

Mailed  
MAR 31 1998

Decision 98-03-071 March 26, 1998

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of the Application of Long Distance Direct, Inc., for a Certificate of Public Convenience and Necessity for Authorization as a Reseller of Interexchange Telecommunications Services.

Application 95-04-025  
(Filed April 21, 1995)

**ORIGINAL**

**OPINION**

**1. Summary**

This decision approves an amended settlement agreement between Long Distance Direct, Inc. (LDDI) and the Consumer Services Division (CSD), subject to an amended provision that a \$45,000 settlement shall be submitted to the State Treasury rather than deposited to a trust fund. This decision also directs staff to prepare a rulemaking to investigate whether, and by what means, the Commission in the future may direct remittance of such settlement monies to a consumer protection fund supervised by the California District Attorneys Association or similar organization.

**2. Background**

In an Interim Opinion, Decision (D.) 97-04-028, issued on April 10, 1997, the Commission granted authority to LDDI to resell telephone services in California, but the Commission remanded a proposed settlement agreement between LDDI and CSD for further development of the record with respect to a trust fund that the agreement proposed to establish.

CSD had protested the LDDI application, alleging that the carrier had operated as a reseller of intrastate service in California without authorization, and that it was accused of switching some consumers' long distance service without proper authorization, a practice known as slamming.

Following negotiations, CSD and LDDI entered into a settlement agreement in which CSD agreed to withdraw its protest to the application and LDDI agreed to

restore the previous long distance service of customers who complained of being switched without authorization. LDDI also agreed to forgo collection efforts as to those customers, to change its methods of soliciting customers, and to make quarterly reports to CSD for one year describing any consumer complaints received by the carrier and its agents. LDDI also agreed to pay a settlement amount of \$45,000 to be directed by CSD to an appropriate source for promoting consumer education and awareness.

The Commission in D.97-04-028 granted LDDI's application to permit it to resell intrastate telephone services in California, but it remanded the settlement agreement to an administrative law judge for further development of the record on the \$45,000 settlement amount and the disposition of those funds.

### **3. Prehearing Conference**

A prehearing conference to consider the remand order was conducted on July 29, 1997. During discussion on the record, counsel for CSD stated that the parties were preparing a joint motion to amend the settlement agreement. Instead of requiring that the settlement amount be deposited to a Commission escrow account prior to transfer to consumer-oriented purposes, the proposed amendment would require that the funds be deposited to the Consumer Protection Trust Fund, an established fund created by court order in 1989 and administered by the California District Attorneys Association.

At the conclusion of the prehearing conference, the administrative law judge directed the parties to file the proposed amendment or other appropriate pleading within 30 days and to supply additional information on the Consumer Protection Trust Fund.

### **4. Joint Motion to Amend Settlement**

On August 11, 1997, the parties filed a Joint Motion for Approval of Amendment to Settlement Agreement. The original Stipulation for Settlement and the amendment to the settlement agreement are attached to this decision as Appendix A and Appendix B, respectively.

Under the amendment, LDDI agrees to pay a settlement fee of \$45,000 in quarterly installments of \$3,000 to the Consumer Protection Trust Fund, created by the

case entitled *People v. ITT Consumer Financial Corporation, et al.*, Alameda County Superior Court, Civ. No. 65038-0 (September 21, 1989). The provisions of the trust fund require that it be administered to enhance the investigation, prosecution and enforcement of consumer protection actions in California.

The parties' amendment also provides that in the event LDDI transfers corporate control to another entity, all amounts owing under the settlement agreement will be paid in full prior to transfer of ownership.

## 5. Discussion

Our staff has negotiated a fair and equitable resolution of the complaints brought against LDDI. Consumers who believe that their long distance service was switched without their approval will have their prior long distance service restored without charge. LDDI has agreed to forgo collection efforts against those who believe their service had been switched without permission, and the company has agreed to amend its solicitation efforts to prevent further complaints.

LDDI also has agreed to pay \$45,000, in quarterly installments of \$3,000, to the Consumer Protection Trust Fund, a highly worthwhile consumer protection fund administered by the state's District Attorneys Association.

On this record, however, we are not persuaded that the Commission has authority to direct payment of a so-called "settlement fee" in the manner described in the settlement agreement. The Commission has authority to levy fines and penalties against the utilities it oversees.<sup>1</sup> We have recognized that, in accordance with legislative

---

<sup>1</sup> See, e.g., PU Code §§ 2100, 2107, 2111, 2115.

policy expressed in Public Utilities Code (PU Code) §§ 2100 and 2104, penalties assessed under these provisions must be deposited in the General Fund. (See *TURN v. Pacific Bell* (1994) 54 CPUC2d 122.) Similarly, we have authority to require refunds to consumers pursuant to PU Code § 453.5. It is settled, however, that such refunds must be disbursed to ratepayers or, through escheat, to the General Fund. (Code Civ. Proc., § 1519.5; see, generally, *Assembly v. Public Utilities Commission* (1995) 12 Cal.4<sup>th</sup> 87.)

At our request, the parties here have addressed the question of the \$45,000 payment by changing the recipient from a CSD-directed trust to a specific consumer protection trust. CSD argues that such a disbursement is authorized under our broad range of powers described in PU Code § 701. However, simply calling the payment a "settlement fee," instead of calling it a fine or penalty, may not be sufficient in our view to overcome those provisions of the Code that require us to direct such payments to the General Fund. As the Supreme Court noted in reference to ratepayer refunds, "acceptance of the premise that section 453.5 applies only when the commission chooses to call its actions 'refunds' would permit the commission, by a simple *ipse dixit*, to avoid the statute in every case." (*Calif. Mfrs. Assn. V. Public Utilities Com* (1979) 24 Cal.3d 836, 847.)

We do not, by this decision, preclude contributions in cases like this to the Consumer Protection Trust Fund, which we regard as a highly commendable objective. We simply find that, on this record, we are not persuaded that the method of disbursement set forth in the amended settlement agreement is an appropriate outcome.

We will explore this subject in a future rulemaking. Our order today requires the Telecommunications Division to prepare a rulemaking proceeding that will enable us to determine whether the Commission in the future may authorize remittance of settlement monies to a consumer protection fund like that administered by the California District Attorneys Association, or whether enabling legislation is required to permit such a disbursement.

Accordingly, this decision amends Paragraph 13 of the Stipulation for Settlement to read as follows:

"13. LDDI agrees to pay to the Commission, for deposit in the General Fund, the amount of \$45,000. The \$45,000 fee shall be paid in quarterly installments of \$3,000 per quarter beginning 90 days after the adoption of this agreement by formal Commission decision or order, and continuing thereafter until LDDI fully satisfies the balance of the full \$45,000 sum."

If either party does not agree with this amendment, it is directed to file its objection within 10 days of the date of this order, in which case the matter will be remanded to the administrative law judge for further proceedings. In the absence of such objection, the Stipulation for Settlement, as so amended, is approved as reasonable in light of the whole record, consistent with the law, and in the public interest, and this approval shall take effect 30 days after the date of this decision.

#### **Findings of Fact**

1. LDDI on April 21, 1995, filed Application 95-04-025 seeking a certificate of public convenience and necessity to resell intrastate telephone services in California.
2. The application was protested by CSD, which alleged that LDDI had operated without authority and that it faced a number of consumer complaints concerning switched long distance service.
3. CSD and LDDI entered into a settlement agreement on November 8, 1996, by which LDDI agreed to resolve certain consumer complaints and comply with restrictions on its service, and CSD agreed to withdraw its protest to LDDI's application.
4. On April 9, 1997, the Commission approved LDDI's application in an Interim Opinion, D.97-04-028, but remanded the parties' settlement agreement to the administrative law judge for further development on the record on a proposed \$45,000 settlement payment by LDDI.
5. A prehearing conference to consider the remand order was conducted on July 29, 1997, and counsel for CSD reported the parties' further negotiations intended to comply with the Commission's remand order.

6. On August 11, 1997, the parties filed a Joint Motion for Approval of Amendment to Settlement Agreement, agreeing, in pertinent part, that the \$45,000 settlement payment would be deposited to the Consumer Protection Trust Fund, an established consumer protection trust fund administered by the California District Attorneys Association.

#### **Conclusions of Law**

1. The Commission has recognized that fines and penalties levied pursuant to certain sections of the Public Utilities Code must be deposited in the General Fund.

2. Ratepayer refunds levied pursuant to PU Code § 453.5 must be disbursed to ratepayers or, through escheat, to the General Fund.

3. The settlement agreement here should be amended to provide that a \$45,000 payment to be made by LDDI should be deposited in the General Fund.

4. Parties should be given 10 days in which to object to this amendment of the settlement agreement, in which case this proceeding should be remanded to the administrative law judge for further proceedings.

