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Decision 00-06-037 June 8, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Coleman Enterprises, Inc. ("Coleman") U-5891-C, doing business as Local Long Distance; Daniel Coleman, an individual, President, Chief Executive Officer and Director of Coleman; and QAI, Inc. U-5606-C, to determine whether they have violated the laws, rules, and regulations governing the manner in which California consumers are switched from one long distance carrier to another.	Investigation 99-12-001 (Filed December 2, 1999)

INTERIM DECISION DENYING MOTION OF QAI, INC. TO BE DISMISSED AS A RESPONDENT

Summary

In this decision, we address the motion of QAI, Inc. (QAI) to be dismissed as a respondent from this proceeding. In its motion, QAI – which is a wholesaler of long distance telecommunications services -- vigorously attacks the theory of "vicarious liability" under which the Order Instituting Investigation (OII) suggests that QAI should be held jointly and severally liable for acts of "slamming" and "cramming"[1] committed by Coleman Enterprises, Inc. (CEI),

[1] "Slamming" is usually defined as a carrier's changing of a consumer's intraLATA toll or long distance service without the customer's permission. "Cramming" refers to the imposition of charges on the consumer's bill that the consumer has not authorized.

which is QAI's customer and also a respondent in this proceeding. (OII, pp. 10 and 13.)

QAI argues that under California law, there are only two theories pursuant to which it could be held liable for the misdeeds of CEI, and that based on the allegations in the OII and supporting declarations, neither theory can be applied here. First, QAI argues that it cannot be considered the "alter ego" of CEI, because there is no overlap of ownership, management, or control between QAI and CEI. Second, QAI argues that it cannot be held liable on the theory that CEI was its agent at the time of the alleged wrongful acts, because the evidence shows that QAI did not exercise the degree of control over CEI's sales activities that agency law requires.

The Commission's Consumer Services Division (CSD) opposes the motion to dismiss. CSD argues that under the applicable law, the Commission was only required to have good cause to name QAI as a respondent, not conclusive proof of wrongdoing, and that this test was amply satisfied here. Although CSD appears to concede that proof to support "alter ego" liability is lacking, CSD argues that the evidence about the compensation arrangements between QAI and CEI is sufficient to raise a triable issue on whether a principal-agent relationship existed between the two companies at the time in question. CSD also argues that the evidence in staff's declarations suggests that QAI and CEI may have been engaged in a "joint venture," and that under California law, one joint venturer can be held liable for the torts of the other.

For the reasons set forth below, we agree with CSD that the OII properly named QAI as a respondent, because good cause for doing so was shown. The documentary evidence submitted by CSD raises enough questions about the precise nature of the QAI-CEI relationship to require a hearing. Under Commission precedent, any party claiming that it has been improperly named in

an investigation bears a heavy burden of proof. Because a hearing is necessary to determine whether QAI should be held liable for any of unlawful acts alleged in the OII, QAI has not met that burden, and its motion for dismissal must therefore be denied.

The Allegations in the OII

As noted above, the OII essentially alleges that CEI has "slammed" and "crammed" consumers, in violation of Pub. Util. Code § 2889.5, and that QAI has been directly involved in the schemes by which CEI did so. The OII gives the following summary of how CEI slammed consumers:

> "Staff's investigation reveals that a significant number of consumers alleged that they had received a marketing call from someone offering to consolidate local and long distance charges on the subscribers' local telephone bill. Consumers agreeing to consolidated billing had their service switched to Coleman [*i.e.*, CEI], although many consumers state that they were assured by the solicitor that their long distance telephone service would not be changed. Some consumers allege that Coleman's sales representatives deceptively misrepresented themselves to be employees of, or [in] some other way associated with[,] Pacific Bell or some other telephone companies and that Coleman switched their services after offering consolidated billing or PIC freeze protection to prevent unauthorized service switches, or after seeking information to verify or update the consumers' LEC records. Staff also alleges that many consumers state that they had no contact with Coleman prior to their service being switched to Coleman and that Coleman's domestic rate of 25 cents a minute was three to five time[s] higher than the rate charged by the consumers' carrier of choice." (OII, p. 5.)

