Decision 03-06-034 June 5, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion Into the Operations and Practices of Telmatch Telecommunications, Inc., (U 5715), to Determine Whether It Has Violated the Laws, Rules and Regulations Governing the Manner in which California Consumers are Billed for Telecommunications Services.	Investigation 99-09-001 (Filed September 2, 1999)

ORDER CORRECTING ERROR AND DENYING REHEARING OF DECISION (D.) 02-06-077

I. INTRODUCTION

We instituted this investigation into the billing and consumer solicitation practices of Telmatch Telecommunications, Inc. ("Telmatch") on September 2, 1999. The Order Instituting Investigation ("OII") into Telmatch's operations and practices contained allegations from the Commission's Consumer Services Division ("CSD") that Telmatch, through its intermediary billing agents, imposed unauthorized charges on consumers' telephone bills (a practice known as "cramming"). The evidence presented against Telmatch at Commission hearings is summarized below.

Telmatch initially began doing business in California under the name Geo Communications, LLC ("Geo"), and received its Certificate of Public Convenience and Necessity on September 27, 1996. (See D.96-12-055.) On February 19, 1997, Geo filed an advice letter that requested a change in the corporate structure of Geo from a limited liability corporation to a regular business

corporation to be known as Geo Communications, Inc., doing business as Telmatch.

Evidentiary hearings were held in this proceeding on September 27 and October 12-14, 1999. During these hearings, CSD presented evidence that Telmatch's consumer solicitation methods violated Public Utilities Code Section 451, which requires all charges by a public utility to be just and reasonable.[1] CSD also submitted evidence indicating that Telmatch violated Section 2890(a) by imposing unauthorized charges on consumers' telephone bills.

The evidence and testimony submitted by CSD demonstrates that, from 1997 to January, 1998, Telmatch, using the name "Benefits Plus," employed a "sweepstakes method" of solicitation in which consumers were promised an opportunity to win $25,000 cash or a new car. Consumers filled out a sweepstakes entry form which, on the front side in large print, stated, "Your telephone service will not change!!!" The consumer's home telephone number was listed as required information on the front of the entry form. On the reverse side of the entry form, in small print, the entry form stated that the consumer consented to purchase a telephone calling card, and that all charges for the calling card would appear on the consumer's regular monthly telephone bill. The entry form also stated, "No purchase is necessary to enter or win." However, there is no option on the entry form that allows the consumer to enter the sweepstakes but yet decline to purchase a calling card. Through billing agents, Telmatch continued to bill consumers for these calling cards up until the issuance of the OII on September 2, 1999.

CSD interviewed several types of consumers in order to demonstrate the misleading and fraudulent nature of Telmatch's consumer solicitation methods. CSD interviewed consumers identified by Telmatch as its "customers," and also interviewed consumers who lodged complaints with Pacific Bell and with the

[1] Unless otherwise noted, all statutory citations are to the California Public Utilities Code.

Commission. CSD investigators testified that even those consumers identified by Telmatch as its own "customers" stated that they were unaware that Telmatch was billing them for calling cards. (D.02-06-077, pp. 7-8.) These consumers expressed surprise and anger when they discovered the charges imposed by Telmatch. (D.02-06-077, p. 8.) Further, CSD investigators determined that the majority of consumers who filed complaints with Pacific Bell did not know why they were being billed, and the majority of consumers who filed complaints with the Commission stated that their telephone bills contained unauthorized charges. (*Id*.)

On October 22, 1999, we issued an Interim Decision, D.99-10-069, which ordered billing agents and Local Exchange Carriers ("LECs"), such as Pacific Bell, to submit to the Commission's fiscal office all funds collected on behalf of Telmatch. Telmatch filed a "Petition for Clarification" of D.99-10-069 on November 12, 1999, seeking clarification as to whether these funds should include amounts held by the billing agents and LECs for fees, reserves or customer refunds. In response to D.99-10-069, the Commission received an approximate total of $62,000 from Verizon California, Pacific Bell and Clearworld Communications. On September 7, 2000, we issued D.00-09-006, which extended the 12-month statutory deadline due to the complexity of the issues involved in this proceeding.[2]

On July 2, 2002, we issued D.02-06-077 and permanently revoked Telmatch's operating authority within the State of California. The Decision found that Telmatch's consumer solicitation practices violated Sections 451 and 2890(a), and imposed $1.74 million in fines, or $2,000 for each of Telmatch's 870 violations. We determined that the severity of Telmatch's offenses was great, its acknowledgement of any wrongdoing was minimal, and it had taken no steps to

[2] In its rehearing application, Telmatch erroneously asserts that we lacked the authority to issue the Draft and Final Decisions in this matter because the statutory deadline had passed. (See Rehearing App., p. 2.) We do not address the question of whether we retain authority to act where the statutory deadline passed since in this case we issued D.00-09-006 on September 7, 2000, extending the statutory deadline for resolution of this proceeding.

change its unlawful conduct. (D.02-06-077, p. 28.) We also ordered Telmatch to pay $5.5 million in reparations to the Commission's Fiscal Office no later than July 27, 2002, to be held in trust on behalf of consumers while the Commission formulated a consumer reparations plan. In addition, Telmatch was provided an opportunity to contest the amount of reparations owed to consumers within ten days of the issuance of D.02-06-077. (D.02-06-077, p. 39, Ordering Paragraph 3.) To date, Telmatch has paid neither the fines nor the consumer reparations ordered in D.02-06-077, and did not challenge the amount of reparations within ten days, as required by the Decision.

On July 31, 2002, Telmatch filed a timely application for rehearing of D.02-06-077. CSD filed a consumer reparations plan on August 16, 2002.

We have reviewed all of the allegations raised in the rehearing application, and determine that cause does not exist for granting the application. However, we will correct a slight miscalculation in the amount of reparations ordered in D.02-06-077.

II. DISCUSSION

In its rehearing application, Telmatch challenges D.02-06-077 on the following grounds: (1) the Commission's conclusion that all Telmatch consumers were crammed is factually and legally unsupportable; (2) D.02-06-077 is not supported by substantial evidence; (3) the standards applied in D.02-06-077 are unconstitutionally vague; (4) the Commission failed to consider Telmatch's financial condition and remedial efforts in assessing fines against Telmatch; (5) the Decision's award of reparations violates due process; (6) the Commission cannot impose fines without filing suit in superior court; and (7) the Commission has no authority to revoke permanently Telmatch's operating authority within the State of California. Telmatch also requests oral argument on its rehearing application.

A. Factual and Legal Support for Cramming Allegations.

Telmatch asserts that the Commission erred both factually and legally in determining that all of Telmatch's approximately 60,000 California "customers" were crammed. (Rehearing App., pp. 38-40.) According to Telmatch, the Commission was required to determine, on an individual basis, that each and every Telmatch "customer" was misled by Telmatch's consumer solicitation materials, and that CSD must demonstrate that each and every Telmatch "customer" relied upon Telmatch's misrepresentations. These allegations lack merit.

Telmatch cites several securities fraud and class action cases in support of its contention that the Commission must prove that each individual Telmatch "customer" was crammed. (See, e.g., *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088-89; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 668-69.) These cases are inapposite, and Telmatch cites no authority for the proposition that Commission investigatory proceedings are akin to securities fraud or consumer class action court cases, or are in any way governed by the complex rules of securities fraud and class actions. As the party seeking rehearing, Telmatch has the burden to demonstrate the specific grounds upon which it considers the Decision to be unlawful, and vague assertions as to the record or the law, without citation, may be afforded little weight. (See Public Utilities Code Section 1732; see also Rule 86.1; Cal. Code Regs., Tit. 20, Sec. 86.1.)

The Decision itself directly addresses Telmatch's argument. In response to Telmatch's claim that there was no evidentiary basis upon which to conclude that all consumers were actually misled, we expressly stated: "[O]ur analysis is focused upon Telmatch's practices and representations not the consumer's state of mind." (D.02-06-077, p. 32.) The Decision noted that the issue of whether Telmatch's consumer solicitation materials constituted an offer to enter a sweepstakes or an offer for utility service is primarily a factual question, and summarized the evidence presented against Telmatch as follows:

> In reaching the determination that Telmatch's representations constituted an invitation to enter a contest, we made findings about the text and graphics of Telmatch's marketing materials. For instance, we observed graphics of hundred dollar bills and Mercedes Benz automobiles. Neither of these items communicates information about a calling card service or associated charges; instead these items refer to contest prizes. Relying upon such graphics and explicit text about chances to win money or a car, we find that Telmatch's representations invited readers to enter a sweepstakes.

(D.02-06-077, pp. 32-33.) The Decision further determined that "Telmatch's contest box does not reasonably inform consumers that they are signing up for a telephone service or that they will be charged a recurring monthly fee on their telephone bills." (D.02-06-077, p. 37, Finding of Fact 25.) Finally, the Decision noted that the Commission's findings are based on the specific facts of Telmatch's contest boxes and entry forms, and not on any per se determination that sweepstakes solicitations are always invalid. (See D.02-06-077, pp. 17-20.)

As will be discussed in more detail in Section 2, below, we were amply justified in determining that the cramming allegations against Telmatch were supported by substantial evidence. (See Section 1757(a)(4).) Moreover, we properly interpreted Section 451 to prohibit precisely the type of misleading consumer solicitation methods utilized by Telmatch. Section 451 requires all charges imposed by a public utility to be just and reasonable. The Decision found that Telmatch imposed unauthorized charges on consumers' telephone bills, that a charge may be unjust under Section 451 for many reasons, and that "[a] utility that furnishes a product or renders a service not authorized by a consumer and then demands a charge has violated Section 451." (D.02-06-077, p. 37, Finding of Fact 30, Conclusions of Law 3 and 4.) The Commission's legal interpretation of the Public Utilities Code is entitled to a strong presumption of validity and should not

be disturbed unless it fails to bear a reasonable relation to statutory purposes. (See *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, 410.)

Thus, the Commission did not err, either legally or factually, in determining that Telmatch's consumer solicitation methods violated Section 451 as to all affected California consumers.

B. Substantial Evidence.

Telmatch next argues that the Decision is not supported by substantial evidence. (See Rehearing App., pp. 18-34.) Telmatch alleges that its marketing materials were clear and unambiguous, that consumers understood its marketing materials, that the evidence does not support CSD's allegations of cramming, and that the Decision erred in concluding that Telmatch billed for noncommunications-related goods and services. These allegations of error lack merit.

Parties may challenge a Commission decision on the ground that the decision is not supported by "substantial evidence in light of the whole record" pursuant to Section 1757(a)(4). In reviewing Commission decisions, courts generally limit their review to a determination of whether the agency's decision is supported under the substantial evidence test. (*Strumsky v. San Diego Co. Emp. Retirement Assn.* (1974) 11 Cal.3d 28, 35.) In such cases, the reviewing court does not reweigh the evidence or exercise its independent judgment to draw conclusions from the record, but instead focuses on whether the Commission's conclusions are reasonably supported. Conflicts of evidence are to be resolved in favor of the findings of the administrative agency, and the fact that evidence is contradicted does not have a bearing on whether that evidence meets the substantial evidence test. (*Molina v. Munro* (1956) 145 Cal.App.2d 601, 604.) Moreover, if findings are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record, and it will not be reversed. (See, e.g., *Lorimore v. State*

Personnel Board (1965) 232 Cal.App.2d 183, 187; *People v. Lane* (1956) 144 Cal.App.2d 87, 89.)

In this proceeding, we weighed all of the evidence submitted by all parties, including Telmatch and CSD, in reaching our conclusion that Telmatch's consumer solicitation methods violated Section 451. The Decision contains a detailed description of Telmatch's sweepstakes entry forms and a comprehensive analysis of why Telmatch's consumer solicitation methods violated Section 451. (See D.02-06-077, pp. 5-7, 17-21.) The Decision expressly considers, and rejects, Telmatch's argument that consumers understood that they were signing up for a calling card program when they filled out Telmatch's sweepstakes entry form. (See D.02-06-077, pp. 20-21.) The Decision also determined that the inclusion of noncommunications-related goods and services, such as lawyer referrals and golf discounts, in Telmatch's calling card program violated Section 2890(a). (See D.02-06-077, pp. 16-17.)

As noted above, these factual determinations are entitled to substantial deference as long as they are supported by inferences reasonably drawn from the record. We found that, in contrast to the "barrage" of text and visual images on the sweepstakes entry form inviting consumers to "ENTER TO WIN," "little language appears that describes the service offered or the associated charges." (D.02-06-077, p. 19.) In addition, we determined that "[t]he language that does appear about the [calling card] service is inconspicuous relative to the bold declarations of a contest and opportunity to win." (D.02-06-077, pp. 19-20.) Finally, we concluded that Telmatch's consumer solicitation materials did not reasonably inform consumers that filling out Telmatch's sweepstakes entry form meant that Telmatch would impose a recurring monthly fee on consumers' telephone bills. (D.02-06-077, p. 20.) These determinations are supported by substantial evidence in light of the entire record, and, accordingly, Telmatch's allegations of error lack merit.

C. Vagueness.

Telmatch next asserts that D.02-06-077 contains unconstitutionally vague standards, and that the Decision fails to put Telmatch and similarly-situated public utilities on notice in terms of what conduct is impermissible under Sections 451 and 2890. (Rehearing App., pp. 34-37.) Telmatch also claims that the Decision employs no objective benchmarks in analyzing whether Telmatch's consumer solicitation materials were unclear and misleading to the average consumer. These assertions lack merit.

Telmatch cites several cases in support of its argument that the Decision fails to articulate clear and unambiguous standards for consumer solicitation materials. (See, e.g., *Echevarrieta v. City of Rancho Palos Verdes* (2001) 86 Cal.App.4th 472, 483; *Ross v. City of Rolling Hills* (1987) 192 Cal.App.3d 370, 375; *McMurtry v. Board of Medical Examiners* (1960) 180 Cal.App.2d 760, 766.) These cases stand for the general, and uncontroversial, proposition that statutes must be definite enough to provide an intelligible standard of conduct for activities that are required or proscribed by law.

As noted above, it is well-settled that there is a strong presumption of the validity of Commission decisions. (See, e.g., *Greyhound*, *supra*, 68 Cal.2d at 410-11; *Pacific Bell v. Public Utilities* Commission (2000) 79 Cal.App.4th 269, 283.) In D.02-06-077, we determined that Sections 451 and 2890 prohibit precisely the type of misleading and ambiguous consumer solicitation practices utilized by Telmatch. Section 451 provides that all charges imposed by a public utility must be just and reasonable. Section 2890(a) states that a telephone bill may only contain charges for communications-related goods and services.[3] In its rehearing application, Telmatch does not claim that these statutes are facially vague or ambiguous. Instead, Telmatch challenges our interpretation of Sections 451 and 2890 as applied to Telmatch. As in all Commission cases, when the

[3] Section 2890 has been amended since the initiation of this OII, but it is referenced herein as it existed at the time of Telmatch's improper consumer solicitation activities.

statutory language is unambiguous, the Commission can determine the intent from the plain meaning of the language itself. (See *Carlton Browne & Co. v. Superior Court* (1989) 210 Cal.App.3d 35, 40; *People v. Superior Court of Santa Clara County* (1984) 150 Cal.App.3d 486, 488.) Remedial consumer protection statutes should be construed in favor of furthering and accomplishing their consumer protection goals. (See, e.g., *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 314; *Ford Dealers v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 356.)

In the present case, we properly determined that Telmatch's consumer solicitation practices violated Sections 451 and 2890, and our interpretation of these statutes in D.02-06-077 was not impermissibly vague. As the Decision notes, "[t]his is not a case where a service solicitation was marginally deficient; instead, by design almost nothing about the solicitation suggested the provision of utility service. (D.02-06-077, p. 33.) The Decision expressly found that Telmatch solicited consumers through a "sweepstakes method" at locations such as fairgrounds, that the entry form emphasized prizes as opposed to utility service, that the entry form stated that consumers' phone service will not change (despite the issuance of a calling card and the imposition of new charges on consumers' bills), and that no purchase is necessary (despite the fact that the form gives no opportunity to "opt out" of the calling card program but still remain eligible for the prizes). (D.02-06-077, pp. 35-37, Findings of Fact 2-11, 24-30.) The Decision also found that Telmatch improperly included services such as golf discounts and lawyer referrals as part of its calling card program, in violation of Section 2890(a). (D.02-06-077, p. 36, Findings of Fact 12, 13, 20.) Given the unambiguous language of Sections 451 and 2890, we reasonably determined that Telmatch's consumer solicitation practices resulted in unjust and unreasonable charges on consumers' bills, and that Telmatch included unauthorized noncommunications-related services as part of its calling card program.

Thus, the Commission's interpretation and application of Sections 451 and 2890 is not unconstitutionally vague or ambiguous.

D. Justification for $1.74 Million Fine.

Telmatch next asserts that we failed to consider its financial condition and remedial efforts in assessing $1.74 million in fines. (Rehearing App., pp. 41-44.) Telmatch also claims that we erred in applying a "totality of the circumstances" test in imposing fines against Telmatch. These arguments lack merit.

In D.98-12-075, the Commission outlined several factors to be considered in assessing fines against a public utility. These factors include the following: 1) the severity of the offense; 2) the conduct of the utility, including the utility's conduct in preventing the violation, detecting the violation, and disclosing and rectifying the violation; 3) the financial resources of the utility; and 4) the totality of the circumstances in furtherance of the public interest. (See D.98-12-075 (1998) 84 Cal.P.U.C.2d 155, 182-84.) We noted in D.98-12-075 that "[i]t is fundamental to the Commission's exercise of its powers and jurisdiction that the agency take reasonable steps to ensure that the utilities comply with its orders and rules," and that "the Commission has traditionally imposed fines when faced with persuasive evidence of non-compliance." (*Id*. at 168.)

In the present case, we properly considered all of the factors listed above in assessing $1.74 million in fines against Telmatch. (See D.02-06-077, pp. 25-30.) In terms of the severity of the offense, the Decision notes that, while the "actual dollar amount per consumer is relatively small, the number of consumers affected is large," and that the unlawful benefit gained by Telmatch due to its consumer solicitation practices was approximately $5.5 million. (D.02-06-077, p. 28.) The Decision also finds that "a widespread violation that affects a large number of consumers constitutes a more severe offense than one that is limited in scope." (D.02-06-077, p. 26.) Thus, the Decision concludes that the severity of Telmatch's offense was great. (D.02-06-077, p. 28.)

In terms of assessing the utility's conduct, including preventing, detecting, disclosing and rectifying the violations, we determined that Telmatch's acknowledgement of wrongdoing was minimal and that Telmatch took the untenable position that its marketing efforts were clear and unambiguous, "despite repeated complaints from consumers that the billed services were not ordered." (*Id*.) The Decision also states that "Telmatch took no steps, absent new legislation, to change its conduct," and that, "[r]ather than prevent future incidents of consumer complaints, Telmatch adopted a caveat emptor approach to dealing with California consumers and continued to solicit consumers with representations of chances to win cash or a car." (*Id*.) The Decision further finds that Telmatch had no consumer service representatives of its own, thus making the task of rectifying violations all the more problematic. (D.02-06-077, p. 36, Finding of Fact 14.) Thus, the Decision concludes that Telmatch failed to take affirmative steps to prevent, detect, disclose and rectify its numerous and repeated violations.

Regarding Telmatch's financial resources, the Decision notes that, due to its improper consumer solicitation practices, Telmatch obtained an unlawful benefit of approximately $5.5 million from California consumers. (D.02-06-077, p. 36, Finding of Fact 17.) The Decision states that "[e]ffective deterrence requires that the Commission recognize the financial resources of the public utility in setting a fine that balances the need for deterrence with constitutional limitations on excessive fines." (D.02-06-077, p. 27.) Fines should be adjusted to achieve the object of deterrence, without becoming excessive. (*Id*.) In recognition of this principle, we deviated substantially from a maximum possible fine of $17.4 million, and instead imposed a fine of $1.74 million, which is a mere 10% of the possible maximum. (D.02-06-077, p. 29.)

Finally, we properly considered the totality of the circumstances in furtherance of the public interest in assessing fines against Telmatch. The Decision notes that the goal of deterring future unlawful conduct by the subject utility and others "requires that the Commission specifically tailor the package of

sanctions, including any fine, to the unique facts of the case." (D.02-06-077, p. 28.) The Decision also states that "[t]he Commission will review facts that tend to mitigate the degree of wrongdoing, as well as any facts which exacerbate the wrongdoing," and that "the harm will be evaluated from the perspective of the public interest." (*Id.*) Thus, considering the totality of the circumstances, including the widespread nature of Telmatch's offenses, we imposed a fine of 10% of the possible maximum fine.

Given the weight of the evidence presented against Telmatch, and considering all of the factors outlined in D.98-12-075 regarding the imposition of fines, we properly exercised our judgment and discretion in assessing $1.74 million in fines against Telmatch. Thus, Telmatch's arguments to the contrary lack merit

E. Award of Reparations.

In its rehearing application, Telmatch alleges that we improperly based our award of reparations upon 870 distinct offenses. Telmatch claims that, because it only billed consumers for its calling card services on a monthly, as opposed to a daily, basis, an award of reparations based on 870 separate offenses is unjustified and violates due process. (See Rehearing App., p. 41.) This allegation lacks merit.

First, Telmatch misunderstands the distinction between punitive damages and penalties, on the one hand, and consumer reparations on the other hand. The cases cited by Telmatch deal solely with punitive damages and penalties. (See, e.g., *Adams v. Murakamai* (1991) 54 Cal.3d 105, 110 (punitive damages); *Hale v. Morgan* (1978) 22 Cal.3d 388, 401 (penalties).) However, the reparations ordered by the Commission are not in the nature of punitive damages or penalties. Rather, they are specifically designed to compensate consumers who were improperly and illegally billed for calling card services by Telmatch. The Decision itself states that "[r]eparations should be distinguished from fines" and that "[r]eparations are not fines and conceptually should not be included in setting

the amount of a fine." (D.02-06-077, p. 24.) The Decision further states that "[r]eparations are refunds of excessive or discriminatory amounts collected by a public utility," and that the purpose of reparations is to "return unlawfully collected funds to the victim." (*Id.*, citing Section 734.) Thus, the cases cited by Telmatch are inapposite.

Second, contrary to Telmatch's allegation, the $5.5 million in consumer reparations was not based upon 870 separate incidents of improper billing. CSD estimated that approximately 60,000 California consumers were billed $4.33 per month by Telmatch for a period of at least 20 months, for an approximate total of $5.2 million.[4] Telmatch also charged each of these 60,000 consumers a one-time activation fee of $4.96, or an additional $300,000, for a grand total of $5.5 million owed by Telmatch in consumer reparations. (See D.02-06-077, pp. 8-9.) We found that "CSD's estimate of $5.5 million reasonably approximates the amount owed California consumers" by Telmatch. (D.02-06-077, p. 24.)

Third, and finally, if Telmatch disagreed with the Commission's calculation of consumer reparations, it was afforded an opportunity to challenge the reparations award within ten days of the issuance of D.02-06-077 by filing a petition to modify. (D.02-06-077, pp. 24-25, fn. omitted.) Telmatch did not file a petition to modify the amount of reparations awarded in D.02-06-077.

Thus, for the reasons discussed above, Telmatch's arguments regarding the Commission's award of reparations lack merit. However, we have noticed a slight miscalculation in the amount of reparations awarded. In the

[4] In its rehearing application, Telmatch admits that most of the facts in this proceeding are not in dispute, and states that Telmatch marketed its calling cards to California consumers in 1997 and January 1998 with "sweepstakes promotions." (Rehearing App., p. 9.) Telmatch's Exhibit 22, presented during hearings in this proceeding, identified approximately 220,000 Telmatch customers. (See Exhibit 22; see also Transcript of October 13, 1999, Vol. 4, p. 410.) Upon examination by the ALJ, Telmatch's witness Ingrid Dahl was unable to estimate the number of active Telmatch customers out of the total number of approximately 220,000. (Transcript of October 13, 1999, Vol. 4, p. 410.) Thus, the Commission accepted, for the purpose of reparations, CSD's estimate of 60,000 active customers, or roughly 27% of the 220,000 customers listed in Telmatch Exhibit 22. (D.02-06-077, pp. 8-9, 24-25, 36, Finding of Fact 18.) Exhibit 22 was received by the Commission under seal, at Telmatch's request. (Transcript of October 13, 1999, Vol. 4, p. 411.)

interest of accuracy, we have determined that reparations should be ordered in the amount of $5,493,600, instead of $5.5 million.

F. Commission's Authority to Directly Impose Fines.

Telmatch claims that we lack the authority to directly impose fines on Telmatch, but rather must seek to enforce any fines in superior court. (Rehearing App., pp. 44-45.) Contrary to Telmatch's argument, we have the authority to directly levy fines or penalties pursuant to Sections 701, 2107 and 2108. Section 701 authorizes the Commission to do all things necessary and convenient in the exercise of its power and jurisdiction. Section 2107 provides that a public utility may be fined between $500 and $20,000 for each violation of the Public Utilities Code, and Section 2108 states that every violation of the Public Utilities Code constitutes a separate and distinct offense.

Telmatch's argument that Section 2104 requires the Commission to seek fines in superior court, rather than imposing fines directly, is contradicted by recent Commission decisions and by denials of petitions for writ of review, challenging the Commission's authority to directly impose fines. The plain language of Section 2104 refers to "actions to *recover* penalties." (Pub. Util. § 2104 (emphasis added).) Thus, the Commission has interpreted Section 2104 to apply to the "recovery" of penalties, rather than to the imposition of penalties. (See, e.g., *Strawberry Property Owners Assoc. v. Conlin Strawberry Water Co.*, D.00-03-023, (2000) 2000 Cal. PUC Lexis 127, *6-*7, and cases cited therein.)

In 1993, the Legislature enacted Senate Bill ("SB") 485, which amended Public Utilities Code Section 2107 to increase the amount of fines that may be imposed on public utilities. (See Stats. 1993, ch. 221, § 12, p. 1462.) The legislative history for SB 485 expressly acknowledges that the Commission "has broad authority *to levy* appropriate fines in the course of its business," and cites Section 701 as the basis of this authority. (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1 (emphasis added).) The legislative history notes that this broad authority has been

"supplemented by additional specific fine authority" of a specified dollar amount, as set forth in Section 2107. (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1.) Further, a bill analysis explicitly states that SB 485 "would increase the fines the Public Utilities Commission *can levy* against public utilities. . . ." (Senate Committee on Energy and Public Utilities, Analysis of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as heard on April 20, 1993, p. 1 (emphasis added).)

Moreover, that legislative history also supports our interpretation of Section 2104 that the Commission is only required to go to court to collect, rather to impose, a fine; that is, to collect an unpaid fine. As stated in the legislative history, "[t]he [Commission] must go to the Superior Court *to collect any fines which are levied*." (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended on April 19, 1993, p. 1 (emphasis added).)

Telmatch points out that, at one time, we interpreted Section 2104 as requiring a court action to impose penalties, rather than the Commission possessing the authority to independently assess fines. (See, e.g., *TURN v. Pacific Tel. & Tel. Co.*, D.82-03-070 (1982) 8 Cal.P.U.C.2d 356, 359.) However, "'an administrative agency may change its interpretation of a statute, rejecting an old construction and adopting a new.'" (*Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1326, quoting *Henning v. Industrial Welfare Com.* (1988) 46 Cal.3d 1262, 1269.) Moreover, "'even when an agency adopts a new interpretation of a statute and rejects an old, a court must continue to apply a deferential standard of review.'" (*Hudson v. Board of Administration*, *supra*, at p. 1326, quoting *Henning*, *supra*, at p. 1270; see also *Californians for Political Reform Foundation v. Fair Political Practices Com.* (1998) 61 Cal.App.4th 472, 484.)

As early as 1990, we interpreted Section 2104 to apply to the "recovery" of penalties, rather than to the imposition of penalties. Thus, we have the authority to impose penalties for violations of the Public Utilities Code or

Commission decisions, but must recover or collect unpaid penalties through a superior court action. (See *Vortel Communications, Inc. v. Advanced Communications Technology, Inc., et al.* (1990) 1990 Cal.P.U.C LEXIS 673 at p. *17; see also *Re Southern California Water Company*, D.91-04-022 (1991) 39 Cal.P.U.C.2d 507, 516.)

Finally, there have been several Commission decisions imposing penalties that have been appealed, in whole or in part, on the basis of our authority directly to impose fines. In each of these cases, a petition for writ of review has been summarily denied by the Court of Appeal. (See, e.g., *Futurenet, Inc. v. Public Utilities Commission*, petition denied June 7, 2000, B137208; *Conlin-Strawberry Water Co., Inc. v. Public Utilities Commission*, petition denied July 26, 2001, F035333 [Commission's authority to impose penalties was the sole issue presented to the court]; *Southern California Edison Co. v. Public Utilities Commission*, petition denied Feb. 28, 2002, B156189.) Most recently, on April 30, 2003, the California Court of Appeal summarily denied the petition for writ of review filed in *Vista Group International, Inc. v. California Public Utilities Commission*, Case No. A100218. One of the primary allegations of legal error in *Vista* was that the Commission lacked the authority to independently assess fines. While a summary denial does not have precedential effect, it is considered to be a "decision on the merits" for res judicata purposes. (See *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 630-631; *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905.) In light of *Pacific Bell*, *supra*, 79 Cal.App.4th at 272, in which the Court held that review is discretionary if petitioner fails to present a convincing argument that the Commission's decision should be annulled, it can be presumed that the writs denied indicate the reviewing courts found no legal error.

For all of the foregoing reasons, the Commission has the authority to impose fines directly on Telmatch without proceeding to superior court.

G. Revocation of Telmatch's Operating Authority.

In its final argument, Telmatch claims that the Commission may authorize Telmatch to operate within the State of California, but lacks the concomitant power to revoke permanently Telmatch's operating authority. According to Telmatch, we lack the ability to revoke its Certificate of Public Convenience and Necessity ("CPCN") because the CPCN was issued pursuant to Section 1001. This argument lacks merit.

Telmatch's CPCN, which authorized Telmatch to conduct business under our jurisdiction within the State of California, was initially revoked by Resolution T-16647 on April 22, 2002. After extensive efforts by the Commission's Telecommunications Division to locate and contact Telmatch, Telmatch's CPCN was revoked due to inactivity, as evidenced by its failure to promptly file annual reports and remitting surcharges with the Commission, as required by Ordering Paragraph 4 of D.93-05-010. (See Res. T-16647, pp. 1-2.) In addition, Telmatch's Utility Identification Number was permanently cancelled by Resolution T-16647. (See Res. T-16647, p. 4.) Telmatch did not challenge Resolution T-16647.

Further, it should be noted that Telmatch does not challenge our authority to suspend or revoke temporarily its CPCN. (See Rehearing App., pp. 45-46.) Rather, Telmatch claims that we lack the power to revoke permanently its CPCN. According to Telmatch, because the Commission is expressly authorized by certain statutes to revoke particular types of CPCNs, the fact that Section 1001 does not expressly authorize the Commission to revoke a CPCN issued pursuant to Section 1001 means that the Commission lacks such authority.

The Commission's jurisdiction to regulate and oversee the conduct of public utilities operating within the State of California is well-established. California Constitution Article XII, section 2 provides that the Commission "may establish its own procedures," and section 6 states that the Commission "may fix rates, establish rules, examine records, issue subpoenas, administer oaths, take

testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." Public Utilities Code Section 701 further provides that the Commission "may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and discretion." Section 761 states that the Commission shall fix any unjust, unreasonable, or improper practice of a public utility, and shall prescribe rules for the performance of any service by a public utility.

Case law supports the breadth of Commission authority based on constitutional and statutory grounds. In *Wise v. Pacific Gas & Electric Company* (1999) 77 Cal.App.4th 287, 300, the Court noted that the Commission "is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers." In *Greyhound*, *supra*, 68 Cal.2d at 410-11, as noted above, the California Supreme Court stated that there is a "strong presumption of the validity of the commission's decisions" and "the commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." Similarly, in *Pacific Bell*, *supra*, 79 Cal.App.4th at 283, the California Court of Appeal stated that courts will not disturb Commission decisions absent a "manifest abuse of discretion or an unreasonable interpretation of the statutes" at issue.

In the present case, the Commission has ample authority to revoke Telmatch's CPCN due to its flagrant and unlawful consumer solicitation practices. To suggest otherwise would transform Telmatch's CPCN, which is a license to do business under the Commission's jurisdiction, into a license to steal from California consumers, with the Commission powerless to take any remedial action. Such a construction of the Commission's authority under the California Constitution and the Public Utilities Code is untenable and flatly inconsistent with the Commission's obligation to broadly implement consumer protection statutes.

(See, e.g., *Lungren*, *supra*, 14 Cal.4th at 314; *Ford Dealers*, *supra*, 32 Cal.3d at 356.)

Thus, the Commission properly acted within its authority and jurisdiction in permanently revoking Telmatch's operating authority within the State of California.

H. Oral Argument.

Telmatch requests an oral argument regarding the issues raised in its application for rehearing. Rule 86.3 of the Commission's Rules of Practice and Procedure specifies that oral argument will be considered if the application "demonstrates that oral argument will materially assist the Commission in resolving the application, and . . . raises issues of major significance for the Commission." (Cal. Code of Regs., Tit. 20, § 86.3.) In this instance, there is ample evidence in the record regarding Telmatch's conduct and consumer solicitation methods. We have a full understanding of the record. There are no legal issues requiring further briefing, whether oral or in writing. Additionally, there is no finding that we have departed from existing Commission precedent without adequate explanation. Accordingly, Telmatch's request for oral argument is denied.

III. CONCLUSION

Rehearing is denied because no legal error has been demonstrated.

IT IS THEREFORE ORDERED that:

1. Rehearing of D.02-06-077 is denied.
2. The amount of reparations ordered should be $5,493,600, instead of $5.5 million.

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3. Within 60 days of the date of this Order, Telmatch is directed to comply with the requirements of D.02-06-077, including the assessment of fines and consumer reparations.

This order is effective today.

Dated June 5, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners