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19

20 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

21 IN AND FOR THE COUNTY OF SAN JOAQUIN

22 PEOPLE OF THE STATE OF
23 CALIFORNIA,

24 Plaintiff,

25 v.

26 PACIFIC BELL TELEPHONE COMPANY
dba AT&T CALIFORNIA, a California
27 Corporation,

28 Defendant.

No. CV028367

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR ENTRY
OF CONSENT JUDGMENT

Hearing Date: February 15, 2006

Hearing Time: 9:00 a.m.

Department: 41

FILED
DEPT. 17 JAN 10 10
BY KATHY VALONE
DEPUTY

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 This motion seeks the Court's approval of a Consent Agreement and Stipulation for
3 Entry of Final Consent ("Consent Judgment") between the parties which would settle the
4 Complaint filed in this matter. The proposed Consent Judgment has been lodged with the Court
5 simultaneously with the filing of the Complaint.

6 The Plaintiff is the People of the State of California ("People") represented by Bill
7 Lockyer, Attorney General of the State of California ("Attorney General") and Thomas J. Orloff,
8 District Attorney for the County of Alameda; Steve Cooley, District Attorney for the County of
9 Los Angeles; Dean D. Flippo, District Attorney for the County of Monterey; Bonnie M.
10 Dumanis, District Attorney for the County of San Diego; James P. Willett, District Attorney for
11 the County of San Joaquin; David W. Paulson, District Attorney for the County of Solano; and
12 Michael J. Aguirre, City Attorney for the City of San Diego (hereinafter collectively referred to
13 as the "Local Prosecutors"). The settlement is the result of good-faith, arms-length negotiations
14 between the People of the State of California and Pacific Bell Telephone Company dba AT&T
15 California ("AT&T"). The Court is requested to determine that the settlement is fair and in the
16 public interest.

17 **INTRODUCTION**

18 The case against AT&T is based on investigations that originated in Alameda and San
19 Joaquin counties. Based on the violations found in those counties, the People expanded their
20 investigation into AT&T's practices throughout the State of California related to facilities with
21 underground tank systems and have alleged the same hazardous waste, underground storage
22 tank, and hazardous material management violations against AT&T at such facilities.

23 The Consent Judgment resolves the alleged statewide violations against AT&T at the
24 facilities identified in the Complaint ("Covered Facilities"). AT&T represents that it has
25 addressed the alleged violations at the Covered Facilities and the Consent Judgment imposes a
26 permanent injunction on AT&T to comply with the applicable laws pertaining to hazardous
27 waste management, underground storage tank ownership and hazardous material management as
28 alleged in the Complaint. With regard to the monetary payments to which AT&T is obligated

1 under the Consent Judgment, it is structured so that civil penalties and costs of enforcement, a
2 total of \$15,500,000, will be distributed state-wide to prosecuting offices and local regulatory
3 agencies who either assisted in the investigation of the case against AT&T or in whose
4 jurisdiction AT&T operates a facility addressed by the Consent Judgment. An additional civil
5 penalty in the amount of \$2,500,000 is suspended and will be assessed only if AT&T engages in
6 certain prohibited conduct within a period of time commencing a year after entry of the Consent
7 Judgment. In addition, \$2,500,000 will be paid by AT&T for environmental projects for
8 environmental prosecutors, investigators and regulatory personnel which will result in a
9 potential statewide benefit to the People. Finally, AT&T is obligated to spend \$4,500,000 over
10 the next five years to enhance its environmental compliance program.

11 Although AT&T's alleged non-compliance with the applicable requirements was serious
12 and widespread throughout the State of California, the People determined that there may be
13 issues associated with proving material environmental harm or damage directly arising from the
14 alleged non-compliance. As a result, the penalties that the People agreed to in this settlement
15 are substantially lower than what the People would have sought if the People could demonstrate
16 that environmental harm directly resulted from the alleged violations.¹ In any case, the Consent
17 Judgment does not resolve, release or affect AT&T's obligations to properly address any
18 environmental harm, impact, or regulatory directives resulting from releases of petroleum-based
19 fuels and other hazardous substances from its underground tank systems.

20 In addition to monetary payments, AT&T is obligated to comply with a permanent
21 injunction prohibiting AT&T from engaging in the misconduct alleged in the Complaint related
22 to its management of underground tank systems at the Covered Facilities.

23 LEGAL BASIS FOR ENFORCEMENT ACTION

24 AT&T is civilly liable under a number of environmental protection and consumer
25 protection laws.

26 _____
27 1. As will be explained, *infra*, the settlement does not resolve AT&T's obligations to clean
28 up releases of hazardous substances, if any, from its facilities. The enforcement of such
obligations are reserved and are intended to be addressed by appropriate regulatory agencies.

1 Health and Safety Code, Division 20, Chapter 6.5 is the regulatory program pertaining to
2 the generation, handling, treatment, storage and disposal of hazardous wastes. The enforcement
3 provisions provide for injunctive relief and civil penalties of up to \$25,000 per day of violation.

4 Health & Safety Code, Division 20, Chapter 6.7 is the primary regulatory scheme
5 governing underground storage tank systems. Liability for violating Chapter 6.7 is on a strict
6 liability basis. The enforcement provisions provide for injunctive relief and civil penalties of
7 \$500 to \$5,000 per day, per non-compliant tank system.²

8 Health & Safety Code, Division 20, Chapter 6.95 is the primary regulatory scheme
9 governing hazardous material management. The enforcement provisions provide for injunctive
10 relief and civil penalties.

11 AT&T also is subject to an injunction and civil penalties pursuant to the Unfair
12 Competition Act (UCA).³ The substantive violations of Health and Safety Code, Division 20,
13 Chapters 6.5, 6.7, and 6.95 provide the basis for allegations of unfair business practices.

14 **THE PROPOSED SETTLEMENT**

15 The proposed civil settlement is embodied in the Consent Judgment. The Consent
16 Judgment is based on the alleged violations of underground tank system requirements,
17 hazardous waste laws, and hazardous material management requirements at the 531 facilities
18 which AT&T owns or operates in the State of California which have or had underground tank
19 systems, and the related unfair business practices.

20 The proposed Consent Judgment contains the following material provisions:

21 **1. Payments for Civil Penalties, Costs and Environmentally Beneficial Projects:**

22 AT&T shall be liable for the payment of TWENTY-FIVE MILLION DOLLARS
23 (\$25,000,000). Since this is an action brought by the Attorney General and one or more
24 district attorneys, the allocation of civil penalties to the respective offices and agencies is
25 sought pursuant to Government Code section 26506. The civil penalties are allocated as

26
27 2. Cal. Health & Saf. Code § 25299.

28 3. Cal. Bus. & Prof. Code §§ 17200 et seq.

1 follows:

2 a. **Civil Penalties and Credits:** SIXTEEN MILLION FIVE HUNDRED
3 THOUSAND DOLLARS (\$16,500,000) AND A CREDIT OF FOUR MILLION
4 FIVE HUNDRED THOUSAND DOLLARS (\$4,500,000). These penalties and
5 credits shall be allocated as follows:

6 i. **Initial Penalty of FOURTEEN MILLION DOLLARS (\$14,000,000):**

7 AT&T shall pay FOURTEEN MILLION DOLLARS (\$14,000,000) in
8 four equal installments.

9 A. **Distribution to Prosecuting Agencies:** Consistent with the
10 requirements of Business and Professions Code section 17206,
11 TEN MILLION DOLLARS (\$10,000,000) of the civil penalties
12 assessed in this matter will be distributed to designated
13 prosecuting agencies that were instrumental in investigating or
14 prosecuting this matter.

15 B. **Distribution to Regulatory Agencies:** Consistent with the
16 requirements of Health and Safety Code section 25299(h), FOUR
17 MILLION DOLLARS (\$4,000,000) of the civil penalties assessed
18 in this matter will be distributed to the designated local regulatory
19 agencies. Any funds distributed to an agency identified in Exhibit
20 "C" of the Consent Judgment is contingent upon that agency first
21 identifying a special account and submitting to the Payment
22 Administrator and the Plaintiff's representatives, a declaration by
23 an authorized representative of that agency that the funds
24 deposited into the special account pursuant to this Consent
25 Judgment shall be expended only to fund the activities of that
26 agency in enforcing Chapter 6.7, Division 20, Health and Safety
27 Code within the agency's jurisdiction pursuant to Chapter 6.11,
28 Division 20, Health and Safety Code. Each local agency receiving

1 civil penalties pursuant to this paragraph will be served with a
2 copy of the Consent Judgment after it is entered by the Court. In
3 the event a local agency does not submit the declaration required
4 by this paragraph within three hundred sixty-five (365) days of the
5 service of the Consent Judgment on that agency, that local
6 agency's share of the civil penalties will be distributed to the State
7 Water Pollution Cleanup and Abatement Account in the State
8 Water Quality Control Fund.

9 ii. **Suspended Penalty of TWO MILLION FIVE HUNDRED**
10 **THOUSAND DOLLARS (\$2,500,000):** A portion of the civil penalty
11 assessed in this matter in the total amount of TWO MILLION FIVE
12 HUNDRED THOUSAND DOLLARS (\$2,500,000) shall be suspended
13 provided that AT&T does not engage in any of the following acts at a
14 covered facility ("Suspended Penalty Conduct") during the period of time
15 between the three hundred sixty-fifth (365th) day and the one thousand
16 seven hundred forty-fifth (1745th) day, inclusive, following entry of the
17 Consent Judgment:

18 A. For any secondary containment testing of an underground storage
19 tank system which it performs pursuant to Cal. Code of Regs.,
20 Title 23, section 2631 or Health and Safety Code section 25284.1,
21 AT&T fails to submit the failing test results to the appropriate
22 local agency authorized, pursuant to Health and Safety Code
23 section 25283, to implement the requirements of Division 20,
24 Chapter 6.7 of the Health and Safety Code ("Local Agency")
25 within 30 days of the completion of the secondary containment
26 test;

27 B. For any underground storage tank system which fails a secondary
28 containment test, i) AT&T fails to repair such underground tank

1 system within the time period required by the underground tank
2 system permit or applicable Local Agency ordinance, but no later
3 than 120 days after test failure; or ii) if the repair of the system
4 failing the secondary containment test requires an additional
5 permit or other regulatory authorization in advance of
6 undertaking the repairs, AT&T fails to complete the repairs within
7 60 days after receipt of such permits or other required
8 authorizations; or iii) after filing an application with the Local
9 Agency to temporarily or permanently close the underground tank
10 system, AT&T fails to implement the closure in accordance with
11 the requirements of the Local Agency.

12 C. AT&T ceases operation of an underground storage tank system in
13 violation of Health and Safety Code section 25298, and Cal. Code
14 of Regs., Title 23, sections 2670(b) and 2671, as applicable.

15 AT&T will be liable for payment of the \$2,500,000 suspended penalty if
16 AT&T engages in the Suspended Penalty Conduct. The Parties have
17 agreed that the suspended penalty will not apply to conduct which may
18 otherwise constitute Suspended Penalty Conduct which occurs within the
19 first three hundred sixty-five (365) days following the entry of the
20 Consent Judgment in order to give AT&T a reasonable time in which to
21 implement environmental management measures required by the Consent
22 Judgment. Upon a finding by the Court that AT&T has engaged in
23 Suspended Penalty Conduct on a single occasion, the suspended penalty
24 of \$2,500,000 shall be assessed in its entirety and the Court shall have no
25 discretion to reduce or otherwise modify the amount of the penalty. Once
26 the suspended penalty is assessed, it can not be assessed again.

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1 iii. **Credit of FOUR MILLION FIVE HUNDRED THOUSAND**
2 **DOLLARS (\$4,500,000):**

3 As part of AT&T's efforts to enhance its compliance with environmental
4 laws applicable to its operation of facilities in the State of California,
5 AT&T has proposed to implement the California Compliance
6 Management System ("CCMS"). The CCMS is an environmental
7 management system covering environmental compliance requirements at
8 AT&T's Covered Facilities and any other facility AT&T operates in the
9 State of California which uses underground tank systems and which first
10 commences operations after entry of the Consent Judgment.

11 Commencing on August 1, 2005 and concluding at the end of February
12 15, 2011 ("CCMS Credit Period"), AT&T shall expend at least FOUR
13 MILLION FIVE HUNDRED THOUSAND DOLLARS (\$4,500,000) to
14 directly develop and directly implement the CCMS. If AT&T has not
15 incurred costs of FOUR MILLION FIVE HUNDRED THOUSAND
16 DOLLARS (\$4,500,000) to implement the CCMS during the CCMS
17 Credit Period, AT&T shall pay the difference of its actual incurred costs
18 and \$4,500,000, as an additional payment to the People.

19 b. **Reimbursement of Costs of Investigation and Enforcement:** ONE MILLION
20 FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000). AT&T shall pay the
21 total amount of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS
22 (\$1,500,000) in settlement of the People's claim for attorneys fees, costs of
23 investigation, and other costs of enforcement incurred in this matter, including
24 payment for the services of the Payment Administrator identified in Paragraph
25 5.3.

26 c. **Environmental Training Projects:** TWO MILLION, FIVE HUNDRED
27 THOUSAND DOLLARS. AT&T shall pay TWO MILLION, FIVE HUNDRED
28 THOUSAND DOLLARS (\$2,500,000) in four equal installments. The

1 \$2,500,000 will be allocated between the following projects:

- 2 i. SIX HUNDRED THOUSAND DOLLARS (\$600,000) payable to the
3 California District Attorneys Association Environmental Project for the
4 purposes of providing training consistent with the purposes of that
5 project;
- 6 ii. FOUR HUNDRED THOUSAND DOLLARS (\$400,000) payable to the
7 California District Attorneys Association Environmental Circuit
8 Prosecutor Project for the purposes of providing training consistent with
9 the purposes of that project;
- 10 iii. FIVE HUNDRED THOUSAND DOLLARS (\$500,000) payable to the
11 Environmental Protection Prosecution Fund for the purposes of providing
12 training and other activities authorized for support from that fund;
- 13 iv. FOUR HUNDRED THOUSAND DOLLARS (\$400,000) payable to the
14 California Hazardous Materials Investigators Association (CHMIA) for
15 the purpose of training. A minimum of \$200,000 of these funds shall be
16 used by CHMIA to assist the Western States Project in conducting the
17 Advanced Environmental Crimes Training Program offered in
18 conjunction with the Federal Law Enforcement Training Center and
19 California Specialized Training Institute;
- 20 v. THREE HUNDRED THOUSAND DOLLARS (\$300,000) payable to the
21 CUPA Forum for the purpose of providing scholarships for its annual
22 training conference;
- 23 vi. THREE HUNDRED THOUSAND DOLLARS (\$300,000) payable to the
24 State Water Pollution Cleanup and Abatement Account in the State Water
25 Quality Control Fund for training consistent with the purposes of that
26 account.

27 In addition, to the extent that AT&T wishes to make training available to Local
28 Agency inspectors on how to inspect for environmental issues arising at

1 telecommunications facilities, the People will assist AT&T in contacting
2 appropriate organizations representing such inspectors to facilitate such training
3 efforts.

4 **2. Permanent Injunctive Relief:**

5 Pursuant to provisions of Health and Safety Code sections 25181, 25299.01, 25516.2,
6 Business and Professions Code section 17203, and the Court's equitable powers, AT&T
7 will comply with the specified provisions of Chapter 6.5, Chapter 6.7, and Chapter 6.95
8 of Division 20 of the Health and Safety Code and related requirements. AT&T has
9 represented to the People that the problems alleged in the Complaint have been
10 completely addressed by AT&T. Therefore, the injunction which is imposed on AT&T
11 is one which generally compels compliance with applicable laws as opposed to one
12 which imposes specific and detailed conduct on a settling defendant. The injunction
13 may terminate if any party provides notice for termination but such notice will not be
14 filed earlier than sixty (60) months following entry of the Consent Judgment. The
15 Consent Judgment provides a process for continuing the injunction after such notice if
16 the Court, based on specified findings, determines that the interests of justice would not
17 be served by a termination of the injunction.

18 **3. Scope of the Settlement:**

19 The scope of the settlement provided by the Consent Judgment follows the regular
20 practice of the Attorney General's Office regarding environmental enforcement matters:

- 21 a. Settlement of all claims in the Complaint or claims which could have been
22 asserted based on the specific facts alleged in the complaint. Claims that may be
23 based on unknown facts or facts which should have been known to the People
24 but which are not asserted in the Complaint are not addressed in the Consent
25 Judgment.
- 26 b. The Consent Judgment does not settle any claims or causes of action for cleanup
27 resulting from releases of motor vehicle fuels or other hazardous substances from
28 underground tank systems. Those claims are expressly reserved and are intended

1 to be addressed by local agencies or regional water quality control boards who
2 have jurisdiction to oversee and regulate such activities.

3 **4. Penalties for Violations of the Injunction:**

4 The injunctive provisions are imposed pursuant to provisions of Health and Safety Code
5 sections 25181, 25299.01, 25516.2, Business and Professions Code section 17203, and
6 the Court's equitable powers. The Court retains jurisdiction to impose penalties on
7 AT&T for non-compliance with the injunctive provisions as provided for by statute.
8 Moreover, any violation of the injunction required by this Consent Judgment shall be
9 considered separate and in addition to any violation of any substantive standards
10 imposed by law. These requirements, which are found in other consent judgments
11 entered into by the People, are intended to discourage future non-compliance. Therefore,
12 under the enforcement terms of the Consent Judgment, should AT&T engage in
13 prohibited conduct --- such as failing to repair an underground tank system which failed
14 its secondary containment test within the appropriate time period --- such misconduct
15 would violate both the injunctive terms of the Consent Judgment and the requirements of
16 Chapter 6.7, and AT&T could be subject to penalties pursuant to this Consent Judgment
17 and pursuant to the applicable penalty provisions of Chapter 6.7 in a separate
18 enforcement action.

19 **ARGUMENT FOR ENTRY OF CONSENT JUDGMENT**

20 **I. The Terms of the Consent Judgment are Within the People's Prosecutorial**
21 **Discretion, and are Subject to Disapproval by the Court Only if the Consent**
22 **Judgment is Clearly Contrary to Public Policy or Law**

23 In determining whether a particular settlement is appropriate, the Court should afford
24 substantial deference to the judgment of the Attorney General and the Local Prosecutors. The
25 Attorney General is constitutionally designated as the "chief law officer of the state" and has the
26 constitutional duty to ensure that state law is adequately enforced. (See Cal.Const. Art. V, § 13;
27 *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 353.) Under Chapters 6.5, 6.7, and
28 6.95 of Division 20 of the Health and Safety Code and the Unfair Competition Act (Bus. & Prof.
Code § 12600 *et seq.*), the Attorney General and the Local Prosecutors sue "in the name of the

1 People of the State of California," which signifies that the action is an exercise of the sovereign
2 power. (See Gov. Code § 100.) The discretionary power of a prosecutor to investigate,
3 prosecute charges, and negotiate settlements traditionally applied in criminal proceedings has
4 been specifically held to apply to civil law enforcement actions filed by the Attorney General
5 under section 17200. (*People v. Cimarusti* (1978) 81 Cal.App.3d 314, 322-24.) As that court
6 stated, it is "the function of the executive to engage in any negotiation with the defense by which
7 a lenient disposition of the charge made is secured without trial." (*Id.*, at 323). Accordingly, the
8 determination of the Attorney General and the Local Prosecutors to settle on the terms set forth
9 in the Consent Judgment should be accorded substantial deference by the Court. As a judgment
10 of the Court, the settlement may be rejected if it is contrary to public policy or incorporates an
11 erroneous rule of law. (*California State Auto. Assn. Inter-Ins. Bureau v. Superior Court* (1990)
12 50 Cal.3d 658, 664.) Such circumstances are rare, however, and do not exist here. (See *Mary*
13 *R. v. B & R Corp.* (1983) 149 Cal.App.3d 308, 316-317 (settlement between physician and
14 patient purporting to bar state from access to information relevant to physician's fitness to
15 practice medicine contrary to public policy); *Valdez v. Taylor Auto Company* (1954) 129
16 Cal.App.2d 810, 819 (trial stipulation stating erroneous conclusion of law to follow from a
17 given factual finding not binding on court in entering judgment).)

18 The settlement in this case also is not subject to other standards of review that apply in
19 tort cases or class actions. Because the settlement does not discharge any liability for
20 contribution, the requirement of a "good faith" determination pursuant to Code of Civil
21 Procedure section 877.6 does not apply.⁴ Nor is this a class action in which individual persons
22 will lose their personal claims, which would necessitate a determination, on behalf of the absent
23 class members, that the settlement is "fair, reasonable and adequate." To the contrary, an action
24 under section 17200 and, by analogy, an action under Chapters 6.5, 6.7, and 6.95 of Division 20
25 of the Health and Safety Code, is "fundamentally a law enforcement action designed to protect

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27 4. That section applies only where the complaint alleges that the defendants are "joint
28 tortfeasors or co-obligors on a contract debt" and approval of the settlement discharges the
settling defendant from liability for contribution.

1 the public and not to benefit private parties," and therefore is not subject to the procedural
2 requirements of class actions. (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 17.)

3 **II. The Consent Judgment Obtains a Beneficial Resolution of Disputed Issues and**
4 **Avoids Prolonged Litigation**

5 Because the litigation process "is fraught with complexities, uncertainties, delays, and
6 risks of many kinds[,]" public policy in California favors settlement. (*Neary v. Regents of*
7 *University of California* (1992) 3 Cal.4th 273, 280.) In this case, the People would have to
8 demonstrate violations of the applicable requirements at each of the 531 facilities identified in
9 the Complaint. Moreover, the People would have to provide rationales for penalty assessments
10 at each of the 531 facilities. Because the People's legal and factual bases for imposing daily
11 civil penalties are disputed by AT&T, litigating this case will be time consuming, complex, and
12 may involve a significant delay in obtaining any resolution. The Consent Judgment resolves
13 these issues in favor of the People by assessing a set penalty amount, providing for
14 reimbursement of the People's costs of investigation and enforcement, providing funds for a
15 number of programs with benefits statewide, requiring AT&T to enhance its environmental
16 compliance program, and addressing injunctive responsibilities of AT&T related to compliance
17 with specific environmental statutory schemes. Moreover, the settlement retains AT&T's
18 responsibilities for addressing any hazardous substance or other contamination at its facilities
19 subject to the oversight of local regulatory agencies.

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1 CONCLUSION

2 For the foregoing reasons, the People respectfully request that the Court approve and
3 enter the Consent Judgment.

4 **RESPECTFULLY SUBMITTED:**

5 **FOR THE PLAINTIFF**

6 Dated: January 13, 2006

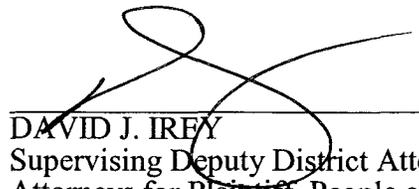
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14 Dated: January 15, 2006

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