After summarizing the contractual relationships between CEI and QAI, the OII gave the following reasons why it was appropriate to include QAI as a respondent in the proceeding:

> "Staff describes an *intricate relationship* between Coleman and QAI. Staff alleges QAI ultimately has control of the customers' service and determines what services customers can receive. QAI provides for the billing and third-party verification of the customers. Coleman has no rights to change the underlying service provided to these customers or to change the rates or services provided. Moreover, the financial arrangements described by CSD shows QAI with control over the revenues generated from these customers. Therefore, there is good cause to believe QAI is involved in the provision of telephone services under the Coleman name and that Coleman and QAI should be jointly and severally liable to consumers should we find violations have occurred and reparations are necessary and fines or other sanctions are imposed." (OII, p. 9; emphasis supplied.)

QAI's Motion To Dismiss

In the motion to dismiss that it filed on January 19, 2000 (and in its February 10, 2000 reply), QAI vigorously argues that it has had an arms' length rather than an "intricate" relationship with CEI, and that under California law this relationship cannot give rise to liability for CEI's wrongful acts.

QAI concedes that its relationship with CEI has changed over time. While QAI acknowledges that CEI is *now* functioning as its agent – and that a principal can be held liable for the misdeeds of its agent -- QAI strenuously argues that at the time of the wrongdoing alleged in the OII, CEI was acting as an independent reseller of the long distance service that QAI provides on a wholesale basis. QAI describes the evolution of its relationship with CEI as follows:

> "... QAI sold its own internal marketing business to CEI in an arms' length transaction. At first, QAI employed CEI as a telemarketer to sell QAI's products under QAI's certificates of public convenience and necessity and QAI's retail tariffs. Later, their relationship changed when CEI contracted to purchase QAI's products at the wholesale level and [resell] those products under CEI's own certificates and tariffs. Later still, due to the high number of customer complaints against CEI, QAI refused to continue to provision customers that CEI served under its own certificates and tariffs. Subsequently, QAI and CEI amended their contract so that CEI would only be authorized to [sell] QAI's products under QAI's certificates and tariffs. Significantly, all the alleged misconduct by CEI took place during the time that CEI was reselling competing wholesale products . . . on its own behalf and under its own certificates and tariffs." (QAI Reply, pp. 8-9.)

QAI argues that the contractual and payment arrangements between itself, CEI and various third-party service providers demonstrate the arms-length nature of the relationship. On this score, QAI states:

> "[U]nder the terms of a five-year agreement executed on November 4, 1997 ('Agreement'), CEI purchased wholesale long distance products from QAI, which CEI resold to consumers under CEI's own brand, i.e., Local Long Distance ('LLD') . . . As noted above, QAI was only one of at least two wholesalers that sold such products to CEI during the same period . . .
>
> "The terms of the Agreement provide that QAI may make advances to CEI, including advances needed to cover the costs of setting up new LLD customers . . . Those advances were made pursuant to a standard promissory note made by CEI and held by QAI. That promissory note required CEI to make periodic payments to QAI, or else QAI could declare a default and collect on the note. CEI never missed a payment on the note, however, so no default was ever declared.

> "Under the Agreement, QAI provides short-term financing for the products and air time purchased by CEI, in that CEI is not required to pay for them up front. Instead, CEI's customers are billed by their respective Local Exchange Carrier . . . When the customers pay their phone bills, the payments are forwarded to a third-party billing agent . . . The billing agent allocates from these revenues the amounts due QAI for the products and air time purchased by CEI and resold to the customers. The portion of the revenues due to CEI – in effect, its 'mark-up' on such products – are remitted to CEI, less repayment of any advances made by QAI to CEI under the Agreement." (QAI Motion, pp. 5-6; citations and footnotes omitted.)

