely withdraw from providing local exchange service, and to relinquish its authority to do so.

IV. Notices

The notice requirements for transfers of a carrier's customer base were developed in D.97-06-096 for advice letter filings. The requirements are useful as a guide in this proceeding. They are as follows:

1. The notice must be in writing;
2. The carrier must provide the notice to customers no later than 30 days before the proposed transfer;
3. The notice must contain a straightforward description of the transfer, any fees the customer will be expected to pay, a statement of the customer's right to switch to another carrier, and a toll-free number for questions; and

4. The notice and the carrier's description of service to customers must be included in the advice letter.

Applicant provided copies of the notices with the application, and in response to rulings by the assigned administrative law judge (ALJ). The first notice was provided, in writing, more than 30 days before service was to terminate. The notice told customers to take immediate steps to transfer to another carrier, and provided a toll free phone number for questions. The notice did not address any fees that the customer may be expected to pay.[2] However, since Applicant did not intend to charge a fee, Applicant argues that this requirement was satisfied. The fourth requirement does not apply to the notice itself. The second notice was almost identical, and was sent 30 days before the new date for service termination. Had Applicant been authorized to discontinue service, the first two notices may have been adequate. However, this was not the case.

GO 96-A, Section XIV, states that "No public utility of a class specified herein shall, unless authority has been obtained from the Commission, either withdraw entirely from public service or withdraw from public service in any portion of the area served." Therefore, Applicant is required to continue to provide service until its withdrawal from service is approved by the Commission.

Applicant's first notice, mailed on April 3, 2001 to customers in the selected rate centers, stated: "This letter is to inform you that due to certain

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[2] In its application, at page 6, Applicant states that its April 3, 2001 notice "contained a statement that FW SoCal would not impose any fees for the transfer to another carrier." This statement is false. The notice contains no such statement. We remind Applicant that we will not tolerate such attempts to mislead the Commission.

economic and market conditions, effective May 15, 2001, FirstWorld Anaheim and FirstWorld SoCal (FirstWorld) will no longer be providing services in your area, including T-1, local exchange and/or toll services." Its notice further stated: "We request that you take immediate steps to make arrangements with another local exchange provider or your incumbent local exchange carriers, Pacific Bell or Verizon, as soon as possible to avoid any interruption in your service." The notice indicated that service would cease on May 15, 2001. Therefore, Applicant's April 3, 2001 notice was false, because it was not authorized to discontinue service on May 15, 2001. It was misleading because it led customers to believe that they would have to move to another carrier by the specified date, or face service interruption.

Applicant's second notice, mailed on May 15, 2001 to customers in the selected rate centers, was identical to the first notice except that it indicated that service would no longer be provided effective June 16, 2001, and included a different list of alternative carriers. Since Applicant was not authorized to discontinue service on June 16, 2001, this notice too was false and misleading.

Applicant's third notice, mailed to most of its remaining customers on August 31, 2001, stated the following:

> "Pursuant to an application on file with the California Public Utilities Commission, this letter is to notify you that due to certain negative economic and market conditions, effective September 30, 2001, FirstWorld will no longer be providing services in your area, including local exchange and/or toll services. On August 28, 2001, FirstWorld filed an application requesting approval from the California Public Utilities Commission to discontinue providing basic services in your area. FirstWorld's application is still pending at the Commission."

This notice is consistent with its previous misleading notices in that it leads customers to believe that service will cease on the date specified regardless of when or whether the Commission's approval is obtained. Therefore, this notice was false and misleading. Given this series of false and misleading notices, we find that Applicant's customers were improperly coerced into moving. As a result, Applicant effectively withdrew from service without authorization in violation of GO 96-A, Section XIV.

By way of mitigation, Applicant says that once it determined that it needed to discontinue service, it contacted the Commission's staff to determine the proper form its request for service withdrawal should take, but it was not able to get clear direction. On April 3, 2001, it filed an advice letter to discontinue local exchange and interexchange service, and simultaneously sent the first notice to customers. Applicant learned a few days later that it would need to file an application to discontinue local exchange service. Applicant then filed a supplement to the advice letter eliminating the request to discontinue local exchange service. On May 9, 2001, Applicant filed this application.

Applicant sent its first customer notice on the same day it filed the advice letter. The fact that it filed the advice letter demonstrates that it knew, at the time of the first notice, that it needed the Commission's approval. Applicant was aware of GO 96-A, and should have known that the Commission's approval was needed before local exchange service could be discontinued. Since Applicant mailed its second notice after this application was filed, it knew that the Commission's advance approval was needed. The fact that it erroneously filed an advice letter, rather than an application, in no way excuses its actions.

