

Decision 01-09-017 September 6, 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 Vista Group International, Inc., (U-5650), doing business as Vista Communications (Vista), Thomas Coughlin, Chief Executive Officer of Vista, and Philip Bethune, President of Vista, to determine whether they have violated the laws, rules, and regulations governing the manner in which California consumers are switched from one Long Distance carrier to another.

Investigation 99-04-020  
(Filed April 22, 1999)

Application for Authority to transfer control of Communications Billing, Inc. (U-6020-C) from its current shareholders to Thomas M. Coughlin, Sr. and Philip A. Bethune.

Application 99-09-038  
(Filed September 20, 1999)

Regina M. DeAngelis and James McTarnaghan for  
Communications Billing, Inc., applicant.  
David Crocker and Lawrence M. Brenton for Vista Group  
International, Inc., respondent.  
Stephanie Krapf for Pacific Bell, interested party.  
Carol Dumond for Consumer Services Division.

**OPINION FINDING VIOLATIONS AND ORDERING SANCTIONS**

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## **Summary**

Today's decision concludes two proceedings, an investigation and an application, concerning a telecommunications service reseller and the owners of that business. In the investigation, we find that the reseller, Vista Group International, Inc., doing business as Vista Communications (Vista or respondent), violated Public Utilities Code Sections 702 and 2889.5 in the course of its telemarketing activities, and that sanctions are warranted for these violations. Specifically, Vista failed to adequately supervise its telemarketers, so that thousands of customers switched long distance providers after receiving misleading solicitations and inadequate information about the rates and switching charges. For these unlawful acts, we conclude that a \$7.0 million fine is warranted. We order reparations of \$20 for each business line of each aggrieved customer, and certain other actions.

In the application, we grant Communications Billing, Inc.'s (CBI) request to withdraw the joint application to transfer a portion of its customer base to Thomas M. Coughlin, Sr. and Philip A. Bethune, owners of Vista.

## **Procedural Background**

The Commission started this investigation to determine whether Vista had engaged in cramming, slamming, and misrepresenting Vista's relationship with local exchange companies. If proven, such activities would constitute violations of Sections 451, 489, 702, 2889.5, and 2890.<sup>1</sup> (The terms "slamming" and

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<sup>1</sup> Unless otherwise indicated, statutory citations are to the Public Utilities Code. We also instructed staff to bring to our attention by motion any evidence of violations of Section 2889.9 after its effective date. This statute was not effective until January 1, 1999. It prohibits a person or corporation from misrepresenting its association or affiliation with a telephone carrier when soliciting a subscriber to purchase a product or service and to have that product or service billed on the subscriber's telephone bill. At

*Footnote continued on next page*

“cramming” refer, respectively, to the unauthorized transfer of a telecommunications customer’s account from one provider to another, and the billing of such a customer for services not authorized by the customer.) In addition, the Commission asked whether fines should be imposed pursuant to Sections 2107 and 2108 for any such violations, whether respondent should be ordered to cease and desist from any unlawful operations or pay restitution, and whether respondent’s certificate of public convenience and necessity should be suspended or revoked. Based upon the evidence presented during the proceeding, the alleged statute violations were reduced solely to Sections 702 and 2889.5.

Evidentiary hearing was held on October 18-22, November 15-19, and December 6 and 15, 1999. Vista and the Commission’s Consumer Services Division (CSD) filed concurrent opening and closing briefs on January 7 and 14, 2000, respectively.

CSD objected to the receipt of exhibits identified at the hearing and offered into evidence later, namely, Exhibits (Exh.) 32, 38, 39, and 40. After review of the exhibits, we conclude that CSD’s arguments regarding the receipt of these exhibits mostly concern the weight to be given the exhibits, rather than whether they should be received into evidence. The exception is Exh. 38, which, indeed, Vista did not submit as promised or offer into evidence. Therefore, Exhs. 32, 39, and 40 are received into evidence. Exh. 38 is not received.

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the time the Commission signed out the order starting the investigation, Vista had informed staff it had ceased all marketing in California in November 1998, making Section 2889.9 inapplicable. We will address this argument in the part of the Opinion dealing with cramming allegations.

On November 10, 1999, the Assigned Commissioner consolidated this proceeding with Application (A.) 99-09-038, which was filed September 14, 1999. This investigation proceeding is adjudicatory with a 12-month statutory deadline; whereas, the later filed application is ratesetting. (See Sections 1701.2 and 1701.3)

On April 6, 2000, the Commission issued an order pursuant to Section 1701.2(d) extending the 12-month deadline in the consolidated proceeding in order to accommodate the later schedule of the application. (D.00-04-032)

### **Vista's Operations**

Vista is an Ohio corporation certified by Decision (D.) 96-07-051 to do business in California as a switchless reseller. Vista is owned by two shareholders, Thomas Coughlin, Sr. and Philip A. Bethune, and is a family-operated business. Vista purchases long distance services from other carriers, and does not have its own primary interexchange carrier (PIC) code with local exchange companies (LECs). Thus, customer data accumulated by LECs regarding Vista appear in the name of the following underlying interexchange carriers and is sent to them: the Furst Group; Sprint; the company that is now MCI WorldCom; Cable and Wireless; and Wiltel. Underlying carriers are able to separate out any PIC disputes regarding Vista. Vista operates reseller services in numerous other states and has entered into a voluntary compliance agreement in Oregon regarding slamming allegations.

In 1996, shortly after starting to operate in California, Vista contracted with telemarketing firms to solicit California small business customers for Vista's long distance services. In 1998, Vista had approximately 67,000 California customers and reported total revenues nationwide of \$40 million with an overall net loss.

### **Slamming Allegations**

During 1997 and 1998, customer complaints about Vista were received from all over the state by the Commission, Vista, the Federal Communications Commission (FCC), and the Better Business Bureau of Ohio (BBB), where Vista was incorporated. CSD reviewed all 133 written complaints available and personally interviewed 122 complaining customers. Nineteen of the customers interviewed by CSD signed declarations regarding slamming. In its reports in this proceeding, CSD summarizes all written customer complaints. (Exhs. 1, 2, 15 and 18.)

In addition, CSD received a copy of BBB's annual report on Vista. The report states that during 1997, BBB processed a pattern of complaints alleging that Vista used deceptive selling practices. BBB reported that Vista had promptly investigated all complaints forwarded to it by BBB. The report also indicates that the Oregon Attorney General obtained an Assurance of Voluntary Compliance from Vista, and that Oregon's legal action was filed to resolve slamming allegations.

In the written complaints, the customers allege that their long distance service was switched for some months to Vista from their chosen carrier without the customer's knowledge, authorization or consent. Based upon information printed on their bills, the name of the company most customers identified as switching their service was Vista, Vista Communications, USBI-Vista or U.S. Billing. A few customers stated they were switched by WilTel/Vista Group/U.S. Billing, WilTel/Worldcom, Vista Group International, Vista Pacific, Vista Services, Vista Billing, Enhanced Services Billing, Inc., Vista/Telec, or the First (sic) Group/Vista, U.S. Billing, WilTel, Enhanced Services Billing, Inc. and the Furst Group. These companies are a mix of Vista, its affiliates, and interexchange carriers from whom Vista purchases the service it resells.

Most of the complaining customers stated that the telemarketer contacting the customer claimed to represent a company other than Vista, such as Pacific Bell (Pacific). Thus, Pacific initially filed a civil lawsuit against Vista regarding fraudulent misrepresentation, which was later settled.

An overwhelming majority of the complaining customers indicated that the telemarketer offered to consolidate local and long distance charges into one telephone bill and represented that nothing else would change. Other customers indicated that the telemarketer claimed to be calling to conduct a telephone survey, to obtain billing information, to simplify the company's billing, or to obtain the best long distance rates available for the customer. Ten customers whom CSD interviewed testified at the hearing about their experiences with Vista.

In addition to interviewing nearly all customers who filed written complaints, CSD obtained the following data on total PIC disputes against Vista recorded by various local exchange carriers and underlying interexchange carriers during 1997-1999:

Sprint	Jan. 1997-Feb. 1999	4,809
MCI WorldCom	Jan. 1997-Mar. 1999	3,346
Cable and Wireless (Exh. 2, pp. 13-15)	Apr. 1998-Feb. 1999	1,685
Pacific Bell (Exh. 13, Attachment 1)	Jan. 1997-Sept. 1998	209
GTE	Jan.-November 1998	<u>724</u> <sup>2</sup>
<b>Total PIC Disputes</b>		<b>10,773</b>

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<sup>2</sup> Reported by Furst/Vista and MCI, respectively, as follows: Jan. – Nov. 1998, 499 PIC disputes and Jan. – Jun. 1998, 225 PIC disputes.

Regarding the above data, it should be noted that customer complaints may be lodged with a local exchange company, long distance carrier, billing agent or reseller. Also, a PIC dispute is recorded for each telephone line involved in the dispute.

CSD called as a witness Pacific's Director of Consumer Protection, Sandy McGreevy, who testified that Pacific categorizes complaints as slams if the customer indicates he or she was switched without authorization. Pacific does not investigate these complaints to ascertain whether the complaint is true. It has a policy of immediately refunding any switching charges (\$9.98 per line) without further inquiry. (Exh. 13.) In addition to the slamming PIC disputes recorded, McGreevy indicated that Pacific recorded 629 allegations of misrepresentation by Vista telemarketers during 1997-1999, with only 14 of these instances occurring in 1999. (Exh. 13, Attachment 1.)

At the hearing, CSD stipulated that Vista had verification tapes recorded by a third-party verifier for each customer alleging an unlawful switch in service. A tape of the purported verification was played for many of the customers who testified. On cross-examination, some customers indicated their conversation with the verifier was terminated when they declined to switch service or asked for clarification about the transaction. One customer alleged the verification tape was altered. However, no other evidence of tampering with verification tapes was produced, and CSD does not allege that this occurred. After hearing the verification tapes, all but one of the customers still insisted they did not authorize their service to be switched.



CSD contends Vista has engaged in a scheme of telemarketing to circumvent the requirements of Section 2889.5,<sup>3</sup> and has represented itself as other telecommunications companies. Although Vista provided scripts to telemarketers, CSD contends the scripts were confusing, misleading, and drafted to create an illusion of a new billing service that did not require a switch in long distance carriers. CSD based this contention upon Vista's hiring of underlying carriers with "billing" as part of their company name.

CSD contends Vista did nothing to monitor, supervise, or randomly check to see if telemarketers followed the scripts. CSD points out that the dialogue between customer and telemarketer was not recorded. CSD considers Vista's reliance on third-party verification to be misplaced, since customers were placed under a misconception by the telemarketer that their service would not be switched and they must answer all verifier questions "yes" in order to get the combined billing service. CSD argues that regardless of whether or not the customer or the third-party verifier detects improper marketing, Vista is

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<sup>3</sup> Section 2889.5 states: "(a) No telephone corporation, or any person, firm, or corporation representing a telephone corporation, shall make any change or authorize a different telephone corporation to make any change in the provider of any telephone service for which competition has been authorized of a telephone subscriber until all of the following steps have been completed:

- (1) The telephone corporation, its representatives or agents shall thoroughly inform the subscriber of the nature and extent of the service being offered.
- (2) The telephone corporation, its representatives or agents shall specifically establish whether the subscriber intends to make any change in his or her telephone service provider and explain any charges associated with that change.
- (3) For sales of residential service, the subscriber's decision to change his or her telephone service provider shall be confirmed by an independent third-party verification company..."

forbidden under § 2889.5 to make any change in a customer's telephone service provider unless the customer is fully informed of the nature and extent of the service being offered.