QAI begins by arguing that such a relationship cannot give rise to liability under California's "alter ego" doctrine. According to QAI, "the alter ego doctrine arises when a plaintiff claims that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interest. In appropriate cases, the corporate form may be disregarded when the corporation is the mere instrumentality or business conduit of another corporation or person." (QAI Motion, p. 10.) However, QAI continues, the alter ego doctrine is disfavored, and can be invoked only when two requirements are met, neither of which can be satisfied here. Under *Mesler v. Bragg Mngmt. Co.* (1985) 39 Cal.3d 290, these two requirements are:

> "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual [or affiliated corporation] no longer exist, and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow." (39 Cal.3d at 300,

citing Automotriz etc. De California v. Resnick (1957) 47 Cal.2d 792, 796.)[2]

QAI also argues that its relationship with CEI prior to February 8, 1999[3] cannot give rise to liability under agency law, because the relationship was not that of principal and agent. Liability under agency law requires *both* that the directly liable party be an agent of the principal *and* that the agent be acting within the scope of its agency, and neither of these tests is met here, according to QAI. First, QAI argues that both it and Daniel Coleman (the president, CEO and principal shareholder of CEI) deny that an agency relationship existed prior to February 1999. Second, QAI argues that it does not exercise any control over CEI beyond that normally imposed by a wholesaler on a reseller of telecommunications services:

> "CSD recognizes that a principal-[a]gent relationship requires an element of control . . . CSD attempts to demonstrate 'control' by pointing out that: (i) QAI decided which of its products Coleman could market; (ii) QAI controlled the prices of its products, and (iii) QAI required that Coleman not market competing products to consumers who had opted for QAI products. These are not hallmarks of control over Coleman's general business operations. Rather, they are strict limits on the terms under which Coleman was permitted to market QAI's products.
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> "Placing such limits on the terms of a marketer's ability to market products does not transform the marketer into an agent." (QAI Reply, pp. 9-10.)

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[2] QAI adds that the inequity required under *Mesler* and other cases "is more than a suspicion that the guilty party may not be able to satisfy a monetary award; rather, the inequity must result from the misuse of the corporate form." (QAI Motion, pp. 10-11.)

[3] As noted later in the text, QAI acknowledges that on February 8, 1999, it amended its agreement with CEI to enter into an agency relationship.

QAI also argues that its lack of control over CEI is demonstrated by the fact that while CEI's marketing of the consolidated billing service was the subject of numerous consumer complaints, QAI's marketing of this same service led to few if any customer complaints. The only logical inference, QAI continues, is that CEI alone was responsible for the customer complaints associated with its activities:

> "[The OII's] only real effort to allege an agency relationship is the reference to the CSD's 'conclusion' that 'Coleman and QAI are jointly providing telephone service to consumers under Coleman's name.' . . . That assertion is specious. The consumers' complaints of slamming and cramming are directed against CEI. Not one complaint against QAI is identified in the OII. If QAI truly were providing telephone service 'jointly' with CEI, surely at least one slammed or crammed customer would have complained about QAI. That no one fingered QAI is all that needs to be said about the sufficiency of CSD's 'joint service' allegation." (QAI Motion, p. 12; citation omitted.)

In sum, QAI argues that it cannot be held liable under California law for the wrongdoing alleged in the OII. Thus, QAI concludes, it was error to name it as a respondent, and it should be dismissed as a party from this proceeding.

CSD's Response to the Motion to Dismiss

In its February 3 response to the motion to dismiss, CSD begins by arguing that QAI has misperceived the function of the OII, which is the document by which the Commission frequently commences an enforcement proceeding. According to CSD, the Commission is required only to have "good cause," not conclusive proof of wrongdoing, to name a party as a respondent in an OII. Since good cause has been defined as "an adequate cause that comports with the

purposes of the Public Utilities Code and with other laws,"[4] CSD contends that the test was satisfied in this case.

CSD notes that at the time the OII was issued, the Commission clearly had adequate grounds for concluding that CEI might be the *agent* of QAI, because CSD's declarations contain enough facts to suggest an agency relationship. First, CSD notes that QAI's own financial documents characterize the advances made to CEI as "agent advances." (CSD Response, p. 4.) Second, the written agreement between QAI and CEI is written as a "marketing" agreement, which is different from the arms-length "reseller" agreement that another wholesaler, RSL COM USA (RSL), had with CEI. (*Id.* at 4 and 6, n. 4.) Third, on the issue of QAI's power to control CEI, CSD states:

> "Here the issue is . . . whether QAI was the one that controlled the provision of service to consumers. QAI controlled most aspects of the provisioning of service to consumers under the CEI d/b/a. QAI controlled the verification, the rating and formatting, and the billing of the service . . . QAI controlled what products its 'Marketer' CEI could offer[,] and QAI could 'change the Products from time to time in its discretion' . . . Thus, QAI could decide, on its own, to discontinue a certain calling rate or increase a rate charged to a current customer. QAI's control over CEI and customers solicited for service by CEI even extended beyond the contract term, as the contract states that the 'Marketer' CEI 'shall not at any time during or after the term of this Agreement (i) transfer or convert or attempt to transfer or convert any Client from the use of the [QAI] products . . . or (iii) market or sell to Clients any services or products of any party other than QAI at any time that such Clients are doing business with QAI.' . . ." (*Id.* at 5.)

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[4] *Investigation of Coral Communications, Inc.*, Decision (D.) 99-04-033, *mimeo.* at ll.

CSD also argues that the evidence before the Commission when it issued the OII could support liability under a *joint venture* theory. According to CSD, the elements of joint venture liability are as follows:

> "A joint venture 'is an undertaking by two or more persons jointly to carry out a single business enterprise for profit.' (*Lasry v. Lederman* (1957) 147 Cal.App.2d 480, 485.) In a joint venture there is 'a community of interest in the enterprise; a sharing of profits and losses; and joint participation in the conduct of the business.' (*Ibid.*) While a joint venture requires the intention of the parties, such intentions can be created by an express agreement or may be inferred from the parties['] acts and conduct. (*Ibid.*) The contribution of the parties do not need to be equal as along as the actions promote the enterprise . . . Where one joint venturer, acting within the scope of the joint venture and in furtherance of its purposes, is guilty of fraud in procuring benefits that are retained by all the joint venturers, all are liable for the fraud . . ." (*Id.* at 6; some citations omitted.)

The joint venture theory may well fit the facts here, CSD continues, because both QAI and CEI were in the business of marketing QAI's consolidated billing service, the activity that led to the alleged slamming and cramming. While the direct marketing of this service was done by CEI, QAI arranged for all of the necessary billing, rating and third-party verification. Moreover, the available evidence indicates that the third-party verifiers hired by QAI were intimately involved in misleading consumers into believing they were agreeing only to a consolidated billing service, rather than the switch of long distance carrier that actually occurred. (*Id.* at 6-8.) Based on this chain of conduct, CSD concludes:

> "If the evidence at hearings shows that QAI and CEI acted together to participate in a scheme to switch consumers' long distance telephone service by misrepresenting a service order change as a consolidated billing service and switching

> customers' long distance service without the consumers' authorization, both QAI and CEI should be liable[,] just as a joint tortfeasor is liable for acts of the other tortfeasor." (*Id.* at 9; citation omitted.)

Discussion

We agree with CSD that the critical issue in ruling on the motion to dismiss is to determine whether it was error to name QAI as a respondent in the OII. (*Investigation of Future Net, Inc.*, D.98-08-040, *mimeo.* at 4.)[5] We note that any party urging such error bears an extremely heavy burden, since the decision of an administrative agency to institute investigatory proceedings is ordinarily not reviewable. *See, e.g., FTC v. Standard Oil. Co. of Cal.*, 449 U.S. 232, 241 (1980) (conclusion of Federal Trade Commission that there was "reason to believe" Standard Oil had violated § 5 of the Federal Trade Commission Act, and that a complaint should issue, was not "final agency action" subject to review under the Administrative Procedure Act.) Our decisions hold that it is not error to name a party as a respondent if there is "good cause" to do so. (*Investigation of Coral Communications, Inc.*, D.99-04-033, *mimeo.* at 11.)