5. If an objection to the amendment is not filed, this decision approving the Stipulation for Settlement should be effective 30 days after the date hereof.

#### **O R D E R**

##### **IT IS ORDERED that:**

1. The Joint Motion for Approval of Amendment to Settlement Agreement of the Consumer Services Division and Long Distance Direct, Inc., is granted, subject to the amendment set forth below.

2. The Stipulation for Settlement, attached hereto as Appendix A, as amended by the Amendment to Stipulation for Settlement, attached hereto as Appendix B, is approved, subject to the amendment set forth below.

3. The Stipulation for Settlement, attached hereto as Appendix A, as amended by the Amendment to Stipulation for Settlement, attached hereto as Appendix B, is amended to delete Paragraph 13 and substitute in its place the following:

"13. LDDI agrees to pay to the Commission, for deposit in the General Fund, the amount of \$45,000. The \$5,000 fee shall be paid in quarterly installments of \$3,000 per quarter beginning 90 days after the adoption of this agreement by formal Commission decision or order, and continuing thereafter until LDDI fully satisfies the balance of the full \$45,000 sum."

4. The amendment set forth in Ordering Paragraph 3 shall take effect unless either party objects to the amendment within 10 days of the date of this decision. In the event an objection is filed, this proceeding shall remain open and shall be remanded to the administrative law judge for further proceedings.

5. In the absence of objection, this order shall be effective 30 days from today, at which time this application shall be closed.

6. The Telecommunications Division is directed to place before this Commission a proposed rulemaking within six months of the effective date of this order to explore whether, and by what means, the Commission may authorize carriers to remit monies to a state-run consumer protection fund as part of a settlement of a formal or informal enforcement action.

This order is effective 30 days from today.

Dated March 26, 1998, at San Francisco, California.

P. GREGORY CONLON  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
Commissioners

I dissent.

/s/ JESSIE J. KNIGHT, JR.  
Commissioner

I dissent.

/s/ RICHARD A. BILAS  
President

## BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of )  
Long Distance Direct, Inc., for a )  
Certificate of Public Convenience )  
and Necessity for Authorization )  
as a Reseller of Interexchange )  
Telecommunications Services. )

Application 95-04-025  
(Filed April 21, 1995)

## STIPULATION FOR SETTLEMENT

This Stipulation for Settlement (settlement agreement or agreement) is entered into by and between the Consumer Services Division (CSD), a successor in this proceeding to the Safety and Enforcement Division (S&E Division), of the California Public Utilities Commission (Commission), and Long Distance Direct, Incorporated (LDDI), hereinafter referred to collectively as the "parties." The effective date of this agreement shall be the date of its approval and adoption by the Commission.

## RECITALS

A. On April 21, 1995, LDDI filed an application for a certificate of public convenience and necessity (cpcn) for authorization as a reseller of interexchange telecommunications services (A.95-04-025).

B. The former S&E Division filed a protest to that application on May 3, 1996. That protest was accepted for filing on May 15, 1996 pursuant to a ruling of the presiding Administrative Law Judge (ALJ), Richard Careaga.

C. The former S&E Division alleged that LDDI has, since February 1993, been operating, as a reseller of interexchange telecommunications services within the State of California without valid authorization as required by the laws of the State of California, including, Public Utilities Code section 1001 et seq., and the rules and regulations of this Commission, and additionally



alleged that LDDI has engaged in acts of unfair business practices in violation of the laws of the State of California, including Public Utilities Code section 2889.5, and the rules and regulations of this Commission, by misrepresenting itself to residential and business consumers and as a result, switching such consumers to its long distance service, a practice commonly known as "slamming."

D. By this settlement, LDDI does not admit or deny the allegations raised by the former S&E Division.

E. The CSD and LDDI desire to resolve on a consensual basis the issues raised in the former S&E Division's protest of LDDI's application (A.95-04-025) for authorization as a reseller of interexchange telecommunications services. The parties have agreed to compromise, settle, and adjust all claims which have been or could have been asserted in the application proceeding on the terms and conditions set forth below in this agreement.

NOW, THEREFORE, for and in consideration of the mutual terms, covenants and conditions herein contained, the parties agree as follows:

1. Within 10 business days after execution of this agreement, the parties will notice a settlement conference, and within one business day of the conclusion of the settlement conference, will file a joint motion seeking approval of this agreement by the Commission, under rule 51 (Article 13.5) of the Commission's Rules of Practice and Procedure. The parties agree to use their best efforts and to cooperate to obtain the approval of this agreement by the Commission.

2. Ex parte contacts are prohibited upon submission of this proposed agreement to the Commission.

3. Each party acknowledges that it has had the benefit and advice of legal counsel in connection with this agreement and understands the meaning of each term of this agreement and the consequences of signing this agreement.

4. Each party to this agreement represents that the person executing this agreement on its behalf has been duly authorized by that party to execute this agreement on its behalf.

5. LDDI has promised to restore each and every customer who has complained of being switched to LDDI without authorization in

addition to each and every customer who was contacted by the former S&E Division and raised allegations of being switched without authorization to that customer's former long distance carrier and has promised not to pursue payment against each and every such customer for any and all services that customer did not authorize. LDDI agrees to request in writing, of any and all collection services that it engages or engaged for collection against any such customer, that such collection services cease all attempts to collect from all such customers. LDDI agrees to make a diligent and best effort to direct all such collections agencies in writing to cause any and all credit reporting agencies to purge their records of any reference to any past or present outstanding debt to LDDI, so that such customers' credit reports/ratings are not impacted in any way for nonpayment of any rates, charges, fees, etc., to LDDI, or any agent of LDDI. LDDI agrees to provide the CSD, within 90 days after the date upon which the Commission approves this agreement by formal decision or order, with a report detailing its compliance with the requirements contained in Paragraph No. 5 herein. This report shall include the names, addresses, and telephone numbers of all customers for whom any action described in this paragraph was taken by LDDI, and/or its agents, the specific action(s) taken, and any and all correspondence from or to LDDI or its agent(s) concerning or pertaining to such actions.

6. LDDI agrees to secure valid authorization to provide long distance telecommunications service, in accord with all relevant laws, including, but not limited to, Public Utilities Code section 2889.5, to all potential California customers before switching any and all such customers to LDDI's services.

7. LDDI agrees to conduct all of its long distance telecommunications operations in California in compliance with all relevant laws, rules and regulations.

8. LDDI promises that it has already discontinued all marketing actions in California and agrees to refrain from all such activity until it has received authorization from this Commission to operate as a reseller of interexchange telecommunications services in California.

9. LDDI has provided evidence that it already has undertaken to provide a billing service to its California customers that specifically informs and notifies such customers that the services they have purchased are being provided by LDDI and that the rates, charges or fees such customers are paying for such services are compensating LDDI. LDDI agrees to cause all of its California customers to be notified and receive periodic notification, including billing information, of LDDI's identity, address, telephone number and other available means of communicating with LDDI. Nothing herein shall prohibit LDDI from notifying its California customers and/or potential customers that it is a reseller of any other company's network services; however, this information should be conveyed in a manner that will not mislead such customers and/or potential customers as to the services and/or the identity of the provider of services provided or to be provided.

10. LDDI agrees to provide notice and information to all California customers and/or potential customers, that any services such customers agree to purchase from LDDI are being marketed for, and shall be provided by, LDDI, a separate entity from a network provider. No employee, agent and/or representative of LDDI shall state or imply that they are associated, in any manner with any entity other than LDDI for purposes of a sale, lease or other transaction of telecommunications services. All employees, agents and/or representatives of LDDI, engaging in marketing, sales, advertising and/or other solicitation activities on behalf of LDDI, shall affirmatively provide to all California customers and/or potential customers that they are acting on behalf of LDDI.

11. LDDI agrees to mail a letter subject to the CSD's previous approval, to all of its current California customers within 30 business days of the execution of this agreement, notifying each California customer of LDDI's identity, address and telephone number, the type of services it is providing to each customer, the rate(s) charged for the service(s) and providing the customer with information concerning the regulatory role of the Commission, including the telephone number of a Commission staffperson designated by the CSD.

12. LDDI agrees to insure that all methods used by it, and any and all agents, employees, and representatives for marketing its services shall notify California customers and/or potential customers of the services provided or to be provided by LDDI, and shall not mislead customers and/or potential customers in any manner, as to the entity providing the services or the services provided.

13. LDDI agrees to pay to the Commission for crediting to an escrow account, a settlement amount of \$45,000, to be paid in quarterly installments of \$3000.00 per quarter beginning 90 days after the adoption of this agreement by formal Commission decision or order, and continuing on a quarterly basis thereafter until it fully satisfies the balance of the full \$45,000 sum. This amount is to be directed by the CSD Director to promote consumer education and awareness, which could include placing the funds with an appropriate trust to accomplish the intended result.

14. LDDI agrees to provide the CSD with quarterly reports beginning 90 days after the date this agreement is adopted by a formal decision or order of the Commission and continuing 12 months after the submission of the first report, of all complaints received by it, its agents and/or representatives, and all complaints of which it has knowledge and/or could readily obtain knowledge, concerning allegations of misrepresentation or unfair business practices, including allegations of "slamming," concerning LDDI, its agents, employees, and/or representatives. This report shall contain, but not be limited to, copies of all letters of complaint, and all other written or electronic contacts regarding long distance switching, billing and service complaints concerning LDDI's California customers. The CSD may, upon its discretion and upon notice to LDDI 60 days prior to the end of the first annual reporting period, require LDDI to continue to provide the above described reports, on a annual basis, for an additional 12 month period.

15. The CSD agrees to withdraw the protest of the former S&E Division to Application 95-04-025, with prejudice, contingent upon the Commission's formal approval of this agreement.

16. This agreement contains the entire agreement between the parties to this agreement, and all previous understandings, agreements, and communications prior to the date hereof, whether express or implied, oral or written, relating to the subject matter of this agreement are fully and completely extinguished and superseded by this agreement. This agreement shall not be altered, amended, modified, or otherwise changed except by a writing duly signed by all the parties hereto.

17. This agreement cannot be modified or altered in any manner unless both of the parties agree at or subsequent to the settlement conference and before submission of this agreement to the Commission for approval. The CSD and LDDI promise to file this agreement with the Commission within one business day of the close of the settlement conference in this proceeding, along with a joint motion that the former S&E Division protest be withdrawn, contingent upon the Commission's approval of this agreement. The parties agree to jointly request that the Commission grant speedy approval of this agreement and LDDI's application (A.95-04-025).

18. LDDI and CSD acknowledge and stipulate that this agreement is fair and is not the result of any fraud, duress, or undue influence exercised by either party upon the other, or by any other person or persons upon either; that the provisions herein made are adequate, reasonable, and satisfactory to each of them; that they have reviewed the applicable factual allegations and legal authorities; that they have arrived at the compromise that forms the basis of their settlement agreement after thorough bargaining and negotiation; and this settlement agreement represents a final and mutually agreeable compromise of the matters set forth in this agreement.

19. In the event LDDI transfers corporate control or all assets to another entity, all amounts owing, pursuant to the provisions of Paragraph No. 13 herein, under this agreement shall be fully paid by LDDI prior to any such transfer. The parties jointly request the Commission to retain jurisdiction of this case and over the parties personally until final performance of the settlement agreement stated herein.

20. This agreement may be executed in counterparts, each of which shall constitute and original.

21. This agreement shall be governed by the laws of the State of California and the Commission's Rules of Practice and Procedure. The parties are the only parties to this proceeding, and jointly request that the Commission waive the comment and reply period set forth in rule 51.4 of the Commission's Rules of Practice and Procedure.

22. In the event of any violation of this agreement, the CSD reserves its rights to initiate a proceeding and to seek whatever remedies that it deems necessary. Likewise, LDDI reserves all of its rights and remedies in defending against such actions. If any provision of this agreement is found by a court or administrative body to be prohibited by federal or state law or regulation, such provision shall not be enforceable and any such non-enforceability will not vitiate any other severable provision of this agreement.

Dated: 11/7/96

Long Distance Direct Incorporated

By: Michael Preston  
Michael Preston  
Vice President of LDDI

Dated: 11/7/96

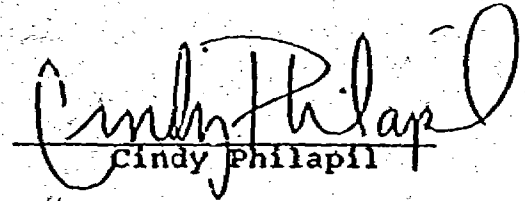
Commission Consumer Services Division

By: William R. Schulte  
William R. Schulte, Director  
Consumer Services Division 11/8/96

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document entitled "JOINT MOTION FOR APPROVAL OF SETTLEMENT AGREEMENT, DISMISSAL OF PROTEST, AND ISSUANCE OF CPCN; STIPULATION FOR SETTLEMENT" upon all known parties of record in this proceeding, by mailing by first-class a copy thereof properly addressed to each party.

Dated at San Francisco, California, this 10th day of December, 1996.

  
Cindy Philapil

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Long Distance Direct, Inc., for a Certificate of Public Convenience and Necessity for Authorization as a Reseller of Interexchange Telecommunications Services.

Application 95-04-025  
(Filed April 21, 1995)

**AMENDMENT TO STIPULATION FOR SETTLEMENT**

This Amendment to Stipulation for Settlement (settlement agreement amendment) is entered into by and between the Consumer Services Division (CSD), a successor in this proceeding to the Safety and Enforcement Division (S&E Division), of the California Public Utilities Commission, and Long Distance Direct, Incorporated (LDDI), hereinafter referred to collectively as the "parties." The effective date of this settlement agreement amendment shall be the date of its approval and adoption by the Commission.

**RECITALS**

A. The CSD and LDDI agreed to compromise, settle, and adjust all claims which had been or could have been asserted in the application proceeding (A. 95-04-025) contingent upon the Commission's adoption of a settlement agreement entered into by the parties on November 8, 1996 (November 1996 settlement agreement).

B. By Decision 97-04-028, the Commission in part approved the November 1996 settlement and granted a certificate of public convenience and necessity (cpcn) to LDDI, and remanded part of



C. the November 1996 settlement agreement "to the Administrative Law Judge for further development of the record on whether a sufficiently close correspondence exists between the conduct alleged, the proposed amount to be paid by applicant in settlement of the allegations, and the purposes to which the proposed amount are to be applied." (D.97-04-028, at 8, Ordering Paragraph No. 19).

C. A Prehearing Conference is scheduled for July 29, 1997 in this proceeding.

D. The CSD and LDDI desire to resolve those issues which could be raised on remand before an Administrative Law Judge. The parties agree to an amendment to the settlement agreement in order to more expeditiously utilize Commission resources.

NOW, THEREFORE, for and in consideration of the mutual terms, covenants and conditions contained in the November 1996 agreement and contained herein, the parties agree to amend Paragraph No. 13 of the Stipulation For Settlement as follows:

13. In lieu of LDDI's agreement of November 8, 1996, to pay to the Commission for crediting to an escrow account an amount to be directed by the CSD Director to promote consumer education and awareness, which could have included placing funds with an appropriate trust to accomplish the intended result, LDDI agrees to instead pay to the Consumer Protection Trust Fund, created by the case entitled *The People of the State of California v. ITT Consumer Financial Corporation, et al.* (Alameda County Superior Court), Superior Court Civil No. 65038-0 (September 21, 1989), a settlement fee of \$45,000, to be used in accordance with the provisions of that trust fund; to wit, to enhance the investigation, prosecution and enforcement of consumer protection actions in California. The 45,000 fee shall be paid in quarterly installments of \$3,000 per quarter beginning 90 days

after the adoption of this agreement by formal Commission decision or order, and continuing on a quarterly basis thereafter until LDDI fully satisfies the balance of the full \$45,000 sum.

The parties further agree that, with respect to Paragraph No. 19 of the November 1996 agreement, that in the event LDDI transfers corporate control of all assets to another entity, all amounts owing, pursuant to the provisions of Paragraph No. 13 of the November 1996 Stipulation For Settlement as now amended by this document shall be fully paid by LDDI prior to any such transfer. The parties jointly request the Commission to retain jurisdiction of this case and over the parties personally until final performance of the settlement agreement as amended.

Dated: 7/18/97

Long Distance Direct Incorporated

By: Michael Preston  
Michael Preston  
Vice President of LDDI

Dated: August 11, 1997

Commission Consumer Services Division

By: William R. Schulte  
William R. Schulte, Director  
Consumer Services Division

(END OF APPENDIX B)

A.95-04-025

D.98-03-071

**Commissioners Jessie J. Knight, Jr. and Richard A. Bilas, Dissenting in Part:**

The Commission has missed a great opportunity to set an important consumer protection policy today that would benefit all consumers in this state. While we whole-heartedly support the approval of the settlement agreement in today's decision, we do not agree with the majority opinion's reasoning regarding the \$45,000 settlement amount and the requirement that it escheat to the state.

The Commission's decision requires that a \$45,000 settlement amount, which the respondent has agreed to pay into a consumer protection fund for the benefit of consumers, must instead escheat to the state. The majority questioned the legality of the fund under our rate refund and penalty statutes, and viewed its use as contrary to the Commission's conflict of interest principles. The decision concludes that payment into the consumer protection fund is not an appropriate outcome. We believe that the original proposal, as put forth by the administrative law judge in the proposed decision, to transmit the funds into the Consumer Protection Trust Fund, administered by the California District Attorneys Association (CDAA), is both ethically and legally permissible. The said fund is not administered by this Commission, nor can this Commission receive disbursements from it. Instead, the CDAA utilizes the fund for consumer-oriented purposes on a state-wide level.

The settlement agreement resolves an enforcement action against the respondent for allegations of the egregious business practice of "slamming", an inherently fraudulent activity. The established fund is meant to fight consumer fraud. As such, it is an appropriate vehicle for enforcing our anti-slamming policy. The Consumer Services Division, the enforcement arm of this Commission, does not have a vested self interest in prosecuting slammers, just to have money paid to a fund that benefits other agencies of the state without its participation. If the majority argues that this provides our special agents with a conflict of interest, having the payment escheat to the state is arguably more of a conflict. Indeed, one could argue that as agents of the state, it would seem the conflict is greater when funds escheat to our ultimate employer and the source of our enforcement power. Be that as it may in regard to this debate, a more fitting argument is that the payments are funneled into the coffers of a third party, over which the Commission has no control under either option.

The payment to the fund is legally permissible on several bases. We do not find the payment to be a Public Utilities (PU) Code §453.5 rate refund, as defined in Assembly v. Public Utilities Commission, 12 Cal. 4<sup>th</sup> 87 (1995), which is statutorily required to go to ratepayers or escheat to the state. Were the settlement agreement to provide for refund checks to ratepayers who were slammed, that would be such a rate refund. Unclaimed monies under such a provision appropriately would escheat to the state.

The payment is both proper under our broad grant of jurisdictional powers under PU Code section 701, as well as our statutory penalty scheme. Under our statutes, the payment could constitute a permissible penalty, which is within the power of the enforcement authority of the Commission. Our penalties are cumulative in nature (PU Code section 2105.) Among the penalties we may assess is a PU Code section 2107 residuary penalty<sup>1</sup>. As the Supreme Court has recognized, not all of our penalty statutes contain language requiring an escheat to the state (*Assembly, Supra* at 103 n. 10). Section 2107 does not contain such an escheat directive. Therefore, this payment could qualify as a penalty thereunder and need not escheat to the state.

Our broad jurisdictional powers under PU Code section 701<sup>2</sup> also provide a basis for this payment. These broad powers permit us to redress wrongs for which there is no specific remedy, as long as there is no conflict with the Public Utilities Code or legislative directives (*Assembly, Supra* at 103.) Here our use of such power does not conflict with express statutory or legislative mandates. Thus, we may exercise this section 701 power.

In this settlement, the payment to the fund is not in conflict with our penalty statutes requiring an escheat to the state. Since the payment comports with our statutory scheme, authorizing the payment under our broad grant of jurisdictional powers in section 701 is permissible. Therefore, the Commission may also approve this payment simply under section 701.

Lastly, there is no reason to extend this policymaking process by establishing yet another rulemaking to examine at length whether conflicts exist or whether statutes require the monies to escheat. The Commission was in a position today to act to set policy to benefit this state's consumers. There were adequate facts before us so to do. The payment into the fund is fair, appropriate and correct. Therefore, we dissent in part from the decision's requirement the funds escheat to the state.

Dated March 26, 1998 in San Francisco, California.

/s/ Jessie J. Knight, Jr.  
Jessie J. Knight, Jr.  
Commissioner

/s/ Richard A. Bilas  
Richard A. Bilas  
Commissioner

---

<sup>1</sup> §2107. Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than twenty thousand dollars (\$20,000) for each offense. (Amended by Stats. 1993, Ch. 222, Sec. 1. Effective January 1, 1994.)

<sup>2</sup> §701. 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. (Enacted by Stats. 1951, Ch. 764.)

A.95-04-025

D.98-03-071

**Commissioners Jessie J. Knight, Jr. and Richard A. Bilas, Dissenting in Part:**

The Commission has missed a great opportunity to set an important consumer protection policy today that would benefit all consumers in this state. While we whole-heartedly support the approval of the settlement agreement in today's decision, we do not agree with the majority opinion's reasoning regarding the \$45,000 settlement amount and the requirement that it escheat to the state.

The Commission's decision requires that a \$45,000 settlement amount, which the respondent has agreed to pay into a consumer protection fund for the benefit of consumers, must instead escheat to the state. The majority questioned the legality of the fund under our rate refund and penalty statutes, and viewed its use as contrary to the Commission's conflict of interest principles. The decision concludes that payment into the consumer protection fund is not an appropriate outcome. We believe that the original proposal, as put forth by the administrative law judge in the proposed decision, to transmit the funds into the Consumer Protection Trust Fund, administered by the California District Attorneys Association (CDA), is both ethically and legally permissible. The said fund is not administered by this Commission, nor can this Commission receive disbursements from it. Instead, the CDA utilizes the fund for consumer-oriented purposes on a state-wide level.

The settlement agreement resolves an enforcement action against the respondent for allegations of the egregious business practice of "slamming", an inherently fraudulent activity. The established fund is meant to fight consumer fraud. As such, it is an appropriate vehicle for enforcing our anti-slamming policy. The Consumer Services Division, the enforcement arm of this Commission, does not have a vested self interest in prosecuting slammers, just to have money paid to a fund that benefits other agencies of the state without its participation. If the majority argues that this provides our special agents with a conflict of interest, having the payment escheat to the state is arguably more of a conflict. Indeed, one could argue that as agents of the state, it would seem the conflict is greater when funds escheat to our ultimate employer and the source of our enforcement power. Be that as it may in regard to this debate, a more fitting argument is that the payments are funneled into the coffers of a third party, over which the Commission has no control under either option.

The payment to the fund is legally permissible on several bases. We do not find the payment to be a Public Utilities (PU) Code §453.5 rate refund, as defined in Assembly v. Public Utilities Commission, 12 Cal. 4<sup>th</sup> 87 (1995), which is statutorily required to go to ratepayers or escheat to the state. Were the settlement agreement to provide for refund checks to ratepayers who were slammed, that would be such a rate refund. Unclaimed monies under such a provision appropriately would escheat to the state.

The payment is both proper under our broad grant of jurisdictional powers under PU Code section 701, as well as our statutory penalty scheme. Under our statutes, the payment could constitute a permissible penalty, which is within the power of the enforcement authority of the Commission. Our penalties are cumulative in nature (PU Code section 2105.) Among the penalties we may assess is a PU Code section 2107 residuary penalty<sup>1</sup>. As the Supreme Court has recognized, not all of our penalty statutes contain language requiring an escheat to the state (Assembly, Supra at 103 n. 10). Section 2107 does not contain such an escheat directive. Therefore, this payment could qualify as a penalty thereunder and need not escheat to the state.

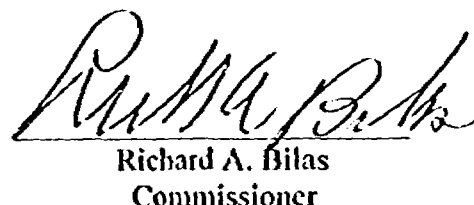
Our broad jurisdictional powers under PU Code section 701<sup>2</sup> also provide a basis for this payment. These broad powers permit us to redress wrongs for which there is no specific remedy, as long as there is no conflict with the Public Utilities Code or legislative directives (Assembly, Supra at 103.) Here our use of such power does not conflict with express statutory or legislative mandates. Thus, we may exercise this section 701 power.

In this settlement, the payment to the fund is not in conflict with our penalty statutes requiring an escheat to the state. Since the payment comports with our statutory scheme, authorizing the payment under our broad grant of jurisdictional powers in section 701 is permissible. Therefore, the Commission may also approve this payment simply under section 701.

Lastly, there is no reason to extend this policymaking process by establishing yet another rulemaking to examine at length whether conflicts exist or whether statutes require the monies to escheat. The Commission was in a position today to act to set policy to benefit this state's consumers. There were adequate facts before us so to do. The payment into the fund is fair, appropriate and correct. Therefore, we dissent in part from the decision's requirement the funds escheat to the state.

Dated March 26, 1998 in San Francisco, California.

  
Jessie J. Knight, Jr.  
Commissioner

  
Richard A. Bilas  
Commissioner

<sup>1</sup> §2107. Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than twenty thousand dollars (\$20,000) for each offense. (Amended by Stats. 1993, Ch. 222, Sec. 1. Effective January 1, 1994.)

<sup>2</sup> §701. 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. (Enacted by Stats. 1951, Ch. 764.)