In a ruling dated June 28, 2001, the ALJ quoted GO 96-A, Section XIV and said:

> "Applicant's first notice informs its customers that it will withdraw from service effective May 5, 2001. The notice makes no mention of the fact that the Commission's approval must be obtained before withdrawal."

The ruling then required Applicant to provide, among other things, the following:

> "A full and complete explanation of why Applicant should not be found to have effectively withdrawn from service, by sending incorrect and misleading notices to its customers, in violation of GO 96-A, Section XIV, and the notice requirements of Decision 97-06-096."

Although Applicant's August 31, 2001 notice mentions that this application was filed, it goes on to say that service will cease affective September 30, 2001. This notice is, therefore, consistent with Applicant's previous misleading notices in that it leads customers to believe that service will cease on the date specified. This demonstrates a pattern of false and misleading notices. Given the fact that the August notice was mailed a month after the ALJ's ruling, we conclude that Applicant intended to mislead its customers.

Applicant knew the Commission's approval was needed to withdraw from service, and yet it got rid of its customers by misleading them into transferring to other carriers. Therefore, we find that Applicant used the false and misleading notices to effectively withdraw from service in violation of GO 96-A, Section XIV.

V. Service Interruptions

As discussed above, Applicant suspended the service of three customers for part of a day, on or about June 28, 2001, and notified these customers that it would temporarily reinstate full service once they called back with a service order from another carrier. These service interruptions are especially egregious. These customers could not be required to transfer to another provider because

Applicant was not authorized to discontinue service. The fact that they had not responded to Applicant's notices and phone calls regarding transfer to another provider is irrelevant. They had every right to expect service to continue, and did not need to respond. Applicant used service interruptions, when its false and misleading notices failed, to effectively discontinue service to these customers without authorization. In addition, nothing in Applicant's local exchange tariffs allows it to discontinue or suspend service when a customer fails to respond to such a notice. Therefore, Applicant also violated its tariffs.

VI. Fines

The Commission set the basis for future decisions assessing fines in D.98-12-075, Appendix B. In setting the amount of the fine, the Commission will consider the severity of the offense, the utility's conduct, the utility's financial resources, mitigating or exacerbating factors, and precedent.

The Commission has found that violations of reporting or compliance requirements cause harm to the integrity of the regulatory processes. For example, compliance with Commission directives is required of all California public utilities. Pub. Util. Code § 702 says:

> "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the Commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

Such compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, we may deal severely with the disregard of statutory or Commission directives, regardless of the effect on the public. In this case, Applicant violated GO 96-A, Section XIV as discussed above.

The number of the violations is also a factor in determining the severity of the offence. A series of distinct violations can suggest an on-going compliance deficiency that the utility should have addressed after the first instance. Similarly, a widespread violation that affects a large number of consumers is a more serious offense than one that is limited in scope. In this case, Applicant provided three successive false and misleading notices to its customers. These constitute three violations of GO 96-A, and Pub. Util. Code § 702, and suggest an ongoing compliance deficiency. In addition, the service interruptions of three customers constitute three distinct violations of the utility's tariffs.

The utility's conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation is also a factor. Prior to a violation occurring, prudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives. The utility should become familiar with applicable laws and regulations and, most critically, regularly review its own operations to ensure full compliance. In this case, Applicant claims that it was unaware, when it filed its advice letter, that it had to file an application for approval to discontinue local exchange service. It should have been aware of the requirement. Applicant claims that it did not commit any violations. As discussed above, it did. In addition, it made no attempt in subsequent notices to correct its violations.

The Commission holds public utilities responsible for their actions. Deliberate as opposed to inadvertent wrongdoing will be considered an aggravating factor. Even if Applicant misunderstood the Commission's requirements at the time it mailed the first notice, it was well aware of them, as evidenced by the filing of this application, before it mailed the second and third notices. In addition, it should have been aware of its own tariffs when it violated them by interrupting service to its customers. Therefore, we find that Applicant's violations were deliberate.

Effective deterrence requires that the Commission recognize the financial resources of the public utility in setting a fine that balances the need for deterrence with the constitutional limitations on excessive fines. Applicant is a subsidiary of Verado Holdings, Inc. (Verado). The last annual report Applicant filed with the Commission was for 1999. The report provided combined financial information, including a consolidated balance sheet for Verado, that shows assets of $267 million, and a net loss of $107 million, as of December 31, 1999. The names of Applicant and its affiliate, FirstWorld Anaheim, appeared on the first two notices. First World Anaheim filed a similar application on the same day using the same outside counsel. In addition, Applicant's and First World Anaheim's responses to ALJ rulings have been very similar.[3] Therefore, it appears that Applicant's operations are not independent of its affiliates. As a result, it is the parent that must be deterred from wrongdoing. Therefore, for the purpose of assessing a fine, we will consider the parent's financial condition using the reported combined financial statements.

Setting a fine at a level that effectively deters further unlawful conduct by the utility and others requires that we also consider facts that tend to mitigate or exacerbate the wrongdoing. In this instance, Applicant claims that it was

[3] By an ALJ ruling, the Commission indicated its intent to take official notice of the existence and content of Application 01-05-022 and the responses to ALJ rulings filed in that docket.

unaware that it had to file an application to discontinue local exchange service at the time it filed its advice letter and, therefore, at the time it mailed its first notice. Ignorance of a Commission or statutory requirement is a feeble excuse at best. In addition, the fact that Applicant sent two additional false and misleading notices, and interrupted service to three customers after it filed this application, and was, therefore, aware of the Commission's requirements, more that offset any mitigation of its conduct due to ignorance. There is no excuse for Applicant's treatment of its customers in this matter.

The final factor to be considered is precedent. We find two fairly recent decisions to be useful in determining what, if any, fines should be imposed.

The first is D. 01-06-036. In this decision, we addressed an application by Verizon Select Services, Inc. (VSSI) to transfer its customer base, and to withdraw from providing local exchange service. We determined that VSSI had sent misleading notices to its customers that led them to believe that service would be automatically terminated after a specified date. The notices technically provided disclosure that the withdrawal was subject to Commission approval, but mistakenly left the impression that service would terminate on a specified date in any event. We imposed no fines, but ordered reparations.

The second decision is D.00-12-053. In this decision, the Commission fined Mail.com, Inc. (Mail) and NetMoves Corporation (Net) $5,000 for failing to comply with Pub. Util. Code § 854. Specifically, Mail acquired Net without advance authorization. We found that: (1) the offense was serious but not egregious because no physical or economic harm was done to the customers, and Mail and Net did not benefit from the violation, (2) Mail and Net did not disclose the violation until asked, (3) the violation was unintentional, (4) Mail and Net took steps to remedy the violation once it was discovered, and (5) Mail and Net's regulated revenues for 1999 were approximately $25,000 with equity of $247,000, and a total net loss of $76 million.

Pub. Util. Code § 2107 provides for fines ranging from $500 to $20,000 for each violation of the Public Utilities Code, or Commission decisions, orders or rules. As discussed previously, Applicant effectively withdrew from service through the use of false and misleading notices. Applicant also interrupted service to three customers in violation of its tariffs. Therefore, its violations were more severe than Verizon's. Applicant's violations were worse than Mail and Net's because Applicant's violations were intentional, and Applicant took no steps to remedy them. At the same time, Applicant's parent's financial condition is generally comparable to Mail and Net's. Therefore, we will impose a fine of $6,000 for each of the three false and misleading notices. Since only one customer was affected by each of the three service interruptions, we will impose a lesser fine of $2,000 each. The total fine is, therefore, $24,000.

VII. CPCN Revocation

In this application, Applicant asks to relinquish its CPCN. Given Applicant's actions as described above, we will revoke Applicant's CPCN.

VIII. Request for Confidential Treatment

Concurrently with this application, Applicant filed a motion for leave to file two documents under seal. The first document is its letter of agreement with Orange City Mills Limited Partnership (Mills), the owner of Block, to provide service to Block. The second document is a letter dated May 3, 2001 from Mills to Block tenants regarding Applicant's discontinuation of service to Block. Applicant represents that these documents should be made confidential because they contain information about Mills's business planning and strategy, and related information, confidential to Mills and not available to the public. We find that this is true for the letter of agreement, and will grant that part of the motion. However, the May 3, 2001 letter is a different story.

The May 3, 2001 letter is Mills's notice to its Block tenants that Applicant would discontinue service effective on or about May 15, 2001, as specified in Applicant's first notice. The letter advises tenants to contact Pacific Bell to obtain service, and provides a phone number and instructions for doing so. The letter contains no information about Mills. The only information it contains about Applicant is the service discontinuance date that Applicant had already made public. In addition, the letter does not indicate that it should be treated as confidential by Mills's tenants or Applicant. Therefore, we find that the letter contains no confidential information, and has already been widely disseminated without advising the recipients that it is confidential. As a result, we will deny Applicant's motion to file the May 3, 2001 letter under seal.

