



**FILED**

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2 897 Northrup Street, #15  
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5  
6 **BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

7  
8 Order Instituting Investigation on the  
9 Commission's own motion into the  
10 operations, practices, and conduct of  
11 Contractors Strategies Group, Inc.; Intella  
12 II, Inc.; A&M Communications; TNT  
13 Financial Services; Limo Services, Inc.;  
14 Calnev Communications, Inc.; 1<sup>st</sup> Capital  
15 Source Funding & Financial Services, Inc.  
16 and their owners to determine whether  
17 Respondents violated the laws, rules, and  
18 regulations of this State regarding the  
19 connection of Automatic Dialing-  
20 Announcing Devices to Customer-Owned  
21 Pay Telephones

Investigation 10-02-004  
(Filed February 4, 2010)

22 **RESPONDENTS' MOTION TO DISMISS COMPLAINT OF VIOLATION OF PUBLIC**  
23 **UTILITIES CODE §734**

24 Respondents move to dismiss the allegations of a violation of Public Utilities  
25 Code §734 for the following reasons:

26 **Background**

27 The Scoping Memo in this matter, issued May 24, 2010, identifies, among  
28 others, the following issues to be addressed:

- Whether Respondents Calnev Communications, Inc. and 1<sup>st</sup> Capital Source Funding & Financial Services, Inc. should be ordered to refund any dial-around

1 compensation collected by Respondents pursuant to Pub. Utilities Code §734;  
2 and,

- 3 • Whether Respondents Contractors Strategies Group, Inc., Limo Services, Inc.,  
4 Intella II, Inc., A&M Communications, and TNT Financial Services should be  
5 ordered to forfeit the dial-around compensation generated by these  
6 Respondents' payphones that is currently being held in escrow pursuant to Pub.  
7 Util. Code §734.

8 By this motion, Respondents move to dismiss these issues on the ground that Public  
9 Utilities Code §734 is not applicable in this case as a matter of law.

10

11 **Facts**

12 The Order Instituting Investigation in this matter alleges that Respondents  
13 maintained a number of payphone lines and received "Dial Around Compensation" via  
14 the use of Automatic Dialing-Announcing Devices ("ADAD") connected to the  
15 payphone lines.

16 Dial Around Compensation is generated when a payphone line is used to dial a  
17 1-800 number. Federal law mandates that a fee of \$0.494 be paid to the owner of the  
18 payphone line each time the line is used to dial a 1-800 number. Importantly, the fee is  
19 paid by the long distance carrier associated with the call. All of the money that the  
20 Commission seeks to have refunded under PUC §734 consists of Dial Around  
21 Compensation that was paid by long distance carriers.

22 All of the payphone lines operated by Respondents were private, and were not  
23 used by or offered to any portion of the public.

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1 **Legal Argument**

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3 1. **Public Utilities Code §734 Does Not Apply Because the Payphone Lines at**  
4 **Issue Were Not Available to Any Portion of the Public**

5 Public Utilities Code §734 provides as follows:

6  
7 When complaint has been made to the commission concerning any  
8 rate for any product or commodity furnished or service **performed**  
9 **by any public utility**, and the commission has found, after  
10 investigation, that the public utility has charged an unreasonable,  
11 excessive, or discriminatory amount therefor in violation of any of  
12 the provisions of this part, the commission may order that the public  
13 utility make due reparation to the complainant therefor, with interest  
14 from the date of collection if no discrimination will result from such  
15 reparation. No order for the payment of reparation upon the ground  
16 of unreasonableness shall be made by the commission in any  
17 instance wherein the rate in question has, by formal finding, been  
18 declared by the commission to be reasonable, and no assignment  
19 of a reparation claim shall be recognized by the commission except  
20 assignments by operation of law as in cases of death, insanity,  
21 bankruptcy, receivership, or order of court. (emphasis added).

22 The term "public utility" is defined by Public Utilities Code §216(a):

23 "Public utility" includes every common carrier, toll bridge  
24 corporation, pipeline corporation, gas corporation, electrical  
25 corporation, telephone corporation, telegraph corporation, water  
26 corporation, sewer system corporation, and heat corporation, where  
27 the service is performed for, or the commodity is delivered to, **the**  
28 **public or any portion thereof**. (emphasis added).

29 Accordingly, since §734 only applies to complaints of unreasonable rates  
30 charged by public utilities, §734 would only apply in this case if the telephone lines at  
31 issue were a service offered to the public or any portion thereof. It is undisputed that  
32 the payphone lines here were exclusively for private use, and were never offered for  
33 use by any member of the public. As such, the operators of the phone lines are not  
34 considered "public utilities" within the meaning of Public Utilities Code §734. See, e.g.,  
35 *People ex. Rel. Knowlton v. Orange County Farmers & Merchants Ass'n.* (1922) 56

1 Cal.App. 205 [telephone lines used only by the owners or members of a private club  
2 are not considered public utilities].

3  
4 **2. Claims Based on Payphone Lines in Use From 2002-2005 are Barred by the  
5 Applicable Statute of Limitations and Doctrine of Laches**

6 There are allegations contained in the Order Instituting Investigation relating to  
7 payphone lines operated by Respondents during the years 2002-2005. Any such  
8 claims are barred by the applicable statute of limitations and doctrine of laches.

9 The Consumer Protection and Safety Division argues that there is no statute of  
10 limitations applicable to this case, but it is incorrect. To begin with, this is an  
11 adjudicatory proceeding seeking enforcement action and has gone beyond the  
12 investigation stage. Thus, the 3-year statute of limitations on Public Utilities Code  
13 §736 would apply.

14 Additionally, the doctrine of laches applies to administrative proceedings such  
15 as this. When there is an analogous statute of limitations that has been exceeded in  
16 bringing the administrative action, the "unreasonable delay" element of laches is  
17 automatically met, and prejudice is presumed. See *Fountain Valley Regional Hospital  
18 and Medical Center v. Bonta* (1999) 75 Cal.App.4<sup>th</sup> 316, 324:

19 We observe that the elements of unreasonable delay and resulting  
20 prejudice may be "met" in two ways. First, they may be  
21 demonstrated by the evidence in the case, and the person arguing  
22 in favor of a finding of laches has the burden of proof on the laches  
23 issue. Second, the element of prejudice may be "presumed" if there  
24 exists a statute of limitations which is sufficiently analogous to the  
25 facts of the case, and the period of such statute of limitations has  
26 been exceeded by the public administrative agency in making its  
27 claim. In the second situation, the limitations period is "borrowed"  
28 from the analogous statute, and the burden of proof shifts to the  
administrative agency. To defeat a finding of laches the agency,  
here the Department, must then (1) show that the delay involved in  
the case (such as the Department's delay between issuing the  
original final reimbursement settlements and the assertion of the  
*revised* settlements) was excusable, and (2) rebut the presumption  
that such delay resulted in prejudice to the opposing party.

1 **3. Public Utilities Code §734 Does Not Apply Because the Dial Around**  
2 **Compensation Was Not Excessive, Unreasonable, or Discriminatory as a**  
3 **Matter of Law, and the Rate of Compensation Was Not Set By**  
4 **Respondents**

5 Section 734 applies when rates charged by a public utility are excessive,  
6 unreasonable, or discriminatory. As discussed above, section 734 is inapplicable in  
7 this case because Respondents' payphone lines were not a public utility. Even  
8 assuming, strictly for the sake of argument, that the payphone lines did constitute a  
9 public utility, the statute still does not apply because the rate of Dial Around  
10 Compensation received by Respondents was set by Federal law.

11 The amount of Dial Around Compensation - - \$0.494 per call - - cannot be  
12 excessive as a matter of law: this is the precise rate that is mandated by Federal law.  
13 Additionally, Respondents cannot be held liable for charging an excessive or  
14 unreasonable rate when they had no role in setting the rate. Again, the amount was  
15 determined by the Federal government, not by Respondents.

16 **4. Public Utilities Code §734 Does Not Apply Because a Refund of the Dial**  
17 **Around Compensation Would Go to the Long Distance Carriers Who Paid**  
18 **the Compensation - - All of Whom Have Already Recouped this Money**

19 Under section 734, the Commission may order that "due reparation" for  
20 excessive rates be made to the complainant. In this case, there is no such  
21 complainant to make reparation to - - the fees in question were not charged to a  
22 member of the public, but rather were paid by the long distance carriers.

23 Thus, in theory, any reparation from Respondents would go to these carriers,  
24 who paid the Dial Around Compensation fees. The problem is that, like any business,  
25 long distance carriers pass the cost of doing business on to their customers in order to  
26 continue making a profit. Like any other rising cost, Dial Around Compensation costs  
27 are passed along and ultimately paid by the customers of the long distance carriers.  
28 As a result, the carriers have already recouped what they paid long ago in Dial Around  
Compensation fees in relation to this matter.

1           The Commission, however, seeks to have the Dial Around Compensation  
2 refunded to the carriers - - which would result in a huge windfall and double-recovery  
3 for the carriers, who have already recouped these amounts, and then some.

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**CONCLUSION**

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Based on the foregoing, it is respectfully requested that the complaint and  
allegations of a violation of Public Utilities Code §734 be DISMISSED.

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Dated: July 1, 2010

  
Alterber Freeman

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I.10-02-004 NER/hkr

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Last Updated on 21-MAY-2010 by: RC4  
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**(END OF SERVICE LIST)**

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day *served* a copy of **“RESPONDENTS’ MOTION TO DISMISS COMPLAINT OF VIOLATION OF PUBLIC UTILITIES CODE §734** to the official service list in **I.10-02-004**. by using the following service:

**E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

**U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **July 1, 2010** at San Jose, California.

/s/ALTERBER FREEMAN

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Alterber Freeman