CSD considers the sales scripts to be inadequate to comply with Section 2889.5 and the verification scripts provided by Vista to be misleading by identifying the third-party verifier as the "verification department" or "verification center" or a place to "confirm account information." CSD contends that only one of four scripts indicates the customer is choosing Vista as its service provider, and that even this one may also be ambiguous, depending on what the telemarketer had told the customer. CSD argues that customers were told that they were getting a new program consolidating two bills into one. When customers asked if switching service providers was involved or tried to confirm there would be no switch, verification was immediately terminated. Moreover, CSD argues, the customer only authorized combined billing, not a switch in provider.

CSD believes that Vista took no action to prevent, detect, and rectify marketing abuses were unreasonable since Vista appeared not to believe it had any responsibility to correct any unlawful acts of its telemarketers. CSD argues that Vista violated Section 2889.5 for a long period of time and tolerated telemarketing abuse. CSD contends Vista did not check the verification tape of all customers solicited by each telemarketer found to have committed a misrepresentation. Thus, CSD concludes that Vista failed to do everything

necessary to secure regulatory compliance by its agents, a violation of Section 702.<sup>4</sup>

The status of refunds to complaining customers varies. Some customers testified that they have received refunds of all charges and increased costs related to the switch in service; others have received refunds of switching fees only; and yet others have not received any refunds. However, all complaining customers have been switched back to their long distance carrier of choice. Customers who testified indicated they spent from several hours to several days to reverse the unauthorized switch and obtain refunds. They were all business customers with multiple business lines.

### **Vista's Response To Slamming Allegations**

Vista advances numerous arguments regarding the facts and law surrounding this case to show that it has complied with all required statutes.

#### **1. Lack of Jurisdiction**

First, Vista argues that its satisfaction of the FCC's verification requirement is sufficient to comply with the regulations of telemarketing, and any additional state requirements are pre-empted by federal law, citing *California vs. Federal Communications Commission*, 75 F.3d 1350 (9th Cir., 1996), *cert. den.* 517 U.S. 1216, 1996. Also, Vista argues that this Commission has no

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<sup>4</sup> Section 702 states: "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in anyway relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

jurisdiction over telemarketers and that Section 7015 may not be extended to the regulation of sales strategies and marketing devices employed by telecommunications carriers, citing *Cellular Dynamics, Inc. vs. MCI Telecommunications Corp.*, 1995 U. S. Dist. LEXIS 4798 (N.D. Ill. 1995), *Weinberg vs. Sprint Corporation*, 165 F.R.D. 431 (D.N.J. 1996) and *Bauchelle vs. AT&T Corp.*, 989 F.Supp. 636 (D.N.J. 1997).

## **2. Customers Not Slammed**

Vista's Director of Regulatory Affairs, Courtney Maroon, investigated many customer complaints and concluded that most customer switches were not slams. She believes many of these complaints are not viable because, for example, there was miscommunication between the customer and entity recording the complaint; buyer's remorse on the part of customers who later changed their minds; confusion within a company about who authorized the switch; or customer error, such as not remembering that they had authorized a switch. Once the confusion was cleared up in her investigation of individual complaints, Maroon contends the customers often confirmed that they or another authorized person in their company approved the switch to Vista's service.

Vista believes the existence of a verification tape proves authorization was given. Maroon testified that the several customers who objected during their taped verification, in fact, did not have their service switched; therefore, the verification did what it was intended to do--prevent an unauthorized switch. Maroon also testified that Vista's policy was to reimburse

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<sup>5</sup> Section 701 states: "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

complaining customers for all charges and fees, even if Vista had a verification tape.

In her investigation, Maroon found no pattern of rudeness to customers by telemarketers, and telemarketing companies immediately terminated employees named as being responsible for unauthorized misrepresentations of Vista as an LEC. Maroon testified that all telemarketing in California ceased in November 1998. After listening to customers testify at the hearing, she believes some customer witnesses are confusing Vista Group International, Inc. with Vista International, a different carrier.

Maroon considers classifying all PIC disputes as unlawful slams to be an error because LECs do not investigate complaints; instead, the LECs automatically classify as a slam any complaint that service was switched without authority. The LECs also refund the switching fees without investigating the complaint. She believes investigation of each complaint, as she or her staff performed, is needed before such a classification can be accurately made.

For many complainants who testified, Vista played a verification tape purporting to authorize a switch in service. CSD stipulated Vista has such tapes for all switched customers. Vista fails to understand how a customer could complete the verification process without being alerted that the customer was authorizing a change in long distance service provider. Vista argues that any customer could have declined Vista service during this process, yet most did not.

### **3. Vista Not Responsible For Acts Of Independent Contractor**

Vista argues that it cannot be held legally responsible for acts outside the scope of the duties of its independent telemarketing contractors. Vista contends its independent contractors are contractually obliged to perform services in accordance with all applicable laws and regulations. Vista contends it

specified in written scripts both (1) the approved questions to obtain customer consent for Vista's service, and (2) dialogue to be used during telemarketing that did not include any representation that Vista was an LEC. Thus, any such representation or extraneous dialogue was outside the scope of the telemarketers' duties and not attributable to Vista. Vista alleges penalties may only be assessed for acts within the scope of official duties or employment as a Vista contractor, citing Public Utilities Code Section 2109.<sup>6</sup>

Vista argues that it cannot be held strictly liable for its contractors' conduct because it made reasonable efforts to insure their compliance with regulations. Vista denies that it condoned improper telemarketer practices and, in fact, had telemarketers terminated who engaged in unauthorized practices. Vista argues that it sent telemarketing scripts to Pacific and the Commission for review, receiving no comments or criticism. Vista contends it called customers solicited by problem telemarketers to verify authorization of switches in service, prohibited telemarketers from referring to LECs, and eventually (in November 1998) voluntarily ceased all telemarketing operations in California.

#### **4. PIC Reports Unreliable**

Last, Vista objects to an LEC recording each PIC dispute as an unlawful slam. According to Vista, this information is collected by LECs and sent to underlying carriers who then send them to Vista. Vista contends the PIC reports are thus unreliable hearsay unsupported by independent investigation of

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<sup>6</sup> Section 2109 states: "In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility."

the LEC prior to recording the complaint as an unlawful slam. Vista argues that no direct correlation between these recorded PIC disputes and actual slams has been shown. Vista contends it does not even receive notice of PIC disputes from the LEC or underlying interexchange carrier, only a charge to reverse the switch.

### **Conclusions Regarding Slamming**

The evidence shows that Vista has violated § 702 and committed multiple violations of § 2889.5, but does not show extensive violations of other statutes. Vista advances arguments regarding the law and facts which surround this case in an effort to show it has met its responsibilities as a public utility and no sanctions should be imposed. We reject Vista's arguments, as discussed below.

Vista's jurisdictional arguments are without merit. First, the U.S. Court of Appeals has rejected the argument that the Commission is pre-empted from enforcing anti-slamming statutes in *CTS vs. California Public Utilities Commission* (1999) 196 F.3d 1011, 1999 U.S. App. LEXIS 28497, cited by CSD:

“The CPUC's actions in fining and temporarily suspending CTS from providing long distance service serve the very purpose specified in § 253(b) of the [Telecommunications] Act and are not 'flagrantly and patently' violative of the Constitution. The CPUC has the power to implement regulations that are 'necessary' to 'protect the public' against slamming, which reasonably may include fines or suspensions needed to prevent such unlawful activity.” (*CTS, supra*, at p. 1017.)

Second, we do not seek to exert jurisdiction over telemarketers, only to evaluate whether Vista, in its use of telemarketers or otherwise, has fulfilled its responsibility as a public utility. Vista argues that under agency law, it is not liable for the unlawful acts of telemarketer agents who are independent contractors. However, in the regulation of public utilities, the principles of agency give way to the theory of non-delegable duties, under which public

utilities have regulatory responsibilities and obligations to the public that cannot be avoided by third-party contracts. Thus, the California Supreme Court has held that Section 702 imposes a duty which cannot be delegated to an independent contractor and does not relieve a utility from liability for a contractor's failure to comply with a Commission regulation. (*Snyder v. Southern California Edison Co.* (1955) 44 C.2d 793, 285 P.2d 912.) Rather, any unlawful acts committed in performance of contractual duties by a third party may be imputed to Vista. (*Cellular Resellers Association v. PacTel Cellular* (1989) 32 CPUC2d 271, 280.)

Vista also argues that it may not be punished under Section 2109 for acts outside the scope of the independent contractor's duties, especially acts of fraud and misrepresentation. Vista is mistaken. Under civil law, "scope of duties" is defined as acts while engaged in the work for which employed and "during working hours." (Witkin, Agency § 126.) Even if acts are for personal convenience or pleasure, if they are foreseeable to be performed, they are deemed within the scope of duties. This rule may apply even where an agent commits fraud or a criminal act. Thus, if a fraud is committed by an agent to deceive a third-party while the agent is functioning in the position provided by the principal, that is, the agent appears to be acting in the ordinary course of his or her duties, the principal is liable for the fraudulent acts. While any such acts are imputed to the principal, the evidence may serve to mitigate any penalty for the acts if reasonable steps were taken to prevent the acts. (Witkin, Agency, §§ 140; *Eamoe v. Big Bear Land & Water Co.* (1980) 98 CA2d 370, P.2d 408.)

Section 2889.5 requires that prior to a switch in business service, the telephone corporation must complete all of the following steps:



1. The telephone corporation, its representatives or agents shall thoroughly inform the subscriber of the nature and extent of the service being offered.
2. The telephone corporation, its representatives or agents shall specifically establish whether the subscriber intends to make any change in his or her telephone service provider and explain any charges associated with that change.
3. For sales of residential service, the subscriber's decision to change his or her telephone service provider shall be confirmed by an independent third-party verification company.

The record shows that Vista's telemarketers did not specifically inform the customer that combined billing would require switching long distance provider. If a customer asked about this, the telemarketers denied that a change of service provider would result. Thus, the purpose of the solicitation was withheld, and Vista did not specifically establish that the customer intended to switch service to Vista. One-third of the customers who filed written complaints were solicited by someone who said he or she represented a company other than Vista. The majority of these customers indicated the caller claimed to represent an LEC. Other customers indicated they were called as part of a survey. All appeared to understand that the solicitation involved consolidating their local and long distance telephone bills into one bill. However, many customers specifically indicated that at no time during the solicitation were they informed that their service would be switched to another long distance carrier. Others could not remember if this was mentioned. Still others indicated they did not learn this information until the verifier asked if they agreed to the switch. Given the degree and extent of customer confusion shown on this record, we find that Vista failed to specifically establish the intent to switch, as required by Section 2889.5.

Many customers who testified were not even familiar with a company called Vista, which is consistent with their testimony that the telemarketer misrepresented its affiliation. This misrepresentation is also confirmed by customer calls to Pacific to inquire or complain about these solicitations.

Apparently, the conversation with the verifier was also ambiguous and misunderstood. Moreover, the unlawful solicitation is not cured by verification. At least one-third of customers interviewed could not confirm that they were contacted to verify a switch in their long distance telephone service. The verification tapes indicate that the verifier stated various purposes for the call, such as to prevent clerical error, but not to specifically confirm a switch to Vista's service. The verifier asked whether the customer understood that Vista would be performing long distance service. Customers answered, "yes." Those who answered "no" were returned to the telemarketer, who assured them no switch in service would occur.

Regarding the lack of disclosure of rates and switching charges, Vista argues that customers would not incur switching charges if they were already receiving service from an interexchange carrier whose service Vista was reselling. However, many customers in interviews and testimony indicated they did incur these charges. Moreover, a customer would incur switching charges if the customer's interexchange carrier was not one with which Vista had a resale agreement. Therefore, there were charges associated with the switch that should have been explained to all customers during the solicitation. This fact is not in the scripts, nor was this subject mentioned by telemarketers according to customers who testified. This omission violates the requirement in Section 2889.5 to disclose any rates and charges associated with a switch in service.

The testimony and statements of customers are reliable and representative of the thousands of complaints in this proceeding. We reviewed over 100 customer complaints regarding unauthorized switching to Vista's service between January 1997-March 1999. The testimony of customers at the hearing was consistent with all of the written statements. The individual statements are consistent with each other regarding the method of solicitation and lack of customer intent to switch long distance provider. Major points in these statements are corroborated by other testimony or evidence in the record, such as similar complaints to Vista, the Commission, other affiliated carriers, and other agencies. These complaints show a pattern of conduct on the part of telemarketers during the period investigated. The complaints also are among the thousands of PIC disputes lodged against Vista with its affiliates during the same period. The investigation shows unauthorized switches in the cases investigated, and we can only conclude that substantially all of the PIC disputes, if investigated, would reveal the same.

We have no showing that any LEC's procedure for recording disputes over switching service produces inaccurate counts. There has been no miscommunication of the dispute. There is no proven buyers' remorse or domestic confusion that negates the dispute. All customers interviewed and who testified continue to allege that they did not intend to switch to Vista's service. Thus, the sample of disputes analyzed in this proceeding does not support Vista's assertion that the recording of PIC disputes is grossly inaccurate. The evidence is quite the contrary.

Since the customer interviews represented customers who complained to LECs and Vista's-affiliated carriers throughout the state and involved slamming allegations during the period of this investigation against Vista, and since there is no showing of inaccuracy of any carriers in recording or categorizing slams, we

are convinced that the customer complaints investigated are representative of the thousands of PIC disputes recorded in this proceeding. Therefore, we accept the previously discussed total of PIC disputes during 1997-1999 (10,773) as the number of unlawful incidents during this period.

The purported verification does not serve to provide authorization to switch providers since customers were not specifically informed that they were being asked to confirm a switch to Vista's service. Moreover, verification was only part of the conversation with the customer, the prior solicitation being ambiguous, deceptive, and in violation of Section 2889.5.

CSD alleges that by not properly monitoring and supervising the telemarketers, Vista also violated Section 702, which requires that every public utility "shall do everything necessary or proper to secure compliance therewith by all of its officers, agents and employees." Vista indicates it complied with this statute by providing a script and causing offending agents to be immediately terminated. Maroon did not know how she could have prevented telemarketers from making statements not in the script. We note, however, that even though Vista had notice of telemarketers' misconduct from customer complaints and had numerous telemarketer employees terminated (Exh. 36), it did not routinely monitor the telemarketing solicitation thereafter, or require that its telemarketing houses do so. It solely relied on customers to complain and only reacted if problems persisted, rather than taking affirmative, preventive action. Vista's failure to act constitutes a violation of Section 702.

### **Cramming Allegations**

After hearing the testimony of Vista's witness, Courtney Maroon, CSD believes the alleged violations of Section 2890, or "crams," were inadvertent, connected to the slams, and due to the lateness of information being provided to

Vista. Thus, CSD did not pursue the allegations of cramming and does not recommend any penalty for them. However, CSD remains concerned that Vista did not acknowledge that unlawful billing connected with an unlawful switch in service provider is a violation of Section 2890, which has no requirement of unlawful intent, and simultaneously violates Section 451 by billing unauthorized charges.

Likewise, after Maroon's testimony, CSD did not pursue allegations of, or recommend penalties for, violations of Section 489 (charging subscribers rates or services that are not tariffed), or Section 451 (billing unauthorized charges). There is no evidence that Vista actually charged rates not tariffed. Even though several customers indicated they were promised unauthorized discount rates, they admitted they never received these rates.

CSD recommends no separate penalty for violation of Section 2889.9, which prohibits a person or corporation from misrepresenting its association or affiliation with a telephone carrier when soliciting a subscriber to purchase a product or service. The record is not clear whether this misrepresentation continued to occur after Vista alleges it ceased all telemarketing in California (November 1998). CSD interviewed a customer in December 1999 who indicated she was slammed by this method in August 1999. However, this customer made no complaint until asked to confirm her satisfaction as a Vista customer, and CSD has not alleged additional complaints after November 1998. The record still shows a marked reduction of slamming and/or cramming complaints after November 1998.

### **Fines**

Sections 2107 and 2108 authorize us to assess a fine from \$500 to \$20,000 for each violation of any order, decision, rule or requirement of the Commission.

In this proceeding, the number of offenses is roughly 10,773, the total PIC disputes recorded by LECs and other carriers. However, CSD recommends a fine for 7,000 offenses in deference to Vista's contention of error in calculating total PIC disputes. We agree that this is a reasonable estimate for this purpose. Thus, the range of a fine under Section 2107 for these offenses is between \$3.5 million and \$140 million. Within this range, CSD recommends a high level of a fine unless Vista demonstrates the inability to pay such a fine. Then, CSD recommends a fine of \$12,000 per offense, or a total fine of \$84 million.

In determining the amount of a fine, we look to the criteria we set in D.98-12-075, Appendix B, which has provided guidance in all subsequent Commission cases where such issues arise. Thus, in setting the amount of the fine in this proceeding, the facts are evaluated based upon the following criteria:

- ◆ the severity of the economic and/or physical harm,
- ◆ the conduct of the utility to prevent, detect, disclose and rectify the violation,
- ◆ the financial resources of the utility,
- ◆ the public interest involved,
- ◆ the totality of circumstances, and
- ◆ Commission precedents.

We require each public utility to fully comply with all relevant statutes, rules, regulations and Commission orders, and we expressly order each utility to do so as a condition of our approval of its authority to operate. Since such compliance is the cornerstone of our regulation, the disregard of a relevant statute, rule, regulation or Commission order is a substantial violation and in this case one which harmed thousands of customers. Therefore, we consider the

estimated 7,000 violations of Sections 702 and 2889.5 in this proceeding to warrant a significant fine.

With respect to Vista's efforts to prevent and rectify violations, we are troubled by the fact that, even after Vista had notice of telemarketers' misconduct from customer complaints, Vista did not routinely monitor telemarketer solicitations thereafter, or even require the telemarketing operations to do so.<sup>7</sup> Once it was aware of misconduct by its telemarketers, Vista did not take adequate steps to prevent future violations. On the other hand, as Vista points out, the telemarketers' acts which violated the statute were unauthorized by Vista and in violation of specific terms of the contract employing the telemarketing companies. Although Vista should have been more diligent in monitoring its telemarketers, Vista did terminate some offending telemarketers, respond to complaints, and issue refunds it concluded were warranted. In particular, Vista performed its own investigation of customer complaints it received directly, and Vista provided refunds where it concluded refunds were appropriate.<sup>8</sup> Balancing Vista's inadequate monitoring of telemarketers against its efforts to halt some improper telemarketing and to remedy some customer

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<sup>7</sup> We note the failure of Vista even to require self-monitoring by the telemarketers not to suggest that self-monitoring would have been adequate under the circumstances, but rather to underscore the shortcomings in Vista's efforts to prevent violations.

<sup>8</sup> We also note that certain occurrences prevent Vista from resolving PIC disputes as quickly as we would wish. There is a lag in Vista receiving the total number of PIC disputes because that information goes first to the underlying interexchange carriers in whose name these disputes are recorded. At no time prior to this proceeding did Vista receive the names, addresses and telephone numbers of customers filing PIC disputes. However, now that Vista has this information, it is able and willing to continue to investigate each PIC dispute and provide full restitution for fees and increased rates to customers who were slammed.

complaints, we conclude that Vista's preventive and remedial efforts warrant a slight mitigation of the amount of the fine.

Vista reported a net loss in 1998 of \$4.6 million, with gross revenues of \$40 million nationwide. Thus, it appears not to have the ability to pay a fine in the high end of the recommended range. The ability to pay a fine is a factor weighed in setting the fine. Prior cases also consider the unjust enrichment from revenues a company receives from customers who have been switched to its service. In this proceeding, there is no record upon which to estimate these revenues.

The public interest in slamming cases is significant because the customer's right to choose a long distance carrier is crucial to the competitive environment in telecommunications. Customers were promptly switched back to their carrier of choice although not all have received refunds; also, Vista fired some offending telemarketers and ceased all telemarketing in California in November 1998. Thus, the damage to competition has been minimized.

Consideration of the totality of circumstances reveals a mix of aggravating and mitigating factors. On balance, we conclude that a fine of \$ 7.0 million, which is near the bottom of the range of permissible fines, is warranted.

### **Restitution**

For purposes of restitution, CSD recommends using the full count of PIC disputes, 10,773. We agree. CSD acknowledges that Vista has issued full credits to many customers and partial credits to many others. Full credit to all injured customers is important to prevent a company from benefiting from proven unlawful conduct. CSD urges that we require Vista to complete the reimbursement by refunding as restitution the actual amount of unauthorized charges or in the alternative to disburse \$20 to each "PIC disputant" if it is



burdensome for Vista to calculate the actual amount due to each of the remaining customers. CSD also acknowledges that other customers may have similar complaints that they have not filed. However, CSD considers existing complainants the best possible pool for making restitution.

We agree it will be less burdensome to issue a flat amount of restitution for each PIC dispute. Therefore, we will order Vista to provide \$20 restitution for each such recorded dispute that Vista has not yet addressed. The expense and inconvenience of providing such restitution is itself an incentive not to allow such violations in the future and is in the public interest. The procedure for making restitution will be for Vista to issue a reparation check for each of the unaddressed business lines and within 60 days thereafter to submit a report to CSD of the itemized restitution provided.

### **Suspension**

CSD considers Vista “marginally” fit to operate; therefore, CSD recommends suspension of authority to conduct business as a reseller for 3-5 years, rather than permanently revoking Vista’s authority. This would be too harsh a penalty for a carrier that took some steps to avoid unlawful acts by third-parties and provided restitution to all identifiable customers. Therefore, we will not suspend Vista’s operating authority, but will consider suspension or even permanent revocation of that authority if Vista engages in unlawful acts in the future.

### **Cease And Desist Unlawful Operations**

CSD requests that Vista, the company, and its owners and its family members, individually, be ordered to cease and desist any unlawful practices and operations now and in the future. However, there is no evidence that any individual owner or employee of Vista abetted unlawful conduct or acted

outside that person's official duties in matters under investigation. Therefore, orders to individuals are not warranted. As in every case where violations are found, we will order the company to cease and desist any unlawful practices and operations. This order is effective upon the effective date of this decision and continues to be so in the future.

**Application 99-09-038**

After the start of evidentiary hearing in this proceeding, CBI filed Application (A.) 99-09-038 and Advice Letter No. 1 with issues related to those in this proceeding. Vista filed a similar Advice Letter No. 4. In the application, CBI, a certified California reseller with few California customers, requested to transfer control of its company to Thomas Coughlin, Sr., and Philip A. Bethune, both shareholders of Vista. The CBI transferors, Courtney Maroon and Amanda Bethune, are Thomas Coughlin's daughters, and Philip A. Bethune is his son-in-law. CSD, in protesting this application, characterized the transfer as a possible "laundering" of a customer base obtained by unlawful slamming. The Commission foresaw such a filing when it issued its order to investigate and mandated that any such application be consolidated with the investigation in Ordering Paragraph 9.

The advice letters filed by Vista and CBI purported to notify the respective customers of the transfer of a portion of CBI's customer base. CSD also protested the advice letters as inadequate and unauthorized.

Subsequently, the assigned Administrative Law Judge agreed with CSD that the advice letters were not authorized under expedited procedures established in D.95-05-051 and that the Commission intended such applications be consolidated with the investigation. Advice Letters No. 1 and 4 were rejected for filing. Thus, the application and issues in the advice letters are all

consolidated with the investigation. However, prior to evidentiary hearing on the application, the parties agreed that since a final decision in the investigation may impact CBI's desire to proceed with the application, a decision in the investigation should be rendered first.

On January 27, 2000, after all evidence in the investigation was submitted, CBI filed a motion to withdraw A.99-09-038. CSD filed a timely response opposing withdrawal unless a grant of the motion was conditioned upon service to CSD of any future application to transfer Vista customer base. We grant the motion to withdraw upon CSD's requested condition, which is reasonable. Any future Vista transfer applications or advice letters must be served on the Commission's Director of the Consumer Services Division.

#### **Appeal of Presiding Officer's Decision**

On June 4, 2001, pursuant to Rule 8.2 of the Commission's Rules of Practice and Procedure, CSD filed an appeal of the Presiding Officer's Decision (POD) alleging numerous factual and legal errors. Based upon the alleged errors, CSD reargues that a higher fine and suspension is warranted. Vista filed a response to CSD's appeal opposing every correction CSD requested as unwarranted. We have corrected the minor factual errors as discussed below.

In addition, in response to CSD's appeal, we have increased the size of the fine from \$3.5 million to \$7.0 million. Upon review of the record and the POD, we determine that the facts, as found by the administrative law judge (ALJ), warrant a fine larger than the lowest amount in the range of permissible fines. We have made changes in the foregoing portions of this decision to reflect the increased fine. Our main difference with the POD is the significance we place in the fact that Vista failed to adequately monitor its telemarketers even after receiving complaints. As the ALJ found, Vista did not perform its own

monitoring of telemarketers or even require the telemarketing firms to monitor their representatives. This was a significant omission on the part of Vista in its efforts to prevent similar slamming violations in the future. We also agree with CSD that the actions of Pacific Bell in switching customers back to their chosen carrier are not appropriate for consideration in determining the size of the fine to be paid by Vista. In this inquiry, it is the conduct of Vista, not third parties, which is relevant. Accordingly, we have deleted the POD's treatment of this fact as a mitigating factor.

Otherwise, we have not substantively modified the POD. However, we have made a variety of non-substantive corrections in response to CSD's appeal.

First, CSD corrects a misstatement in Footnote 1, namely that it discovered a complaint after Vista alleged it discontinued all service in November 1998. CSD contends it discovered this information by a misrepresentation by Vista concerning satisfied customers. CSD recommends that this sentence be deleted, and this revision has been made.

Second, CSD points out that Vista did not provide Exh. 38 as promised, therefore, it should not be received into evidence. CSD is correct that this exhibit was erroneously referred to as Exh. 40. However, CSD's characterization of Exh. 38 is in error. Exh. 38 was a documentation regarding litigation against offending telemarketers, which Vista promised but failed to provide. We have revised the POD to refer to Exh. 38, which was the sole exhibit not provided as promised.

Third, CSD requests clarification of its position. The POD indicates CSD argues that it is Vista's responsibility to detect improper marketing and not that of the third party verifier or the customer. CSD does not disagree with this statement, but adds that its primary argument is that § 2889.5 prohibits any change in service provider unless the customer has been fully informed of the

switch and any resulting charges, and clearly indicates an intent to switch, which may be confirmed. CSD requests that this language be inserted in lieu of the language in the POD. We have revised the POD to include CSD's supplemental language.

Fourth, regarding the crams resulting from the slams for which CSD does not recommend a penalty, CSD recommends revisions to correctly refer to multiple violations of §§ 702 and 2889.5, and violations of other statutes that are not extensive or warrant sanctions. We have made this clarification.

We reject CSD's appeal with respect to suspension. CSD argues that the POD erroneously considers mitigation, which is not in the record and that this fact plus the testimony of Vista's Director of Regulatory Affairs, Courtney Maroon, shows a failure to meet required standards of proper supervision. CSD contends Maroon testified that she worked part-time, was not familiar with applicable law and never considered verifying the effectiveness of third-party verifiers. Without evidence of mitigation, CSD argues that a five-year suspension, with a two-year stay, is appropriate. We disagree with CSD that the record is devoid of evidence of mitigation. We have inserted a citation to Vista's proof of mitigation, namely the showing in Exhibit 36 of Vista's requests to telemarketers that offending employees be terminated. Moreover, we note that CSD itself, having acknowledged in its opening brief that Vista is "marginally fit" to provide utility service, appears uncertain that suspension is an appropriate remedy.

Finally, CSD challenges the POD's statement that Vista had no opportunity to address CSD's assertion of a complaint after November 1998 when Vista contends it ceased all telemarketing in California. CSD argues that Vista had ample opportunity to question on this point the three customers it named as satisfied customers in a late-filed exhibit. CSD requests revisions to reflect this

customer did not complain until asked to confirm her satisfaction with Vista's service and that CSD has not mentioned any other complaints. Without citation to the record we cannot determine whether this information regarding the derivation of this one complaint is accurate. Moreover, the POD's characterization of the one complaint being an "anomaly" and the significant decline of switches after November 1998 remain accurately portrayed facts. Therefore, we decline to make this revision.

### **Findings of Fact**

1. In 1996, Vista entered into a contract with various telemarketers to solicit California business customers to switch to Vista's long distance service in order to obtain combined billing whereby the customer paid only one telephone bill for all business lines. Vista's contract expressly prohibited telemarketers from representing themselves to be any company other than Vista.

2. Vista provided a script of the sales solicitation for the telemarketers to follow. The script did not include a discussion of Vista's rates and charges for switching long distance service.

3. Between January 1997 and November 1998, Vista's telemarketers solicited California business customers by misrepresenting themselves to be local exchange companies (LECs), obtaining an agreement to receive the service. Customers who asked were assured by telemarketers that their long distance service would not be switched. Telemarketers did not inform potential customers of any charges associated with switching long distance carriers.

4. Between January 1997 and March 1999, and possibly on one occasion in August 1999, as a result of Vista's telemarketing, thousands of California businesses were switched to Vista's long distance service without proper authorization. Many of these customers were charged a one-time switching fee

and monthly long distance line charges for each business line. One customer reported an unlawful switch in August 1999.

5. Between January 1997 and March 1999, numerous California business customers complained orally and in writing to the Ohio Better Business Bureau, Vista, the Commission and various Vista affiliates alleging unlawful switches of their primary interexchange carrier (PIC disputes) to the service of a carrier later determined to be Vista.

6. Between January 1997 and March 1999, 629 customers complained to Pacific that Vista telemarketers represented themselves as employees of an LEC offering combined billing, and that subsequently their long distance service was switched without authorization.

7. Between January 1997 and March 1999, and in August 1999, PIC disputes alleging Vista unlawfully switched long distance service on a total of 10,773 lines were filed with Pacific, MCI, Sprint, Cable and Wireless, and GTE.

8. The testimony of customers shows a pattern of unlawful switching by telemarketers' misrepresentations and failure to specifically inform customers that they were being solicited to switch their long distance service.

9. Pacific immediately refunded the switching charges for customers complaining to it of unlawful switching. Customers identifiable to Vista obtained total or partial refunds.

10. Vista alleges it voluntarily terminated all telemarketing solicitation of California customers in November 1998, although there is slight evidence of telemarketing after that date.

11. Vista has a tape, recorded by its third-party verifier, for many business customers complaining of an unlawful switch to Vista's long distance service. After listening to their own verification tape at the hearing, nine of the ten customers testifying still indicated they did not understand or intend to switch

their long distance service to Vista. Several customers had their verification terminated when they asked questions. For other customers who asked questions, telemarketers were placed back on the line and assured them that their service would not be switched and they should answer “yes” to all questions.

12. After Pacific demanded in July 1997 that Vista cease all misrepresentation, Vista so informed its telemarketers. Between August 1997 and May 1998, Vista terminated the contracts of eight telemarketing companies for misrepresenting their affiliation.

13. In 1998, Vista’s gross revenues nationwide reportedly were \$40 million, and it recorded a net loss of \$4.6 million.

14. Vista’s telemarketers harmed the customers who were slammed, causing harm to those businesses and to the competitive market for telecommunications services.

15. Vista’s conduct before and after the complaints did not fulfill its public utility obligations. In particular, Vista did not report these incidents to the Commission, and Vista did not monitor telemarketing sales presentations after reports of misrepresentation and misinformation. Thus, Vista did not take all reasonable steps to secure compliance with Commission regulation.

16. Vista’s acts to prevent and resolve incidences of slamming, although not adequate under the circumstances, warrant some mitigation of any fine.

17. Vista’s acts to investigate and resolve identifiable PIC disputes warrant some mitigation of any fine. However, Vista has not addressed many additional PIC disputes identified in this proceeding.

### **Conclusions of Law**

1. The solicitation by Vista’s telemarketers violated Section 2889.5.



2. The acts of Vista's telemarketers in violation of Section 2889.5 should be imputed to Vista.

3. Vista failed to fulfill its duty under Section 702 to ensure that marketing by its agents was carried out consistent with Section 2889.5.

4. Vista's telemarketing constituted a substantial offense, albeit mitigated somewhat by Vista's acts to prevent and resolve incidences of slamming.

5. The purpose of fines and penalties is to punish violations and deter future unlawful behavior.

6. The public interest requires that customers' right to choose a long distance carrier be protected, the competitive provision of long distance service be preserved, and further violations be deterred.

7. Weighing the severity of the offense, Vista's financial resources, mitigation measures, and the public interest in this proceeding, a fine of \$7.0 million is warranted, which is at the low end of the fine range (between \$3.5 million and \$140 million) under Pub. Util. Code § 2107.

8. Vista should complete its restitution process by providing \$20 per business line to customers identified in this proceeding whose PIC dispute(s) Vista has not addressed.

9. Suspension of Vista's operating authority for any period is an unduly harsh sanction given the mitigating circumstances in this proceeding.

10. This order should be effective immediately in order to provide customer restitution as soon as possible.

## **O R D E R**

**IT IS ORDERED** that:

1. Vista Group International, Inc. (Vista), must immediately cease and desist from engaging in "slamming" (unlawful switches in service) by fraudulent

telemarketing solicitation and from all further violations of the Public Utility Code and other applicable California or federal law.

2. Within 12 months after the effective date of this order, Vista will pay a fine of \$7.0 million to the General Fund of the State of California.

3. Within 90 days after the effective date of this order, Vista must provide restitution to complaining business customers identified in this proceeding at \$20 per business line (approximately 10,773 business lines).

4. Within 120 days after the effective date of this order, Vista must submit to the Director of the Commission's Consumer Services Division (CSD) a report of all restitution provided in compliance with this order. This report must include the name, address, telephone number, number of lines disputed, and total restitution for each customer. If Vista is unable to locate a complaining business customer, it must show that it has made reasonable efforts to locate the customer. Vista will retain all documents supporting this report for a period of three years from the effective date of this order, and shall promptly submit them to any Commission audit of these and any other related records. Any restitution which cannot be made will escheat to the State of California.

5. Should Vista, any corporate affiliates, any of its officers, directors, management employees or contractors, or 5% or greater shareholders, seek to transfer or acquire any customer base, such a request must be through the formal application process. In addition, this proceeding and its outcome must be disclosed in any future application, and any such application must be served on the Director of CSD.

6. Communications Billing, Inc.'s motion to withdraw Application 99-09-038 is granted, subject to the conditions set forth herein.

7. CSD's appeal of the Presiding Officer's Decision issued in this proceeding is denied.

8. Investigation 99-04-020 and Application 99-09-038 are closed.

This order is effective today.

Dated September 6, 2001, at San Francisco, California.

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