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Decision 97-05-089 May 21, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Communication Telesystems International and Edward S. Soren, President of Communication Telesystems International to determine whether they have complied with the laws, rules, regulations and applicable tariff provisions governing the manner in which California consumers are switched from one long distance company to another, and other requirements for long distance carriers.

ORIGINAL

I.96-02-043
(Filed February 23, 1996)

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Robert J. Mazique, Attorney at Law, for Pacific Bell, and James H. McPhail, Attorney at Law, for GTE California, Incorporated; Robert Gnaizda and Mishka Migacz for The Greenlining Institute; Susan E. Brown for Latino Issues Form; William C. Harrelson, Senior Counsel, for MCI Telecommunications, Inc., interested parties.

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TABLE OF CONTENTS

FINAL DECISION.....	2
I. Procedural Background	2
II. Summary of Each Party's Case.....	4
A. S&E.....	4
B. The Greenlining Institute and Latino Issues Forum.....	7
C. Pacific Bell.....	9
D. GTEC.....	9
E. CTS.....	10
F. MCI.....	11
III. Discussion.....	12
A. Factual Issues	12
1. Historic vs. Ongoing Practices and Policies	12
2. Statistical Analysis	13
a) Comparison of CTS PIC Dispute Rates.....	13
b) Lipoff Analysis.....	15
c) Relationship of PIC Dispute Data to Actual Unauthorized Transfers	20
3. Factual Conclusions	21
4. Ethnic Community.....	21
B. Legal Issues.....	22
1. Burden of Proof	22
2. Standard of Proof	22
3. Requirements of PU Code Section 2889.5.....	22
4. Commission Authority To Impose Sanctions	23
a) Imprisonment	23
b) Fines Payable to State.....	24
c) Reparations	24
5. Mental State Element.....	24
6. Definition of Subscriber.....	26
7. Compliance with PU Code Section 2889.5 and the "Stay With Us" Program.....	28
8. Legal Conclusions	31
IV. Sanctions.....	32
A. Sanctions for Past Conduct.....	32
1. Unauthorized Transfers	32
2. Fines.....	35
B. Confidentiality of Attachment A.....	36
C. Limitations on Future Conduct.....	36
1. Operating Authority Revocation.....	36
2. PIC Change Suspension	38
3. Prohibitions Binding on Successor Entities.....	39
V. Findings of Fact.....	39
VI. Conclusions of Law.....	41
FINAL ORDER	42

FINAL DECISION

I. Procedural Background

On February 23, 1996, the Commission issued its Order Instituting Investigation and Order to Show Cause Why Communication Telesystems International's Certificate of Public Convenience and Necessity Should Not Be Revoked, 1. 96-02-043 (OII). In the OII, the Commission summarized evidence presented by its staff¹ which alleged that Communications Telesystems International (CTS) transferred customers to its service without authorization.

In the OII, the Commission also imposed certain prohibitions on CTS' operations while the investigation was pending. Among the prohibitions was a directive that CTS submit no presubscribed interexchange carrier (PIC) changes to the local exchange carriers (LEC). To allow CTS an opportunity to present evidence that the interim measures were not warranted, the Commission scheduled a hearing for March 7, 1996. Pursuant to a request from CTS, the hearings were delayed until April 1-3, 1996. After the close of the preliminary hearing, the Commission issued Decision (D.) 96-05-050 in which it declined to modify its earlier opinion.

On May 24, 1996, the assigned Administrative Law Judge (ALJ) granted the unopposed motion for intervention by the Greenlining Institute and the Latino Issues Forum (Greenlining). These organizations indicated an interest in issues regarding CTS' service to ethnic communities.

On May 21, 1996, Greenlining filed a motion requesting that the Commission require CTS to post a bond sufficient to ensure that CTS would be able to pay any fines or restitution the Commission might order. In D.96-06-035, the Commission denied

¹ The staff unit participating in this proceeding was then known as the Safety and Enforcement Division (S&E) and will be referred to as such in this decision. By action of the Executive Director on September 10, 1996, the responsibilities performed by S&E in this proceeding were transferred to the Consumer Services Division.

Greenlining's request but ordered CTS to submit monthly financial reports while this matter is pending.

Pursuant to a procedural schedule adopted at the March 7, 1996, prehearing conference, and subsequently altered several times, the parties conducted discovery, both through written data requests and depositions, and presented prefiled written direct testimony.

The procedural schedule called for hearings on the merits of this investigation to begin on May 29, 1996. The assigned ALJ, however, determined that hearings on a motion by Greenlining seeking sanctions against CTS for actions at a May 23, 1996, Greenlining press conference should take precedence; therefore, the parties presented testimony on that issue on May 29. The Commission issued D.96-07-035 on July 19, 1996, in which it censured CTS' management for ignoring the potential for witness intimidation at the press conference.

Hearings on the merits began on May 30 and concluded on June 7, 1996. The parties filed post-hearing opening and reply briefs and participated in oral argument before the Commissioners on July 15, 1996.

On July 3, 1996, CTS filed a motion requesting that the Commission censure Greenlining for a June 17, 1996, letter Greenlining sent to CTS' counsel, the law firm of Heller, Ehrman, White and McAuliffe. CTS alleged that the letter contained a serious threat to counsel's role in this proceeding and to the overall integrity of the proceeding. The parties responded to CTS' motion and CTS filed a reply.

CTS' counsel informed the assigned ALJ that despite the threats it perceived in Greenlining's letter, counsel was not in fact intimidated and was thus able to fully and effectively continue to represent CTS in this matter. With counsel's ability to continue to represent CTS and because CTS' request for censure of Greenlining occurred after the close of the evidentiary record on the merits, CTS' motion will be addressed in a separate and subsequent ruling or decision.

The assigned ALJ issued her Proposed Decision on December 13, 1996. CTS, Safety & Enforcement Division (S&E), and Greenlining filed comments on January 15, 1997, and reply comments on January 24, 1997.

On March 24, 1997, the assigned ALJ issued a new Proposed Decision. CTS, S&E, Greenlining,¹ and Pacific Bell filed comments; all but Pacific Bell also filed reply comments. After a careful review of the record and to resolve issues raised in the comments and reply comments, the assigned ALJ modified the new Proposed Decision and issued it for limited comment on May 8, 1997. Comments were filed by CTS, S&E, and Greenlining on May 16, 1997. Given the importance of the consumer protection issues in this proceeding, and the need to offer CTS their full due process rights, we conducted an additional searching review of the record in this case.

II. Summary of Each Party's Case

A. S&E

S&E presented evidence on the number of PIC disputes involving CTS that had been submitted to Pacific Bell and GTE California Incorporated (GTEC), the largest LECs in California. These data showed that customers presented a total of 56,216 PIC disputes to Pacific Bell in 1994, 1995, and through March 1996, and to GTEC for 1995, and through March 1996.

S&E's testimony stated that CTS' PIC dispute rate of 10.84% for 1995 was much higher than the industry average of 3.51% for the same period.

S&E also presented evidence that CTS has a high customer turn-over rate, up to 40% per month.

At hearing, S&E called several customer witnesses to testify to their experiences with CTS. Although each customer's description of his or her interactions

¹ On April 18, 1997, Greenlining requested that the Commission take official notice of recent statutory revisions to PU Code Section 2889.5 and a study prepared by Pacific Telesis. CTS opposed Greenlining's request. Greenlining's request is denied.

with CTS was slightly different, several common themes emerged. Recollections about a phone conversation with CTS were often hazy. The person, if any, who actually spoke to CTS was usually not the subscriber. CTS representatives offered free services. The "Stay With Us"³ program which often resulted in repeated transfers of the customers, caused the greatest indignation among the customers. The customers were also quite infuriated by CTS' lack of response to their repeated telephone calls and letters.

Two illustrative examples of the customer testimony are set out below, along with the explanation provided by CTS:

Annie Chiem: Chiem testified that she received a telephone solicitation from a CTS representative. Her testimony was unclear as to whether or not she ordered service from CTS. Chiem's mother, Ky Tran, is the subscriber of record for the telephone line in question. Soon after beginning service from CTS, Chiem was unable to place calls to China and had other service problems so she called CTS on several occasions to cancel, but CTS did not answer or did not transfer her service to another carrier. Subsequent bills revealed that CTS remained her carrier and also contained billings for calls that Chiem denied making.

CTS provided a copy of a transcript of a verification telephone call for Chiem's number. The summary sheet indicates that the verification company "conducted a conversation with a person who stated that he was Ky Tran." (Tran is Chiem's mother.) The transcript shows that the person speaking to CTS identified herself as Tran but the birth date shown is Chiem's, and Chiem identified the voice on the recording as being her. CTS also attributed Chiem's difficulty in leaving CTS to their "Stay With Us" program.

Lorraine Gemigniani: Gemigniani represents Brazsoft, a company that sells software to various entities in Brazil. She testified that her business relies

³ Under the "Stay With Us" program, CTS would automatically transfer customers back to CTS if another carrier transferred the customer away.

extensively on telephone transactions and that she diligently monitors long distance costs and considers alternative providers. Gemigniani voluntarily contracted with CTS to provide service to her business in October of 1995. The first day of service from CTS, the entire business was unable to place or receive international calls, which effectively brought her business to a standstill. Gemigniani immediately canceled service from CTS. Gemigniani was infuriated when Brazsoft was returned to CTS service approximately ten days later and yet again about six weeks later. Gemigniani did not authorize either of the subsequent transfers. During the time she was receiving service from CTS, Brazsoft employees were unable to place or receive international phone calls such that it was impossible for them to conduct business.

CTS presented a signed letter of agency (LOA) from Gemigniani. Page 1 of the LOA they presented, however, contained a signature on the line labeled "customer signature" which was illegible, but the line was blank on the original LOA, a copy of which Gemigniani provided for the record. Gemigniani authenticated her signature on Page 2 of the CTS LOA. She also disavowed the check marks on the LOA which indicate subscription to the "Stay With Us" program because not only had she made it clear that she was using CTS on a trial basis but also the check marks on the LOA are inconsistent with "the short accounting checks" she uses.

CTS also testified that their customer service records indicated that they restored service to Brazsoft in late October due to a request from a person who is no longer employed by the Brazsoft. Gemigniani testified that this former employee was at no time authorized to make long distance service changes. CTS testified that the final service switch was due to the "Stay With Us" program.

S&E concluded its case by asserting that based on all the evidence of unauthorized transfers, as well as widespread billing errors and other unscrupulous practices, the Commission should impose severe sanctions on CTS to, among other things, send a message that the Commission would not tolerate this type of behavior.

S&E recommended permanent suspension of CTS' Certificate of Public Convenience and Necessity (CPCN).

B. *The Greenlining Institute and Latino Issues Forum*

These intervenors presented testimony of experts on various ethnic communities regarding the likelihood of community members submitting complaints to authorities and the effects of unauthorized customer transfers on these communities. Greenlining also submitted an extensive recommendation of appropriate sanctions against CTS.

Greenlining's first witness was its Executive Director, John Gamboa, an expert in telecommunications marketing to minority communities. He testified that many Latinos fear government and that they perceive the telephone company to be a part of the government, due to their experiences in their countries of origin. In some countries, the telephone system is controlled by the equivalent of the FBI. In addition to this fear of government, culturally, Latinos want to please and be courteous and they tend to be unusually trusting of company representatives according to Gamboa. For these reasons, Gamboa stated that these communities are particularly susceptible to marketing abuse, such as the practices he alleged CTS had used, and concluded that a 10% reported slamming complaint rate could represent an actual slamming rate of 50%.

Gamboa also testified to the particular effects of slamming on the minority community:

"It may sound corny, but when immigrants from other countries—choice is probably the basis of freedom. Having choice, not only choices as a consumer but choices of who your elected leaders are, choices of where your children will go to school—choice is the most important thing. When you take that away from people, or when you deny them that choice, you are inhibiting not only the choices that—you are inhibiting them from extending further to the other choices.

"It should be incumbent upon all of us for new immigrants and for people who have not exercised or had the opportunity to exercise

such choices should be incumbent upon us to give them that opportunity.

"That's the bad part about slamming. They may lose a few dollars. That's bad, too, especially for poor people who are struggling, poor people who at times families can't afford to feed their families; but to deny them choice, I think, is unconscionable. Nobody thinks about what the impact is on choice. I told you it may sound corny, but it's so true." (Tr. at 838-9.)

Greenlining also presented Henry Der, the former Executive Director of Chinese for Affirmative Action, who testified that most limited-English speaking persons of Chinese ancestry in this country are immigrants. For that reason, they tend to have an uneasiness about dealing with government or large, private entities. They also give a great deal of deference to authority figures. In the Asian culture, Der testified, it is considered "impolite to say 'no'" to an authority figure trying to solicit your support. (Tr. at 854.) Asian marketing representatives may use this deference against Asian sales prospects. (Tr. at 856.) Der concluded that Asians tend not to complain because they are embarrassed at being duped, do not know which company they can trust their business to, and simply may not know where to complain. For these reasons, he felt that the PIC dispute rates should be studied further to determine if they were too low.

Greenlining's final witness was Nghia Trung Tran, the Executive Director of the Vietnamese Community of Orange County. Tran first noted that unauthorized transfer of long distance service is a serious problem in the community his organization serves. He described the problems members of his staff have personally had with CTS, as well as the reports they have received from other community members. Tran testified that Vietnamese immigrants, who are usually war refugees, are extremely reluctant to register complaints with authorities. According to Tran, this reluctance goes so far as refusing to report crimes, including felonies.

Tran reviewed transcripts of CTS' confirmation tapes with customers and concluded: "It's fraud. These people have never given their authority—their authorization to switch long distance carriers." (Tr. at 900.)

Tran also expressed his shock at the percentage of PIC disputes filed by persons who indicated Vietnamese as their preferred language, 31.48%. He noted that members of his community do not even report crimes at that high of a level.

Greenlining requested that the Commission impose a variety of sanctions against CTS including substantial fines and customer education funding.

C. Pacific Bell

Pacific Bell did not call any witnesses but two of its employees were called as witnesses by other parties. S&E called Sandy McGreevy to explain the basis for the Subscription Management Report upon which S&E relied for much of its statistical information. CTS called Michelle Abbott to testify about CTS' customer complaint level as compared to other carriers.

Counsel for Pacific Bell presented oral argument in which he stated that a year ago Pacific Bell was receiving about 300,000 to 350,000 PIC changes per month. It is currently receiving approximately 600,000 per month and expects that number to climb to one million a month. It has also experienced an enormous increase in PIC disputes, each of which take an average of 25 minutes of company time to resolve. Hence, unauthorized transfers of long distance service are imposing substantial costs and burdens on Pacific Bell, and presumably the other LECs. Given the opening to competition of the local exchange market, Pacific Bell sees the problem expanding. For these reasons, Pacific Bell counsel requested "firm and decisive action" by the Commission to put a stop to this practice. (Tr. at 1844.)

D. GTEC

GTEC did not call any witnesses of its own but CTS called Rosemarie Kaylor, a GTEC employee, to testify on CTS' actions to improve its customer complaint record with GTEC.

E. CTS

CTS' first witness was its chief operating officer, Roger Abbott. He described CTS' telemarketing efforts directed at minority communities, and CTS' reasons for terminating such efforts in late 1995. Abbott also described CTS' current marketing efforts which are broadly disseminated direct mail solicitations for its new program which does not require that the customer presubscribe to CTS. This program, "Talk Cents," simply requires that the customer dial an access code to use CTS' service.

CTS' second witness was its regulatory counsel, Eric Lipoff. He began by describing CTS' marketing and regulatory compliance activities. Lipoff explained that CTS used both employees and independent telemarketing agents to solicit customers. Orders obtained by the telemarketers were confirmed by a third party, Promotions International, which recorded the verification calls. Lipoff also described the improvements to the confirmation process which were instituted in response to customer complaints. He also stated that due to the high level of complaints CTS received from members of the Vietnamese community, it discontinued all marketing efforts directed at the community.

Lipoff offered several explanations for CTS' high level of PIC disputes. First, he indicated that CTS' target market, the Spanish-speaking community, has a higher PIC dispute rate with all carriers. He suggested that bias among Pacific Bell's Ethnic Marketing Group, which receives these complaints, may be the cause for this higher dispute rate. Second, Lipoff analyzed a random selection of PIC disputes and concluded that the cause of the vast majority of CTS' PIC disputes was its "Stay With Us" program. Third, he described the customer service and billing debacle CTS experienced in late 1994 and early 1995.

CTS also presented several expert witnesses. David Cohen, a Professor of Rhetoric, examined CTS' marketing, sales, and confirmation documents and testified that, viewed chronologically, the documents show a pattern of improvement in accuracy and intelligibility of what is being conveyed.

Robert Self, an expert in comparative long distance rates, testified that CTS' tariffed rates for presubscribed service are not higher than those of AT&T Communications of California's (AT&T). William Wecker, a statistician, testified that, relying exclusively on Lipoff's analysis of the random sample of PIC disputes, no statistical relationship between PIC disputes and actual slams had been demonstrated. Brian Adamik, an expert on telecommunications marketing analysis, stated that CTS' marketing documents are consistent with industry practice. He also stated that it is generally accepted industry knowledge that certain ethnic segments of the market are "high value" customers in that they have a higher propensity to make long distance phone calls. (Tr. at 1265.) Donald Sciglimpaglia, a Professor of Marketing, reviewed CTS' marketing materials and concluded that the materials are consistent with good marketing practices. CTS' final witness was Jennifer Byram, a legal assistant at the law firm representing CTS, who testified regarding her presentation of data prepared by Pacific Bell. She also testified that she attempted, by calling another carrier, to have the long distance carrier changed for two phone lines where she was not the listed subscriber and that she was successful with one but not the other.

F. MCI

MCI did not call any witnesses, but its counsel appeared and offered a statement of counsel to clarify the record regarding CTS witness Byram's attempt to transfer another person's long distance service to MCI.

MCI's counsel stated that the requested transfer to MCI did not take place. Counsel offered the explanation that MCI had recently instituted the practice of verifying incoming telephone orders, not just telemarketing solicitation orders as required by Public Utilities (PU) Code Section 2889.5, which may have prevented witness Byram's change from being implemented.

III. Discussion

A. Factual Issues

1. Historic vs. Ongoing Practices and Policies

The record in this proceeding amply demonstrates that CTS' current operating practices differ substantially from the practices in place when the majority of the evidence against it was collected.

- During 1994 and 1995, the period in which most complaints against CTS were lodged, CTS was soliciting customers via telemarketing. This means of customer solicitation, while not improper, is certainly fraught with the potential for customer misunderstanding as well as the creation of inappropriate financial incentives for sales representatives.
- CTS targeted the ethnic markets almost exclusively. As discussed more thoroughly below, this particular market segment presents special challenges for sales solicitations.
- CTS sought to provide its prospective customers with presubscribed service, which required that CTS submit a PIC change to the customers' LEC.
- CTS relied extensively on its "Stay With Us" program as the basis for submitting subsequent PIC changes, without specific approval from the subscriber.
- Although an adept customer service staff and program would be required to ameliorate the predictable difficulties which arose under such circumstances, at the time in question, CTS, a relative newcomer to the long distance service market, was offering inadequate customer service.

In contrast to those factors listed above, CTS witnesses testified regarding their current practices. CTS no longer markets exclusively to ethnic markets; instead, it solicits customers from throughout the state. CTS now relies exclusively on direct mail advertising and no longer uses telemarketing. CTS has discontinued its "Stay With Us" program. CTS' most popular calling program is "Talk Cents" which does not require presubscription.

CTS' witnesses did not specify what role the Commission staff's investigation had in instigating their current practices. The timing of several changes, however, coincided with the Commission staff's activities. The Commission's prohibition on carrier-initiated PICs by CTS effectively eliminated the potential for PIC disputes by forbidding CTS to submit PIC changes.

Although we are willing to recognize that different practices and policies are currently in effect at CTS than those that were in place when most complaints occurred,⁴ we do not condone some sort of customer service and statutory compliance "learning period" for new long distance service providers, or any public utility. When we grant a CPCN, we are not necessarily authorizing a research and development effort or a learning opportunity; rather, we are granting authority to the carrier to provide "adequate, efficient, just, and reasonable service...as [is] necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public." (PU Code Section 451.) We expect all certificated public utilities to fully comply with all applicable requirements at all times.

The purpose of distinguishing between historic and future time periods in this decision is simply to align the sanctions, set out below, with the behavior to which they are directed.

2. Statistical Analysis

a) Comparison of CTS PIC Dispute Rates

Pacific Bell provided testimony that showed that of the total PIC changes submitted by CTS in 1995 to Pacific Bell, 10.84% of the switched customers complained to Pacific Bell that they had not, in fact, authorized the transfer. The

⁴We also recognize that to the extent these changes are voluntary, CTS could, at anytime, reestablish the undesirable programs.

average Pacific Bell PIC dispute rate for all carriers during 1995 was 3.51%. Thus, CTS' 1995 PIC dispute rate was 309% of the industry average.

CTS provided testimony challenging the validity of this comparison. CTS insisted that it should be compared not to the overall industry average but to PIC dispute rates for companies that target the market CTS targets, that is, the ethnic market. CTS offered evidence, based on Pacific Bell data, that the largest three long distance carriers had higher PIC dispute rates with Spanish language customers than with all customers. In CTS' closing brief, CTS states that Company A's Spanish-only rate exceeds the all-customer PIC dispute rate by 41%, Company B's rate is 83% higher, and Company C's is 68% higher. Thus, for the largest three long distance carriers, the Spanish-only PIC dispute rate exceeds the all-customer dispute rate by an average of 64%.⁵

CTS alleges that the same phenomenon which results in the higher Spanish-only PIC dispute rate for the large companies is the cause of CTS' above-average PIC dispute rate. The data, however, do not support CTS' assertion. The difference between large companies' all-customer and Spanish-only dispute rates is 64%. Using the industry average of 3.51% as a proxy for a CTS all-customer rate,⁶ CTS' PIC dispute rate, 10.84%, which is Spanish-only, is 309% of its all-customer rate. Thus, CTS' PIC dispute rate, which would be expected to be 64% higher than the all-customer rate, is actually 209% higher. Furthermore, even if we were to compare CTS' dispute rate with those for large companies on the basis of ethnicity, we find CTS' rate is still

⁵ CTS makes this comparison to the "Big Three" companies despite arguing elsewhere that it should not be compared to these companies because these companies are "least like CTS or the rest of the long-distance industry." (CTS Comments on P.D. at p.4.)

⁶ A proxy is necessary because virtually all CTS customers are Spanish-speaking or a member of some other minority group.

exceedingly high, surpassing the highest rate in that group by 126%.' For these reasons, CTS' proffered explanation for its high PIC dispute rate, differences in the market it serves, is not supported by the evidence in this proceeding.

CTS also presented evidence comparing its PIC dispute rates to other long distance carriers' Spanish-only dispute rates. This comparison, CTS alleged, showed that CTS' rate was in line with industry norms. In presenting the data, CTS contended that the large carriers, the "Big Three," should be excluded from the comparison due to substantial differences between CTS and the carriers. In essence, CTS argued that the Commission should compare like companies to like, that is, apples to apples, not oranges.

CTS' suggested comparisons, however, failed to incorporate any rationale for comparability. CTS submitted evidence and charts which simply displayed all companies' PIC dispute rates in ascending order. CTS provided no analysis of which, if any, of the companies met their standards for comparability. CTS did not analyze which of the companies were of similar overall size, what proportion of their customers indicated a preference for a language other than English, or any other principled basis for choosing one company over the other for comparison purposes. Simply put, CTS did not provide a rationale for selecting any other company as the apple to which they wished to be compared.

b) Lipoff Analysis

In an attempt to understand the relationship between PIC disputes reported to a LEC and unauthorized customer transfers, CTS witness Lipoff performed a detailed analysis of 45 randomly selected PIC disputes. This analysis revealed that two transfers had to be discarded because one customer had not been a CTS customer and one phone number supplied by S&E was erroneous; two transfers

' This comparison uses Company C's dispute rate of 83%, the highest of the three largest carriers.

were the result of data input errors by CTS staff; and CTS had some form of confirmatory evidence to support the remaining 41 transfers.

Based on the Lipoff analysis, CTS concluded that the PIC dispute data had no relationship to unauthorized transfers of customers. However, closer review of the analysis suggests that witness Lipoff may have used too broad a definition of confirmatory evidence in his analysis. For example, in seven of the transfers the only documented evidence of customer authorization was a copy of a brief form filled out by CTS' verification company which contained a birth date purportedly of a person associated with the account. Assuming the birth date is correct, all this form proves is that someone spoke to the verification representative as a follow-up to a sales call, and provided their birth date. From the fact that a conversation occurred and the provision of a birth date, CTS finds sufficient evidence to conclude that it has "verif[ied] the subscriber's intent to change his or her telephone company" as required by PU Code Section 2889.5. CTS has overly relied on this slim bit of evidence. Mere evidence of a telephone conversation is insufficient to meet the requirements of the statute.

CTS did not record actual sales calls to customers. Rather, it recorded subsequent calls for the purpose of verifying transfer orders. CTS provided transcripts of verification telephone calls for 32 customer transfers which led to PIC disputes. Careful review of these transcripts undermines any confidence in CTS' verification procedures.

Transcript Sample 1

The verification found in Exhibit (Exh.) 36 at Attachment 34 contains the following dialogue:

"Confirmation Agent (CA): You do understand that CTS is not affiliated or endorsed by Pacific Bell?

"CA: Do you understand?

"Customer (MS): No, Uhhh....

"CA: CTS, the company that is calling you, has nothing to do with your company, Pacific Bell. The bill only comes in the same envelope ma'am.

"MS: But, of low income, right?

"CA: Of low income.

"MS: Yes.

"CA: It's with the company, CTS ma'am.

"MS: But, it comes the same with Pacific Bell?

"CA: With Pacific Bell. It comes in the same bill.

"MS: Oh."

This transcript suggests that the customer may have thought CTS was providing some sort of low-income program similar to that provided by Pacific Bell. It certainly does not reflect a fully informed decision by the consumer.

Transcript Sample 2

The verification found in Exh. 36 at Attachment 37 contains the following dialogue:

"CA: The purpose of this confirmation is to confirm your wish to save up to 30% off the basic AT&T, MCI, and Sprint rates to selected destinations by switching your long distance service to CTS and that you are authorized to make this change. Is that correct? Correct?

"Customer (IG): Hey, I am not going to change companies?

"CA: Well, your long distance company does change. What remains the same is your local telephone company.

"IG: Oh, local.

"CA: Is that okay?

"IG: Yes."

The transcript goes on to make two lengthy statements about the specific nature and costs of the service to which there are no replies.

This transcript reflects customer confusion over the basic transaction, the customer did not understand that he/she was making a change in long distance service. Given that lack of understanding, the transcript fails to reflect a customer intent to change service as is required by PU Code Section 2889.5.

Transcript Sample 3

The transcripts found in Exh. 38 at Attachment 38, along with the CTS explanation found in Exh. 73 at 18, show a complicated and inexplicable history for this account. CTS switched this phone line from another long distance service to CTS a total of five times in less than a year.

The provided transcripts show that the customer apparently placed two orders with CTS, one in November of 1994 and one in November of 1995. The first transcript includes the "Stay With Us" program offer, to which the customer responded "yes."

The second transcript does not include the "Stay With Us" offer. Rather, the transcript states as follows:

"Customer (AR): Okay, I'll stick with it and if later I'm not convinced, I can change it later right?"

"CA: You can change it any time you wish ma'am.

"AR: Okay."

The specific processes required to make such a change under the "Stay With Us" program was not explained to the customer. Despite this representation, the customer was switched back to CTS under the "Stay With Us" program after less than a month of service. This final transfer apparently led the customer to contact the LEC and allege that an unauthorized transfer had taken place.

Thus, while this customer initially responded affirmatively to the "Stay With Us" program offer, which is discussed in detail below, the subsequent verification contained no such offer. After the customer exercised her right to switch carriers, a right she had specifically inquired about, CTS nevertheless transferred her back to their service. The customer then filed a PIC dispute.

Transcript Sample 4

The transcripts found in Exh. 36 at Attachment 40, and in the CTS explanation for this account found in Exh. 73 at 19, show that this customer switched long distance carriers seven times in five months. Of the seven, CTS provided transcripts of three verification phone calls. The same person is identified in each of the transcripts. The first two show the same birth date, "four, three, sixty-nine." The third transcript, however, shows a birth date of "four, thirteen, sixty-two." Setting aside the plausibility of a customer changing service to and from CTS so frequently, the discrepancy in the birth date suggests at least a lack of attention to important details in CTS' verification transcripts and general record keeping.

As shown by the transcripts discussed above, CTS' verification telephone conversations fail to demonstrate the reliability of CTS' verification efforts. Thus, the Lipoff analysis, which draws the conclusion that these transcripts overcome customer allegations of unauthorized transfer, is not persuasive.

To substantiate the remaining two PIC disputes, out of the 41 analyzed by witness Lipoff, CTS provided written LOAs. The first LOA found at Exh. 36, Attachment 36, shows that the customer, a hotel, entered into an agreement for alternative operator assistance with CTS for a three-year term, subject to automatic renewal unless canceled with 60 days' notice.

After three years had passed, the customer switched service to MCI by submitting an order to the Pacific Bell business office. CTS switched the customer back through an online PIC change. Approximately a year later, the customer again submitted an order to Pacific Bell seeking service from MCI. CTS again switched the customer back. CTS provided no evidence of any contact with the customer to support the two subsequent transfers back to CTS service. CTS was apparently relying on the automatic renewal provision of the contract. The customer filed a PIC dispute with Pacific Bell, challenging the last PIC change submitted by CTS.

The final LOA considered in the Lipoff analysis regards long distance service to Brazsoft. CTS' LOA with Brazsoft was discussed above, and included a signature on the "customer signature" line which was not present on the customer's copy of the LOA as well as the customer's disavowal of the check marks selecting the "Stay With Us" program. CTS also accepted a service order on this account from an unauthorized person.

In conclusion, the Lipoff analysis of 41 PIC disputes relied on (1) cursory forms which purported to support a service order for seven of the disputes, (2) questionable transcripts of verification phone calls for 31 service orders, and (3) two written LOAs neither of which clearly authorized the disputed transfers. From this evidence, witness Lipoff drew the conclusion that all customer transfers were fully authorized in a manner consistent with PU Code Section 2889.5. Witness Lipoff's conclusion is not supported by this evidence for the reasons set out above.

c) *Relationship of PIC Dispute Data to Actual Unauthorized Transfers*

There are factors which show the PIC dispute amounts to be understated, as well as at least one factor which show them to be overstated.

Factors which tend to show Understatement:

- Only unauthorized transfers that are reversed by customer contact to the LECs are recorded as PIC disputes. Customers can also reverse unauthorized transfers by directly contacting their long distance carrier of choice. These later transfers are not included in PIC dispute data.
- Only disputes submitted within 90 days of the original transfer are included. Transfers that occurred more than 90 days prior to the customer submitting the dispute are not recorded as PIC disputes.
- Only where the customer has specifically alleged an unauthorized transfer does the LEC record a PIC dispute. If the customer neglects to mention this, then it is not so recorded.

A factor which tends to show Overstatement:

- The largest LEC, Pacific Bell, consistently shows a much higher PIC dispute rate than GTEC.

3. Factual Conclusions

The PIC dispute data maintained by the LECs is the most comprehensive data set available which relates to unauthorized customer transfer. While not purporting to conclusively prove any specific underlying fact, there is sufficient evidence to support an inference of wide-spread unauthorized customer transfers. Absent evidence directly undermining the credibility of the LEC's process and record keeping, or suggesting an alternative data source, the Commission will continue to rely on this data.

4. Ethnic Community

CTS pointed to evidence that all long distance carriers have higher PIC dispute rates for customers who indicate a language preference other than English. Greenlining presented highly-qualified expert witnesses who testified that Spanish and Asian customers are much *less* likely to complain than customers who do not indicate a language preference other than English. These customers, who are "high value" customers according to CTS' witnesses, are frequently solicited by long distance carriers due to their above-average international calling patterns. Unfortunately, their lack of familiarity with the aggressively competitive long distance telephone market coexists with their desirability as customers. These facts may set the stage for higher PIC dispute rates generally. The record in this case, however, is insufficient to support a conclusive finding on the exact cause of these higher rates. It may be that carriers are simply transferring more customers that fit this profile without authorization; it is also equally probable that communication failures are the cause.

For purposes of this decision, we need not decide the precise role in PIC dispute levels caused by customers who indicate a language preference other than English. We would like to emphasize, however, our commitment to ensure full and fair

customer choice to all customers regardless of their primary language preference. We will not tolerate any group of customers being singled out due to "industry norms" or any other spurious reason.

B. Legal Issues

1. Burden of Proof

Staff has the burden of proving that CTS failed to comply with PU Code Section 2889.5 and any other facts necessary for the Commission to impose sanctions.

2. Standard of Proof

It is well settled that the standard of proof in Commission investigation proceedings is by a preponderance of the evidence. (*Investigation On the Commission's Own Motion Into All Facilities-Based Cellular Carriers*, D.94-11-018, mimeo. at 21-22.) Similarly well settled is the standard of proof for criminal sanctions. When the Commission seeks to impose the sanction of imprisonment, the standard of proof becomes beyond a reasonable doubt. (*Id.*)

CTS alleges that to seek large punitive fines or license revocation, S&E must prove its case with clear and convincing evidence. CTS cited no Commission decision for this proposition. Notwithstanding the lack of cited precedent for the clear and convincing standard, we find the proof to be clear and convincing in fact, such that we need not resolve this issue.

3. Requirements of PU Code Section 2889.5

PU Code Section 2889.5 requires that prior to transferring a customer to its long distance service, the transferring long distance service provider must:

If the subscriber is solicited by telephone, or other than in person:

- a. Thoroughly inform the subscriber of the nature and extent of the service being offered,

- b. Specifically establish whether the subscriber intends to make any changes in telephone service and explain any associated charges,
- c. Verify the customer's order through a follow-up telephone call, and
- d. Mail the subscriber a packet of information with confirmatory information seeking written authorization to make the change.

If the subscriber is solicited in person:

- a. Thoroughly inform the subscriber of the nature and extent of the service being offered,
- b. Specifically establish whether the subscriber intends to make any changes in telephone service and explain any associated charges,
- c. Obtain the subscriber's signature on a document which fully explains the nature and extent of the action, and
- d. Furnish the subscriber with a copy of the document.

Failure to comply with these requirements forms the factual basis of the offense of "slamming."

4. Commission Authority To Impose Sanctions

PU Code Section 2889.5 does not either grant any additional or remove any existing authority of the Commission with respect to actions the Commission can take to enforce the statute. Thus, to the extent the Commission decides to take action based on failure to comply with this statute, e.g., impose sanctions, the Commission's authority must come from another source.

Commission authority to impose sanctions for violations of PU Code Section 2889.5 can be found in several statutes.

a) Imprisonment

Pursuant to PU Code Section 2110, the Commission may order individuals imprisoned for statutory violations for up to one year and/or fined

up to \$1,000. PU Code Section 2113 grants the Commission contempt powers for violations of its orders, and allows the Commission to order imprisonment of violators for up to five days. (Code of Civil Procedure Section 1218.) The Commission reserves imprisonment for the most flagrant offenders of its authority. (See Decision 89729, 1 CPUC2d 2, 51 (1978).) The California Supreme Court has upheld the Commission's authority to imprison those it finds in contempt. (*In RE Victor*, 220 Cal.729 (1934).)

b) Fines Payable to State

The Commission may also order fines payable to the State of California. (PU Code Sections 2104 and 2107.)

c) Reparations

The Commission also has specific authority to order reparations for overcharges where the customer files a complaint with the Commission and the Commission finds that the utility has charged an unreasonable, excessive or discriminatory rate for service. (PU Code Section 734.)

Relying on both the specific authority found in PU Code Section 734 and its general grant of authority found in PU Code Section 701, the Commission may order refunds of charges improperly assessed to customers.

5. Mental State Element

CTS argues that the Commission must add a mental state element to the requirements discussed above before it may impose sanctions on CTS. (CTS Opening Brief at 31-33.) CTS states that to do otherwise would render violations of PU Code Section 2889.5 to be "strict liability" offenses, an impermissible result. CTS cites "hornbook law" for this proposition, as well as numerous criminal cases.

Generally, every crime or public offense is composed of two elements: the act or omission and the mental state. (17 Cal Jur 3d (Rev) Part 1 Section 82.) The mental state requirement is not unqualified, however. (*Id.* at Section 96.) No mental state is required for certain elements of specific crimes such as

statutory rape and bigamy. Public welfare offenses similarly do not require proof of a mental state element. (*Id.*)

The basis for omitting the mental state element in certain public welfare offenses was recently restated by a California Appellate Court:

"We first observe that the licensing regulations in this case give rise to 'strict liability' upon breach. The rationale for strict liability offenses was explained by the Supreme Court in *In re Marley* . . . as follows: 'There are many acts that are so destructive of the social order, or where the ability of the state to establish the element of criminal intent would be so extremely difficult if not impossible of proof, that in the interest of justice the legislature has provided that the doing of the act constitutes a crime, regardless of knowledge or criminal intent on the part of the defendant.'

" . . . Under many statutes enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations, criminal sanctions are relied upon even if there is no wrongful intent. These offenses usually involve light penalties and no moral obloquy or damage to reputation. Although criminal sanctions are relied upon, the primary purpose of the statutes is regulation rather than punishment or correction. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of enforcement." (*People v. Rouse*, 202 Cal. App. 3d Supp. 6, 10, 249 Cal. Rptr. 281, 283 (1988)(citations omitted).)

In *Rouse*, the Court found that the sanctions for violation of taxicab regulations were public welfare offenses and upheld the lower court's conviction. The Court found that taxicabs were subject to a comprehensive scheme of regulation, there was no damage to reputation for failure to comply with licensing regulations, and enforcement would be difficult if not impossible if proof of criminal intent were required. The Court concluded that the taxicab regulations were analogous to regulations prohibiting the sale of mislabeled or short-weighted food, filling prescriptions without a license, and unsanitary conditions in a nursing home.

The Rouse analysis is applicable to violations of PU Code Section 2889.5. Long distance carriers are subject to a comprehensive system of regulation. The damage to reputation from failure to comply with this regulation is not equivalent to a criminal conviction. Proving violations of this statute would be virtually impossible if the Commission had to show criminal intent. The legislative purpose in adopting this statute is protection of the public, as with regulation of taxicabs, food sales, and nursing homes.

For this reason, the Commission need not add a mental state element to PU Code Section 2889.5.

6. Definition of Subscriber

PU Code Section 2889.5 requires that the long distance company establish the intent, among other things, of the "subscriber" to switch long-distance carriers. CTS states that it accepts orders based on "unverified representation of an adult in the household that he or she has authority to make the switch." (CTS Opening Brief at 29.) CTS further states that this is standard industry practice and that to the extent the statute is inconsistent with that result, the statute is absurd and should be disregarded. (*Id.* at 30.)

As a initial matter, the fact that it is customary practice in the industry does not establish that subscriber should be interpreted to mean any adult that answers the phone.⁸ (*Chern v. Bank of America*, 15 C.3d 866, 876, 127 Cal. Rptr. 110 (1976).)

⁸ It has, however, provided the basis for San Francisco Chronicle columnist Jon Carroll to write a humorous column describing the transfer of one of his telephone lines:

"So now I am in the clutches of three distinct telephonic entities. There used to be one phone entity, but we all hated it a lot and demanded that it be broken up. So now it has been, and we are beating our heads on the flagstones and saying, 'Dumb dumb dumb, we were soooo dumb.'"

Footnote continued on next page

CTS' next legal theory for setting aside the plain words of the statute appears to be based on the law of agency. (CTS Opening Brief at 30.) As a general matter, "a person may do by agent any act which he might do himself." (2 Witkin, Summary of California Law, (9th ed. 1987) Agency and Employment, section 75.) An agency relationship arises through two means, the granting of actual authority or ostensible authority.

Ostensible authority is inapplicable here because it requires that the principal take actions upon which a third party reasonably relies. (*Id.* at section 93.) As CTS does not confer with the principal, the subscriber in this case, it cannot rely on this means of creating an agency relationship.

The subscriber can grant an agent actual authority to switch long distance telephone companies either expressly or implicitly. (*Id.* at section 79.) The words or actions of the principal define the extent of the agency relationship. To the extent a third party, such as CTS, wishes to rely on the agency relationship to bind the principal, the third party has a duty to ascertain the scope of the agency. (*Id.* at section 78.)

CTS' efforts to determine the relationship of the person to whom their telemarketer was speaking was limited to a single conclusory statement:

"Confirmation Agent: This is to verify that you would like to switch your long distance telephone service to CTS and *that you are authorized to make this change.* Is this correct?

"Customer (MS): Yes." (Exh. 36 at Attachment 34 (emphasis added).)

"I have a vague memory of someone asking me if I wanted to save \$100. Well, sure I do. But I didn't sign anything. Tracy didn't sign anything. Can things really be switched around just on the word of whoever answers the phone?

"Maybe it was a house guest. I have several friends who are easily puckish enough to agree to whatever proposal a telephonic stranger makes." Carroll, *The Joys of Deregulation*, (August 6, 1996) San Francisco Chronicle at p.E8.

