STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 9, 2003 **Agenda ID #3081**
Adjudicatory

TO: PARTIES OF RECORD IN CASE 03-01-007

This is the draft decision of Administrative Law Judge McKenzie. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ Angela K. Minkin
Angela K. Minkin, Chief
Administrative Law Judge

ANG: avs

Decision **DRAFT DECISION OF ALJ McKENZIE (Mailed 12/9/2003)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

DSLExtreme.com, Inc. and Sonic.net, Inc. Complainants, vs. Pacific Bell Telephone Company (U 1001 C), SBC Advanced Solutions, Inc. (U 6346 C); and Verizon California Inc. (U 10020 C), Defendants.	Case 03-01-007 (Filed January 10, 2003)

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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ORDER GRANTING DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

In this decision, we dismiss the Amended Complaint that the complainants, two Internet Service Providers (ISPs), submitted on February 19, 2003. As explained below, the Amended Complaint was filed with the permission of the assigned Administrative Law Judge (ALJ) following a January 30, 2003 hearing on complainants' request for a temporary restraining order (TRO). The ALJ denied the TRO, but not before allowing the complainants to reformulate the theory under which they were pursuing the TRO and the injunctive relief they were seeking from defendants. Thus, the Amended Complaint here represents complainants' *third* attempt to state causes of action that would entitle them to relief.

For many of the same reasons that the ALJ denied the TRO, we conclude that complainants have either failed to state a cause of action, or that judgment against them should be granted as a matter of law. Under these circumstances, it is not appropriate to allow complainants to attempt to amend their complaint again, or to let them pursue broad discovery in the hope that they can eventually uncover facts that would enable them to state a claim. Instead, we will dismiss the Amended Complaint with prejudice.

I. Factual Background

This case arises out of the December 2002 decision of DIRECTV Broadband, Inc. (DIRECTV), a subsidiary of Hughes Electronics, to stop providing Direct Subscriber Line (DSL) service to its customers. DSL is a form of high-speed Internet service that allows users to access the Internet at much higher speeds than can be achieved through either a computer modem or dial-up

service over telephone lines. The DSL market in California (and elsewhere) has seen healthy growth since the late 1990s.

When DIRECTV decided to exit the DSL business, it wanted to ensure that its retail customers would be able to make the transition to a new ISP with a minimum of inconvenience. To achieve this, DIRECTV negotiated arrangements with defendants SBC Advanced Solutions, Inc. (SBC ASI) and Verizon Advanced Data Inc. (VADI), both of which provide DSL transport service, whereby the ISP service offered by affiliates of these two companies, SBC Yahoo! DSL (SBC Yahoo) and Verizon Online DSL (Verizon Online), respectively, would be advertised as the "preferred products" for DIRECTV customers seeking a new ISP within the geographic areas where SBC ASI or VADI offered the underlying DSL transport.

A press release announcing the preferred product arrangement with SBC Yahoo was issued jointly by DIRECTV and SBC Internet Services (SBCIS) on December 27, 2002; it is attached to both the January 10, 2003 complaint and to the February 19 Amended Complaint as Exhibit 2. The press release stated that DIRECTV would "*exclusively* recommend to its customers in the SBC operating area that they transition to SBC Yahoo! DSL service," (emphasis added), and urged such customers to telephone or consult the two companies' websites for further details.

A similar joint press release was issued by DIRECTV and Verizon Online on December 30, 2002. This press release (which is attached to both the January 10 complaint and the Amended Complaint as Exhibit 3) stated that DIRECTV would recommend Verizon Online's DSL service to customers "in Verizon regions" (*i.e.*, areas where VADI provided the underlying DSL transport), but made no mention of an exclusive arrangement. Interested

customers were urged to telephone Verizon Online or to consult DIRECTV's website.

A. Complainant's Initial Complaint and Request for a TRO

The initial complaint and motion requesting a TRO were filed on January 10, 2003, about two weeks after issuance of the press releases. The complainants were (1) Sonic.net, Inc. (Sonic), a Northern California ISP that is unaffiliated with SBC but which purchases DSL transport from SBC ASI and offers DSL service that competes with SBC Yahoo, and (2) DSLExtreme.com, Inc. (DSLExtreme), a Southern California ISP that is unaffiliated with either the SBC or Verizon companies, but which purchases DSL transport from both SBC ASI and VADI and offers DSL service that competes with both SBC Yahoo and Verizon Online.

In their pleadings, complainants alleged that the defendants were either (1) offering their affiliated ISPs unlawful preferential service by eliminating significant downtime for these affiliates in the DSL transitioning process, or (2) misleading retail customers into believing that such downtime could be avoided or reduced if the customer chose either SBC Yahoo or Verizon Online. Complainants argued that a TRO was necessary because DIRECTV had guaranteed to keep its DSL service running only through January 16, 2003, and that without immediate relief, both DIRECTV customers seeking a new ISP and ISPs unaffiliated with SBC or Verizon would be irreparably harmed. As relief, complainants sought an order requiring Pacific Bell Telephone Company, SBC ASI and Verizon California Inc. (Verizon) to "maintain DSL Transport connectivity for all [DIRECTV] subscribers until March 14, 2003," as well as an order that would either (1) prohibit the defendants from discriminating in favor of their affiliated ISPs with respect to downtime and other aspects of the ISP

transitioning process, or (2) require the defendants to issue corrected advertisements making clear that retail customers who chose ISPs unaffiliated with SBC or Verizon would not be disadvantaged with respect to downtime.

Responses to the TRO motion were filed by Verizon on January 15, 2003, and by SBC ASI on January 16.[1] In its papers, Verizon argued strongly that the standards used by the Commission for issuing a TRO had not been met,[2] because complainants were unlikely to prevail on the merits, and because the relief they were seeking would actually harm DIRECTV customers seeking to transition to a new ISP. First, Verizon argued that it was under a duty not to discriminate against unaffiliated ISPs, that it had not discriminated, and that it had actually implemented a procedure whereby customers migrating from DIRECTV would suffer only a few minutes of downtime whether they chose

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[1] In its response, Verizon pointed out that based on the relief complainants claimed to be seeking, they had named the wrong affiliate as a defendant. At the time the filings in this case were made, wholesale DSL transport in California was provided by VADI, which was "created as a separate wholesale data affiliate in compliance with the conditions imposed by the FCC in approving the merger of GTE Corporation and Bell Atlantic." (January 16 Response, p. 2, n. 2.) In the February 19 Amended Complaint, only VADI among the Verizon affiliates is named as a defendant.

It should be noted that in D.03-06-044, the Commission granted VADI's application to transfer its advanced data service assets including DSL and reintegrate with Verizon. D.03-06-044 also held that the competitive issues raised by the protestants would most likely be considered in the Commission's line-sharing proceeding.

[2] In D.94-04-082, *Westcom Long Distance, Inc. v. Pacific Bell, et al.*, 54 CPUC2d 244, 259, the Commission gave the following description of the tests that a party seeking a TRO must meet:

> "[T]hat the requesting party is likely to prevail on the merits; (2) that the requesting party will suffer irreparable injury without the order; (3) that no substantial harm to other interested parties will occur; and (4) that the public interest will not be harmed. We note that all four criteria must be met before the Commission will issue a TRO or a preliminary injunction."

Verizon Online or an ISP unaffiliated with Verizon. Second, Verizon argued that the advertisements at issue did not state, or even remotely imply, that customers choosing a non-affiliated ISP would suffer greater service disruptions or additional downtime than customers choosing Verizon Online, and that when these advertisements were read in context, the Commission could properly conclude as a matter of law that they were not misleading.[3] Third, Verizon argued that the advertisements of Verizon Online were beyond the Commission's jurisdiction, since the Commission does not regulate the activities of retail ISPs. Finally, Verizon argued that granting the requested TRO would have the perverse effect of harming the very customers that complainants claimed they wanted to protect:

> "Even though Verizon has implemented a process to minimize disruptions for [DIRECTV] customers migrating to an unaffiliated ISP, the process still involves disconnecting DSL transport service, albeit for a few minutes, to switch the customer to the new ISP. Accordingly, the proposed temporary injunction [prohibiting any disconnection of DSL transport to DIRECTV customers until March 14, 2003] would literally preclude any [DIRECTV] customer in Verizon's territory

[3] Verizon pointed to the following passage on DIRECTV's website as an example of how the advertising directed at DIRECTV customers seeking a new ISP could not reasonably be read as suggesting that the preferred providers would offer less downtime or better service than unaffiliated ISPs:

> "If you are a Verizon local telephone customer and wish to switch your DSL service to Verizon Online or another [ISP] that uses Verizon as its underlying DSL provider, DO NOT disconnect your DSL service from DIRECTV Broadband, as this will result in loss of service. Contact the ISP you have selected, *who will work to transfer your DSL service with minimal disruption*." (January 15, 2003 Declaration of Thomas Wolthoff, Exhibit D, p. 2; emphasis added.)

> from moving to another ISP. Moreover, because[DIRECTV] is, by Complainants' own admission, beyond the jurisdiction of the Commission and may terminate its services before the injunction is lifted,[4] the inability to transition customers to new ISPs may leave subscribers with a live DSL transport connection but no ISP services. Customers would then be left with a 'dead' DSL line that has no capability to access the Internet or to send or receive email." (January 15 Verizon Response, p. 4.)

In its January 16 papers, SBC ASI made arguments similar to Verizon's. In particular, SBC ASI emphasized that the practical effect of the TRO sought by complainants would be to prohibit it from processing connect orders from new ISPs chosen by former DIRECTV customers, since such new connection orders could not be processed until disconnection orders from these customers had been handled. In the event DIRECTV chose to shut down its network prior to expiration of the TRO, SBC ASI continued, "the end use customers of [DIRECTV] would in effect be stranded without any opportunity to obtain high speed Internet service from any other ISP." (January 16 SBC ASI Response, p. 8.)[5]

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[4] Elsewhere in its response, Verizon noted that it had agreed to keep DIRECTV's DSL lines in service until February 28, 2003. Thus, Verizon argued, hasty disconnections would not be the result of action by VADI, and there would be enough time to prepare and submit responsive pleadings without the necessity of a TRO. (Verizon Response, pp. 13-14.)

[5] Elsewhere in its response, SBC ASI gave the following description of the combination of DSL transport and ISP services needed to provide high speed Internet access to retail customers:

> "Wholesale DSL Transport is a high speed virtual path between the end user's premise and the ISP's connection point with the ASI network. ISPs use this transport in combination with the ISP's servers, routers, and network connections to provide their subscribers with content, e-mail capabilities, access to the Internet, web hosting, and other enhanced services." (SBC ASI January 16 Response, p. 4.)

In addition to pointing out the technical capriciousness of the injunction complainants were seeking, SBC ASI asserted that it had not discriminated among its affiliated and non-affiliated ISPs in providing DSL Transport service, and that, whichever ISP provider they chose, *all* retail customers would experience 7 to 9 days of downtime in order to complete the processing of a disconnect order from DIRECTV, followed by a new connect order from the successor ISP. SBC ASI also argued that none of the advertisements at issue suggested anything different, and that because DIRECTV had recently modified its website to make clear that DIRECTV would keep its network up and running until at least January 31 (two weeks longer than previously announced), there was no need for a TRO.

The ALJ held a conference call with all the parties on January 17, 2003. During the conference call, complainants conceded that they had not understood the technical implications of their proposed injunction, and agreed that in view of DIRECTV's announcement that its network would remain in operation until at least January 31, 2003, emergency relief was not necessary. The ALJ set January 24 as the date for a TRO hearing in the event one was necessary, and ruled that complainants would have until mid-day on January 23 to submit reply papers. The ALJ also instructed complainants to advise him by the close of business on January 22 whether a TRO hearing would still be necessary.

B. Complainants' Revised Request for a TRO

On January 22, complainants advised the ALJ that they would no longer be seeking a TRO against VADI and its Verizon affiliates, but that they still wished to pursue such relief against SBC ASI, SBC California and their affiliates. The ALJ reiterated that complainants should file their reply papers on January 23.

On that date, complainants submitted papers in which they substantially changed the nature of the relief they were seeking. Acknowledging that they had been unaware of the technical considerations raised by defendants about disconnect and new connect orders, complainants conceded that their "original request regarding maintaining DSL Transport connectivity is obviously no longer needed." (Complainants' January 23 Response, p. 1.) However, they continued, immediate injunctive relief was still necessary to prevent deceptive marketing by SBC California and SBC ASI. Complainants claimed that by refusing to inform DIRECTV's customers that the company's network would remain up and running for some time, these defendants were inducing a sense of panic in DIRECTV's customers, while at the same time sending them misleading advertisements. Complainants also claimed that in at least one instance, an SBC ASI technician had orally disparaged complainants' service to a retail customer. In view of this situation, complainants sought the following relief in their modified TRO request:

> "(1) An order enjoining SBC California from marketing via telephone, mail, or email to former DirecTV DSL subscribers who have chosen to migrate their DSL services to Complainants;
>
> "(2) An order enjoining SBC ASI's technicians from disparaging the services of Complainants;
>
> "(3) An order requiring SBC ASI and/or SBC California to notify all California DirecTV subscribers that SBC ASI has an agreement with DirecTV to maintain DSL Transport connectivity through February 28th and will seek to transition customers to the Internet service provider of their choice with a maximum of five days downtime." (Complainants' January 23 Response, p. 3.)

Following receipt of complainants' new papers, another conference call was held. The ALJ agreed that in view of the changes in relief complainants

were seeking, the TRO hearing should be postponed until January 30, and he gave defendants until January 27 to file a set of papers responding to complainants' new allegations. On January 27, both SBC ASI and SBC California filed formal responses to the amended TRO request, as well as written testimony concerning the issues raised by the amended TRO request.

II. Issues at the TRO Hearing

A. Complainants' Claims of Misleading Advertising and Request for an Order that Complainants' Former DIRECTV Customers Not be Solicited by Defendants

The TRO hearing in this case was held on January 30, 2003. As indicated above, the first question posed by the revised TRO request was whether SBC California and SBC ASI should be enjoined "from marketing via telephone, mail, or email to former DirecTV DSL subscribers who have chosen to migrate their DSL services to Complainants." Complainants argued that the marketing of SBC Yahoo service being done by the defendants to customers that complainants had picked up from DIRECTV needed to be enjoined because the marketing was both abusive and deceptive. The marketing was abusive, complainants argued, because it was directed at new Sonic and DSLExtreme subscribers who were either waiting to have their new DSL service activated, or for whom it had recently been activated. (Complainants' January 23 Response, p. 6.) Complainants contended that the marketing was deceptive because it promised a monthly rate of $29.95 for SBC Yahoo service, even though a careful examination of defendants' advertisements made clear that this price was available only to customers who *also* agreed to accept an expensive package of local telephone services from SBC. (*Id.* at 7.)

Leaving aside the defendants' various jurisdictional objections to this requested relief, the ALJ concluded that the evidence presented at the TRO hearing did not support complainants' allegations on the merits. SBC ASI witness Becky De La Cruz testified that under the Federal Communications Commission (FCC) rules governing her company's operations, SBC ASI was not permitted to tell its own affiliated ISP which ISP, if any, a former customer of DIRECTV had chosen. Thus, according to Ms. De La Cruz, it would not be permissible for defendants to devise a "do not call" list that would insulate complainants' new DSL customers from attempts by SBC Yahoo to market its DSL service to them. (Ex. 9, pp. 4, 17.) During their cross-examination of Ms. De La Cruz, complainants did not undermine her testimony on these FCC rules or SBC ASI's compliance with them. In denying the TRO, the ALJ stated, among other things, that he was not inclined to issue a ruling that would have the effect of requiring SBC ASI not to comply with FCC rules. (January 30 Transcript, pp.127-28.)

On the issue of allegedly misleading advertising, complainants introduced into the record a print advertisement from an SBC marketing campaign that they contended was deceptive.[6] However, the ALJ concluded that when read with reasonable care and considered as a whole, this advertisement was not misleading. (*Id.* at 132-36.) The advertisement clearly stated in the body of the ad that SBC Yahoo service was available for "*as low as* $29.95 a month for the first year, depending on the package you choose." (Emphasis added.) The

[6] The advertisement was attached to complainants' January 23, 2003 response as Exhibit 1, and also to the prepared testimony of SBC witness Frank Mona. It is also Exhibit 6 to the Amended Complaint.

fine print in the advertisement stated that the "$29.95 rate applies to customers subscribing to an SBC Total Connections or SBC Solutions Package," and it also contained several other disclaimers. The ALJ concluded that although the clarity of this ad could have been improved,[7] it was sufficiently clear so that a reasonable DSL consumer would not believe, contrary to the assertion of one of complainants' witnesses, that "publishing a $29.95 price implies that your bill will be $29.95. And in this case, the bill will [really] be $90.00. And I'm concerned that that leaves the customer misled." (Tr. 51.)

B. Complainants' Claims of Disparagement by SBC Personnel

Complainants' second claim in their January 23 Response was that in at least one instance, an SBC ASI technician who had been sent out on a "trouble ticket" to the home of a new DSLExtreme subscriber had disparaged DSLExtreme's service to the customer and suggested that SBC Yahoo's DSL service was superior. Complainants attached e-mail discussion from

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[7] As the ALJ pointed out in denying the TRO, on first reading there appears to be a conflict between the ad's headline that "DIRECTV is ending its DSL service" and the statement in the body of the ad that the customer should consider SBC Yahoo service "now that DIRECTV Broadband *is no longer offering* DSL services." (Emphasis added.) The ALJ pointed out it could take some reflection to realize that the latter statement meant that DIRECTV would no longer be offering DSL service to new customers, but would continue to provide it (until its system shut down) to existing customers. (*Id.* 132-34.)

Notwithstanding this possible ambiguity, the ALJ ruled that reasonable consumers of DSL service, who tend to be sophisticated people, were very unlikely to be misled by this aspect of the ad. (*Id.* at 135-36.) The ALJ also rejected complainants' argument that, based on the language of the ad, reasonable DSL consumers would believe they could purchase SBC Yahoo service for a flat $29.95 per month. (*Id.* at 49-52.)

BroadbandReports.com in support of this claim, and requested that the alleged disparagement be enjoined. (Complainants' January 23 Response, pp. 7-8.)

However, at the January 30 hearing, complainants did not offer the testimony of either the customer who had allegedly heard the disparagement or of any other customer who had heard similar disparagement. Moreover, SBC ASI's witness testified that the company has a strong policy against disparagement of non-affiliated ISPs, and that it has enforced this policy. Belle Guice testified that the anti-disparagement policy was adopted by SBC ASI in July 2000, and that after a search of the relevant records, she could find only three cases in which technicians had been disciplined for violating the policy. (Tr. 85-86.)[8] Ms. Guice also testified that SBC ASI had investigated the disparagement incident described in complainants' January 23 response, but had tentatively concluded the alleged incident had not occurred.

Although Ms. Guice acknowledged that she had not investigated the notes kept by repair crews that might describe incidents of disparagement not considered aggravating enough to justify formal discipline (January 30 Tr. at 87), the ALJ concluded from her testimony that any instances of disparagement of non-affiliated ISPs had been few, and had been dealt with promptly when they did occur. Accordingly, the ALJ ruled there were no grounds for issuing a TRO prohibiting SBC ASI technicians from disparaging complainants' DSL service. (*Id.* at 128-30.)

C. Complainants' Request for a Notice to Customers that their DIRECTV DSL Service Would Be Available Until February 28, and

[8] Redacted versions of the "case summaries" concerning these three technicians were attached to Ms. Guice's prepared testimony. (Ex. 8, pp. 5-6 and Exhibits 1-3.)

that Changeover to a New DSL Provider Would Be Accomplished With No More Than Five Days of Downtime

Complainants' third request for relief in their January 23 response was that SBC ASI and/or SBC California be required to notify DIRECTV customers (1) that their DIRECTV DSL service would remain available through February 28, 2003, and (2) that SBC ASI would endeavor to transfer the customer to a new ISP of the customer's choice with a maximum of five days downtime.

In their January 27 responsive papers and in the prepared testimony of their witnesses, both SBC ASI and SBC California raised numerous objections to this proposal. For example, Becky De La Cruz of SBC ASI set forth four reasons based on notions of privacy and customer relations why the requested relief should be denied:

> "First, ASI does not have a business relationship with DirecTV's subscribers and it makes no sense to require ASI to communicate with them. Second, ASI has no authority from DirecTV or any other of its ISP customers to communicate with the ISP's subscribers concerning the business plans of the ISP. Third, ASI treats the ISP's subscriber information as proprietary to the ISP, and does not share such information with other ISPs unless authorized to do so by the ISP that owns the information. Finally, there is a substantial risk that such a message would actually mislead subscribers into believing that their internet access service will continue to a particular date and cause them to be stranded if and when DirecTV takes down its network at an earlier date." (Ex. 9, p. 14.)

In addition to these reasons, Ms. De La Cruz pointed out that transitioning DIRECTV customers to a new ISP with a maximum of five days downtime, as complainants sought, was not technically feasible at the time of the TRO hearing. Ms. De La Cruz stated that even with the special "stacking"

procedure that SBC ASI had put in place to allow the disconnect order from DIRECTV and the new connect order from the successor ISP to be processed together, downtime for DSL customers transitioning from DIRECTV to a new ISP was still averaging about seven days (*Id.* at 6-7, 11-12.)

At the January 30 hearing, complainants acknowledged that the final factor cited by Ms. De La Cruz in opposing the proposed notice was no longer relevant, because SBC ASI had induced DIRECTV to post a notice on its website informing customers that "the last day any portion of the DIRECTV Broadband network will be operational in your area is Friday, February 28, 2003." A copy of this notice was admitted into evidence as Exhibit 10.[9] (January 30 Tr. at 108-112.)

Since complainants conceded this website notice had mooted their request for a notice to customers concerning DIRECTV's shut-down date, the remaining issue was whether defendants should be required to inform DIRECTV customers about how much downtime they should expect during the transition process.

Ms. De La Cruz's testimony was also relevant on this issue. In response to questioning from the ALJ, she noted that SBC ASI, like VADI, had investigated whether a special "cut-over" procedure could be used to shorten downtime for customers transitioning from DIRECTV to a new ISP. She stated that while SBC ASI had determined that such a procedure was technically feasible, the procedure had been rejected because it was manual and would have been extremely time-consuming and expensive for both SBC ASI and the new ISP. (Tr. 103.)

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[9] A similar website notice for DIRECTV customers residing in areas where VADI provided the underlying DSL Transport was admitted into evidence as Exhibit 11.

Based on this testimony and argument by counsel, the ALJ concluded that complainants had not met the burden of showing that the notice about downtime sought by complainants was justified.[10] First, the ALJ agreed with SBC ASI that, since it did not have a direct business relationship with DIRECTV customers, it would not be appropriate to require SBC ASI to communicate with the DIRECTV customers. (January 30 Tr., p. 132.)

Second, the ALJ concluded that because retail ISP customers were still experiencing seven business days of downtime even with SBC ASI's new procedure for bundling disconnect and new connect orders together (Ex. 9, p. 18), it would not be reasonable to require SBC ASI to notify the remaining DIRECTV customers that they could expect only five days of downtime when transitioning to a new ISP. (January 30 Tr., p. 132.)[11] The ALJ also noted that this appeared to be a short-term problem, because according to Ms. De La Cruz's testimony, SBC ASI had recently conducted field trials as a result of another matter pending at the Commission, Case 01-07-027, *California ISP Association, Inc. v. Pacific Bell Telephone Company, et al.* (CISPA), which demonstrated that with various system improvements, significantly reduced downtime for transitioning

[10] The ALJ also noted that since the requested notice amounted to a mandatory rather than a prohibitory injunction, the proof prerequisites for its issuance were higher. (January 30 Transcript, p. 132.)

[11] At an earlier point in the hearing, Dane Jasper, president of complainant Sonic, had stated that in requesting the notice to DIRECTV customers about the amount of downtime they could expect, he was "not seeking a shorter interval" than SBC ASI could currently provide, but he wanted the interval to be defined. (January 30 Tr., p. 44.)

ISP customers was expected to be the norm in California within about six months.[12]

[12] On February 10, 2003, the parties in the CISPA case submitted a Revised Settlement Report that included and commented upon the provisions of a Revised Release and Settlement Agreement. In the Revised Settlement Report, the parties gave the following description of their settlement concerning the ISP migration interval issue:

> "An issue of importance in this proceeding has been the migration interval when an ISP subscriber attempts to migrate from one ISP to another. CISPA has previously explained why it believes it is technically feasible to substantially shorten the interval currently experienced on [SBC] ASI's system. Recent historic experience has been that subscribers can experience from 7-9 days of downtime in the migration from one ISP to another. ASI agreed to tighten up its commitments in the Settlement Agreement and to implement a substantially shorter migration interval than was previously offered. Specifically, ASI commits to make system enhancements by the end of third quarter of this year that will reduce subscriber downtime to a maximum of one business day when the two ISPs are served in the same DSLAM, and no more than 2-4 days of downtime when they are served in different DSLAMs." (Revised Settlement Report, pp. 8-9.)

In D.03-07-032, the Commission approved a slightly modified and updated version of the Revised Release and Settlement Agreement. In it, SBC ASI states that it is currently working on system enhancements that will enable an ISP to send a single "ISP Change Order" when the ISP acquires a new subscriber from another ISP. The Revised Release and Settlement Agreement continues:

> "With the ISP Change Order process, ASI expects to be able to offer, by the end of the Third Quarter of 2003, a standard interval of no more than one business day downtime of its DSL Transport service when the acquiring ISP asks for service in the same ASI DSLAM. For those instances in which the acquiring ISP asks for service in Remote Terminals, or in a different DSLAM in the same Central Office, ASI expects to be able to offer an average interval of no more than one business day downtime of the DSL Transport service in the Fourth Quarter of 2003." (D.03-07-032, Appendix A, p. 5, ¶ 7.)

Footnote continued on next page

III. The Allegations of the Amended Complaint

Pursuant to the ALJ's ruling at the close of the January 30 TRO hearing, complainants filed their Amended Complaint on February 19, 2003. As we shall see, a comparison of the claims raised in the Amended Complaint with those litigated at the TRO hearing against SBC ASI and SBC California indicates that complainants have raised few new factual issues with respect to these defendants. With respect to the claims asserted against VADI, it appears that complainants have merely repackaged the allegations made in their original complaint, allegations they decided not to pursue at the TRO hearing.

After setting forth the circumstances of DIRECTV's decision to exit the DSL business and its preferred provider arrangements with SBC Yahoo and Verizon Online (as described in the Background section above), the Amended Complaint alleges on information and belief that the agreements with DIRECTV "contained clauses whereby SBC ASI and VADI agreed not to terminate the underlying DSL Transport services for these [DIRECTV] subscribers until February 28th, 2003," and that the agreements "also contained confidentiality clauses whereby SBC ASI and VADI agreed not to disclose the continuing status of the DSL Transport network to any customer, except its affiliated ISP customers SBC Internet Services and Verizon Online." (Amended Complaint, ¶¶ 9-10.)

A. The Allegations Against SBC ASI and SBC California

In paragraphs 26-35 of the Amended Complaint, complainants restate their arguments at the TRO hearing about the allegedly misleading nature of the

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The Revised Release and Settlement Agreement also states that SBC ASI will advise the Commission and CISPA on the status of these enhancements at the end of the Third Quarter of 2003. (*Id.*)

DIRECTV-SBCIS press release of December 27, 2002 and the SBC mailer sent to customers in California. The press release (Exhibit 2 to the Amended Complaint) is alleged to be "false and deceptive" and "an impediment to competition" because it wrongly suggests that if a DIRECTV subscriber wants to minimize disruption of service, the subscriber "should 'transition' to SBC Internet Services rather than an independent ISP such as Complainants." When taken in context, complainants allege, readers of the press release "could not help but believe that SBC California was offering [DIRECTV] DSL subscribers less downtime if they transitioned their service to a Defendant-affiliated ISP." (¶¶ 27-28.)

With respect to the mailer (Exhibit 6 to the Amended Complaint), complainants first quote its language that if the subscriber orders SBC Yahoo service, that company "will pick up where you left off" and will "make the transition as smooth as possible." After noting the inconsistency of tenses in the ad pointed out by the ALJ at the TRO hearing (as discussed in footnote 7 above), complainants allege that the inconsistency "could, and likely did . . . fool[] customers into believing that their [DIRECTV] DSL service was already disconnected," and that as a result of the quoted language in the ad, "the average consumer could only be left with the impression that switching to SBC Yahoo! DSL would minimize downtime." (¶¶ 32-34.) Complainants also allege that they have suffered damage as a result of the press release and the mailer, "given the[ir] disparate marketing budgets and brand recognition." (¶ 35.)

Complainants also allege that the timing of the joint press release was designed to pressure DIRECTV customers into choosing SBC Yahoo as their new ISP. While DIRECTV's original announcement of December 13, 2002 stated that DIRECTV would continue to provide service for 90 days, the December 27 press release quoted DIRECTV's president as saying that DIRECTV's "network will be

operational until at least January 16, 2003," so he encouraged DIRECTV customers to "quickly take advantage of this opportunity" to switch to SBC Yahoo. Complainants allege that "with [DIRECTV's] subscribers faced suddenly with this impending deadline, and probably limited energy to deal with DSL provider research [during the holidays], Defendants could be assured to acquire an even greater number of DSL customers than by relying on fair competition alone." (¶ 37.)

The Amended Complaint continues that because SBC ASI did not inform its non-affiliated ISP customers that DIRECTV planned to keep its network in operation until February 28, 2003 -- even though this information was known to SBCIS -- SBC ASI has "discriminat[ed] among its customers. Such discrimination is in violation of SBC ASI's obligations to provide non-discriminatory service as a common carrier. A common carrier can not be involved in a secret agreement designed to hide information from all but one customer, and ultimately fool end users into using the favored customer's services." (¶ 42.)

Finally, complainants allege that "SBC ASI has restricted Complainants' access to its DSL ordering system and thereby discriminated in the provision of DSL Transport against Complainants." (¶ 43.) The discrimination is alleged to have arisen out of SBC ASI's "refusal" to indicate on its Complex Product Service Order System (CPSOS), between December 13 and December 30, 2002, what the disconnection dates for DIRECTV customers would be. Complainants allege that "this disconnection information is usually available and is vital to inform new subscribers about the status of their DSL service orders. The CPSOS failure prevented Complainants from informing their new potential subscribers when

they would lose their [DIRECTV] service, or allowing any reasonable estimate as to when their new DSL service would be functional." (¶ 45.)

B. The Allegations Against VADI

Some of the Amended Complaint's allegations against VADI are identical to those against SBC ASI. For example, complainants allege that "VADI fully intended to maintain DSL Transport connections for all [DIRECTV] subscribers through February 28, 2003," but that this information was known only to Verizon Online, VADI's affiliate. (¶ 53.) Because VADI refused to share the information about the February 28 cutoff date with any of its other ISP customers, it is alleged to have engaged in unlawful discrimination under § 453 of the Pub. Util. Code. (¶¶ 54, 74, 77.)

Complainants also allege that VADI violated the Pub. Util. Code's anti-discrimination provisions by withholding information about DSL transition procedures. Complainants allege that VADI had decided by December 30 to develop a procedure that would minimize DSL subscriber downtime, but did not provide any information about this procedure until January 8, despite numerous requests from complainants to do so. (¶¶ 56-57.) Even then, the January 8 information was allegedly incomplete, and complainants claim they did not receive complete information, including the critical fact that the procedure could be used for customers with static Internet protocol (IP) addresses, [13] until

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[13] In his April 25, 2003 reply declaration in support of VADI's motion to dismiss the Amended Complaint, Thomas Wolthoff, the Director of ISP Ordering & Customer Contact for Verizon Services Organization Inc., explains the difference between static IP and dynamic IP addresses as follows:

> "Some customers use their DSL service for web hosting activities (*i.e.* maintaining websites). Web hosting is impossible with a dynamic IP address because a dynamic IP address changes each time the hosting

Footnote continued on next page

January 14, 2003, just "two days before the pending eradication of the [DIRECTV] network." (¶ 56.)

C. Summary of Statutory Provisions Violated and Prayer for Relief

After making the above-noted allegations, the Amended Complaint enumerates the various provisions of the Pub. Util. Code that defendants have allegedly violated. With respect to § 451, which requires utilities to provide adequate, efficient, just and reasonable service, and requires that the charges for such service be just and reasonable, complainants allege that SBC California has violated the provision by participating in a marketing scheme designed to confuse DIRECTV subscribers, which has resulted in "charges being obtained by means of misleading or confusing sales." SBC ASI and VADI are both alleged to have violated § 451 "through [their] participation in the [DIRECTV] agreement[s] whereby [they] failed to alert Complainants about the fact that [they] had agreed to maintain the [DIRECTV] DSL Transport network through February 28, 2003." (¶¶ 69, 71.) The alleged failures to post essential information on SBC ASI's CPSOS ordering system are also claimed to constitute a violation of § 451. Complainants then allege that this same conduct by SBC ASI and VADI violated the anti-discrimination requirements of § 453, because these defendants thereby "granted a preference or advantage to their affiliated ISPs for DSL transport." (¶¶ 73-78.)

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subscriber turns on her service, and therefore a visitor to a server hosted on a dynamic IP service would be unable to locate the server. Because only static IP addresses are capable of supporting web hosting applications, they are generally more expensive than dynamic IP addresses." (April 25 Wolthoff Declaration, ¶ 4.)

Defendants' conduct is also alleged to constitute a violation of Pub. Util. Code § 2896, which requires telephone corporations to provide customers with "sufficient information upon which to make informed choices among telecommunications services and providers," including information on pricing and the terms and conditions of service. SBC California is alleged to have violated these provisions through its participation in the "deceptive marketing campaign regarding downtime," and SBC ASI and VADI through their participation in the DIRECTV agreements whereby they "failed to alert Complainants about the fact that [they] had agreed to maintain the [DIRECTV] DSL Transport network through February 28, 2003." (¶¶ 81-82, 84.) SBC ASI is also alleged to have violated § 2896's requirement that telephone corporations provide "reasonable statewide quality service standards" by failing to make information available on a timely basis on CPSOS about the disconnect dates for DIRECTV customers. VADI is alleged to have violated the same provisions by failing to give DSLExtreme timely information about VADI's "hot swap" procedures. (¶¶ 83-85.)

In their prayer for relief (which appears at pages 27-29 of the Amended Complaint), complainants request many of the same things they sought at the January 30 TRO hearing. They request an order directing both SBC ASI and VADI to send notices to all DIRECTV customers who migrated to SBC Yahoo or Verizon Online informing these customers that they gained no advantage in downtime by choosing these affiliated ISPs, and further informing them that they can immediately choose a new, unaffiliated ISP without penalty or delay. Complainants also want a list of the DIRECTV customers who transitioned to SBC Yahoo or Verizon Online to be made available to all ISPs operating in California, and a complete report broken down by various time periods on the

numbers of DIRECTV customers who migrated to affiliated versus non-affiliated ISPs.

Complainants also seek more general relief. They seek an order prohibiting SBC ASI and VADI from offering to their affiliated ISPs any contract, agreement, rule, facility or privilege that is not also available to unaffiliated ISPs, and they want an order directing defendants to make all of their agreements with DIRECTV available to the Commission, as well as all marketing scripts used in persuading DIRECTV customers to migrate to SBC Yahoo or Verizon Online. Finally, complainants seek penalties of $20,000 per day against SBC ASI, VADI and "Pacific Bell" for unspecified violations of Commission decisions, orders and rules, as well as the costs of this complaint case and "reasonable attorneys' fees pursuant to statute."

IV. Defendants' Motions to Dismiss

After setting the due date for the Amended Complaint at the January 30 TRO hearing, the assigned ALJ directed the defendants to inform him by March 7, 2003 whether they would be filing answers or motions to dismiss with respect to the new pleading.

On March 7, SBC ASI, SBC California and VADI all informed the ALJ that they would move to dismiss. In a March 18, 2003 ruling, the ALJ directed the defendants to file their motions (as well as answers to the Amended Complaint) no later than March 28, 2003; complainants were directed to file any response by April 18, 2003.[14]

[14] Administrative Law Judge's Ruling Setting Briefing Schedule on Motions to Dismiss, issued March 18, 2003.

All of the defendants filed timely motions to dismiss, and complainants filed a timely response on April 18. The ALJ also granted VADI leave to file a reply to complainants' response, which VADI submitted on April 25, 2003.

Because the defendants' arguments seeking dismissal are at times lengthy and complex, they are considered where appropriate in the Discussion section of this decision, which follows.

V. Discussion

A. The Allegations that SBC California Engaged in False and Misleading Advertising Are Without Merit

We begin with the question whether dismissal is appropriate of the causes of action asserted against SBC California due to its alleged involvement in a misleading advertising campaign.[15] These allegations are central to this case, because complainants have argued from the beginning that SBC California (or Pacific Bell) sought to persuade DIRECTV customers they would experience less downtime by choosing SBC Yahoo as their new ISP, even though defendants knew this to be false. However, for many of the same reasons cited by the ALJ in

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[15] Even though the misleading advertising is alleged to have benefited SBC California's ISP affiliate, SBCIS, neither that company nor Verizon Online has been named as a defendant here, because complainants recognize that this Commission does not exercise jurisdiction over information services such as ISPs. (D.98-10-057, 82 CPUC2d 492, 497-99; D.02-10-060, Appendix A, p. 19.)

Based on a claim that it was merely acting as an agent for SBCIS in sending out the mailer, SBC California argues that the Amended Complaint should be dismissed as to it because "the Commission does not have jurisdiction over marketing that SBC California performs on behalf of SBCIS." (SBC California Motion to Dismiss, p. 12.) We do not need to rule on this dubious jurisdictional argument here, because we assume for purposes of this motion that, since the mailer was promoting the bundle of services being offered by SBC California (including SBC Yahoo service), the mailer was prepared by and intended to benefit SBC California directly.

denying a TRO on January 30, we conclude that complainants' claims of false and misleading advertising must be dismissed.

As noted above, complainants contend that both the December 27, 2002 press release issued jointly by SBCIS and DIRECTV (Exhibit 2 to the Amended Complaint), and the undated mailer bearing the SBC logo that was mailed to DIRECTV customers (Exhibit 6 to the Amended Complaint), falsely suggest that if these customers want to minimize disruption to their DSL service, they should choose SBC Yahoo as their new DSL provider. (¶¶ 27, 34.)

The fundamental difficulty with this theory is that when read in context, neither the press release nor the mailer suggests that a customer who chooses SBC Yahoo as the customer's new DSL provider will experience any less downtime than a customer choosing a non-affiliated ISP. While the press release quotes DIRECTV's president as saying that "our top priority through this transition is to ensure that all of our customers continue to access their broadband service *with the least amount of disruption possible*" (emphasis added), nowhere in the press release is there stated or implied a comparison between the downtime associated with SBC Yahoo service versus a non-affiliated ISP's service.

In fact, the only other mention of downtime in the press December 27 release comes in a subparagraph offering "[f]ree SBC Yahoo! Dial service for 30 days if SBC Yahoo! DSL is ordered within that time. The dial service provides an *interim solution* for customers since their DIRECTV DSL service must be *disconnected* before the SBC Yahoo! DSL service can be activated." (Emphasis added.) Apart from making the offer of dial service, all this subparagraph does is inform the DSL subscriber that some downtime is involved when one switches from DIRECTV to another ISP. No comparison is stated or implied between the

downtime that will be experienced with SBC Yahoo service versus any other ISP's service.

With respect to the mailer (which is Exhibit 6 to the Amended Complaint), complainants contend that the following paragraph suggests subscribers will experience less downtime if they choose SBC Yahoo rather than another ISP:

> "**Now that DIRECTV Broadband is no longer offering DSL service, what do you do?** Easy. Go with two of the best known names in the business – SBC and Yahoo! Just named the preferred service for DIRECTV DSL subscribers, SBC Yahoo! *will pick up where you left off*, and then some, with Internet that logs onto you. Just call us today . . . and we'll *make the transition as smooth as possible*." (Boldface in original; italics added.)

Complainants' claims with respect to this paragraph are also without merit. Saying that SBC Yahoo DSL service "will pick up where you left off," and that SBC will "make the transition as smooth as possible" is puffing; the language does not imply that the downtime the customer will experience with SBC Yahoo is any less than with another ISP's service. At most, the paragraph extols SBC Yahoo service and suggests it will be as good as any other ISP's.

It is clear under California law that in evaluating the capacity of advertisements such as the mailer and the December 27 joint press release to mislead consumers, the standard to be used is the understanding of a reasonable consumer, and that in appropriate circumstances this understanding can be determined as a matter of law. The reasonable consumer standard is the one used under Business & Professions (B&P) Code § 17500 *et seq.* (the so-called False Advertising Act) as well as B&P Code § 17200 *et seq.*, which together form the

Unfair Competition Law (UCL). We also believe it is the appropriate standard to apply under Pub. Util. Code § 2896, upon which complainants rely.[16] As the First District Court of Appeal recently said of the UCL in *Lavie v. Procter & Gamble Co.*, 105 Cal.App.4th 496 (2003):

> "California and federal courts applying the UCL have never applied a 'least sophisticated consumer' standard, absent evidence that the ad targeted particularly vulnerable consumers. Rather, they have consistently applied a standard closer to an ordinary or 'reasonable consumer' standard to evaluate unfair advertising claims." (105 Cal.App.4th at 504.)

It is also clear that under the Unfair Competition Law, whether a particular advertisement is misleading can be determined as a matter of law. As stated by the court in *Haskell v. Time, Inc.*, 857 F. Supp. 1392 (E.D. Calif. 1994):

> "Advertising that amounts to 'mere' puffery is not actionable because no reasonable consumer relies on

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[16] In *Greenlining Institute v. Public Utilities Com.*, 103 Cal.App.4th 1324 (2002), the First District Court of Appeal held that the Commission lacks jurisdiction to enforce the provisions of the UCL in its proceedings. However, just as the Commission takes the antitrust implications of its decisions into account even though it does not have jurisdiction to enforce the antitrust laws, *Northern California Power Agency v. Pub. Util. Com.*, 5 Cal.3d 370, 377-79 (1971), we also think it is appropriate to take the standards of the UCL into account when interpreting Pub. Util. Code provisions that have similar purposes. In this case, we think the purpose of Pub. Util. Code § 2896 -- which requires telephone corporations to furnish prospective customers with "sufficient information upon which to make informed choices among telecommunications services and providers," including the provider's identity, service options, pricing, and terms and conditions of service -- is sufficiently similar to the purpose of B&P Code § 17500 -- which prohibits any person, firm, corporation or association from making or disseminating any statement in connection with goods or services for sale "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading" -- that it is appropriate to use the reasonable consumer standard when interpreting § 2896.

> puffery. The distinguishing characteristics of puffery are vague, highly subjective claims as opposed to specific, detailed factual assertions . . . Whether the alleged misrepresentations amount to mere puffery may be determined on a motion to dismiss . . . *Similarly, if the alleged misrepresentation, in context, is such that no reasonable consumer could be misled, then the allegation may also be dismissed as a matter of law*." (857 F.Supp. at 1339; citations omitted; emphasis added.)

Although the press release and the mailer might have been more explicit on the issue of downtime, no reasonable DSL subscriber who read them could have concluded that less downtime was being promised with SBC Yahoo service than with any competing ISP's service. As the ALJ noted at the TRO hearing, DSL subscribers as a group are generally sophisticated consumers with the ability to distinguish between specific promises and mere puffery. The language cited by complainants in the joint press release and the mailer are clearly examples of the latter. Accordingly, complainants' claims of false advertising should be dismissed as a matter of law.

B. The Allegations that SBC ASI Withheld Information About DIRECTV Disconnect Dates from Non-Affiliated ISPs Are Without Merit

Complainants fare no better with their claims that SBC ASI violated the anti-discrimination provisions of the Pub. Util. Code by failing to provide information to non-affiliated ISPs on the CPSOS system between December 13 and December 30, 2002 about the disconnect dates for DIRECTV customers. The problem with this theory is that the Amended Complaint's allegations are directly contrary to the testimony of SBC ASI's witness at the TRO hearing about how the CPSOS system works, testimony on which complainants made no

timely request for discovery and on which they had a full opportunity for cross-examination.

In claiming discrimination on the CPSOS system, complainants rely on the January 9, 2003, declaration of James Murphy, the president of DSLExtreme, a declaration they also presented at the TRO hearing. In paragraph 4 of his declaration (which is included as Exhibit 5 in the Amended Complaint), Mr. Murphy states:

> "This disconnection information is usually available and is vital to inform potential or new subscribers about the status of their DSL service orders. The CPSOS failure prevented DSLExtreme from informing these potential subscribers when they would lose their DirecTV DSL service, or allowing any reasonable estimate as to when any newly established DSL service could be functional."

Mr. Murphy's assertions about what is "usually available" on CPSOS was directly contradicted in the prepared testimony of Becky De La Cruz, which was served on all parties by SBC ASI on January 27, 2003. In her testimony (which was admitted into evidence at the TRO hearing as Exhibit 9), Ms. De La Cruz states that Mr. Murphy's characterizations of how the CPSOS system works are "false," and indicative of his "lack of knowledge" about the system generally and about "the information provided to ISPs about the DirecTV transition." She continues:

> "As all ISPs that use CPSOS know, ASI's CPSOS system is designed so that each ISP can only view and access information regarding orders that ISP has placed. ASI built this security into the CPSOS to protect each ISP's proprietary information from being seen or used by one of its competitor ISPs. Therefore, these statements by Mr. Murphy are false.
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> "In the normal course of business, only the ISP that has the subscriber can send in a disconnect order for their

> subscriber, and ASI's systems do not allow other ISPs to be privy to what is happening between the ISP and its subscriber . . . If another ISP acquired a DirecTV subscriber, the end user would request DirecTV to disconnect the service, and the acquiring ISP would need to wait for DirecTV to send in the disconnect order before the acquiring ISP could send in a new connect order. The acquiring ISP would not have access to the disconnect information in CPSOS to indicate when that would occur.
>
> "However, in order to enable its subscribers to transition to any other ISP more easily, DirecTV took the extraordinary measure of authorizing ASI to make the DirecTV subscriber information available to all ISPs. DirecTV provided ASI with a written authorization to make the DirecTV subscriber information available to all ISPs specifically for the purpose of placing disconnect and new connect orders on a DirecTV subscriber's line when the ISP has received authorization from a DirecTV subscriber to change their service to such ISP. Upon receiving this special authorization, ASI had to re-program its CPSOS system in order to make an exception to the built-in security. ASI was able to accomplish this re-programming and make DirecTV's accounts available to all ISPs beginning on Dec 30, 2002." (Exhibit 9, pp. 20-21.)

In light of this testimony -- which was not contradicted at the TRO hearing (Tr. 94-96) -- complainants cannot rely on Mr. Murphy's declaration as the basis for a discrimination claim. Once complainants received the testimony of Ms. De La Cruz on January 27th, they could have requested an opportunity to conduct discovery to determine whether they could discredit her unambiguous assertions about how CPSOS works. However, complainants made no such request. In light of this, and the full opportunity for cross-examination they were afforded at the TRO hearing, it would not be fair to give complainants yet another opportunity to amend their complaint in the hope they can state a claim

for unlawful discrimination based on when the disconnect information about DIRECTV customers first appeared on CPSOS.

Although the Commission is not required to follow technical rules of evidence and looks to the discovery provisions of the Code of Civil Procedure (CCP) only for guidance,[17] we note that our ruling here finds support in cases construing CCP § 437c(h). This statute provides that on a motion for summary judgment -- which these dismissal motions, supported by both declarations and TRO hearing testimony, resemble -- "if it appears from the affidavits submitted in opposition to [the motion] . . . that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just."

The Courts of Appeal have consistently held that when a 437c(h) situation arises, the party opposing summary judgment must make a timely motion for a continuance to obtain additional discovery, and that without such a motion, the decision granting summary judgment cannot later be attacked for alleged discovery limitations. For example, in *Zamudio v. City and County of San Francisco*, 70 Cal.App. 4th 445 (1999), the issue was whether a summary judgment granted in favor of a subcontractor on an injured employee's negligence claim should be reversed. In affirming the summary judgment, the Court of Appeal held that appellant's failure to request a continuance and discovery pursuant to § 437c(h) constituted a waiver of his objections:

> "Appellant complains that, while he sought the entire contract [between San Francisco and the construction

[17] *See* Pub. Util. Code § 1701; D.94-08-028, 55 CPUC2d 672, 677 (1994).

> manager] in discovery, only excerpts of the contract were presented. Presumably, the inability of the trial court to consider the entire contract somehow prevented appellant from resisting the motions for summary judgment. Appellant does not explain why a motion to compel production of the entire contract was not filed. Nor is it explained why a continuance of the hearing, pursuant to [CCP § 437c(h)] was not sought . . . Moreover, although this very issue was mentioned in the points and authorities filed in opposition to summary judgment, such reference does not serve as a substitute for an evidentiary objection or request for continuance . . . Appellant's objection was waived in the trial court. Thus, he may not now raise it on appeal." (70 Cal.App. 4th at 454; citations and footnotes omitted.)[18]

In view of Ms. De La Cruz's unambiguous testimony about CPSOS's partitioning features, the fact that complainants knew they would be expected to conduct cross-examination on this testimony at the TRO hearing, and their failure to request any discovery regarding the testimony, complainants cannot continue to rely on Mr. Murphy's January 9 declaration as the basis for a claim of unlawful discrimination with respect to CPSOS. Accordingly, the Amended

[18] For a Commission decision to the same general effect, see D.01-08-061, *California Dept. of Transportation v. Crow Winthrop Development Limited Partnership*, in which the Commission dismissed without prejudice a complaint against Pacific Bell under § 626 of the Public Utilities Code alleging that Pacific's arrangements with a property developer had unreasonably restricted the access of Cox Communications to tenants on property controlled by the developer. Although Cox argued it had not been allowed to complete its discovery, the Commission granted the dismissal because Cox had raised this issue only at the last minute. The Commission also rejected Cox's argument that it should be allowed to amend the complaint, noting that "complainants sought leave to extensively amend their complaint, raising new issues for the first time," which would make compliance with Pub. Util. Code § 1701.2(d) difficult. (*Mimeo.*, at 27-29.)

Complaint's allegations of discrimination based on failure to make DIRECTV disconnect information available on CPSOS must be dismissed.

C. The Allegations that SBC ASI Unlawfully Discriminated by Failing to Inform its Non-Affiliated ISP Customers that DIRECTV Service Would Be Terminated on February 28, 2003 Should Be Dismissed

As noted above, the final major allegation against SBC ASI in the Amended Complaint is that because the company did not inform non-affiliated ISPs that DIRECTV planned to keep its network in operation until February 28, 2003 – a fact that was known to SBCIS, SBC ASI's affiliate -- SBC ASI has unlawfully discriminated among its wholesale DSL Transport customers. (¶ 42.) The loss of customers supposedly brought about by this conduct was allegedly aggravated by publicity such as the December 27 joint press release, which quoted DIRECTV's president as saying that "we have communicated to our customers that the DIRECTV Broadband network will be operational until at least January 16, 2003," thus raising the possibility that DIRECTV might shut down its network two months earlier than a prior statement had indicated.

While it is clear that DIRECTV's website did not inform customers in SBC territory about the February 28 shutdown date until just before the TRO hearing in this case, the difficulty with complainants' discrimination theory is that they do not allege that SBCIS became aware of the February 28 date as a result of any preferential treatment by SBC ASI. As stated in SBC ASI's motion to dismiss the Amended Complaint:

> "[T]he amended complaint fails to allege that SBC ASI informed its affiliate SBCIS of the February date. If SBC ASI did not inform *any* of its ISP customers of this [DIRECTV] plan, and Complainant[s] fail to allege that it did, there is no basis for a claim of discrimination. All of

> its ISP customers were treated in the same manner by SBC ASI." (SBC ASI Motion to Dismiss, p. 3; footnote omitted.)[19]

In addition to attacking the above-noted argument as a quibble over pleading, the complainants give short shrift to SBC ASI's argument that it would have been inconsistent with the company's policy of protecting confidential ISP customer information (as described by Ms. De La Cruz) if the February 28 shutdown date had been revealed to all ISPs contrary to DIRECTV's wishes:

> "The information regarding the continued functionality of DSL Transport to [DIRECTV's] customers does not qualify for such protection. It was no secret that [DIRECTV] was going out of business and that its network would cease to function at some date. The status of the [DIRECTV] network was vital information necessary for all ISP customers to place orders for [DIRECTV] refugees and market to potential [DIRECTV] customers. Without that knowledge, and in combination with [DIRECTV's] threats to eliminate its network, ISPs were prevented from making an informed decision on ordering DSL Transport." (Complainants' Reply To Motions to Dismiss, p. 14.)

We conclude that based on the facts alleged, the Amended Complaint does not state a cause of action for unlawful discrimination under § 453(a), the principal anti-discrimination provision of the Pub. Util. Code. Since it seems

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[19] In a footnote to its motion to dismiss, SBC ASI adds that "if this matter were to go to hearing, we would show that SBCIS knew of the DSL Transport connectivity date because it was told directly by [DIRECTV], not as a result of any information obtained from SBC ASI." (*Id.* at 3, n. 3.) In view of the preferred provider arrangement announced in the joint press release issued by DIRECTV and SBCIS on December 27, 2002, and the fact (discussed *infra*) that both VADI and Verizon Online were parties to the Transition Agreement whereby the latter became the preferred provider for transitioning DIRECTV customers in Verizon territory, SBC ASI's assertion is more than plausible.

apparent from the preferred provider arrangement announced in the December 27 joint press release that DIRECTV itself was the source of SBCIS's knowledge about the February 28 shutdown date, it is difficult to understand how SBC ASI can be said to have discriminated among its wholesale ISP customers if, as SBC ASI maintains, it told *none* of them about the February 28 shutdown date.

It is clear under the caselaw that unequal treatment of similarly-situated customers lies at the core of the undue discrimination that § 453(a) has been held to prohibit. In *Andersen v. Pacific Bell*, 204 Cal.App.3d 277 (1988), a group of customer service representatives alleged that Pacific Bell had discriminated against them by ordering them to engage in unethical and dishonest marketing practices when offering telephone services to residential customers. In holding that the trial court had properly granted summary judgment against the plaintiffs on their discrimination claim, the Sixth District Court of Appeal quoted § 453(a) and said:

> "This broad language prohibits many forms of arbitrary discrimination, including rate discrimination . . . and discrimination in hiring . . . But unless discrimination in some form is present, [§ 453(a)] simply does not apply.
>
> "In this case, Pacific Bell gave the same marketing directive to all of its service representatives. Thus, one must ask, where is the discrimination? To quote their brief, plaintiffs argue that 'Pacific made a conscious decision to use service representatives, *and service representatives only*, through which [sic] to carry out its overarching [sic] scheme to increase corporate revenue.' (Italics in original.) . . . But this argument does not identify discrimination among similarly situated persons; it merely attacks the division of labor. One might as well argue that a taxicab company has arbitrarily discriminated by requiring taxi drivers, and taxi drivers only, to drive unsafe cabs. To be sure, some law

> may have been broken, but discrimination is not a relevant or helpful concept." (204 Cal.App.3d at 285; citations omitted.)[20]

Perhaps recognizing the difficulty with their theory under traditional notions of discrimination, complainants also offer the following rationale for their § 453(a) claim:

> "Knowing silence towards one set of customers is discrimination in favor of those privileged to have the information. This is particularly egregious when one of the parties entitled [to] the knowledge is an affiliate. SBCIS and SBC ASI were parties to a contract with [DIRECTV]. As part of that contract, apparently, SBCIS and SBC ASI agreed that the [DIRECTV] network would be maintained through the end of February and that, no end users or other ISPs would be told of the true date of disconnection . . . So in effect, as is often the case, the affiliates were working in cooperation. SBC ASI had no information to give SBCIS, they already had it, as did [DIRECTV]. SBC ASI's failure to share this information with the rest of its customers is discriminatory." (Complainants' Response to Motions to Dismiss, pp. 13-14.)

We find this argument unpersuasive. It not only ignores the issues about protecting confidential ISP customer information raised by Ms. De La Cruz, but is also just one step removed from an argument that because another SBC affiliate -- SBCIS -- was involved, SBC ASI could not enter into any arrangement with DIRECTV that might have the effect of benefiting that affiliate

[20] For a Commission discussion of § 453(a) to the same effect, see *Re Southern California Gas Company*, D.96-09-104, 68 CPUC2d 379, 383-384 (1996).

in any way.[21] Although the Commission takes economic effects into account in determining whether utility practices result in undue discrimination (*United States Steel Corp. v. Public Utilities Com.* (1981) 29 Cal.3d 603, 610-11), we decline on the facts here to read complainants' novel and potentially broad concept of discrimination into § 453(a).[22] Accordingly, their claims against SBC ASI based

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[21] Indeed, the breadth of complainants' theory is shown by ¶ 3 of the prayer for relief, which asks for "an order prohibiting SBC ASI and VADI from extending to any affiliated ISP any contract or agreement, or any rules, facilities or privileges, in providing and supporting DSL Transport and related services unless such items are extended to all similarly-situated ISPs operating in California." (Amended Complaint, p. 28.)

Complainants' argument also ignores the legitimate interest of DIRECTV -- an entity over which we do not exercise jurisdiction -- in encouraging its customers through truthful communication to migrate sooner rather than later to a new ISP.

[22] Complainants' inability to state a claim under § 453(a) is also fatal to their claims based on the same facts under §§ 2896 and 451.

With respect to § 2896, there is a serious issue whether this provision is intended to protect wholesale customers such as complainants. The Commission's recent decisions in *Utility Consumers' Action Network v. Pacific Bell* strongly suggest that § 2896 was intended only to codify existing protections for residential telephone customers, not to benefit customers like complainants who purchase DSL Transport on a wholesale basis. *See*, D.01-09-058, *mimeo.* at 15-17; D.02-02-027, *mimeo.* at 6-8. Even if complainants are covered by § 2896, however, the last sentence of subsection (a) thereof states that "a provider need only provide information to its customers on the services which it offers." In its motion to dismiss, VADI argues that this language cannot reasonably be construed as imposing a duty on it to disclose to ISP customers such as complainants when a different ISP customer will stop taking DSL transport service:

> "The information allegedly withheld from DSLExtreme, however, does not even relate to the service provided to DSLExtreme (i.e., DSL transport) but to when a *different* customer, DirecTV, would stop receiving service from VADI. There is no authority holding that either [§§ 451 or 2896] is implicated where a utility allegedly fails to inform its customers about what another customer has elected to do with his service. Such information obviously has nothing to do with the quality of service

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on failure to disclose DIRECTV's planned shutdown date must be dismissed.[23]

D. The Allegations that VADI Unlawfully Discriminated by Failing to Disclose the February 28, 2003 Shutdown Date to Non-Affiliated ISPs Should Be Dismissed

As noted in the summary of the Amended Complaint, complainants no longer allege that VADI engaged in deceptive marketing by suggesting that retail ISP customers would experience less downtime if they chose VADI rather than a

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> provided to DSLExtreme. VADI is a provider of DSL transport, not a purveyor of information. VADI's alleged failure to provide DSLExtreme with information about the service it provided to DirecTV did not render the quality of the DSL transport that DSLExtreme received unreasonable or inadequate . . ." (VADI Motion to Dismiss the Amended Complaint, p. 20; emphasis in original.)

We agree with this analysis, and so conclude that in view of SBC ASI's responsibility to protect the confidentiality of proprietary customer information such as DIRECTV's, complainants have failed to state a claim under either §§ 451 or 2896 of the Pub. Util. Code based on SBC ASI's failure to inform other ISPs of the date on which DIRECTV's DSL Transport service would end.

[23] Because we are dismissing all of the allegations in the Amended Complaint against SBC ASI, there is no need to address in this order the lengthy argument made in SBC ASI's motion to dismiss that this Commission lacks jurisdiction to regulate wholesale DSL Transport service on the ground that it is an interstate service subject to regulation by the Federal Communications Commission. *See,* SBC ASI Motion to Dismiss, pp. 2, 9-14. We note, however, that our recent decision in the CISPA case, D.03-07-032, effectively rejects SBC ASI's jurisdictional argument. In D.03-07-032, we specifically affirmed a March 28, 2002 ruling issued by the Assigned Commissioner and the assigned ALJ in the CISPA case that rejected a jurisdictional argument nearly identical to SBC ASI's position here. (*Mimeo.* at pp. 3-4; Ordering Paragraph 4.) The March 28, 2002 ruling (which is attached to D.03-07-032 as Appendix B) stated that "we reject Defendants' assertions that the Commission does not have jurisdiction to pursue claims of fraudulent or misleading conduct, or poor service quality relating to DSL service," although it agreed with defendants that "the scope of the complaint should not include the reasonableness of DSL rates, operating speeds and the like set forth in the federal tariff . . ." (Appendix B, p. 11.)

non-affiliated ISP. Instead, the Amended Complaint now asserts that VADI violated various provisions of the Pub. Util. Code by (1) failing to inform non-affiliated ISPs that the shutdown date for DIRECTV's DSL network would be February 28, 2003, and (2) withholding from DSLExtreme (the only complainant served by VADI), from December 30, 2002 until January 8, 2003, any information about the "hot swap" procedure VADI had devised to minimize customer downtime, and then informing DSLExtreme only on January 14, 2003 that, contrary to earlier suggestions, the hot swap procedure could be used for retail customers seeking static IP addresses.

Like SBC ASI, VADI has moved to dismiss the allegations relating to its alleged failure to disclose the February 28 shutdown date on the ground that, even if these allegations were true, they would not state a claim for discrimination under § 453(a) of the Pub. Util. Code. No claim is stated, VADI argues, because there is no allegation that Verizon Online, VADI's affiliate, learned of the shutdown date as a result of preferential treatment by VADI.

VADI 's motion to dismiss is supported by the March 27, 2003 declaration of Thomas Wolthoff, the Director of ISP Ordering & Customer Contact for Verizon Services Organization Inc. In his declaration, Mr. Wolthoff states that on December 24, 2002, DIRECTV, VADI, Verizon Online and other Verizon telephone companies entered into a Transition Agreement whereby DIRECTV "promised to recommend to its existing customers in the Verizon region that they order new DSL service" from Verizon Online. (Wolthoff Declaration, ¶ 5.) The Transition Agreement also provided that the Verizon companies would keep DIRECTV's DSL transport lines in service through February 28, 2003. Thus, Mr. Wolthoff states, Verizon Online learned through

the Transition Agreement, to which it was a party, that DIRECTV's DSL Transport service would end on February 28, 2003. (*Id.*)

For the same reasons set forth in our discussion of the similar allegations against SBC ASI, we agree that complainants have not stated a claim for discrimination against VADI. If VADI did not give Verizon Online better information about the February 28 shutdown date than it gave to other, non-affiliated ISPs, as Mr. Wolthoff's declaration indicates then *a fortiori* there has been no undue discrimination under § 453(a). And for the same reasons set forth in footnote 22, we conclude that these alleged facts also do not state a claim under either §§ 451 or 2896 of the Code.

In VADI's case there is an additional reason for dismissing these allegations. According to Mr. Wolthoff's declaration, VADI sent all of its wholesale ISP customers (including DSLExtreme) an e-mail message on January 3, 2003 stating that DIRECTV's "network will be up until February 28, 2003." (*Id.* at ¶ 6.)[24] Mr. Wolthoff also states that DSLExtreme apparently did not receive this message because it had failed to notify VADI that it was no longer using the e-mail address in question to receive wholesale notifications. (*Id.* at ¶¶ 16-17.)

In their April 18 response to the motion to dismiss, complainants admit that the January 3rd e-mail described by Mr. Wolthoff was sent, and they do not

[24] Mr. Wolthoff states that although VADI believed it was authorized to reveal the shutdown date to its ISP customers, DIRECTV objected to the January 3 e-mail and VADI did not mention the date again in its subsequent e-mails to customers. Nonetheless, as VADI points out in its April 25 reply brief in support of the motion to dismiss, VADI "did nothing to retract [the] information," and "the proverbial cat was out of the bag." (VADI Reply, p. 4, n. 3.)

dispute his claim that DSLExtreme apparently did not receive it because the company had failed to keep its "customer profile" with VADI up-to-date. (Complainants' Response, p. 7.) These admissions are an additional reason for dismissing the claims against VADI based on its alleged failure to disclose the February 28 shutdown date.

E. The Allegations that VADI Delayed in Telling DSLExtreme About the "Hot Swap" Procedure, and that it Could be Used for Customers With Static IP Addresses, Are Without Merit

The second claim against VADI in the Amended Complaint is that it discriminated against DSLExtreme (1) by not providing information for at least nine days (December 30 to January 8) about the "hot swap" procedure VADI had devised to minimize retail customer downtime, and (2) by then waiting nearly another week (until January 14) to inform ISP customers that the hot swap procedure could, contrary to earlier suggestions, be used for retail customers seeking static IP addresses. For the reasons set forth below, we believe that these claims are also without merit and should be dismissed.

The "hot swap" procedure was VADI's solution to the problem of how to minimize the downtime experienced by retail customers making the transition from DIRECTV to a new ISP. In his March 27, 2003 declaration, Mr. Wolthoff notes that VADI began working on the hot swap procedure immediately after DIRECTV's December 13 announcement that it was leaving the DSL business, because the usual transitioning process "involves disconnecting the user from his existing ISP and installing DSL transport with his new ISP. This process is time consuming, and can leave a user without DSL service for five or more days." (March 27 Wolthoff Declaration, ¶ 9.)

As Mr. Wolthoff also states, even while VADI was starting to work out the details of how the hot swap procedure would operate, it began to receive urgent inquiries from ISPs about what to tell customers who wished to transition to them from DIRECTV. On December 17, for example, VADI received such an inquiry from Verizon Online. In response, VADI told its affiliate that it "could either tell the prospective customers that they could proceed with the standard disconnect/install procedure, or it could tell them not to disconnect from [DIRECTV] and hold their orders while VADI tried to develop a more efficient transition process." (*Id.* at ¶ 10.) After reassuring all its ISP customers by e-mail on December 20 that it was working on a more efficient transition procedure, VADI on December 24 and January 3 sent e-mails to all of its ISP customers with the same advice about continuing to hold customer orders that it had given Verizon Online. (*Id.* at ¶¶ 11-12.)[25]

The availability of the hot swap procedure was finally announced on January 8, 2003 in a detailed, step-by-step e-mail message that was sent to all of VADI's ISP customers; it is attached to Mr. Wolthoff's March 27 declaration as Exhibit D. The January 8 message was careful to point out the hot swap procedure could be used only for customers with dynamic IP addresses -- *i.e.*, those not engaged in web hosting -- and that "a process for transitioning customers to static IP service is being developed." (Exhibit D, p. 2.) On January 14, VADI sent another e-mail to all of its ISPs informing them that due to the nature of its network architecture in the Western U.S. (including California),

[25] Although DSLExtreme did not receive the January 3 e-mail because of its failure to update the e-mail addresses in its VADI customer profile, Mr. Wolthoff's opening

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the hot swap process could, in fact, be used for customers seeking static IP addresses. (March 27 Wolthoff Declaration, ¶ 18 and Exhibit G.) Mr. Wolthoff also notes that "VADI did not supply this information to [Verizon Online] or any other ISP prior to January 14," and that all of its ISP customers received such information at the same time via e-mail. (*Id.*)

DSLExtreme's response to Mr. Wolthoff's narrative is to charge that, in order to benefit Verizon Online, VADI first delayed announcing the hot swap procedure, and then delayed announcing the fact that the procedure could be used for static IP addresses. On the first issue, DSLExtreme states:

> "As the announced transition partner, [Verizon Online] stood to benefit from the delay. During this time [*i.e.*, from December 18 to January 8], [DIRECTV] customers had the option of choosing minimal disruption via [Verizon Online] while its affiliated network provider was determining a hot swap procedure, or submitting an order to another ISP that had no information and was hostage to VADI's whims. In DSLExtreme's case, they were captive until just 36 hours before the first scheduled demise of the [DIRECTV] network." (Complainants' April 18 Reply, p. 8.)

On the question of the timing of the announcement that the hot swap procedure could be used for static IP addresses, DSLExtreme claims:

> "[Verizon Online], using dynamic IP procedures announced on January 8th, enjoyed a full week advantage over DSLExtreme for attracting [DIRECTV] refugees. This was a critical week because it was the week before the date that all of [DIRECTV's] customers thought their service would be disconnected, January 16th." (*Id.*).

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declaration indicates that DSLExtreme did receive the December 20 and 24 e-mail messages. (March 27 Wolthoff Declaration, ¶ 16.)

The problem with DSLExtreme's assertions is that they run afoul of both the realities of the DSL market and of the press releases and advertisements attached to the Amended Complaint. As to DSL marketing realities, one of the most important factors is that only customers with static IP addresses can engage in "web hosting"; *i.e.*, maintaining websites. In his April 25, 2003 reply declaration, Mr. Wolthoff states that as a result of this:

> "[C]onsumers seeking static IP addresses represent a different segment of the market for DSL internet services than consumers seeking dynamic IP addresses. Therefore, customers seeking static IP addresses would be unlikely to select a dynamic IP service just because the dynamic IP service offered short term convenience in installation due to the availability of a hot-swap process." (April 25 Wolthoff Declaration, ¶ 5.)

The e-mail that VADI sent to all of its ISP customers on January 8 expressly noted that (1) the new hot swap procedure would work only for dynamic IP addresses, and (2) "currently, all [DIRECTV] customers are provisioned with static IP addresses." (March 27 Wolthoff Declaration, Exhibit D.) In view of the latter statement – an assertion with which DSLExtreme has not taken issue – it seems clear that VADI was not in a position to help Verizon Online by delaying the announcement that the hot swap procedure would work for static IP addresses, because DIRECTV customers who wished to retain static IP addresses after the transition would, in Mr. Wolthoff's words, "be unlikely to select a dynamic IP service just because the dynamic IP service offered short term convenience in installation . . ."[26]

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[26] In paragraph 19 of his March 27 declaration, Mr. Wolthoff states that "although the static IP hot – [swap] process was available for all unaffiliated ISPs on January 14, [Verizon Online] has never been able to use it due to its own internal ordering system

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DSLExtreme also claims that the six-day "delay" in announcing that VADI's hot swap procedure would work for static IP addresses was "critical" because January 8-14 was "the week before the date that all of [DIRECTV's] customers thought their service would be disconnected, January 16th." The problem with this argument is that if any DIRECTV customers in Verizon territory thought their DIRECTV service would be shut down on January 16, it was not as the result of any statement made by VADI or Verizon Online.

The only statement in the record by any of the defendants referring to a possible January 16 shutdown date is the joint press release issued by SBC and DIRECTV on December 27, 2002. This press release, which is Exhibit 2 to the Amended Complaint, includes a statement by Ned Hayes, DIRECTV's president, that "we have communicated to our customers that the DIRECTV Broadband network will be operational until at least January 16, 2003, so we encourage DIRECTV DSL customers in the SBC territory to quickly take advantage of" the opportunity to transition to SBC Yahoo. Even if this statement persuaded some customers to choose either SBC Yahoo or Verizon Online as their new DSL provider because there was little time to research alternatives, the statement can be imputed only to SBCIS, not to VADI. (VADI Motion to Dismiss, pp. 13-14.)[27]

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requirements for static IP addresses." Based on this, VADI argues that Verizon Online was actually disadvantaged by the announcement that the hot swap procedure would work for static IP addresses. (VADI Motion to Dismiss Amended Complaint, p. 18.)

[27] We also think the following footnote from VADI's motion to dismiss fairly characterizes the statements about a DIRECTV shutdown date that VADI and Verizon Online actually did make:

> "Statements that *were* issued by [Verizon Online] are consistent with a February 28 termination date and, tellingly, [are] not referred to in the Complaint. VADI's December 30 press release [Exhibit 3 to the Amended

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Thus, there is no merit in the Amended Complaint's claims that VADI discriminated in favor of Verizon Online with respect to the January 8 announcement of the hot swap procedure, or the January 14 announcement that the procedure could also be used for static IP addresses. The uncontroverted evidence in Mr. Wolthoff's declarations shows that (1) VADI gave Verizon Online the same information with respect to the procedure and how to handle DIRECTV "refugees" that it offered to every other ISP, (2) VADI's advertisements did not suggest DIRECTV's DSL network would be shutdown anytime before February 28, and (3) due to Verizon Online's own internal systems, it was at a disadvantage after the January 14 announcement in competing with other ISPs for DIRECTV customers who wanted to retain static IP addresses. The complainants cannot defeat a motion to dismiss supported by such a detailed factual showing merely by citing to their own pleadings, attacking the opposing declarants' credibility, or vaguely suggesting that discovery may enable them to turn up some contrary evidence. VI Witkin, CALIFORNIA PROCEDURE (4th ed.), Proceedings Without Trial §§ 201, 208; Weil & Brown, CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL

> Complaint] estimated a March termination date, by referring to [DIRECTV's] December 13th press release and its stated intent to maintain service for 'approximately ninety days' from that date. Therefore, this press release could not have left [DIRECTV] subscribers with the impression that their service would end in January. [Verizon Online's] promotional website [Exhibit 4 to the Amended Complaint], which told subscribers not to disconnect their [DIRECTV] service if they wanted to take advantage of an offer that was valid 'through 2/28/03,' similarly does not suggest a January disconnection. The clear implication of this offer is that [DIRECTV's] service would remain operational at least until the promotion ended – or until February 28, 2003." (Motion to Dismiss, p. 14, n. 8; emphasis in original.)

¶¶ 10:198-10:201. Accordingly, all of the allegations against VADI in the Amended Complaint concerning the hot swap procedure must be dismissed.

F. The Repeated Changes in Complainants' Factual Allegations and Legal Theories Make it Appropriate to Dismiss the Amended Complaint with Prejudice

As is evident from the lengthy history of this proceeding, the allegations in the Amended Complaint are the second set of liability theories complainants have asserted against VADI, and the *third* set of allegations complainants have made against SBC ASI and SBC California. In its reply brief in support of the motion to dismiss, VADI notes in response to yet another set of allegations raised for the first time in complainants' April 18 brief[28] that "DSLExtreme's theory of the case continues to evolve with every new filing,"

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[28] In their April 18 response to the motions to dismiss, complainants assert for the first time that under the Transition Agreements with DIRECTV, SBC ASI and VADI both agreed to reduce DIRECTV's indebtedness to them directly in proportion to the number of DIRECTV customers who chose to go with either SBCIS or Verizon Online, and that "SBC ASI and VADI agreed to engage in activities designed to steer as many customers as possible to SBCIS and [Verizon Online.]" (April 18 Response, pp. 2-3.)

As VADI correctly notes in its April 25 reply brief, the complainants cannot cure pleading defects in the Amended Complaint by coming up with new allegations of discrimination in a responsive brief. *See, Robinson v. Hewlett-Packard Corp.* (1986) 183 Cal.App.3d 1108, 1131-32 (issues not raised in the complaint could not be considered on a summary judgment motion); *City of Hope Nat'l Med. Ctr. V. Superior Court* (1992) 8 Cal.App.4th 633, 639 (same). Moreover, in his April 25 reply declaration, Mr. Wolthoff flatly denies the new allegations. He states that "the consideration [DIRECTV] received under the Transition Agreement was a reduction in its debt to VADI by a fixed amount, and did not vary by the number of customers who transitioned from [DIRECTV] to [Verizon Online.]" Mr. Wolthoff also notes that Verizon Online "paid to VADI the difference between the amount that [DIRECTV] owed under VADI's tariff nationwide and the reduced amount that [DIRECTV] actually paid to VADI under the Transition Agreement." (April 25 Wolthoff Declaration, ¶¶ 2-3.)

and that "DSLExtreme's *modus operandi* all along" has been to come up with a new theory of liability as soon as defendants have refuted the prior one. VADI urges that "unless the Commission puts an end to DSLExtreme's fishing expedition, it will never end." (VADI Reply Brief, p. 1.)

In its motion to dismiss the Amended Complaint, SBC ASI makes a similar argument:

> "While the ALJ has shown remarkable patience with the Complainants, allowing them to restate their complaint on two occasions to cure obvious problems of pleading and proof, the amended complaint is no closer to setting forth causes o[n] which the Commission may act. We respectfully request that Complainants not be permitted to further amend the Complaint, particularly given the fact that [the] underlying transaction about which they complain has been completed and the [DIRECTV] subscribers have found new service providers." (SBC ASI Motion to Dismiss, p. 19.)

We are normally reluctant to dismiss complaints without leave to amend, especially where significant discovery has not yet occurred. However, it is appropriate to make an exception to that general policy in this case. As is evident from the history of the case set forth above, complainants have made factual allegations they have failed to investigate, asserted legal theories that are plainly at odds with existing law, and repeated allegations that were discredited at the TRO hearing. In view of this history, there is no reason to think that granting them yet another opportunity to amend their complaint and pursue discovery would yield a record justifying a hearing.

The situation here is somewhat similar to the one described in *Chicago Title Insurance Co. v. Great Western Financial Corp.*, 69 Cal.2d 305 (1968). In that case, the California Supreme Court upheld a decision of the Superior Court's

Appellate Department sustaining demurrers without leave to amend to a fourth Amended Complaint. The plaintiffs, a group of title insurance companies, alleged that Lehman Brothers and firms in which it had a controlling interest had conspired to monopolize the title insurance business in Los Angeles County, had engaged in a group boycott of plaintiffs, and had stolen away one of plaintiffs' principal title insurance customers by agreeing to pay the customer secret rebates.

After holding that plaintiffs had failed to state a cause of action under the Cartwright Act pursuant to any of their theories, the Supreme Court agreed that further leave to amend the complaint should be denied. The Court said:

> "There is a dangerous vice inherent in the complaint with which we are herein presented because it is ambiguous and investigatory in nature. Respondents are entitled to know [] what acts constitute the alleged violations so that the time and expense involved in conducting an investigation and pursuing discovery may be reasonably limited, for the complaint might otherwise be construed as a blanket license to indulge in interrogatories, depositions, and motions to produce ad infinitum, ad nauseam . . .
>
> * * *
>
> "By irresponsible pleading containing unrestrained and unverified allegations, appellants attempt to secure the right by discovery to explore at random and at enormous expense to respondents, several large and important businesses and their relationships with one another . . . The method used by appellants has been aptly characterized by Judge Kaus as a 'shotgun' technique where plaintiffs deal solely in broad generalities and otherwise indulge in factual and legal conclusions, unsupported speculation and argumentative allegations." (69 Cal. 2d at 326-27; citations omitted.)

We regret to say that in their two complaints and TRO motions, complainants here have engaged in similar conduct. Accordingly, the Amended Complaint herein will be dismissed with prejudice and without leave to amend.

VI. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____.

VII. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and A. Kirk McKenzie is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The original complaint and motion for a TRO were filed on January 13, 2003.

2. In their January 13 TRO motion, complainants contended that DSL subscribers in California were facing irreparable harm as a result of DIRECTV's decision to shut down its DSL network on January 16, 2003. They also contended that SBC ASI and Verizon were acting unlawfully by either (1) offering DSL subscribers transitioning from DIRECTV less downtime if these subscribers chose the ISP affiliates of SBC and Verizon as their new DSL provider rather than a non-affiliated ISP, or (2) participating in misleading advertising campaigns designed to convince DIRECTV subscribers that the amount of downtime they would experience would be less if they chose one of defendants' ISP affiliates as their new DSL provider rather than a non-affiliated ISP.

3. In their TRO motion, complainants sought an order (1) requiring defendants to maintain DSL Transport connectivity for all DIRECTV subscribers

until March 14, 2003, (2) prohibiting defendants from discriminating in favor of their ISP affiliates (SBCIS and Verizon Online) with respect to downtime and other aspects of the transitioning process, or in the alternative, if such discrimination was not occurring, (3) requiring defendants to issue corrected advertisements stating that DIRECTV customers who transitioned to a non-affiliated ISP would not be disadvantaged with respect to downtime.

4. Verizon responded to the TRO motion on January 15, 2003, and SBC ASI and SBC California responded on January 16. In their responses, both Verizon and SBC ASI denied that they had discriminated in favor of their ISP affiliates or had issued misleading advertisements, and emphasized that ordering them to maintain DSL Transport connectivity for all DIRECTV subscribers through March 14 could have the effect of harming these subscribers by leaving them with no DSL service in the event DIRECTV decided to shut down its DSL network prior to March 14, 2003.

5. In a January 17, 2003 conference call, complainants acknowledged that an immediate TRO hearing was no longer necessary because DIRECTV had announced that its network would remain in operation through the end of January. Complainants also acknowledged that the form of TRO they had requested on January 13 could leave some DIRECTV subscribers without any DSL service for an extended period of time.

6. On January 22, 2003, complainants informed the ALJ that they would no longer be seeking a TRO against Verizon and its affiliates.

7. On January 23, complainants submitted a reply pursuant to the ALJ's permission which asserted that SBC California and SBC ASI were engaged in deceptive advertising, and which requested that a revised form of TRO be issued against these two companies. Complainants requested that the revised TRO

should (1) enjoin SBC California from engaging in marketing to former DIRECTV subscribers who had chosen one of the complainants as their new ISP provider, (2) enjoin SBC ASI technicians from disparaging complainants' ISP service, and (3) order SBC ASI and/or SBC California to notify all DIRECTV subscribers that SBC ASI would be maintaining DSL Transport connectivity for DIRECTV through February 28, 2003, and that defendants would seek to transition DIRECTV subscribers to a new ISP of their choice with a maximum of five days downtime.

8. On January 27, 2003, both SBC ASI and SBC California submitted briefs in opposition to complainants' request for a revised TRO, as well as extensive written testimony opposing issuance of the TRO.

9. Complainants did not request a postponement of the scheduled January 30, 2003 TRO hearing date in order to seek discovery regarding any of the contentions in defendants' written testimony.

10. At the January 30 TRO hearing, the ALJ ruled that although the clarity of the advertisement attached to complainants' January 23 reply as Exhibit 1 (and to the Amended Complaint as Exhibit 6) might have been improved upon, the advertisement was not misleading with respect to the price being charged for SBC Yahoo DSL service.

11. At the January 30 TRO hearing, the ALJ ruled that an order prohibiting SBC California from marketing to former DIRECTV subscribers who had chosen one of the complainants as their new ISP provider was not justified because, *inter alia*, such an order would likely run afoul of FCC rules requiring SBC ASI to keep proprietary customer information confidential, and would apparently be inconsistent with SBC ASI's own internal policies protecting the confidentiality of such ISP customer information.

12. At the January 30 TRO hearing, the ALJ ruled that an order prohibiting SBC ASI technicians from disparaging the DSL service offered by complainants was not justified, because complainants had failed to offer any evidence that disparagement of them had occurred, and also because testimony by SBC ASI's witness established that the few documented instances of disparagement of ISPs that had occurred since 2000 had been dealt with promptly.

13. At the January 30 TRO hearing, complainants acknowledged that DIRECTV's recent decision to post on its website a notice informing subscribers that DIRECTV's DSL network would remain in operation through February 28, 2003, had rendered moot the portion of complainants' revised TRO request seeking an order requiring defendants to inform DIRECTV subscribers of the February 28 shutdown date.

14. SBC ASI witness Becky De La Cruz testified that it was not technically feasible as of the date of the January 30 TRO hearing to guarantee to DIRECTV subscribers that they would experience no more than five days of downtime in transitioning to another ISP, because even with a special procedure for stacking DIRECTV disconnect orders with connect orders from new ISPs, downtime was still averaging about seven business days.

15. Sonic president Dane Jasper testified at the TRO hearing that he was not seeking a shorter downtime interval than SBC ASI could currently provide.

16. The ALJ ruled that based on (1) the absence of a direct business relationship between SBC ASI and DIRECTV's customers, (2) the De La Cruz testimony concerning current downtime intervals, and (3) the fact that ISP transitioning downtime on SBC ASI's system was likely to be significantly reduced in the near future owing to system improvements resulting from field trials in the CISPA case, there was no justification for requiring SBC ASI to

inform DIRECTV customers that SBC ASI would endeavor to transition them to a new ISP with no more than five days of downtime.

17. Owing to the conclusions set forth in Finding of Fact (FOF) Nos. 10-16, the ALJ denied complainants' revised request for a TRO.

18. At the conclusion of the January 30 hearing, the ALJ ruled that complainants would be permitted to file an Amended Complaint no later than February 18, 2003, and that defendants should advise him whether they would answer the Amended Complaint or move to dismiss it.

19. SBC ASI, SBC California and VADI all informed the ALJ on March 7, 2003 that they would move to dismiss the Amended Complaint. Pursuant to the ALJ's ruling, the dismissal motions were filed on March 25, 2003, and complainants submitted a response in opposition on April 18, 2003. With the permission of the ALJ, VADI submitted a short reply on April 25, 2003.

20. The Amended Complaint alleges that Exhibit 2 thereto (the joint press release issued by SBCIS and DIRECTV on December 27, 2002), as well as Exhibit 6 thereto (an undated mailer concerning SBC Yahoo service), were part of a misleading advertising campaign which sought to suggest, falsely, that if DIRECTV subscribers wanted to minimize their downtime when transitioning to a new ISP, they should choose SBC Yahoo service rather than another ISP's service.

21. In fact, the Amended Complaint alleges, there was no difference in the downtime that a DIRECTV subscriber would experience when transitioning to SBC Yahoo versus an independent ISP.

22. The Amended Complaint alleges that because SBC ASI did not inform non-affiliated ISP customers like complainants that DIRECTV planned to keep its network in operation through February 28, 2003, even though this information

was known independently by SBCIS, SBC ASI has unlawfully discriminated against its unaffiliated ISP customers.

23. The Amended Complaint alleges that, between December 13 and December 30, 2002, SBC ASI unlawfully discriminated against unaffiliated ISPs by failing to post information on its CPSOS system about what the disconnection dates for individual DIRECTV customers would be, even though this information was ordinarily available on the CPSOS system.

24. The Amended Complaint alleges that because VADI did not inform non-affiliated ISP customers like complainants that DIRECTV planned to keep its network in operation through February 28, 2003, even though this information was known independently by Verizon Online, VADI has unlawfully discriminated against unaffiliated ISP customers.

25. The Amended Complaint alleges that VADI unlawfully discriminated against its unaffiliated ISP customers by failing to inform them until January 8, 2003 that VADI had developed a hot swap procedure for minimizing downtime for customers seeking dynamic IP addresses, even though this procedure was disclosed earlier to VADI's affiliate, Verizon Online.

26. The Amended Complaint alleges that VADI unlawfully discriminated against its unaffiliated ISP customers by failing to inform them until January 14, 2003 that the hot swap procedure could also be used for DSL subscribers seeking static IP addresses, even though this information was known to Verizon Online.

27. In her testimony at the January 30 TRO hearing, Becky De La Cruz stated that the CPSOS system is partitioned so that as a normal matter, only the ISP with a particular subscriber can send in a disconnect order for that subscriber,

and that other ISPs would not be able to view such disconnection information on the CPSOS system.

28. Becky De La Cruz testified at the January 30 TRO hearing that it was only because DIRECTV had given SBC ASI a special authorization to make information concerning its subscribers generally available to all ISPs that users of the CPSOS system (such as complainants) became able to access information regarding the disconnect dates for particular DIRECTV customers.
Ms. De La Cruz also testified that it took until December 30, 2002 for SBC ASI technicians to modify the normal information partitioning systems on CPSOS so that such customer information could be viewed by all ISPs.

29. At the January 30 hearing, complainants did not undermine the testimony described in FOF Nos. 27 and 28.

30. In their April 18, 2003 response, complainants have not disputed SBC ASI's assertion that SBCIS became aware of the February 28, 2003 shutdown date for DIRECTV's DSL network through communication with DIRECTV rather than as a result of preferential treatment by SBC ASI.

31. In his March 27, 2003 declaration, Thomas Wolthoff states that Verizon Online became aware of the February 28, 2003 shutdown date for DIRECTV's DSL network by virtue of being a party to the Transition Agreement with VADI and DIRECTV, rather than as the result of preferential treatment by VADI.

32. The March 27 Wolthoff declaration also states that VADI sent its wholesale customers an e-mail message on January 3, 2003 informing them that DIRECTV's DSL system would remain in operation through February 28, but that DSLExtreme, the only complainant served by VADI, failed to receive this message because DSLExtreme had not kept the e-mail addresses in its VADI customer profile up-to-date.

33. Complainants' papers do not dispute the factual assertions summarized in FOF Nos. 31 and 32.

34. According to the March 27 Wolthoff declaration, on December 17, 2002, VADI advised Verizon Online that while VADI was working on a more efficient transition procedure, Verizon Online could advise prospective customers either to proceed with the standard disconnect/install procedure, or to not disconnect from DIRECTV and hold their orders while the more efficient process was being worked on.

35. According to the March 27 Wolthoff declaration, VADI sent an e-mail message to all of its ISP customers on December 20, 2002 stating that it was working on a more efficient transition procedure. On December 24 and on January 3, 2003, VADI sent all of its ISP customers e-mail messages with the same advice it had given to Verizon Online, as set forth in FOF No. 34.

36. According to the March 27 Wolthoff declaration, DSLExtreme received the e-mail messages of December 20 and 24.

37. According to the March 27 Wolthoff declaration, VADI sent a detailed e-mail message to all of its ISP customers on January 8, 2003 explaining how to use the hot swap transition procedure, noting that it worked only for customers seeking dynamic IP addresses, and stating that VADI was working on a more efficient transition procedure for customers who wanted static IP addresses.

38. According to the March 27 Wolthoff declaration, on January 14, 2003, VADI sent an e-mail message to all of its ISP customers informing them that due to Verizon's network architecture in the western U.S. (including California), the hot swap transition procedure announced on January 8 would also work for DSL customers seeking static IP addresses.

39. According to the April 25, 2003 reply declaration of Thomas Wolthoff, DSL customers seeking static IP addresses comprise a different market than DSL customers seeking dynamic IP addresses, because a static IP address is necessary for maintaining a website. Static IP addresses are also more expensive than dynamic IP addresses.

40. According to the January 8 e-mail message sent by VADI to all of its ISP customers, all of DIRECTV's DSL subscribers were provisioned with static IP addresses.

41. According to the March 27 Wolthoff declaration, VADI always gave the same information concerning the hot swap procedure at the same time and in the same manner (via e-mail) to all of its ISP customers.

42. In their papers, complainants have not disputed any of the factual assertions summarized in FOF Nos. 34-40.

43. Because of the differences explained in FOF No. 39, it is very unlikely that during the January 8-14, 2003 period, Verizon Online would have been able to gain any DIRECTV customers as a result of the availability of the hot swap process.

44. According to the March 27 Wolthoff declaration, Verizon Online has never been able to use the hot swap process for customers seeking static IP addresses because of its own internal ordering system requirements.

45. No press release or other statement issued by VADI suggested that DIRECTV would shut down its DSL system on or about January 16, 2003. All of the press releases and other statements issued by VADI were consistent with a February 28, 2003 shutdown date for DIRECTV's DSL network.

Conclusions of Law

1. Owing to the extensive factual record developed at the January 30, 2003, TRO hearing and to the detailed factual assertions contained in the March 27 and April 25, 2003, declarations of Mr. Wolthoff, the motions of SBC ASI, SBC California and VADI to dismiss the Amended Complaint are more nearly akin to motions for summary judgment.

2. Under § 2896 and the other provisions of the Pub. Util. Code relied on by complainants, the capacity of an advertisement to mislead consumers should be determined by how the advertisement would be understood by a reasonable or ordinary consumer, unless the advertisement is targeted at particularly vulnerable consumers.

3. Under § 2896 and the other provisions of the Pub. Util. Code relied on by complainants, if the alleged misrepresentations in an advertisement are such that no reasonable consumer could be misled by them because they amount to mere puffery, then judgment against the misleading advertising claim may be granted as a matter of law.

4. As a group, DSL subscribers are generally more sophisticated than reasonable consumers.

5. No reasonable consumer could be misled by the press release attached to the Amended Complaint as Exhibit 2 into believing that a customer choosing SBC Yahoo as his or her new DSL provider would experience any less downtime than a customer choosing an unaffiliated ISP as his or her new DSL provider, because the press release neither states nor implies any such comparison.

6. No reasonable consumer could be misled by the mailer attached to the Amended Complaint as Exhibit 6 into believing that a customer choosing SBC Yahoo as his or her new DSL provider would experience any less downtime

than a customer choosing an unaffiliated ISP as his or her new DSL provider, because the mailer neither states nor implies any such comparison.

7. In view of Conclusion of Law (COL) Nos. 5 and 6, the claims of misleading advertising asserted in the Amended Complaint against SBC ASI and SBC alifornia should be dismissed as a matter of law.

8. In view of the uncontradicted testimony at the January 30 TRO hearing about how the CPSOS system's security features work, as described in FOF Nos. 27-28, complainants cannot continue to rely on Mr. Murphy's January 9, 2003 declaration to support their assertion that disconnection information about the customers of other ISPs is usually available on the CPSOS system.

9. In the absence of any evidence to support complainants' claims that SBC ASI unlawfully discriminated against non-affiliated ISPs by delaying the posting of information on the CPSOS system regarding the disconnect dates for DIRECTV's customers, these discrimination allegations should be dismissed.

10. In order to state a claim for unlawful discrimination under § 453(a) of the Pub. Util. Code, one must allege unreasonable discrimination among similarly-situated customers.

11. Because the Amended Complaint does not allege that SBCIS became aware of the February 28, 2003 shutdown date for DIRECTV's DSL system as a result of preferential treatment by SBC ASI, and because complainants have not disputed that SBCIS became aware of this date as a result of the preferred provider negotiations during December 2002, the Amended Complaint's claims of unlawful discrimination under § 453(a) based on SBC ASI's failure to disclose the February 28, 2003 shutdown date to all of its ISP customers should be dismissed.

12. The Amended Complaint's claims that SBC ASI's failure to disclose the February 28, 2003 shutdown date to its ISP customers also violated §§ 451 and 2896 of the Pub. Util. Code, should also be dismissed.

13. Because the Amended Complaint does not allege that Verizon Online became aware of the February 28, 2003 shutdown date for DIRECTV's DSL system as a result of preferential treatment by VADI, and because complainants have not disputed that Verizon Online became aware of this date by virtue of being a party to the Transition Agreement along with VADI and DIRECTV, the Amended Complaint's claims of unlawful discrimination based on VADI's alleged failure to disclose the February 28, 2003 shutdown date to all its ISP customers should be dismissed.

14. In addition to the reasons set forth in COL No. 13, the Amended Complaint's claims that VADI unlawfully discriminated based on its alleged failure to disclose DIRECTV's February 28, 2003 shutdown date to all ISP customers should be dismissed because on January 3, 2003, VADI sent an e-mail to all of its wholesale customers including DSLExtreme stating that DIRECTV's DSL system would remain in operation through February 28. DSLExtreme did not receive this e-mail because it had failed to keep its customer profile information with VADI up-to-date.

15. The claims in the Amended Complaint that VADI discriminated against DSLExtreme by not providing information about the hot swap transition procedure until January 8, 2003 should be dismissed, because the evidence offered by VADI and not disputed by complainants shows that (1) VADI informed its non-affiliated ISP customers beginning on December 20 that the hot swap process would take some time to develop, and (2) VADI disclosed the details of the hot swap process to all of its ISP customers, including Verizon

Online, at the same time and in the same manner; *i.e.*, through the January 8, 2003 e-mail message.

16. Because DSL subscribers seeking static IP addresses constitute a different market than DSL subscribers who are content with dynamic IP addresses, and because all DIRECTV DSL customers were provisioned with static IP addresses, it is very unlikely that Verizon Online gained any advantage in marketing its DSL service between January 8, 2003, when VADI informed its ISP customers that the hot swap process could only be used for dynamic IP addresses, and January 14, 2003, when VADI informed its ISP customers that the hot swap process could also be used for DSL subscribers seeking static IP addresses.

17. Because Verizon Online was unable to use the hot swap transition process for customers seeking static IP addresses due to the requirements of its own internal ordering systems, the January 14 announcement that the hot swap process could be used for DSL subscribers seeking static IP addresses put Verizon Online at a competitive disadvantage.

18. Because of the conclusions set forth in COL Nos. 16 and 17, the allegations in the Amended Complaint that VADI unlawfully discriminated against DSLExtreme by delaying until January 14, 2003 the announcement that the hot swap process could also be used for customers seeking static IP addresses, should be dismissed.

19. In view of the fact that the allegations in the Amended Complaint represent complainants' third attempt to state causes of action against SBC ASI and SBC California, and the fact that complainants did not pursue their allegations against VADI in the original TRO motion and have not disputed any of the material facts in the declarations supporting VADI's Motion to Dismiss the

Amended Complaint, it would not be appropriate to afford complainants another opportunity to amend their complaint.

20. The Amended Complaint herein should be dismissed with prejudice, effective immediately.

ORDER

IT IS ORDERED that:

1. The Amended Complaint in this proceeding dated February 19, 2003 is dismissed with prejudice.
2. Case 03-01-007 is closed.

This order is effective today.

Dated _____, at San Francisco, California.