IX. Procedural Matters

In Resolution ALJ 176-3063 dated May 14, 2001, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

X. Comments on the Draft Decision

The draft decision (DD) of the ALJ in this matter was mailed to Applicant (there are no other parties) in accordance with Pub. Util. Code § 311(g)(1), and Rule 77.7 of the Commission's Rules of Practice and Procedure. Applicant filed comments on March 25, 2002.

In its comments on the DD, Applicant argues that proposed fine and restitution orders are stayed by its February 15, 2002 bankruptcy filing in U.S. Bankruptcy Court for the District of Delaware. It points out that Section 362(a)(1) of the Bankruptcy Code[4] prohibits the Commission from commencing or continuing any "judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of that case under this title." Applicant then goes on to argue that the police and regulatory power exception under Section 362(b)(4) does not apply here. The DD orders restitution to ratepayers harmed by Applicant's actions, and also fines it pursuant to Pub. Util. Code § 2107.

We recognize that the filing a bankruptcy petition operates as a stay applicable to all entities, of "the commencement or continuation of a judicial, administrative, or other action or proceedings against the debtor; and that the general policy behind the automatic stay is to grant complete and immediate, albeit temporary, relief to the debtor from creditors and to prevent dissipation of the debtor's assets before orderly distribution to all creditors can be affected." (*S.E.C .v. Brennan (2nd Cir. 2000), 230 F3d, 65, 71.*) In other words, a main purpose of the stay is to protect the priority of payments to creditors.

We also recognize that the Bankruptcy Code provides certain exceptions to the automatic stay. Section 362(b)(4) provides an exception for certain governmental police and regulatory actions. This section provides that the filing

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[4] Hereinafter, all section references are to the U.S. Bankruptcy Code, unless stated otherwise.

of a petition does not stay "the commencement or continuation of an action or proceeding by a governmental unit…to enforce such governmental unit's…police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unity to enforce such governmental unit's…police power." We understand that this provision permits a governmental unit such as the Commission to "commence or continue any police or regulatory action, including one seeking a money judgment, but it may enforce only those judgments and orders that do not require payment or authorize the government to exercise control over property of the estate." 3 Collier at 362-59 to 362-60. This exemption allows these proceedings to continue so that the bankruptcy court does not become a "haven for wrong doers." (*Berg v. Good Samaritan Hospital (9th Cir. 2000) 230 F.3d 1165, 1167.)*

We understand that the U.S. Ninth Circuit Court of Appeals applies two tests for determining whether a state's actions falls within the scope of Section 362(b)(4): the pecuniary purpose test and the public policy test. Under the "pecuniary purpose" test, the court must determine "whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to the matters of public safety and welfare. (See *Universal Life Church, Inc. v. United States of America (9th Cir. 1997) 128 F.3d 1294,* 1297.) The relevant inquiry here is whether the action is being pursued "solely to advance a pecuniary interest of the governmental unit," in which case the stay will be imposed. (*Universal Life Church, Inc. v. United States of America (9th Cir. 1997) 128 F.3d 1294, 1297.)* Such actions have been described as those that would "result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate." (*In re Charter First Mortg., Inc.,* *42 B.R. 380, 382 (Bankr. D. Or. 1984).)* We believe it is clear from the facts and reasoning set forth above, that this test does not apply to the fines, which we impose on Applicant herein.

Our research reveals that Courts apply the "public policy" test in order to "distinguish between government actions that effectuate public policy and those that adjudicate private rights." (*Universal Life Church, Inc. v. United States of America (9th Cir. 1997) 128 F.3d 1294, 1297.)* This research also reveals that from the legislative history of Section 362(b)(4) and case law, it is well established that consumer protection is a valid exercise of the police and regulatory power for purposes of this section. We note that our imposition of a fine is necessary as a deterrent to encourage all other utilities that find themselves in similar situations to follow the requirements or our regulations. Thus, we believe the action we are taking herein is primarily concerned with consumer protection, and that it does not conflict with any purpose of federal bankruptcy law, and that this order will be upheld in the bankruptcy court.

We believe that a strong case can be made that the restitution order set forth in the DD falls within the exception set forth in Section 362(b)(4). We also believe that the fines proposed by the DD fall clearly within the exceptions of Section 362(b)(4). In order to avoid unnecessary litigation, however, we will not order Applicant to provide restitution to those ratepayers who were harmed by Applicant's actions.