CTS made no effort to ascertain (1) if it was speaking to the subscriber (2) if not, the relationship of the speaker to the subscriber, (3) whether the subscriber had actually given the speaker explicit authority to make this specific decision or decisions of this type, and (4) any other information that might indicate whether an agency relationship existed. Given CTS' cursory inquiry and complete lack of information regarding the relationship to the subscriber, CTS is factually in no position to now allege the existence of an agency relationship. As discussed above, third parties have a duty to ascertain the scope of the agency relationship. CTS has failed to discharge this duty. Thus, even accepting CTS' legal theory, *arguendo*, CTS fails to prove its case. Whatever might establish the legal predicate for a valid agency relationship upon which a long distance carrier might rely for compliance with PU Code Section 2889.5, the cursory "added on" question presented in CTS' verification transcripts is inadequate.

7. Compliance with PU Code Section 2889.5 and the "Stay With Us" Program

After a large group of its customers were simultaneously transferred away from CTS, it began offering a special program under which its customers would be automatically transferred back to CTS if another carrier had transferred the customer away. This program was called "Stay With Us" and it required that the customer contact CTS directly to disengage the program before the customer could transfer to another carrier without being automatically switched back.

CTS offered this program to its customers using the following recommended script:

"CTS also offers a special free benefit called the 'Stay With Us Service.' We offer this service because sometimes our customers have been switched to other long distance companies without their permission. We will notify you by mail if another company switches your long distance service. CTS provides this information to you so that you can seek reimbursement of the charges incurred as a result of the

unauthorized switch and restoration. In addition, CTS will automatically restore your CTS service. This program will continue for six months unless you cancel it by contacting CTS directly. Do you want the benefits of Stay With Us service for no additional charge?" (Response of CTS to Questions Raised at Oral Argument, Attachment 7, (July 31, 1996).)

This script fails to clearly inform the customer that should the customer wish to switch long distance providers, the customer must take the additional initial step of notifying CTS. The customer would not understand from this script, which was presented verbally during a telephone call, that the customer would be switched back to CTS even if the customer sought services from a different long distance carrier. Moreover, this presupposes that the customer received this portion of the presentation at all.

As tariffed with the Commission, the Stay With Us program requires that CTS notify the customer in writing prior to returning a customer to CTS' service to give the customer an opportunity to stop the return transfer. CTS provided copies of the letters it indicated were sent to Stay With Us customers who attempted to leave CTS. (See Response of CTS to Questions Raised at Oral Argument, Attachment 6, (July 31, 1996).)

For example, S&B witness Dr. Charles W. Getz, who holds a Ph.D. and whose professional specialties include data processing and telecommunications, indicated that he did not recall any discussion of the Stay With Us program nor did he conscientiously agree to its provisions. In fact, he stated "It's total news to me." (Tr. at 1168.) He also stated that neither he nor his wife received any written communication from CTS, as is required by CTS' Stay With Us tariff, when he attempted to leave CTS and received service from another carrier. (Tr. at 1157-58.) This is consistent with Dr. Getz's decision to challenge the validity of CTS returning him to their service after he selected another provider, and to complain to the Commission.

In short, the Stay With Us presentation, if made at all to a customer, fails to fully inform the customer of the practical consequences of signing up for the program. Further, Dr. Getz's testimony calls into question whether CTS complied with its own tariff in notifying customers of CTS' intention to return the customer to its service.

The most telling critique of the Stay With Us program is found in CTS' own testimony. As described above, CTS witness Lipoff analyzed a sample of complaints of unauthorized transfers. His analysis revealed that over 70% of the complaints resulted from Stay With Us transfers. (Exh. 73 at p. 6.) These customers, by registering complaints, did not believe that they had authorized these transfers.

Ensuring that the customers fully understand the practical consequences of their decisions to accept the Stay With Us program is critical to establish CTS' compliance with PU Code Section 2889.5. To comply with the section, CTS must, among other things, (1) "thoroughly inform the subscriber of the nature and extent of the service being offered" and (2) "specifically establish whether the customer intends to make any change."

The customer information provided in the telephone solicitation script, to the extent such script was followed, fails to meet the first requirement. The customer simply was not informed of the nature and extent of the program, i.e., that the customer could not leave CTS without prior notification. The letter which CTS' tariff required be sent prior to making such a transfer does not cure this lack of information as the record does not support the conclusion that the letter was routinely sent to customers prior to the transfer.

The second requirement is blatantly disregarded. CTS made no efforts to affirmatively establish whether the customer intended to return to CTS. CTS' letter, to the extent it was actually sent, does not accomplish this result because CTS deemed the absence of action by the customer to constitute approval of CTS' intention to take the customer back. The statute requires that CTS "specifically establish whether

the customer intends to make any change in service." CTS' "no response = approval" letter is insufficient for this purpose.

Absent affirmative information from the customer, each Stay With Us transfer failed to meet the requirements of PU Code Section 2889.5. Having failed to meet this statutory requirement, and nevertheless submitting the PIC change to the LEC, CTS has violated PU Code Section 2889.5 with each of these transfers.

8. Legal Conclusions

To demonstrate a violation of PU Code Section 2889.5, S&E must show that it is more likely than not that CTS has failed to meet the requirements of that statute. CTS has admitted that it accepts the word of any adult that answers the phone regarding transfer of long distance service. The statute requires that CTS specifically establish the intent of the subscriber to transfer service. Although agency law principles may allow another person to validly authorize such a transfer, CTS' inquiries do not establish the factual basis for a principal/agent relationship between the subscriber and the person on the phone. Because CTS cannot demonstrate which, if any, of its orders came from the subscriber, the validity of all CTS-initiated PIC change orders is undermined.

CTS also admits that through its Stay With Us Program it transferred customers without first ascertaining whether the customer intended to be returned to CTS at that time. CTS' testimony also supports the conclusion that the majority of its unauthorized transfer complaints were caused by the Stay With Us program.

Thus, S&E's evidence plus CTS' own admissions form the basis for concluding that the evidence shows clearly and convincingly that CTS engaged in widespread violations of PU Code Section 2889.5.

IV. Sanctions

A. Sanctions for Past Conduct

1. Unauthorized Transfers

In the only other case of widespread violation of PU Code Section 2889.5, *Sonic Communications, dba SCI Communications*, 1995 Cal. PUC LEXIS 176 *6, (D. 95-04-029), the Commission ordered the carrier to refund to each customer the difference between Sonic's rates and the customer's carrier of choice. Sonic's rates were approximately three times the typical long distance rate. This refund policy was intended to make the customer financially whole.

The Commission has not addressed the issue of customer refunds in instances, such as here, where the carrier which has perpetrated the unauthorized transfers does not have rates appreciably higher than typical rates. Applying the *Sonic* standard to CTS would therefore result in effectively no sanction for nearly 57,000 violations of PU Code Section 2889.5 because CTS' rates, unlike Sonic's, are not higher than typical rates. This is an untenable result.

The record in this case demonstrates that customers, and indeed the competitive marketplace, suffer in ways that go beyond mere cost differentials. We find that the public interest would not be served by applying the *Sonic* standards in this case. For this reason, we will for the purpose of this case adopt a different measure of reparations for unauthorized transfers.

The Commission has recently approved two settlements of investigations involving allegations of violations of Section 2889.5, *Hearline Communications*, D.96-12-031; *Cherry Communications*, D.96-09-041. In both decisions, the Commission found that refunds to customers advanced the public interest.

Reimbursing customers for costs wrongfully imposed is the primary purpose for reparations. (See PU Code Section 734.)⁹ When a customer is transferred to the service of a long distance carrier without authorization, all charges imposed by the unauthorized carrier are wrongfully imposed. The public interest requires that the revenue collected under these circumstances should be returned to the customers.

Specifically returning to each customer the amount that the particular customer paid would be administratively unworkable. For this reason, we will use the methodology set out in Confidential Attachment A as a means of calculating the total reparations. This methodology yields a reparations fund of approximately \$1.9 million.

Returning this fund to all subscribers who were transferred without authorization is administratively unworkable. Thus, we determine that the class of subscribers that have submitted complaints against CTS to the customer's LEC regarding unauthorized transfer reasonably represents the class of subscribers that have been transferred without authorization.

