Decision **DRAFT DECISION OF ALJ WONG (Mailed 6/6/2006)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Westcom Long Distance, Inc. (U 5163 C), Complainant, vs. Pacific Bell (U 1001 C); Execuline of Sacramento Inc. (U 5008 C), aka North Valley Consultants, Sierra Telecom, Call America (Chico), Chico Telecom, AA TeleCom, Toll Communication; CAS Network of Fresno; American ShareCom, Inc.; Americall Corporation (U 5031C), aka Page U, Cal Page, Pac West Telecom, Inc., Strategic Products Corp., Keith's Telephone Supply, Bell's Answering Service, Cal Net Paging, Masterson Communications; Teltrex Management Corp; Mark Scully d/b/a Private Exchange Network; Call America Business Communications Corp. (U 5055 C); BizTel Corporation (U 5078 C) dba Nor-Cal Microwave; Napa Valley Telecom Services (U 5044 C); Ameritel (U 5011 C); Western Tele-Communications, Inc. aka Western Information Systems, Inc. aka WestMarc Communications, Inc.; Does 1-100, Defendants.	Case 92-07-045 (Filed July 23, 1992)

OPINION GRANTING MOTIONS TO DISMISS

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OPINION GRANTING MOTIONS TO DISMISS

I. Summary

This is the final opinion in connection with this proceeding and closes a very old docket.[1] Today's decision addresses the January 9, 1995 motion to dismiss that was filed by Call America Business Communications Corporation (Call America), and the January 10, 1995 motion to dismiss that was filed by Execuline of Sacramento, Inc. (Execuline), Express Tel, and Pac-West Telecom, Inc. (Pac-West).[2] The motions to dismiss are based on the grounds that the complainants, Westcom Long Distance, Inc. (Westcom)[3] and its president, J. Michael Sunde, allegedly engaged in the unlawful interception of the wire communications of third parties and invaded their privacy.

The decision also addresses the motion to dismiss of Pacific Bell (Pacific) that was filed on June 2, 1995. Pacific contends that the complaint should be

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[1] An interim decision was issued in Decision (D.) 94-04-082 (54 CPUC2d 244), which was modified by D.94-10-061 (57 CPUC2d 120). In D.94-04-082, the Commission granted the motions to dismiss of certain defendants, and denied the motions to dismiss of other defendants. Those defendants whose motions to dismiss were denied have filed new motions to dismiss that are addressed in this decision.

[2] The joint motion of Execuline, Pac-West and Express Tel, who are sometimes referred to jointly in this decision as "Execuline et al.," is also being filed on behalf of the following entities who are related to these three defendants: North Valley Consultants, Sierra Telecom, Call America (Chico), Chico Telecom, AA Telecom, Toll Communication, CAS Network of Fresno, American Sharecom, Inc., Americall Corporation, Page U, Cal Page, Strategic Products Corp., Keith's Telephone Supply, Bell's Answering Service, Cal Net Paging, Masterson Communications, Extelcom, Inc., Trans Tel, National Network Corp., Sun Management, Inc., Tel America, Trans-Tel Communications, and Trans America Management.

[3] Westcom is no longer authorized to provide telecommunications service in California, its authority having been revoked by Resolution T-16529.

dismissed on the following grounds: (1) abuse of process; (2) the complainants' lack of standing; (3) the complainants' ineligibility for compensation; and (4) absence of an economic incentive for interexchange carriers (IECs) to use exchange lines to terminate interexchange calls.

Based on the equitable doctrine of unclean hands, we conclude that the conduct of the complainants was reprehensible and that it abused the Commission's processes. This conduct and abuse merit dismissal of the complaint and all of the amendments and amended complaints. Accordingly, the motions of Call America, Execuline, Express Tel, Pac-West, and Pacific to dismiss the complaint and all of the amendments and amended complaints, with prejudice, are granted.

Although Westcom is no longer in business, due to the circumstances that have arisen in the course of this proceeding and other proceedings in which Westcom and Sunde have participated, we will allow the presiding officer in each Commission proceeding where Sunde makes an appearance to determine whether he should be required to retain a licensed attorney in order to participate in the proceeding, and whether Sunde should be permitted to act as a representative on behalf of a party to a Commission proceeding.

Today's decision also denies the complainants' January 20, 1995 and January 24, 1995 motions for sanctions and removal of defendants' counsel. In addition, this decision denies the complainants' February 1, 1995 motion to force Pacific to sign a non-disclosure and protective agreement and also denies other requests for relief.

As for the five outstanding discovery-related motions filed by the parties, no further action is required by the Commission since this decision grants the motions to dismiss.

II. Background

At the time the complaint was filed, Westcom was a certificated nondominant IEC authorized by the Commission to provide inter local access and transportation area (LATA) message toll services.[4] On July 23, 1992, Westcom filed its initial complaint. An amendment and amended complaints were filed by Westcom on October 5, 1992, December 21, 1992, January 15, 1993, December 7, 1994, December 28, 1994, March 17, 1995, and June 23, 1995.[5] Westcom's president was added as a complainant when the fourth amended complaint was filed on December 28, 1994. But in the sixth amended complaint that was submitted for filing on June 23, 1995, the references to Sunde as a complainant were removed from the amended complaint.[6]

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[4] In D.00-09-071, the Commission placed certain conditions on Westcom's operating authority due to the imposition of a suspended penalty in the amount of $11,000. (D.00-09-071, Ordering Paragraph (OP) 4, pp. 199-200.) Westcom's certificate of public convenience and necessity (CPCN) was revoked by the Commission in Resolution T-16529 on June 14, 2001. In addition, according to the web site of the California Secretary of State, Westcom's status as a corporate entity authorized to do business in California has been "forfeited."

[5] Westcom labeled both the January 15, 1993 and December 7, 1994 amended complaints as the "Third Amended Complaint For Temporary Restraining Order, Cease And Desist Order, Preliminary And Permanent Injunction." This resulted in the naming of the December 28, 1994, March 17, 1995, and June 23, 1995 as the fourth, fifth, and sixth amended complaints, respectively. This decision adopts the complainants' nomenclature for what has been labeled as the fourth, fifth and sixth amended complaints.

[6] The issue of whether the filing of the sixth amended complaint effectively removed Sunde as a complainant is discussed later in this decision. Thus, our reference to "complainants" throughout this decision refers to both Westcom and Sunde.

The complainants allege that Pacific is authorized to sell and provide switched access services, commonly referred to in the industry as Feature Group A (FGA), Feature Group B (FGB), and Feature Group D (FGD), to IECs for their use in providing interexchange services to their customers. The complainants allege that Pacific is not authorized to provide local business lines and Centrex lines to the IECs for their use in providing interexchange services to their customers. The complainants allege that the IEC defendants are using business lines and Centrex lines provided by Pacific to carry the interexchange traffic of their customers, instead of purchasing switched access services. The complainants allege that the IEC defendants' activities are in violation of Commission orders.

The complainants allege that by allowing the defendant IECs to illegally use local business lines and Centrex lines to carry interexchange traffic, the IEC defendants incur lower costs and can charge customers lower prices than non-participating IECs because the defendant IECs are not using and paying for higher priced switched access services.[7]

The complainants also allege that Pacific's ratepayers have been harmed because the IEC defendants have been able to illegally use business lines to carry interexchange traffic instead of paying for higher priced access services. The

[7] Originally, Westcom had alleged in its complaint and the amended complaints that the IEC defendants were charging lower prices than Westcom, and that Westcom had lost customers and revenue as a result. However, at page 1 of the complainants' fifth amended complaint, the complainants allege: "The Fifth Amended Complaint clarifies that this case has evolved from one asserting claims of harm and damage to Westcom, to one asserting claims of harm and damage to California consumers, subscribers and ratepayers."

complainants estimate the loss in access service revenues at $216 million per year.

As a result of Pacific's alleged failure to force the defendants to subscribe to access services instead of business lines, the complainants allege that Pacific has "undermined and subverted the purpose and intent of incentive based rate of return regulation" by allowing Pacific to retain a larger portion of its earnings. (Sixth Amended Complaint, p. 17.)

The complaint also alleges that Pacific is engaging in unfair competition, is discriminating against similarly situated customers, and is engaging in restraint of trade for allowing the other defendants to use business lines to carry interexchange traffic and for refusing to bill the defendants for switched access charges. The complainants also allege that Pacific may be allowing the IEC defendants to illegally use business lines at this point in time, but that Pacific will later attempt to take action against these IECs when intraLATA competition is allowed so as to gain a market advantage over potential competitors.

The complaint requests a variety of relief. Among other things, the complainants sought a temporary restraining order and a preliminary injunction, as well as reparations. In D.94-04-082 (54 CPUC2d 244), Westcom's request for a temporary restraining order and a preliminary injunction was denied. With respect to Westcom's request for reparations for itself, D.94-04-082 concluded that the Commission lacked jurisdiction to award damages, and that it would not entertain any attempt by Westcom to prove that it lost customers and suffered financial hardship as a result of the defendants' alleged activities. (54 CPUC2d at 252.)

The complainants also request a permanent injunction and an order requiring Pacific to locate, identify, and disconnect all business lines that are

being used by IECs to illegally transport interexchange traffic. The complainants further request that Pacific be ordered to backbill for all past switched access charges that have allegedly been avoided because of the illegal use of business lines to carry interexchange traffic. The complainants also request that the authorizations granted to the IEC defendants be revoked and that Pacific be directed to refund to its ratepayers all sums recovered as a result of the complaint.

On January 9, 1995, Call America filed a motion to dismiss the complaint and all of the amendments to the complaint. Call America's motion to dismiss is based upon the alleged unlawful invasion of privacy and unlawful interception of wire communications of third parties by Westcom and Sunde.[8] On January 10, 1995, a similar motion to dismiss was jointly filed by Execuline et al.

On January 20, 1995 and January 24, 1995, the complainants filed their responses in opposition to Call America's motion to dismiss and to Execuline et al.'s motion to dismiss, respectively. Pacific filed a response in support of the two motions to dismiss on January 24, 1995.

In an Administrative Law Judge's (ALJ) ruling dated February 2, 1995, leave was granted to the moving defendants to file replies to the complainants' responses. Those replies were filed on February 10, 1995.

On March 9, 1995, the complainants filed a motion to amend their response to the motion to dismiss filed by Execuline et al. The complainants had failed to include the original affidavit of Mark Edwards with their January 24, 1995

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[8] Call America contends that these grounds for dismissal were not raised in its first motion to dismiss, which was denied in D.94-04-082, because it was not aware of the complainants' actions at the time the first motion to dismiss was filed.

response and then moved to amend the response to include the Edwards' affidavit. A similar affidavit by Edwards was attached to the January 20, 1995 response to Call America's motion to dismiss. No opposition to this motion was received.

On June 2, 1995, Pacific filed its motion to dismiss. The complainants filed their response in opposition to Pacific's motion on June 13, 1995. Call America and Execuline et al. filed responses in support of Pacific's motion on June 19, 1995.

On July 31, 1995, Call America, Execuline, Pac-West and Express Tel filed a motion "to supplement the record with newly discovered information" in support of Pacific's motion to dismiss for abuse of process. No one filed any response to this motion.

Today's decision, as indicated in the ALJ ruling of March 24, 1995, will also address the May 3, 1994 motion by Execuline and Pac-West to compel Westcom to comply with Pub. Util. Code § 1706. Westcom filed an opposition to that motion on May 12, 1994. The Division of Ratepayer Advocates (DRA) and the Commission's Public Advisor filed a joint opposition to the motion on May 18, 1994. Call America filed a response in support of the motion on May 17, 1994. In an ALJ ruling dated June 20, 1994, Execuline and Pac-West were given permission to file a reply. That reply was filed on June 29, 1994. Permission was also given to William R. Daly to file a late response on June 24, 1994 in opposition to the motion to compel of Execuline and Pac-West.[9]

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[9] Daly has appeared before the Commission in various proceedings as a non-attorney representative of different parties.

A number of other motions have been filed by the complainants and the various defendants. Those motions are described later in this decision.

III. The Change in Complainants

At the time the motions to dismiss of Call America, Execuline et al., and Pacific were filed, both Westcom and Sunde were named in the fourth and fifth amended complaints as complainants. The sixth amended complaint, which was submitted for filing on June 23, 1995, purports to remove Sunde as a complainant. The sixth amended complaint was filed after the three motions to dismiss had been filed.

For purposes of the three motions to dismiss, we shall treat Westcom and Sunde as the complainants because both Sunde and Westcom were named as complainants at the time the three motions to dismiss were filed. As for the effectiveness of the sixth amended complaint, that issue is discussed later in this decision.

IV. The IECs' Motions to Dismiss

A. Position of the Parties

Call America argues that the December 7, 1994 amended complaint and the fourth amended complaint show that on at least 54 separate occasions, and on "hundreds" more occasions by the complainants' own admissions, "Westcom's employee and/or agents intercepted, interrupted, and interfered with third parties' long distance calls on the telephone networks" of Call America and other IECs. (Call America, Motion To Dismiss, p. 3.) Call America contends that the interception, interruption, and interference with the telephone calls of others are in violation of § 2511 of Title 18 of the United States Code (USC), California Penal Code § 631, and Pub. Util. Code §§ 7903 and 7904. Call America also asserts that Westcom's unauthorized monitoring of calls between third parties may also constitute eavesdropping upon confidential communications in violation of Penal Code § 632.

Call America claims that evidence of this misconduct appears in paragraph 21 of the December 7, 1994 amended complaint and the fourth amended complaint, and the exhibits attached to the December 7, 1994 amended complaint. Call America contends Westcom repeatedly and deliberately dialed a series of different telephone numbers for the express purpose of establishing a connection into the telephone conversation of an outgoing party. According to Call America, the exhibits to the amended complaints clearly show that Westcom's employees or agents were then able to question the calling and/or called parties to determine their names, addresses, telephone numbers and long distance carriers. For example, in some of the exhibits to the amended complaints, Call America alleges that the:

> "… full names of calling and called parties, together with their locations, telephone numbers, and office positions, have been disclosed by Westcom without any concern for the breach of privacy involved in publication of such information. Westcom has also disclosed the company names, addresses and telephone numbers of business customers." (Call America, Motion To Dismiss, pp. 5-6, footnotes omitted.)

Call America argues that the parties, whose phone conversations were intercepted, could not be deemed to have consented to the disclosure of this information to Westcom's employees and agents.

Call America further argues that the activities and conduct of Westcom's employees and agents were intentional, as evidenced by the "Local Business Line Verification" forms that were attached to December 7, 1994 amended complaint as Exhibits 1 and 3. Call America contends that these

exhibits show the complainants' repeated and systematic dialing of specified telephone numbers.[10] Call America argues that the disclosure and use of the information by the complainants was the result of the unauthorized interception of third party telephone calls, and that the complainants' use of such information was in violation of Pub. Util. Code §§ 7903 and 7904.

Call America argues that the unlawful conduct by Westcom and Sunde should, at a minimum, result in the dismissal, with prejudice, of the complaint and all of the amendments. Call America also contends that the Commission should consider additional sanctions against Westcom and Sunde.

Execuline et al. contend that the complaint, and all of the related amendments, should be dismissed with prejudice because of Westcom's unlawful and unethical conduct in violation of 18 USC § 2511, Penal Code § 631, and Pub. Util. Code § 7903. They also contend that the unlawful conduct renders the illegally obtained information, as well as any evidence derived therefrom, inadmissible before a regulatory body such as this Commission. Execuline et al. also contend that Westcom's conduct is contrary to the Commission's policy of protecting telephone conversations, as expressed in the Commission's General Order 107. They further argue that each instance of Westcom's alleged violations also constitute Rule 1 violations.

Express Tel makes a separate argument that the complaint should be dismissed as to itself because the matters allegedly relating to Express Tel

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[10] Exhibits 1 and 3 purportedly show some or all of the following: the telephone number that Westcom's agent dialed into so as to enable it to patch into a calling party's call; the calling party's name, telephone number, and IEC; and the called party's name, telephone number, and IEC.

occurred in October 1992, more than two years before Express Tel was added as a defendant to the complaint. Express Tel argues that the addition of Express Tel as a defendant was therefore outside the statute of limitations as provided for in Pub. Util. Code § 735.

Pacific's response supports the motions to dismiss, and argues that regardless of whether Westcom violated the wiretapping law, the complaint should still be dismissed because Westcom's conduct violated its statutory obligation as a regulated public utility to act responsibly. Pacific also contends that the Commission has the authority to dismiss complaints such as this one because of the complainants' abuse of process.

Pacific argues that Westcom's behavior is unacceptable for five reasons. First, Westcom intentionally made telephone calls to intercept private telephone calls. Second, when Westcom intercepted the calls, Westcom's agents misled the calling parties into divulging private information. Third, Westcom's agents were acting under false color of authority so as to obtain information about the calling parties and their IECs, thereby infringing upon their privacy. Fourth, Westcom's agents acting under false color of authority, contacted the intended recipients of the intercepted calls and questioned them. And fifth, Westcom published the information that it obtained from the third parties, which further violated the privacy rights of the calling and called parties.

Pacific also recommends that each of the IEC defendants be required to certify their compliance with the access tariffs. Such certification should specify that each IEC is paying tariffed access charges and is not using business exchange lines in place of access. Pacific contends that a false certification, or the failure to file such a certificate, should result in the revocation of the IEC's certificate of public convenience and necessity.

The complainants filed separate responses to the motion to dismiss of Call America and to the joint motion of Execuline et al. The responses to the motions to dismiss are virtually identical.[11]

The complainants contend that the initial investigation was conducted in late 1991 and early 1992. In the initial investigation, Westcom claims that it dialed a series of 11-digit interstate telephone numbers and, after obtaining a switch dial tone from the defendants' switches, Westcom dialed an authorization code followed by a long distance number. The call was then processed by the defendants' switches which resulted in completed long distance calls. The complainants assert that this initial investigation did not produce any evidence related to the patched calls, that the initial investigation is not related in any way to the later investigation regarding patched calls, and that the initial investigation has not been contaminated.

The complainants contend in their responses to the motions to dismiss that in "late 1993 and late 1994" they discovered another method of identifying unlawful circuits.[12] This method was as follows:

> "Complainants simply dialed a series of eleven (11) digit, interstate telephone calls, dialable by the general public.

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[11] The complainants' responses differ somewhat in their arguments as to why the defendants' attorneys should be sanctioned and removed. The complainants' motions regarding the attorneys representing the defendants are discussed later in this decision.

[12] In the complainants' February 9, 1995 response to Execuline et al.'s motion for leave to file a reply at page 4, the complainants acknowledged that the reference to "late 1993 and late 1994" was a result of a proofreading error. It appears, based on Exhibits 1 and 3 to the December 7, 1994 amended complaint, that the complainants had meant to refer to late 1992 as the time period in which they discovered another method of identifying unlawful circuits.

> This time however, defendant's switching systems caused Complainants' long distance calls to be 'patched' or tied into the calling (outgoing) party from defendants' switches. A two party connection was established. Not one single such call resulted in a three (3) party conversation…." (Complainants' January 20, 1995 and January 24, 1995 Responses, p. 3, footnote omitted.)

The complainants assert that this patching problem occurred as a result of "glare." According to the complainants, glare usually occurs only on standard business lines and other two wire circuits. Had switched access services been used as required by law, the complainants argue that the glare would have never occurred.

The complainants argue that they were never connected to the called parties, and that the called party was never a party to the conversation between the calling party and Westcom's agents. The complainants contend that they were the "sender" of the two way telephone conversation, and thus, they did not intercept, eavesdrop or wiretap any conversations because the conversations only took place between the calling party and Westcom's agents. The complainants argue that one cannot intercept, eavesdrop, or wiretap one's own telephone conversations. According to the complainants, they simply placed phone calls, and "reacted in a fully lawful manner to defendants' negligent patching of calls together." (Complainants' Response, p. 9.)

The complainants also argue that in order to intercept a call, a communication must be acquired through the use of an electronic or mechanical device. The use of a standard telephone, such as what the complainants used, cannot on its own, intercept any communication. Instead, the complainants assert that it was the defendants' own switching systems which caused the patched calls to occur.

The complainants also argue that even though they did not intercept any communication, if it were assumed that the complainants did so, they were then acting under color of law as a private attorney general and such interceptions would not be unlawful under the exemption provided for in 18 USC § 2511(2)(c).

With respect to Express Tel's argument that the complaint should be dismissed against it because of the statute of limitations, the complainants argue that Express Tel continued to use business lines to carry interexchange traffic as recently as November of 1994. In support of that contention, the complainants attached Exhibit 7 and Sunde's affidavit to the response. In addition to this recent activity, the complainants argue that the statute of limitations was stayed when the complainants were effectively barred from filing any action, motion, or amendment in this case due to an order suspending discovery pending the outcome of the applications for rehearing of D.94-04-082.

B. Discussion

Before turning our attention to the IECs' motion to dismiss, we address the complainants' March 9, 1995 motion to amend its January 24, 1995 response to Execuline et al.'s motion to dismiss to include the Edwards' affidavit. The affidavit of Edwards was referred to in the complainants' response, and was attached to the complainants' earlier response of January 20, 1995. No one would be prejudiced by amending the January 24, 1995 response to include the Edwards' affidavit. Accordingly, the complainants' motion to amend the January 24, 1995 response to include the Edwards' affidavit should be granted.

The defendants' motions to dismiss are essentially based on the doctrine of unclean hands. That doctrine is based on the equitable principle that one who seeks equity must do so with clean hands. (D.88-11-051 [29 CPUC2d

549, 557].) In other words, whenever a party who has initiated judicial proceedings to obtain a remedy "has violated conscience, good faith or other equitable principle in his prior conduct, then the doors of the court will be shut against him…" and the court will refuse to acknowledge his right or to afford him any remedy. (Pond v. Insurance Co. of North America (1984) 151 Cal.App.3d 280, 289-290.) The defendants contend that the complaint and the amendments should be dismissed due to the complainants' improper conduct in connection with this proceeding.

In determining whether the doctrine of unclean hands should be applied so as to bar the complainants, we should weigh the relative extent of each party's wrong upon the other and upon the public, and strike an equitable balance. (Republic Molding Corporation v. B.W. Photo Utilities (1963) 319 Fed.2d 347, 350.) In the proceeding before us, we have, on the one hand, the complainants' allegations that the defendants have used business and/or Centrex lines, instead of switched access service, to carry interexchange traffic. On the other hand, the defendants allege that the complainants' conduct violated various laws and that the complainants invaded the privacy rights of the calling and called parties.

With respect to the defendants' arguments that the complainants have violated several different federal and state laws, the complainants argue that either the terms of the statutes do not apply to them, or that they fall within one of the exceptions to the statutes.

In deciding whether the doctrine of unclean hands should apply, we do not have to determine if each of the elements of the statute that the complainants are alleged to have violated is present. That is, the complainants' conduct need not be such as to constitute a crime, be punishable, be actually fraudulent, or be

the basis for a cause of action. Instead, it is sufficient that the conduct violates conscience, or good faith. (Seymour v. Cariker (1963) 220 Cal.App.2d 300, 305; Katz v. Karlsson (1948) 84 Cal.App.2d 469, 474-475.) Or the conduct may be rendered unclean because in the eyes of honest and fair minded persons, the conduct that was undertaken in connection with the proceeding is wrong and should be condemned. (Bennett v. Lew (1984) 151 Cal.App.3d 1177.)

Although the various code sections regarding the interception and eavesdropping cited by the defendants may or may not exactly fit the complainants' conduct, it is our belief that the complainants' conduct impinged upon the privacy rights of the calling and called parties. Those privacy rights and concerns are expressed in various statutes, Commission decisions, and in General Order 107-B.

The overriding concern of Congress in enacting the federal wiretap provisions was the protection of privacy of wire and oral communications. (Lam Lek Chong v. United States Drug Enforcement Administration (1991) 929 Fed.2d 729, 732; United States v. Clemente (1979) 482 F.Supp. 102, 106.)

In Penal Code § 630, the Legislature set forth its declaration of policy regarding eavesdropping upon private communications. The Legislature states in pertinent part:

> "The Legislature hereby declares that advances in science and technology have led to the development of new devices and techniques for the purpose of eavesdropping upon private communications and that the invasion of privacy resulting from the continual and increasing use of such devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society.

> "The Legislature by this chapter intends to protect the right of privacy of the people of this state." (Penal Code § 630.)

In Pub. Util. Code § 2891(a)(1), safeguards are in place to prevent the release of a residential telephone customer's calling patterns. This code section provides in pertinent part:

> "(a) No telephone or telegraph corporation shall make available to any other person or corporation, without first obtaining the residential subscriber's consent, in writing, any of the following information:
>
> > "(1) The subscriber's personal calling patterns, including any listing of the telephone or other access numbers called by the subscriber, but excluding the identification to the person called of the person calling and the telephone number from which the call was placed, subject to the restrictions in Section 2893…."

When the Legislature enacted Pub. Util. Code § 2891, it stated in Section 1 of Chapter 821 of the 1986 Statutes that:[13]

> "The Legislature hereby finds and declares that residential telephone and telegraph customers and subscribers have a right to private communications, that the protection of this right to privacy is of paramount state concern, and to this end, has enacted this act."

Pub. Util. Code § 2893(a) requires that every caller identification service offered in this state shall allow a caller to withhold display of the caller's

[13] This code section was subsequently amended by Chapter 214 of the Statutes of 1994.

telephone number. In Section 1 of Chapter 483 of the 1989 Statutes, which added Pub. Util. Code § 2893, the Legislature declared the following:[14]

> "(a) Telephone subscribers have a right to privacy, and the protection of this right to privacy is of paramount state concern.
>
> "(b) To exercise their right of privacy, telephone subscribers must be able to limit the dissemination of their telephone number to persons of their choosing."

In the caller identification decision, the Commission noted that in November 1972, the voters of California amended Article I, Section 1 of the California Constitution to include the right of privacy among the inalienable rights of all people. The Commission recognized that the language and spirit of the 1972 amendment allows for the protection of a privacy interest even though the interest was not expressly targeted for protection. That is, the right of privacy "is implicated whenever a person reasonably believes that an inquisitive action has been taken…." (D.92-06-065 [44 CPUC2d 694, 707-709].)

General Order 107-B includes regulations governing how telephone corporations may monitor or record telephone conversations. In addition, the General Order contains a requirement that each telephone corporation subject to the Commission's jurisdiction maintain a set of instructions for its employees regarding what steps have been taken to ensure the privacy or secrecy of the telephone communications.

There are several reasons why we conclude that the complainants' conduct was reprehensible and interfered with the privacy rights of the calling

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[14] This code section was subsequently amended by Chapter 675 of the Statutes of 1996.

and called parties. However, before we explain our reasons for that conclusion, it is helpful to describe the manner and method in which Westcom's agents were able to patch into other telephone calls.

It appears from the exhibits attached to the December 7, 1994 amended complaint, which were incorporated by reference into the subsequent amended complaints, and the description in the complainants' responsive pleadings, that Westcom's agents were calling into the telephone lines of the IEC defendants. At approximately the same time, the calling party was attempting to place a call to the called party.[15] One of two things appears to have happened. Westcom was able to patch into an ongoing two-way conversation between the calling party and the called party, at which point Westcom asked questions of both the calling and called parties. Alternatively, if no three-party conversation occurred, as alleged by the complainants, then what is likely to have happened is that after Westcom's agent questioned the calling parties as to their identity, the number they were calling from, who their IEC was, and who they were trying to call, the Westcom agent then disconnected and subsequently dialed the number of the party whom the calling party had intended to call to determine who the called party's IEC was.

The first reason why we believe the complainants' conduct was reprehensible and amounts to unclean hands is because of the manner in which Westcom's agents patched into the conversations of the calling parties. Westcom's activities interfered with, and prevented a connection between the

[15] See Complainants' January 20, 1995 and January 24, 1995 Responses, pp. 2-5; Sunde Affidavit In Support Of Complainants' Responses, pp. 4-5.

calling party and the called party. Although Westcom argues that it did not intercept, eavesdrop, or wiretap any of the calls, and that the patching occurred as a result of glare and switching problems, Westcom did not specifically address the defendants' arguments that the complainants interfered and delayed the calls of the calling parties.

Under Pub. Util. Code § 558, every "telephone corporation … operating in this State shall receive, transmit, and deliver, without discrimination or delay, the conversations and messages of every other such corporation with whose line a physical connection has been made."[16] We recognize that Westcom was not the calling party's IEC, but it is a telephone corporation subject to this Commission's jurisdiction. When Westcom patched into the calling party's call, Westcom made a physical connection with the calling party's line. By patching in and interrupting the calling party's call, and asking questions of the calling party, Westcom and its agents prevented the transmission and delivery of the call to the called party.

The complainants' argument that the patching was the fault of the defendants ignores the fact that Westcom's agents repeatedly dialed selected telephone numbers for the express purpose of patching into a calling party's call that was intended to connect with someone other than the complainants. Under the circumstances, Westcom's conduct cannot be portrayed as accidental or

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[16] We believe that an analysis using Pub. Util. Code § 558 is more appropriate than Call America's argument that Westcom violated Pub. Util. Code § 7904. The wording of Pub. Util. Code § 7904 appears to require that the telephone message be sent to and received by the office of the telephone corporation. Under the circumstances, it appears that a physical connection occurred as a result of the patching, but it cannot be said that the calling party was attempting to send the call through Westcom.

inadvertent interruptions. Instead, as shown by Exhibits 1 and 3 to the December 7, 1994 amended complaint, Westcom's conduct can best be characterized as intentional. We can also surmise that Westcom's agents made numerous other unsuccessful attempts at patching as well, as evidenced by Westcom's statement in its December 7, 1994 amended complaint that "Westcom was 'patched' into hundreds of outgoing calls…." (December 7, 1994 Amended Complaint, p. 12.) By engaging in this conduct, the complainants on numerous occasions prevented the calling party's call from connecting to the called party. Such conduct by the complainants also borders on a possible violation of Pub. Util. Code § 2110.[17]

Our second reason why we believe the complainants' conduct was reprehensible and amounts to unclean hands is because of the manner in which the information was obtained from the calling parties and the called parties. In the defendants' motions to dismiss, they questioned the manner in which Westcom's agents represented themselves to the calling parties and to the called parties. The complainants contend that the calling parties voluntarily gave the information to the complainants. However, the complainants have not explained in their responses to the motions to dismiss what they said, or who they represented themselves to be, when they spoke to the calling and called parties.

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[17] Pub. Util. Code § 2110 provides: "Every public utility and every officer, agent, or employee of any public utility, who violates or fails to comply with, or who … aids, or abets any violation by any public utility of any provision of the Constitution of this state or of this part, or who fails to comply with any part of any order, decision, rule … or requirement of the commission, or who … aids, or abets any public utility in such violation or noncompliance in a case in which a penalty has not otherwise been provided, is guilty of a misdemeanor…."

When the calling party attempted to make a call, the calling party did not expect to talk with Westcom's agents, but rather expected to talk with the party whom the calling party was attempting to call. Upon patching into a conversation where Westcom was not the intended recipient, Westcom's agent was able to ask for the name of the calling party, the number that the party was calling from, the number the party was trying to call, and which IEC the calling party was using.

When a telephone customer is asked a series of questions about customer specific information by someone who interrupts a telephone call, it is reasonable for the calling party to assume that the questioner is the telephone operator. Regardless of whether Westcom's agents represented themselves as Westcom, or if they represented themselves as an operator for the LEC or the calling parties' IEC, it is clear that some of the calling parties and called parties were reluctant or refused to disclose certain information to Westcom's agents as evidenced by some of the "local business line verification" forms attached to the exhibits in the December 7, 1994 amended complaint. Thus, we cannot assume that the calling and called parties voluntarily gave the complainants their informed consent for the release of customer specific information, and Westcom's assertion that the information from the calling parties was voluntarily given must be rendered suspect. Westcom's gathering of this information is especially troubling in light of the various statutes seeking to protect the privacy of telephone customers.

The complainants' conduct may also be in violation of Pub. Util. Code § 7903.[18] Westcom's agents were able to acquire and obtain information by patching into the calling party's call, presumably by representing themselves as an agent, operator, or employee of a telephone company. The use of that information in the amended complaints is now being used, arguably, to the complainants' "own account, profit, or advantage."

Further, we are not persuaded by the complainants' arguments that their conduct was justified because they were acting under color of authority. At the time the complaints and amendments were filed, Westcom was a certificated public utility and was not a law enforcement agency. The complainants have not alleged that any of Westcom's employees or agents were governmental employees acting under the color of law. (See Thomas v. Pearl (7th Cir. 1993) 998 F.2d 447, 450-451.) The complainants also referenced the private attorney general concept as justification for their conduct. However, that concept does not pertain to one's law enforcement authority, which, in the case of Westcom, does not exist. Rather, that concept is an equitable theory upon which an award of attorney's fees can be based. (Serrano v. Priest (1977) 20 Cal.3d 25, 42-43.)

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[18] Pub. Util. Code § 7903 provides as follows: "Every agent, operator, or employee of any telegraph or telephone office, who in any way uses or appropriates any information derived by him from any private message passing through his hands, and addressed to any other person, or in any other manner acquired by him by reason of his trust as such agent, operator , or employee, or trades or speculates upon any such information so obtained, or in any manner turns, or attempts to turn, the information so obtained to his own account, profit, or advantage, is punishable by imprisonment in the state prison, or by imprisonment in the county jail not exceeding one year, or by fine not exceeding ten thousand dollars ($10,000), or by both such fine and imprisonment."

Our third reason why we believe the complainants' conduct was reprehensible and amounts to unclean hands is because the information obtained from the calling and called parties impinged upon the privacy rights of those telephone customers from whom the information was extracted.

Westcom's patching into a calling party's call is analogous to Westcom's use of a caller identification system. Instead of having the caller's telephone number displayed, Westcom's agents apparently asked the calling party to provide their name, and the telephone number of both the calling party's number and the number of the party the calling party was trying to reach. It does not appear from the exhibits attached to the December 7, 1994 amended complaint that Westcom's agents informed the calling parties that they had the right to withhold that information, as provided for in Pub. Util. Code § 2893(a).[19] Although the exhibits show that some of the callers refused to reveal that information, in the majority of the calls listed, the calling party provided the information. Obtaining customer specific information from the calling parties, possibly under false pretenses, and using that information to call up the party whom the calling party had intended to call, offends the notion that some people may not have wanted this information disclosed at all. Such questioning also appears to have been done without regard for the privacy concerns of the calling parties as well as the called parties.

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[19] Pub. Util. Code § 2893(a) provides in pertinent part: "The commission shall … require that every telephone call identification service offered in this state by a telephone corporation, or by any other person or corporation that makes use of the facilities of a telephone corporation, shall allow a caller to withhold display of the caller's telephone number … from the telephone instrument of the individual receiving the telephone call placed by the caller."

In addition, the complainants' questioning of the callers sought to elicit information about the calling pattern of the calling parties. Although Pub. Util. Code § 2891 appears to apply only to residential telephone customers, the idea that someone can obtain and disclose the calling patterns of business telephone customers without their consent is reprehensible as well.

The complainants' conduct, however, must be weighed along with the allegations against the defendants. As the courts have recognized, the doctrine of unclean hands should not be applied where to do so would create an injustice or if the act being complained about is against public policy. (Health Maintenance Network v. Blue Cross (1988) 202 Cal.App.3d 1043, 1061; Jomicra, Inc. v. California Mobile Home Dealers Assn. (1970) 12 Cal.App.3d 396, 402; Hill v. Younkin (1969) 274 Cal.App.2d 880, 883; Kofsky v. Smart & Final Iris Company (1955) 131 CalApp.2d 530, 532.)

In D.94-04-082, the interim opinion in this proceeding, the Commission expressed a reluctance to dismiss the complaint against Call America and Execuline et al. because of possible wrongdoing by the defendants. (54 CPUC2d at pp. 252-254.) The Commission stated:

> "In deciding these motions, we want to balance the competing interests of the defendants who may be required to defend, and the possibility that activities in violation of our rules, orders, and decisions have or are taking place." (54 CPUC2d at 249.)

The Commission also expressed concern in the interim opinion about the complainants possible abuse of the Commission's processes. (54 CPUC2d at pp. 253, 264.)

In balancing the complainants' behavior with the allegations against the defendants, we must ask ourselves whether the complainants' unclean hands

prejudiced the defendants or if it affected the equitable conduct between the litigants. The misconduct must be so intimately connected to the injury of another with the matter for which the plaintiff seeks relief. (Tinney v. Tinney (1963) 211 Cal.App.2d 548, 555; Treager v. Friedman (1947) 79 Cal.App.2d 151, 173.)

The complainants contend that the original investigation did not involve any patching of calls. If the later investigative methods are determined to be unlawful, the complainants contend that the latter method should not contaminate the initial investigation.

We believe the complainants' reasoning is in error. The amended complaints incorporate the allegations derived from the initial investigation, as well as the investigative methods that the complainants employed in late 1993. The complainants have not sought to amend the complaint by deleting the allegations arising from the latter investigative methods used by the complainants.

The complainants' conduct prejudiced the defendants and their customers, and tainted the initial investigation, because Westcom was able to obtain customer specific information from the IECs' customers. This was information for which the calling parties had a reasonable expectation of privacy. In addition, the calling parties' calls were either interrupted or delayed as a result of the complainants' actions. Although the complainants' conduct apparently was intended to produce evidence supporting the allegations, the conduct of the complainants was reprehensible and amounts to unclean hands because it infringed upon the privacy rights of the customers of the IECs. The complainants' conduct was not isolated, but instead was a deliberate attempt to obtain as much information from the defendants' customers as possible. These

activities are directly related to the allegations for which the complainants seek relief and, thus, the latter investigative methods employed by the complainants tainted the earlier investigation.

The allegations concerning the defendants' conduct must also be taken into account. If the allegations against the defendants are true, the defendants should not be entitled to profit from their wrongful conduct. (Insurance Company of North America v. Liberty Mutual Insurance Company (1982) 128 Cal.App.3d 297, 307-308.) As the Commission recognized in D.94-04-082, even if Westcom has unclean hands, it would not benefit the public interest if Westcom's allegations were to go unchecked. (54 CPUC2d at 253-254.) One of the defendants, Pac-West, admitted in its September 18, 1992 answer to the initial complaint (at paragraph 24 on page 4) that in one instance involving three trunk groups, business lines were used to provide interexchange carrier services to Pac-West customers. If other defendants engaged in the same type of conduct, as alleged by the complainants, switched access revenues could have been affected as a result.

In weighing and balancing whether the defendants' motions to dismiss should be granted because of the complainants' conduct, we conclude that under the circumstances, the complainants' conduct is sufficient to merit the granting of the motions to dismiss. The complainants' repeated attempts to patch into the calls of the defendants' customers violated the privacy rights of those customers. In doing so, the complainants' conduct may have violated a number of laws and regulations. The complainants' reprehensible conduct, as discussed earlier, should bar the complainants from seeking a remedy before the Commission.

Accordingly, the motions to dismiss that were filed by Call America and Execuline et al. should be granted with prejudice.[20]

Express Tel made a separate argument that the complaint should be dismissed against it because the statute of limitations had expired. Express Tel contends that a review of Exhibit 3 to the December 7, 1994 amended complaint shows that the time period in which Express Tel allegedly engaged in unlawful conduct occurred in late October 1992. Express Tel argues that the applicable statute of limitations was two years and that a complaint should have been filed by October 1994. The complainants, however, did not file the third amended complaint naming Express Tel as a defendant until December 7, 1994.

The complainants' January 24, 1995 response to Express Tel's argument asserts that, as late as November 1994, Express Tel customers were still using illegal lines to carry interexchange traffic, as evidenced by Exhibit 7 to the complainants' response and Sunde's affidavit in support of the complainants' response.

We first dispose of the complainants' argument that the statute of limitations period should be extended because of the complainants' perception that they were prevented from filing the amended complaint within the two-year period.

The complainants assert that the ALJ ruling of June 20, 1994 prevented them from filing an amended complaint. That ruling did not prohibit the

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[20] Pacific's abuse of process argument, discussed later in this decision, and the Commission's concern in D.94-04-082 over the complainants' possible abuse of process and lack of candor in its pleadings, are additional reasons justifying dismissal of the complaint. (See 54 CPUC2d at pp. 253-254, 262.)

complainants from filing an amended complaint. All that ruling did was to suspend discovery until the applications for rehearing of D.94-04-082 were resolved. (See June 20, 1994 ALJ Ruling.) It has been the Commission's experience that Westcom and its president, Sunde, have not hesitated to file pleadings when they believe it is in their interest to do so as evidenced by the complainants' numerous pleadings, as well as the complainants' filings in the Superior Court and the Supreme Court regarding this proceeding.[21] However, when Westcom fails to file a pleading in a timely manner, Westcom seeks an excuse for its actions. (See D.92-12-038, fn. 2; D.94-10-061 [57 CPUC2d at pp. 121, 123]; D.00-09-071, pp. 126-131.)

The statute of limitations argument of Express Tel raises the issue of whether we should permit the use of the information generated from the complainants' conduct. That is, the complainants' allegations against Express Tel are based on the complainants' conduct which allegedly took place in October 1992 and November 1994. If the complainants' gathering of the information in November 1994 was based on illegal conduct, then arguably, Penal Code §§ 631(c) and 632(d) prevent the use of that tainted information in proceedings before this Commission.[22]

As we discussed in D.94-04-082, as modified by D.94-10-061, the applicable statute of limitations is two years. (54 CPUC2d at 251-252; See 57

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[21] See California Supreme Court Case No. S044421 and San Francisco County Superior Court Case No. 959844.

[22] Penal Code §§ 631(c) and 632(d) essentially state that any evidence obtained as a result of unauthorized wiretaps or eavesdropping shall not be admissible in any administrative proceeding.

CPUC2d at 124.) Thus, for any alleged unlawful conduct that occurred in or prior to October 1992, a complaint should have been filed by October 1994. The complainants failed to do so.

The complainants argue, however, that because Express Tel continued to engage in the same kind of conduct in November 1994, the filing of the complaint in December 1994 was timely. The problem with this argument is that the alleged wrongdoing in November 1994 was only uncovered as a result of the complainants' reprehensible conduct, as described earlier. Consistent with Penal Code §§ 631(c) and 632(d), any evidence uncovered as a result of the complainants' actions would not be admissible in any administrative proceeding. Accordingly, Express Tel's motion to dismiss the complaint should be granted.

V. Pacific's Motion to Dismiss

A. Position of the Parties

Pacific's motion to dismiss was filed because of Pacific's belief that the filing of the fifth amended complaint on March 17, 1995 raised additional grounds for dismissal. Pacific's first ground as to why the complaint should be dismissed is because of the complainants' alleged abuse of process. Pacific argues that the Commission has the power to prevent abuse of process. Pacific contends that Westcom, in disregard of its obligation as a regulated public utility and of the privacy interests of the calling parties, abused the Commission's complaint process by intercepting calls and interrogating unsuspecting callers. Pacific also contends that the complainants have repeatedly filed amended complaints without an evidentiary basis for doing so, and that such filings were done only for the purpose of increasing their chances of receiving compensation.

Pacific's second argument is that the complainants lack standing to pursue the complaint because the Fifth Amended Complaint does not seek to

remedy injuries to Westcom or to Sunde. Pacific also contends that the complainants cannot bring this action as a representative of customers because they have not been authorized to do so.

The third ground upon which Pacific urges dismissal is that neither Sunde nor Westcom are eligible for compensation pursuant to Pub. Util. Code § 1800 et seq. In addition, Pacific contends that the complainants do not qualify for compensation under the Advocates Trust Fund or a common fund because the complainants are motivated by their own economic interests to bring this action.

Pacific's fourth ground for dismissal is that the implementation rate design price structure adopted in D.94-09-065 eliminated any financial incentive for carriers to use exchange lines to terminate interexchange calls. During an IEC's peak periods, Pacific contends that it now costs more for an IEC to use a measured business line or a Centrex line for access than it does to use switched access.

The complainants' response to Pacific's motion to dismiss repeats many of the same arguments that were included by the complainants in their responses to the IECs' motions to dismiss, which need not be repeated here. Several new arguments were made as well.

One new argument that the complainants make is that they have not engaged in any abuse of process. Unlike the Victor v. Southern California Gas Company decision, D.88-03-080, which Pacific cited, the complainants argue they have only filed a single complaint, rather than a series of frivolous complaints.

The complainants argue that the filing of amended complaints is an entirely proper procedure as authorized by former Rule 8.[23]

Regarding Pacific's standing argument, the complainants contend that Westcom had been a customer of Pacific until 1993, and that Westcom is a customer of California services from other carriers. The complainants' response also states that it still provides some long distance service in California, and that the complainants have been authorized to bring this complaint by another long distance company that is interested in the prosecution of this case.[24]

With respect to Pacific's argument that the complaint should be dismissed because the complainants are not eligible for compensation, the complainants contend that the complaint cannot be dismissed on such grounds. The complainants also assert that the citations of Pacific are not on point because of recent changes to the intervenor compensation program.

As for Pacific's argument that any financial incentive to use exchange lines to terminate interexchange calls has been eliminated, the complainants argue that there are still incentives to use business lines to originate and terminate interexchange carrier traffic.

Call America's response supports Pacific's motion to dismiss. Call America contends that the complainants' fourth and fifth amended complaints amount to an abuse of process because the complainants are only trying to

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[23] Former Rule 8 is now found in Rule 2.6 of the Commission's rules.

[24] In the complainants' response to Pacific's motion to dismiss, the complainants assert that Coachella Valley Communications, Inc. (Coachella) has authorized the complainants to pursue this action on Coachella's behalf as shown in Exhibit 3 of the complainants' response.

posture their complaint in order to qualify for intervenor's fees, and the amended complaints do not contain any new allegations or information. Call America asserts that Pacific's argument that the complainants are ineligible for compensation demonstrates that the complainants lack standing to pursue the complaint.

Call America also reiterates that Pacific's motion to dismiss should be granted because the complainants' intercepted and invaded the privacy of third parties, and because both Westcom and Sunde lack standing to bring the complaint.

Execuline et al.'s response also supports Pacific's motion to dismiss. Their response argues that the complainants' filing of numerous amended complaints was without sufficient justification and amounts to an abuse of process which warrants dismissal of the complaint.

B. Discussion

Several of the IECs filed a motion on July 31, 1995 denominated: "Motion Of Interexchange Carriers To Supplement The Record With Newly Discovered Information, In Support Of Pacific Bell's Motion To Dismiss For Abuse Of The Commission's Processes." The additional information that was attached to the IECs' motion was a July 26, 1995 Press Release from the United States Attorney for the Eastern District of California announcing that Sunde had been charged in a federal criminal complaint with "mail fraud and blackmail in connection with an attempt to extort money from the owner of a small California telephone company." In addition, the motion included the arrest warrant, the criminal complaint, and the affidavit in support of the complaint. The IECs contend that the statements in the affidavit demonstrate that Sunde is flagrantly

abusing the Commission's processes for private gain.[25] No opposition to this motion was filed.

Since the statements contained in the affidavit have a bearing on Pacific's abuse of process argument, we will grant the IECs' motion of July 31, 1995 to supplement the record. As discussed later in this decision, we also take official notice of Sunde's plea of guilty in this federal criminal case.

Many of the issues raised by Pacific's abuse of process argument have already been addressed in the earlier discussion regarding the IECs' motions to dismiss. We incorporate that discussion in this section by reference. There are also several other arguments that the defendants and the complainants have raised which need to be addressed.

One issue is whether the filing of numerous amendments by the complainants amounts to an abuse of process.

The complainants' argument that amendments are permitted by former Rule 8 overlooks the fact that amendments submitted after the scheduled hearing date may only be filed and served as permitted or directed by the ALJ. Although no evidentiary hearings were scheduled in this proceeding, Westcom and Sunde filed one amendment and six amended complaints.

The effect of an amended complaint is that it supersedes a previously filed complaint. (Rule 2.6 (a); Witkin, California Procedure, 4th Ed., Pleading

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[25] The affidavit of Postal Inspector Pedro Colon in support of the criminal complaint includes several references to instances where Sunde allegedly threatened to file a complaint against telephone resellers at the Commission, with the courts, and with the Internal Revenue Service (IRS) unless he received "payoffs in exchange for not turning them into the IRS and not filing complaints against them in court and before the CPUC." (July 31, 1995 Motion, Affidavit, p. 5.)

§ 1119, p. 575.) However, if amended pleadings are allowed to automatically supersede a prior pleading, disruptions to the management of a proceeding can easily result. It should be left up to the Commission or the ALJ to decide whether the addition and then subsequent deletion of a complainant or defendant should be permitted, or if an amendment containing new allegations should be allowed. (See 6 CPUC2d 299, 308; 72 CPUC 90, 92.)[26]

The complainants' frequent use of amended pleadings is of concern to us. That process has led to the naming of Sunde as a complainant in the fourth and fifth amended complaints.[27] Numerous pleadings and correspondence regarding Sunde's status and his eligibility for compensation have been filed in this proceeding and at the California Supreme Court. (See March 24, 1995 ALJ Ruling, pp. 3-6; 54 CPUC2d at 260-261.) However, in Westcom's sixth amended complaint, Westcom seeks to remove Sunde as one of the named complainants.

The Commission and other parties have spent considerable time and resources on the issues of whether Sunde is a proper party to this proceeding,

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[26] Our procedure regarding amendment of pleadings is very similar to the procedure provided for in Code of Civil Procedure § 473.

[27] It appears that Sunde may have been included as a complainant for the sole purpose of enabling Sunde, since Westcom was not represented by counsel, to file a Petition for a Writ of Mandamus (Petition) in pro per with the California Supreme Court in SO44421. Sunde was added as a complainant when the fourth amended complaint was filed on December 28, 1994. Sunde's Petition was filed with the Supreme Court on or about January 19, 1995. (ALJ Ruling, March 24, 1995, p. 4, fn. 4; See SO44421: Call America's "Memorandum of Points and Authorities In Opposition To Petition For Writ Of Mandamus," p. 1, fn. 1; "Verified Answer Of Express Tel, Execuline of Sacramento, Inc. and Pac-West Telecom, Inc. To The Verified Petition For A Writ Of Mandamus Of J. Michael Sunde," p. 2, fn. 1, p. 9, fn. 20, pp. 12-13, fn. 25; and CPUC's "Opposition Of Respondent To Petition For Writ Of Mandamus," pp. 1-2, 8.)

and whether he should be able to claim intervenor compensation. Yet, Sunde has decided after the Commission and other parties have spent significant resources addressing these issues at the Commission and at the California Supreme Court, that he should no longer be named as a complainant.[28]

We shall permit the filing of the sixth amended complaint removing Sunde as a named complainant pursuant to Rule 8(a)(1). We also conclude that Westcom and Sunde are abusing the processes of this Commission, and possibly those of the California Supreme Court, given the inclusion and subsequent removal of Sunde's name both in Westcom's Amended Complaint and in its notices of intent to claim intervenor compensation. Westcom's gaming of Sunde's status for the purpose of seeking relief at the Supreme Court, and for intervenor compensation, are disruptive and interfere with the orderly administration of the Commission's processes.

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[28] As noted at page 5 of the March 24, 1995 ALJ Ruling, an amended request adding Sunde's name for a finding of eligibility for intervenor compensation was filed on or about February 16, 1995. However in Sunde's March 6, 1995 letter to the California Supreme Court, he suggested that the amended request of February 16, 1995 be withdrawn. On or about June 22, 1995, Westcom filed an "Amended Notice Of Intent To Claim Compensation." That amended notice deleted Sunde's name from the request for a finding of eligibility. Pacific moved to strike the amended notice on July 5, 1995, and Westcom opposed the motion in its response filed on July 12, 1995. On July 14, 1995, Call America filed a response in support of Pacific's motion. Pacific's motion should be granted because allegations have been made that Sunde should be considered the alter ego of Westcom for purposes of determining whether Westcom and Sunde are eligible for an award of compensation. Given the allegations contained in the amended complaints and in the other related pleadings regarding the eligibility of Westcom and Sunde for compensation, Pacific's motion to strike the June 22, 1995 Amended Notice Of Intent To Claim Compensation is granted. We note that this above-mentioned chronology is yet another example of Westcom's and Sunde's proclivity to change course while at the same time causing the Commission staff and other parties to incur substantial time and costs to sort out the position of the complainants.

As for Pacific's argument that the complainants are not eligible for compensation under Pub. Util. Code § 1800 et seq., the Advocates Trust Fund, or a common fund, those issues are discussed later in this decision. Whether or not the complainants are eligible for compensation, however, is not a ground for dismissal of the complaint. As discussed above, the complainants' repeated amendments and posturing at both the Commission and at the Supreme Court over the complainants' eligibility for compensation constitutes an abuse of process.

The next issue is Sunde's federal criminal prosecution. We take official notice that Sunde pled guilty on July 1, 1996 in the United States District Court for the Eastern District of California in a criminal proceeding, Case Number MAG 95-277. According to the Press Release issued on July 1, 1996 by the United States Attorney's office for the Eastern District:[29]

> "SUNDE … pleaded guilty in federal court in Sacramento today to one felony count of mailing a threatening communication with intent to extort money from the owner of a small California telephone company."

According to the September 27, 1996 Press Release of the United States Attorney's office:

> "SUNDE … was sentenced today in Sacramento by U.S. District Court Judge Edward J. Garcia to five months in prison, to be followed by a one year term of supervised

[29] A copy of the July 1, 1996 press release was transmitted along with a cover letter to the ALJ by one of the defendants' counsel. A copy of the letter and the press release was also sent to Sunde. In a July 8, 1996 letter to the ALJ, Sunde responded that his conduct in the federal criminal case was "unrelated to this case, [and] provides no basis for dismissal."

> release including five months in a halfway house, and a $10,000 fine, in connection with SUNDE's effort to extort money from the owner of a small California telephone company."

The underlying criminal complaint alleged that on or about June 7 and June 24, 1995, Sunde :

> "…devised a scheme and artifice to defraud and to obtain money by false pretenses, knowingly caused mail matter to be delivered through the United States mail for the purpose of executing the scheme; and
>
> "On or about July 5, 1995 in Placer County in the Eastern District of California, defendant did demand money in consideration for not informing against a violation of United States law.
>
> "In violation of Title 18 United States Code, Section(s) 1341 and 873."

The information contained in the affidavit supporting the criminal complaint in federal court against Sunde, and his subsequent guilty plea, establishes a willingness on the part of Sunde to engage in protracted litigation before the Commission as a means of obtaining private gain through a threat of litigation. His conviction only reinforces our conclusion that the Commission's processes have been abused by the complainants.

In light of our conclusions about the complainants' abuse of process, there is no need to address the issue of the standing of the complainants to pursue this complaint. We note, however, that the complainants' argument that they have been authorized by Coachella to represent its interest in this proceeding is not a viable one. Although Exhibit 3 of the complainants' response to Pacific's motion to dismiss appears to authorize Sunde to represent

Coachella's interest in this proceeding, no petition to intervene in this complaint proceeding was ever filed by Coachella as required by Rule 53.

The other issue is Pacific's argument that the complaint should be dismissed because there is no economic incentive for IECs to use exchange lines rather than switched access to carry interexchange traffic. This argument is more in the nature of a defense to the complaint rather than a basis as to why the complaint should be dismissed.

Based upon our earlier discussion regarding the granting of the IECs' motions to dismiss, and the abuse of process discussion raised by Pacific, we conclude that dismissal of the complaint with prejudice, as sought by Pacific's motion, should be granted.

VI. Motion to Compel Compliance With Pub. Util. Code § 1706

A. Introduction

Execuline and Pac-West filed a motion on May 3, 1994 seeking to compel Westcom to comply with Pub. Util. Code § 1706. This motion was filed before Sunde's name was added as a complainant. Given the dismissal of this complaint, this motion is moot.

However, while this issue has been considered elsewhere, we do address the issue of whether, under the circumstances of this proceeding, Westcom and Sunde should be required to retain an attorney to represent them in future proceedings before the Commission.[30]

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[30] Due to our conclusions regarding the complainants' disregard of privacy rights, their abuse of the Commission's processes, the fact that Westcom's president is Sunde, that "Sunde is the primary individual responsible for uncovering and investigating the allegations contained herein, and will be the person primarily responsible for

Footnote continued on next page

Pub. Util. Code § 701 provides:

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Included among that regulatory authority is the right to make orders and to formulate rules governing the conduct of the public utility. (East Bay Municipal Utility District v. Railroad Commission (1924) 194 Cal. 603, 612.)

Rule 63 provides in part that the presiding officer may set hearings and control the course of the hearings. The presiding officer may also "take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission."

As a public utility, and as an officer of a public utility, Westcom and Sunde, respectively, are obligated to obey and comply with every order, decision, direction, or rule made or prescribed by the Commission. (Pub. Util. Code § 702.) Our earlier discussion notes that the complainants' conduct in this proceeding appears to be in violation of Pub. Util. Code §§ 558 and 7903.

Westcom's conduct of patching into the conversations of unsuspecting third parties and asking certain questions, erodes our confidence in the ability of Westcom and Sunde to pursue this complaint without interfering with and

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prosecuting this Complaint through the Commission" (Fourth Amended Complaint, p. 2), and the allegation that Sunde is the alter ego of Westcom, justifies the broadening of our inquiry into whether Sunde should also be required to be represented by an attorney in future Commission proceedings.

intruding on a telephone customer's expectation of privacy. That was one of the reasons for granting the motions to dismiss the complaint.

This is not the first time that the complainants have conveniently overlooked the private nature of the information that they obtained in order to further their own objectives. In C.92-09-006, a complaint case filed by Westcom against Citizens Utilities Company of California (CUCC), Westcom sought to offer into evidence exhibits containing personnel information of a witness called by Westcom. The ALJ, on his own accord, sealed the records offered into evidence because of the private nature of the personnel records. (See Payton v. City of Santa Clara (1982) 132 Cal.App.3d 152, 154-155; See C.92-09-006 and C.92-09-025, 4 R.T. 270-272, 7 R.T. 561, 570-571, 8 R.T. 691-693.) In addition, in C.92-03-049, a related complaint case involving Westcom and CUCC, Westcom used numerous telephone bills of Westcom's customers as evidence in that proceeding, without deleting customer specific calling patterns.

The addition and then subsequent deletion of Sunde as a complainant in this proceeding, and in the notice of intent to claim intervenor compensation and related amendment, have been troubling as well. After several pleadings associated with the addition of Sunde as a complainant were filed, Sunde decided to delete his name from the complaint. As discussed earlier, his motive for doing so is questionable. With little cost to the complainants, all of these activities have caused additional work and expense for the Commission and the defendants.

The conduct of Westcom and Sunde is not just limited to privacy concerns and suspect procedural maneuvering. Westcom's failure to obey D.92-08-028 was an issue in C.92-09-025, a complaint case related to C.92-09-006. The Commission previously noted in D.92-12-038 that "we are very concerned

about Westcom's seemingly deliberate disobedience of a Commission order…." (D.92-12-038, p. 9.)[31]

All of the items mentioned above lead us to conclude that to prevent future abuses of the Commission's processes, the presiding officer should carefully consider requiring Westcom or Sunde to retain an attorney for any proceeding in which they appear and prohibiting Sunde or Westcom from acting as a representative on behalf of others in proceedings that may be filed at the Commission.

We have imposed similar restrictions on a complainant before. In D.88-03-080, we imposed conditions on an individual who was found to have frivolously filed complaints against an energy utility. The Commission noted in Conclusion of Law 2 at page 13 of D.88-03-080 that: "The Commission has the power to prevent its processes from being used for frivolous litigation for the purposes of vexation and harassment."

In addition, placing restrictions on the conduct of complainants is consistent with the theory behind the unclean hands doctrine. One of the reasons why that doctrine is used, is to protect the judicial forum's integrity from the improper action of a party. (Hall v. Wright (1957) 240 Fed.2d 787, 795.)

If the presiding officer decides to require Westcom or Sunde to retain an attorney in order to participate in a proceeding before this Commission, this will result in a check on the complainants' actions. If Westcom and Sunde decide

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[31] This issue was subsequently decided in D.00-09-071. In that decision, the Commission concluded that "Westcom failed to obey and comply with ordering paragraph 5 of D.92-08-028, and that Westcom's failure resulted in a violation of § 702." (D.00-09-071, p. 132.)

to file motions, amend their pleadings, or engage in discovery, they will have to endure some of the financial burden just as the Commission and other parties have to do.

We are not convinced by the argument that, if, Westcom or Sunde is required to retain an attorney to represent their interests in proceedings before this Commission, such a requirement would be inconsistent with Westcom's right to due process and an opportunity to be heard. Westcom and Sunde could continue to participate in our proceedings provided a licensed attorney is retained. If such a requirement is imposed, this will help ensure that the Commission's processes are not subjected to abuse, it will shift some of the costs of participation onto Westcom or Sunde, and it will help safeguard the public's right to privacy.

VII. Motions for Sanctions and Removal of Defendants' Counsel

A. Position of the Parties

In the complainants' January 20, 1995 response to the motion to dismiss by Call America, the complainants also moved for sanctions against Call America, and the removal of Call America's counsel.[32] The complainants also request that Call America's counsel be reported to the State Bar for suspension or disbarment because of counsel's alleged "outrageous" conduct. The

[32] It is unclear from the complainants' motion for sanctions whether they seek sanctions against Call America and Execuline et al., or if the complainants seek sanctions against counsel for those defendants. Although the complainants request sanctions against the defendants, the complainants' arguments as to why sanctions should issue revolve around the statements made in the defendants' pleadings, and how counsel for the defendants have "presented evidence to this Commission that Complainants had committed criminal acts" and drafted false and misleading pleadings.

complainants filed nearly identical motions and requests with respect to Execuline et al. and its counsel on January 24, 1995. The only substantial difference between the two motions was that in the motion against Call America, the complainants alleged that Call America falsely accused the complainants of hacking. On February 16, 1995, the complainants filed an amended motion for sanctions and for removal of defendants' counsel with respect to Execuline et al. adding the argument that they had also falsely accused the complainants of hacking.

The complainants assert the following, among other things, in their motions:

> "Throughout this case, defendants' counsel has engaged in unprofessional, bad faith representations designed for the purpose of diminishing Complainants in the eyes of the Commission and for the purpose of personal gain! Defendants' false pleadings display malicious and evil intent, are a fraud upon this Commission, constitute serious misconduct and can only now be rectified by the issuance of sanctions against defendants and the removal and disqualification of defendants' counsel <u>and</u> law firm from any further representation in this case. Complainants fully expect final adjudication of this issue to lie with the Supreme Court of the State of California!"

The complainants argue that the defendants have committed misconduct because they have "knowingly made false and ludicrous claims that Complainants are guilty of eavesdropping, intercepting, and wiretapping its own telephone calls." Instead of making allegations, the complainants assert that the defendants have made "positive, affirmative statements that Complainants have committed <u>criminal</u> acts, punishable with fines and jail time" (emphasis in original) without any evidence. The complainants also assert that defendants'

counsel have refused to make reasonably diligent efforts to comply with the complainants' legally proper discovery requests.

Call America argues that the complainants' motions should be denied. With respect to the accusations of hacking, eavesdropping, intercepting, and wiretapping, Call America contends that those allegations are supported by Westcom's own exhibits and verified statements, and that such arguments are within the range of permissible argument and constitute a valid basis for urging the Commission to dismiss the complaint. As for the complainants' allegation regarding Call America's refusal to comply with the complainants' data request, Call America argues that its objections are being asserted in a manner that is permitted by the Code of Civil Procedure. According to Call America, the objections were based largely on the concerns generated by the complainants' admitted interference with outbound calls.

Execuline et al. asserts that its pleadings have merit and are largely based on Westcom's own statements and exhibits. As for the complainants' request that counsel for Execuline et al. be removed and be reported to the California State Bar, the defendants point out that Sunde himself is not an attorney, that no licensed attorney would cavalierly file such a motion, and that Sunde feels free to file such motions because he is not subject to discipline by the State Bar.

B. Discussion

The complainants believe that the defendants' motions to dismiss contain false and dishonest information which cannot be viewed as legitimate, aggressive pleadings. We have reviewed the allegations in the motions to dismiss, and the responses by the complainants. As discussed earlier, we are of the opinion that the complainants engaged in conduct which impinged upon the

privacy rights of others, as shown by the documents attached to the December 7, 1994 amended complaint. In light of the complainants' own documents, and our analyses of the motions to dismiss, we cannot conclude that the allegations contained in the motions to dismiss were false or misleading. Nor can we conclude that counsel for Call America and Execuline et al. refused to make reasonably diligent efforts to comply with the discovery requests propounded by the complainants. Accordingly, the complainants' motions for sanctions, and motions that counsel for Call America and Execuline et al. be removed are denied.

With respect to the complainants' request that counsel for Call America, and Execuline et al., be reported to the State Bar, we do not believe that counsel for the defendants have engaged in any conduct which would cause us to report their actions to the State Bar. Therefore, the complainants' request is denied.

We note that the complainants' request that defendants' counsel be reported to the State Bar is additional justification to examine the participation of Westcom or Sunde in Commission proceedings. Since Sunde himself is not a member of the California State Bar, he is not bound by the California State Bar's Rules of Professional Conduct.[33] Despite this, he apparently feels free to allege

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[33] Despite Sunde's status, he has used stationery which leaves the impression that he is licensed to practice law. For example, in Sunde's April 26, 1994 letter to the Commission's Docket Office in this proceeding, his September 19, 1994 letter to ALJ Wetzell in C.93-10-023, and his November 2, 1994 letter to ALJ Wong in C.92-07-045, the letterhead of these letters state: "J. Michael Sunde, Civil Litigation Before The CALIFORNIA PUBLIC UTILITIES COMMISSION." (Emphasis added; See 54 CPUC2d at p. 253.) It appears that Sunde later changed his stationery to read: "J. Michael Sunde, Representation Before The CALIFORNIA PUBLIC UTILITIES COMMISSION," as evidenced by Sunde's January 30, 1995 letter to Call America's attorney, his February 4,

Footnote continued on next page

that others, who are bound by such rules, violated those rules. This kind of advocacy by Westcom and Sunde should be placed in check. Thus, as discussed earlier, the presiding officer in each Commission proceeding in which Westcom or Sunde may make a future appearance should decide whether Westcom and Sunde should be required to be represented by a licensed attorney, or whether Westcom or Sunde should be allowed to act as a party's representative.

VIII. Motion to Enforce Signing of Non-Disclosure and Protective Agreement, Motion to Supplement the Record With New Evidence, and Motion for Sanction

A. Position of the Parties

On February 1, 1995, the complainants filed a pleading entitled "Motion To Enforce Signing Of Non-Disclosure And Protective Agreement; Motion To Supplement The Record With New Evidence; Motion For Sanction." These motions arose out of the non-disclosure agreement that Westcom and Pacific were ordered to enter into by D.94-04-082.

The complainants argue that Pacific and the complainants negotiated a proposed non-disclosure agreement that the complainants signed on January 20, 1995 and returned to Pacific. At about the same time, the complainants contend that Pacific provided copies of the proposed agreement to the IEC defendants. According to the complainants, the IEC defendants added additional terms to the proposed agreement. This revised agreement was then submitted to the

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1995 letter to ALJ Wong in C.92-07-045, and his July 8, 1996 letter to ALJ Wong in this proceeding.

complainants for their concurrence. The complainants have refused to execute the revised agreement arguing that the defendants' revisions are without merit.

The complainants contend that the defendants' actions are part of a conspiracy to obstruct the complainants' discovery efforts. According to the complainants, this obstruction is in violation of the Business and Professions Code and the State Bar's Rules of Professional Conduct.

Pacific asserts that it has negotiated in good faith with the complainants to create a mutually agreeable non-disclosure agreement as provided for in D.94-04-082. Contrary to what the complainants have asserted in their February 1, 1995 pleading, Pacific argues that Sunde misrepresented and omitted some key facts regarding negotiations concerning the agreement.

According to Pacific, on December 6, 1994, Sunde sent to Pacific a proposed non-disclosure agreement with some requested changes. In late December 1994, the third amended complaint was received by Pacific. Due to the complainants' activities disclosed in the third amended complaint, Pacific sent a copy of the proposed agreement to counsel for the other defendants on January 5, 1995 and sent a copy of the cover letter to the complainants. The letter stated in part:

> "After signature of this Agreement, we plan to release confidential information regarding your clients. … If you have any objections, please notify us and Mr. Sunde at your earliest convenience."

On January 18, 1995, Pacific sent a letter to the complainants to confirm that a conference call would be held on January 27, 1995 to discuss, among other things, the non-disclosure agreement. On or about January 20, 1995, the complainants signed the agreement that had been attached to the January 5, 1995 letter.

On January 27, 1995, a telephone conference was held between Pacific and the complainants. Among the items discussed were revisions to paragraphs 2 and 3 of the agreement. On January 31, 1995, a revised agreement was distributed to the other defendants with a copy to the complainants. The revisions made changes to paragraphs 2 and 3 of the agreement. The January 31, 1995 letter asked the defendants to inform Pacific if the revised agreement was acceptable to them.

On February 3, 1995, Pacific sent the complainants a letter confirming the discussion that was held on January 27, 1995. Regarding the non-disclosure agreement, the letter stated:

> "We discussed proposed changes to Paragraphs 2 & 3 of this Agreement. I have input the changes we discussed and have attached a copy of the revised Agreement as Exhibit A."

On February 16, 1995, Pacific signed the revised agreement and forwarded it to the complainants for their signature. The February 16, 1995 letter stated that during the January 27, 1995 conference call, it was Sunde who suggested the proposed changes to paragraph 2 of the agreement. The letter also stated that due to the complainants' February 1, 1995 motion to enforce signing

of the non-disclosure agreement, it appeared that the complainants were reneging from the January 27, 1995 agreement to revise paragraph 2 of the agreement.

Execuline et al. argues that the revisions to the non-disclosure agreement to which it consented are justified because it provides the IEC defendants with notice and an opportunity to object before any information pertaining to the defendants is disclosed to the complainants. The revisions also prohibit the complainants from using the disclosed information for any unlawful activity. With respect to the motions for sanctions and that defendants' counsel be reported to the State Bar, Execuline et al. contends that the motions are without merit and that, as a sanction for this type of frivolous assertion, the proceeding should be dismissed.

Call America argues that the concerns which it expressed to Pacific concerning the non-disclosure agreement arose out of its concerns over potential misuse by the complainants of any information which Pacific might disclose to the complainants. According to Call America, it was concerned about the complainants' interference with customer calls and the complainants' intrusions into the privacy of both the calling and called parties. Call America further asserts that nothing which Pacific and Call America did violated any Rules of Professional Conduct or the Business and Professions Code.

B. Discussion

Although the title of the complainants' February 1, 1995 motion suggests the kinds of relief the complainants are seeking, the relief sought is somewhat broader. At page 2 of the February 1, 1995 motion, the complainants state that they seek: (1) an order requiring Pacific to endorse the original non-disclosure agreement that was submitted to the complainants; (2) an order

allowing "the incorporation of this newly discovered evidence of obstruction into" the complainants' January 20th and 24th responses to the motions to dismiss; and (3) an order levying additional sanctions against all defendants in this case. At page 7 in the concluding paragraph of the motion, the complainants also request that: (1) "defendants' attorneys" be removed; and (2) that "Counsels' outrageous conduct" be reported to the State Bar.

We turn first to the motion regarding the non-disclosure agreement. We are not convinced by the complainants' argument that Pacific should be ordered to sign the non-disclosure agreement that was distributed to the complainants and to the defendants on or about January 5, 1995. Based on the documents attached to the complainants' motion and to Pacific's response, we cannot conclude that Pacific and the complainants had mutually agreed to an acceptable non-disclosure agreement as of January 5, 1995. It is clear that on January 5, 1995, Pacific informed the defendants, with a copy of the cover letter to the complainants, that they could object to the proposed form of the non-disclosure agreement. The complainants should have known by January 18, 1995, when the conference call for January 27th was confirmed, that the non-disclosure agreement was still subject to change. Indeed, based on other documents, it appears that on January 27, 1995, the complainants understood that they were still negotiating the agreement, since they themselves requested the revision of paragraph 2. Accordingly, the complainants' motion for an order that would require Pacific to execute the January 5, 1995 proposed agreement is denied.

We also note, as Pacific has pointed out, that the complainants have not been entirely forthcoming as to some of the events surrounding the negotiation of the non-disclosure agreement. Although the complainants supposedly signed

the agreement on January 20, 1995, two days prior to that date Pacific and Westcom had agreed to hold a telephone conference on January 27th. One of the purposes of the January 27th meeting was to discuss the agreement. Omission of certain pertinent facts from pleadings may be viewed as a Rule 1 violation, and such omission further justifies our conclusion that in each Commission proceeding in which Westcom or Sunde appears, the presiding officer must determine whether they should be required to retain an attorney to represent them.

Regarding the complainants' motion to supplement with new evidence its responses to the motions to dismiss, we must first decide whether the conduct of the defendants amounts to obstruction. The complainants argue that when Pacific allowed the other defendants to comment on the proposed non-disclosure agreement, this involvement obstructed the complainants' discovery efforts.

The key to resolving this issue is whether the IEC defendants have a privacy interest in the materials sought by the complainants. Code of Civil Procedure § 1985.3 protects a consumer's right to privacy in one's personal records maintained by others, including a telephone corporation which is a public utility. The party seeking to subpoena the records must take certain steps to notify the consumer that the consumer's personal records are being sought.

Under the statute, a "consumer" is defined as an individual, a partnership of five or fewer persons, an association, or a trust. (Code of Civil Procedure § 1985.3(a)(2).) Based on that definition, the term consumer does not include a corporation. However, the statute does allow for the protection of personal records that are maintained by a telephone corporation.

In Sehlmeyer v. Department of General Services (1993) 17 Cal.App.4th 1072, the Court of Appeals had the opportunity to examine the applicability of

Code of Civil Procedure § 1985.3 to a state administrative proceeding. The court held that:

> "… before confidential third party personal records may be disclosed in the course of an administrative proceeding, the subpoenaing party must take reasonable steps to notify the third party of the pendency and nature of the proceedings and to afford the third party a fair opportunity to assert her interest by objecting to disclosure, by seeking an appropriate protective order from the administrative tribunal, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered." (Sehlmeyer, 17 Cal.App.4th at pp. 1080-1081.)

Part of the rationale for the court's decision in Sehlmeyer was derived from the California Supreme Court's analysis in Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652. In the Valley Bank case, the Supreme Court held that there were overriding constitutional considerations which compelled recognition of some limited form of protection for confidential information given to a bank by its customers. Those constitutional considerations were rooted in the amendment to the California Constitution, which added the right of privacy as an inalienable right of the people. The Supreme Court stated that it was safe to assume that the right of privacy extends to one's confidential financial affairs as well as to the details of one's private life. In vacating the trial court's order granting discovery of the bank records of both individuals and corporations, the Supreme Court's action afforded protection to the records of corporate entities, as well as to the records of individuals. (Id., at pp. 655-656, 658-659.)

In light of the case law regarding both discovery of confidential personal records maintained by an entity and notice to the affected consumer, we cannot conclude that the actions by Pacific and the other defendants regarding the proposed non-disclosure agreement constituted a conspiracy to obstruct the

complainants' discovery efforts. Instead, the actions by the defendants were consistent with how administrative agencies should deal with discovery of confidential personal records. As the Commission recognized in the Caller ID decision, the language and spirit of the amendment to the California Constitution allows for the protection of a privacy interest even though the interest has not been expressly targeted for protection. (44 CPUC2d at p. 709.) Accordingly, the complainants' motion to incorporate this alleged evidence of obstruction into the complainants' January 20th and 24th responses to the motions to dismiss is denied.

Since we have determined that the defendants' actions regarding the revisions to the non-disclosure agreement did not obstruct the complainants' discovery efforts, the complainants' motion for sanctions against all defendants in this case, the request that the attorneys for the defendants be removed, and the request that the attorney for the defendants be reported to the State Bar, are denied.[34]

IX. Discovery-Related Motions

There are five discovery motions that are currently pending. They are as follows: (1) the February 28, 1995 motion of Execuline et al. "To Quash Certain

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[34] We note that the complainants' arguments regarding the conduct of counsel for the various defendants is a virtually identical form pleading to the one which the complainants used in their motions as to why counsel for Call America and Execuline et al. should be removed, and reported to the State Bar. (See February 1, 1995 Motion To Enforce Signing etc., pp. 5-7 and January 20, 1995 Response To Motion To Dismiss etc., pp. 20-22.) This repetitive use of form pleadings, especially when it alleges a violation of the State Bar's rules regarding conduct, is yet another example of a reason why the presiding officer should determine in each proceeding in which an appearance is made by Westcom or Sunde, whether they should be required to retain a licensed attorney.

Portions Of The Subpoenas Duces Tecum" of the complainants; (2) the March 3, 1995 "Motion Of Call America Business Communications Corporation To Quash Subpoena Duces Tecum;" (3) Pacific's March 3, 1995 "Motion To Abey [sic] Subpoena Served On Pacific Bell By Complainants;" (4) the complainants' May 1,

1995 "Motion To Compel Production Of Documents And Answers To Interrogatories" and "Motion For Contempt" filed against GTE California, Incorporated; and (5) the complainants' June 13, 1995 "Motion To Abey [sic] Second Set of Data Requests and Requests For Production Of Documents By Pacific Bell."

Due to the granting of the motions to dismiss the complaint, the five discovery motions are now moot.

X. Complainants' Request for Compensation

On February 1, 1993, Westcom filed a "Request for Findings of Eligibility for Compensation" in this proceeding. Sunde's name was not included in this request. Oppositions to Westcom's request were filed by Pacific, Teltrex Management Corporation, and Call America.

In D.94-04-082, the Commission addressed Westcom's request for compensation. With respect to Westcom's request that it be deemed eligible for compensation from a common fund of reparations or from the Advocates Trust Fund, the Commission stated "that it is premature at this stage to find that Westcom is eligible for compensation from either of those two sources." The Commission determined that neither of those two sources "require that a person be found eligible for compensation prior to the conclusion of the proceeding." (54 CPUC2d at pp. 261, 265.)

Due to the repeal of former Article 18.7 of the Commission's Rules of Practice and Procedure, which included former Rule 76.54, and the adoption of Article 18.8 of the Rules, the Commission decided not to issue a preliminary ruling pursuant to Pub. Util. Code § 1804(b)(1). However, in D.94-04-082 the Commission stated: "we shall permit Westcom to make a showing of significant

financial hardship in accordance with § 1804(c) after a final order or decision has been issued." (54 CPUC2d at p. 261.)

After the time for the filing of an application for rehearing of D.94-04-082 had lapsed, Sunde sent a letter dated November 2, 1994 to the ALJ seeking the issuance of a formal Commission decision on Westcom's eligibility pursuant to Pub. Util. Code § 1804(b)(1). Letter responses to Sunde's letter were submitted by some of the defendants. In an ALJ ruling dated November 23, 1994, the ALJ ruled that Westcom's letter should be treated as a motion and denied Westcom's request that the Commission issue a decision addressing Westcom's request for eligibility.

Sunde then sought to relitigate this issue by filing his Petition with the California Supreme Court in January 1995. Sunde's Petition was summarily denied by the California Supreme Court.

At about the same time that Sunde filed his Petition with the Supreme Court, the complainants submitted their fourth amended complaint on December 28, 1994 adding Sunde's name as a complainant. In addition, on February 16, 1995, Sunde and Westcom submitted an "Amended Request For Findings of Eligibility For Compensation," adding Sunde's name to the request for compensation and substituting the original reference to Article 18.7 of the Rules with references to Article 18.8. On March 24, 1995, an ALJ ruling allowed the filing of the complainants' amended request, and the responses to the amended request. The ruling also referenced the Commission's decision in D.94-04-082, and stated:

> "To the extent that the complainants expected a preliminary ruling to issue following the submission of the amended request, such a ruling shall not be issued. Instead, a determination as to whether the complainants are eligible for

> compensation from a common fund, the Advocates Trust Fund, or Article 18.8 will be addressed at the time a final order in this proceeding is issued, or shortly thereafter."

Under the circumstances and the actions of the complainants, we conclude that Westcom and Sunde are not eligible for compensation in this proceeding for three reasons. First, as we discussed in this decision, the actions and conduct of the complainants amounted to unclean hands and an abuse of the Commission's process, which merit dismissal of the complaint. To award the complainants compensation for conduct which results in dismissal of their complaint and rewards them for this kind of behavior is inconsistent with the Legislature's intent that the intervenor compensation program be administered in a manner that encourages effective and efficient participation. (See Pub. Util. Code § 1801.3(b).)

Second, no common fund has been established as a result of this complaint proceeding. Instead, the complaint is being dismissed. In addition, the Advocates Trust Fund has been fully depleted and the Trust has been dissolved. (See Resolution ALJ-183.)

Third, the complainants do not qualify as a "customer," and they have not made a "substantial contribution" to this decision, as required by the intervenor compensation statutes. The complainants are not representing consumers, customers, or subscribers of the telephone companies, the complainants were not authorized by a customer to represent the customer, and Westcom's articles of incorporation or bylaws does not authorize it to represent the interests of residential customers. (Pub. Util. Code § 1802.) Instead, it is clear from the record that the complainants filed the complaint on their own behalf and for their self-interest. In addition, the complainants have not made a substantial contribution to this decision because we have not adopted any of

their contentions or recommendations. (*Ibid.*) Instead, we are dismissing the complaint due to the actions and conduct of the complainants.

Accordingly, Westcom and Sunde's request for compensation from a common fund, the Advocates Trust Fund, or from the intervenor compensation program should be denied.

XI. Westcom's Emergency Motion to Full Commission to Issue Rulings

On January 20, 2000, Westcom filed a motion seeking a "decision on all related actions." Westcom contends that there are as many as ten motions that the ALJ has refused to rule on.

With the issuance of today's decision, Westcom's January 20, 2000 motion is now moot.

XII. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. No comments were filed.

XIII. Assignment of Proceeding

Michael R. Peevey is the Assigned Commissioner and John Wong is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. At the time the complaint was filed, Westcom was a certificated IEC.
2. Westcom's CPCN was revoked by Commission Resolution T-16529 on June 14, 2001.
3. A complaint, an amendment to the complaint, and six amended complaints have been filed in connection with this proceeding.

4. Westcom's president, J. Michael Sunde, was added as a complainant in the fourth amended complaint that was filed on December 28, 1994.

5. In the sixth amended complaint filed on June 23, 1995, the references to Sunde as a complainant were removed.

6. In January 1995, Call America and Execuline et al. filed motions to dismiss the complaint and all of the amendments to the complaint on the basis that the complainants had unlawfully intercepted the wire communications of third parties, and invaded their privacy.

7. On June 2, 1995, Pacific filed a motion to dismiss the complaint because of the complainants' alleged abuse of the Commission's processes.

8. The exhibits attached to the December 7, 1994 amended complaint show that Westcom's agents were calling into the telephone lines of certain IEC defendants and were also able to patch into outgoing telephone calls.

9. The complainants' conduct was reprehensible because of the manner in which Westcom's agents patched into the conversations of the calling party.

10. Westcom's activities interfered with, and prevented a connection between, the calling party and the called party.

11. Westcom's agents repeatedly dialed selected telephone numbers for the express purpose of patching into a calling party's call.

12. Westcom's conduct regarding the patching of calls was intentional as is evidenced by the exhibits to the amended complaint.

13. The complainants' conduct, which prevented the calling party's call from connecting to the called party, also borders on a possible violation of Pub. Util. Code § 2110.

14. The complainants' conduct was reprehensible because of the manner in which the information was obtained from the calling parties and from the called parties.

15. When a telephone customer is asked a series of customer specific questions by someone who interrupts a telephone call, it is reasonable for the calling party to assume that the questioner is the telephone operator.

16. The complainants were not acting under color of authority when they patched into calls and questioned the calling parties.

17. The June 20, 1994 ALJ Ruling did not prevent the complainants from filing an amended complaint naming Express Tel as a defendant.

18. The July 31, 1995 motion of the IECs to supplement the record with newly discovered information contains information about Sunde's criminal proceeding in Federal District Court, including an affidavit which has a bearing on Pacific's abuse of process argument.

19. Numerous pleadings and correspondence regarding Sunde's status with respect to the complaint and his eligibility for compensation have been filed in this proceeding and at the California Supreme Court, and the Commission and other parties have expended time and resources on these issues.

20. The complainants filed an amended request in February 1995 adding Sunde's name to the compensation request, and on June 22, 1995, Westcom filed an amended notice deleting Sunde's name from the request for a finding of eligibility.

21. Pacific filed a motion on July 5, 1995 to strike the amended notice of June 22, 1995.

22. Sunde should be considered the alter ego of Westcom.

23. The information contained in the affidavit supporting the criminal complaint in Federal District Court against Sunde, and his subsequent guilty plea, establishes a willingness on the part of Sunde to engage in protracted litigation before the Commission as a means to obtain private gain through a threat of litigation.

24. Although the complainants contend that they have been authorized by Coachella to represent its interest in this proceeding, no petition to intervene in this proceeding was ever filed by Coachella as required by Rule 53.

25. On May 3, 1994, Execuline and Pac-West filed a motion to compel Westcom to comply with Pub. Util. Code § 1706.

26. Although we have granted the motions to dismiss the complaint and its amendments, it is in the Commission's interest to address the issue of whether Westcom and Sunde must be represented by an attorney in subsequent proceedings before this Commission.

27. Westcom and its agents' conduct of patching into the conversations of unsuspecting third parties, and asking customer specific questions of those third parties, erodes our confidence in the ability of Westcom and Sunde to participate in Commission proceedings.

28. With little cost to the complainants, the complainants' addition and then subsequent deletion of Sunde's name from the complaint have burdened the Commission staff and the defendants with additional work and expense.

29. Westcom's failure to obey a Commission decision was an issue in a complaint case that Westcom filed against a LEC.

30. The Commission has previously imposed restrictions on a complainant so as to prevent abuse of the Commission's process.

31. If a presiding officer decides to require Westcom or Sunde to retain an attorney in order to participate in Commission proceedings, this will shift some of the financial burden of pursuing the proceeding onto Westcom or Sunde.

32. On January 20, 1995 and January 24, 1995, the complainants filed motions for sanctions, and motions that counsel be removed and reported to the State Bar for violation of the California State Bar's Rules of Professional Conduct.

33. Sunde is not a member of the California State Bar and is not bound by such rules.

34. Sunde has used stationery which leaves the impression that he is licensed to practice law.

35. On February 1, 1995, the complainants filed a pleading entitled "Motion To Enforce Signing Of Non-Disclosure And Protective Agreement; Motion To Supplement The Record With New Evidence; Motion For Sanction."

36. Based on the documents attached to the complainants' February 1, 1995 motion, and to Pacific's response, we cannot conclude that Pacific and the complainants had agreed on a mutually acceptable non-disclosure agreement as of January 5, 1995.

37. The complainants have not been entirely forthcoming as to some of the events surrounding the negotiation of the non-disclosure agreement.

38. There are five pending discovery motions in this proceeding.

39. To award the complainants compensation for conduct which results in dismissal of their complaint and rewards them for this kind of behavior is inconsistent with the Legislature's intent that the intervenor compensation program be administered in a manner that encourages effective and efficient participation.

40. No common fund has been established as a result of this complaint proceeding.

41. The Advocates Trust Fund is no longer in existence.

42. The complainants do not qualify as a customer, and did not make a substantial contribution to this decision, as required by the intervenor compensation statutes.

43. Westcom filed its "Emergency Motion To Full Commission To Issue Rulings" on January 20, 2000.

Conclusions of Law

1. For purposes of the three motions to dismiss, Westcom and Sunde should be treated as the named complainants.

2. The complainants' March 9, 1995 motion to amend their January 24, 1995 response to Execuline et al's motion to dismiss by incorporating the affidavit of Mark Edwards is granted.

3. The motions to dismiss of Call America and Execuline et al. are based on the doctrine of unclean hands.

4. In determining whether the doctrine of unclean hands should be applied to bar the complainants' actions, the relative extent of each party's wrong upon the other and upon the public should be taken into account, and an equitable balance should be reached.

5. Conduct may be unclean if it violates conscience or good faith, or when in the eyes of honest and fair-minded persons, the conduct is wrong and should be condemned.

6. The complainants' act of patching into outgoing telephone calls interfered with and prevented the transmission and delivery of the call to the called party in possible violation of Pub. Util. Code § 558.

7. The manner in which the complainants obtained the information from the calling and called parties was reprehensible and amounted to unclean hands, and may be in violation of Pub. Util. Code § 7903.

8. The complainants' conduct may be in violation of Pub. Util. Code § 7903 because Westcom's use of that information is arguably being used for the complainants' own account, profit, or advantage.

9. The private attorney general concept is an equitable theory upon which an award of attorney's fees can be based, and does not pertain to one's conduct as a enforcement officer.

10. The complainants' conduct was reprehensible and amounts to unclean hands because the information obtained from the calling and called parties impinged upon the privacy rights of those customers.

11. The doctrine of unclean hands should not be applied where to do so would create an injustice or if the act being complained about is against public policy.

12. In weighing and balancing whether the defendants' motions to dismiss should be granted, we conclude that the complainants' conduct merits dismissal of the complaint.

13. Express Tel's motion to dismiss the complaint should be granted because, consistent with Penal Code §§ 631(c) and 632(d), any evidence uncovered as a result of the complainants' actions would not be admissible in any administrative proceeding.

14. The July 31, 1995 "Motion Of Interexchange Carriers To Supplement The Record With Newly Discovered Information, In Support Of Pacific Bell's Motion To Dismiss For Abuse Of The Commission's Processes" should be granted.

15. An amendment submitted after the scheduled hearing date may only be filed and served as permitted or directed by the Commission or the ALJ.

16. If amended pleadings are allowed to automatically supersede a prior pleading, disruptions to the management of a proceeding can result.

17. We should permit the filing of the sixth amended complaint removing Sunde as a complainant.

18. The inclusion and then removal of Sunde as a named complainant, and the changing of Sunde's status for the purpose of seeking relief at the California Supreme Court and for intervenor compensation, are disruptive, interfere with, and abuse the orderly administration of the Commission's processes.

19. Pacific's July 5, 1995 motion to strike Westcom's June 22, 1995 amended notice of intent to claim compensation should be granted.

20. Whether or not the complainants are eligible for compensation is not a ground for dismissal of the complaint.

21. Official notice shall be taken of Sunde's guilty plea to one felony count of mailing a threatening communication with intent to extort money in Federal District Court, Case Number MAG 95-277.

22. Due to our conclusions about the complainants' abuse of process, there is no need to address the issue of the standing of the complainants to pursue this complaint.

23. Pacific's argument that the complaint should be dismissed because there is no economic incentive for IECs to use exchange lines rather than switched access to carry interexchange traffic is more in the nature of a defense to the complaint, rather than a basis as to why the complaint should be dismissed.

24. Based upon the discussion regarding the granting of the IECs' motions to dismiss, and the abuse of process discussion, we conclude that Pacific's June 22, 1995 motion to dismiss the complaint should be granted.

25. Westcom, as a public utility, and Sunde, as an officer of a public utility, are obligated under Pub. Util. Code § 702 to obey and comply with every order, decision, direction, or rule made or prescribed by the Commission.

26. Placing restrictions on the conduct of the complainants is consistent with the doctrine of unclean hands so as to protect the judicial forum's integrity from the improper action of a party.

27. Requiring Westcom or Sunde to retain an attorney in a future proceeding does not trigger due process concerns because they can still participate in the proceeding, and such a requirement will help ensure that the Commission's processes are not subjected to abuse, will shift some of the costs of participation onto the complainants, and will help safeguard the public's right to privacy.

28. In light of the documents attached to the December 7, 1994 amended complaint, and our analyses of the motions to dismiss, we cannot conclude that the allegations contained in the motions to dismiss were false or misleading, nor can we conclude, based on our analyses, that counsel for Call America and Execuline et al. refused to make reasonably diligent efforts to comply with the discovery requests of the complainants.

29. The complainants' January 1995 motions for sanctions, motions that counsel for Call America and Execuline et al. be removed, and the request that counsel for Call America and Execuline et al. be reported to the State Bar, should be denied.

30. The complainants' motion for an order requiring Pacific to execute the January 5, 1995 non-disclosure agreement should be denied.

31. Omission of pertinent facts from pleadings may be viewed as a Rule 1 violation.

32. Code of Civil Procedure § 1985.3 has been interpreted to mean that before confidential third party personal records may be disclosed in the course of an administrative proceeding, the subpoenaing party must take reasonable steps to notify the third party of the pendency and nature of the proceedings, and to afford the third party a fair opportunity to assert one's interest.

33. In light of the case law regarding discovery of records maintained by an entity, and notice to the affected consumer, we cannot conclude that the actions of Pacific and the other defendants regarding the non-disclosure agreement amounted to a conspiracy to obstruct the complainants' discovery efforts, and therefore, the complainants' motion to incorporate this alleged evidence of obstruction into the complainants' January 1995 responses to the IECs' motions to dismiss should be denied.

34. The complainants' February 1, 1995 motion for sanctions against the defendants, the request that the attorneys for the defendants be removed, and the request that the attorneys for the defendants be reported to the State Bar, should be denied.

35. The repetitive use of form pleadings, especially when it alleges a violation of the State Bar's rules regarding conduct, is another example of why the presiding officer should determine whether Westcom or Sunde should be required to retain a licensed attorney in order to participate in a Commission proceeding.

36. The following discovery motions are moot in light of the granting of the motions to dismiss the complaint: (1) the February 28, 1995 motion of Execuline et al. to quash certain portions of the subpoena duces tecum of the complainants;

(2) the March 3, 1995 "Motion of Call America Business Communications Corporation To Quash Subpoena Duces Tecum;" (3) Pacific's March 3, 1995 "Motion To Abey [sic] Subpoena Served On Pacific Bell By Complainants;" (4) the complainants' May 1, 1995 "Motion To Compel Production Of Documents And Answers To Interrogatories" and "Motion For Contempt" filed against GTE California Incorporated; and (5) the complainants' June 13, 1995 "Motion To Abey [sic] Second Set Of Data Requests and Request For Production Of Documents By Pacific Bell."

37. Westcom and Sunde are not eligible for compensation in this proceeding, and their request for compensation from a common fund, the Advocates Trust Fund, or from the intervenor compensation program should be denied.

38. Westcom's January 20, 2000 "Emergency Motion To Full Commission To Issue Rulings" is moot in light of the issuance of today's decision.

O R D E R

IT IS ORDERED that:

1. The following motions are granted:

   a. The March 9, 1995 motion of Westcom Long Distance, Inc. (Westcom) and J. Michael Sunde (Sunde), collectively the "complainants," to amend its January 24, 1995 response to the motion to dismiss of Execuline of Sacramento, Inc. (Execuline), Express Tel, and Pac-West Telecom, Inc. (Pac-West) to include the Edward's affidavit;

   b. Pacific Bell's (Pacific) July 5, 1995 motion to strike Westcom's June 22, 1995 "Amended Notice Of Intent To Claim Compensation;" and

c. The July 31, 1995 "Motion Of Interexchange Carriers To Supplement The Record With Newly Discovered Information, In Support Of Pacific Bell's Motion To Dismiss For Abuse Of The Commission's Processes."

2. The following motions are denied:

a. The complainants' request in their January 20, 1995 and January 24, 1995 responses to the motions to dismiss of the interexchange carriers seeking sanctions and removal of defendants' counsel; and

b. The complainants' February 1, 1995 "Motion To Enforce Signing Of Non-Disclosure And Protective Agreement; Motion To Supplement The Record With New Evidence; Motion For Sanction," and all other relief requested in that pleading.

c. The complainants' February 1, 1993 "Request for Findings of Eligibility for Compensation" and February 16, 1995 "Amended Request For Findings of Eligibility For Compensation."

3. The sixth amended complaint that was submitted for filing on June 23, 1995, which deleted Sunde's name, the president of Westcom, from the complaint, shall be permitted for filing and filed as of that date.

4. The following motions to dismiss the complaint, and all of the amendments and amended complaints, with prejudice, are granted:

a. The January 9, 1995 "Motion Of Call America Business Communications Corporation [Call America] To Dismiss The Complaint And All Amendments Thereto Due To Westcom's Unlawful Invasion Of Privacy And Unlawful Interception Of Wire Communications Of Third Parties;"

b. The January 10, 1995 "Motion To Dismiss" filed by Execuline, Pac-West, and Express Tel, and entities related to

these three interexchange carriers (collectively referred to as "Execuline et al."); and

c. The June 2, 1995 motion to dismiss of Pacific.

5. The May 3, 1994 motion of Execuline and Pac-West to compel the complainants' compliance with Pub. Util. Code § 1706 is moot but the presiding officer shall determine in each Commission proceeding in which Westcom or Sunde appear, whether Westcom or Sunde should be required to retain a licensed attorney to represent them before the Commission. The underlying conduct of the complainants warrants the imposition of these requirements.

6. In light of the granting of the motions to dismiss, the following motions are now moot: (1) the February 28, 1995 motion of Execuline et al. "To Quash Certain Portions Of The Subpoenas Duces Tecum" of the complainants; (2) the March 3, 1995 "Motion of Call America Business Communications Corporation To Quash Subpoena Duces Tecum;" (3) Pacific's March 3, 1995 "Motion To Abey [sic] Subpoena Served On Pacific Bell By Complainants;" (4) the complainants May 1, 1995 "Motion To Compel Production Of Documents And Answers To Interrogatories" and "Motion For Contempt" filed against GTE California, Inc.; (5) the complainants' June 13, 1995 "Motion To Abey [sic] Second Set of Data Requests and Requests For Production Of Documents By Pacific Bell;" and (6) Westcom's January 20, 2000 "Emergency Motion To Full Commission To Issue Rulings."

7. The request by Westcom and Sunde for intervenor compensation from a common fund, the Advocates Trust Fund, or from the intervenor compensation program is denied.

8. Case 92-07-045 is closed.

This order is effective today.

Dated _____, at San Francisco, California.