In its comments on the DD, Applicant alleges that D.01-06-036 established new rules for customer notices for withdrawal from service, and that application of those rules to notices given before that decision was issued constitutes retroactive rulemaking. The supposedly new rules are the requirement that if an applicant issues a notice, prior to Commission approval that it intends to discontinue service on a specified date, it must indicate that discontinuance is subject to the Commission's approval, and that it may not discontinue service until such approval has been obtained. Applicant is incorrect. D.01-06-036 did not establish new rules. It merely applied the existing requirement of GO 96-A, Section XIV that the Commission's approval is needed prior to withdrawal from service. Therefore, separate from the fact that no rulemaking was involved, no retroactive imposition of a new rule has occurred. Furthermore, the customer notices addressed in D.01-06-036 were sent to customers before the decision was issued, and before Applicant's notices in this proceeding were sent. Therefore, for application of the requirements of D.01-06-036 in this proceeding to constitute retroactive rulemaking, their application in D.01-06-036 would also have to constitute retroactive rulemaking. Applicant has made no such allegation, and such is not the case.

Applicant cited several recent decisions where the Commission found that customer notices did not indicate that the Commission's approval was necessary for service to be withdrawn. Since the Commission did not impose restitution or fines in those decisions, Applicant argues that their imposition in this proceeding is discriminatory. These decisions are discussed below.

In D.01-08-068, the request of Cable & Wireless U.S.A., Inc. to withdraw from providing local exchange services was approved. The applicant was found to have properly issued a customer notice that said service discontinuance was subject to Commission approval. No restitution or fine was imposed because notice was properly given, and no customer's service was interrupted. That is not the case herein.

In D.01-09-040, the request of Rythms Links, Inc. to withdraw from providing local exchange and interexchange services was approved. In that proceeding, the applicant was found to have improperly issued a customer notice that said service would be discontinued on a specified date, prior to receiving the Commission's approval, and without indicating that discontinuance was subject to Commission approval. No fine was imposed. The Commission's approval was after the date specified in the notice because of an administrative oversight by the Commission. It would have been inappropriate to impose sanctions on a utility for the Commission's error. No such administrative oversight by the Commission has occurred in this proceeding.

In D.01-10-062, the request of Teligent Services, Inc. to discontinue providing specified local exchange services, and to complete a Bankruptcy Code Chapter 11 reemergence plan, was approved. The applicant issued customer notices that said it had filed for bankruptcy, and filed with the Commission and the Federal Communications Commission for approval to withdraw from service. No restitution or fine was imposed because the notices satisfied the Commission's requirements. That is not the case herein.

In D.01-10-063, the request of Broadband Office Communications, Inc. to withdraw from providing local exchange and interexchange services was approved. The applicant was found to have improperly issued customer notices that said service would be discontinued on a specified date, prior to receiving the Commission's approval, and without indicating that discontinuance was subject to Commission approval. No restitution or fine was imposed because no customer's service was interrupted. That is not the case herein.

In D.01-11-019, the request of Sprint Communications Company, L.P. to withdraw from providing local exchange services was approved. The applicant obtained the Commission's approval prior to sending customer notices. That is not the case herein.

In D.01-11-020, the request of Mpower Communications Corporation to withdraw from providing local exchange services in specified areas was approved. The applicant was found to have improperly issued a customer notice that said service would be discontinued on a specified date, prior to receiving the Commission's approval, and without indicating that discontinuance was subject to Commission approval. The applicant subsequently issued a corrected notice that corrected these deficiencies. In addition, no customer's service was interrupted, and no customer switched to another carrier as a result of the first notice. No restitution or fine was imposed. That is not the case herein.

In D.01-11-022, the request of OpTel (California) Telecom, Inc. to discontinue providing local exchange services was approved. The applicant was found to have improperly issued a customer notice that said service would be discontinued on a specified date, prior to receiving the Commission's approval, and without indicating that discontinuance was subject to Commission approval. No restitution or fine was imposed because no customer's service was interrupted. That is not the case herein.

In D.01-11-024, the request of Onsite Access Local, LLC to withdraw from providing local exchange and interexchange services was approved. The applicant issued a customer notice that said service would be discontinued on a specified date, prior to receiving the Commission's approval, and without indicating that discontinuance was subject to Commission approval. The Commission did not find that service was interrupted to any customer. No restitution or fine was imposed.