The reparations amount will be equally distributed to all CTS customers that submitted a complaint to their LECs according to the following procedure:

⁹ PU Code Section 734 grants the Commission authority to order public utilities to return unlawfully collected amounts to customers. The statute is stated in terms of individual customers who file complaints. From this terminology, CTS concludes that the Commission is without authority to order reparations in the case of widespread unlawful activity, unless each and every affected customer files a formal complaint with the Commission. CTS Comments on 12/13/96 PD, at 7-9. The Commission does not view its authority so narrowly. Reading PU Code Section 734 in conjunction with PU Code Section 701, allows the Commission to apply the design of reparations—returning wrongfully assessed charges to customers—to circumstances where the Commission has found pervasive unlawful activity. CTS' reading would have the Commission inundated with formal complaints, while large-scale scofflaws are effectively shielded from liability.

1. CSD shall contact all California LECs to determine the exact number of disputed PIC changes received by that LEC against CTS in calendar years 1994, 1995, and 1996. CSD shall divide the reparations amount set out in Attachment A by the number of complaints to determine the reparations amount for each complaint. Where a subscriber submitted more than one PIC dispute, the subscriber shall receive reparations for each dispute.

2. CTS will prepare checks for the customer reparations amount made payable to each and every customer characterized as a disputed PIC change by their respective LEC. Such customers shall be defined as those who have been switched to another carrier by the LEC and whose request for a PIC change has been designated as 2229 by Pacific Bell and 2219 by GTEC.

3. Pacific Bell, GTE California, and any other applicable LEC will provide the Commission staff and CTS with a list on a computer readable medium of such designated customers to whom checks should be issued. CTS shall reimburse all such LECs for the cost of producing and providing the lists within 30 days of receiving the invoice from the LEC.

4. CTS shall provide the Commission staff with the check(s) for each customer within 60 days of receiving from the LEC the lists of customer names. The Commission staff will mail the checks with a notice. The notice, which will be prepared by the Commission in English, Spanish, and Vietnamese, will inform the recipients of the reason for the check.

5. Any undeliverable or returned checks and checks not cashed within 90 days of mailing shall be returned by the Commission staff to CTS and reissued by CTS payable to the order of a public purpose trust, fund, or organization to be designated by the Consumer Services Division (CSD) to use to advance consumer

education and awareness about how to avoid being "slammed."¹⁹ Any returned or undeliverable checks received by CTS shall be reissued as described above and delivered to the Executive Director within 60 days of their receipt by CTS.

6. The Executive Director is authorized to resolve all disputes regarding the appropriate process for effectuating the Commission's intent to get the checks to customers quickly and efficiently.

In addition to the reparations ordered above, CTS shall reimburse the State of California for costs incurred in prosecuting this OII, including the cost of processing and mailing reparations to customers. Although the record contains no complete estimates of such costs, the Commission is sufficiently familiar with costs of prosecuting cases such as this to estimate costs at \$100,000. CTS shall pay this amount to the Commission within 180 days of the effective date of this order.

2. Fines

We conclude that other sanctions, in addition to this limited suspension and reparations, are required to firmly demonstrate that CTS' past conduct failed to adhere to the level of fair dealing and customer service that we expect from Commission-certificated utilities, and which is required to comply with PU Code Section 451.

As noted previously, we find CTS' "Stay With Us" program to have most blatantly failed to comply with PU Code Section 2889.5 to the detriment of California consumers. Such violations demonstrate that CTS has failed to provide "just and reasonable service" as required by PU Code Section 451. PU Code Sections 701 and 2107 authorize the Commission to impose a penalty of "not less than five hundred dollars (\$500), nor more than twenty thousand dollars (\$20,000) for each offense."

¹⁹ If the Consumer Services Division is unable to designate a trust, fund, or organization, the undeliverable or returned checks shall be reissued by CTS payable to the State of California, General Fund.

CTS' own analysis indicates that approximately 70% of its PIC disputes arose out of PIC changes submitted pursuant to this program. CTS' total PIC disputes, 56,000, multiplied by 70% yields 39,200 "Stay With Us" PIC disputes. That amount multiplied by the lower end of the statutory range, \$500, yields \$19.6 million.

Consistent with prudent and fair enforcement policies, we will stay all but \$2 million of the potential fine. CTS should consider itself to be on "probation" regarding the stayed fine. Should CTS violate any additional statutes or Commission directives, the Commission will review the penalty amount that has been stayed.

Accordingly, pursuant to PU Code Sections 2107 and 2104, CTS is ordered to pay to the California State Treasury to the credit of the General Fund the sum of \$2 million. CTS shall file with the Commission proof of such payment no later than 180 days from the effective date of this order.

B. Confidentiality of Attachment A

The data upon which the Commission based its reparations methodology are currently under seal by ruling of the Law and Motion ALJ. Due to the importance of making this data available to the public, we will order CTS to appear before the Law and Motion ALJ to show cause why Attachment A should not be publicly available. The Law and Motion ALJ shall hold such a hearing within 30 days of the effective date of this order unless otherwise scheduled by the ALJ. CTS shall specifically show why the nearly year-old data in Attachment A are not so obsolete as to be without commercial value.

Pending a ruling by the ALJ, Attachment A shall not be provided to members of the public.

C. Limitations on Future Conduct

1. Operating Authority Revocation

CTS has demonstrated that it can not conform itself to the requirements for Commission-certificated nondominant interexchange carriers. The record in this proceeding shows that CTS has violated PU Code Section 2889.5 on a

widespread basis, such that a significant number of California consumers have been denied the freedom to receive service from the carrier of their choice. CTS' actions also have the effect of undermining the full and fair competition in the telecommunications markets which the Commission has sought to establish.

For these reasons, safeguarding the rights of consumers¹¹ and protection of the public interest requires that CTS' authority to provide intrastate telecommunications service, presubscribed or otherwise, in California be suspended for a period of three calendar years from the date of this order.¹² After the suspension period is concluded, CTS may apply for reactivation of its intrastate authority and will be required to make the showings then-required for new applicants. All CTS advertisements for interstate or international services shall clearly state that CTS is not authorized to provide intrastate service.

CTS shall notify its current customers, both presubscribed and otherwise, that it is no longer permitted to provide intrastate interLATA and intraLATA telecommunications services by order of the Commission. CTS shall reimburse all fees incurred by customers to transfer from CTS to another carrier. Within 20 days of the effective date of this order, CTS shall provide the Commission's Public Advisor with a draft copy of the notice for review and approval prior to CTS sending it to the customers.

In its comments on the March 23, 1997, Proposed Decision, CTS informed the Commission that it has the capacity to program its switches to distinguish between intrastate and interstate calls such that during the period of its suspension it

¹¹ See Telecommunications Act of 1996, Section 253 (b), Pub.L. No.104-104, Section 253(b), 110 Stat. 56, 70 (1996).

¹² Specifically, we are suspending the authority we granted CTS in C.92-06-007, 44 CPUC2d 470, to provide interLocal Access and Transport Area (LATA) long distance and operator services within California and in D.93-04-063, 49 CPUC2d 146, to provide intraLATA telecommunications service.

could offer "interstate and international calling through, for example, dial-up 10xxx access or '800' access." (CTS Reply Comments at 1.) CTS states that Proposed Decision mistakenly assumed that Commission jurisdiction extends to these services.

Subject to the limitations set out below, we clarify that CTS is prohibited from completing or billing for any intrastate interLATA and intraLATA telecommunications services between points in California."

In distinguishing between interstate and intrastate calls, we are relying on CTS' representation of its ability to program its switches in this manner. Should CTS' fail to deliver on its representation such that, for any reason, an intrastate call is completed and/or billed for, the Commission will consider the sanctions including fines available under PU Code Section 2107 and imprisonment pursuant to PU Code Section 2113. CSD is directed to prepare and implement an enforcement monitoring plan designed to ensure that CTS is strictly adhering to the letter and spirit of this decision. Should CSD discover any deviations from the terms of this decision, the Commission will not hesitate to impose prompt and enhanced sanctions on CTS.

In sum, we intend to enforce to the full extent of our legal authority our jurisdiction over intrastate calls.

2. PIC Change Suspension

The record in this proceeding shows that CTS' failings have been particularly acute with regard to competently managing the ability to submit PIC changes directly to LECs. For this reason, safeguarding the rights of consumers and protecting the public interest requires that CTS' ability to submit such changes be permanently suspended. During the suspension period, CTS shall submit no request for PIC changes to California LECs, and the California LECs are directed to accept no

" In response to concerns raised by Pacific Bell to CTS, we also clarify that this decision does not affect the LECs' authority to provide billing and collection services for interstate and international calls, but prohibits them from providing such services for intrastate calls.

PIC changes from CTS. However, if and when CTS' intrastate operating authority is reactivated, subscribers may submit such changes directly to their LEC. After two calendar years have elapsed from the date CTS' intrastate operating authority is reactivated, CTS may apply to have their PIC submission privileges reinstated. Such an application shall include a specific plan to ensure full and complete compliance, with appropriate auditing, with all statutes and Commission rules and policies. CTS shall bear the burden of proving such facts.

3. Prohibitions Binding on Successor Entities

The sanctions set out above—reparations, operating authority suspension, and PIC change prohibition—shall be binding on any successor entities unless and until the Commission orders differently. To ensure that any transactions are fully reviewed by the Commission, CTS may not avail itself of the modified procedures established for NDIECs in *California Ass'n of Long Distance Carriers*, 54 CPUC 2d 520 (1994) (D.94-05-051). For all transfers under PU Code Sections 851 to 854, CTS shall seek Commission authorization pursuant to the application process. Similarly, any applications to the Commission for operating authority for a firm which includes any current or former officers or shareholders of CTS shall reveal such involvement and the Commission shall carefully scrutinize the application.

V. Findings of Fact

1. In 1995, CTS solicited customers by telemarketing, targeting customers whose preferred language is other than English.

2. In 1995, CTS sought to provide its customers with presubscribed service, including the "Stay With Us" program which switched customers back to CTS if the customer was transferred by another carrier and the customer had not previously notified CTS. This novel scheme resulted in customers being essentially trapped into taking service only from CTS.

3. In 1995, CTS' customer service was inadequate.

4. CTS discontinued telemarketing and the "Stay With Us" program at about the same time the Commission instituted this enforcement action. CTS' most popular current calling program does not require presubscription.
5. CTS' 1995 PIC dispute rate was over 309% of the industry average in California.
6. The three largest long-distance carriers' Spanish-only PIC dispute rate exceeds their all-customer PIC dispute rate by an average of 64%.
7. CTS' PIC dispute rate, which is essentially Spanish-only, exceeds the industry average all-customer PIC dispute rate by 209%.
8. CTS' Spanish-only PIC dispute rate is not in line with other carriers' Spanish only PIC dispute rates.
9. CTS provided no analysis of directly comparable companies' PIC dispute rates.
10. CTS' detailed analysis of 45 randomly selected PIC disputes does not support CTS' assertion that it had complied with PU Code Section 2889.5.
11. The PIC dispute data collected by Pacific Bell and GTEC and presented by S&E is sufficient to support a finding that CTS, more likely than not, transferred at least 56,000 customers without prior authorization.
12. S&E's evidence, along with CTS' admissions, show clearly and convincingly that CTS engaged in widespread violations of PU Code Section 2889.5.
13. CTS' inquiry regarding "authorization" is insufficient to establish a principal/agent relationship.
14. CTS has admitted that it accepted the word of any adult that answered the phone regarding transfer of service.
15. CTS has admitted that, pursuant to its "Stay With Us" program, it did not affirmatively establish that the subscribers authorized transfer of their accounts at that time.
16. The Commission has not addressed the question of reparations for unauthorized subscriber transfer where the transferring carrier's charges do not exceed those of the customer's carrier of choice.

17. CTS' analysis shows that approximately 70% of CTS' PIC disputes are attributable to the "Stay With Us" Program.

18. During the time period its PIC dispute rate greatly exceeded the industry average, CTS executives earned millions of dollars in salaries and bonuses.

19. Customers who have been transferred without their knowledge or consent legitimately felt deceived and misled.

VI. Conclusions of Law

1. S&E has the burden of proving that CTS has failed to comply with PU Code Section 2889.5.

2. The standard of proof in Commission investigation proceedings is preponderance of the evidence.

3. The standard of proof when the Commission seeks to impose criminal sanctions is beyond a reasonable doubt.

4. PU Code Section 2889.5 sets out the requirements for a valid transfer by an interexchange carrier.

5. While PU Code Section 2889.5 does not give the Commission authority to impose sanctions, that authority is given in other statutes.

6. PU Code Section 2889.5 does not require proof of a mental state element.

7. A subscriber's agent could authorize a valid transfer under PU Code Section 2889.5.

8. CTS' "Stay With Us" program failed to establish whether the subscriber intended to change service such that all transfers based on this program violate PU Code Section 2889.5. No reasonable person could have concluded that this scheme complied with PU Code Section 2889.5 and our rules forbidding unauthorized customer transfer.

9. CTS' "Stay With Us" program violated PU Code Section 2889.5 such that CTS failed to provide "just and reasonable service" as required by PU Code Section 451.

10. Safeguarding the rights of consumers and protecting the public interest requires that CTS make reparations to all subscribers that submitted PIC disputes to their LECs.

11. Safeguarding the rights of consumers and protecting the public interest requires that CTS' authority to provide intrastate telecommunication service in California be suspended for a period of three calendar years.

12. Safeguarding the rights of consumers and protecting the public interest requires that CTS' ability to submit PIC changes be permanently suspended, although CTS may apply for reinstatement of this ability in two years after its intrastate operating authority is reinstated, but must make the showings set out below.

13. The public interest requires that CTS reimburse the Commission for the costs of this investigation.

14. The public interest requires that the Commission impose a fine on CTS for its "Stay With Us" program. The Commission has authority to impose penalties under either PU Code Section 701 or the specific penalty provisions of PU Code Section 2100 et seq. The minimum fine provided by PU Code Section 2107 is \$19.6 million for 39,200 instances of statutory violations.

15. Consistent with prudent and fair enforcement policies, all but \$2 million of the fine should be stayed, so long as CTS does not violate any further statutes or Commission directives. If CTS does violate additional statutes or Commission directives, the Commission will review the entire amount of the fine.

FINAL ORDER

Therefore, IT IS ORDERED that:

1. Communications Telesystems International (CTS) shall return \$1,939,412, as reparations, to subscribers that have submitted presubscribed interexchange carrier (PIC) disputes to their local exchange carrier (LEC). Each subscriber shall receive an equal amount for each PIC dispute as determined by the Commission's Consumer Services Division (CSD).

2. CTS shall proceed according to the process set forth in this decision for dispersal of these funds.

3. CTS shall appear before the Law and Motion Administrative Law Judge and shall show cause why the data contained in Confidential Attachment A should not be released to the public.

4. CTS' intrastate operating authority in California, as granted in Decision (D.) 92-06-007 and D.93-04-063, is suspended for three calendar years from the effective date of this order. CTS shall notify its current customers, both presubscribed and otherwise, that it is no longer able to complete intrastate toll calls by order of the Commission. CTS shall offer to reimburse all transfer fees to any customer that wishes to transfer from CTS to another carrier. The Commission's Public Advisor shall approve the notice.

5. CTS' right to submit PIC changes directly to LECs is permanently suspended. CTS shall submit no such changes to California LECs. A copy of this decision shall be mailed to all California LECs and competitive LECs.

6. California LECs shall not accept PIC changes from CTS pending further order of the Commission.

7. CTS may apply to have its right to submit PIC changes reinstated two years after its intrastate operating authority is restored. It shall bear the burden of proving that it is capable of complying with all statutes and Commission rules and policies. CTS' application shall contain a written plan which includes auditing to ensure full and complete compliance.

8. CTS shall be fined \$19.6 million for its "Stay With Us" program; all but \$2 million of such fine shall be stayed pending any further violations of statute, or Commission directives by CTS.

9. CTS shall pay to the California State Treasury to the credit of the General Fund the sum of \$2 million and shall file with the Commission proof of such payment no later than 180 days after the effective date of this order.

10. CTS shall pay to the Commission the sum of \$100,000 within 180 days after the effective date of this order.

11. CTS' sanctions, reparations, operating authority suspension, and PIC change prohibition, shall be binding on any successor entities, unless and until the Commission otherwise orders.

12. For all transfers subject to Public Utilities Code Sections 851 to 854, CTS shall file an application and may not rely on the advice letter process.

13. Any applications for operating authority submitted by a firm which includes current or former CTS officers or shareholders shall clearly state such involvement. Commission staff are directed to carefully scrutinize any such applications.

14. CSD shall prepare and implement an enforcement monitoring program which will be designed to ensure that CTS is strictly adhering to the terms of this decision. Should CSD discover any deviations from the terms of this decision, the Commission will not hesitate to impose prompt and enhanced sanctions on CTS.

This order is effective 30 days from today.

Dated May 21, 1997, at Sacramento, California.

P. GREGORY CONLON
President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners

CONFIDENTIAL ATTACHMENT A

This portion of the decision is redacted.

END OF CONFIDENTIAL ATTACHMENT A