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[5] QAI's motion appears to characterize the issue as whether there is currently sufficient evidence to conclude that one of two legal theories --- agency or joint venture -- is applicable. We note that in ruling on this motion, we are specifically *not* predetermining issues that will be decided during any hearings that may be held in this proceeding. A decision following a hearing, "made with the benefit of facts determined in the course of administrative proceedings, is the correct vehicle" for determining whether any particular legal theory supports finding QAI responsible for wrongdoing. (*Id.* at 8.) To the extent QAI's motion attempts to determine which theories may or may not ultimately be proved correct, it is premature.

As noted above, CSD argues that the OII and supporting declarations contain enough evidence to justify naming QAI under either of two theories: (1) that CEI acted as the *agent* of QAI, and (2) that QAI and CEI were engaged in a *joint venture* to sell consolidated billing service in California. While QAI has raised doubts about whether CSD can prevail under either of these theories -- and has presented a colorable case that that its relationship with CEI was one of arms-length dealing between a wholesaler and a reseller -- enough questions remain about the nature of the QAI-CEI relationship that a hearing is necessary. Under these circumstances, it was not error to name QAI as a respondent in the OII.

QAI places heavy reliance on its 1997 "independent marketing" agreement with CEI, and argues that the terms of this agreement bespeak an arms-length relationship that precludes liability under either of CSD's theories. However, we cannot agree with QAI that the 1997 agreement (or the 1999 amendment thereto) speak for themselves.

First, QAI apparently acknowledges that since the February 1999 amendment, it has had an agency relationship with CEI:

> "According to the [contracts] and Daniel Coleman's sworn testimony, CEI did not act as agent for QAI until after all of the PIC disputes alleged in the OII[,] and after QAI stopped provisioning CEI's separate brand. In fact, CEI executed a separate addendum on February 8, 1999 for the express purpose of allowing CEI to sell QAI's product *as an agent*. This separate written agreement would have been wholly

> unnecessary had an agency relationship already existed." (QAI Response, pp. 3-4; emphasis in original.)[6]

However, the November 1997 agreement expressly states that it creates neither an agency nor a joint-venture relationship between QAI and CEI,[7] and the 1999 amendment does not purport to change this.[8] In view of QAI's admission here that its relationship with CEI since February of 1999 has been that of principal and agent, we conclude that the labels given to the QAI-CEI relationship in the written contracts cannot be considered determinative.

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[6] QAI makes the same point elsewhere in its February 10 reply. For example, in summarizing what CSD's declarations purportedly show, QAI states on page 6 of its reply:

> "CEI entered into a *separate addendum agreement*, dated February 8, 1999, with QAI at the point CEI *stopped* acting as an independent long-distance reseller, and started acting as a marketing 'agent' for QAI's brand of long-distance service." (Emphasis in original.)

[7] The 1997 agreement is included as pages 15-22 of Exhibit G to the Declaration of CSD Investigator Dao Phan. Paragraph 6(a) of the 1997 agreement provides in pertinent part:

> "**Relationship of Parties.** In rendering service pursuant to this Agreement, Marketer [*i.e.*, CEI] is acting as an independent contractor and not as an employee or *agent* of QAI. As an independent contractor, Marketer shall have no authority, express or implied, to commit or obligate QAI in any manner whatsoever, except as specifically authorized from time to time in writing by an authorized representative of QAI, which authorization may be general or specific. Nothing contained in this Agreement shall be construed or applied to create a partnership or *joint venture*, or an employer/employee or *master/servant* relationship." (Ex. G, p. 19; emphasis supplied.)

[8] The February 8, 1999 addendum (which appears on page 23 of Exhibit G to the Dao Phan declaration) provides that QAI grants to CEI "the non-transferrable, non-exclusive right to market Products . . . in accordance with QAI's certifications with applicable PUCs under the brand name 'Long Distance Billing'." In consideration of this, CEI agrees to pay QAI a "regulatory compliance fee" of 1.5% of retail billings. However, the February 8 addendum states that other than these changes, the November 4, 1997 agreement "shall remain in effect as written."

While the evidence cited by CSD in support of its agency theory is not conclusive, it is sufficient to pass the "good cause" test. First, we agree with CSD that without a hearing, we cannot decide whether the contractual restrictions imposed on CEI in the marketing of QAI's wholesale products are limitations that wholesalers ordinarily impose on telecommunications resellers (as QAI contends), or are more indicative of the control that a principal would exercise over its agent.

Second, as CSD has pointed out, the advances paid by QAI to CEI are characterized in financial documents produced during the investigation as "agent advances." (CSD Response, p. 4.) While QAI argues that it is "absurd" to infer an agency relationship from this, it admits that there is a similarity of language between the 1997 agreement and the 1999 amendment,[9] the latter of which concededly changed QAI's relationship with CEI into one of principal and agent. Under these circumstances, we conclude that a hearing is necessary to sort out the precise nature of the QAI-CEI relationship during the time the alleged slamming and cramming occurred, so it was not error to name QAI as a respondent under an agency theory.[10]

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[9] QAI's reply states:

> "Although some of the language in the CEI-QAI agreements is similar and QAI used similar labels to keep track of amounts owed to CEI under those contracts, that does not transform the relationship between QAI and CEI during the period when CEI resold QAI's products under its own certificates and tariffs, the period when CEI allegedly engaged in slamming and cramming, into a principal-agency relationship. QAI and CEI had different relationships over different times, with their financial arrangements being given separate accounting treatment under two separate promissory notes." (QAI Reply, p. 9; footnote omitted.)

[10] In its rebuttal of CSD's agency theory, QAI suggests that CEI and CSD may have been manufacturing evidence in this case. QAI's February 10 reply states:

Footnote continued on next page

With respect to the joint venture theory, the Achilles' Heel in QAI's argument is third-party verification. Although QAI strenuously argues that its relationship with CEI prior to February 1999 was that of wholesaler and

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> "[F]ar more troubling is the perceived possibility that CSD, together with CEI, may have been involved in manufacturing evidence. Subsequent to CEI entering into settlement negotiations with CSD which called for CEI to cease doing business in California, CEI 'refiled' its initial tariff request indicating that it had been doing business under QAI's tariff and sought to continue to do business thereunder. (QAI was never notified of this filing, and its existence was concealed from QAI to prevent QAI from previously objecting and asserting its rights.)" (QAI Reply, p. 7.)

On February 18, 2000, CEI filed a motion seeking leave to respond to this allegation. In its response (which is attached to the motion), CEI argues that the "manufactured" tariff was in fact filed for the purpose of minimizing CEI's exposure for violation of the Commission's detariffing rules, that QAI had been informed as early as September 20, 1999 that CEI was considering such a filing, and that the suggestion of evidence manufacturing appears to be the result of miscommunication among QAI counsel. CEI states that QAI personnel assisted CEI in the tariff's preparation by sending a copy of the QAI tariff to David Huard, one of CEI's counsel. CEI states that it filed an advice letter containing a draft tariff (closely modeled on QAI's) on October 20, 1999, and subsequently revised it at the request of the Telecommunications Division. According to CEI, the final version of the tariff was filed on December 9, 1999, and notice of the filing appeared in the Commission's Daily Calendar on December 20, 1999.

Although we do not need not to pass on the merits of QAI's allegations for purposes of deciding the motion to dismiss, we note that the explanation of the tariff "refiling" set forth in CEI's response (which we will accept for filing) is plausible. Page 10 of the OII described CEI's continuing violation of the detariffing rules as "serious," and filing a tariff in CEI's own name appeared to be a logical way of bringing an end to CEI's exposure on account of this violation. Moreover, QAI has not sought to challenge the chronology of events set forth in CEI's February 18 response. Under these circumstances, it is appropriate to treat QAI's allegation of evidence manufacturing – which is normally a very serious charge -- as unfortunate rhetorical excess.

reseller,[11] and that the joint venture theory makes no sense as a business matter,[12] QAI does not deny that it was responsible for providing the third-party verification services used by CEI.

This is a critical concession, because the OII clearly alleges that the third-party verification companies used by CEI misled consumers about the nature of the services being sold by CEI. After pointing out that "QAI provides for the billing and third-party verification of the [CEI] customers," the OII states:

> "Staff informs us that in many instances it does not believe that service order switches were properly verified . . . [C]onsumers allege that they thought they were talking to their local exchange carrier and/or were only authorizing some type of consolidated billing arrangement. In addition, it appears that customers were never informed of the fees associated with the

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[11] In its response, CSD does not concede that the QAI-CEI relationship during this period was that of wholesaler and reseller. CSD notes that the 1997 QAI-CEI contract is styled an "independent marketing agreement" that provided for agent advances, while CEI's contract with RSL -- its other wholesale provider -- was a true reseller agreement that, among other things, "is entitled 'Resale Services Agreement', identifies CEI by name rather than as a Marketer, specifically say[s] RSL is providing service to CEI for resale, and contains the per minute rates paid by CEI for the service purchased for resale." (CSD Response, p. 6, n. 4.)

[12] QAI's Reply to CSD states:

> ". . . CSD's joint venture theory makes no sense. CSD offers no explanation for why QAI would sell off its marketing arm only to turn around and enter into a joint venture with the purchaser. Nor does CSD explain why the supposed 'single business enterprise' would offer products that competed with QAI's. If we are to accept CSD's 'joint venture' theory, then *any* two companies that had a wholesaler-retailer relationship could be held jointly and severally liable for each other's acts as joint tortfeasors. Fortunately for the world of commerce, the 'joint venturers' doctrine is not nearly as broad as CSD would have the Commission believe." (QAI Reply at 12.)

service order switches, which is a separate violation of P.U. Code § 2889.5." (OII, p. 9.)

One of the bases for this allegation is the declaration of CSD investigator Dao Phan, which quotes from several of the verification tapes provided by CEI during staff's investigation. These tapes provide evidence that at the very least, a significant number of customers appear to have been misled by the third-party verifiers as to the nature of the services they would be purchasing from CEI.[13]

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[13] The verification tape provided for Homework Data Systems, a consumer that complained about being slammed by CEI, illustrates how some consumers were misled during the verification process. CEI switched the service of Homework Data Systems even though Joan Orr of that firm made it clear that she did not want to switch long distance providers. The tape includes the following colloquy between the verification representative (VR) and Ms. Orr (JO):

> "VR. Once again I have your number as 707-995-9126 with additionals of 9623 and a residential line of [pause] one moment, please, 995-1628. Total of 3 lines. Your new long distance service starts in 5-10 days, provided by Local Long Distance, which is independent of your local telephone company. All long distance charges will be included in your local telephone [bill.]
>
> JO. *Wait, wait a minute. As far as I know, nothing is changing.*
>
> VR. Okay, ma'am, you'll receive one itemized bill from your local provider with Local Long Distance long distance charges consolidated on the back, okay.
>
> JO. Fine.
>
> VR. O.K., ma'am, and that's for all calls made in the United States and Canada. And that will all be on your local telephone bill with a flat rate of 25 cents a minute for long distance calls made in the United States and Canada only. International rates will vary. That's all the information I need. If you have no questions, I'd like to thank you for your time and you have a wonderful day.
>
> JO. *Okay, as long as nothing changes, we're fine.*

Footnote continued on next page

QAI does not appear to be denying that the scripts used by the verification companies were misleading to some consumers. Indeed, QAI appears to limit its argument on this score to the contention that if CSD has evidence of QAI's involvement in improper verification activity, CSD should pursue this evidence in a separate OII directed solely against QAI. (QAI Reply, pp. 12-13.)

We conclude that QAI has failed to refute or explain away the key evidence that supports the joint venture theory; *viz.*, QAI's role in providing CEI with verification services that are alleged to have involved fraud, and QAI's obvious interest in ensuring the continued viability of CEI (which was heavily indebted to it). In view of the fact that QAI provided the verification services that are alleged to have been an integral part of CEI's slamming and cramming, we cannot say as a matter of law that QAI could not be held liable as a joint venturer for the wrongdoing of CEI. This being the case, it was not error to name QAI as a respondent in the OII, and QAI's motion to dismiss must be denied.

Comments on Draft Decision

On April 21, 2000, the draft decision of the assigned Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. No comments were submitted regarding the draft decision.

VR. Ma'am, you'll just receive one itemized bill from your local provider with Local Long Distance long distance charges consolidated on the back like I explained.

JO. Okay." (Dao Phan Declaration, p. 52; emphasis supplied.)

Findings of Fact

1. The OII alleges that CEI has engaged in slamming and cramming of consumers, that QAI is involved in the provision of telephone services under CEI's name, and that CEI and QAI may therefore be jointly and severally liable for the violations of California law and Commission orders alleged in the OII.

2. On November 4, 1997, QAI and CEI entered into a contract denominated an "Independent Marketing Agreement," which is included as an exhibit to the declaration of CSD investigator Dao Phan.

3. On February 8, 1999, QAI and CEI entered into an amendment to the November 4, 1997 agreement, which is also included as an exhibit to the declaration of CSD investigator Dao Phan.

4. The advances paid by QAI to CEI pursuant to the November 1997 Independent Marketing Agreement are described as "agent advances" in some of the financial statements provided during CSD's investigation.

5. Under both the Independent Marketing Agreement and the February 8, 1999 amendment thereto, QAI was responsible for providing and did provide the third-party verification services used by CEI.

6. The OII alleges that the third-party verification used by CEI was misleading to some consumers who had their service switched.

Conclusions of Law

1. In order to be dismissed from this investigation, QAI must demonstrate that the Commission lacked good cause to name it as a respondent in the OII.

2. At this point in the investigation, before any hearings have been held, a determination about whether any particular theory does or does not support a

finding of wrongdoing by QAI is premature. Instead, QAI's motion should be decided on the basis of the good cause standard.

3. The various disclaimers contained in the November 4, 1997 Independent Marketing Agreement, and the February 8, 1999 amendment thereto, are not conclusive on the issues of whether QAI and CEI had a principal-and-agent relationship, or whether QAI and CEI had entered into a joint venture to sell telecommunications services (such as a consolidated billing service) in California.

4. In determining whether an agency relationship exists, an important factor is the extent of the alleged principal's power to control the alleged agent's manner and means of accomplishing the desired result.

5. Virtually all of the complaints about CEI's marketing activities relate to actions that occurred prior to February 8, 1999.

6. QAI admits that since the February 8, 1999 amendment to the Independent Marketing Agreement, its relationship with CEI has been that of principal and agent.

7. There is a factual dispute between QAI and CSD about whether, prior to February 8, 1999, the QAI-CEI relationship was one of principal and agent.

8. A hearing is necessary to determine whether QAI and CEI had a principal-and-agent relationship prior to February 8, 1999.

9. In determining whether or not a joint venture exists, an important factor is whether two or more persons have acted jointly to carry out a single business enterprise for profit. Proof of such intent may be based upon an express agreement or upon the parties' conduct. Where a joint venture is shown, and one of the joint venturers engages in tortious conduct while acting in furtherance of the joint venture, the other joint venturer can be held liable for the tortious acts.

10. There is a factual dispute between QAI and CSD as to whether QAI and CEI may have been engaged in a joint venture to sell telecommunications services in California.

11. A hearing is necessary to determine whether, prior to February 8, 1999, QAI and CEI were engaged in a joint venture.

12. Based on the facts set forth in the CSD declarations, the Commission had good cause to name QAI as a respondent in the OII.

13. Because a hearing is necessary to determine whether, prior to February 8, 1999, CEI was the agent of QAI, or whether CEI and QAI were engaged in a joint venture, QAI's motion to be dismissed as a respondent from this proceeding should be denied.

O R D E R

IT IS ORDERED that:

1. The January 19, 2000 motion of QAI, Inc. (QAI) to be dismissed as a respondent from this proceeding is denied.

2. The February 18, 2000 motion of Coleman Enterprises, Inc. for leave to file a response to the February 10, 2000 reply of QAI in support of its motion to be dismissed as a respondent, is granted.

This order is effective today.

Dated June 8, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners