Decision 05-06-033 June 16, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion Into the Fitness of the Officers, Directors, Owners and Affiliates of Clear World Communications Corporation, U-6039, Including Individual Officers, Directors and Shareholders James, Michael, and Joseph Mancuso, and Into the Conduct of Other Utilities, Entities, or Individuals (including Christopher Mancuso) Who or That May Have Facilitated the Mancusos' Apparent Unlicensed Sale of Telecommunications Services.	Investigation 04-06-008 (Filed June 9, 2004)

Brian J. McCormack and Stephen Z. Vegh, Callahan & Blaine, for Clear World Communications Corporation; James, Michael and Joseph Mancuso, respondents.
Susan E. Brown and Mirissa McMurray, Attorneys at Law, for Latino Issues Forum.
Nicola T. Hanna and Erin Schneider, Attorneys at Law, for MCI, Inc.
Chris Witteman, Attorney at Law, for Consumer Protection and Safety Division.

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OPINION RESOLVING INVESTIGATION

1. Summary

Following a lengthy investigation, we conclude that two predecessor companies of Clear World Communications Corporation (Clear World) operated as unauthorized resellers of long distance service in California between the years 1997 and 1999 and were not "agents" of other licensed resellers, and we further conclude that the assets of one of these companies were transferred to Clear World without authorization. Based on penalties assessed in similar cases in the past, we impose a fine of $100,000. As to Clear World itself, we further conclude that while incidents of fraudulent sales of long distance service by some of its telemarketers may have occurred, the evidence is insufficient to show systemic violations by Clear World or its principals. However, because the record demonstrates inconsistencies in regulatory compliance by this company, we impose additional reporting requirements on Clear World to ensure its continued compliance with requirements of the Public Utilities Code. The appeals of the decision of the Presiding Officer by two parties are denied.

2. Background

This investigation is an outgrowth of a February 2003 decision by the Commission, Decision (D.) 03-02-066, that denied Clear World's application to expand its services to include local exchange calling, imposed sanctions on the company, and directed further investigation of alleged wrongdoing by Clear World and its officers. That decision also found at least three incidents of slamming (unauthorized switching of long distance provider) and other infractions that made Clear World unfit to expand its service beyond the sale of long distance and local toll services.

The Commission directed its Consumer Protection and Safety Division (CPSD) and Legal Division to conduct further investigation of Clear World and its principals and, if they decided it was appropriate, to recommend an Order Instituting Investigation (OII) on or before May 8, 2003, seeking further sanctions.

The subsequent investigation was wide-ranging and intense, evoking numerous objections by the respondents. Because Clear World resisted what it deemed unreasonable data requests, and because CPSD was compelled to gather information from entities other than Clear World, CPSD twice petitioned the Commission for stays in the date for its recommendation of an OII. The OII was finally filed and adopted by the Commission on June 9, 2004.

Based on the evidence it had gathered, CPSD urged the Commission to revoke the operating license of Clear World, to permanently ban brothers James, Michael, and Christopher Mancuso, and their father, Joseph Mancuso, from regulated utility service in California, and to impose fines and reparations on both Clear World and on James and Michael Mancuso as individuals for alleged slamming, other misrepresentations to customers, failure to cooperate with the Commission in this investigation, and earlier unlawful operation of telecommunications companies.

Prehearing conferences in this matter were conducted on July 27 and October 8, 2004. The Commission, through the assigned Administrative Law Judge (ALJ) Glen Walker and Commissioner Geoffrey F. Brown, conducted 10 days of hearings on November 9 through 24, 2004, during which time CPSD presented the testimony of 18 witnesses and introduced 423 exhibits or attachments. Latino Issues Forum presented the testimony of three witnesses and introduced three exhibits. Clear World presented the testimony of seven

witnesses and introduced 44 exhibits. By pre-arrangement at hearing, bank records subpoenaed by CPSD were received as a late-filed exhibit on January 5, 2005, and Clear World's response to that showing was received on January 15, 2005. Concurrent briefs were filed on January 31, 2005, and concurrent reply briefs were filed on February 22, 2005, at which time this matter was deemed submitted for Commission decision. The Commission was notified on February 14, 2005, that Joseph Mancuso, father of the three Mancuso brothers, died on or about December 28, 2004.

3. A Brief History of the Mancusos' California Entities

The Mancusos since the early 1990s have formed and operated a number of telecommunications companies. The history of these operations is recounted in D.03-02-066, but a brief review here will assist the reader in assessing the evidence presented at hearing.

Christopher Mancuso (hereinafter sometimes referred to simply as Christopher, in the interests of brevity and clarity, not informality), the most experienced of the Mancuso family in telephone marketing, organized most of the telephone companies operated by the Mancusos. In 1989, working with a partner from outside the family, he had formed National Telephone and Communications, Inc. (NTC), a certificated reseller of long distance service. Christopher in 1992 sold a controlling interest in the company but continued to serve NTC as a consultant. The Commission investigated NTC in 1997 and, in D.98-02-029, fined the company $1.2 million for slamming violations and required $335,000 in restitution to customers. The decision also effectively banned Christopher from further service to NTC.

Christopher in 1994 or earlier organized a telecommunications company called American Electronics Corporation, better known by its dba as Discount Long Distance (DLD), with his father Joseph Mancuso as president and his brother Michael Mancuso as general manager. DLD in 1997 purported to become the agent of AmeriVision Communications, Inc. (AmeriVision) for the sale of long distance service to the public under AmeriVision's tariffs and operating authority.

Christopher incorporated Worldwide Telecommunications Corporation (Worldwide) on July 23, 1998, with his father Joseph Mancuso as Chief Executive Officer and brother James Mancuso as agent for service of process. Christopher negotiated a contract with WorldTel Services, Inc. (WorldTel), a certificated interexchange reseller, by which Worldwide resold long distance service under WorldTel's tariffs. On February 4, 1999, the Commission's chief enforcement officer notified Worldwide that its method of providing its own long distance service under the name of WorldTel was unlawful in California, and he directed that such sales cease immediately. Worldwide ceased sale of telephone services, amended its agreement with WorldTel, and filed an application for registration as a reseller of long distance service. The application was never granted and was withdrawn in April 2002.

Clear World, the principal respondent in this case, was incorporated in California on May 11, 1998 and filed an application on July 13, 1998 for authority to resell long distance and local toll service in California. The application was granted under the Commission's short-form registration process in D.98-08-056 on August 17, 1998. Once again, Christopher Mancuso did much of the organization work in his role as a "consultant" for the new company, but his brother Michael was named chief executive officer and James Mancuso, a lawyer,

became general counsel. In October 1998, Clear World acquired all of the assets of DLD, including its customer lists and sales force.

At the height of its business in 2003, Clear World had 750 employees generating 30,000 new orders a month in 32 states, with telemarketer operations in Santa Ana (the headquarters), Los Angeles, Fresno, Downey and Riverside. At the time of hearing, Clear World had closed all of its telemarketing offices except Santa Ana, had reduced headcount to 130 employees, and was showing a net loss in operating income. Clear World claimed that it had approximately 100,000 customers nationwide, with about 20,000 of them in California.

Earlier, in 1992, Christopher had formed a number of consulting companies, including Communication Consulting Incorporated (CCI) and International Telecommunications Consulting, L.L.C. (ITC), to provide carrier negotiations and bill auditing services for telecommunications carriers, including Clear World and the other Mancuso-owned companies. In 1996, Christopher negotiated with MCI Worldcom (MCI) what came to be known as the "billion-dollar agreement." In it, MCI provided attractive pricing on underlying long distance service to the various telephone companies owned by or associated with the Mancusos by combining the sales of those companies to achieve the maximum volume reduction in the wholesale price of long distance lines.

Christopher Mancuso did not appear in this case, and CPSD's attempts to summon his appearance were unsuccessful. While Christopher was active in the formation of most of the Mancuso-owned companies, his role was described as that of a consultant rather than an officer or shareholder. The reason for this, as he recounted in a 1998 deposition in a Superior Court case, was that Christopher had been convicted of felony mail fraud in 1986 and in 1987 had served six months in prison for his role in a Ponzi scheme involving the sale of milk

cultures purportedly used for cosmetics. (A Ponzi scheme is one that defrauds investors by paying them returns with funds raised from later investors.) While a felony conviction does not necessarily bar Christopher Mancuso from service as an officer or shareholder of a regulated utility in California, it is a substantial impediment when the felony involves fraud. This was the reason that Christopher sought to avoid an official role in DLD, Worldwide or Clear World, but continued to serve them through his consulting companies, CCI and ITC.

4. The Issues in This Case

Following two Prehearing Conferences, Assigned Commissioner Brown on August 4, 2004, issued a Scoping Memo establishing dates for hearing and setting forth nine issues to be considered in this proceeding. The Scoping Memo also granted the petition of Latino Issues Forum to intervene. The parties agreed on the issues to be considered, and they agreed that the hearing would be confined to these issues.

We turn now to discussion of each of these issues.

4.1 Does the evidence show that DLD, the Mancuso Respondents and Christopher Mancuso sold long distance service without Commission authority in violation of Pub. Util. Code §§ 1001 and 1013?

In California, long distance resellers are utilities that must register with, and obtain a certificate of public convenience and necessity (CPCN) from, the Commission. (Pub. Util. Code §§ 1001 and 1013(a).) CPSD alleges that Christopher Mancuso, in league with his brothers and his father, operated two unlicensed telephone companies, DLD and later Worldwide, in both instances without obtaining a CPCN. The Mancusos then and now maintain that DLD and Worldwide were established as "agents" lawfully selling long distance service

under the tariffs of licensed resellers. The evidence overwhelmingly shows that DLD and Worldwide operated as resellers, held themselves out as resellers, and were recognized to be resellers by those with whom they dealt.

Licensed telephone companies frequently employ agents or independent contractors to sell their telephone products. A veteran telecommunications witness, Arturo David Jemio, called as an expert by Clear World, testified that he makes a comfortable living matching telemarketer "rooms," or groups of experienced telemarketers, with the "products" of companies that depend on telemarketing sales. Such rooms contractually have an agency or independent contractor relationship with the companies for which they sell.

We concluded in D.03-02-066 that DLD's agreement in 1997 to sell the long distance services of AmeriVision, a certificated reseller, was something other than an agency agreement. We noted, however, that the so-called agency agreement between DLD and AmeriVision had not been produced in evidence and left lingering doubts as to the intent of the parties. In this proceeding, CPSD produced the billing aggregator's agreement and related agreements that identified DLD as a "reseller of long distance telecommunications services" rather than as an agent.

Carl Thompson, former executive vice president of AmeriVision, testified via video conference transmission from Oklahoma that the parties intended to form an agency agreement and that the identification of DLD as an independent reseller was a result of his learning disability that caused him to misidentify certain words in the agreement. If Thompson has a learning disability, it wasn't apparent in his testimony. His responses demonstrated a keen knowledge of the telephone telemarketing industry, as well as strong negotiating skills. Indeed,

when he left AmeriVision in 1998, he negotiated a "golden parachute" that was to pay him $20,000 a month for three years.

Scott Nieman, MCI sales representative for DLD and AmeriVision beginning in 1998, testified that while he at one time thought that the agreement between the two companies was an agency agreement, he dealt almost exclusively with Christopher Mancuso in arranging the underlying MCI long distance service to DLD and AmeriVision (and, later, Worldwide and Clear World) at a deeply discounted wholesale rate.

Kelly Franks, regulatory and accounting specialist for AmeriVision between 1996 and 2003, testified that she became convinced that DLD was operating as a separate telephone reseller company and that it shared a contract with AmeriVision to use MCI as the underlying long distance carrier. Stephen D. Halliday, an attorney and an officer of AmeriVision beginning in 1998, testified that DLD was using the reseller certification of AmeriVision to provide telephone services to the public on behalf of DLD. He said that DLD operated as an independent reseller, not as an agent. He stated that AmeriVision in 1998 advised DLD that their relationship would be terminated unless DLD obtained certification from this Commission as a reseller. Halliday identified an internal AmeriVision memo in May 1998 concluding that AmeriVision in effect had been falsely identifying DLD sales as its own, "essentially hiding [DLD] as a company from regulatory agencies and government scrutiny." (Exhibit 32.) On cross-examination, Halliday admitted that he did not have first-hand knowledge of Thompson's intent in 1997 in purportedly forming an agency agreement with DLD.

Billing documents obtained by CPSD showed that state and federal surcharges were paid on behalf of DLD, something that would not have occurred

had DLD only been an agent for AmeriVision sales, the surcharges for which would be attributable only to AmeriVision. Franks and Halliday both testified that DLD had its own direct customer base in addition to representing AmeriVision's customer base.

CPSD alleges that another unlicensed Mancuso company, Worldwide, used the tariffs and certification of a licensed reseller, WorldTel, to provide long distance services to California customers after July 1998. We concluded in D.03-02-066 that WorldTel assigned all of its rights and responsibilities to Worldwide, receiving a $5,000-per-month fee for Worldwide's use of WorldTel's tariffs and operating authority.

Kenneth Lipinski, chief executive officer for WorldTel until it ceased doing business in 2000, testified that he negotiated WorldTel's agreement with James Mancuso and Worldwide in 1998 as part of an effort to begin winding down WorldTel's operations. While Worldwide in effect took over WorldTel's functions of selling and servicing long distance customers, all billing for these services went out under the name of WorldTel and under the tariffs filed by WorldTel.

In D.03-02-066, we concluded that the July 1998 agreement was not a proper agency agreement because WorldTel did not retain sufficient control over Worldwide. We agreed with the letter to Worldwide dated February 4, 1999, from William R. Schulte, then the Commission's chief enforcement officer, that Worldwide was unlawfully "renting" the operating authority and tariffs of WorldTel in order to conduct long distance reselling in California. Schulte's letter directed Worldwide to cease such sales immediately and file for its own operating authority.

James Mancuso testified that when he received Schulte's letter, he and his father Joseph (co-owners of Worldwide at that time) immediately met with Commission staff to correct Worldwide's practices. Worldwide ceased further sales, continued serving existing customers, renegotiated a new agency agreement with WorldTel, and filed an application for registration as a reseller of long distance service. The application was never granted and was withdrawn in April 2002, when Worldwide went out of business, arranging the transfer of its few remaining customers to other long distance providers.

On this record, we find that DLD operated as a reseller of long distance service without certification by this Commission in violation of Pub. Util. Code § 1001 (requiring an operating certificate) or Pub. Util. Code § 1013(a) (requiring short-form registration). We further find that since he had earlier formed and operated a licensed reseller of long distance services, Christopher Mancuso in 1997 (when DLD contracted with AmeriVision) knew or should have known that DLD's operation was contrary to Commission regulations.

As we found in D.03-02-066, and as we find again here, Worldwide's agreement with WorldTel in 1998 was not a proper agency agreement, although the evidence is less certain as to whether the parties intended to make it an agency agreement similar to agency arrangements common in the industry. While we find that Worldwide violated Pub. Util. Code § 1001 or § 1013(a), its actions are mitigated by its immediate cessation of sales in February 1999 upon receipt of the Schulte letter and its efforts to file for authority under § 1001 and to otherwise work with Commission staff in correcting its operating status.

4.2 Does the evidence show that Clear World, the Mancuso Respondents and Christopher Mancuso misrepresented and concealed DLD's sales and related facts in violation of Pub. Util.

Code § 2114 and Rule 1 of the Rules of Practice and Procedure?

CPSD cites deposition testimony of Michael and James Mancuso to support its contention that respondents concealed DLD's sales and related facts in violation of Pub. Util. Code § 2114, which makes it a felony to misrepresent facts in sworn testimony before the Commission and imposes a penalty of up to $500,000.

We are not persuaded by CPSD's evidence. Granted, the testimony of AmeriVision witnesses Franks and Halliday establishes that DLD sales revenues were combined with and misrepresented as AmeriVision revenue in billing agent accounts, and that Christopher Mancuso played a prominent role in arranging this revenue technique. Christopher, however, has never testified before the Commission on this subject and therefore cannot be shown to have violated Pub. Util. Code § 2114 and/or Rule 1. Clear World did not exist when the DLD and AmeriVision billing revenues were combined, and there is no evidence to show that Clear World later misrepresented the facts. James and Michael Mancuso testified at depositions that DLD revenue sales were properly reported, but in doing so they said that their statements were based on their belief that an agency relationship existed between DLD and AmeriVision. That testimony may have been erroneous (because we now find that a DLD/AmeriVision agency relationship did not exist), but it has not been proved that it was knowingly false because the deponents also made it clear that their conclusions were based on a belief that a valid agency arrangement existed. Therefore, the evidence also fails to show a violation by these respondents.

4.3 Does the evidence show that Clear World, the Mancuso Respondents and Christopher Mancuso engaged in slamming or fraudulent

marketing in violation of Pub. Util. Code §§ 451, 2889.5 and 2890?

"Slamming" is the unauthorized change of a customer's telephone provider. Under Pub. Util. Code § 2889.5, no such change may be made unless (1) the customer is fully informed of the new service; (2) the customer agrees to the change and is told of any additional charges; (3) the customer's decision to change providers is verified by an independent third-party verification service; and (4) the customer within 14 days is informed by mail that the change is being made, advised of details of the new service, and given a telephone number to call if the customer has questions. Pub. Util. Code §§ 451 and 2890 provide that a telephone bill may only contain charges for products or services that the consumer has authorized, and that all such charges must be reasonable.

CPSD contends that Clear World telemarketers engaged in widespread slamming, primarily by misrepresenting the terms of the long distance and local toll service offered by Clear World, and that the slamming was a systemic practice known to and encouraged by Clear World's management. CPSD and intervenor Latino Issues Forum assert that Clear World targeted Latino communities, making its sales pitch in Spanish to non-English speaking Latinos, many of them new to this country.

To support these allegations, CPSD presented evidence purporting to show a high level of primary interexchange carrier disputes (more commonly known as PIC disputes) against Clear World, the testimony of six former Clear World telemarketers who stated that misrepresentations to customers were common, and the testimony or deposition testimony of six Clear World customers who believed that they had been slammed.

4.3.1 PIC Disputes

A PIC dispute occurs when a customer complains to a local exchange carrier like SBC California (SBC) that his or her long distance service was switched to another carrier without authorization. SBC and Verizon California Inc. track PIC disputes and report them to the Commission monthly. The PIC dispute process has evolved into a "no-fault system" in which a customer's statement that the customer's long distance service was switched without authorization is accepted at face value, and the customer's service is switched back to the customer's previous long distance company, with all associated charges (including up to 30 days of long distance charges) charged back to the company that made the initial switch. (*See, e.g.*, 47 C.F.R. §§ 64.1100-64.1190.)

In D.03-02-066, the Commission recognized CPSD's contention that Clear World had 48,176 PIC disputes during the period of 1998-2000 and 21,830 in 2001, but the Commission noted that most of those numbers should be cut in half because a PIC dispute generally is counted as two disputes, one for the long distance switch and another for the local toll switch. In this proceeding, SBC's witness testified that there had been approximately 14,000 PIC disputes recorded against Clear World in 2003, again acknowledging that this in fact represented about 7,000 individual complaints.

SBC's witness, responsible for monitoring PIC disputes received by SBC, stated that a PIC dispute is not always a slam, since no slam would have occurred if there was no misrepresentation of the terms of the switch and the switch was verified in the third-party verification process. Because of the no-fault system, however, SBC does not investigate whether a PIC dispute was a slam.

The witness also testified that SBC conducts an aggressive "winback program" in which it offers incentives to those who have changed their SBC long distance service to return to SBC. He acknowledged that SBC has been required to change its winback solicitation in light of this Commission's December 16, 2004 decision in *Telscape v. Pacific Bell,* in which it was found that SBC's winback practice of suggesting to callers that a switch was fraudulent "has the potential for generating inaccurate reports of slamming." (D.04-12-053, at 26.) The decision adopted a partial settlement between SBC and a number of competitive carriers in which SBC agreed to stop suggesting to former customers, without investigation or verification, that they may have been slammed.

4.3.2 Former Employee Testimony

Six former employees of Clear World at the Fresno and Los Angeles offices, all of whom had been fired by the company and had filed claims for additional pay with the California Department of Labor, testified that Clear World telemarketers were under intense pressure to sell and often misrepresented rates and terms of the Clear World service to potential customers.

Violeta Hernandez testified that she worked for Clear World for seven weeks and that her floor manager Johnny Yee told her she could say anything she wanted to make a sale. She stated that while she never misled a customer, she heard other representatives lie in their calls about Clear World's rates. Yessica Pacheco, called by Latino Issues Forum, said that she worked for Clear World for six weeks in 2003-2004 in the Fresno office. She testified that she was given and used a shortened (but still accurate) version of the official sales script, and that she heard other sales representatives lie to potential customers about free calls. Xochitl Mendez, a sales secretary for Clear World in

Los Angeles from March 2002 to October 2003, testified that telemarketers were encouraged to use hand-written sales pitches and frequently misrepresented rates, saying for example that a call to Honduras was 7 cents per minute when actually it was 45 cents per minute. Deposition testimony of Gloria Mancilla and Isabel Ruiz, former Clear World employees in Fresno, was received by stipulation. They testified to the existence and use by others of handwritten "scripts" that exaggerated and misrepresented the benefits of using Clear World service. Mancilla testified that she was told that many of the workers at Fresno were undocumented, but she acknowledged on cross-examination that Clear World required work authorization documents from her at the time she was hired and that she would not have been hired without such documentation.

On cross-examination, all of the former employee witnesses testified that they had been given two days of training before they were permitted to make calls, that the training included the text and explanation of the slamming statutes, and that they were given an official script and warned that they would be disciplined if they varied from it in any essential terms. They testified that they knew that random monitoring of their calls took place daily, but several of them said that they could tell when they were monitored because of an echo on the line or other means of detection. Three of the former employees said that they had been disciplined or suspended for going off script. Most of the employees said that they themselves did not make misrepresentations to potential customers, but they heard their colleagues do so. Violeta Hernandez, who took the Clear World job on the recommendation of her mother, who had worked there for several months, said that sales in Los Angeles followed the rules until the arrival of Johnny Yee, who encouraged sales by any means.

(Johnny Yee, who also was terminated by Clear World, was subject of attempts to subpoena him to appear at hearing, but service upon him was unsuccessful.)

4.3.3 Customer Testimony

Through testimony by translators, or by deposition testimony translated into English and stipulated by the parties, six former Clear World customers described their experiences in having their long distance service switched. Blanca Lozada said she understood that Clear World service was part of SBC, and she took it for that reason. She acknowledged that a third-party verifier explained that Clear World was a separate company and that she later received a "welcome letter" confirming that. Nevertheless, she called SBC to complain, and she was returned to SBC long distance service and all Clear World charges were removed from her bill. Carlos Rodriguez, Jr., testified in deposition that he had understood that he would be switched to Clear World long distance service, that his voice was on a verification recording confirming the change, but that in a call to SBC he became convinced that he had been misled. He was switched back to SBC long distance and all Clear World charges were removed from his bill. Margarita Barragan stated that she was told she would receive 100 free minutes on a calling card, and she understood there would be no commitment to Clear World. She admitted that she agreed to switch her service, and she identified her voice in the verification tape confirming the switch to Clear World. While she did receive the calling card, she by that time had called SBC to complain of the unexpected commitment to Clear World, and all charges were refunded to her. Yolanda Laracuente listened to her verification tape and confirmed that she had authorized the switch to Clear World, but she stated that she understood Clear World to be an SBC program. She called SBC, learned that there was no connection between Clear World and SBC, and was switched back to SBC long

distance. Prudencia Hernandez during her deposition confirmed that it was her voice on a tape verifying her switch to Clear World service, but she stated that she understood the change would be made without charge, only to receive a bill later with a switch charge of $6.85. She called to complain, was switched back to her former carrier, and the $6.85 charge was removed.

Latino Issues Forum presented the deposition testimony of J. Enrique Baca, who complained that Clear World had changed the long distance service of his 82-year-old mother Clarita Baca without authorization. During the deposition, however, Enrique Baca for the first time heard the verification tape and identified the voice of his mother verifying the change. The tape was played at hearing and, while Clarita Baca could be heard asking to have questions repeated, she was for the most part articulate and knowledgeable. Her telephone service, her son stated, was in her name. When asked from the bench whether there was any evidence to suggest that the verification tape did not show a valid consent, CPSD and Latino Issues Forum admitted that they had no direct evidence that the subscriber had been misled.

4.3.4 Latino Issues Forum Expert

Luis Arteaga, executive director of the Latino Issues Forum, testified as an expert on the basis of his public service agency's long representation of Latinos and low-income populations in California. He testified that he had read CPSD pleadings in this case and had viewed videotaped sessions in which CPSD and Latino Issues Forum representatives questioned several former employees of Clear World.

Arteaga stated that limited-English Latinos are especially vulnerable to fraudulent telephone sales when they are approached by someone who speaks their native language and shares cultural ties. He said that many immigrants are

anxious to be part of American society and therefore make an effort to be cooperative when such calls are received.

Based on his understanding of the case and his review of the videotaped interviews of former Clear World telemarketers, Arteaga said that he had concluded that the environment at Clear World, at least in its Fresno office, encouraged telemarketers to do whatever was necessary to make a sale, including misleading potential customers and lying to them, and that it appeared that these practices were encouraged by Clear World management.

On cross-examination, Arteaga stated that at the time he prepared his testimony, he was not aware that Clear World monitored the calls of telemarketers, that all sales were confirmed in an independent tape-recorded verification process, and that a welcome letter reciting the terms of the sale was mailed to each new customer. Upon reviewing the letter, Arteaga added that the welcome letter is valuable in giving customers a phone number to call, and that the Spanish-language letter was actually a benefit to Latinos because it described the calling service in their native language.

Arteaga said that Clear World should be closed down if the allegations of the former employees were found to be true and if telemarketers were consistently told to make statements that were illegal or deceptive. On the other hand, he stated that Clear World's monitoring, verification and welcome letter would be a "gold standard" for this type of telemarketing if in fact the monitoring could not be detected and evaded, and if in fact the verification was shown to be above reproach.

4.3.5 CPSD Survey

Patricia Costanza, president of Tmdgroup, Inc., a social marketing and research group, testified that, at the request of CPSD, her organization conducted

107 interviews in Spanish of Latino customers who had filed complaints with SBC alleging that their long distance service had been switched by Clear World without authorization. She said that her survey was intended to examine attitudes and behavior rather than attempt any statistical analysis. The principal finding of the survey was that limited-English Latinos who complained to SBC were embarrassed and confused about their experiences with arranging telephone service. She said that 23 of the 107 persons called said that their telephone service had not been switched.

On cross-examination, Costanza admitted that she embarked upon the survey believing that a PIC dispute was a slam. She also had not been told that recorded validations existed for all of those customers whose service had been switched. Had she been aware that slams had not been established and that recorded validations existed, she said she would have advised CPSD to save its money or supply different data because the type of survey she was asked to conduct would have little value.

4.3.6 Cramming

CPSD in its opening statement said that it would present evidence that Clear World had violated Pub. Util. Code § 2890, the "cramming" statute that prohibits unauthorized charges for products or services on a subscriber's telephone bill. The only specific allegation of cramming raised at hearing, however, was the CPSD investigator's testimony that a Universal Service Charge of $22.44 appeared on a customer's telephone bill on April 1, 2002, in a month when the customer had no charges for telephone calls. On cross-examination, however, the investigator was shown that the charge (a fee imposed by the Federal Communications Commission based on a percentage of domestic calls) related to the customer's telephone calls for March 2002, which totaled $211.

Once this was pointed out, CPSD conceded that it would check whether that explanation applied to other references of Universal Service Charge entries that it had identified as cramming. Since this commitment to further investigate the cramming allegations took place on the third day of hearing, and since no further reference to cramming was raised by CPSD in the following seven days of hearing, we must conclude that the allegations of cramming have effectively been withdrawn.

4.3.7 Clear World's Defense of Slamming Allegations

Clear World responded to the allegations of slamming through the testimony of James Mancuso, its general counsel; Marvin Solares, its regional sales manager; and Arturo David Jemio, its outside expert on telemarketing practices. It also presented the testimony of several current employees.

James Mancuso testified that Clear World's executives early on established a program to comply with Pub. Util. Code § 2889.5. Before new hires are permitted to make calls, he said, they attend two days of training on the company's telecommunications product and on the state and federal rules on slamming and other prohibited practices. The training manual contains an approved calling script, in both Spanish and English, and Mancuso said that new hires are warned that any serious deviation from the script would result in disciplinary action.

Solares testified that between 12 and 15 employees at the Santa Ana office each day monitor the calls of Clear World employees via their seat numbers and scheduled work hours, tuning into their conversations with customers. He said that if the monitors detect a significant departure from script (for example, not explaining restrictions on plan benefits or not repeating the name "Clear World" or "Claro Mundo" at least three times), the monitors issue disciplinary notices

requiring that the employee be pulled off line and given corrective training by the floor supervisor. Solares said that lies by a telemarketer result in immediate discharge, while less serious departures from script result in warning notices and additional training. He said that, on average, about one or two employees per week are disciplined for varying from the approved script, and about one employee per month is terminated for that reason. Solares said that he had examined the handwritten "scripts" produced by CPSD's witnesses and he interpreted most of them to be classroom notes or notes on particular sales points.

James Mancuso said that all completed sales are confirmed by an independent third-party verifier (in the parlance, called the "TPV"). Clear World's verifier is VoiceLog LLC, a Maryland-based company that calls the new customer and asks, among other things, whether the customer is over the age of 18 and is authorized to switch telephone service, and whether the customer wants to switch its provider of long distance service and local toll service from the customer's current provider to Clear World Communications. The verification script had been amended by D.03-02-066 to eliminate a deceptive question, and the revised TPV script was approved by the Commission's Public Advisor. Mancuso said that unless the customer answers "yes" to all questions, the sale is canceled. He said that about 20 percent of sales are canceled through this and spot-checking efforts that the company has in place.

Finally, Mancuso testified, a "welcome letter" in the customer's language is triggered automatically by each confirmed sale and the letter is mailed to each new customer explaining the terms of the Clear World telephone service and providing a number to call if the customer has questions or decides to cancel the service. Mancuso produced records showing that Clear World spends $100,000

per year in postage for these letters, and that it has up to 14 customer service operators on duty to respond to customer questions and complaints. CPSD stipulated that a customer letter is indeed sent to each new customer in the normal course of business.

In his testimony, Jemio said that he has worked with Solares for years and has trained hundreds of telemarketers in selling the Clear World product. He said that Clear World's product is the hardest to broker of all the products he tries to match to telemarketing rooms. He added:

> "If there's a telemarketing company that says I want to sell Clear World, and I bring them on, I have got to have each one of the reps approved and trained [on the sales manual and script] before they get on the phone, and I need a fax with a seating chart filled out every day. If a rep gets up and goes on break, changes seats for some reason, they need to fax that. And Clear World has to know who is sitting where and at what time. And even empty stations have to be made aware over at [Clear World] monitoring." (Transcript, at 999.)

Jemio said that Clear World's procedures are adequate or superior to the standard in the industry, adding that he has been in the business "long enough to know which company is looking for a quick sell and a quick buck and which company is trying to stay in business and be here five years from now." (Transcript, at 1008.) He said he was not surprised to learn that a few Clear World telemarketers said they departed from the sales script because telephone selling is hard work and some people are likely to try shortcuts. He also testified that telemarketers cannot detect when they are being monitored, adding that this is an "urban legend" that he does not discourage among his own telemarketers. ("If they hear static, a click on the line , they assume they are being monitored, which is fine by me. I let it click all day long." (Transcript, at 1018.))

On cross-examination, Jemio acknowledged that he was being paid by Clear World to appear and give his testimony and that, until recently, he earned a commission on all of the telemarketing business he arranged for Clear World. On another subject, he said that he understood that Clear World's predecessor, DLD, was a reseller of long distance service, a contention that Clear World's officers had denied.

Clear World also presented the testimony of three current employees who have been with the company for from one to four years. They each testified that they received two days of training, that they adhere to the approved script, and that they meet with managers for additional training at least once a week. They said that the script changes frequently to show new rates in different states. They also testified that there was no way for a telemarketer to detect when his or her conversations were being monitored by the company. Witness Michelle Perez testified that typically she dials about 100 people an hour in order to speak to 20 or 30 of them. She said that eight sales is an average sales day. Another

witness, Mary Realpe, admitted on cross-examination that she omitted one term of the required script when she attempted at deposition to deliver her sales message from memory.

4.3.8 Discussion

While we have little doubt that some Clear World telemarketers gave false or misleading information to those they called in order to make sales, we find on this record that CPSD has failed to show by a preponderance of evidence that slamming incidents were widespread or that such incidents were endorsed or encouraged by Clear World management.

The incidence of PIC disputes involving Clear World is unclear, and CPSD's statement at hearing that comparison of PIC dispute rates among carriers was irrelevant suggests to us, as Clear World alleged, that Clear World's PIC dispute record was not much different from that of other telecommunications carriers. (A CPSD witness testified that Clear World's PIC dispute rate was 2% above industry average; a Clear World witness testified that it was about 4% below industry average.) This Commission has earlier commented that PIC dispute records furnished by SBC (as was the case here) are suspect because of that carrier's aggressive winback program. (*Telscape v. Pacific Bell* (2004) D.04-12-053.)

In any event, all parties agreed that PIC disputes standing alone are not proof of slamming. As SBC's witness stated, PIC disputes at most are "alleged slams" that, without more, are simply unproven complaints. The fact that Clear World was able to present tape recordings verifying the sale for each alleged slamming incident was effective rebuttal.

The testimony of customers who believed their long distance service had been switched without authorization was generally vague ("I understood that

Clear World was connected to SBC"), and in every instance was contradicted by a recorded transcript of the customer acknowledging in the customer's language that he or she had authorized the change. CPSD and Latino Issues Forum would have us infer that because a customer was 82 years old and was confused by one or two verification questions, she therefore must have been misled in her earlier conversation with the sales representative. On the contrary, the customer's verification, standing alone, is sufficient to show consent to the switch, and no further inference can be drawn when the basis of the inference is speculation rather than evidence.

Similarly, we are not persuaded by the testimony of six former Clear World employees who alleged that widespread slamming took place and was encouraged by management. In the first place, the gravamen of most of their testimony was the pressure they were under to sell and the unfairness of their discharge, as evidenced by the complaints they filed with the Department of Labor. Those allegations are not within the scope of this proceeding. Only two of the former employees testified that they had made misrepresentations to customers, and one admitted that she had been disciplined for doing so. The other former employees said that their impression that slamming took place came from bits of conversations that they overheard in listening to other agents. Such uncorroborated hearsay testimony is inherently unreliable when it goes to the recollection of overheard remarks of one party in a two-party telephone conversation. While such hearsay testimony is admissible in our administrative hearings, it cannot without corroboration be the basis of a finding that slamming occurred. (*See, e.g., Cleancraft v. San Diego Gas & Electric* (1982) D.83-06-092.)

In its brief, CPSD attaches excerpts from letters from customers received by the Commission complaining about Clear World sales practices, along with

excerpts from interviews with former Clear World telemarketers. The difficulty with this, however, is that only six of the customers and six of the former telemarketers were produced for deposition or cross-examination. As shown at hearing, the testimony of customers often became equivocal when the customers were asked to listen to their own tape-recorded voices verifying their switch in service. Similarly, the comments of former telemarketers often became less certain when the telemarketers were confronted with their own training and disciplinary records. This is not to say that the excerpted comments were not heartfelt and sincere; it is to say that without examination the comments may not tell the full story and must be given evidentiary weight accordingly.

Latino Issues Forum in its reply brief attaches selective excerpts from its interviews with former Clear World telemarketers in an effort to show how customers were misled, how customers were instructed to deal with the follow-up verification process, and how difficult the telemarketers found the working conditions at Clear World. There is no explanation of why these individuals were not presented at hearing and were not made available for deposition or cross-examination. CPSD in its reply brief states that videotapes of the telemarketers were not shown at hearing because of "limited hearing time and resources." (CPSD Reply Brief, at 15.) The excerpts would require the fact finder to assume, without proof, a nexus between the untested statements and the issues in this case. We can give little weight to such argument.

CPSD's survey of customers who had alleged PIC disputes has no probative value, since the survey was based on faulty assumptions. Testimony by an expert for the Latino Issues Forum convincingly recounted the vulnerability of Spanish-speaking immigrants, but the witness acknowledged that he had not been given important information when he was asked to form an

opinion on Clear World's practices. The commonsense observation that immigrants uncomfortable in their adopted country's language may be prey to unscrupulous speakers of their native language does not render those who speak to them in that language per se predatory. Finally, the appearance of handwritten scripts or notes that may or may not have been used by some telemarketers and the alleged wrongdoing by a Los Angeles floor supervisor who avoided subpoena are troubling, but they are not sufficient without more persuasive evidence to demonstrate widespread slamming abuse.

Clear World in its defense has made a convincing case of its compliance with Pub. Util. Code § 2889.5. In the process of doing so, it also has shown that the business of telemarketing a niche product (long distance service for Spanish-speaking subscribers) is difficult and often unpleasant. Burnout rate for telemarketers is high, with most employees lasting no more than a few weeks or months. James Mancuso, an experienced attorney, testified that he could not do the job because of the constant rejection, with 96 of every 100 calls met with a refusal to buy, an angry hang-up or hostility. The turnover rate among new subscribers is consistently high, with only about 10 percent of new customers staying with the service for the six months necessary to qualify for a free month of calling. CPSD's investigator produced "churn rates" for Clear World showing that for the period January through June 2003, Clear World connected 100,593 new customers at the same time it was disconnecting 28,689 customers. We note that, in general, competitive telephone companies like this one frequently fail or drop out of the market. Commission records show that 161 CPCNs were granted for telephone services in 2002, while 201 CPCNs were withdrawn. There were 134 new CPCNs granted for telephone service in 2003, while 227 were withdrawn. For 2004, our records show 163 CPCNs granted and 670 withdrawn.

The evidence in this case and the manner in which it was presented differ sharply from other slamming cases that we have considered. For example, in *Accutel Communications, Inc. (2002) D.02-07-034,* where we fined the company $760,000, we had before us the testimony or statements of 34 customers who said that they had been slammed, and the company presented no exculpatory evidence like verification tapes or confirmation letters. In *Qwest Communications Services* (2002) D.02-10-059, in which we imposed a fine of $17.9 million, the company was found to have forged TPV tapes and records of authorization, and its internal tracking system constituted an admission of 3,420 incidents of slamming. In *Communications TeleSystems International* (1996) D.97-05-089, where a $2 million fine was imposed, it was shown that customers who had terminated their service were transferred back to the service without their authorization through an automatic "Stay With Us" program.

By contrast, in this case, the evidence presented to us on the allegations of slamming has either been rebutted or is for the most part speculative and conclusory. CPSD introduced more than 400 exhibits, but most of them were not referenced in the hearings or in briefs, or otherwise meaningfully analyzed. In short, the record lacks the evidentiary proof necessary to establish wrongdoing with regard to the alleged slamming.

This is not to say that our finding (that the allegations of slamming by Clear World were not proved by a preponderance of the evidence) constitutes a determination that the firm and its principals are "innocent" of the slamming allegations brought against it. The high turnover rate among both customers and employees is suggestive of a pattern of behavior that might well lend itself to abuse. But suggestion and speculation are not enough.

When this Commission sits as a court of law in an adjudicatory proceeding, it bears the same responsibility of any civil court in this country. There must be a preponderance of evidence of specific allegations, not merely a plausible theory buttressed by suggestive penumbras of verisimilitude. The burden of proof ultimately is, and should be, with those assigned to prosecute the defendant. If that burden is not met, then the allegations must fail, regardless of any doubt regarding the totality of defendants' behavior. What *may* have been actual marketing behavior and what was proved differ. It is the latter that matters if the rule of law is to obtain. The burden of proving the slamming allegations has not been met in this case.

We further find that there is no evidence whatever of cramming.

4.4 Does the evidence show that Clear World and the Mancuso Respondents concealed the role of Christopher Mancuso in Clear World and related entities in violation of Pub. Util. Code § 2114 and Rule 1 of the Rules of Practice and Procedure?

Clear World in 1998 applied for and received operating authority as a telecommunications reseller without disclosing the significant role that Christopher Mancuso would come to play in negotiating contracts and auditing sales and billing for the company. CPSD contends that had the Commission been aware of Christopher's role in Clear World, it would have denied or restricted the company's operating authority on the basis of Christopher's felony conviction a decade earlier and the sanctions imposed on him in the NTC case in 1998. CPSD argues that this failure of disclosure violates Pub. Util. Code § 2114, which requires truthful certification in a reseller application, and our Rule 1, which prohibits misleading or dishonest information by an applicant before the Commission.

At hearing, however, the evidence showed that Christopher's services to Clear World were performed solely through his ITC consulting company. Clear World delegated to ITC the task of negotiating agreements with other resellers and billing aggregators, and auditing the sales and revenue distribution by billing aggregators. Christopher himself never served as an officer or shareholder of Clear World, and he was not involved in the day-to-day management of the company. ITC was paid at least $5.3 million over the course of its services to Clear World, but, on the other hand, James Mancuso testified that between 1998 and early 2003, ITC through its negotiations and audits had increased Clear World revenues by $7.8 million.

CPSD's investigator acknowledged that applicants for reseller authority are not required to disclose the identities of their consultants. She agreed that there is no such requirement in the Public Utilities Code or in the Commission's regulations. While the Commission's sanctions against Christopher in the 1998 NTC decision barred him from service in any capacity in NTC, the sanctions did not preclude his operation of a consulting service for other telecommunications entities. In D.03-02-066, we concluded that Christopher was deeply implicated in the so-called agency agreements of DLD and Worldwide, but we declined to impose sanctions on that basis. Because of the strong findings in that decision, however, Clear World as a result of D.03-02-066 canceled its contract with ITC and severed all ties with entities associated with Christopher Mancuso.

CPSD in its brief inadvertently misstates the requirement of Clear World's short-form registration form (Exhibit 258) to require disclosure of any "officer, director, shareholder, *or functional equivalent thereof*" who has been sanctioned by federal or state regulatory commissions. (CPSD Opening Brief, at 63; emphasis in original.) On this record, Christopher Mancuso could be found to have been

the "functional equivalent" of an officer in the formation and initial operation of Clear World. In fact, however, the short-form registration form executed by Clear World in July 1998 did not contain the "functional equivalent" language. Instead, it requires disclosure of any "affiliate, officer, director, partner [n]or owner of more than 10% of applicant." The evidence shows that neither Christopher Mancuso nor ITC was an affiliate, partner or 10% shareholder of Clear World.

CPSD by its own admission cannot establish that Clear World had an obligation to disclose the identities of its consultants when it applied for operating authority, nor have we been shown any authority that required subsequent reporting of ITC's role in the company, other than in the normal financial reports filed annually with the Commission.

CPSD subpoenaed bank records from City National Bank in Los Angeles that it believed would show a commingling of funds of Worldwide, DLD and Clear World and direct payments to Christopher Mancuso as well as to the named officers and directors of those companies. The bank records were received as a late-filed exhibit on January 4, 2005. The records showed billing aggregator deposits only to Worldwide in 1998 and 2000, no deposits for DLD or Clear World, and direct payments to vendors and officers of Worldwide, but no direct payment to Christopher Mancuso. The bank records do not show commingling of funds among the various companies, nor do they show any direct payments to Christopher Mancuso that would be evidence that he was a *de facto* officer of any of these companies.

Accordingly, we find that the evidence is insufficient to show a violation of Pub. Util. Code § 2114 or the Commission's Rule 1 as to disclosure of the role of Christopher Mancuso. This does not mean that one who would not pass muster

as an applicant for a CPCN were he a corporate officer can, through an agency or consultant agreement, actually run a corporate entity behind the scenes. Corporate veils can be pierced. However, that must be done with evidence, not inference alone. (*In re Coral Communications, Inc.* (2001) D.01-04-035.)

4.5 Does the evidence show that Clear World purchased the customer list of DLD without Commission approval in violation of Pub. Util. Code § 854?

Pub. Util. Code § 854 requires Commission approval of the acquisition of all or part of a public utility like a reseller of telecommunications services. Clear World bought DLD's assets for $3.3 million in 1998, including "customer lists" and a staff of 75 telemarketers. We have determined that DLD was in fact a reseller of telephone services and not an agent of a certificated reseller. It follows, therefore, that Clear World's purchase of DLD's assets without Commission authorization was a violation of Pub. Util. Code § 854.

4.6 Does the evidence show that Clear World and DLD underpaid required surcharges and fees in violation of Pub. Util. Code §§ 405, 739.3, 879, 879.5 and 2881?

Telecommunications utilities in California are required to pay user fees (Pub. Util. Code §§ 401-410) and surcharges that support various public interest programs (Pub. Util. Code §§ 879, 879.5, 2881). Failure to do so can result in suspension or revocation of operating authority and penalties. (Pub. Util. Code § 405.)

CPSD's financial witness testified that inconsistencies in Clear World's revenue reporting and the apparent operation of two unregulated resellers (DLD and Worldwide) raised the possibility that not all required fees were paid. At hearing, however, the "inconsistencies" cited had to do primarily with Clear World's practice of condensing early general ledger entries after a period of time, a practice that Clear World's controller stated was a standard practice and necessary to reduce the volume of entries to permit the accounting software to function properly.

CPSD also noted substantial fluctuations in revenues and related surcharges reported in late 2002 and early 2003. On cross-examination, however, it was shown that the surcharge reports were prepared on Clear World's behalf by a billing aggregator, Billing Concepts, Inc. CPSD's witness acknowledged that he had not considered whether higher surcharge payments in 2003 reflected a report by the billing aggregator that combined surcharge payments made by Clear World and by other resellers for whom the aggregator collected and distributed funds.

Further testimony revealed that CPSD had miscalculated payments made to ITC, the consulting firm owned by Christopher Mancuso, when in fact the payments were made to an unrelated company called Integrated Technologies Corporation, which shared the ITC acronym but was in fact a telemarketing company located in the Dominican Republic.

Based on unverified summary reports submitted on behalf of Clear World, CPSD's financial witness estimated that Clear World may have underpaid surcharges by $140,653 in 2002 and may have overpaid surcharges by $100,425 in 2003, but he acknowledged that he lacked sufficient information to conclude that either an underpayment or an overpayment had been made. Clear World's controller testified that CPSD's analysis was flawed, and he showed that an additional surcharge report made on Clear World's behalf by Billing Concepts in April 2002 had been overlooked, resulting in an understatement of customer revenue of $432,952, along with the surcharges attributable to that amount. He stated that his examination of the billing company records persuaded him that Clear World had a relatively small overpayment of surcharges for the 2002-2003 time periods.

We conclude that Clear World and its aggregators should have kept their books in a manner that permitted prompt verification of surcharge payments. On the other hand, CPSD by its own admission is unable to show that Clear World either underpaid or overpaid its surcharge obligation in any year under examination. The allegation of underpayment, therefore, is unsubstantiated. (In its Opening Brief, at 70, CPSD states that it has withdrawn its allegation of failure to pay surcharges.)

4.7 Does the evidence show that Clear World failed to comply with D.03-02-066, Ordering Paragraph 3, regarding an audit?

Because of unanswered questions that arose in Clear World's application to sell local exchange service, the Commission ruled in Ordering Paragraph 3 of D.03-02-066 that Clear World was to conduct a comprehensive audit of the company's relationship with Christopher Mancuso and the companies he had organized. Specifically, Ordering Paragraph 3 required:

> Clear World shall conduct a complete, comprehensive audit of any and all business and consulting relationships, whether reduced to writing or otherwise, between Clear World, its officers and directors, and entities and persons associated with Clear World and with Christopher Mancuso (as well as any firm, company, limited liability company, partnership, corporation, or other entity of any nature that is, or was, associated with him, owned by him, or with which he has, or has had, a consulting or employment agreement), including loans of money or informal business relationships and shall list and describe in detail all such relationships, of any nature whatever. Said audit shall be completed and returned to the Consumer Safety and Protection Division and the Assigned Commissioner and Administrative Law Judge in this proceeding no later than 45 days after the effective date of this order.

James Mancuso testified that, in compliance with Ordering Paragraph 3, he retained the services of Stephens, Reidinger & Beller LLP (Stephens, Reidinger),

certified public accountants, to conduct the required audit. Stephens, Reidinger in turn interpreted the order to cover a 15-month period of January 1, 2002, to March 31, 2003. The firm interviewed Clear World managers, reviewed Clear World's financial records for the audit period, and surveyed consultant contracts and arrangements. The audit report showed eight contracts or arrangements with firms owned by or associated with Christopher Mancuso. It also confirmed that all such contracts and arrangements had been terminated by Clear World as part of the compliance process ordered by D.03-02-066.

CPSD challenges the auditors' unilateral decision to limit the audit period to 15 months. CPSD further alleges that the report is incomplete because it failed to address the total amount that Clear World over the years had paid to Christopher Mancuso and his companies and it failed to address Christopher's role in the formation of Clear World.

The evidence, however, shows that no one at the Commission objected to the Clear World compliance report or its accompanying audit documents at the time they were submitted in April 2003. James Mancuso testified that the first he heard of CPSD's objections to the reports came a year later when this OII was issued.

We have examined the language of D.03-02-066, along with the compliance report and audit report submitted by Clear World in response to that decision. We are unable to agree with CPSD that the audit was unreasonably restricted or attenuated. Instead, the CPA firm appears to have selected a period of time that it deemed relevant to Clear World's application in the case (a selection that went unchallenged when the report was submitted) and scrutinized all transactions involving Christopher Mancuso, down to his lease of an auto and use of a Clear World pager. Based on James Mancuso's written notice to Christopher and

others, the auditors reasonably concluded that all business ties with Christopher Mancuso had been severed by Clear World. The ordering paragraph arguably did not require an accounting of payments made to Christopher's consulting firms for Clear World's entire existence, nor did it require information on Christopher's role in helping form the corporation. Had CPSD sought that information as part of the compliance report, it should have said so at the time that the compliance report was filed.

We conclude that CPSD has alleged but not shown duplicity by Clear World and its CPA firm in carrying out the audit and otherwise complying with the requirements of D.03-02-066.

4.8 Does the evidence show that Clear World failed to properly retain and produce corporate and business records, and otherwise cooperate with Commission staff, in violation of Pub. Util. Code §§ 311, 314, 581-82 and 701?

Public utilities in California are required to open their books and provide complete information in response to inquiries by Commission staff. (Pub. Util. Code §§ 581-588.) Section 701 and other provisions of the Code make clear that the Commission may regulate public utilities in the state by whatever means it considers necessary and convenient.

CPSD has been conducting its investigation of Clear World and other Mancuso-owned entities for more than three years (first in the proceeding that led to D.03-02-066 and then in this proceeding). It has propounded hundreds of data requests to Clear World and the Mancuso Respondents, conducted field investigations of at least three Clear World offices, and interviewed and deposed dozens of witnesses.

We found in D.03-02-066 that Clear World in several instances failed to retain and produce corporate and business records in the earlier investigation, and CPSD argues that Clear World since that time has continued to resist the Commission's document requests, forcing CPSD to obtain the data from other companies that had dealt with Clear World.

At hearing, however, CPSD did not dispute testimony that Clear World had produced more than 5,000 pages of documents in response to CPSD data requests, and that Clear World had offered to make all of its stored records, including canceled checks and contractual documents, available to CPSD for examination and copying in Clear World's storage warehouse. CPSD responded that it had neither the time nor resources to examine what it was told were 2,000 boxes of records in the warehouse. Counsel for Clear World argued that the boxes of stored records are readily accessible, are labeled by date and category, and that the offer to make them available was in compliance with Code of Civil Procedure § 2031 governing discovery responses in civil courts, an assertion not challenged by CPSD.

James Mancuso testified that, in responding to this investigation, Clear World had spent $1.5 million in attorney fees between October 2001 and November 2004. There is no question that discovery disputes – particularly between the lawyers for Clear World and for CPSD on the reasonableness of data requests -- have dogged this investigation for many months. Since the OII was issued on June 9, 2004, the assigned ALJ has been asked to rule on dozens of such discovery matters, and he has both upheld and overruled many of the data requests propounded both by CPSD and by Clear World.

CPSD has placed on the record more than 3,000 pages of documents it has obtained, many of them from Clear World. It had available to it but elected not

to pursue thousands of other documents in the Clear World warehouse. CPSD has not presented persuasive evidence of non-compliance since the issuance of D.03-02-066, and we cannot on this record find by a preponderance of evidence that there were further record-keeping or reporting violations beyond those noted in D.03-02-066 or beyond those already addressed and resolved in ALJ discovery rulings.

4.9 Does the evidence show that CPSD collected and compiled evidence in violation of the rights of Clear World and the Mancuso Respondents?

Before issuance of the OII in this case, CPSD conducted an examination under oath (EUO) of two MCI employees, two former employees of AmeriVision and the former president of WorldTel, all with respect to their dealings with Clear World and its predecessor companies. While these individuals were permitted to have personal counsel present during the EUOs, attorneys for Clear World were not permitted to attend or participate in the examinations. After the OII was issued on June 9, 2004, transcripts of the examinations were delivered to Clear World counsel. Examination of witnesses thereafter was conducted by noticed depositions or by data requests. Clear World has objected to the pre-OII examinations as "one-way depositions" in which it was denied the right to make objections and cross-examine, and it has sought to eliminate from the record any evidence elicited from these examinations.

CPSD responded that the pre-OII examinations were conducted pursuant to law, that the transcripts were delivered to Clear World shortly after the OII was issued, and that Clear World had ample opportunity to depose the individuals and prepare its defense.

We find that CPSD proceeded properly under the authority of Pub. Util. Code §§ 311 and 314, and pursuant to Gov. Code § 11181. Pub. Util. Code §§ 581-

82 and 584 also require utilities to provide information to this Commission on request. Section 314 states in relevant part:

> The commission, each commissioner, and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility. The commission, each commissioner, and any officer of the commission or any employee authorized to administer oaths *may examine under oath any officer, agent, or employee of a public utility in relation to its business and affairs.* Any person, other than a commissioner or an officer of the commission, demanding to make any inspection shall produce, under the hand and seal of the commission, authorization to make the inspection. A written record of the testimony or statement so given under oath shall be made and filed with the commission. (Emphasis added.)

Section 314 does not require a formal Commission investigation, and the powers it describes can and must be delegated in order to be effective. In that regard, Section 314 tracks the procedures of Gov. Code §§ 11180 *et seq.*, which provide in part:

> In connection with any investigation or action authorized by this article, the department head may do any of the following:
>
> (a) Inspect and copy books, records, and other items described in subdivision (e);
>
> (b) Hear complaints;
>
> (c) Administer oaths;
>
> (d) Certify to all official acts; and
>
> (e) Issue subpoenas for the attendance of witnesses and the production of papers, books, accounts, documents, any writing as defined by Section 250 of the Evidence Code, tangible things, and testimony pertinent or material to any inquiry, investigation, hearing, proceeding, or action conducted in any part of the state.
>
> ….

The California Supreme Court has upheld pre-filing use of examinations under oath. "A formal administrative hearing need not be pending before a subpoena issued by the head of a department can be judicially enforced under sections 11187 and 11188." (*Brovelli v. Superior Court* (1961) 56 Cal.2d 524, 529.) *Brovelli* found further that there is "no constitutional objection" to a procedure where testimony is compelled from a witness "without instituting formal proceedings against the one from whom the evidence is sought or filing any charges against him." (*Brovelli, supra,* 56 Cal.2d at 529.)

Courts have broadly interpreted the Government Code in order to permit law enforcement investigations in this state prior to institution of formal enforcement proceedings. In *People v. West Coast Shows, Inc.* (1970) 10 C.A.3d 462, 470, the court upheld pre-proceeding sworn testimony pursuant to a deposition subpoena obtained by an attorney general. The deposition was held to be a valid exercise of agency investigative power under Gov. Code §§ 11180 *et seq.*:

> … [Government Code] sections 11180-11191 relate not to *judicial proceedings* but instead to statutorily permitted *investigations* in which the court ordinarily plays no part. *Brovelli v. Superior Court*…, a case also concerned with sections 11180-11191, states: "As has been said by the United States Supreme Court, the *power to make administrative inquiry is not derived from a judicial function but is more analogous to the power of a grand jury, which does not depend on a case or controversy in order to get evidence but can investigate 'merely on suspicion that the law is being violated*, or even just because it wants assurance that it is not.' (*West Coast Shows, Inc.*, supra, 10 C.A.3d at 470 (emphasis added; citation omitted).)

Here, the Commission's Executive Director delegated his authority under Section 314 to examine utility witnesses under oath. Obviously, a Commissioner, Executive Director, or department head generally does not have the specific knowledge to carry out examinations of this sort. Therefore, it is necessary (if Section 314 is to have any real world use) for the individuals named in Section

314 to delegate that power to staff. Pub. Util. Code § 7 authorizes such a delegation:

> Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise.

The Executive Director's letters of December 15, 2003 and January 15, 2004, and the subpoenas he signed in January and May, 2004, reflect delegation of the actual taking of the EUOs to CPSD.

As to confidentiality of the EUO transcripts, Commission General Order 66-C(2.2)(a) requires that the records of Commission investigations remain confidential, unless and until "disclosed by formal Commission action." Similarly, transcripts of sworn testimony in administrative investigations are kept confidential unless and until formal charges are filed. The case of *Commercial Capital Corp. v SEC* (7th Cir., 1966) 360 F2d 856, 858, explains why this is so:

> Petitioner witnesses appeared pursuant to subpoena during a hearing held by respondent Securities Exchange Commission. After the hearing, respondent denied petitioners' request to obtain a copy of the hearing transcripts. Petitioners sought review. The court dismissed the action and found that the denial of a copy of the transcripts was not a denial of due process. Under § 6(b) of the Administrative Procedure Act, 5 U.S.C.S. § 1005(b), respondent was not required to define what constituted good cause for the withholding of transcript copies. Furthermore, the sale or the withholding of copies of the transcript was within the sound discretion of respondent, and petitioners failed to show an abuse of that discretion. The legislative history of the Administrative Procedure Act shows Congress was aware that *investigations by the Commission, like those of a grand jury, might be thwarted in certain cases if not kept secret, and that if witnesses were given a copy of their transcript, suspected violators would be in a better position to tailor their*

> *own testimony to that of the previous testimony, and to threaten witnesses about to testify with economic or other reprisals.* (Emphasis added).

If the transcript is to remain confidential, it follows that third parties may be excluded from the process that gave rise to the transcript. We are aware of no constitutional or statutory right of a non-witness (in this case, representatives of Clear World) to be present at an EUO, or to obtain a transcript of an EUO prior to the filing of formal action by the Commission.

Courts have held that excluding the witness's attorney from an EUO would not be prohibited, and would not affect the admissibility of the evidence so obtained. (*See In re Groban* (1957) 352 U.S. 330, 333 (referring to examination by state fire marshal where witness was not permitted to have a lawyer present: "A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, nor can a witness before other investigatory bodies").) As the Supreme Court explained in another case:

> [W]hen . . . agencies are conducting nonadjudicative, fact-finding investigations, rights such as apprisal, confrontation, and cross-examination generally do not obtain.
> A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. Although the latter are frequently initiated by complaints from undisclosed informants, and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of the purpose and scope of the investigation, and *while they may have the advice of counsel, counsel may not, as a matter of right, otherwise participate in the investigation. The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial.* We have found no authorities suggesting that the rules governing Federal Trade

> Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding . . . (*Hannah v. Larche* (1960) 363 U.S. 420, 446 (emphasis added; internal citations, quotations, and footnotes omitted).)

If the witness is not entitled to counsel *during* an EUO, it follows *a fortiori* that other interested parties (in this case, counsel for Clear World) may be excluded as well.

Here, CPSD made its pre-OII transcripts available to Clear World once the Commission authorized a formal proceeding, and counsel for Clear World did in fact depose all of the witnesses prior to their appearances at hearing. At hearing, it was ruled that no witness testimony would be received until Clear World was given the opportunity in advance to depose or otherwise question the witness. While Clear World may have regarded staff's investigation as overly aggressive, the investigation nevertheless was conducted in accordance with the law. It follows that there was no violation of the rights of Clear World and the Mancuso respondents, and we affirm the rulings of the ALJ overruling the objections of the respondents.

We decline to address Clear World's argument on brief that CPSD counsel violated California Rules of Professional Conduct in not notifying Clear World counsel that CPSD was interviewing three current employees of Clear World. The Commission does not have jurisdiction to address such an allegation. (We note, however, that the CPSD attorney here was acting as the designee of the Executive Director, who is authorized by Pub. Util. Code § 314 to examine utility employees under oath. CPSD notes in its reply brief that no formal investigation had been initiated at the time of the communications.)

5. The Remedy, and Other Matters

We have concluded that respondents were in violation of Pub. Util. Code § 1001 or § 1013(a) and § 854 for the unlawful operation of DLD and Worldwide and the unlawful acquisition of DLD by Clear World. Section 1013(h) of the Code authorizes a fine of up to $20,000, which may be multiplied by the number of days in which the violation continued. Similarly, § 2107 authorizes a fine of no less than $500 nor more than $20,000 per day for violation of Commission orders.

Recent penalties assessed by the Commission for providing telecommunications services without a CPCN have ranged from $500 to $24,000. (*See, Telecom Consultants, Inc.* (2004) D.04-01-039 ($500 fine); *FirstWorld SoCal* (2001) D.02-05-045 ($24,000 fine); *Evercom Systems, Inc.* (2001) D.03-06-069 ($11,000 fine).) The penalty for transferring assets without Commission authorization has ranged from $5,000 to $51,500, as reflected in *NetMoves Corporation* (2000) D.00-12-053 ($5,000 penalty) and *Wild Goose Storage, Inc.* (2003) D.03-06-069 ($51,500 fine).

As established at hearing, DLD made telephone sales under AmeriVision tariffs between June 1997 and October 1998, and Worldwide made telephone sales under the WorldTel tariffs between August 1998 and February 1999, for a total of approximately 695 days. Under the standard of § 1013(h) and § 2107, the minimum penalty would be approximately $350,000, while the maximum penalty would be approximately $14 million. We elect to mitigate the fine to $100,000 (equating roughly to $5 per current California customer). We do so under the guidelines of the *Affilate Enforcement Rulemaking,* D.98-12-075, taking into account the relatively small size (20,000 California customers) and current operating losses of Clear World. To the extent the Statute of Limitations applies

to this fine, we deem it tolled by the Commission's order in D.03-02-066 requiring continued investigation of DLD and Worldwide.

A fine of $100,000 conforms to the penalties set in our earlier cases since the case before us involves three separate violations - the operation of two telecommunications companies without CPCNs and the transfer of assets of one of those companies without authorization.

We note also three other factors that mitigate the penalty that we impose: (1) non-monetary sanctions against Clear World for essentially the same offenses were previously imposed by the Commission in D.03-02-066; (2) Worldwide in 1999 immediately ceased sales and sought certification after it was notified that its purported agency agreement with WorldTel was unlawful, and (3) a preponderance of the evidence does not establish a pattern of wrongdoing by Clear World since operation of the two predecessor reseller companies.

D.03-02-066 concluded that DLD and Worldwide had not operated as legitimate agents of other telecommunications companies. While the decision did not impose a fine (because the proceeding was an application for expanded authority rather than an investigatory case), the decision denied Clear World's efforts to expand into the local exchange market, ordered a further investigation that has imposed substantial burden and expense on the company for two years, required restrictions in the company's operating procedures, and effectively barred Christopher Mancuso from further participation in Clear World. Our record suggests that Christopher's role as a negotiator and billing consultant had contributed significantly to the company's financial success in the past. (At hearing, James Mancuso testified that comparing Christopher's contribution to that of his successor following D.03-02-066 "is like Barry Bonds being compared to a girl's coed softball league.")

The penalty that we impose today shall be paid by Clear World to the California General Fund, as detailed in the ordering paragraphs. We decline to impose personal liability on the Mancusos because there is no evidence to show that Clear World is a sham corporation, and CPSD has failed to prove alter ego connections such as commingling of funds or the holding out by an individual that he is personally liable for the debts of the corporation. (*See, generally*, *Associated Vendors, Inc. v. Oakland Meat Co.* (1962) 210 Cal.App.2d 825, 838-840.)

As a final matter, we take note that a pattern of regulatory inconsistencies on Clear World's part pervades the evidence before us. It is troublesome that Clear World could not promptly produce records showing its recent compliance with state and federal surcharge payments. It is disturbing that handwritten notes departing from the "official" script were available to some telemarketers, and that a former floor supervisor accused of shady practices apparently evaded subpoena. In D.03-02-066, we found that Clear World's recordkeeping was flawed, and in this proceeding the company has been slow and often reticent in producing records for Commission investigators. Christopher Mancuso's failure to appear and his continued avoidance of service of a subpoena suggest (but do not prove) that there was more to his service to DLD, Worldwide and Clear World than the record now reflects.

Because of this, there is need for additional monitoring of Clear World's operations. Clear World promises to continue to apply a "gold standard" to its operation as a reseller of long distance service. In order to assure us, as well as itself, that this commitment remains in place, our order today requires Clear World to deliver to us an annual compliance report for the next three years confirming that commitment.

Clear World is directed to file an annual compliance report on or before December 31 in the years 2005, 2006 and 2007. The compliance report, to be served on the Director of the Telecommunications Division, shall be certified by two officers of Clear World and shall state in detail (1) the names of all shareholders, officers and consultants of the company during the year; (2) the company's dealings, if any, with Christopher Mancuso or any entity controlled by or associated with Christopher Mancuso during the year; (3) the number of PIC disputes filed against the company during the year as compared to the number of PIC disputes filed against the company the preceding year; (4) the number of complaints alleging slamming filed during the year with this Commission and with the Federal Communications Commission, and the disposition of each such complaint; (5) the number of new California customers added by Clear World, and the number of California customers lost by Clear World, during the year; (6) the amount of surcharges paid by Clear World during the year, and (7) a description of Clear World's program during the year to ensure compliance with Pub. Util. Code § 2889.5. The compliance report should be accompanied by documents that will permit the Commission to verify the data supplied in the report.

If the Telecommunications Division detects deficiencies in operations or customer service in Clear World's annual compliance report, it is directed to report to us with recommendations for corrective action.

6. Disposition of Appeal

On April 15, 2005, CPSD and the Latino Issues Forum appealed the Presiding Officer's Decision (the POD) pursuant to Rule 8.2 of the Rules of Practice and Procedure. Clear World responded to the appeals on April 28, 2005.

The appeals for the most part reargue positions taken and rejected above. Primarily, they challenge the determination that CPSD did not prove by a preponderance of evidence that Clear World had engaged in widespread slamming of customers. CPSD states that it introduced evidence of 100,000 PIC disputes involving Clear World over a six-year period. (In fact, the evidence suggests that there were about 50,000 individual PIC disputes, since most PIC disputes include two complaints for a long distance switch and a local toll switch.) CPSD contends that the Commission has previously concluded that so large a number of PIC disputes "is sufficient evidence to support an inference of wide-spread unauthorized customer transfers." *(Communication TeleSystems* (1997) 72 CPUC2d 621, 633.) CPSD contends that a contrary finding in this case would change the Commission's policy and would make enforcement of slamming violations more difficult.

CPSD errs. The Commission has not changed its policy. What it required in *Communication TeleSystems* is exactly what it requires here – proof that the alleged violations occurred. A high incidence of PIC disputes supports an inference of slamming, but more is required to establish proof of slamming. In *Communication TeleSystems*, Commission staff produced evidence that the utility did not have verifications for 39,200 PIC disputes associated with a program that recaptured customers who had transferred to another long distance service. The utility's PIC dispute rate was found to be 10.84% above industry average. By contrast in this case, Clear World produced recorded verification and evidence of a confirming letter as to all of the PIC disputes examined at hearing.
Clear World's PIC dispute rate, according to CPSD's witness, was about 2% above average.

More importantly, CPSD and Latino Issues Forum in their appeals simply disregard the evidence that tended to rebut their allegations. In doing so, they lose sight of the shifting burden of producing evidence on this issue and their role in presenting probative evidence when the burden has shifted back to them.

Here, CPSD had the burden of proof in this proceeding, and it had the initial burden of producing evidence to prove slamming. (*See, e.g.*, Evidence Code § 550; *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131.) With the introduction of the PIC records and the testimony of customers that their switch in service was unauthorized, CPSD met its burden. If no further evidence had been forthcoming, CPSD would have prevailed on the slamming issue. At this point, however, the burden of producing evidence shifted to respondents to disprove these claims. Unlike the *Communication TeleSystems* case (where verification of the switched service was lacking or incomplete), the respondents here presented a recorded verification in which each customer who testified confirmed his or her authorization to switch long distance service. Moreover, the evidence showed and CPSD acknowledged that each such customer received a "welcome to Clear World" letter that again confirmed the switch and invited the customer to call if he or she had questions.

With this rebuttal evidence by the respondents, the burden shifted back to CPSD and Latino Issues Forum. To meet this burden, they sought to show that the verifications were fraudulently obtained. That is, while the switch in service had in fact been authorized, the authorization was obtained through trickery and false promises. CPSD and Latino Issues Forum were unable to show fraudulent misrepresentations through the testimony of customers, most of whom had only vague recollections of their conversations with Clear World representatives. When they were unable through the customers' testimony to show fraud, CPSD

and Latino Issues Forum asked the Commission to infer fraud because of the testimony of some Clear World telemarketers that they had overheard their colleagues make fraudulent statements during sales calls. There was, however, only the most attenuated and highly speculative link to be inferred between these largely uncorroborated hearsay allegations and the testimony of the customers produced by CPSD. As CPSD and Latino Issues Forum were instructed from the bench during the fifth day of hearing:

> "There always has to be, in order to establish a probative fact, a link between one event and another event. It cannot be a situation in which we just suppose something happened just because somebody asserts it and because we have some evidence out there that in other particular situations people were doing things. That's too far a stretch." (Transcript, at 740-41.)

The POD does not contradict prior Commission decisions regarding PIC disputes. However, it does conclude, as did every party who testified on the subject, that while a PIC dispute may be evidence of a slam, it is not proof of a slam unless unchallenged or unless supported by other evidence. In contrast to the fact situation in *Communication TeleSystems,* the evidentiary value of PIC disputes here was refuted by contrary evidence.

Finally, as Clear World notes in its response to the appeals, CPSD failed to provide source documents verifying the number of PIC disputes lodged against Clear World. (Transcript, at 400-402.) The record, therefore, reflects CPSD's investigatory conclusions as to the PIC dispute rate, but it is silent as to the supporting data confirming those conclusions.

CPSD and Latino Issues Forum also claim error in the finding that much of the testimony of Clear World's former telemarketers was uncorroborated. They contend that the POD "applies a double standard" in requiring corroboration for

the testimony of Latino telemarketers while not requiring corroboration for the testimony of two Clear World witnesses. (CPSD Appeal, at 1.) This observation misconstrues the law.

Most of the telemarketers' testimony dealt with statements in which the witnesses said that they overheard some of their colleagues make fraudulent claims during telephone sales calls. Such testimony is hearsay where it offers as truth the content of out-of-court statements of persons not presented for cross-examination. Subject to a number of exceptions, hearsay is inadmissible in civil courts because it cannot be cross-examined for accuracy. (Evidence Code § 1200.) While hearsay is admissible in our administrative hearings, it cannot be the basis for an evidentiary finding without corroboration where the truth of the out-of-court statements is at issue. (Gov. Code § 11513(d).) No such corroboration was offered here, although CPSD attempted to link the out-of-court statements to other evidence that it claimed was related to the statements in question. The POD found the claimed connections indirect and tenuous as evidence corroborating the truth of the out-of-court statements.

By contrast, the testimony of the Clear World witnesses was not hearsay. It was direct testimony, not subject to a rule of corroboration because the witnesses were available for cross-examination. CPSD and the Latino Issues Forum cross-examined the Clear World witnesses at length as to the truth of the matters they asserted. We reject the claim of error as to the hearsay testimony, and we admonish the appellants for suggesting a double standard where a cursory review of the rules of evidence would have refuted such a suggestion.

We find no merit in CPSD's claim that its staff reports and more than 400 exhibits and attachments were not considered as evidence. All purported facts set forth in the staff reports and exhibits were considered and were given

evidentiary weight. Little or no weight was given to those documents with no established relevance to the issues in this proceeding or to those documents that constituted argument or speculation. (*See* transcript, at 1211: "Where there is not really evidence but argument, essentially argument, [we will note] the difference between what is argument and what has been submitted as purported fact.")

CPSD does not contest the POD's findings that respondents operated two reseller companies without CPCNs and acquired the assets of one of those companies without authorization. CPSD also does not contest the findings that it failed to prove cramming, that it failed to prove that respondents underpaid government surcharges, and that it failed to show noncompliance by respondents as to an audit requirement. CPSD appeals other findings of the POD, contending in particular that the failure of respondents to call Clear World's president, Michael Mancuso, to the stand was a "tacit admission" that he had made misrepresentations in prior testimony. (CPSD Appeal, at 28.) CPSD does not explain why, if this testimony was important to its case, it did not itself subpoena the witness to appear. As to the other areas of appeal, we believe that the POD adequately addresses the reasoning that underlies its conclusions, and no further analysis is required here.

Finally, CPSD criticizes the POD for failure to find the respondents unfit to operate a telecommunications company despite an earlier finding in D.03-02-066 that they were unfit to expand their service to include local exchange service. The POD in this case does not make a finding of unfitness for the simple reason that CPSD failed to prove it.

Part of Clear World's response to the appeals requires comment and correction. Clear World argues that the Commission, acting in an appeal function, is required to accept the factual findings of the hearing officer, stating:

> "The basis of the Appeal is obvious. Plainly, CPSD objects to the factual findings made by the Trial Court and requests the Commission to reweigh the evidence and return a decision so that CPSD can prevail on every factual dispute. The Commission should be guided by the fundamental principle of law that trial courts decide questions of fact, and appellate bodies decide questions of law. *Tupman v. Haberkern* (1929) 208 Cal. 256."

Respondents misconstrue the authority of this Commission. While their claim may have merit in civil courts, it is inapplicable to the Commission, which is free to consider the record *de novo* and to adopt an alternate decision that amends, alters or reverses the POD. (Pub. Util. Code § 1701.2; *see also* Rule 8.2 of the Rules of Practice and Procedure.) It is the Commission, not the presiding officer, that is responsible for the final decision in this matter, although the Commission is somewhat restrained in the manner in which it may review the record. In adjudicatory cases, such as this one, Pub. Util. Code § 1701.2(a) requires the Commission, should it approve a decision different from that of the POD, to accompany it with a "written explanation of each of the changes made to the decision."

As a final matter, several typographical and other errors in the POD are noted by CPSD and acknowledged by Clear World, and those errors have been corrected where warranted.

7. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Glen Walker is the ALJ and Presiding Officer in this proceeding.

Findings of Fact

1. This investigation is an outgrowth of D.03-02-066, which denied Clear World's application to provide local exchange service, imposed sanctions on the company, and directed further investigation by CPSD.

2. Christopher Mancuso organized most of the telephone companies operated by the Mancuso family.

3. Christopher Mancuso, with a partner from outside the family, formed NTC in 1989.

4. In February 1989, by D.98-02-029, the Commission fined NTC $1.2 million for slamming violations and required $335,000 in restitution to customers.

5. DLD was organized in 1995 with Joseph Mancuso as president and Michael Mancuso as general manager.

6. DLD in 1997 purported to become the agent of AmeriVision, a certified reseller of telephone services, for the sale of long distance service to the public under AmeriVision's tariffs.

7. Worldwide was incorporated in 1998 with Joseph Mancuso as chief executive officer and James Mancuso as agent for service of process.

8. Worldwide in August 1998 purportedly became the agent of WorldTel, a certified reseller of telephone services, for the sale of long distance service to the public under WorldTel's tariffs.

9. On February 4, 1999, the Commission's chief enforcement officer notified Worldwide that its sales under WorldTel's tariffs were unlawful and directed that such sales cease immediately.

10. Worldwide in February 1999 met with Commission staff, ceased the sale of telephone services, amended its agreement with WorldTel and filed an application for registration as a reseller in its own name.

11. Worldwide's application for reseller authority was never granted and was withdrawn in April 2002.

12. Clear World was incorporated on May 11, 1998 with Michael Mancuso as chief executive officer and James Mancuso as general counsel, and was authorized to resell long distance and local long distance service in D.98-08-056.

13. At the height of its business in 2003, Clear World had 750 employees generating 30,000 new orders a month in 32 states, with telemarketer operations in five California locations.

14. By November 2004, Clear World had closed all of its telemarketer offices except one in Santa Ana, had reduced headcount to 130 employees, and was showing a net loss in operating income.

15. In November 2004, Clear World reported that it had approximately 100,000 customers nationwide, with about 20,000 of them in California.

16. Christopher Mancuso served DLD, WorldWide and Clear World through two consulting companies he had incorporated, CCI and ITC.

17. In 1996, Christopher Mancuso negotiated a contract in which MCI provided discounted prices for underlying long distance service by combining the sales of the telephone companies owned by or associated with the Mancusos.

18. Christopher Mancuso in 1986 had been convicted of felony mail fraud and in 1987 served six months in prison.

19. Christopher Mancuso did not appear in this proceeding, and CPSD was unsuccessful in serving him with a subpoena requiring his appearance.

20. DLD's agreements with a billing aggregator and others identified DLD as a "reseller of long distance telecommunications services," and not as an agent for such services.

21. AmeriVision testimony and documents identified DLD as doing business as a reseller of long distance telecommunications services.

22. AmeriVision in 1998 notified DLD that their relationship would be terminated unless DLD obtained certification as a reseller.

23. Christopher Mancuso has never testified before the Commission on the subject of DLD sales.

24. James Mancuso and Michael Mancuso testified before the Commission on the subject of DLD sales but said such sales related to DLD's agency status.

25. SBC in 2003 received 14,000 PIC disputes (representing about 7,000 individual complaints) against Clear World.

26. SBC's "winback program" in PIC dispute matters was criticized by the Commission in D.04-12-053 for its potential to generate inaccurate reports of slamming.

27. A no-fault system governs PIC disputes, and customers who complain are switched back to their previous carrier without investigation of the complaint.

28. Six former employees of Clear World in Fresno and Los Angeles testified that they overheard other Clear World telemarketers make misrepresentations to potential customers.

29. Six former Clear World customers testified that they called SBC to complain that their long distance service had been switched by Clear World.

30. Verification tapes show that the six former Clear World customers confirmed the switch in service by Clear World.

31. A Latino Issues Forum expert was not aware at the time he stated his opinion that Clear World monitored calls of telemarketers, that all sales were confirmed in a verification process, or that a welcome letter was sent to new customers of Clear World.

32. A research group retained to interview 107 Latino customers was under the mistaken impression that a PIC dispute was a slam and was not aware that verification tapes were on file for all of the customers.

33. The only specific allegation of cramming concerned a Universal Service Charge of $22.44 on a customer's bill in April 2002, a month in which the customer had no charges for telephone calls. However, the charge actually related to the prior month's telephone calls instead of April calls.

34. Clear World telemarketers are required to undergo two days of training before they are permitted to make calls.

35. Clear World telemarketers are disciplined for significant departures from an approved sales script.

36. Clear World monitors the calls of its telemarketers.

37. All Clear World sales are confirmed by an independent third-party verifier.

38. A confirmation letter is mailed to each new Clear World customer explaining terms of service and providing a number to call if the customer has questions.

39. Applicants for telecommunications reseller authority are not required to disclose the identities of their consultants.

40. Staff lacks sufficient information to determine whether Clear World underpaid or overpaid state and federal surcharges.

41. Stephens, Reidinger, certified public accountants, conducted a required audit of Clear World.

42. Clear World produced more than 5,000 pages of documents in response to CPSD data requests, and it offered to make available for copying all documents stored in its warehouse.

43. The Commission's Executive Director delegated his authority to CPSD to examine utility witnesses under oath.

Conclusions of Law

1. DLD operated as a reseller of long distance service without certification by this Commission in violation of Pub. Util. Code § 1001 or § 1013(a).

2. Christopher Mancuso in 1997 knew or should have known that DLD's operation was contrary to Commission regulations.

3. Worldwide operated as a reseller of long distance service without certification by this Commission in violation of Pub. Util. Code § 1001 or § 1013(a).

4. The record does not show a violation of Pub. Util. Code § 2114 or of the Commission's Rule 1 in testimony regarding DLD sales.

5. PIC disputes standing alone are not proof of slamming.

6. While hearsay testimony is admissible in administrative hearings, it cannot without corroboration be the basis of a finding that slamming occurred.

7. The evidence of record is insufficient to demonstrate that Clear World systemically engaged in slamming in violation of Pub. Util. Code § 2889.5.

8. There is no evidence that demonstrates cramming by Clear World.

9. Neither the Public Utilities Code nor Commission regulations require an applicant for reseller authority to disclose the identities of its consultants.

10. Clear World violated Pub. Util. Code § 854 in 1998 when it purchased DLD's assets without first obtaining Commission approval.

11. There is insufficient evidence to determine whether Clear World overpaid or underpaid federal and state surcharges in 2002 or 2003.

12. CPSD has not shown duplicity by Clear World and its CPA firm in carrying out the audit requirements of D.03-02-066.

13. CPSD has not presented persuasive evidence of non-compliance with business record disclosure requirements of the Public Utilities Code.

14. CPSD has collected and compiled evidence in this case in full compliance with governing statutes.

15. Pub. Util. Code § 1013(h) authorizes a fine of up to $20,000 per day, multiplied by the number of days in which the violation occurred, for violation of Pub. Util. Code § 1001 or § 1013(a).

16. The Commission should determine the extent of a fine under Pub. Util. Code § 1013(h) pursuant to the guidelines in D.98-12-075.

17. A fine totaling $100,000 should be imposed for two violations of Pub. Util. Code § 1001 or § 1013(a) and for one violation of Pub. Util. Code § 854.

18. Clear World should be directed to serve an annual compliance report on the Director of the Telecommunications Division for the years 2005, 2006 and 2007.

19. The appeals filed by CPSD and Latino Issues Forum should be denied.

O R D E R

IT IS ORDERED that:

1. Clear World Communications Corporation (Clear World) is fined $100,000 for (i) violation of Pub. Util. Code § 1001 or § 1013(a) in the unauthorized sale of long distance service through two of its predecessor companies, American Electronics Corporation doing business as Discount Long Distance (DLD), and Worldwide Telecommunications Corporation, and (ii) violation of Pub. Util. Code § 854 in the 1998 purchase of the assets of DLD without Commission authorization.

2. The penalty imposed by Ordering Paragraph 1 is due and payable to the State of California General Fund within 90 days of the date of this decision. Proof of payment shall be served on the service list and shall be provided to the Director of the Telecommunication Division within five days of payment.

3. All other allegations brought against Clear World by the Consumer Protection and Safety Division (CPSD) are dismissed.

4. Clear World's allegation that CPSD investigatory techniques were unlawful is dismissed.

5. Clear World is directed to file an annual compliance report on or before December 31 in the years 2005, 2006 and 2007. The compliance report, to be served on the Director of the Telecommunications Division, shall be certified by two officers of Clear World and shall state in detail (1) the names of all shareholders, officers and consultants of the company during the year; (2) the company's dealings, if any, with Christopher Mancuso or any entity controlled by or associated with Christopher Mancuso during the year; (3) the number of PIC disputes filed against the company in California or attributable to California customers during the year as compared to the number of PIC disputes filed against the company the preceding year; (4) the number of complaints alleging slamming filed during the year with this Commission and with the Federal Communications Commission, and the disposition of each such complaint; (5) the number of new California customers added by Clear World, and the number of California customers lost by Clear World, during the year; (6) the amount of surcharges paid by Clear World during the year; and (7) a description of Clear World's program during the year to ensure compliance with Pub. Util. Code § 2889.5. The compliance report shall be accompanied by documents that will permit the Commission to verify the data supplied in the report.

6. The Director of the Telecommunications Division is directed to report to the Commission any deficiencies in operations or customer service that the division detects in Clear World's compliance reports, with recommendations for corrective action.

7. The appeals filed by CPSD and the Latino Issues Forum are denied.

8. Investigation 04-06-008 is closed.

This order is effective today.

Dated June 16, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners