



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

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Order Instituting Investigation on the Commission's own motion into the operations, practices, and conduct of Telseven, LLC, Calling 10 LLC dba California Calling 10, (U-7015-C), and Patrick Hines, an individual, to determine whether Telseven, Calling 10, and Patrick Hines have violated the laws, rules and regulations of this State in the provision of directory assistance services to California consumers.

I.10-12-010  
(Filed December 16, 2010)

**RESPONSE TO THE ORDER INSTITUTING INVESTIGATION AND DENIAL OF ALL  
ASSERTIONS OF POSSIBLE VIOLATION OF CALIFORNIA LAW OF TELSEVEN, LLC,  
CALLING 10, LLC dba CALIFORNIA CALLING 10, AND PATRICK HINES, AN INDIVIDUAL**

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In accordance with Ordering Paragraph 14 of the above-captioned Order Instituting Investigation issued December 21, 2010 (the "OII"), Telseven, LLC ("Telseven"), Calling 10, LLC dba California Calling 10 ("California Calling 10") and Patrick Hines, an individual ("Hines"),<sup>1</sup> hereby answer and respond to the OII.<sup>2</sup> Unless expressly admitted herein, the Respondents each deny each and every factual and legal assertion of the OII concerning possible violations of California law, as more fully set forth below. Without limiting the generality of the above, Respondents each deny each and every allegation set forth in Ordering Paragraph 1.a through 1.j of the OII, and further deny that any of the remedies set forth in Ordering Paragraph 2.a through 2.j of the OII are warranted in whole or in part, based upon all relevant facts and applicable law.<sup>3</sup>

## **I. SUMMARY AND PROCEDURAL BACKGROUND**

### **A. Summary**

It is the position of Respondents that the factual record relied upon by the Commission in adopting the OII, consisting primarily if not entirely of the Staff Report referred to throughout the OII,<sup>4</sup> is incomplete and inaccurate in numerous material respects, and that its legal conclusions are based on erroneous legal analysis of even this incomplete record and applicable law, including erroneous assertion of jurisdiction over the service provided by the LLC Respondents.

As discussed in greater detail below:

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<sup>1</sup> Each is referred to also as a "Respondent" and they are collectively referred to as "Respondents." Telseven and California Calling 10 are collectively referred to as the "LLC Respondents."

<sup>2</sup> The OII was served via USPS Certified Mail and received on December 27, 2010. Counsel for Respondents and counsel for the Consumer Protection and Safety Division ("CPSD" or "Commission Staff") have agreed that this Response was originally due to be filed on January 26, 2011. By email Ruling dated January 26, 2011, the ALJ extended this date to January 31, 2011. Respondents note that the service copy of the OII was not addressed as set forth in Ordering Paragraph 13 since Telseven was not included in the parties addressed.

<sup>3</sup> OII at 45-48.

<sup>4</sup> *Id.* at 3.

- Established carriers employ a commonly used, industry standard network message to give millions of callers reaching disconnected or out of service numbers the offer to use and be charged for their 411 directory assistance service.

We're sorry, your call cannot be completed as dialed. Please check the number and dial again. For directory assistance information, you may dial 411, or your directory assistance provider.

- LLC Respondents' Enhanced Number Assistance Directory Assistance ("ENADA") service network message is a consumer friendly, regulatory compliant improvement to the commonly used, industry standard network message employed by carriers to give callers reaching disconnected or out of service numbers the offer to use and be charged for the 411 directory assistance service.
- The ENADA service is a stand-alone interstate directory assistance service for callers to toll-free numbers, not offered as part of a local exchange service, and thus not subject to the jurisdiction of the Commission or a service for which a Certificate of Public Convenience and Necessity ("CPCN") is required.
- The ENADA service does not violate federal law applicable to the use of toll-free numbers. Furthermore, the ENADA service is not a pay-per-call service under federal law and LLC Respondents have paid FUSF surcharges on their ENADA service. In any event, any potential violations of federal law are within the purview of the FCC, not the Commission.
- The disclosures to ENADA callers are adequate and non-misleading, as demonstrated by the fact that approximately 95% of the callers to the toll-free numbers served by ENADA choose to hang up and not make a second call to the equal access number, which is the only way a caller can be billed for the service.
- All calls to the ENADA equal access service were authorized by the callers under applicable law, and supported by the call detail records of the LLC Respondents and third party underlying telecommunications service providers.
- No "cramming" of charges on ILEC invoices occurred and the billing ILECs actively participated in the content and format of their invoices.

The informal investigation that has resulted in the OII started over four years ago.

Respondents are small companies and an individual, not large established companies with unlimited resources to engage in regulatory litigation. Nevertheless, over the course of the last four years, Respondents have expended substantial time and resources cooperating to the best of their ability with the informal investigation, participating in extensive in-person

and telephonic meetings with Commission Staff, voluntarily obtaining a CPCN at the request of Commission Staff, producing thousands of pages of documents, responding to numerous data requests to the Commission Staff, and participating in an extensive deposition of a knowledgeable representative of Respondents conducted by Commission Staff.

Unfortunately, instead of a meaningful dialog, the investigation continued on an irregular basis, often with months of inactivity or response to materials provided, and on a shifting basis as one theory after another appears to have been explored and abandoned by Commission Staff. After all of this time and effort, it is notable that the first time the specific concerns of the Commission with the disclosures and service characteristics of the Respondents' service have been expressed in an organized manner is the OII itself. This clarifying step could have happened and been addressed years ago and could be efficiently resolved now.

The OII and Staff Report rely primarily on material provided to the Commission Staff during the informal investigation that led to the issuance of the OII, as well as information developed by the staff itself, apparently based on or developed in light of material provided by Respondents, Interested Parties, and other third parties. Except to the limited extent described in Section I.B following, Respondents presently have no knowledge of or access to any of the universe of information and documents provided by other parties to the Commission Staff during this informal investigation stage, or other information used by Commission Staff to reach and support the assertions in the Staff Report, or not used because it does not support the allegations of the OII. Since discovery has just been commenced by Respondents to obtain this information, and will commence in the near future to obtain additional relevant information, Respondents' complete positions in this matter will of necessity be set forth in their testimony and briefs based upon the final record of this proceeding.

## **B. Procedural Background and Status**

The OII was issued without the Staff Report attached, but to the detriment of Respondents did include information that had been submitted to the Commission under claims of confidentiality by Respondents (and perhaps others) which the Commission effectively denied in the OII.<sup>5</sup> Respondents were not provided either any notice that such public disclosure would be made, or any opportunity to oppose such disclosure or to provide any basis for the confidentiality claimed prior to its disclosure. The process under which these materials were submitted pursuant to General Order 66-C did not include any requirement that the claims of confidentiality be justified either factually or legally, and the overwhelming precedent of the Commission is that, at a minimum, the party submitting such information on a confidential basis is provided a meaningful opportunity to address the merits of any challenge to such designation, either in writing or at a hearing. In fact, the process implemented by the OII itself and Commission Staff with respect to the Staff Report and its Attachments, discussed below, is a clear example of such a process that preserves the confidentiality of information submitted to the Commission on that basis until it is appropriately challenged and ruled upon after the submitting party is permitted to file an opposition to publication.

In response to Ordering Paragraph 8 of the OII, on January 21, 2011, counsel for Commission Staff sent a letter to counsel for all parties, proposing a temporary agreement under which both the Staff Report and its Attachments would be distributed on an interim “lawyers’ eyes only” basis, pending resolution of claims of confidentiality of some of these materials. Counsel’s letter also identified those Attachments to the Staff Report which were

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<sup>5</sup> *Id.* at 49, Ordering Paragraph 8.

subject to claims of confidentiality (without specifying the claimant) and which of those claims Commission Staff did not agree with.

Once all participating counsel executed the “lawyers’ eyes only” agreement and the subject materials were distributed, counsel for Respondents (but not Respondents themselves) saw for the first time the selected materials included as attachments to the Staff Report. Some of these consist of documents provided by third parties in response to Commission Staff data request, subpoena, or other form of demand not known to Respondents, and that are subject to explicit claims of confidentiality by Respondents.<sup>6</sup> These confidentially designations have not yet been ruled upon by the Commission, regardless of whether the Staff may agree or disagree with them. All parties including Respondents agreed to the Commission Staff counsel proposal for interim treatment of these materials pending establishment of a permanent process to govern both future treatment of confidential information to be exchanged going forward, as well as the process to govern resolution of contested confidentiality claims concerning materials already submitted to the Commission Staff and included in the Staff Report or its Attachments.

While the above-described interim agreement treats the entirety of the Staff Report as confidential and subject to the “lawyers’ eyes only” interim agreement, it is Respondents’ informal understanding that Commission Staff believes the entire body of the Staff Report (not including Attachments referred to therein) should be made public. Ordering Paragraph 8 of the OII requires that any party file a motion by January 28, 2011, if the party believes that any portion of the Staff Report or its Attachments proposed to be made public should be instead treated as confidential. On January 28, 2011, Respondents filed their “Motion for Confidential Treatment of Certain Material” pursuant to Ordering Paragraph 8 of the OII.

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<sup>6</sup> For example, a letter from a Respondent to an Interested Party which is identified as Confidential by the sender but included within the scope of the Staff data request to the Interested Party.

This Motion also specified numerous documents categorized by Staff counsel's letter as "CX" documents (i.e., documents submitted by Respondents to the Commission as confidential but which Staff asserts do not warrant such treatment) which Respondents will be prepared to allow to be treated publicly as part of the process of establishing permanent treatment of confidential materials.

Because of the complex confidentiality issues present in this case, it will be essential that the ALJ promptly adopt an appropriate Protective Order in this proceeding before the dates on which Respondents and Interested Parties are required to provide information or documents pursuant to Ordering Paragraphs 3 and 6 of the OII.<sup>7</sup> Based on the date of service for Respondents, this date is February 10, 2011; however, Interested Parties were likely served with the OII earlier or later. Due process requires that relevant information known to the Commission Staff, Interested Parties, and other third parties be made available to Respondents in order to permit them a meaningful opportunity to develop their responses and defenses to allegations in the OII, and that confidential information used in this proceeding be subject to proper protection.

In addition to the general and specific denials above, and based on the current limited nature of information available to them, Respondents identify below material factual and legal issues that are essential to any lawful ultimate determinations made in this proceeding. Respondents reserve the right to supplement or modify the positions discussed herein as relevant information becomes available.

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<sup>7</sup> On January 25, 2011, California Calling 10 submitted data requests to all Interested Parties seeking production of all information, documents, or other things produced to the Commission Staff in connection with this proceeding. Respondents have prepared and will shortly circulate to all parties a proposed Protective Order for use in this proceeding, and will promptly file a Motion for its adoption.

## **II. LLC RESPONDENTS' ENHANCED NUMBER ASSISTANCE DIRECTORY ASSISTANCE SERVICE**

The OII incorrectly describes the service of LLC Respondents involved in this investigation as a telecommunications service that is an element of basic telephone service.<sup>8</sup> This is erroneous as a matter of both fact and law. LLC Respondents do not provide any local exchange services or any directory assistance services provided as part of a local exchange service (e.g., 411). Nor do LLC Respondents provide any call completion services. Instead, LLC Respondents provide a stand-alone, competitive interstate Enhanced Number Assistance Directory Assistance ("ENADA") service. The ENADA service is a national directory assistance service that primarily provides directory information concerning toll-free numbers, as well as available other directory information available if requested by the consumer. Similar services are provided by numerous entities that are not regulated telecommunications service providers. As the OII admits, the ENADA service is provided by means of computer servers and, when a caller obtains a live operator for further ENADA information, that service is provided through contract with an underlying provider.

As the record will show, consumers are informed of LLC Respondents' ENADA service when a consumer dials a previously-discarded toll-free number that is determined to be available from the FCC-regulated pool of spare and available toll-free numbers, and is now active and in use by LLC Respondents. When a consumer calls a toll-free number that is now active and in use by LLC Respondents, instead of receiving a disconnection notice with no helpful information, LLC Respondents provide the consumer with options for additional assistance.

Consumers make millions of calls to telephone numbers that have been discontinued or discarded by the previous subscriber of that number. In many cases consumers are left

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<sup>8</sup> OII at 22, note 79.

with a useless message that a number is out of service with an offer for 411 service with no price disclosure. For example, the following message can be heard on such numbers:

We're sorry, your call cannot be completed as dialed. Please check the number and dial again. For directory assistance information, you may dial 411, or your directory assistance provider.

In order to assist and provide value to such customers, carriers themselves, as well as other directory assistance providers, have migrated to providing information on the status of these numbers. When a consumer calls a previously discarded toll-free number that is now active and in use by LLC Respondents' networks, LLC Respondents (a) inform the consumer at no charge that the number is now associated with a new directory assistance service provided by LLC Respondents; (b) advise the consumer that for a specified charge, the consumer can hang up and dial another number to be connected to LLC Respondents' ENADA service, which can assist the consumer in learning more about the toll-free number and other directory information available; and (c) provide contact information for non-charge trouble assistance.

Importantly, unlike some other providers' messages, LLC Respondents' messages have contained, and continue to contain, price disclosure information for their ENADA service. Additionally, consumers that contact the toll-free number are not charged for the call.

In fact, the only way for consumers to access and be charged for LLC Respondents' ENADA service is by hanging up, picking up the phone and initiating a second call to an LLC Respondent's equal access number (i.e., 10-15-15-8000). LLC Respondents are competitive providers and, thus, cannot utilize a 411 dial pattern for their services. Instead, they utilize equal access numbers, which are used by consumers to access the services of providers other than their presubscribed telephone carriers. Equal access numbers have been in use

by carriers for many years and are common in the telecommunications industry, even utilized by large carriers such as AT&T and Verizon.

The record will show that the vast majority of consumers that listen to LLC Respondents' toll-free network message – approximately 95% - hang up and do not choose to call the ENADA service. In other words, out of 100 consumers that listen to LLC Respondents' toll-free network message, only 5 of those consumers, after making an informed decision, decide to hang up, pick up the phone and initiate a second call to an LLC Respondent's equal access number to use the ENADA service. The remaining 95% decide not to use the ENADA service and therefore are not charged at all, demonstrating that consumers are making an informed choice as to whether they will use the service and incur the requisite charge.

All calls to the LLC Respondents via toll-free and via the equal access numbers terminate at a platform in Nevada. No calls terminate in California. In other words, all calls from California exchanges terminate at this platform in Nevada and no calls are terminated or completed in the State of California.

For each consumer billed for the ENADA service, LLC Respondents rely on bona-fide call detail information delivered with the call, call records from the Nevada platform, as well as third party telephone call records from the underlying transport providers that demonstrate that the consumer contacted the ENADA service. These telephone call records document when a customer picks up a receiver, dials digits on a key pad, and connects to the service. Such records prove the initiation of the second call and thus clearly confirm that the consumer placed the second call to LLC Respondents' ENADA service.

LLC Respondents do not directly bill or collect the charges for the ENADA service. Instead, the billing and collection services are handled by the callers' applicable LECs, who

control the content of charges on the bill to the consumers, including the name of the service provider and the description of the service, among others.

Moreover, LLC Respondents provide information about their ENADA service to consumers that contact toll-free numbers now in use by LLC Respondents on their networks. LLC Respondents disclose the price of the ENADA service clearly on the toll-free call and consumers are never charged for that call.

LLC Respondents also provide customer service websites – [www.telseven.com](http://www.telseven.com) and [www.calling10.com](http://www.calling10.com) – from which consumers may obtain information about the ENADA service, including rates, terms and conditions of service.

Additionally, LLC Respondents provide a free price quote option to consumers who call the ENADA service. LLC Respondents' provision of a free price quote option stands in stark contrast to 411 directory assistance services where such price quote options are not the norm.

Finally, customer service and satisfaction is a top priority for Respondents, and as such, the LLC Respondents have a liberal, no-questions ask refund policy whereby charges are to be refunded if a customer inquires about an ENADA charge. At times, because of the third party billing process, this may mean that the customer receives multiple refunds on the same charge or that a customer inquiry may be mistakenly reported by a third party billing entity as “complaint” rather than an inquiry by the customer.

### **III. THE OII'S JURISDICTIONAL ASSERTIONS ARE ERRONEOUS**

The OII asserts that the Commission has jurisdiction over all Respondents because they “have provided a telecommunications service to California customers, and over

telecommunications lines and facilities located in California, and because their charges have appeared on the bills of California consumers.”<sup>9</sup>

At the outset, the ENADA service at issue is not an intrastate service and is not an element of basic telecommunications service as defined in the Commission decisions relied on by the OII or under applicable law.<sup>10</sup> The ENADA service that is described in the OII and subject to this investigation is not provided as part of a local exchange service. Nor is it designed to provide directory assistance for local telephone numbers but instead is designed as a national directory assistance service for toll-free numbers and is offered to consumers calling toll-free numbers. The ENADA service is a competitive stand-alone, national directory assistance service, through which consumers can obtain toll-free directory assistance information by calling a dial-around equal access number that terminates at a platform in Nevada. Consumers receive directory assistance and related number information as part of the ENADA service, but LLC Respondents do not complete calls to any number provided to customers as part of its ENADA service. No intrastate calls are completed and no local exchange services are being provided; rather, all ENADA service calls terminate at the platform in Nevada. These facts have been applicable to LLC Respondents at all times when they have provided services to California consumers.

It is well-established under federal law that the jurisdiction of a telecommunications service is determined by the origination and termination points of the service.<sup>11</sup> If a service

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<sup>9</sup> *Id.* at 22, citations omitted.

<sup>10</sup> *Id.* at note 79.

<sup>11</sup> See, e.g., *AT&T Corp. Petition for Declaratory Rulemaking Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Red, 4829, ¶¶5, 22, 28 (2005); *Vonage Holdings Corporation*, Memorandum Opinion and Order, 19 FCC Rcd. 22,404, ¶17 (2004); *Starpower v. Verizon Virginia*, 17 FCC Red. 6873 (Apr. 8, 2002); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶159 (2002); *Time Machine, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd. 1186, ¶30 (1995); *Teleconnect Co. v. Bell Tel. Co. of Pa.*, Memorandum Opinion and Order, 10 FCC Rcd. 1626, 7712-14 (1995), *of 'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 116 F.3d 593 (D.C. Cir. 1997); *Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Red. 1 (1988) (“*ONA Plans Order*”).

originates in one state and terminates in another state, the service is jurisdictionally interstate. If the service originates and terminates in the same state, the service is jurisdictionally intrastate. In the case of the ENADA service, at all times when LLC Respondents have provided their ENADA service to California exchanges, all calls from California exchanges (including all toll-free and equal access number calls) terminated at the platform in Nevada. No calls from California exchanges terminated within the State of California. Accordingly, when LLC Respondents have provided their ENADA service to callers with California exchanges, the service was clearly jurisdictionally interstate in nature.

While the Commission may have authority to regulate the adjunct-to-basic 411 and interLATA toll directory assistance services offered as part of a local exchange service by a local exchange carrier, such regulatory authority does not translate into a *jurisdictional* test as to whether a directory assistance service is intrastate or interstate in nature. It also does not confer authority for the Commission to find that a stand-alone directory assistance service such as LLC Respondent' that terminates in another state and provides information primarily about toll-free numbers terminating across the nation is subject to California intrastate jurisdiction as part of a local exchange service or otherwise for purposes of imposing intrastate regulatory obligations and fees. The OII position that some of these information responses provide information about California toll-free numbers is both legally irrelevant and unquantified even if relevant.

Indeed, the component of basic service described in the Commission decisions cited in the OII is "access to" 800 and 800-like services, not those services themselves and not directory assistance services concerning these services.<sup>12</sup> LLC Respondents obtain the toll-free services used to provide the message about the ENADA service from underlying telecommunications carriers, and end-user callers obtain "access to" those services from

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<sup>12</sup> OII at note 79.

their serving Local Exchange Carrier. LLC Respondents do not provide any toll-free services to consumers; they merely use toll-free transport services of underlying telecommunications carriers to inform callers about their ENADA service. The provision of the ENADA service is conducted via an equal access number. A service provided via an equal access services is clearly not a basic local exchange service, and the OII admits that all of these calls are interstate.

Importantly, the record will show that throughout the course of the preceding four year informal investigation, LLC Respondents have consistently set forth their position regarding the interstate nature of the ENADA service and the commensurate lack of jurisdiction by the Commission. As Commission Staff has been made well aware, California Calling 10 registered in California, obtained a CPCN and paid California regulatory surcharges in an effort of cooperation and to accommodate Commission Staff. At no time, however, have LLC Respondents provided intrastate services in California or waived any rights to assert the interstate jurisdictional status of ENADA service.

Second, no Respondent has or does now own, control, operate or manage a telephone line for compensation in California in connection with provision of the ENADA service, any more than any other user of interstate toll-free or interstate equal access services provided by a telephone corporation certificated to provide such services becomes a telephone corporation by using that service. The fact that California Calling 10 is authorized to act as a reseller of intrastate services does not mean that it in fact did so when providing the ENADA service. In this instance, California Calling 10 chose instead to acquire interstate toll-free and equal access transport services from underlying carriers in the role of a customer, using these services in the provision of its interstate ENADA service.

Moreover, even if either of the LLC Respondents did own, control, operate or manage telephone lines in California to provide the ENADA service, if the service provided

thereby is not a basic intrastate telecommunications service but is instead, for example, either an interstate or information service, a Certificate of Public Convenience and Necessity would not be required to lawfully provide such a service to California residents, and the service would not be subject to regulation by the Commission even if provided by a certificated carrier.

With respect to the OII's reliance on §§ 2896 and 451,<sup>13</sup> both provisions apply only to telephone corporations as defined in the P.U. Code. Respondents do not meet this definition. Of course, if the service involved would not be subject to Commission regulation if provided by a public utility, treating nonpublic utilities as a public utilities as permitted to a limited extent under P.U. Code § 2889.9 would not change this result, and an entity may be a public utility without meeting the definition of a telephone corporation, which requires actual performance of the activities set forth in P.U. Code § 234(a).

The deficiencies asserted by the OII regarding the adequacy of Respondents' disclosures to end users<sup>14</sup> are premised on the provisions of P.U. Code Sec. 2890(d)(2)(A) through(D). Respondents admit that charges for their services have appeared on ILEC telephone bills in California, but assert that their disclosures are in compliance with the requirements of these statutory provisions. The record will show that the disclosure of charges is in greater detail than is provided by many other similar services, some of which are provided with no disclosures whatsoever. The record will also show that Respondents' disclosures have been implemented as directed by a billing ILEC in most instances. Respondents further assert that their acknowledged liberal refund policy is an unquestionable full implementation of the requirements of P.U. Code Sec. 2890(e) since such refunds would by definition resolve a billing dispute to the caller's satisfaction.

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<sup>13</sup> *Id.* at 23.

<sup>14</sup> *Id.* at 22-24.

Finally, the entirety of P.U. Code § 2890(d)(2) is preceded by P.U. Code § 2890(d)(1), which provides that “A billing telephone company may not bill for a person, corporation, or billing agent unless that person, corporation, or billing agent complies with paragraph (2).” The actions or inactions of the billing ILECs involved in this proceeding are therefore, at a minimum, evidence of their belief that Respondents have sufficiently complied with the requirements of paragraph (2) to permit them to invoice these charges to their customers without violating P.U. Code § 2890 (a) or (d).

#### **IV. RESPONDENTS’ BUSINESS MODEL COMPLIES WITH ALL APPLICABLE LAWS**

##### **A. Respondents Use of Toll-Free Numbers Complies with Federal Laws.**

The OII makes several unsubstantiated and incorrect claims about Respondents' use of toll-free numbers.

The OII characterizes the toll-free numbers used by LLC Respondents’ service as “defunct” and “discarded” numbers.<sup>15</sup> In fact, the “available for assignment” status of all of these numbers is established by the SMS/800 database, which is managed by an entity controlled and operated by the ILECs.<sup>16</sup> This is where the toll-free numbers used by the ENADA service are acquired, and they have been inactive for a required “quarantine” period deemed by SMS/800 administration to be sufficiently long to minimize the likelihood of confusion when assigned to a new user.<sup>17</sup>

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<sup>15</sup> *Id.* at 10.

<sup>16</sup> Verizon, AT&T, and Qwest are the “Company” offering SMS/800 Services pursuant to their jointly issued FCC Tariff No.1.

<sup>17</sup> LECS provide their 411 message when a number is in quarantine with no price disclosure. The LLC Respondents cannot because they must wait until the number is available through the SMS/800 process, and then must activate and pay for the number and transport to provide the ENADA service message to a caller.

The OII engages in unsupported speculation when it asserts that users reach these toll-free numbers because they mis-dialed a desired number.<sup>18</sup> The OII cites no evidence to support this hypothesis, and Respondents doubt that any reasonable record can be developed to demonstrate this is the case. It is just as likely that the end user simply elected to use an old personal address book listing and didn't bother to check if a new number was listed in advertising or other listing sources. The OII does not identify any toll-free number used by Respondents' service that is one digit off of a popular toll-free number, much less how many minutes of use over these toll-free numbers could be so characterized without actual investigation of the callers and calls involved.

Additionally, the federal case law regarding "misdialed" services cited in the OII was inaccurately portrayed. The carriers in the particular case were cited for violations of the FCC's operator service provider requirements for branding and the like, not for any "misdial" scheme.<sup>19</sup> In fact, in those cases, the FCC did not limit the collection of or use of any numbers by the companies involved, but instead directed the companies to come into compliance with the FCC's operator service provider requirements.

LLC Respondents have complied with the FCC regulations cited by the OII concerning hoarding of toll-free numbers.<sup>20</sup> The FCC tariff governing the SMS/800 data base contains specific requirements applicable to the quantity of toll-free numbers that can

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<sup>18</sup> For example, the caller meant to dial 800-555-1212 but dialed 800-555-1312.

<sup>19</sup> The FCC cites ASC and Opticom for violations of the operator service providers' branding, rate disclosure, and collect call requirements under sections 226(b)(1)(A), 226(b)(1)(C)(i), and 226(b)(1)(B), respectively, under the Communications Act of 1934. See *In re ASC Telecom, Inc. d/b/a/ Alternatel, Notice of Apparent Liability for Forfeiture*, FCC 02-259, File No. EB-02-TC-136, (rel. Sept. 23, 2002); *In Re One Call Communications, Inc. d/b/a/ Opticom, Notice of Apparent Liability for Forfeiture*, FCC 02-258, File No. EB-02-TC-003, (Rel. Sept. 23, 2002). Neither the NALs, nor the Consent Decrees mandate that ASC or Opticom cease using toll-free numbers or modify their use of such numbers. *Id.*; see also *In Re ASC Telecom, Inc. d/b/a/ Alternatel, Order and Consent Decree*, FCC 04-56, File No. EB-02-TC-136 (rel. Mar. 19, 2004); *In Re OCMC, Inc. d/b/a One Call Communications, Inc. d/b/a Opticom, Order and Consent Decree*, FCC 03-317, File No. EB-02-TC-003 (Rel. Dec. 12, 2003).

<sup>20</sup> OII at 30-32.

be assigned by a given RespOrg, and enforcement of these and other restrictions applicable to assignment of toll-free numbers, including any potential hoarding of toll-free numbers, is within the purview of the FCC, not this Commission. Therefore, LLC Respondents' use of toll-free numbers under federal law can form no basis for any assertion of non-compliance with P.U. Code § 451, even if it did apply to LLC Respondents.

Moreover, no hoarding can be taking place because the toll-free numbers used by LLC Respondents are not "defunct"; they are actively in use by Respondents as a mechanism for offering the ENADA service to toll-free callers. From a marketing perspective, who might want a new toll-free number for ABC Corporation more than someone who dialed their previous toll-free number? Toll-free numbers are often closely tied to marketing efforts (e.g., 1 800 FLOWERS) and such use is not prohibited by law. Finally the OII's statement that LLC Respondents pay their RespOrg \$10 per year for access to and control of these numbers<sup>21</sup> completely ignores the significant amount per year Respondents have paid and continue to pay to underlying carriers for transport of the toll-free call to the Nevada platform, among other related costs. The OII's implication that these charges are not paid is misleading and will be corrected on the record.

**B. The LLC Respondents Have Complied with the Requirements of the Incumbent Local Exchange Carriers that Invoice Their Subscribers for ENADA Service.**

The OII recognizes that charges to users of its service "are routed by Respondent to Respondents' billing agents ILD and BSG (aka OAN), which bundle and forward the charges and an accompanying description of the "service" to the billing telephone companies, primarily AT&T and Verizon."<sup>22</sup> The charges are prepared from information from the underlying providers delivered with the toll-free call or call detail records ("CDRs"), and then

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<sup>21</sup> *Id.* at 10.

<sup>22</sup> *Id.* at 12.

Respondents' CDRs collected by its service platform. Since Respondents do not have the technical capability or the contractual arrangements necessary to deal directly with all of the billing ILECs across the country, they engage in the common industry practice of contracting with billing agents/aggregators for this specialized service. The formatting, labeling, and other content finalization of these charges, compliant with their applicable ILEC arrangements, is performed by these billing agents and the resulting data submitted to the billing ILEC. The billing ILEC is responsible for including only authorized charges on its customers' invoices.

The record will demonstrate that, if any of the assertions of the OII that unauthorized charges were invoiced are true, it is despite the willingness of Respondents to comply with any and all directives of the billing ILECs, billing agents, and the Commission during the four years duration of the informal investigation. Criticisms of the ENADA service first appearing in the OII could have been, and would have been, addressed sooner by Respondents, as their compliance with requests or requirements communicated to them demonstrates. The Commission's recent *Telephone Billing Rules* decision<sup>23</sup> discusses the broad involvement expected of all industry segments if the Commission's third party telephone billing policies are to be effectively implemented. To their knowledge, Respondents have complied or negotiated compliance steps with all requirements of the billing ILECs, including specific changes to disclosures. Respondents have endeavored to comply with any such requests or demands provided by a billing ILEC to any of Respondents' billing agents.

The role of the ILECs in the invoicing of the charges of Respondents at issue here is critical for several reasons. First, the record will demonstrate that the billing ILECs have

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<sup>23</sup> Decision 10-10-034, Final Decision Adopting California Telephone Corporation Billing Rules, Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities, Rulemaking 00-02-004, October 28, 2010 ("Billing Rules Order").

collected a material portion of the amounts they invoiced for the ENADA service as third party billing charges. In addition, the record will demonstrate the extent to which the ILECs: (1) have also collected Originating 800 Access Charges on all of the toll-free calls made to Respondents' toll-free numbers, whether or not the caller subsequently dialed the second equal access number to reach LLC Respondents' ENADA service; (2) collected potential transport and other charges dependent upon the nature of its interconnection with the underlying carrier providing toll-free service to Respondents; (3) collected associated "dip" charges for translating and routing the dialed toll-free numbers to the translated NPA/NXX number and serving carrier; (4) collected charges for the handling of any equal access call made as a result of the user first calling the toll-free number; or (5) collected third party billing charges for the invoiced charges it inserted into its customer bills, perhaps irrespective of whether or not the end user eventually was given a refund by LLC Respondents. The extent of this compensation and compensation received by other parties from these calls is relevant to the issues and remedies discussed in the OII and must be explored on the record.

## **V. THE OII'S ASSERTIONS OF DISCLOSURE VIOLATIONS ARE ERRONEOUS**

The OII acknowledges that there are two opportunities for Respondents to disclose the full amount of the ENADA charges and the true nature of the ENADA service: first, when the customer calls the toll-free number, or second, when the customer makes the required subsequent call to the equal access number. However, the OII then suggests that if the toll-free and equal access calls are separate, it may be only the latter disclosure on the equal access number that matters from a legal point of view.<sup>24</sup> To the contrary, any correct analysis of the disclosures made to a caller that was eventually billed for the ENADA service must include both disclosures, since there is no evidence that any caller reached the second

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<sup>24</sup> OII at 12.

disclosure without hearing the first disclosure providing the necessary dialing instructions. It would completely distort the effectiveness of the combined disclosures made in connection with the ENADA service to ignore the impact of the first disclosure – i.e., that it caused approximately 95% of the callers hearing it to hang up without making the second call. Any such analysis would be unreasonable and of no statistical validity. Furthermore, any reasonable analysis of the adequacy of Respondents' disclosures must consider not only the contents of both disclosures, but these actual consequences of those disclosures on the total body of callers to the toll-free numbers served by the ENADA service. It is for this reason that any attempt to conduct a survey of callers to determine whether the calls made were authorized must involve proportional and statistically valid inclusion of all callers to the toll-free numbers served by the ENADA service.

With respect to the content of these disclosures, Respondents question, in light of the prevalent practices of other California providers of directory assistance services whereby no rate disclosure is provided on messages offering 411 service or on the 411 service call, whether one or both of these disclosures is required as a matter of law for this specific service. Respondents deny that either of these disclosures is insufficient or misleading. While admittedly some applicable charges such as taxes and USF surcharges are not quantified in dollar terms,<sup>25</sup> they are described generally in accord with industry standards in language comparable to that used by many telecommunications utilities in California and not in violation of federal or California law.

Importantly, the fact that 95% of the callers to LLC Respondents' toll-free numbers chose to hang up and not make the second call to use the ENADA service is a strong indication that consumers are receiving and listening to the network message and price

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<sup>25</sup> It is not clear that it would be technically possible to do so on a prior disclosure message when the charges vary with call duration or data content requested.

disclosure, and are making an informed decision as to whether they want to use the ENADA service. An inadequate disclosure would presumably result in a much higher percentage of subsequent calls to the ENADA service. If it were logistically possible to determine why the approximate 95% of callers to the toll-free numbers served by the ENADA service did not hang up and make the second required call to the ENADA service equal access number, it is likely that many used one of the multiple other sources for current toll-free number information to obtain the desired number based on the network message they heard.

Additionally, unlike 411 directory assistance, LLC Respondents provide a free price quote option, where the customer has the additional option of a free price disclosure prior to purchasing the service. Directory assistance services have been in existence for many years, and at this point, there are no federal or California state laws that require price quote disclosure on a directory assistance call. Nevertheless, LLC Respondents provide such a free price quote option. If the Commission believes that directory assistance services must have a specific price disclosure and/ or a particular mechanism to effectuate a price disclosure on calls to a directory assistance service, the proper venue for such rule changes is the initiation of a separate rulemaking rather than singling out a small, competitive provider who provides consumers with a free price quote option unlike other imbedded providers of 411 services.

It is relevant that no such descriptions (specific price or general descriptions) are provided prior to direct dial services in California or 411 services. A subscriber to long distance service, for example, will typically incur time (and perhaps distance) charges on a call, as well as surcharges, taxes, etc., with absolutely no message disclosure prior to the call. The first time a typical long distance subscriber will see these charges is on their subsequent invoice, which is often significantly higher than the subscriber expected. As to the general rates applicable to most subscribers, even when signing up for service they are

likely to get either a “fine print” brochure or a reference to web-based terms and conditions. The Commission has not found these practices to involve insufficient disclosures. The disclosures of Respondents cannot be reasonably evaluated outside of this industry context that has been permitted by the Commission for decades,<sup>26</sup> specifically, the context of industry practices in California concerning disclosures (or lack thereof) made by providers of 411 services and other directory assistance services. The Commission cannot enforce fundamentally different standards concerning a “meeting of the minds” on some services but not others.

In its discussion of the disclosures made when a caller reaches the ENADA platform on the second call, the OII sets forth charts from the Staff Report timing segments of the interactive menu questions and instructions.<sup>27</sup> The OII admits that “Staff has not been able to ascertain precisely at which point the customer incurs a charge.”<sup>28</sup> Respondents have not yet obtained the call detail records relied on for these figures. Furthermore, the OII does not make clear which entity’s switch records are being relied on (ILEC, underlying carriers, etc.). This is of fundamental importance because most switches used in interconnected networks exhibit differences in time stamp measurements that could significantly impact the accuracy of the short call duration measurements listed in the OII. In this case the call detail records of Respondents were used to record call data, but the same calls would also appear in the switch data of one or more of the underlying carriers and LECs.

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<sup>26</sup> In this context the question of the degree of “meeting of the minds” between a user of a service and the provider needed support imposition of a charge becomes again subject to the expectation of detailed rate information that is required for a service provider to enforce. “I had no idea it cost \$2.00 a minute to call China” has never been viewed as a legitimate basis for a caller to avoid the applicable charge, even when the customer never heard of the contractual source of the specific rate.

<sup>27</sup> OII at 15-18.

<sup>28</sup> *Id.* at 16.

Finally, the OII notes that “Staff also reports that the value of the service is questionable, even if it were to be offered for free.”<sup>29</sup> Respondents submit that such a value perception is not relevant to the issues in this proceeding. The Commission permits and regulates many services that are perceived by many people as “questionable” at best, particularly with respect to their content. While the role of the Commission is appropriate with respect to enforcement of ILEC third party billing requirements, it should not be concerned with value perceptions of the content of these communications. For example, it is entirely plausible that a caller to one of the toll-free numbers served by the ENADA service had an urgent need to reach the desired party previously reached by that number, no availability at that moment of the Internet or other alternative information sources, and thought that “I don’t care if it costs \$5.00 plus other charges, I want the answer right now.” For example, some people choose to take the time to find street parking around the Commission’s offices; while others choose to pay \$20 or more for the convenience of immediate parking in a paid lot. It is fundamental differing human behaviors such as these which cannot be overlooked when evaluating the “value” or usefulness of a service.

With respect to telephone billing disclosures, Respondents have relied on the expertise of the billing agents/aggregators, and the obligations of the billing ILECs to ensure that billing requirements are met, and complied with all requirements made known to them. Respondents do not believe the use of the term “Dir Asst” on invoices is inherently misleading, since the ENADA service is a form of directory assistance service, albeit a limited and specific offering. It is the understanding of Respondents that the content and format of these invoice descriptions are controlled by the billing ILEC.<sup>30</sup>

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<sup>29</sup> *Ibid.*

<sup>30</sup> It is also Respondents’ understanding that the billing ILECs limit the amount of available space on these invoices (e.g., two lines) making it in some cases impossible to add further details.

Finally, Respondents have repeatedly made known and demonstrated their willingness to modify their disclosures requested by the billing ILECs, billing agents, or regulatory authorities such as the Commission. Respondents have no desire to make the nature of their disclosures a matter of dispute, particularly on a prospective basis. As they have in the past, Respondents will make changes to these disclosures upon any reasonable request, but will defend these past disclosures as consistent with or in excess of industry practice, not misleading, and compliant with all requests of billing ILECs and billing agents.

**VI. CALL DETAIL RECORDS VALIDATE AUTHORIZATION BY ALL CALLERS TO THE EQUAL ACCESS NUMBERS FOR ENADA SERVICE**

To Respondents' knowledge, no "cramming" has occurred with respect to LLC Respondents' ENADA service. P.U. Code § 2890(d)(2)(D) provides that evidence a call was dialed constitutes prima facie evidence that it was authorized. Moreover, use of the ENADA service is authorized through the customer's actions. The very nature of an equal access call requires the customer to initiate the service (i.e., go to a phone, pick up the receiver, dial the equal access number) in order to be billed for the service.

Call detail records of LLC Respondents and carriers participating in the equal access calls involved in this proceeding will provide such evidence for the record. As explained above, the record will demonstrate that, if any of the assertions of the OII that unauthorized charges were invoiced are true, it is despite the willingness of Respondents to comply with any and all directives of the billing ILECs, billing agents, and the Commission during the four years duration of the informal investigation.

**VII. RESPONDENTS AND THEIR COOPERATING BUSINESS ENTITIES HAVE COMPLIED WITH ALL APPLICABLE CORPORATE LAWS**

Respondents Telseven and California Calling 10 are duly constituted corporate entities that have conducted their operations during the time period in question in

accordance with applicable requirements of corporate law. Respondent Hines is an individual. All of Hines' actions relevant to this proceeding on behalf of either of the LLC Respondents or their affiliates have been taken by him within the scope of his corporate authority. The LLC Respondents are each small privately held companies, and there is no California or other applicable corporate law that prohibits such multiple corporate positions, particularly in affiliated corporate entities. In fact, even large conglomerates and service providers competing with the LLC Respondents commonly utilize such multiple offices for particular individuals within their various affiliates, and this does not as a legal matter create individual liability for such authorized corporate officials acting within the scope of their corporate authority. The complete record will demonstrate that no disregard of the corporate entities or imposition of personal liability is permissible here under applicable facts and law and that, accordingly, Hines should be dismissed as a Respondent.

Similarly, the OII identifies several companies related to the LLC Respondents that, through contractual arrangements, provide various services or functions which are used to provide the ENADA service of the LLC Respondents. Such "outsourcing" of some or all functions is again a common practice in the telecommunications and Internet industries, as the record in this proceeding will reflect. There can be no inference drawn from the common and frequent use of outsourced or contracted-for inputs by a service provider, even if these inputs are provided by an affiliated company. The record will demonstrate that several companies subject to Commission regulation engage in comparable corporate structuring of their various offerings for numerous reasons. For example, state-specific LEC corporations isolate an LEC subsidiary in one state from application of regulations by multiple state regulatory Commissions, and corporate "service organizations" are used to provide functions across state lines to many state-specific LECs. In the case of Respondents, the record will reflect that there are rational business reasons for creation of similar limited purpose

operating entities, which could include such things as grouping functions subject to a consistent set of regulations in one company, subjecting only activities regulated by a particular state to regulation by that state, and other similar reasonable business considerations.

The OII properly recognizes one of the key outsourced functions of central importance to this proceeding: the provision by AT&T California and Verizon of the “actual billing and collection services” used by the corporate Respondents.<sup>31</sup> These ILEC billing services are approved and regulated by the Commission. Furthermore, the P.U. Code, the Commission’s recent *Billing Rules Order*, and other Commission precedent explicitly establish the primary responsibility of the ILECs offering this service to ensure that unauthorized charges are not placed on their customer invoices. The OII even acknowledges that AT&T was aware of details concerning Respondents’ service.<sup>32</sup>

#### **VIII. RESPONDENTS' HANDLING OF CONSUMER INQUIRIES AND COMPLAINTS COMPLIES WITH THE PUBLIC UTILITIES CODE**

The OII discusses how customer contacts were reported as “inquiries” by the billing agents/aggregators hired by the LLC Respondents.<sup>33</sup> The OII also references four specific CAB complaints, with reference to additional data in the Staff Report. The record will show that even if all of these “inquiries” were in fact complaints, they constitute a *de minimis* percentage of the total calls or end users that dialed the toll-free numbers used by LLC Respondents’ in offering their ENADA service.

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<sup>31</sup> *Id.* at 8.

<sup>32</sup> *Id.* at 19-21.

<sup>33</sup> *Id.* at 9. LLC Respondents utilize the service of such billing agents/aggregators because these entities have the contractual arrangements with the billing ILECs that establish the terms and conditions under which charges can be or credits can be placed on ILEC customer invoices, interface with the ILECs concerning this process, and are responsible for compliance with ILEC third party billing compliance.

The record will show that for every 100 calls to a toll-free number used by LLC Respondents, only approximately 5 of those callers, after hearing the disclosure, chose to hang up and chose to make the second call to the equal access number provided to access the ENADA service. Dialing this second number is the only possible way a caller can be charged for the service.

Of the approximate 5% of the original callers who do make the second call, the record will show that materially fewer made an “inquiry” or complaint. While the OII, apparently based on an even smaller number of complaints filed with the CAB, argues that such a small number of complaints may prove the service was unauthorized by the 100% caller universe, the complete record will demonstrate otherwise. In fact, the position of the complaining parties cannot be extrapolated to the broader body of end users who dialed the toll-free numbers served by the ENADA service. Instead of the OII’s speculative hypothesis that the claim of this fractional portion of end users that they did not authorize the service can reasonably be extrapolated to the conclusion that none of the other 100% authorized the service, it is far more rational to conclude that the users who may have been confused or felt they were erroneously billed are the limited few who inquired about the charge. Their level of misunderstanding cannot be imputed to the larger user universe, particularly when they comprise such a small percentage of the total.

The OII compounds this statistical and logical mistake by implying that the acknowledged liberal refund policy of the LLC Respondents that resulted in over 70% of the end users making these inquiries or complaints receiving complete refunds is somehow an anti-consumer scheme. The complete record will show that, to the contrary, such “no questions asked” refund policies are employed by many large and small businesses, are adopted for consumer friendly and competitive purposes of attracting market share, promoting consumer goodwill, minimizing consumer dissatisfaction, reducing customer

service costs in the longer run, and avoiding contentious disputes. For example, the well known practices of Groupons and Nordstroms that “if you are not completely satisfied for any reason, return our product for a full refund, no questions asked” does not form a reasonable basis to argue that these entities believe their products are defective.

The OII also establishes that most of these customer inquiries or complaints are directed to either the ILEC invoicing its customer, or the billing agent/aggregator that delivered the charges to the ILEC for inclusion in the ILEC invoice and also provides customer service contacts under contract with Respondents.<sup>34</sup> Clarification of the process and facts involved must occur as the record is developed. Respondents do not have the necessary information (some of which has been provided only to the Commission as described above) to specifically determine which of the involved entities actually was contacted by the inquiring customer, how these customer contacts were handled, how they were categorized by these parties, and whether such actions were consistent with their agreements and applicable Commission requirements. Respondents’ policy has been and continues to be never to dispute or to refuse any refund requested by a customer, whether granted themselves or offered to any customer by either the billing ILEC or other customer service entity.

#### **IX. THE OII’S ASSERTIONS OF OTHER POSSIBLE VIOLATIONS ARE ERRONEOUS**

The OII incorrectly alleges that Telseven operated as an unlicensed telephone company from 2003 through 2007.<sup>35</sup> As demonstrated above, no CPCN was required by Telseven for several reasons, including among others that the ENADA service is interstate

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<sup>34</sup> This specific outsourcing of customer service interface with billed customers makes good business sense because it is the billing agents/aggregators that are the most familiar with how the ILEC invoices are formatted and how credits or refunds are administered through the ILEC billing system under the contracts between them.

<sup>35</sup> OII at 21.

in nature, the ENADA service is not an adjunct to basic local telephone service, and that Telseven did not own, operate, or control telephone lines in California.

The OII cites to California Calling 10's use of the dba California Calling 10 LCC in its registration application. However, Attachment 1 to that registration application, the "Certificate Of Good Standing, Foreign Limited Liability Company," issued by the California Secretary of State, explicitly states: "California Calling 10, LLC...purports to be a limited liability company organized and existing under the laws of Delaware as Calling 10, LLC." There was no cloaking of its identity and, if anything, a clerical error in the application and less than careful review of its contents. Furthermore, at the time of the filing of the application, Commission Staff was well aware of the filing of the application and its connection to Telseven and thus no nefarious tactics were being employed as implied by the OII.

Concerning Telseven's alleged failure to pay public service surcharges, as the OII acknowledges, Telseven has informed the Commission that the service involved was interstate in nature and not subject to such surcharges. The fact that California Calling 10 elected, despite its similar legal position, to file a registration application and thereafter pay such surcharges as an accommodation to the Commission Staff and in order to hopefully avoid continuing disputes with the Commission, cannot form a basis for asserting that Telseven should have paid such surcharges. All of its factual and legal defenses are preserved with respect to this issue, despite the delay of three years since its cessation of operations in California until the OII formally raised this assertion.

The OII also incorrectly alleges that LLC Respondents may be providing a pay-per-call service and not paying federal universal service fund ("FUSF") surcharges in violation of federal law. The ENADA service is not a pay-per-call service as defined under federal law, and LLC Respondents have paid FUSF surcharges on their ENADA service and are



**CERTIFICATE OF SERVICE**

I hereby certify that my business address is 1628 Tiburon Boulevard, Tiburon, California 94920 and I have served on this day a copy of the foregoing,

**RESPONSE TO THE ORDER INSTITUTING INVESTIGATION AND DENIAL OF ALL  
ASSERTIONS OF POSSIBLE VIOLATION OF CALIFORNIA LAW OF TELSEVEN, LLC,  
CALLING 10, LLC dba CALIFORNIA CALLING 10, AND PATRICK HINES, AN  
INDIVIDUAL**

on all known parties in **I.10-12-010** as indicated in the attached Service Lists by electronic mail, U.S. Mail, and/or hand-delivery.

Executed this 31st day of January 2011, at Tiburon, California.

\_\_\_\_\_/s/ Channing Clarkson  
Channing Clarkson



California Public  
Utilities Commission

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## CALIFORNIA PUBLIC UTILITIES COMMISSION Service Lists

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