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Decision 01-04-035 April 19, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Coral Communications, Inc. (Coral) and Michael Tinari, President of Coral; William Gallo, Senior Vice President of Coral; Devon Porcella, Vice President of Sales and Operations of Coral; Neal Deleo, Vice President Finance and MIS of Coral to determine whether the corporation or its principals have operated within California without having a certificate to operate from the Commission and whether they have charged California subscribers for telecommunications services the subscribers never authorized.	Investigation 98-08-004 (Filed August 6, 1998)

O P I N I O N

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O P I N I O N

I. Summary

In this decision we find that Coral Communications, Inc. (Coral) has engaged in an illegal practice known as "cramming." Specifically, Coral placed nearly $6 million of unauthorized charges on the local telephone bills of over 250,000 Californians. Coral based these charges on sweepstakes entry forms that contained purported authorizations in the fine print. To get the billings on the local telephone bills, Coral used multiple levels of billing intermediaries between itself and the local exchange carrier (LEC) that actually billed the customer. Coral also converted the billings to cash by selling its accounts receivable to financing firms called "factors." The LECs, billing intermediaries, and factors all retained portions of the improperly-billed amounts for their fees and charges, as well as reserves for customer refunds. By this decision, we order full refunds of all charges assessed by Coral. Unfortunately, Coral is allegedly defunct and insolvent. In order to make as complete a refund as possible to customers, we order the billing intermediaries and factors to disgorge all funds retained from Coral billings. We also order the Commission's General Counsel to take all reasonable steps to secure Coral assets for reparations to Coral's California victims.

II. Procedural Background

On August 6, 1998, the Commission issued its Order Instituting Investigation (OII) 98-08-004 into the operations, practices, and conduct of Coral and its officers, Michael Tinari, William Gallo, Devon Porcella, and Neal Deleo. In the OII, the Commission stated that Consumer Services Division (CSD) investigators had submitted declarations showing that Coral might have billed over 300,000 California consumers for telephone calling cards. Coral

charged these customers an initial $2.99 set up fee and a $6.99 monthly charge. The OII also stated that Coral had not received a Certificate of Public Convenience and Necessity (CPCN) authorizing it to provide telephone service in California.

On November 13, 1998, and on January 14, 1999, the assigned Administrative Law Judge (ALJ) held prehearing conferences (PHC). Counsel appeared for Coral, Michael Tinari, Devon Porcella, William Gallo, and Neal DeLeo at the first PHC, and appeared again at the second PHC. Counsel indicated Coral's intent to comply with CSD's discovery requests, and provided written testimony on the date set for distribution of prepared testimony to the parties.

On December 3, 1998, the Commission issued Decision (D.) 98-12-010, in which it added Easy Access International (Easy Access), Edward Tinari, and Celestine Spoden as respondents. Counsel representing the three new respondents appeared at the January 14, 1999, PHC.

On April 12, 1999, the date set for the evidentiary hearing, Coral's counsel appeared and stated that he was withdrawing as counsel for Coral, Michael Tinari, Devon Porcella, and William Gallo, but that he would continue to appear on behalf of Neal DeLeo. Coral has not participated in this proceeding since April 12, 1999.

Counsel for Easy Access participated in evidentiary hearings on April 12 and 13, 1999, and Spoden appeared as a witness on behalf of Easy Access. On May 7, 1999, Edward Tinari, the president of Easy Access, informed the assigned ALJ by letter that Easy Access had become insolvent and would no longer participate in the proceeding.

On August 5, 1999, the Commission issued D.99-08-017, in which it noted that Coral and Easy Access had ceased to participate in the proceeding, that

Easy Access claimed to be insolvent, and that Coral appeared to be as well. The decision also noted the possibility that Coral's billing agents might have retained reserves to fund customer refunds. The decision added as parties the five known Coral billing agents: International Telemedia Associates (ITA), Telephone Billing Services Inc. (TBS), OAN Services Inc. (OAN), Accutel Communications (Accutel),[1] and Calling Card Plus, Inc. (CCPI). The decision also ordered these billing agents to file complete accountings of their financial relationships with Coral and to remit any retained funds for further disposition by the Commission. As set out below, neither ITA nor CCPI responded to the directives in D.99-08-017, and the Commission subsequently suspended their rights to bill through California LECs. OAN and TBS sought rehearing of D.99-08-017.

TBS and Accutel submitted the accountings in response to D.99-08-017. OAN submitted a statement that it had performed no bills for Coral but that it had performed such services for Accutel. OAN stated that Accutel had informed it that Coral was its sales agent for a portion of the billings OAN did for Accutel. On February 15, 2000, the assigned ALJ issued a ruling directing TBS and Accutel to supplement their accountings, which both did. On April 3, 2000, the assigned ALJ issued a ruling directing OAN to respond to factual representations regarding its involvement with Coral made in Accutel's supplemental accounting. OAN filed an accounting that showed that it had collected $288,690 from California customers. Accutel also supplemented its response and stated that it did not have a written contract with Coral.

[1] Accutel is also associated with Nortel, and the record shows that OAN believes them to be one and the same.

On April 20, 2000, the Commission issued D.00-04-067, which stayed the portion of D.99-08-017 directing the billing agents to deposit funds with the Commission. The decision also indicated that the substantive issues raised in OAN's and TBS' rehearing applications would be addressed in a later decision. We address these substantive issues, among other things, in today's decision.

On November 3, 2000, the ALJ issued her Presiding Officer's Decision (POD). OAN filed an appeal of the POD. All issues raised by OAN have been carefully reviewed and considered. Where warranted, changes have been made in the text of the decision.

III. Factual Background

A. How Unauthorized Charges Are Placed on Customers' Bills

The subject of this decision is the placing of unauthorized charges on customers' local telephone bills. To explain how this can occur, we first describe the billing process in general.

Local telephone bills can include charges for many services in addition to local telephone service. These services include long distance telephone calls and other telecommunications-related services, such as voicemail.[2] Although the charges appear on the customer's local service bill, the LEC does not necessarily provide each of the billed services. Instead, the actual service provider typically obtains billing and collection services from the

[2] Throughout this decision we refer to "carriers" and "service providers," both of which place charges on local telephone bills. "Carriers" are competitive local exchange carriers or interexchange carriers. Competitive Local Carriers provide local telephone service, while Interexchange Carriers provide long distance service, and some carriers provide both. Each of these services requires operating authority from this Commission. In contrast, voice mail and other telecommunications-related services do not require such authority.

LEC. The LEC offers these services pursuant to tariffs filed with this Commission. There can also be several billing and collection intermediaries between the service provider and the LEC. Understanding the various links in the billing chain, as well as their historical genesis, is necessary for this case and the remedies we order.

B. LEC Billing for Long Distance Carriers

Pacific Bell provides billing and collection services to other service providers pursuant to orders of this Commission and the Federal Communications Commission (FCC). Along with the FCC, we authorized LECs to provide billing and collection services as part of the "Access Charges" series of decisions. See, e.g., Pacific Telephone and Telegraph Company, (1983) 13 CPUC2d 331, 393 (D.83-12-024). These orders implemented the divestiture of the regional Bell operating companies from their former corporate parent, the American Telephone and Telegraph Company (AT&T) and allowed the newly independent regional operating companies to charge AT&T and other long distance carriers for access to the local system to initiate and terminate long distance calls. We authorized Pacific Bell and other LECs to provide billing and collection services because the provision of these services would allow consumers to continue to receive one bill for both local and long distance services, and would generate "the maximum sustainable contribution toward basic exchange plant cost recovery." (Id.) The revenue generated from long-distance carriers for billing and collection services would be an offset to local system costs that the customer would otherwise bear through rates and charges for local service. To provide this service, Pacific Bell obtains title to the billing and collection customers' accounts receivable, and the end-user customers are thereby obliged to remit the total amount to Pacific Bell. (Id.)

We also allowed the LECs to enhance the value of their billing and collection services by permitting them to disconnect local service for nonpayment of long distance service provided by another carrier.[3] We recognized that this enhancement would tend to coerce customers to pay all charges on their bills, including those from other carriers. Thus, the other carriers would benefit by keeping uncollectible accounts low, which would enable the LEC to charge a premium for its billing and collection services. 13 CPUC2d at 394-5. We reasoned that this coercive effect would impose "no drastic change" on customers' then-current perception of the need to pay their entire bill or face service disruption.

C. The Advent of Billing Agents

After the AT&T divestiture, the number of long distance telephone companies grew tremendously; we have granted over 1,000 applications for long distance operating authority in California. The vast majority of these companies contract for their billing and collection services from the LECs, such as Pacific Bell. To process the billings, however, the LEC must receive the carrier billing information in a computer format that is compatible with the LEC's billing programs. Rather than having each individual carrier independently manage this computer formatting function (and the interaction with the LEC), billing aggregation service companies–-or "billing agents"--have emerged. The billing agents receive billing information from the carrier providing the service, reformat the information, and submit it to the LECs for billing to customers. This arrangement allows the carriers to bypass

[3] Recently, in D.00-03-020, we rescinded this authorization.

negotiating individual contracts with the LECs and to provide for efficient billing data presentation to the LECs.

In addition to reformatting the billing information, the billing agents also must transfer the carriers' accounts receivable to Pacific Bell. Some billing agents actually take title to the accounts receivable before transferring the accounts to Pacific Bell, while others merely act as an agent on behalf of the carrier and transfer the accounts directly from the carrier to Pacific Bell.

Telecommunications-related services, such as voice mail, 900/976 information services, and others, are also billed through LECs. The providers of these services, however, are not required to obtain operating authority from the Commission. Thus, not only are certificated long distance carriers submitting customer billing information to the LECs, but so are various uncertificated telecommunications service providers. Like long-distance carriers, however, the service providers often engage billing agents in the process of preparing billing information to submit to the LECs.

D. Commission Authority Over Billing Agents

The California Legislature recognized the role that billing agents have come to play in placing charges from carriers and service providers on customers' local telephone bills. In 1998, the Legislature added §§ 2889.9 and 2890 to the Public Utilities Code,[4] which for the first time expressly subjected billing agents to portions of the Public Utilities Code.

The legislative intent was to prevent "cramming," such as that engaged in by Coral, and to give the Commission means for dealing with cramming when it occurs. The new statutes impose new requirements on all

[4] All statutory citations are to the Public Utilities Code unless otherwise indicated.

entities that generate charges on a customer's bill. The statutes also require telephone companies to bill only for customer-authorized charges and to include a "clear and concise" description of the product or service. The Legislature granted the Commission authority to impose penalties on billing agents that violate §§ 2889.9 and 2890. Billing agents must also respond to Commission or staff requests for information, and failure to do so subjects them to immediate suspension of their rights to bill through California LECs.

E. Use of Multiple Billing Agents and Factors

Carriers or service providers sometimes use several billing agents to obtain the different services needed to get the billing information ready for the LECs. For example, one billing agent might provide "rating" service, i.e., applying the proper charges for each call made. A second billing agent may then actually prepare and submit the resulting data to the LEC. In this instance, the actual carrier or service provider is three steps removed from the customer. The chain is: carrier or service provider, billing agent 1, billing agent 2, LEC, and end-use customer. When the customer pays the bill, the money flows in reverse sequence from the LEC to the carrier or service provider. Because customers may subsequently seek refunds, LECs and billing agents typically hold a fraction of the payments as reserves.

We have learned in this proceeding that "factors" also play a large role in the streams of billing and payment. Factoring is defined as "[t]he buying of accounts receivable at a discount. The price is discounted because the factor (who buys them) assumes the risk of delay in collection and loss on the accounts receivable." Black's Law Dict. (7th ed. 1999) p. 612, col. 2. Furthermore, as the record in this proceeding shows, a single entity may provide both billing and factoring services. Easy Access witness Spoden testified that factors typically retain approximately 60% of the total billed

amount--about 50% for customer refund reserves and 10% for fees. Despite the high cost, many businesses use factoring service to finance business expansion.

The amount the factors are willing to advance is based on gross billings accepted by the LECs. If the reserves turn out to be unnecessary to pay customer refunds, the left-over reserve amount is typically turned over to the carrier or service provider.

Unfortunately, the use of multiple billing agents and factors creates a situation that facilitates cramming by carriers and service providers. On the basis of invalid authorizations, such carriers and service providers are able to generate accounts receivable to sell to factors before the end-use customers are even billed. Once these customers are billed, many of them unwittingly (or out of fear of losing their telephone service) pay the unauthorized charges. In addition, the multiple levels of billing agents provide distance between the LEC and the carrier or service provider, and help the carrier or service provider to conceal or misrepresent its identity. In short, a carrier or service provider that wishes to engage in cramming has ready means available to (1) gain access to end-user telephone bills, and (2) convert the unauthorized billings quickly into cash. The crammer may then dissipate these funds and declare bankruptcy. The facts of this case all too clearly illustrate the consequences of this system for California customers.

IV. Description of Coral's Activities

A. Coral's Business Practices

Coral is a Florida corporation, and its last-known headquarters was in Boca Raton, Florida. Coral claims to have obtained authorization to charge customers for telephone calling cards through sweepstakes entry forms. These cards enabled customers to charge calls from other places to their local telephone number. For these calling cards, Coral placed an initial set up fee of

$2.99 and a monthly charge of $6.99 on customers' local telephone bills. Coral began billing California customers in May 1997.

CSD offered a series of declarations showing that Coral had billed 258,000 California customers for a Coral calling card, and that 97% of those customers did not use the card. Coral billed almost $6 million to Californians.

The declarations showed examples of the sweepstakes marketing approach that Coral used to obtain customer "authorization" to place charges on local telephone bills. The sweepstakes forms were primarily dedicated to promoting the prize, and only in the fine, seven point, print did the form reveal that the signature authorized Coral to charge the entrant for a telephone calling card. Consumer witnesses testified that they assumed the form was a raffle ticket for a drawing, not a contract authorizing charges to their local telephone number.

CSD investigators retrieved three Coral sweepstakes boxes from three different retail locations in Newark, California. Each of the boxes is about seven inches on a side with an angled top. Photocopies of each side of the boxes are included in the record. The tops have a tablet of forms and an attached pen. A slot on the top of each box is for placement of the completed forms. The forms on all three boxes mention Coral, and the outside of two of the three boxes mentions Coral.

Each of the boxes is different in appearance and has different "official rules" printed on it. Two of the boxes offer a $25,000 prize and one offers $50,000. One box has a picture of an automobile, which is unexplained.

The box that contains the most detailed explanation of Coral's role devotes a small portion--7% of the printed surface area--to the following statement: "Coral Personal Communicator card! Save up to 65% on your long distance calls while you're away from home or the office. Nationwide toll-free

personal voice mail service." This is the entire statement on the box relating to Coral.

Each box has a tablet of forms that measure 5.5" wide by 4.25" tall.[5] Copies of the forms are contained in the record. The forms on two of the boxes state in large letters "ENTER TO WIN $25,000" followed by a paragraph of Rules. The Rules paragraph is printed in eight point type, with lines spaced unusually close together. The Rules paragraph begins with the statement in all capitals "NO PURCHASE NECESSARY" and then goes on to state that Coral will issue a "Coral Communications Calling Card under the terms set forth on the form."

Following the Rules paragraph, the form is perforated.

After the perforation, the form reads: "OFFICIAL L.O.A. FORM" with large spaces below for signature, name, full address, age, "spouse's" age, date, and home phone. Below the spaces appears the following: "THIS IS A DISCOUNT TRAVEL CARD ONLY," followed in capitalized italics by "YOUR TELEPHONE SERVICE WILL NOT CHANGE." Then there appears the following statement printed in dense, seven point type: "I would like a Coral Communications Discount Travel Card sent to me at the address provided above. I authorize Coral Communications, Inc., to bill all calling card usage at 25 cents/minute plus my service fee of up to 25 cents/day and a one time fee of $2.99 to my home number listed above." The form contains no restrictions on who can sign it.

[5] A copy of this form is reproduced in section V.C. of today's decision, where we discuss the legal effect of the "authorization" purportedly obtained by Coral.

Coral based its claim of authorization to place charges on customers' local telephone bills solely on these forms.

Coral's claim to have obtained even this level of "authorization" for all the telephone numbers it billed is not supported by the record. For example, the purchasing manager for Kings County, California, stated that Coral had charged four county telephone lines. These lines included the line that a Kings County computer uses to call persons ordered to wear electronic monitoring devices. Not surprisingly, Coral was unable to supply any forms that purported to authorize these billings.

Coral memoranda showed that actual use of the calling card was minimal, with only about 3% of the cards ever being used at all. In fact, the actual usage rate was so low that Coral's vice president, William Gallo, admitted to CSD's investigator that Coral simply absorbed the actual costs of providing the calls rather than obtain a CPCN to provide telephone service.[6] Coral erroneously believed that if it did not charge for the actual calls, it was not required to obtain a CPCN.

CSD also offered a videotape of the Coral sweepstakes promotion at a mall in Tracy, California. The portion of the tape viewed during the hearing[7] shows that the Coral sweepstakes marketing display contained a boat and a large banner inviting the public to enter to win the boat or a cash prize. No

[6] The record shows that Coral was one of many entities that had not obtained a CPCN but for which Pacific Bell was at one time providing billing and collection services. Pacific Bell has instituted more stringent polices to ensure that all billing customers have obtained any required operating authority.

[7] CSD provided a copy of the tape for the record as a late-filed exhibit. It will be admitted into the record as Exhibit 21.

visible signs informed potential entrants that the sweepstakes was associated with any telephone company or telephone service.

Coral's sweepstakes marketing method permitted persons other than the subscriber of record to "authorize" charges on the subscriber's telephone bill. For example, Coral's method allowed children to place charges on their parents' bill. CSD presented witnesses, including middle-school-aged children, who stated that a sweepstakes form was particularly attractive to that age group because the children believe that they will win a prize. One parent reported that when she called Coral to complain about the unauthorized charges, the service representative immediately attributed the charges to the customer's children, even before determining whether the customer had children. From this, we infer that using "authorizations" from children was a common occurrence with Coral.

B. Coral's Billing Agents and Factors

1. ITA

From May 1997 to June 1998, Coral submitted its billings to California and other LECs through ITA. The record contains details of Coral's weekly transactions with ITA for the first half of 1998. The summary of these transactions reveals the amounts that ITA, Coral, and the LECs retained:

Total Nationwide Coral Sales Billed by LECs	$8.2 million
LEC Reserves for customer refunds	- $1.2 million
Billing and Validation Fees[8]	- $1.0 million
ITA Reserve for refunds	- $3.0 million
ITA Factoring Fee and Adjustment	- $ .5 million
Amount Advanced to Coral	$2.5 million

[8] The record is not clear whether these fees were paid to the LECs or to ITA.

On March 4, 1998, Pacific Bell notified CSD that it had discontinued billing for Coral Communications through ITA because Coral could not provide proof that it had a CPCN.

In D.99-08-017, the Commission added ITA as a party to this proceeding. ITA, however, has not appeared. At the hearing provided for in D.99-08-017, CSD counsel stated her understanding that ITA had sought bankruptcy court protection. The Commission subsequently issued D.99-10-048, which directed California LECs to cease billing for ITA.

2. Accutel and OAN

Coral used Accutel as its first-level billing agent.[9] Accutel combined Coral's billings with its own, and presented the combined billings to the second-level billing agent (and factor), OAN.

From May 28, 1998, to July 3, 1998, Accutel provided billing services directly to Coral. These billings, however, were placed on customers' bills using Accutel's name. Accutel billed $1,618,808.40 to California customers in this manner. Of this amount, $540,738.84 has been refunded to customers. Prior to entering into its agreement with Coral, Accutel's officers reviewed "boxes of Letters of Authorization" at Coral's headquarters. Based on their review of these forms, Accutel agreed to perform the billing services for Coral under Accutel's name.[10]

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[9] Accutel is a Commission-certificated interexchange carrier. It is currently under investigation by the Commission for charging customers for unauthorized services. Investigation into Accutel Communications, Inc., d.b.a. Florida Accutel Communications, Inc., I.99-04-023.

[10] These are apparently the same sweepstakes forms described in Section IV.A. above, and analyzed in Section V.B. below.

Accutel presented the combined billings to OAN. Accutel states that OAN was its "LEC outclearing company" from which we conclude that OAN then transferred the billings to the LECs. Thus, OAN acted as the second-level billing agent for Coral. OAN also provided factoring services indirectly to Coral, according to Accutel's accounting filed with the Commission. In that accounting, Accutel states that OAN factored Coral's accounts and that the fees retained by OAN were $621,515.50.

Accutel stated that it participated in the OAN billing and factoring program as a "subCIC"[11] to the Agreement between OAN and Nortel[12] dated January 1, 1997.[13] OAN stated that it purchased accounts from Nortel pursuant to an Account Purchase Agreement, also dated January 1, 1997, as part of its factoring services. From OAN's description, we infer that OAN purchased the seller's (Accutel) accounts receivable. Consequently, OAN became the assignee of Accutel's accounts receivable. Accutel stated that it did not have a written contract with Coral, hence it is unclear whether Accutel actually obtained title to the accounts receivable or was acting as Coral's agent in transferring the accounts receivable to OAN.

In its supplemental accounting, dated April 17, 2000, OAN disputes many of Accutel's assertions. First, OAN reiterates that neither Coral

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[11] CIC is the acronym for Carrier Identification Code. All billing agents that contract directly with the LECs must have a CIC to enable proper billing record-keeping. OAN has a CIC, but Accutel does not. When OAN provides billing services to Accutel, Accutel is a "subCIC" to OAN's CIC.

[12] OAN stated that it believed Accutel and Nortel to be one and the same based on the conduct of the two corporations and their principals.

[13] The use of Sub-CICs is provided for in a subsequent Letter Agreement between the OAN and Nortel, dated May 15, 1997.

nor Easy Access was ever a client of OAN; OAN states that it provided billing services on behalf of Accutel. Some of the services billed by OAN for Accutel were, at Accutel's request, designated "Coral Com SSM" for accounting purposes. OAN states that with considerable effort, it was able to provide accounting information on the Coral designated billings.

OAN's supplemental accounting also states that it had provided no factoring services to Coral or Easy Access. OAN states that it provided factoring to Accutel for all of its billings, including the billings designated Coral. OAN calculated that for the California accounts labeled "Coral," it had provided Accutel a total of $271,014 in advance payments. As set out in Attachment 1, OAN collected and retained from California customers a total of $288,690.[14] OAN also stated that it refunded $91,359.77 to California customers.

Subtracting the amount Accutel says it refunded ($540,738.84) plus OAN's refunds ($91,359.77), from the amount Accutel billed to California customers on behalf of Coral ($1,618,808.40), leaves $986,709.80. Accutel states that it paid Coral $308,950.19,[15] and that it retained $147,603.95 in fees, for a total of $456,554.14. Thus, out of the $986,709.80, the disposition of $530,155.66

[14] OAN further states that the amount it advanced to Accutel for nationwide billings exceeds the amount collected, less LEC and OAN fees, by $317,039. Thus, OAN contends that Accutel owes it $317,039.

[15] Accutel's accounting states that it paid Coral $373,175.66, but that Coral was overpaid $64,225.47. Thus Accutel contends that Coral owes it this amount. Accutel further states that it has not taken any steps to collect this debt because it understands that Coral has filed for bankruptcy protection. For our purposes, we will disregard the overpayment, because the source of the funds was not Coral's California billings.

is not shown on Accutel's accounting. In its supplemental accounting, Accutel attributes this latter amount to OAN's fees.

OAN's accounting is not consistent with Accutel's assertion. According to OAN's accounting, its fee for the nationwide total of Coral-designated Accutel billings was $139,855. OAN states that its total nationwide Coral-designated Accutel billings were $655,657, not $1,618,808.40 as Accutel states.

Clearly, Accutel and OAN are not reporting consistent accounting information. The OAN accountings report on a total of only $655,657, a fraction of the Coral billings Accutel reports, $1,618,808.40. Neither party offered any explanation or attempted to reconcile the data. It appears that the Coral-designated Accutel billings by OAN are a subset of the total Accutel billings. Accutel, however, did not report that it used the services of another billing agent to bill the unaccounted-for amounts. Accutel also did not state that all its billings that went through OAN were labeled "Coral," hence calling into question whether OAN's data would be complete. Consequently, on the record before us, we cannot definitively reconcile this accounting information.

For our purposes, we will rely only on the admissions made by OAN and Accutel as to the amounts they retained from Coral's billings to California customers. As shown in Attachment 1, OAN retained $288,690 from the billings to California customers for Accutel charges labeled "Coral." Accutel states that it retained $147,603.95.[16] The accounting thus shows that

[16] As a factor, OAN provided upfront cash for Accutel's accounts labeled Coral, OAN thus retained all amounts collected from the Coral accounts. Accutel, in contrast, did not provide factoring services so it retained only a portion of the collected amounts for its fees.

OAN, Accutel, and Coral shared amounts collected from California customers as follows:

Accutel	$147,603.95
OAN	$288,690.00
Coral	$308,959.19
Total	$745,253.14
Unbillables (per OAN)	$ 51,253.00
LEC Adjust. (per OAN)	$ 35,165.00
LEC Chrgs/Reserves (per OAN)	$ 30,940.00
Total	$117,358.00
Total Accounted For	$862,611.14
Total Billings Less Refunds	$986,709.80
Unaccounted for	$124,098.66

OAN and Accutel claim that, as provided in their contracts, the advance payments that Accutel made to Coral and that OAN made to Accutel justify their respective retention of the amounts collected from California customers. We address this contention in section V of today's decision.

3. CCPI and TBS

The record shows that Accutel and OAN did no billing for Coral after July 3, 1998. After that time, Coral contracted with CCPI as its first level billing agent.[17] CCPI combined Coral's billings with those of other carriers and service providers and presented the aggregated billings to TBS, the second-level billing agent, which then presented the billings to the LECs. TBS

[17] Like ITA, CCPI failed to submit the accounting required by D.99-08-017. The Commission ordered all California LECs to cease providing billing services to CCPI, as well as ITA, in D.99-10-048.

provided this billing service indirectly to Coral via CCPI from August 17, 1998, to September 28, 1998. TBS was apparently aware that Coral was a client of CCPI, because TBS discontinued such billing when one of its officers read an article in the trade press about Coral's regulatory issues.[18] TBS billed 24,831 telephone numbers in California a total of $461,010.75. Coral presented billings to TBS (via CCPI) only for GTEC and its affiliates; Coral did not present any billings for Pacific Bell. In supplemental information, TBS stated that it billed a nationwide total of $1,799,737.25 for Coral, of which it actually collected $338,084.01. In its accounting, TBS states that it retained $143,978.97 as fees, and $260,000 as reserves.[19]

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[18] TBS did not specify the contents of the article that caused it to cease billing for Coral. We note the following news reports of Coral's activities: Stroud, Missouri Sues Five Telecommunications Companies for Alleged Phone Scams, St. Louis Post Dispatch (March 5, 1998), LEXIS, News library (Missouri Attorney General filed lawsuit alleging that Coral and its president, Michael Tinari, had used deceptive practices to add services to customers' phone bills); PR Newswire, Illinois Attorney General Jim Ryan Attacks Phone Fraud, Filing First "Cramming" Suit Against a Billing Company, (March 19, 1998), LEXIS, News library (lawsuit alleged that Coral used sweepstakes contest to bill customers for about $7 per month for telephone credit cards and voice mail, and accused ITA of aiding and abetting by providing means to demand and collect payment); Communications Daily, Section: Telephony (April 30, 1998), LEXIS, News library (Florida Public Service Commission directed all Florida telephone companies to cease billing for Coral on April 30, 1998, with Coral to respond to staff inquiries regarding deceptive contest entry forms and soliciting business in Florida without certification). Pursuant to Rule 73 of our Rules of Practice and Procedure and Evidence Code § 452(g), we take official notice of the existence of these new reports, but not their content.

[19] The amount TBS states that it retained exceeds the amount TBS states that it actually collected. TBS declined to provide supplemental information clarifying these assertions, so we will rely on TBS' assertion that it retained a total of $403,978.97.

C. Coral's Relationship with Easy Access

In D.98-12-010, based on a motion and supporting declaration by CSD, the Commission added Easy Access, Edward Tinari, and Celestine Spoden as respondents to this proceeding. CSD contended that Easy Access had purchased the calling card business from Coral, and that Easy Access had a business and familial relationship with Coral since Edward Tinari is Michael Tinari's father.

At the April 1999 hearing, CSD presented evidence regarding the alleged purchase. CSD argued that in an agreement dated October 16, 1997, Easy Access agreed to buy, and Coral agreed to sell, Coral's voice mail and domestic long distance calling card business. CSD further stated that numerous Easy Access documents support this interpretation of the agreement. For example, on April 28, 1998, Easy Access issued a Confidential Private Offering Memorandum which contained numerous references to its "acquisition" of the Coral business. CSD also offered internal memoranda which show an Easy Access officer exercising business planning and implementation authority over Coral's operations.

Spoden, Chief Financial Officer of Easy Access, testified that contrary to CSD's contention, Easy Access did not purchase the Coral calling card business. Spoden stated that pursuant to the agreement between the two companies, Coral assigned its accounts receivable, less a 10% management fee, to Easy Access. Easy Access, a publicly traded company that had been in existence for two years or more, was able to obtain a more favorable factoring agreement for the accounts receivable. Easy Access also granted Coral options to purchase stock in Easy Access at a set price. Spoden pointed out that the agreement also stated: "Coral shall be responsible for: generating, coordinating, interpreting and processing in their entirety all sales leads,

negative verification postcards, customer service, . . . billing and collection, . . . customer complaints . . . and the filing of all federal and state telecommunications tariffs."

Regarding the day-to-day operations of Easy Access and Coral, Spoden testified that the two companies were located in the same building but in separate, nonadjoining suites, and that there was little business interaction between the officers and employees of each. Spoden explained that the internal documents which appeared to show that Easy Access was exercising business control over Coral actually related to attempt by a corporate subsidiary of Easy Access to implement a calling card business similar to Coral's.

Pursuant to the agreement, Spoden concluded, Easy Access provided factoring-like services to Coral. Coral assigned its accounts receivable, less certain expenses and a management fee, to Easy Access. Easy Access retained the funds collected. Based on the amount collected, Coral accrued rights to purchase Easy Access stock at a set price. At the end of this series of transactions, and after paying all LEC, billing agent, and factor fees and reserves, about 75% of the remaining funds went to Coral, 15% to sales expenses, and 10% to Easy Access.[20] Easy Access did not identify the factor.

V. Discussion

We begin by evaluating the validity of Coral's customers' authorizations and find that the purported authorizations were invalid. With our

[20] The contract between Easy Access and Coral also granted Coral significant amounts of Easy Access stock options. The parties envisioned the value of Easy Access stock increasing, so that the options would be valuable to Coral, and through Coral's exercising of the options, Easy Access would gain additional capital. The stock price fell, however, so the options were not exercised.

jurisdictional reach in mind, we address the task of obtaining reparations for customers from Coral and other parties that retained amounts collected without authorization. Finally, we impose sanctions on Coral for its violations of the Public Utilities Code.

A. The Validity of Coral's "Authorizations"

In D.99-04-033, we determined that Coral was a public utility and thus subject to our jurisdiction. Coral obtained customers for its calling card through sweepstakes promotion. At the time Coral was using this method, sweepstakes were not expressly prohibited as a means of obtaining orders for products or services to be charged to a customer's local telephone service. However, California law now forbids the use of sweepstakes for this purpose. § 2890(c).

The Public Utilities Code generally regulates the provision of service by telecommunications utilities such as Coral. In particular, § 451 mandates that all public utility charges and services must be just and reasonable. To provide guidance in interpreting § 451 with respect to documents that purport to authorize charges to local telephone bills, we turn to basic contract law, because Coral treated the filled-out sweepstakes forms as a contract for service between Coral and the purported customer.

Under California Civil Code § 1550, there are four essential elements of an enforceable contract: (1) parties capable of contracting; (2) the consent of the parties, (3) a lawful object; and (4) consideration. As set out below, Coral's sweepstakes forms fail to demonstrate the first two elements of a valid

contract.[21] Consequently, the forms are not valid contracts that authorize the addition of charges to a customer's local telephone bill.

The first element of a contract is that the parties be capable of contracting. Generally, all persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights. 14 Cal. Jur. 3d (rev) Contracts, Part 1, § 15. Contracts with minors that delegate power, relate to real property, or relate to personal property not in the minor's immediate control are void. Id. at § 17.

The record in this proceeding shows that Coral made no effort to ensure that adults signed the forms. Neither the forms nor the boxes on which they were displayed contained any admonition that the contest was open only to adults. In fact, the record shows that middle-school-aged children were particularly attracted to the display, and often signed the forms. The record also shows that Coral was aware that children signed a significant number of entry forms. Despite this information, Coral took no steps to confirm that the person signing the form was an adult prior to placing charges on a local telephone bill.[22] Thus, it is unlikely that Coral could demonstrate that an adult signed all of its forms.

Even if an adult did sign it, Coral's sweepstakes forms fail to show consent to be "bound" by the terms stated on the form. The second element of a valid contract is the consent of the parties. The parties must express mutual consent; that is, agreeing to the same thing at the same time. Id. at § 44. One

[21] We do not reach the issues of whether the forms demonstrate the third and fourth elements of a contract.

[22] Coral also made no attempts to confirm that the person signing the form was actually the subscriber of record for the telephone number on the form.

party must make an offer with sufficiently definite and certain terms, and the other party must accept those terms. Id. at §§ 51, 59. In determining whether there has been mutual consent, the courts are not interested in the subjective intent of the parties, but rather the objective intent, i.e., what a reasonable person would believe from the outward manifestation of intent. Id. at § 45.

The forms upon which Coral relied to place charges on a sweepstakes entrant's local telephone bill fail to demonstrate the entrant's objective intent to authorize such charges. The forms state that "NO PURCHASE IS NECESSARY" and "YOUR TELEPHONE SERVICE WILL NOT CHANGE." The overall appearance and display of the forms is that of a contest, not a sale of telephone service.

A copy of the sweepstakes form, which is included in Exhibit 12, is reproduced below:

(SEE CPUC FORMAL FILES FOR THE COPY OF THE SWEEPSTAKES FORM.)

The form which Coral considered to be a "letter of authorization" did not clearly state that the customer was authorizing Coral to charge the customer's local telephone bill for a calling card. The clear purpose of the form and the box on which it was displayed was to solicit contest entrants. The box, just below the place for the tablet of forms, stated "NO PURCHASE OR ACCEPTANCE OF SERVICES REQURIED." The form itself boldly stated that "NO PURCHASE NECESSARY" and "YOUR TELEPHONE SERVICE WILL NOT CHANGE." Each of these statements, in a word, is false. They misrepresent the consequences (in Coral's view) of signing the form, and are inconsistent with a solicitation of consent to enter into a contractual relationship.

The fine print at the bottom of the form, in different places, described Coral's card as a "Discount Travel Card" and a "Discount Calling Card;" neither of these terms is defined. The fine print also contained an authorization to bill calling card usage at "25 cents/min. plus my service fee of up to 25 cents/day and a one time installation fee of $2.99." This text, however, was difficult to read in comparison to the rest of the text on the document. It was also deceptive and flatly contradicted by the more prominently displayed statements that the entrant was <u>not</u> changing telephone service or incurring a purchase obligation. In fact, Coral intended (but did not clearly communicate) the opposite result: The entrant's telephone service <u>did change</u> and the entrant <u>was becoming obligated</u>, in Coral's view, to pay for services from Coral. Thus, not only did this form fail to demonstrate an objective intent on the part of the entrant to authorize charges on his or her local telephone bill; this form contained objectively false statements.

Other aspects of California contract law support the conclusion that Coral's means of obtaining customer authorization for charges was inadequate.

To be enforceable, a contract's terms must be apparent to a reasonable person. If the writing does not appear to be a contract, and its contractual terms are not called to the attention of the person who receives it, the person is not bound by the purported contract. 1 Witkin, Contracts (9th ed. 1987), § 123. Here, the "contract" is the sweepstakes entry form. Although the fine print beneath the signature line describes a "Discount Calling Card" and related charges, the "NOTICE" in significantly larger type above the fine print announces "THIS IS A DISCOUNT TRAVEL CARD ONLY." Such a form, when attached to a sweepstakes entry box, does not reasonably appear to be a contract for the purchase of a telephone calling card. No evidence was presented that persons filling out the form received additional presentations drawing their attention to the contractual nature of this document. Accordingly, Coral's sweepstakes entry form is not a valid contract authorizing Coral to place charges on a customer's local telephone bill.[23]

Placing charges on a person's local telephone bill based on an invalid "authorization" is unreasonable. Unreasonable practices are prohibited by § 451. Because all Coral charges were based on this type of "authorization," all Coral charges were, therefore, unreasonable and unlawful. Consequently, all funds collected based on these charges must be returned to the customers in the form of reparations as required by § 734.

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[23] The FCC also applied this reasoning when it prohibited the use of sweepstake entry forms as a means of obtaining customer authorization to change presubscribed interexchange carriers. See 47 C.F.R. § 64.1150(b). The FCC found that customers are "confused as to the nature of the document signed" and "may mistakenly sign [an authorization] to enter a sweepstake." Amer-I-Net Services Corp., 13 FCC Rcd 22055, 22065-66, 1998 LEXIS 6688, File No.ENF-98-11 (FCC 98-285) (Released October 30, 1998).

B. Obtaining Reparations from Coral

Pursuant to § 734, we may order a public utility to make "due reparation" for any "unreasonable" charge collected by the public utility. Here, we have found that all charges imposed by Coral were unreasonable. All amounts so collected are, therefore, subject to our authority to order reparations pursuant to § 734, and must be returned to the California customers from whom the amounts were collected.

Unfortunately, the record strongly suggests that Coral is insolvent, with no known assets in this state. Thus, though we today order Coral to make full reparation, there is substantial uncertainty over whether this order, by itself, will provide relief to California customers.

Coral, however, did not act in isolation in presenting these unlawful charges to California consumers. The billing agents, factors, and the LECs each played a pivotal role in extracting unauthorized charges from Californians. Most disturbing is that the corporations that appear to have instigated this scheme (Coral, ITA, and CCPI) are insolvent, defunct or both.

Despite the difficulties of proceeding against Coral, we direct the General Counsel to take all reasonable steps to locate any Coral assets, and to obtain and enforce a judgment based on today's decision.

C. Authority Over Accutel, TBS, and OAN

Our authority over Accutel, TBS, and OAN is based on § 2889.9, which became effective January 1, 1999. In D.99-08-017, we exercised that jurisdiction by (1) making Coral's billing agents parties to this proceeding, and (2) ordering them to turn over all funds collected and retained from Coral

customers,[24] or to provide other financial security equivalent in amount and liquidity, for a potential reparations award in favor of Coral's customers. In TBS' and OAN's applications for rehearing of D.99-08-017, both contend that our subject matter jurisdiction over billing agents is limited to ordering billing agents to submit reports, and to follow rules adopted by the Commission for reporting subscriber complaints,[25] and to ordering LECs to cease billing for uncooperative companies. This limited subject matter jurisdiction, TBS and OAN argue, gives the Commission no authority to order billing agents to turn over funds obtained from California customers. In D.00-04-067, we determined that the issues regarding the limits of our jurisdiction over billing agents would be addressed in a subsequent decision; we do so in the next section.

D. Authority to Order Billing Agents to Turn Over Funds

Prior to the addition of § 2889.9 in 1998, the Public Utilities Code contained no reference to billing agents. As noted previously in section III.D., § 2889.9 defines "billing agents" and, along with § 2890, imposes numerous billing and reporting requirements. The overall purpose of these sections, which are to be read together, is to "serve as a deterrence to cramming." (Assem. Bill No. 2142 (1997-1998 Reg. Sess.) § 1.) The Commission is also authorized to enforce certain sections of the Public Utilities Code against billing agents.[26] These sections are largely related to the Commission's authority to impose fines.

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[24] "All funds collected and retained" includes any funds collected from Coral customers and (1) held as reserves, (2) retained in payment of fees or for factoring payments, or (3) held by the billing agent for any purpose.

[25] These rules are set out in D.00-03-020, App. B.

[26] Sections 2102, 2103, 2104,2105,2106, 2107, 2108, 2109, 2110, 2111, 2114.

In addition to the authority granted to the Commission in § 2889.9, the Legislature in § 2889.9(i) directed the Commission to "adopt rules, regulations, and issue decisions and orders, as necessary to safeguard the rights of consumers" and to enforce the provisions of the article. In D.99-08-017, the Commission relied on this section as the basis for its authority to order billing agents to turn over funds that were obtained from Coral's "customers."

In their applications for rehearing of D.99-08-017, OAN and TBS argue that the Commission is precluded from interpreting § 2889.9(i) in this way. TBS and OAN point to the third sentence of subsection (b) of § 2889.9, which states:

> "Neither this authority nor any other provision of this article grants the commission jurisdiction to regulate persons or corporations or their billing agents who are not otherwise subject to commission regulation, other than as specifically set forth in this section and Section 2890."

Based on this sentence, TBS and OAN conclude that the Commission does not have the authority to order billing agents to return unlawfully billed and collected amounts to California customers.

The California Supreme Court has provided guidance for interpreting consumer protection statutes such as §§ 2889.9 and 2890. In upholding Department of Motor Vehicles regulations implementing an automobile repair consumer protection statute, the Court stated:

> "This statute was passed as a remedial statute, designed to protect the public. The dominant concern of this statutory scheme is that of protecting the purchaser from the various harms which can be visited upon him by an irresponsible or unscrupulous dealer. Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority in contemporary society. As a remedial statute, it must be liberally construed to effectuate its object and purpose, and to suppress the mischief at which it is directed."

Ford Dealers v. Dept. of Motor Vehicles, (1982) 32 Cal. 3d 347, 356 (citations omitted).

The statutes we consider today, §§ 2889.9 and 2890, have the same purpose--–protection of the public–-as the repair statutes in the Ford Dealers opinion. We will, therefore, follow the Supreme Court's direction in interpreting the sentence of § 2889.9(b)[27] on which TBS and OAN rely.

Although the third sentence of § 2889.9(b) states that the Commission may not "regulate" persons, corporations, or billing agents other than as set forth, "regulate" is not specifically defined. However, in the context of the Public Utilities Code, "regulate" has a particular meaning. For example, § 701 authorizes the Commission to "supervise and regulate every public utility" and to "do all things, . . . necessary and convenient in the exercise of such power and jurisdiction." Among the Commission's specific grants of authority are the power to set all rates and charges, § 454; to determine the rules, practices, equipment, and facilities to be used by a public utility, § 761; and, to grant or deny operating authority, § 1001. When the Commission "regulates" a public utility, the Commission determines, among other things, whether the public utility may operate in this state, what price it may charge for its products and services, and what practices and equipment it may employ in its operations. Thus, in this context, "regulated" has an expansive but specific meaning.

By ordering the billing agents to turn over funds wrongfully obtained, the Commission is not "regulating" billing agents within the ordinary meaning

[27] The first sentence of subsection (b) addresses public utilities and is not applicable to billing agents. The second sentence states that the Commission may impose certain statutory provisions (the fine provisions discussed previously) against entities that are not public utilities, such as billing agents, as if the entities were public utilities.

of that term. The Commission has not sought to require billing agents to obtain operating authority, nor has the Commission attempted to approve or modify the billing agents' rates and charges; the billing agents operate largely without supervision from this Commission. In contrast to the Commission's multi-faceted regulatory power over public utilities, a decision ordering billing agents to return wrongfully collected funds to customers is narrowly tailored to address a specific circumstance with particular billing agents. Thus, such an order does not constitute the "regulation" of billing agents in violation of § 2889.9(b).

Instead, we are following the Legislature's directive set out in § 2889.9(i), which is to adopt rules and to issue decisions necessary to "safeguard the rights of consumers and to enforce the provisions of this article." The purpose of these statutes is to "deter cramming." One of the most potent means of deterring cramming is to regain any funds so obtained. Equally important is the consumer's right to have wrongfully obtained funds returned. Safeguarding this right requires that the "crammer" and those holding or collecting the proceeds from cramming return any such funds that they may possess.

Billing agents are included in the grant of authority in § 2889.9(i). As discussed in section III. D., the statutory framework recognizes the role of billing agents, and imposes certain specific obligations on them. In granting the Commission the authority necessary to "safeguard the rights of consumers," the Legislature did not exempt billing agents, or any other entities, from complying with this authority. Thus, all entities, including billing agents, which are included in §§ 2889.9 and 2890, are subject to Commission orders necessary to "safeguard the rights of consumers and enforce the provisions of this article."

This authority is not limitless, and must be exercised in a manner consistent with subsection (b). An order to turn over funds obtained from persons billed by Coral, however, does not rise to the level of "regulating" these billing agents. Therefore, § 2889.9(i) grants this Commission the authority to order the billing agents to return funds retained from Coral's unauthorized billings. Accordingly, we find no merit to the issues raised in the rehearing applications filed by OAN and TBS.

E. Regaining Funds in the Possession of Billing Agents

Notwithstanding Coral's insolvency, Coral did not receive all of the funds from its billings to Californians. A sizable share of these funds was retained by the other participants in the billing and collection chain-–the billing agents, factors, and LECs.[28] As noted above, Coral is subject to our reparations authority. Pursuant to § 2889.9(i), we also intend to regain the funds in the possession of the billing agents, and return those funds to the customers from whom the funds were wrongfully obtained.

Our responsibility to California customers demands that we make every effort to get back the money paid by customers victimized by Coral's unauthorized billings. Effective deterrence of future unauthorized billing necessitates that all amounts collected without authorization be recouped and returned to customers. See State v. Levi Strauss & Co., (1986) 41 Cal. 3d 460, 472 (in consumer class actions, courts will use concept of fluid recovery to ensure that policies of disgorgement and deterrence are realized).

[28] The ITA billing chain shows that of a total $8.2 million in billing, Coral obtained $2.5 million and the billing intermediaries retained $5.7 million. The Accutel/OAN chain shows that Coral received $308,595, and the intermediaries $436,293. TBS' accounting appears to show that it retained more than it collected on Coral's behalf.

As we noted in D.99-08-017, it is our policy to pursue resolutely all assets that may be needed to fund reparation orders or fines. Here, due in part to Coral's apparent financial insolvency,[29] we will turn to the other entities that, wittingly or not, participated in and benefited from Coral's illegal acts. The record in this proceeding reveals that there were (1) contractual provisions between the billing entities and Coral that provide for refunds from reserve accounts, and (2) agreements between Coral and the billing agents and factors to transfer funds collected as a result of bills for Coral's unauthorized services and charges from Coral to the billing agents and factors. Both the reserve accounts and the funds transferred are possible sources of money for reparations. Therefore, we analyze in the following pages the extent to which the entities now holding this money can be compelled by the Commission to turn it over to the California customers from whom the money was collected.

Requiring that the billing agents and factors disgorge proceeds retained from the illegal Coral billings is fair because these entities failed in their duty to ascertain the validity of Coral's billings.[30] In the case of Accutel, it apparently did review Coral's sweepstakes forms, yet it chose to disregard the obviously misleading nature of these documents and to bill for Coral anyway.

Requiring these billing agents to disgorge these funds will also deter future violations of § 2890, by these and other billing agents. The billing agents deal directly with the carriers or service providers and thus are in a position to provide a preliminary assessment of the validity of charges that may appear on

[29] Although Coral's insolvency compels us to seek other sources to fund reparations, we do not consider insolvency a prerequisite to proceeding against other entities that benefited from the wrongdoing.

[30] See section V.E.2.B.

customers' local telephone bills. This "gatekeeping" function is clearly reflected in the reserve account provisions of their contracts with the service providers and carriers, and is contemplated by the LEC tariffs for billing service. Therefore, we order the billing agents to disgorge all proceeds retained from Coral billings.

In ordering the relief against billing agents, we do not invalidate any contract between Coral and an agent, or between an agent and another agent. Rather, we hold that Coral and its billing agents can only transfer assets to the extent that they have a valid interest in those assets. We hold that every penny collected from California customers on Coral's account is traceable to billings for unauthorized services and charges. Coral has no legal interest in the proceeds from such billings, and consequently may not validly convey any legal interest in such proceeds to a third party. By virtue of their contracts with Coral or Coral's agents, third parties may have rights to recover the fees that the third parties have earned for billing or other services, under the terms of the contract. However, these recovery rights are against the assignor, Coral or Coral's agent, not against the wrongfully billed customers. To hold otherwise would make Coral's victims the guarantors of Coral's contracts with its billing agents. The billing agents must look to the wrongdoer, not the victims, to make them whole.

1. Contractual Provisions

The record shows that the contracts between the LECs, billing agents, factors, and carriers all provide for customer refunds. To ensure sufficient funds would be available for customer refunds, the LECs, factors, and billing agents all maintained reserve accounts. It is our objective to "activate" this refund chain for the benefit of California customers.

We therefore order all California LECs and billing agents that provided billing services, directly or indirectly, to Coral to refund to California customers all such amounts collected on behalf of Coral and held as reserves for customer refunds.

2. Funds Retained in Payment of Fees

The billing agents and factors obtained their fees for billing or factoring services by retaining a portion of money collected from California customers instead of paying for the services directly. In some cases, Coral assigned its accounts receivable directly to the billing agent or factor. In other cases, the contract simply allowed the billing agent or factor to retain a portion of the amounts collected by the LECs in payment of its fees. In the latter case, the billing agent or factor did not take title to the accounts receivable but rather acted as an agent for Coral in transferring the accounts receivable to the LECs.[31]

In today's decision, we determine that all Coral proceeds collected from California customers were illegally obtained because the proceeds are all traceable to unauthorized service and charges. Thus, to the extent the billing agents or factors shared in these proceeds, as either assignees or agents, they must return the funds to the customers victimized by Coral's wrongdoing.

a) Which Billing Agents are Assignees and Which are Agents?

The legal status of the billing agents as Coral's assignees or agents determines the applicable legal framework under which their potential duty to return funds to customers is analyzed. Here, we determine that TBS

[31] As noted in section III.B., the LECs require assignment to themselves of all accounts receivable for which they provide billing and collection service.

and ITA acted as Coral's agents, and that OAN and Easy Access were Coral's assignees. The record is unclear as to whether Accutel and CCPI were agents or assignees.

Although the legal framework is different for agents and assignees, the result is the same under both: Agents and assignees with notice of a customer's claims must return wrongfully billed funds to customers.

CCPI

As previously noted, CCPI has submitted neither a copy of its contract with Coral for the record, nor a thorough accounting of its relationship with Coral.[32] Thus, the record does not allow for a determination of CCPI's status as an assignee or agent, or the amount it retained from Coral billings.

TBS

The record does contain the billing contract between CCPI and TBS. This contract transfers from CCPI to TBS the right to fees amounting to 8% of the gross amount billed on Coral's behalf. The agreement authorizes TBS to deduct its fees, returned revenue items, and other applicable fees and charges from amounts otherwise due to CCPI. The contract, however, does not transfer Coral's accounts receivable to TBS. Thus, in arranging to have Coral's billings placed on customers' local telephone bills, TBS was acting as Coral's agent.

Accutel and OAN

As discussed above, OAN was the assignee of Accutel's accounts receivable. Accutel stated that it did not have a written contract with

[32] CCPI had previously submitted incomplete information that showed that it had paid $305,396.68 directly to Coral in five payments from October through December 1998. CCPI did not provide information on its fees or any reserves.

Coral, hence it is unclear whether Accutel actually obtained title to the accounts receivable or was acting as Coral's agent in transferring the accounts receivable to OAN.

ITA

As noted above, ITA has reportedly sought the protection of Bankruptcy Court. ITA and Coral executed a series of contracts that are included in the record.[33] In the first contract, ITA agrees to provide billing services for Coral. The caller billing services include the editing and rating of Coral's call details for submission to the LECs with which ITA maintains a billing and collection agreement. The contract provides that the LECs will purchase the call transactions from ITA, on behalf of Coral, as provided in ITA's agreements with the LECs who are also to remit funds to ITA pursuant to these agreements. ITA will, in turn, account for and allocate the funds so remitted as provided in the ITA/Coral billing contract. Section 2.2.4 of that contract provides that ITA will remit funds to Coral less LEC fees and holdbacks, and less ITA fees and holdbacks.[34] Any payments owed to a third-party factor, or owed to ITA under its expedited payment plan, will also be removed prior to disbursement to Coral. Thus, ITA obtained a portion of the funds collected from Coral's "customers" in payment of its fees but ITA did not

[33] In addition to the Billing and Collection Contract discussed in the text, Coral and ITA executed (1) a Certification Agreement whereby Coral certified that the call transactions submitted to ITA were actual calls generated by end-users, and (2) a personal guaranty by Michael Tinari and William Gallo of all Coral's obligations to ITA.

[34] ITA charged 3.5 cents per call for billing "one plus" traffic, with a 5% reserve holdback. ITA charged 18 cents per transaction for "enhanced services," i.e., voice mail or calling cards, and retained a holdback of 30%.

obtain ownership of the accounts receivable. ITA, therefore, acted as a Coral's agent.

Easy Access

As analyzed below, Easy Access is Coral's assignee.

b) Funds in the Possession of Assignees

An assignee is "one to whom property rights or powers are transferred by another." Black's Law Dict. (7th ed. 1999) p. 114, col. 2. Where Coral transferred its accounts receivable to a billing agent or factor, the factor or billing agent became Coral's assignee. The record shows that Easy Access accepted transfers of Coral's accounts receivable, and thereby became Coral's assignee. The record also shows that Coral transferred accounts to Accutel, which in turn sold its accounts to OAN. The general rule is that, as assignees, OAN and Easy Access "stepped into the shoes" of the assignors and accepted these funds subject to all valid defenses and remedies against Coral. Brienza v. Tepper, (1995) 35 Cal. App. 4th 1839, 1848; see also Civil Code § 1459.

We have already established that customers could successfully resist a collection action brought by Coral, the defense being that they had not authorized the charges in question. Under the general rule, this defense would also defeat Coral's assignees. However, there is an exception to the general rule. OAN and Easy Access would not be subject to the defenses of Coral's customers if OAN or Easy Access could show that it is a bona fide purchaser of the accounts; i.e., that it purchased the accounts in good faith, for value, and without notice of the customers' defenses. Weiner v. Roof, (1942) 19 Cal.2d 748, 752; Gold Circle, Etc. v. Riviera Finance-East Bay, (N.D. Calif. 1982) 540 F. Supp. 15, 21.

As shown below, however, this exception does not apply to OAN or Easy Access because neither can show that it accepted the accounts

receivable without notice of the Coral customers' claims.[35] Indeed, the record shows that Easy Access had actual notice, and OAN had constructive notice, of the Coral customers' defenses.

Exhibit 14 contains a September 28, 1997 memorandum from the Chief Financial Officer of Easy Access, Celestine Spoden, to which is attached an outline of the Coral business proposal. This outline describes the business as "voice mail" and "calling card" services, and states that the letters of authorization are in the form of sweepstakes entries. It also states that the monthly charge is $6.99, with an initial $2.99 activation fee.[36] The outline explicitly states that "usage on calling card and voice mail pickup is minimal." Easy Access, by virtue of this information, that purported customers were obtained via sweepstakes entry forms, and that these "customers" used the voice mail and calling card services only minimally, had actual notice that the customers were likely to have claims for refunds on the charged amounts.

Unlike Easy Access, the record contains no evidence that OAN --which provided billing and factoring services to Accutel, one of Coral's billing agents--received actual notice of the Coral customers' claims. OAN, however, was placed on constructive notice by Pacific Bell's tariffs. The record shows that if OAN had made even a minimal inquiry, it could have learned (1) from its client, Accutel, that the purported customer authorizations for Coral were obtained through sweepstakes forms, and were thus subject to claims of invalidity, and (2) from the trade press, that the Attorneys General of Illinois

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[35] We make no findings on whether OAN or Easy Access could make the showings necessary for the first two requirements.

[36] These amounts appear to be inconsistent with charges listed elsewhere in the record.

and Missouri, as well as the Florida Public Service Commission, had instituted proceedings against Coral for unauthorized charges.

The tariff under which Pacific offers billing and collection services to firms such as OAN provides:

For telecommunications related services,

> "Section 8.5.5 Obligations of the Customer
>
> (B) All Transactions submitted by the Customer will be accurate and consistent with the Customer service requested by and provided to the end user."

For Message Toll Service calls,

> "Section 8.3.5 Obligations of the Customer
>
> All Messages submitted by the Customer for billing will be accurate and consistent with the Customer service requested by and provided to the end user including the telephone number actually dialed by the end user."

Pacific Bell, Schedule Cal. P.U.C. No. 175-T, Sheet 522 and 484.

Tariff provisions such as these have the force and effect of law, and all members of the public are charged with notice of them. Trammell v. Western Union Tel. Co., (1976) 57 Cal. App. 3d 538, 550 (holding the addressee of a telegram subject to the limitation-of-liability provision in Western Union's tariff). We find that this tariff language placed OAN on constructive notice of the customers defenses. OAN cannot establish the defense that it was a bona fide purchaser for value of the accounts receivable.

We find that because OAN purchases billing and collection services from Pacific Bell pursuant to the tariff, it is OAN's duty to comply with the tariff, and that such duty may not be delegated to Accutel, or any other entity. The legal principle that certain duties may not be delegated to another

is rooted in the law of torts and is a form of vicarious liability. See 6 Witkin, Summary of California Law, Torts, (9th ed. and 2000 supplement) § 1017. The purpose of the rule is to ensure that the person whose agent's activity caused the harm is available to respond in damages to the injured party. Maloney v. Rath, (1968) 69 Cal. 2d 442, 446. The courts have recognized that the source of nondelegable duties may be statutes, contracts, and common law precedents. See Barry v. Raskov, (1991) 232 Cal. App. 3d 447, 455 (holding mortgage loan broker liable for independent contractor appraiser's negligence).

The California Supreme Court has also held that the Public Utilities Code and the need to protect the public may render a duty nondelegable. In Eli v. Murphy, (1952) 39 Cal. 2d 598, 600, the Court held that:

> "The effectiveness of safety regulations is necessarily impaired if a carrier conducts its business by engaging independent contractors over whom it exercises no control. If by the same device it could escape liability for the negligent conduct of its contractors, not only would the incentive for careful supervision of its business be reduced, but members of the public who are injured would be deprived of the financial responsibility of those who have been granted the privilege of conducting their business over the public highways. Accordingly, both to protect the public from financially irresponsible contractors, and to strengthen safety regulations, it is necessary to treat the carrier's duties as nondelegable."

The Court found that a Commission-licensed trucking firm was responsible for the harm caused by its subcontractor. The Court reasoned that the trucking firm remained responsible for complying with the Commission's safety regulations and could not delegate the duty for such compliance to its subcontractor. Eli v. Murphy, 39 Cal. 2d at 600.

Similarly, in Snyder v. Southern Cal. Edison Co., (1955) 44 Cal. 2d 793, 799, the Court found that a electric utility was responsible for the failure of its subcontractor to comply with Commission regulations in installing a power line and pole. The Court made this finding notwithstanding the fact that the subcontractor had contractually agreed to comply with all Commission regulations:

> "Where an activity involving possible danger to the public is carried on under public franchise or authority the one engaging in the activity may not delegate to an independent contractor the duties or liabilities imposed on him by the public authority."

In a 1969 case, a Court of Appeal observed that the California Supreme Court had issued two additional decisions that "expanded the area of non-delegable duty of care in specified situations." Kline v. Leatherman, (1969) 270 Cal.App. 2d 792, 796, accord Gamboa v. Conti Trucking, Inc., (1993) 19 Cal.App. 4th 663.

Here, the Commission has approved Pacific Bell's billing and collection service tariffs, and has imposed certain terms and conditions upon provision of these services. In executing an agreement with Pacific Bell's pursuant to those tariffs, OAN agreed to comply with the tariff requirements. OAN may not delegate this compliance duty to Accutel, or any other billing agent so as to assert that it lacked notice for the bona fide purchase defense. Like the trucking safety regulations at issue in Eli v. Murphy, the consumer tort issues in Barry v. Raskov, and the pole regulations in Snyder v. Southern Cal. Edison, the tariff provisions provide important safeguards to customers. Safeguards that would be substantially undermined if a billing agent, such as OAN, could insulate itself from liability by contracting with other billing agents. As the courts have repeatedly noted, absent this rule, firms have every

incentive to use potentially insolvent contractors with minimal supervision to provide services to customers. See Barry v. Raskov, 232 Cal.App at 454, n.1.

The value of accounts receivable is usually evaluated by a lender "in light of the past record of payment of the obligors, the obligors' current solvency, and the presence or absence of any dispute over the validity of the accounts or debts owed." Constructora Maza, Inc., v. Banco de Ponce, (1st Cir.1980) 616 F.2d 573, 577. While factors are not generally held to the same standard of diligence as commercial lenders in investigating the accounts that they purchase,[37] the courts have held that factors *do* have a heightened duty of inquiry where there are special protections for the customers whose accounts are being purchased. Such is the case, for example, with the trust provided for in the 1984 amendments to the Perishable Agricultural Commodities Act (PACA), which created a statutory trust for the benefit of unpaid produce suppliers.[38]

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[37] Gold Circle, Etc. v. Riviera Finance- East Bay, *supra,* 540 F.Supp. at 20.

[38] In Consumers Produce v. Volante Wholesale Produce, (3rd Cir. 1994) 16 F.3d 1374, the United States Court of Appeals for the Third Circuit described the PACA trust mechanism as follows:

> "Under the trust provision, commission merchants, dealers and brokers who receive perishable agricultural commodities hold them in trust for produce suppliers until the suppliers are fully paid. The trust is a floating, non-segregated, statutory trust which extends not only to commodities, but also to inventories of food or other products derived from the commodities and receivables or proceeds from the sale of the commodities or products. 7 U.S.C. § 499e(c)(2).
>
> "An unpaid produce supplier or seller must give written notice of its intent to preserve trust benefits to the produce dealer, broker or commission merchant within thirty (30) days after payment is due. The

Footnote continued on next page

In E. Armata, Inc. v. Platinum Funding Corp., (S.D.N.Y. 1995) 887 F. Supp. 590, for example, the District Court rejected a factor's argument that it should be treated as a bona fide purchaser of accounts receivable from a produce firm. The Court observed that since the factor, Platinum, was aware of the nature of the produce firm's business, it would be deemed to have notice that the funds of the produce firm, Andrews, were subject to the PACA trust. The District Court also held that since Platinum knew that Andrews was having trouble paying its bills, the factor should be deemed to have constructive notice of a breach of the PACA trust. The District Court said:

> "Platinum's claim that it was a bona fide purchaser fails because it had constructive knowledge of the trust and constructive knowledge of the breach of trust. The trust in this case, a PACA trust, is created by federal statute. Accordingly, the lender had constructive notice of the existence of the trust by virtue of its knowledge of the nature of the borrower's business . . . Having knowledge of the trust's existence, Platinum, being advised that Andrews was having difficulty paying its suppliers and having notice that two creditors had turned bills owing from Andrews over for collection, had a duty to do more than check as to the filing of any judgments or liens against Andrews. That information put Platinum on notice that a breach of trust could have occurred. It had rights under the Factoring Agreement to conduct an audit of Andrews' books and records, including review of bank accounts and cancelled checks . . . Conducting such an audit in April 1994 would have revealed at least

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notice of intent must also be filed with the Secretary of Agriculture. Id. at § 499e(c)(3)." (16 F.3d at 1378.)

For a full discussion of the PACA trust mechanism, see *Note*, "Statutory Trust Under Perishable Agricultural Commodities Act," 128 ALR Fed 303 (1995).

> one bounced check and PACA filings in April 1994, as well as outstanding amounts due for suppliers' deliveries in February 1994 . . . Under these facts, Platinum should have known that the PACA trust was in breach. Therefore, Platinum is liable to plaintiffs for $80,466.60 held by Andrews in the PACA trust."

887 F. Supp. at 594.

Similarly, in Post & Taback, Inc. v. Merrill Lynch Business Financial Services, Inc., (S.D.N.Y. 1993) 1993 U.S. Dist. LEXIS 13391, dealers in agricultural commodities sued under PACA for money owed to them for commodities they had sold to Western Growers, Inc. (Western). The dealers contended that they were entitled to recoup proceeds that Western had used to pay down a line of credit from Merrill Lynch. The dealers also sued Business Funding Group (BFG), which had acted as a factor for Western and, after purchasing Western's accounts receivable for about 60 cents on the dollar,[39] had made the last payment to Merrill Lynch on the line of credit.

The District Court held that the dealers could not recoup from Merrill Lynch, because it had no reason to suspect that the payments it received on the line of credit were in breach of the PACA trust. However, the court concluded that BFG was liable, because it obtained constructive notice of a

[39] The District Court opinion notes that under the factoring arrangement in Armata, "Platinum regularly advanced to Andrews 60% of the face amount of batches of invoices assigned by Andrews and paid an additional amount upon collection of the entire batch of invoices assigned after subtraction of Platinum's fees and expenses . . ." (887 F. Supp. At 593.) Interestingly, the supplemental accounting submitted by OAN in this docket on April 17, 2000 shows a similar arrangement. OAN advanced to Accutel 58% of the face amount of billings with a Coral designator, and then made "tail payments" to Accutel that brought the total payments, on a national basis, up to about 87.5% of the face amount of the billings.

breach when Western had offered to sell its accounts receivable at a 40% discount. The District Court said:

> "A breach occurred in the present case not simply because a sale [of accounts] was made, but because the sale was made at a discount to raise funds for . . . Western, rather than to maintain assets that could satisfy Western's obligations.
>
> "BGF should have known that Western was breaching its obligations as trustee when it offered to sell the trust property at a discount. At a minimum, BFG should have conducted a careful inquiry to determine whether Western's actions comported with Western's obligations as trustee. No evidence has been submitted to show that BFG conducted any inquiry whatsoever. The Court finds that BFG was on constructive notice of the breach of trust and therefore cannot avail itself of a bona fide purchaser defense."

Post v. Tuback, at *17-18.

Where there is a duty to investigate, one is charged with knowledge of the facts that would have been disclosed by an investigation. Hobart v. Hobart Estate Company, (1945) 26 Cal. 2d 412, 442; Mortkowitz v. Texaco, (N.D. Calif. 1994) 842 F. Supp. 1232, 1240. OAN concedes that its customer, Accutel, asked OAN to flag some accounts with a Coral identifier. Further, as stated in Section IV.B.2 of this decision, Accutel was well aware that the purported authorizations for Coral service were based upon sweepstakes forms, because it had reviewed some of these forms.

In addition to the information available from Accutel, a simple online search of the trade press would have revealed that the Attorneys General of Illinois and Missouri, as well as the Florida Public Service

Commission, had instituted proceedings against Coral for unauthorized charges.

In short, if OAN had conducted a reasonable inquiry rather than passively relying on Accutel's representations about the accounts (which OAN had purchased at a substantial discount), OAN could easily have discovered that Coral was not a "sales representative" but a calling card service provider, and that the authorities in three states had filed accusations of unauthorized billing. These facts would have been sufficient to put OAN on notice that Coral's customers were likely to have good defenses to the Coral charges.[40] Since OAN should have inquired further into the accounts with the Coral identifier, it cannot be considered a good faith purchaser of these accounts. Accordingly, we conclude that OAN accepted the assignment of Coral accounts from Accutel subject to the customers' claims. Since this decision finds that the customers' claims are valid, OAN must therefore return all the funds from Coral's accounts to Coral's customers.

[40] Thus, OAN's situation is very different from that of Riviera Finance, the factor in Gold Circle. In that case, Riviera had paid 94 cents on the dollar for the accounts of a trucking firm, Keshun, that delivered merchandise for Gold Circle stores. Personnel in the Gold Circle accounting department repeatedly assured Riviera that they had no problems with Keshun (540 F. Supp. at 18), even though Gold Circle was failing to follow its own procedures in matching the trucker's invoices with bills of lading, and some people in the accounting department had concluded that Keshun was guilty of issuing fraudulent invoices. (Id. at 19.) Under these circumstances, the court concluded that Riviera was a bona fide purchaser of Keshun's accounts receivable without notice of the fraud, and that it would be inequitable to require Riviera to return to Gold Circle payments the latter had made on the fraudulent accounts receivable. (Id. at 20-21.)

c) Funds in the Possession of Agents

Unlike Easy Access and OAN, the other billing agents involved here--TBS, ITA, Accutel, and CCPI[41]--did not obtain title to Coral's accounts receivable, but instead acted only as Coral's agents in the transfer of the accounts receivable to the LECs. These billing agents, however, deducted their fees from the amounts collected. As with the amounts retained by the assignees, the amounts retained by the agents are subject to the superior rights of the customers to return of the funds.

California law states that agents, who are in possession of funds that properly belong to a third party must return the funds to the third party:

> "If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, [the agent] must, on demand, surrender it to such person, or so much of it as [the agent] has under [the agent's] control at the time of the demand, on being indemnified for any advance which [the agent] has made to [the] principal, in good faith, on account of the same; and is responsible therefor, if, after notice from the owner, [the agent] delivers it to [the] principal."

Civil Code § 2344.

Pursuant to this statute, TBS, ITA, Accutel, and CCPI must return all funds which were collected from California customers and which these billing agents have retained. This statute requires the agent to return only so much of the funds as remain in the agent's possession. When the agent parts

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[41] Although the record is not clear as to whether Accutel and CCPI were agents or assignees, the record is clear that both acted as Coral's billing agent. To perform the functions of a billing agent, Coral would have had to grant Accutel and CCPI at least the authority of an agent. For purposes of this decision, we will assume that CCPI and Accutel acted as Coral's agents.

with the funds, the agent is no longer under a duty to return the funds to the owner. Therefore, the agents are not responsible for any funds they paid to Coral.

The California courts have considered whether an agent who applies collected funds to the principal's debt to the agent has sufficiently parted with the funds so that the agent should not be required to return the funds to the owner. The courts have concluded that where the agent, without notice, collects funds for the principal, and applies those funds to the principal's debt to the agent, the agent is a bona fide purchaser. As a bona fide purchaser, the agent need not surrender the funds to the owner. Weiner v. Roof, (1942) 19 C.2d 748, 752. As with the assignee liability analysis, however, all three agents had actual or constructive notice of the claims by Coral's purported customers against the funds that the billing agents retained.

TBS received constructive notice of the likely claims of Coral's "customers." As discussed in the previous section, Pacific Bell's billing and collection tariff placed TBS on constructive notice. The tariff requires that billings presented are not "inaccurate or misleading or in any way inconsistent with the Customer service requested by and provided to the end user." Like OAN, TBS should have inquired into the basis for Coral's billings and Coral's regulatory compliance history. Either type of inquiry, as discussed in the previous section, would have informed TBS of the likely claims of against Coral's billings.

CCPI, ITA, and Accutel had actual or constructive notice of Coral's business practices. Each dealt directly with Coral, and either knew or should have known the Coral's billings were based on "authorizations" contained in sweepstakes entry forms, and that only 3% of the customers charged for service actually used it. We find these facts constitute sufficient

notice to CCPI, ITA, and Accutel that Coral's purported customers would seek refunds of the amounts so collected. Thus, having notice of Coral's customers' claims, CCPI, ITA, and Accutel cannot claim that they are bona fide purchasers. Pursuant to the provisions of Civil Code § 2344, CCPI, ITA, and Accutel must, therefore, return all funds collected from Coral's customers and retained for any purpose.

d) Amounts to be Returned

As noted in section IV.B.3. of this decision, TBS retained a total of $403,978.97 from the Coral billings. Of this total, $260,000 is held as reserves and thus is subject to our order regarding refunds pursuant to contractual provisions. TBS retained the remaining $143,978.97 as its fees. This amount must also be returned to customers.

Accutel's accounting shows that it retained $147,603.95 of the net receipts from Coral billings. This amount must be returned.

For its billing agent services for Coral's California billings, OAN's accounting shows that it retained $74,788 from Coral's unauthorized California billings. OAN also retained $207,848 from Coral billings for its factoring services. Both of these sums must be returned to the customers.

ITA did not submit an accounting as ordered by the Commission and, consequently, the Commission suspended its rights to bill customers through California LECs. The accounting information in the record from Coral and CSD, however, shows that ITA retained at least $3,500,000 of proceeds collected from California customers as a result of Coral billings for unauthorized services and charges. ITA must return these funds. Unfortunately, ITA has reportedly sought Bankruptcy court protection so reaching these funds may not be feasible.

e) OAN's Legal and Equitable Arguments

In its appeal of the POD, OAN contends that the Commission is powerless to order it to return funds it retained from the billings labeled as Coral's, that California law does not require such a return, and that equity requires that OAN retain these funds. We disagree with OAN on each of these contentions. As an initial matter, Section 2890 grants the Commission authority to order the return of the funds as we have previously discussed.

The gist of OAN's remaining legal and equitable arguments seems to be that it is entitled to retain funds wrongfully collected from customers because it is already "$187,752 in the hole" with regard to Coral's billings. OAN apparently believes that its claim to the funds is superior to the claims of the victims of the wrongful billing.

We disagree. OAN misunderstands California law, and has failed to comprehend the equities of this matter.

As noted later in this decision, California law provides that where an agent or assignee is in possession of funds that properly belong to a third party, the agent or assignee must turn over the funds. Although there is one exception to this rule, that exception requires that OAN have no notice of the deficiencies in the billings. Pacific Bell's tariffs, however, require that billing agents, such as OAN, know whether the billings were authorized. Consequently, OAN cannot claim that it had no notice of the deficiencies in Coral's billings because OAN was legally required to know.[42] Therefore OAN

[42] The tariff includes no mental state element and thus is a "strict liability" regulation. See Communications TeleSystems International (1997) 72 CPUC 2d 621,635 (D.97-05-089). We note, however, that even using a negligence standard (i.e., whether OAN knew or should have known the billings were unauthorized), the facts would support a finding that OAN violated the tariff.

is ineligible for the exception, and the general rule of California law applies to OAN.

OAN goes on, however, to provide great detail on its lack of culpability for Coral's wrongful billing. Indeed, the record shows no evidence that OAN knowingly cooperated with Coral. OAN misses the point, though. California law does not require it to be culpable. OAN is simply an agent or assignee in possession of funds that properly belong to Coral's California victims. The fact that Coral promised these funds to OAN (in return for upfront cash) is not relevant. Coral had no right to the funds and hence could not give OAN such rights. The money belongs to the victims, and California law requires that OAN return it.

OAN is most myopic in its view of the equities of this matter. Through the instrumentality of OAN's billing and collection contract with Pacific Bell, Coral placed unauthorized billings on customers' local telephone bills. Some customers mistakenly paid these amounts. OAN now claims that this Commission should allow it to retain these wrongfully billed and mistakenly paid amounts.

OAN attempts to shield its role in this billing by blaming its client, Accutel. Again, OAN misses the point. OAN willingly engaged in a business relationship with Accutel. OAN's business judgment turned out to be faulty as Accutel is accused of widespread violations of the Public Utilities Code. OAN asserts its right to the funds is superior to that of the customer/victims based on Accutel's conduct, but we reject OAN's arguments. Unlike the customers, OAN was not misled into signing a service agreement that was disguised as a sweepstakes form. Unlike many customers, OAN was not billed due to a child's signature on a sweepstake form. Unlike customers, OAN could and should have prevented the entire transaction. OAN is in the

business of providing billing services. Pacific Bell's tariffs place the duty to present only authorized billings squarely on OAN. Accutel is not the first billing and collection customer to place unauthorized charges on local telephone bills. OAN should have taken reasonable steps to ensure that Accutel's billings were authorized. Having failed to do this, OAN is in no position to seek this Commission's authorization to retain wrongfully billed funds.

F. Reparations Plans

In consultation with CSD, the billing agents are directed to develop plans for accomplishing these refunds to California end-use customers in an efficient and administratively workable fashion. Rather than attempt to dictate the means by which these refunds will be accomplished, we will allow CSD and the billing agents flexibility in devising a plan to best use available information to accomplish our goal. The billing agents shall file and serve written plans within 45 days of the effective date of this decision as compliance filings.

Our history of ordering reparations and other refunds suggests that customers will often be difficult or impossible to locate due to the passage of time, and that billing records may be unavailable. To the extent any informational deficiencies arise, the billing agents are directed to use the best available information and to develop for our consideration a recommended proposal for any funds that cannot feasibly be returned to customers. Such a proposal should be consistent with the concept of fluid recovery discussed in State v. Levi Strauss, 41 Cal. 3d 460, 471-80 (1986).

G. Penalties

In today's decision, we determine that Coral billed California customers as a result of sweepstakes entry forms that did not meet the

requirements of a valid contract.[43] Such billings were not just and reasonable as is required by § 451. Pursuant to § 2107, we may assess fines of between $500 and $20,000 per violation of our statutes and decisions. CSD requests that we impose the maximum fine of $10,200,000, which represents $20,000 for each of the 510 days Coral billed California consumers.

In D.98-12-075, we adopted general principles to guide the determination of the proper amount of a fine. First, we look at the severity of the offense. This is typically measured by the amount wrongfully obtained. In this case, that amount would be nearly $6 million. Second, the conduct of the utility is considered. Here, Coral failed to prevent, detect, disclose, or rectify the unauthorized billing. Indeed, we find that the unauthorized billing was the intended result of a calculatedly deceptive promotional campaign to enlist customers under the guise of a sweepstakes. These two factors weigh heavily against Coral.

We also consider the financial resources of the utility. Coral is apparently insolvent and defunct. Nevertheless, our objective of deterrence of future wrongdoing by others requires a substantial fine.

The next factor is the totality of the circumstances in furtherance of the public interest. The record in this proceeding shows widespread brazen acts to bill California end use customers for unauthorized services and charges. The public interest requires strong deterrence of future schemes of this type. The fine level should be set accordingly high.

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[43] As reflected in the caption of this proceeding, CSD also alleged that Coral was providing telecommunications services without having obtained operating authority. Coral did not contest this allegation. However, due to the far graver issues with profound ramifications for telecommunications customers addressed in this decision, we consider this omission only as an aggravating factor in our fine calculation.

The final factor is the role of precedent. This is our first major case of unauthorized charges. In a case where we imposed a fine for unauthorized transfer of customers, we imposed a fine of $19.6 million, although we suspended all but $2 million. Communications TeleSystems International, (1997) 72 CPUC2d 621, 640.

CSD supports using the days of operation as the basis for calculating the fine, but CSD also notes that the number of customers wrongfully billed could serve as the basis. CSD observes, however, that the number of customers (258,000) multiplied by the lower end of the statutory fine range ($500) results in a fine over $100 million. That amount is beyond any fine ever imposed by this Commission.

The final factor in our guidelines is precedent in setting an appropriate fine. In Communications TeleSystems International, 72 CPUC2d at 639-40, we imposed a fine of $19.6 million and suspended all but $2 million for violations of § 2889.5. In FutureNet, D.99-06-055, we imposed a fine of $1.3 million for violations of § 394.

We will base our fine calculations on the number of days Coral was in operation, 510. Pursuant to §§ 2107 and 2108, we fine Coral $10, 000 for each day of this continuing offense. Accordingly, Coral shall pay a fine of $5.1 million to the General Fund of the State of California. The General Counsel shall take all reasonable steps necessary to locate any Coral assets, and to obtain and enforce a judgment based on this decision.

H. Disclosure Requirements

In the event that Coral, Michael Tinari, William Gallo, or any of Coral's current or former officers, directors, management employees or contractors, or owners of 5% or more of Coral's stock, seek to obtain public utility operating authority from this Commission, such request must be made

through the formal application process, and the affiliation or former affiliation with Coral must be disclosed. In addition, if Coral or any individual included in the previous sentence is affiliated in one of the listed roles with any other entity that intends to submit records directly or indirectly to LECs for billing to California consumers, such affiliation must be disclosed in writing to the LEC and to the CSD Director.

I. Jurisdiction Over Easy Access and the Individual Respondents

1. Did Easy Access Acquire Control of Coral?

We determined that Coral was a public utility in D.99-04-033, based on admissions in its 1998 application for a CPCN.[44] The sole telecommunications service Coral provided in California was its calling card business. CSD alleges that Easy Access purchased and exercised control over Coral's calling card business, and thereby became subject to the Commission's jurisdiction, and liable for Coral's misconduct.

Pursuant to § 854, the Commission obtains jurisdiction over any entity that merges, acquires, or controls, directly or indirectly any public utility. CSD presented no evidence that Easy Access has merged with or formally acquired Coral's corporate stock. Instead, CSD focused on proving that Easy Access obtained "control" over Coral's public utility function, the calling card business.

[44] Coral submitted Application 98-03-015 on March 2, 1998, seeking Commission authorization to provide intrastate telecommunications service as a switchless reseller. CSD protested the application. On June 24, 1998, Coral sought permission to withdraw its application. In D.98-07-051, the Commission's Executive Director granted Coral's request.

CSD contended that Easy Access "purchased" Coral's "calling card business" based on the allegedly plain words of the October 16, 1997, agreement between Coral and Easy Access. In contrast, Spoden testified for Easy Access that the agreement effected only a transfer of accounts receivable.

The agreement is not clear. Reading the various provisions together, however, reveals the contracting parties' apparent intention regarding the asset transfer. The agreement states, under the heading "Sale and Purchase of Assets," that Coral shall transfer to Easy Access all of Coral's interest in the "Coral Business," which is defined in Exhibit A to the agreement. Exhibit A describes Coral's service offerings, voice mail and related services, and its means of obtaining customers, namely, sweepstakes. Exhibit A does not describe or contain any reference to tangible assets, contractual rights, stock, "going concern" or "good will" value, intellectual property, or any other recognized asset. The only "asset" apparent from the descriptions found in Exhibit A is the accounts receivable from Coral's customers.

Exhibit B is consistent with this narrow reading of Exhibit A. Exhibit B states that Coral retains the obligation to manage all components of the business operations including sales, customer service, marketing, regulatory and legal compliance, among other things.

In return for Coral's accounts receivable, Easy Access agreed to sell Coral stock options at a specified price. The number of options Coral earned increased with the amount that Easy Access actually collected from the accounts receivable. The precise calculation required a multi-step process. First, Coral received a share of the gross billings as its management fee. Second, certain sales expenses were deducted. Third, half of the remaining amount was to be re-invested in Coral's business. Easy Access retained the

final remaining amount. For each $1 million of revenue retained by Easy Access under this final step, Coral would be issued an option to purchase 1 million shares of Easy Access common stock at $3 per share. The agreement also provides that Easy Access would sell stock to Coral, with the number of shares dependent on amount of "profit" generated from the billing revenue. Easy Access eventually granted Coral options to purchase up to 1.5 million shares of Easy Access stock at a set price.

Spoden testified for Easy Access that the agreement provided for the sale of an "income stream" to Easy Access, not a business. He testified that he was aware of only two means of selling businesses, by selling the assets of the business or the stock. According to Spoden, the agreement between Easy Access and Coral does neither. He further stated that the purpose of the agreement was to allow Coral to obtain a more favorable factoring arrangement, and to provide Easy Access with the potential for additional equity investment, in the event Coral exercised the stock options.

We have previously interpreted the term "control" as used in § 854 to mean "actual or working control." WUI, Inc., v. Continental Telephone Corp., (1979) 1 CPUC2d 579, 586 (D.90363). Here, the agreement upon which CSD bases its claim of control explicitly leaves Coral responsible for actual operation of the public utility business. The agreement does not provide for Easy Access to oversee operations, or to approve major management decisions. The agreement leaves Coral with unfettered discretion to run the calling card business as it sees fit. In sum, while some provisions of the agreement can be read to suggest that Easy Access obtained an equity interest in Coral, the agreement as a whole does not effect a transfer of control of Coral's business to Easy Access.

CSD bears the burden of proving its assertions by a preponderance of the evidence. Communications TeleSystems International, (1997) 72 CPUC2d 621, 633. CSD has not met this burden regarding its contention that Easy Access acquired control of Coral. Thus, we conclude that Easy Access did not become subject to our jurisdiction by virtue of assuming control of a public utility. As noted above, however, the agreement does assign to Easy Access funds from unauthorized billings to California customers. These funds are subject to the California customers' right to reparations. (See § V.E., above.)

2. Did Easy Access Act as Coral's Alter Ego?

CSD also argues that Easy Access acted as the alter ego of Coral by exercising control and by not maintaining an arms-length relationship with Coral. CSD offered evidence that Edward Tinari, President of Easy Access, concealed his ownership of 10% of the Coral stock, and that Easy Access concealed and misrepresented its management of the Coral business. CSD presented documents that showed that Coral and Easy Access commingled funds and shared a common business location. CSD showed that the Tinari family controlled a significant amount of Easy Access stock, as well as 40% of Coral's. Coral and Easy Access also shared a previous attorney, and Edward Tinari was an employee of Coral, as well as an officer of Easy Access. Finally, the Board of Directors of each company failed to meet regularly or to maintain adequate corporate records, according to CSD.

CSD advocated that the Commission "look through" Coral to Easy Access because Easy Access managed Coral's calling card business for the purpose of fraudulently generating additional funds for Easy Access. CSD showed that Easy Access knew that Coral was billing 150,000 customers a service fee of $6.99/month for the Coral calling card, but that there was

"minimal" usage of the calling cards. CSD also contended that Coral and Easy Access also schemed to avoid operating in states with "bonding requirements and proactive attorney generals," and changed corporate names to avoid creating a "paper trail back to Coral."

In rebuttal, Spoden testified for Easy Access that the interactions between the entities were limited and related to on-going business issues with the factoring contract. Spoden also stated that a subsidiary of Coral was contemplating starting a calling card business similar to Coral's and that the memoranda that went back and forth between Coral and Easy Access related to setting up this new business, not managing Coral's existing business.

When a corporation is lawfully operated, the general rule is that only the corporate entity itself, and not its shareholders, officers, or other persons (legal or natural), bear liability for the consequences of the corporation's actions. Under the alter ego doctrine, however, the corporate veil may be "pierced," i.e., individuals or other corporations acting on behalf of the corporation may be held liable for its debts and misdeeds. The doctrine requires that there be such a unity of interest and ownership between the corporation and the individuals or other corporation that the separate entities cease to exist, and that an inequitable result would follow if the doctrine were not applied. See 15 Cal Jur 3d (rev), Corporations, § 33.

California courts have recognized that "the law as to whether courts will pierce the corporate veil is easy to state but difficult to apply." Las Palmas Assoc. v. Las Palmas Center Assoc., (1991) 235 Cal. App. 3d 1220, 1248 (quotations and citations omitted). Generally, when considering whether to pierce the corporate veil to hold another corporation liable, as CSD urges here, the courts will disregard the corporate entity where "it is so organized and controlled, and its affairs are so conducted, as to make it merely an

instrumentality, agency, conduit, or adjunct of another corporation." Id. at 1249 (quotations and italics omitted). Where the two corporations, despite their separate legal existence, are engaged in a single enterprise, and that enterprise incurs an obligation, both corporations will be held liable. Id. at 1250.

We will first consider the evidence regarding the conduct of Easy Access. To meet the standard for piercing the corporate veil, CSD must show that Coral and Easy Access were conducting a "single enterprise" and that Coral became an "instrumentality, agency, conduit, or adjunct" of Easy Access. Here, CSD has presented no evidence to refute Spoden's contention that Easy Access and Coral were entirely separate entities prior to the October 1997 agreement. Thus, the terms of the October 1997 contract must form the basis for finding that the two entities had become a "single enterprise."

The agreement fails to establish that Coral and Easy Access combined their separate activities and undertook a single enterprise. As discussed above, the plain words of the agreement leave Coral with unfettered management responsibility for the calling card business. CSD has presented insufficient evidence to demonstrate that Easy Access actually exercised control over Coral's operations. Coral apparently conducted its sales and billing efforts entirely independent of Easy Access, with Easy Access only becoming involved with the accounts receivable stream of revenue. The evidence showed that Easy Access started to develop a business modeled on Coral's but did not complete it. Of the revenue actually realized from Coral billings, Coral received about 75%;[45] third party vendors, 15%; and Easy

[45] Pursuant to the agreement, Coral received 10% of the gross billings, before deducting any customer refunds, LEC or billing agent charges, and sales expenses.

Access, 10%. Thus, the obligations Coral incurred were not so much for the benefit of Easy Access as for Coral. In sum, CSD had not shown by a preponderance of the evidence that Easy Access and Coral had such a unity of ownership and interest as to constitute a single enterprise.

Because Easy Access was not operating as a public utility, either by virtue of purchasing Coral's calling card business or acting as Coral's alter ego, CSD has not presented a basis for this Commission to exercise its public utility jurisdiction over Easy Access. However, by virtue of the agreement with Coral, Easy Access received funds that were obtained from California customers through Coral's wrongful billing, and these funds are subject to the consumers' right to reparations, as discussed above.

3. Did the Individual Respondents Act as Coral's Alter Ego?

CSD also alleges that Edward Tinari, Michael Tinari, and William Gallo have assumed such control over Coral that the corporate entity should be disregarded and the individuals held liable as "alter egos." On the basis of credit card records for charges in Cabo San Lucas and Walt Disney World and a purchase at Wilson Leather, CSD suggests that Michael Tinari, William Gallo, and Edward Tinari used the Coral credit card for personal use. Michael Tinari and William Gallo personally guaranteed the payments on the Coral American Express card. CSD also presented evidence that the individuals made loans to Coral and Easy Access, and that Coral paid Michael Tinari and William Gallo substantial sums for "outside services" in addition to a salary. CSD alleges that Edward Tinari and other Tinari family members owned significant amount of the shares of Easy Access, but not a majority of the shares in this publicly traded company, and that Edward Tinari and Michael Tinari together owned 40% of Coral stock.

What CSD has not shown is that the three named individuals used Coral's assets as if the assets were their personal property, instead of the corporation's. Other than the use of the corporate credit card, which they had personally guaranteed, CSD has not shown that Gallo and the Tinaris, collectively or individually, made operational decisions without regard to Coral's corporate structure.

In short, CSD presented insufficient evidence to show that these individuals, collectively or individually, created or constituted such a unity of ownership that Coral had ceased to exist as a separate corporate entity.

J. Further Efforts to Return Funds to Customers

As noted above, the funds obtained from California end-use customers moved through a chain of intermediaries, each of which retained a share of the proceeds. The contractual chain provided for customer refunds to be reimbursed through the chain. With today's decision, we activate that refund chain.

However, Easy Access presents a special case. We previously determined that Easy Access did not purchase the Coral business. In the agreement between Coral and Easy Access, Coral merely transferred its accounts receivable to Easy Access. Spoden testified for Easy Access, and we find, that the agreement was essentially a factoring agreement. Pursuant to this agreement, as shown in its accountings, Easy Access obtained payments from Coral's billing agents that originated from Coral's illegal billing to California customers. Easy Access retained about $300,000 of the total amount processed under this agreement. This amount is subject to the customers' refund rights.

Nevertheless, the record in this proceeding shows that Easy Access indirectly obtained funds from California consumers via assignment from Coral. Thus, any such funds that Easy Access did not turn over to Coral or

refund to customers are subject to the terms of this decision. The record shows that Easy Access admitted receiving about $3 million in Coral billings. Of this amount, 75% was paid to Coral, and 15% to third party vendors, leaving 10% at Easy Access. Easy Access also stated that its costs have consumed that 10%. Such costs, however, are not relevant to whether Easy Access obtained a share of Coral's illegally billed funds via assignment. Thus, Easy Access received $300,000 subject to the provisions of today's decision. The General Counsel is directed to take reasonable steps to enforce this decision and to recover this $300,000 for Coral's California victims. We recognize that Easy Access is reportedly insolvent, and located in another state. Nevertheless, the General Counsel is directed to take all reasonable steps to enforce this obligation, in the event that Easy Access has, or may one day obtain, sufficient funds to pay.

As to Coral itself, the record in this proceeding shows that Coral used various intermediaries to convert rapidly to cash the billings for unauthorized services and charges. Thus, some fraction of the proceeds has come into Coral's possession, although subsequent disbursement of the proceeds is uncertain. Our actions ordered above, and our subsequent pursuit of these intermediaries, will serve two valuable functions. First, these entities are ordered to disgorge all amounts retained from unauthorized billings, which will be returned to California end-use customers. Second, these actions will serve to deter other entities from acting as intermediaries in future wrongful billings. In this way, we hope to prevent recurrence of this scenario.

K. Need for Further Proceedings

In its appeal of the POD, OAN contended that the Commission must allow OAN further procedural opportunities regarding accounting data provided by OAN. As set out below, OAN has been extended ample opportunities to present, explain, or challenge the accounting data.

In D.99-08-017, the Commission named OAN, and several other billing agents, as additional respondents, and ordered all the billing agents to

> "file with the Commission's Docket Office and serve on all parties, a full accounting their respective transactions with, or on behalf of, Coral Communications, Inc. . . . Such accountings shall include, without limitation, a statement of all amounts billed for Coral/Easy Access, amounts actually collected, amounts refunded to customers, amounts disbursed to Coral/Easy Access, and amounts retained by the billing agent."

Ordering Paragraph 1. The decision also ordered all billing agents to pay over to the Commission's fiscal office all amounts collected and retained from Coral/Easy Access billings.

Accutel filed its accounting on September 24, 1999.

OAN filed the required accounting on August 25, 1999, and stated that:

> "[n]either Coral nor Easy Access has ever been a client or customer of OAN. OAN has billed no charges whatsoever on behalf of Coral/Easy Access, has collected no amounts on behalf of Coral/Easy Access, has refunded no amounts to customers with respect to Coral/Easy Access, has disbursed no amounts to Coral/Easy Access, and has retained no amounts with respect to Coral/Easy Access.
>
> "OAN has performed billing services on behalf of [Accutel]. Accutel informed OAN that Coral served as a sales agent for Accutel with respect to a portion of the services that OAN billed on behalf of Accutel."
>
> OAN Accounting at p. l.

On February 15, 2000, the ALJ issued a ruling directing Accutel (and TBS) to supplement their accountings. On March 20, 2000, Accutel supplemented its accounting. In the supplement, Accutel made representations regarding the amounts OAN obtained from billings Accutel made on behalf of

Coral. Accutel stated that OAN provided factoring services of Accutel's accounts and that OAN had retained $621,515.50 from the Coral billings as its fees.

On April 4, 2000, the ALJ issued a ruling that stated:

> "OAN is hereby ordered to respond to the factual representations regarding OAN made by Accutel. OAN is ordered to provide a full accounting of all services including factoring, it provided to Coral. Such accounting shall include, but is not limited to, a statement of all amounts factored for Coral, amounts actually collected, amounts refunded to customers, amounts disbursed to Coral and amounts retained for any reason by OAN."

Administrative Law Judge's Ruling at p. 1.

On April 17, 2000, OAN filed its "Response of OAN Service, Inc., to ALJ's Ruling of April 4, 2000." Attached to OAN's response was a document entitled "Summary Accounting for Records Accutel requested be designated "Accutel/Coral Com SSM" For Accounting Purposes Only From 05/14/97 – 10/05/99." In this document OAN tabulated that it had collected and retained $288,690 from the Coral-identified billings, not $621,515.50 as Accutel had asserted.

In the POD, Accutel's assertions as to the amounts retained by OAN were disregarded. The amount reflected in POD Attachment 1, $288,690, is derived solely from OAN's filing.

In its Appeal of the POD, OAN stated that the Commission may not base its decision on OAN's accountings because "OAN was given no opportunity to comment on the use of its accountings, in conjunction with a legal theory presented for the first time in the POD, as the basis for an order requiring disgorgement of assets. The accountings are not evidence, and are not a proper basis for a finding of fact or a Commission order." OAN Appeal

at 40. OAN goes on to state that the Commission must give OAN notice of its intent to force disgorgement of unlawfully billed and collected amounts, and an opportunity to be heard and to present evidence in its defense.

Since D.99-08-017 issued in August 1999, OAN and the other billing agents have had notice of the Commission's intent to recoup any available funds from Coral billings. OAN's claim of a lack of notice is unwarranted.

As for an opportunity to present evidence, it is unclear what issue of material fact OAN intends to dispute. The only previously disputed issue of material fact was the amount that OAN had retained from Coral billing. Contrary statements have been disregarded, and OAN's self-stated position is reflected in this decision. As ordered by the Commission, OAN has presented accounting data showing the amount of funds that it retained from accounts associated with Coral's billings. OAN has not alleged any errors on its part in presenting this data, and no other party has challenged the data. Thus, there is no dispute regarding these facts. Lacking any dispute, there is no need for additional procedural steps regarding these facts. The legal significance of the facts was set out in the POD, and has been squarely challenged by OAN in its appeal. We resolve OAN's legal challenge elsewhere in this decision.

Findings of Fact

1. After April 12, 1999, Coral did not participate in this proceeding.
2. After May 7, 1999, Easy Access did not participate in this proceeding.
3. Easy Access states that it is insolvent.
4. TBS, Accutel, and OAN submitted accountings of their billing activity on behalf of Coral. TBS, Accutel, and OAN submitted supplements to their accountings.
5. Local telephone bills include charges for many services in addition to local telephone service.

6. LECs provide billing and collection services to telecommunications service providers and interexchange carriers.

7. At the time of Coral's billings, LECs were authorized to disconnect local service for nonpayment of interexchange charges such as Coral's.

8. Billing agents are intermediaries between the service provider or interexchange carrier and the LEC. Billing agents format billing information and manage interaction with the LEC.

9. Factoring is the buying of accounts receivable at a discount. The price is discounted because the factor assumes the risk of delay in collection and loss on the accounts receivable.

10. Coral is a Florida corporation, and its last known headquarters was in Boca Raton, Florida.

11. Coral claims to have obtained authorization to charge customers for telephone calling cards through sweepstakes entry forms.

12. For the calling cards, Coral placed an initial set up fee of $2.99 and a monthly charge of $6.99 on customers' local telephone bills.

13. Coral began billing California customers on their local exchange telephone bill in May of 1997 for these cards.

14. Coral billed 258,000 California consumers for a Coral calling card.

15. Ninety seven percent of the billed customers did not use Coral's card.

16. Coral billed almost $6 million to California consumers.

17. A videotape of a Coral promotion at a mall in Tracy, California showed that the Coral sweepstakes marketing display contained a boat and large banner encouraging consumers to enter to win the boat or a cash prize. The tape also showed that there were no large signs informing consumers that the sweepstakes were associated with any telephone company or telephone service.

18. All of the Coral sweepstakes displays addressed in CSD's testimony were unattended by any personnel.

19. Coral took no steps to ensure that the sweepstakes forms would be signed only by adults.

20. Many children submitted Coral's sweepstakes forms, and Coral was aware of this fact.

21. The press contained reports of lawsuits against Coral by the Attorneys General of Illinois and Missouri, and Florida Public Service Commission, and such reports were readily available through an online news service.

22. The Coral marketing program failed to inform customers that the sweepstakes form ordered a calling card and authorized Coral to place charges for the card on the entrant's local telephone bill.

23. The Coral marketing program failed to apprise customers in a reasonable manner of the terms and conditions of the calling card offer.

24. The Coral marketing program failed to obtain customers' authorization to charge their local telephone bill for a calling card.

25. From May 1997 to June 1998, Coral submitted its billings to California LECs through ITA, a billing agent.

26. Coral's transactions with ITA for the first half of 1998 are summarized below:

Total Nationwide Sales Billed by LECs	$8.2 million
LEC Reserves for customer refunds	-$1.2 million
Billing and Validation Fees	-$1.0 million
ITA Reserve for refunds	-$3.0 million
ITA Factoring Fee and Adjustment	-$ .5 million
Amount Paid to Coral	$2.5 million

27. On March 4, 1998, Pacific Bell notified CSD that it had discontinued billing for Coral through ITA because Coral could not provide proof that it had a CPCN.

28. Coral sold telecommunications services in California for 510 days.

29. From May 28, 1998, to July 3, 1998, Accutel provided billing services to Coral under Accutel's name.

30. Accutel billed $1,618,808.40 to California customers on behalf of Coral, of which $540,738.84 has been refunded to customers.

31. Prior to billing customers, Accutel's officers reviewed purported letters of authorization at Coral's headquarters. Based on their review of these documents, Accutel agreed to perform the billing services for Coral under the Accutel's name.

32. Accutel billed customers on behalf of Coral through OAN.

33. OAN admits that, at Accutel's request, OAN labeled certain Accutel accounts with a marker indicating they were Coral's accounts.

34. OAN did not request documentation concerning the basis for Accutel's request.

35. OAN could have obtained information about Coral's business from Accutel.

36. OAN could have readily discovered that Coral's regulatory history included allegations of unauthorized billing from authorities in three states.

37. OAN factored Coral's accounts receivable billed by Accutel.

38. The accountings showed that OAN, Accutel, and Coral shared amounts collected from California customers as follows:

Accutel	$147,603.95
OAN	$288,690.00
Coral	$308,959.19
Total	$745,253.14
Unbillables (per OAN)	$ 51,253.00
LEC Adjust. (per OAN)	$ 35,165.00
LEC Chrgs/Reserves (per OAN)	$ 30,940.00
Total	$117,358.00
Total Accounted For	$862,611.14
Total Billings Less Refunds	$986,709.80
Unaccounted For	$124,098.66

39. From August 17, 1998, to September 28, 1998, TBS provided billing service to Coral indirectly via CCPI.

40. CCPI submitted a copy of its checkbook register showing that it disbursed $305,396.68 to Coral.

41. TBS billed 24,831 different telephone numbers in California a total of $461,010.75.

42. In supplemental information, TBS stated that it billed a nationwide total of $1,799,737.25 for Coral, of which it actually collected $338,084.01. TBS states that it retained $143,978.97 as fees and $260,000 as reserves, and has ignored an opportunity to clarify this statement.

43. Easy Access states that it is unable to make timely payment of its obligations, and it ceased to participate in this proceeding effective May 7, 1999.

44. Edward Tinari is the President and a Director of Easy Access.

45. Michael Tinari is Edward Tinari's son and the President of Coral.

46. William Gallo is the Senior Vice President of Coral.

47. The forms used by Coral measure 5.5" wide by 4.25" tall and copies are contained in the record. The forms have in large letters "ENTER TO WIN $25,000" followed by a paragraph of Rules. The Rules paragraph is printed in eight point type, with lines spaced unusually close together. The Rules paragraph begins with the statement in all capitals "NO PURCHASE NECESSARY" and then goes on to state that Coral will issue a "Coral Communications Calling Card under the terms set forth on the form." Following the Rules paragraph, the form is perforated. After the perforation, the first line states "OFFICIAL L.O.A. FORM," with large spaces below for signature, name, full address, age, "spouse's" age, date, and home phone. Below the spaces appears the following statement in densely printed seven point type: "I would like a Coral Communications Discount Travel Card sent to me at the address provided above. I authorize Coral Communications, Inc., to bill all calling card usage at 25 cents/minute . . . and a one time fee of $2.99 for my home number listed above."

48. The form described in Finding of Fact 47, when attached to sweepstakes entry box, does not reasonably appear to be contract for the purchase of a telephone calling card.

49. No evidence was presented that persons filling out the form described in Finding of Fact 47 received additional presentations drawing their attention to the purported contractual nature of this document.

50. The sweepstakes entry form described in Finding of Fact 47, or a substantially similar version, was the sole means that Coral used to obtain customer names and telephone numbers.

51. CSD has presented insufficient evidence to show that Easy Access actually exercised control over Coral's operations.

52. Of the revenue actually realized from Coral billings and subject to the October 1997 agreement, Coral received about 75%; third party vendors, 15%; and Easy Access, 10%.

53. Easy Access accepted an assignment of Coral's accounts receivable and retained $300,000 from these billings.

54. CSD did not establish by a preponderance of the evidence that Michael Tinari, Edward Tinari, and William Gallow, either collectively or individually, operated Coral with such a unity of ownership and control that the corporation ceased to exist as a corporate entity.

55. Coral has no known assets in California.

56. The severity of Coral's offense is indicated by the illegally billed amount, $6 million.

57. Coral failed to prevent, detect, disclose, or rectify unauthorized billing.

58. OAN and TBS filed applications for rehearing of D.99-08-017.

59. Coral did not deny that it offered intrastate telecommunications service without a certificate of public convenience and necessity.

60. We have considered Coral's uncertificated operations only as an aggravating factor in our fine calculation.

Conclusions of Law

1. The Commission has jurisdiction over billing agents pursuant to Pub. Util. Code §§ 2889.9 and 2890.

2. The Commission is authorized pursuant to §§ 2889.9(f) and (g) to order billing agents to submit information.

3. The Commission is authorized to issue orders and decisions concerning the activities of billing agents as are necessary to safeguard the rights of consumers and to enforce the provisions of § 2889.9.

4. There is substantial evidence that ITA is insolvent, defunct, and/or has sought U.S. Bankruptcy Court protection.

5. Section 451 requires that all public utility charges and terms of service must be just and reasonable.

6. Coral treated the sweepstakes entry form as a contract for service.

7. Under Civil Code § 1550, there are four essential elements of an enforceable contract: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) consideration.

8. Contracts with minors that delegate power or relate to real property or personal property not in the minor's immediate control, are void.

9. The sweepstakes forms purport to delegate power to Coral to bill a particular local telephone account.

10. The sweepstakes were not signed by adults and are, therefore, void.

11. In determining whether the parties have mutually consented to the terms of a contract, the critical factor is their objective intent, rather than subjective intent

12. Coral's sweepstakes forms fail to demonstrate the entrant's objective intent to authorize charges to a local telephone bill.

13. The sweepstakes entry form described in Finding of Fact 47 was an unreasonable means of ascertaining authorization to charge a customer's local telephone bills a calling card, because the form it to state clearly that the sweepstakes entrant was authorizing charges to his or her local telephone bill.

14. Coral violated § 451 each time it charged a sweepstakes entrant for telecommunications service based on the form described in Finding of Fact 47.

15. The sweepstakes entry form described in Finding of Fact 47 is not an enforceable contract authorizing Coral to place charges on a customer's local telephone bill.

16. All charges based on the sweepstakes entry form described in Finding of Fact 47, or substantially similar versions thereof, are unreasonable and unenforceable.

17. All amounts collected by Coral or on its behalf must be refunded to customers.

18. Public Utilities Code §§ 2889.9 and 2890 are remedial statutes designed to protect the public.

19. A remedial statute should be liberally construed to effectuate the statute's object and purpose, and to suppress the mischief at which the statute is directed.

20. Under the Public Utilities Code, the term "regulate" has an expansive meaning and includes the power to set rates and charges, as well as to grant or deny operating authority.

21. Ordering particular billing agents to return unlawfully collected amounts in their possession does not constitute the "regulation" of billing agents not otherwise subject to the Commission's jurisdiction under the final sentence of § 2889.9(b).

22. Billing agents are not exempt from the Commission's authority to safeguard the rights of consumers.

23. We determined that Coral was a public utility in D.99-04-033.

24. CSD bears the burden of proving its assertions by a preponderance of the evidence.

25. CSD failed to show by a preponderance of the evidence that Easy Access acquired the Coral calling business.

26. The October 1997 contract fails to establish that Coral and Easy Access combined their separate activities and undertook a single enterprise.

27. CSD had not shown by a preponderance of the evidence that Easy Access and Coral had a unity of ownership and interest in a single enterprise.

28. Safeguarding the rights of consumers requires that we make every effort to obtain reparations for wrongfully billed consumers.

29. Safeguarding the rights of consumers requires that we deter future wrongdoing by ordering all entities that have retained funds illegally obtained by a third party to disgorge those funds.

30. The record is not clear whether CCPI and Accutel were Coral's agents or assignees.

31. OAN and Easy Access were assignees of Coral.

32. Pacific Bell provides billing and collection services pursuant to Schedule Cal. P.U.C. No. 175-T, which provides, among other things, that it is the billing and collections customer's obligation to submit only accurate and authorized charges.

33. Pacific Bell's billing and collection tariff placed OAN on constructive notice of the validity of billings it presents to the Pacific Bell.

34. OAN and Easy Access had notice of the claims against Coral's accounts receivable. OAN and Easy Access are not bona fide purchasers for value.

35. OAN and Easy Access each accepted assignments of Coral's accounts receivable and retained some of the funds collected from Coral billings.

36. The courts have held factors to a heightened duty of inquiry where there are special protections for the customers whose accounts are being purchased.

37. Where there is a duty to investigate, one is charged with knowledge of the facts that would have been disclosed by an investigation.

38. All funds obtained from assignment of Coral billings and retained by OAN and Easy Access are subject to California customers' superior rights.

39. ITA and TBS were agents of Coral.

40. Agents, in possession of funds that properly belong to a third party, must return such funds to the third party.

41. Where an agent, without notice, collects funds for the principal, and applies those funds to the principal's debt to the agent, the agent is a bona fide purchaser and need not surrender the funds to the owner.

42. ITA, TBS, CCPI, and Accutel had actual or constructive notice of the claims by the persons that Coral billed.

43. Neither ITA, TBS, CCPI, nor Accutel were bona fide purchasers, and must return to customers all funds collected and retained from Coral's billings.

44. The contracts among the LECs, billing agents, factors, and Coral all provided for recourse for customer refunds, thus creating a "refund chain" ultimately up to Coral.

45. Safeguarding the rights of customers requires that the billing agents and factors refund to customers all amounts collected and retained from Coral billings.

46. TBS admitted that it holds $260,000 as reserves for potential refunds to Coral's customers.

47. As assignees, OAN and Easy Access "stepped into the shoes" of Coral and accepted these funds subject to all valid defenses and remedies against Coral.

48. Safeguarding the rights of consumers requires that we take all actions necessary to enforce the terms of this decision against all entities that obtained and retained funds from Coral's illegal billing.

49. TBS retained $143,978.97 as its fees and must return this amount to customers.

50. Accutel retained $147,603.95 of the net receipts from Coral's billings and must return this amount to customers.

51. OAN retained $74,788 from Coral's collections for billing fees and $207,848 for factoring services; the sum must be returned to customers.

52. ITA retained $3,500,000 of the proceeds collected from Coral's billings and must return this amount to customers.

53. Easy Access retained $300,000 from Coral collections that must be returned to customers.

54. The Commission is authorized, pursuant to § 2107, to assess fines of between $500 and $20,000 per violation of the Public Utilities Code and decisions.

55. In D.98-12-075, we adopted general principles to guide the determination of the proper amount of a fine.

56. The severity of the offense as measured by the amount of the ill-gotten gain and Coral's failure to prevent, detect, disclose, or rectify the unauthorized billing weigh heavily against Coral in setting the amount of the fine.

57. Deterrence of future wrongdoing by others requires a substantial fine.

58. The public interest requires that the fine level reflect a clear policy that unauthorized billing will result in substantial fines.

59. The public interest requires that Coral pay a fine of $5.1 million.

60. Safeguarding the rights of consumers requires that Coral, Michael Tinari, William Gallo, or any of Coral's current or former officers, directors, management employees or contractors, or 5% or greater shareholders, obtain any operating authority from this Commission through the formal application process, with disclosure of the affiliation or former affiliation.

61. Safeguarding the rights of consumers requires that Coral or any person or entity included in Conclusion of Law 60 be affiliated in one of the listed roles with any other entity that intends to submit records directly or indirectly to

LECs for billing to California consumers, such affiliation must be disclosed to the LEC and the Director of the CSD.

62. The public interest requires that this decision be effective immediately.

63. We should take official notice of the existence of the press reports listed in footnote 18.

O R D E R

IT IS ORDERED that:

1. Coral Communications, Inc. (Coral) shall refund to all California customers all amounts Coral charged to and collected from such customers.

2. Coral shall cease and desist from any and all further violations of the Public Utilities Code and other applicable California or federal law.

3. Coral shall not bill, directly or indirectly, any California customers for any telecommunications-related service unless expressly authorized by this Commission.

4. International Telemedia Associated (ITA), Call Card Plus, Inc. (CCPI), Accutel Communications (Accutel), OAN Services Inc. (OAN), Telephone Billing Services Inc. (TBS), and Easy Access, Inc. (Easy Access) shall refund to all California customers all assigned and retained Coral funds:

ITA	$3,500,000
Accutel	$147,603.95
OAN	$288,690
TBS	$403,978.97
Easy Access	$300,000

5. ITA, CCPI, Accutel, OAN, TBS, and Easy Access shall refund to all California customers all funds obtained from Coral billings and held as reserves.

6. Coral, ITA, CCPI, Accutel, OAN, TBS, and Easy Access shall meet, confer, and cooperatively develop an efficient and orderly plan for promptly returning all funds subject to Ordering Paragraphs 1 and 5 to the California customers from whom the funds were obtained. Consumer Services Division (CSD) shall convene such a meeting no later than 30 days after the effective date of this decision. CSD shall promptly submit a compliance filing identifying any entity that failed to attend CSD's meeting. CSD shall prepare a resolution suspending any absent entity's authority to bill through California LECs and place it on the Commission's next agenda. To the extent billing and customer information is unavailable, CSD shall propose, in consultation with the other parties, the next best use of available funds consistent with the doctrine of fluid recovery. CSD shall submit a compliance filing with the proposed refund plan and status report no later than 180 days after the effective date of the show cause order.

7. Coral shall pay a fine of $5.1 million to the General Fund of the State of California within 45 days of the effective date of this order.

8. Should Coral, Michael Tinari, William Gallo, or any of Coral's current or former officers, directors, management employees or contractors, or 5% or greater shareholders, seek to obtain public utility operating authority from this Commission, such request must be through the formal application process and the affiliation or former affiliation must be disclosed. In addition, should Coral or any individual included in the previous sentence be affiliated in one of the listed roles with any other entity that intends to submit records directly or indirectly to local exchange carriers (LECs) for billing to California consumers, such affiliation must be disclosed to the LEC and the Director of the CSD.

9. The applications of TBS and OAN seeking rehearing of Decision 99-08-017 are denied.

10. This proceeding is closed.

This order is effective today.

Dated April 19, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

Commissioner Henry M. Duque, being necessarily absent, did not participate.

ATTACHMENT 1

OAN "Accutel / Coral Com. SSM" Accounting Information
(Submitted April 17, 2000)

Total Gross Calif. Billings	$467,265
Total Advanced to Accutel based on Calif. Billings	$271,014
Total Amount Collected (including OAN charges) and Retained by OAN	$288,690
Billing Services Charges ($6,054 + .71[1] ($97,767) = $75,469	$75,469
Factoring Collections, and fees (Total Collections less Billing Service Charges)	$213,221

(END OF ATTACHMENT 1)

[1] OAN's accounting shows some data as "US Total" without corresponding California-only entries. To estimate the California share, the Gross Billing California Only is divided by U.S. Total, resulting in .71.