In the above decisions, the Commission did not impose restitution or fines because (1) the notices satisfied the Commission's requirements, (2) the notices were incorrect due to an administrative oversight by the Commission, or

(3) service to customers was not interrupted. In this case, the notices did not satisfy the Commission's requirements, and service to customers was interrupted. Therefore, Applicant's claim of discriminatory treatment is unsubstantiated.

Applicant argues that the draft decision is wrong in stating that customers had a right to expect it to continue to provide service indefinitely, especially since it is not a carrier of last resort. This is not what was said. The utility is required to continue to provide service until it is authorized to discontinue service. The customers have a right to expect it to provide service until it is authorized by the Commission to stop.

Applicant argues that had the Commission acted expeditiously, it would not have been able to transfer the three customers, whose service it interrupted, without their consent. The Application was filed in May 9, 2001, and the service interruptions occurred on June 28, 2001. Given Applicant's customer notice violations, the application could not have been processed before the interruptions occurred.

Applicant states that the financial figures for its parent in the draft decision are erroneous. It says that the correct figures for December 31, 2001 are assets of $72 million, and a net loss for 2001 of approximately $344 million. The draft decision contained typographical errors. The errors have been corrected herein. As corrected, they show assets of $267 million and a net loss of $107 million as of December 31, 1999. These figures are taken from Applicant's last annual report filed with the Commission. Applicant is required to file financial reports every year. It filed no reports for 2000 and, as yet, none for 2001. Its representation in its comments is merely argument. It did not provide a copy of its financial statements with its comments. In addition, the assigned ALJ issued two rulings requiring that Applicant, among other things, provide "a full and complete explanation" of why it should not be fined for its misconduct. The second ruling went further by explicitly requiring Applicant to provide any "other relevant information that Applicant believes should be considered by the Commission in addressing this application, including, but not limited to potential fines, restitution, and revocation of its CPCN." Applicant could and should have known that its financial resources were a factor in determining what level of fines to impose, and could have provided updated financial figures in its responses to either ruling. It chose not to do so. The draft decision properly relies on Applicant's most recently filed reports. Applicant will not be allowed to benefit from its failure to follow the Commission's reporting requirements, or fully respond to ALJ rulings.

Findings of Fact

1. The application appeared in the Daily Calendar on May 11, 2001.
2. No protests have been filed.
3. Applicant was authorized in D.97-02-038 to provide facilities-based and resold local exchange and interexchange service.
4. On April 3, 2001, Applicant filed Advice Letter 63 requesting authority to withdraw from providing local exchange and interexchange service to selected rate centers.
5. On April 16, 2001, Applicant supplemented Advice Letter 63 by Advice Letter 63-A that revised the filing to address only interexchange service.
6. On April 3, 2001, Applicant mailed a notice to customers in the selected rate centers stating that service would cease on May 15, 2001.
7. On May 15, 2001, Applicant mailed a notice to customers in the selected rate centers stating that service would cease on June 16, 2001.

8. As of May 9, 2001, 427 of the 621 customers in the selected rate centers had pending service orders with other carriers.

9. By July 16, 2001, only nine customers in the selected rate centers remained, of which three were to start service with other carriers on July 17, 2001, and three had service orders pending with other carriers.

10. On or about June 28, 2001, Applicant suspended service (except 911 and 611) for part of a day to the remaining three customers in the selected rate centers, and informed them that service would be temporarily reinstated when they called back with a service order from another provider.

11. On August 31, 2001, Applicant mailed a notice to its remaining customers, except for multi-location customers, stating that service would be discontinued effective September 30, 2001.

12. After the filing of Applicant's first modification, its only remaining customer, a multi-location customer, notified Applicant that it was going out of business and would terminate its service on October 31, 2001.

13. The notice requirements in D.97-06-096 for advice letter filings are useful as a guide in this proceeding.

14. Applicant's statement in its application that its April 3, 2001 notice contained a statement that "FW SoCal would not impose any fees for the transfer to another carrier" is false.

15. Applicant's April 3 and May 15, 2001 notices did not satisfy the notice requirements in D.97-06-096 because Applicant was not authorized to discontinue service on the dates specified in the notices.

16. Pursuant to GO 96-A, Section XIV, Applicant is required to continue to provide local exchange service until its withdrawal is approved by the Commission.

17. Applicant's April 3 and May 15, 2001 notices state that service will be discontinued on the dates specified therein, and do not indicate that Applicant may not discontinue service unless and until its request is approved by the Commission.

18. The ALJ ruling dated June 28, 2001 reminded Applicant of the fact that it must obtain the Commission's approval before withdrawal.

19. Nothing in Applicant's tariff allows it to discontinue or suspend service when a customer fails to respond to a notice.

20. The three false and misleading notices constitute three violations of GO 96-A, Section XIV, and Pub. Util. Code § 702, and suggest an ongoing compliance deficiency.

21. The service interruptions of three customers constitute three violations of Applicant's tariffs.

22. Applicant made no attempt in its second or third notices to correct the violations in its first notice.

23. Applicant's violations of GO 96-A, Section XIV, Pub. Util. Code § 702, and its tariffs were deliberate.

24. Applicant's filings with the Commission report combined financial information.

25. The name of Applicant and its affiliate, FirstWorld Anaheim, appeared on the first two notices.

26. First World Anaheim filed a similar application (A. 01-05-022) on the same day this application was filed, using the same outside counsel.

27. First World Anaheim's responses to ALJ rulings in A.01-05-022 are very similar to Applicant's responses in this application.

28. Applicant's operations are not independent of its affiliates.

29. The parent must be deterred from wrongdoing.

30. Applicant's violations were more severe than Verizon's violations addressed in D.01-06-036 because it withdrew from service through the use of false and misleading notices, and interrupted service to three customers.

31. Applicant's violations were worse than Net and Mail's violations addressed in D.00-12-053 because its violations were intentional, and it took no steps to remedy them.

32. Applicant's parent's financial condition is generally comparable to Net and Mail's.

33. Concurrently with this application, Applicant filed a motion for leave to file (1) its letter of agreement with Mills, the owner of the Block, to provide service to Block, and (2) a letter dated May 3, 2001 from Mills to the tenants of Block regarding Applicant's discontinuation of service to Block, under seal.

34. The letter of agreement contains information about Mills's business planning and strategy, and related information, that is confidential to Mills and not available to the public.

35. The May 3, 2001 letter contains no information about Mills, and does not indicate that it should be treated as confidential by Mills's tenants or Applicant.

36. The only information Mills's May 3, 2001 letter contains about Applicant is the service discontinuance date that Applicant had already made public.

37. The May 3, 2001 letter contains no confidential information, and has been widely disseminated.

38. Since D.01-06-036 did not establish new rules, no retroactive imposition of a new rule has occurred.

39. In D.01-08-068, D.01-09-040, D.01-10-062, D.01-10-063, D.01-11-019, D.01-11-020, D.01-11-022, and D.01-11-024, the Commission did not impose

restitution or fines because (1) the notices satisfied the Commission's requirements, (2) the notices were incorrect due to an administrative oversight by the Commission, or (3) service to customers was not interrupted.

40. Since the Application was filed in May 9, 2001, and the service interruptions occurred on June 28, 2001, and given Applicant's customer notice violations, the application could not have been processed before the interruptions occurred.

41. Applicant is required to file financial reports every year.

42. Applicant filed no reports for 2000 and, as yet, none for 2001.

43. Applicant did not provide a copy of its financial statements with its comments.

44. The assigned ALJ issued two rulings requiring that Applicant, among other things, provide "a full and complete explanation" of why it should not be fined for its misconduct.

45. The assigned ALJ's second ruling required Applicant to provide any "other relevant information that Applicant believes should be considered by the Commission in addressing this application, including, but not limited to potential fines, restitution, and revocation of its CPCN."

46. Applicant could and should have known that its financial resources were a factor in determining what level of fines to impose, and could have provided updated financial figures in its responses to either ruling, but chose not to do so.

Conclusions of Law

1. A hearing is not necessary.
2. Applicant's April 3 and May 15, 2001 notices are false and misleading.

3. Applicant's August 31, 2001 notice, which mentions that this application was filed, is false and misleading because it says that service will cease effective September 30, 2001.

4. Applicant could and should have known that it needed the Commission's approval before it could discontinue local exchange service.

5. Applicant's notices were intended to mislead its customers into transferring to other carriers.

6. On or about June 28, 2001, Applicant violated its tariffs when, it suspended service (except 911 and 611) for part of a day to the remaining three customers, and informed them that service would be reinstated when they called back with a service order from another provider.

7. Applicant's former customers could not have been required to switch to another carrier prior to the effective date of this decision.

8. Applicant effectively withdrew from providing local exchange service to its customers without the Commission's advance approval in violation of GO 96-A, Section XIV, and Pub. Util. Code § 702.

9. For the purpose of assessing a fine, the parent's financial condition should be considered using the reported combined financial statements.

10. Applicant should be fined $24,000.

11. Applicant's CPCN should be revoked after it has fully complied with this decision.

12. Applicant's motion for leave to file the letter of agreement, and the May 3, 2001 letter from Mills to its tenants, under seal should be granted for the letter of agreement, and denied for the May 3, 2001 letter.

13. Section 362(a)(1) of the Bankruptcy Code prohibits the Commission from commencing or continuing any "judicial, administrative, or other action or

proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of that case under this title."

14. The filing of a bankruptcy petition operates as a stay applicable to all entities, of "the commencement or continuation of a judicial, administrative, or other action or proceedings against the debtor.

15. The general policy behind the stay is to grant complete and immediate, albeit temporary, relief to the debtor from creditors and to prevent dissipation of the debtor's assets before orderly distribution to all creditors can be affected."

16. A main purpose of the stay is to protect the priority of payments to creditors.

17. Section 362(b)(4) provides that the filing of a petition does not stay "the commencement or continuation of an action or proceeding by a governmental unit…to enforce such governmental unit's…police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unity to enforce such governmental unit's…police power."

18. Section 362(b)(4) permits a governmental unit such as the Commission to "commence or continue any police or regulatory action, including one seeking a money judgment, but it may enforce only those judgments and orders that do no require payment or authorize the government to exercise control over property of the estate.

19. The exemption allows these proceedings to continue so that the bankruptcy court does not become a "haven for wrong doers."

20. The U.S. Ninth Circuit Court of Appeals applies two tests for determining whether a state's actions falls within the scope of Section 362(b)(4): the pecuniary purpose test and the public policy test.

21. Under the pecuniary purpose test, the court must determine "whether the government action relates primarily to the protection of the government's pecuniary interest in the debtor's property or to the matters of public safety and welfare."

22. The relevant inquiry is whether the action is being pursued "solely to advance a pecuniary interest of the governmental unit," in which case the stay will be imposed.

23. Such actions have been described as those that would "result in an economic advantage to the government or its citizens over third parties in relation to the debtor's estate."

24. Courts apply the "public policy" test in order to "distinguish between government actions that effectuate public policy and those that adjudicate private rights."

25. The legislative history of Section 362(b)(4) and case law establish that consumer protection is a valid exercise of the police and regulatory power for purposes of this section.

26. Our imposition of a fine is necessary as a deterrent to encourage all other utilities that find themselves in similar situations to follow the requirements or our regulations.

27. The action we are taking herein is primarily concerned with consumer protection, and does not conflict with any purpose of federal bankruptcy law.

28. A strong case can be made that the restitution order set forth in the DD falls within the exception set forth in Section 362(b)(4).

29. The fines proposed by the DD fall clearly within the exceptions of Section 362(b)(4).

30. The pecuniary purpose test does not apply to the fines, which we impose on Applicant herein.

31. In order to avoid unnecessary litigation in bankruptcy court, we will not order Applicant to provide restitution to those ratepayers who were harmed by Applicant's actions.

32. Applicant's claim of discriminatory treatment is unsubstantiated.

33. The DD properly relies on Applicant's most recently filed reports.

34. Applicant should not be allowed to benefit from its failure to follow the Commission's reporting requirements, or fully respond to ALJ rulings.

35. This order should be made effective immediately so that Applicant can complete its cessation of operations as soon as possible.

O R D E R

IT IS ORDERED that:

1. The application of FirstWorld SoCal (Applicant) to withdraw from the provision of local exchange service is granted to the extent set forth below.

2. Applicant shall pay a fine of $24,000 payable to the California Public Utilities Commission for deposit to the General Fund, and shall remit said amount to the Commission's fiscal office within 30 days of the effective date of this order.

3. Applicant shall not accept new customers.

4. Applicant shall provide 30 days notice to its remaining customers, if any, that it will discontinue service pursuant to this order. The notice shall satisfy all applicable Commission requirements.

5. Applicant's Certificate of Public Convenience and Necessity to provide local exchange service is revoked effective the date Applicant has fully complied with this order.

6. Applicant's motion, filed concurrently with this application, for leave to file its letter of agreement with Orange City Mills Limited Partnership (Mills) under seal is granted.

7. Applicant's motion, filed concurrently with this application, for leave to file the May 3, 2001 letter, from Mills to its tenants, under seal is denied.

8. This application is closed.

This order is effective today.

Dated May 16, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners