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Decision 00-09-071 September 21, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Westcom Long Distance, Inc. (U5163C), Complainant, vs. Citizens Utilities Company of California (U87C), Defendant.	Case 92-03-049 (Filed March 30, 1992)
Westcom Long Distance, Inc. (U5163C), Complainant, vs. Citizens Utilities Company of California (U87C), Defendant.	Case 92-09-006 (Filed September 3, 1992)
Citizens Utilities Company of California (U87C), Complainant, vs. Westcom Long Distance, Inc. (U5163C), Defendant.	Case 92-09-025 (Filed September 16, 1992)

Ellen S. Deutsch, for Citizens Utilities Company and Michael J. Sunde, for Westcom Long Distance, complainants.
Goodin, MacBride, Squeri, Ritchie & Day, LLP, by Thomas J. MacBride, Jr., Attorney at Law, for Citizens Utilities Company.

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FINAL OPINION REGARDING THE CONSOLIDATED COMPLAINT CASES

I. Summary

Today's decision addresses three complaint cases involving Westcom Long Distance, Inc. (Westcom) and Citizens Utilities Company of California (Citizens). Westcom is a certificated interexchange carrier (IEC) and Citizens is a local exchange carrier (LEC). Westcom filed two of the complaint cases against Citizens (Case (C.) 92-03-049 and C.92-09-006), and Citizens filed C.92-09-025 against Westcom.

The complaint cases involve numerous allegations and arguments, as evidenced by the length of this decision. The complaint cases at issue involve billing disputes associated with Feature Group B (FGB) and Feature Group D (FGD) access service, the capabilities of the networks of both Westcom and Citizens, the cutover to equal access in June 1991, the issuance of Decision (D.) 92-08-028, and certain events which occurred before and after these events.

Two separate evidentiary hearings were held in June 1992 and in June 1993, for a total of eight days of hearing. Two interim decisions have been issued as a result of these complaint cases.

This decision concludes that the Commission has no jurisdiction over the FGB billings that occurred prior to June 1, 1992. That is because Westcom reported a percent of interstate usage (PIU) factor to Citizens of 100%, and, as a result, Citizens billed Westcom using the interstate tariff on file with the Federal Communications Commission (FCC). As for the FGB bills for June 1992 through the termination of service on August 25, 1992, Westcom has not proved that it is entitled to any credit. In addition, based on the evidence, we cannot agree with Westcom's assertion that Citizens had the ability to actually measure FGB terminating usage during the time period in question.

With respect to the FGD billings, we conclude that the problems are attributable to: (1) Westcom's failure to provision its switch to recognize a 1 + 7-digit call as an interLATA[1] call within the 916 area code; and (2) the tariff provision which provides that the number dialed by the end user shall be a seven or 10-digit number. Due to the tariff provision, we conclude that Citizens should have allowed its switch to pass on a 1 + 916 + 7-digit call to Westcom's switch at the time of the cutover to equal access. We have determined, however, that no reparations are owed to Westcom, except for a $20 credit for calls to Westcom over its 800 toll free line. Since the other request for relief by Westcom is a request for damages, this Commission has no jurisdiction to award that kind of relief. The Commission's Fiscal Office is directed to tender to Citizens the $12,608.79 that it received as a deposit from Westcom in connection with C.92-03-049.

This decision also concludes that Westcom violated Public Utilities Code § 702[2] by failing to comply with the notice required by D.92-08-028, and failing to comply with the intraLATA restrictions contained in D.88-09-009 and D.91-09-018. We also find that Westcom "slammed" five of its former customers without their authority by changing their IEC to Westcom without their permission. The Commission imposes penalties in the total amount of $11,000 against Westcom.

Since Westcom is no longer operating as an IEC in California, we will suspend the imposition of the penalties, and will not revoke its operating authority at this time. If, however, Westcom resumes activities in California as

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[1] "LATA" refers to the local access and transport area.

[2] Unless otherwise stated, all code section references are to the Public Utilities Code.

an IEC, the Commission staff is directed to open an Order Instituting Investigation (OII) into why Westcom's operating authority should not be revoked. In addition, the suspension of the penalties shall be lifted, and the Commission shall then take action to impose and collect the penalties for Westcom's failure to comply with Commission decisions and for slamming. Similarly, if Westcom's officers or shareholders become involved with an entity that seeks to operate as a provider of telecommunication services in California, the staff is directed to bring this to the Commission's attention, so that the Commission can open an OII into the revocation of Westcom's operating authority, and to take action to impose and collect the penalties from Westcom.

We note that Westcom could have easily avoided termination of its access services by paying all the monies in dispute to Citizens pending a decision, or it could have deposited all of the disputed amounts with the Commission. In doing so, Westcom could have also avoided having to send the notice required by D.92-08-028. Westcom's decision not to tender all of the disputed amounts, and its failure to comply with D.92-08-028, have resulted in today's outcome.

In resolving the issues raised in all three complaint cases, we had to carefully weigh all of the evidence, and the veracity of the various witnesses and exhibits. Since some of the evidence presented by both Westcom and Citizens relied on hearsay, we had to carefully review all of the evidence that was presented. Based upon our review of the evidence, and as explained in the text of this decision, we find that most of Westcom's allegations are unsupported by the overwhelming weight of the evidence.

With respect to Westcom's request for intervenor compensation, we conclude that since no common fund was created, Westcom is not entitled to any compensation from a common fund or from the Advocates Trust Fund. With respect to Westcom's request for compensation from § 1801 and following,

Westcom's request is denied because it did not timely file a notice of intent to claim compensation.

II. Procedural Background

A. Introduction

These complaint cases involve disputes between Westcom and Citizens, and events which took place in the 1989 through 1992 timeframe. In an Administrative Law Judge's (ALJ) ruling on October 2, 1992, C.92-03-049, C.92-09-006, C.92-09-011 and C.92-09-025, were consolidated.

On August 11, 1992, the Commission adopted D.92-08-028. This interim decision was issued in part to address the issue raised in C.92-03-049 of whether Westcom could continue to withhold payment of the disputed amounts without facing the risk of Citizens terminating the access services that it provided to Westcom.[3]

On December 16, 1992, the Commission issued D.92-12-038. That decision denied the interim relief sought by Westcom in C.92-09-006 and denied the motion of Citizens to dismiss C.92-09-006. The Commission also denied the interim relief sought by Citizens in the complaint case filed by Citizens against Westcom in C.92-09-025. The decision also granted Citizens' motion to dismiss Westcom's complaint in C.92-09-011.

[3] In footnote 6 of D.92-08-028, the Commission noted that Westcom could also deposit all of the outstanding disputed amounts, as well as any future disputed amounts, with the Commission. Westcom did not deposit any additional funds with the Commission in connection with C.92-03-049.

B. C.92-03-049

Westcom filed its original complaint against Citizens in C.92-03-049 on March 30, 1992. On May 18, 1992, Westcom filed an amended complaint. At the start of the evidentiary hearing, Westcom's President, J. Michael Sunde, clarified that the amended complaint should be substituted for the original complaint, and that the exhibits to the original complaint should be attached to the amended complaint.[4] Citizens filed its answer to both the original complaint and to the amended complaint.

The evidentiary hearing was held on June 2, 1992 through June 4, 1992. Prior to the start of the hearing, argument was held on Citizens' motion to strike certain portions of Westcom's complaint involving FGB switched access service. Citizens sought to strike those references because Westcom had specified that it was using the FGB service for 100% interstate use. Since Westcom reported its FGB usage as 100% interstate usage, Citizens applied its interstate access tariff to the FGB service. After review of the pleadings and hearing argument on the motion, the motion was denied. However, the assigned ALJ stated that this jurisdictional issue would be examined as part of this proceeding.

At the request of the ALJ, late exhibits were submitted by both Westcom and Citizens. Westcom submitted "Late-Filed Exhibit No. 26." Since no objection to its admission was raised by Citizens, Exhibit 26 shall be received in evidence.

[4] At the hearing, Sunde clarified that the amended complaint no longer contained allegations regarding FGB circuit problems in Susanville. (2 R.T. pp. 56-57.)

Late-filed Exhibit Numbers 27, 28, 34, and 38 were submitted by Citizens. Since Westcom has not objected to these four exhibits, they shall be received in evidence.

Citizens also submitted two other exhibits which were labeled as "Late-Filed Exhibit No. 37" and "Late-Filed Exhibit No. 39." Those two exhibits were submitted in response to the ALJ's request. (See 3 R.T. 49.) Late-Filed Exhibit No. 37 reflects the amount that Citizens back billed to Westcom for FGD switched access service. Late-Filed Exhibit No. 39 reflects the amount that Citizens back billed to Westcom for FGB service. The labeling of these two exhibits were in error since those two exhibit numbers were previously assigned to two other exhibits. (See 3 R.T. 9-10, 43-44, 69.) In order to clarify the exhibit order for the record, what was submitted as Late-Filed Exhibit No. 37 and Late-Filed Exhibit No. 39 shall be relabeled as Exhibit 46 and Exhibit 47, respectively. Since Westcom did not object to the receipt of these two exhibits, Exhibits 46 and 47 shall be received into evidence.

Citizens submitted its "Revised Late-Filed Exhibit No. 39" to the ALJ on July 8, 1992. (See 3 R.T. 43-44.) This exhibit shall be received into evidence as Exhibit 39.

Citizens also submitted "Late-Filed Exhibit No. 29." Westcom objected to the admission of Exhibit 29 on the basis that the rate element for the Information Surcharge shown in Exhibit 29 of $.0267 is incorrect. Westcom contends that the correct rate element is .000267.

In Citizens' response to Westcom's objection, Citizens asserts that the rate quoted by Westcom of $.000267 is the rate per access minute, while the surcharge of $.0267 shown in Exhibit 29 is the rate per 100 access minutes. Thus, both rates are correct. With Citizens' clarification, the objection of Westcom to

the admission of Exhibit 29 is overruled, and Exhibit 29 shall be received into evidence.

One of the issues in contention in this proceeding was the possible recording and timing differences between the switching and billing equipment of Westcom and Citizens. During the hearing, the ALJ encouraged Westcom and Citizens to see if they could reach an agreement to test for possible timing differences in the equipment of both companies. Westcom and Citizens agreed to joint testing, which occurred on July 28, 1992. The Telecommunications Branch of the Commission's Advisory and Compliance Division (CACD) were observers during the testing.[5] After the completion of the joint testing, the ALJ permitted the submission of an exhibit memorializing the results of the joint testing. "Late-Filed Exhibit #45" was submitted on July 30, 1992. Since no one objected to the receipt of Exhibit 45 into evidence, that exhibit shall be received into evidence.

Transcript corrections were submitted by Citizens in a letter dated July 29, 1992. Since no opposition to Citizens' proposed corrections was submitted, Cititzens' transcript corrections shall be accepted and the corrections shall be made to the reporter's transcript.

After the close of evidentiary hearings, Westcom filed a petition to set aside submission and to reopen the proceedings. Citizens filed a response in opposition. In an ALJ ruling dated July 31, 1992, the petition to set aside submission was denied.

[5] CACD's Telecommunications Branch was subsequently reorganized as the Telecommunications Division.

This matter was submitted on August 25, 1992 following the filing of concurrent reply briefs.

At the evidentiary hearing, the ALJ informed the parties that an interim decision would issue to address Westcom's request for a preliminary and permanent injunction to prevent Citizens' threatened cutoff of access services to Westcom. That decision was issued on August 11, 1992 as D.92-08-028. In that decision, the Commission denied Westcom's request for injunctive relief in C.92-03-049, and held that Citizens could immediately terminate service to Westcom for its failure to pay in accordance with the applicable tariff payment provision. The remaining issues raised in the evidentiary hearing are addressed in this decision.

Westcom's opening brief contains a section entitled "Prior Citizens' Abuses." In that section, Westcom describes a complaint case (C.89-10-027) that it filed against Citizens in 1989. A copy of that complaint case was attached to Tab 2 of Exhibit 4. Westcom moves in its opening brief to "admit all documents contained in Westcom's Exhibit 4, including Tab 2" because Westcom alleges it shows the "past illegal and fraudulent billing practices of Citizens." (Westcom Opening Brief, p. 1, underlining in original.)

During the evidentiary hearing in this proceeding, the ALJ asked about the status of C.89-10-027. He was informed that a settlement had previously been reached in that case, whereby Westcom agreed to drop C.89-10-027 and Citizens agreed to drop a cross-complaint against Westcom. (1 R.T. 36.) The ALJ then ruled that Tab 2 of Exhibit 4 would not be received into evidence. However, official notice of the previously filed complaint was taken, and parties were permitted to argue about that prior filing in their briefs. (1 R.T. 39-40.) The ALJ also specifically stated:

> "I'm not planning on entertaining evidence of prior Complaints in this case. I plan to restrict the evidence to things that have been alleged in the latest Complaint filed by Westcom. (1 R.T. 40.)

The Commission also addressed the allegations contained in C.89-10-027 when Westcom filed C.92-09-011 against Citizens alleging the same allegations it made in C.89-10-027. The Commission in D.92-12-038 dismissed C.92-09-011 with prejudice, in part, because Westcom failed to allege any new information. (D.92-12-038, p. 5.) Since the ALJ has already ruled on the admissibility of Tab 2 of Exhibit 4, and because the Commission has revisited the allegations in C.89-10-027 through Westcom's subsequent filing of C.92-09-011 and dismissal in D.92-12-038, Westcom's request in its opening brief to admit "all documents contained in Westcom's Exhibit 4, including Tab 2" is denied.

Westcom has deposited with the Commission the sum of $12,608.79 in C.92-03-049. This amount was deposited by Westcom prior to the hearings in an agreement reached between the parties, which was memorialized in an April 2, 1992 letter from the ALJ to the parties. The amount was deposited by Westcom in order to avoid termination of access service to Westcom by Citizens prior to the hearing. (D.92-08-028, p. 3.) No interest on the deposited amount is being earned since the amount on deposit with the Commission is less than $20,000. (See Pub. Util. Code § 1702.2.)

C. C.92-09-006

On September 3, 1992, Westcom filed its "Complaint For Temporary Restraining Order, Cease And Desist Order, Preliminary And Permanent Injunctions And Reparations" against Citizens. On November 13, 1992, Westcom filed its "First Amended Complaint." On April 8, 1993, Westcom filed its "Second Amended Complaint."

Although Westcom's first and second amended complaints state that "Westcom incorporates by reference Complaints 92-03-049, 92-09-006 and 92-09-011" into its amended complaints, we shall treat the First Amended Complaint and Second Amended Complaint as amendments to C.92-09-006 only. That is because the evidentiary record in C.92-03-049 was closed, and the matter was submitted upon the filing of reply briefs in C.92-03-049. (See 3 R.T. 150.)[6] Since C.92-09-011 was dismissed with prejudice in D.92-12-038, C.92-09-011 can no longer be amended.

Citizens filed its answer to the original complaint, as well as answers to the first and second amended complaints.

A prehearing conference was held on January 22, 1993 in C.92-09-006, C.92-09-025 and C.92-09-011. In June 1993, five days of evidentiary hearings were held in C.92-09-006 and C.92-09-025.

D. C.92-09-025

On September 16, 1992, Citizens filed a complaint against Westcom "For Preliminary And Permanent Injunction, Order To Show Cause, Accounting And Reparations, And For Revocation Of Certificate Of Public Convenience And Necessity."[7] Westcom filed its answer on October 5, 1992. Testimony regarding the issues presented in C.92-09-025 was developed in the June 1993 evidentiary hearing with C.92-09-006.

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[6] In addition, in an ALJ ruling dated July 31, 1992, Westcom's petition of July 3, 1992 to set aside the evidentiary hearing and reopen discovery in C.92-03-049 was denied. The issues raised in Westcom's motion were subsequently incorporated into C.92-09-006 and its amended complaints.

[7] A description of Citizens' allegations are contained in the section entitled "Citizens Complaint In C.92-09-025."

Both C.92-09-006 and C.92-09-025 were submitted upon the filing of reply briefs on August 27, 1993. (8 R.T. 695.)

E. Westcom's Request For Compensation

On June 3, 1993, Westcom filed its "Request for Findings of Eligibility for Compensation" (initial request). On June 17, 1993, Westcom filed its "Amended Request for Findings of Eligibility for Compensation" (first amended request). On February 16, 1995, Westcom filed its "Amended Request for Findings of Eligibility for Compensation (Notice of Intent to Claim Compensation)" (second amended request).

Westcom's initial request stated at page 2 that it believed it was eligible for compensation from one of three following sources:

> "(1) a common fund of reparations or other sums that may be generated as a result of this complaint; (2) the Advocate's Trust Fund created by CLAM/TURN v. PUC, 25 Cal. 3d 891 (1979); or (3) the provisions for intervenor fees in Article 18.7 of the Commission's Rules of Practice and Procedure."

Citizens filed an opposition to the initial request and first amended request on June 28, 1993, and to the second amended request on March 13, 1995.

In an ALJ ruling dated March 20, 1995, the ALJ stated in pertinent part:

> "Under PU Code Section 1804(a)(1), a customer who seeks an award under the statutory scheme, 'shall, within 30 days after the prehearing conference is held, file and serve on all parties to the proceeding a notice of intent to claim compensation.' The prehearing conference was held on January 22, 1993, and not on June 1, 1993 as the revised footnote to Westcom's second amended request would lead one to believe. June 1, 1993 was the first day of evidentiary hearings into C.92-09-006 and C.92-09-025. (See Vol. 4 R.T. p. 152.) Even if Westcom's submission of its second amended request was allowed to relate back to June 3, 1993, the date when Westcom's initial request was filed, the notice

> of intent to claim compensation under Article 18.8 would still have been late because the initial request was filed five months after the date of the prehearing conference."

The ruling also stated that the issue of Westcom's eligibility for compensation under all three theories, and its claim of significant financial hardship, would be addressed in a decision. The compensation issues are discussed later in this decision.

F. Draft Decision and Comments

This proceeding was filed before January 1, 1998, and is not subject to the provisions of Article 2.5 of the Commission's Rules of Practice and Procedure (Rules). The draft decision of the ALJ was mailed to the parties on August 8, 2000. In accordance with § 311(g)(1) and Rules 77.2, 77.3, 77.4, and 77.5, parties were given an opportunity to comment on the draft decision.[8] No one filed any comments to the draft decision.

III. C.92-03-049

A. Westcom's Allegations

Westcom's amended complaint alleges a series of misdeeds by Citizens. These allegations can be categorized into nine issues. First, Westcom alleges that Citizens failed to properly route 916 calls to Westcom during the changeover to equal access. Westcom alleges that even though the 916 calls were not routed properly, Citizens still charged Westcom switched access costs for these call attempts. In addition, Westcom contends:

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[8] On or about January 17, 2000, Westcom submitted an "Emergency Motion To Full Commission to Issue a Decision." It does not appear that this motion was filed with the Commission. (See Rule 3.) Since a decision has been issued, Westcom's motion is now moot.

> "Westcom received hundreds of customer complaints due to this problem and suffered serious financial losses as well. Westcom was forced to absorb the cost of these hundreds of calls placed to Westcom toll free 800 lines; and Westcom lost many thousands of dollars of lost revenues because 916 calls were not routed to us properly by Citizens." (Amended Complaint, p. 2.)

Westcom seeks reparations in the amount of $15,000 for the lost revenue associated with the improper routing of the 916 calls. In addition, Westcom seeks compensation from Citizens to reimburse Westcom for the 800 calls that it allegedly received.

Westcom's second allegation involves alleged overcharges by Citizens for FGB services in the amount of $16,585 up through February 1992, and for March and April of 1992 in the amount of $5,900 and $6,500, respectively. Westcom alleges that the overcharges were the result of back billing by Citizens beyond the time limit permitted by the tariffs and Commission decision, and because of improper recording in Citizens' switches.

Westcom's third allegation concern alleged overcharges by Citizens for FGD services in the amount of $8,075.71 through February 1992, and for March and April of 1992 in an amount to be determined.[9] Westcom alleges that these overcharges were caused by Citizens back billing beyond the time allowed in the tariffs and Commission decision.

The fourth allegation in the amended complaint is that Citizens has recently started to bill Westcom for terminating traffic on its FGD trunks to

[9] During the hearing, Sunde testified that the April 10, 1992 bill for March 1992 usage did not have any contested differences. (1 R.T. 106-107.)

Citizens. Westcom alleges that it informed Citizens that Westcom did not terminate any traffic on Citizens' FGD trunks.

Westcom's fifth allegation is that Citizens charges Westcom for Pacific Bell (PacBell) rate elements which are not contained in Citizens' tariffs. Westcom seeks a credit of all such charges.

Westcom's sixth allegation concerns its FGD trunks in Elk Grove on Lines 96, 97, and 100. Westcom advised Citizens' central office personnel that Westcom did not receive any traffic on these lines, and that Citizens has not solved this problem. Westcom seeks compensation of $5,000 for the customer complaints and lost customer goodwill associated with Citizens' alleged failure to route calls over these trunks.

The seventh allegation concerns $1,417.19 in late charges that Citizens billed Westcom.[10] Westcom seeks a credit for this amount because of Citizens' alleged failure to respond to the disputed billings.

Westcom's eighth allegation is that Citizens has billed Westcom $752 for installation charges that exceed the back billing limitation specified in the tariffs and in Commission decisions. Westcom seeks a credit for this amount.

The ninth allegation is that Citizens has improperly billed Westcom the sum of $294.41 for approximately 10 months, for a total overcharge of approximately $2,754.52, for circuits to Keddie. Westcom alleges that it did not

[10] Due to a transposition error, the $1417.19 amount listed in the amended complaint should actually be $1417.91. This represents the late charges that appeared in the February and March 1992 usage shown in Exhibits 31 and 33. The amended complaint did not include the late charges that appeared in the April 1992 usage of $187 and $138.78 as shown in Exhibits 31 and 33.

order circuits to Keddie, but simply requested that Citizens open Keddie to Westcom's 950-1459 access number. Westcom seeks a credit for this overcharge.

At the hearing, Westcom contends that it is entitled to a total credit of $41,983. (See 1 R.T. 15, 68-69, 117, 136; Ex. 6, p. 1; Ex. 12, p. 1; Ex. 19; Ex. 20, p. 1.) The credits are based upon the following:

1. FGB through April 1992	$28,985.00	[11]
2. FGD through March 1992	8,075.00	[12]
3. Keddie Overcharge	2,754.00	[13]
4. Interest	1,417.00	[14]
5. Back billing for installation charges	752.00	[15]

In addition to the above credit, Westcom seeks reparations for calls made to Westcom over its 800 lines as a result of the alleged failure by Citizens to properly route 916 calls during the changeover to equal access.

Westcom's amended complaint seeks injunctive relief to prevent Citizens from disconnecting Westcom from the access services that Citizens provides to Westcom. The threatened disconnection arose as a result over a billing dispute concerning the access services billed to Westcom by Citizens.

At the time the hearing concluded in C.92-03-049, Citizens claimed that Westcom owed a total of $47,751.05. Of this total, Citizens states that $35,168.12

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[11] See Exhibit 12.

[12] See Exhibit 6.

[13] See Exhibit 20.

[14] See Exhibit 19.

[15] See amended complaint at page 5.

is owed by Westcom for FGB services and $12,582.93 is owed for FGD services. (Exhibits 30 and 32.) At the second hearing into C.92-09-006 and C.92-09-025, Exhibit 72 was received into evidence.[16] That exhibit shows a total outstanding balance of $73,525.84. Of this total balance, $59,325.33 is for FGB service, and $14,200.51 is for FGD service. The increase in the total is due to the usage billed in June through August 1992 for FGB service, and the usage billed in April through August 1992 for FGD service.

B. Description of the Access Services

Westcom's complaint involves the billings that it received from Citizens in connection with the FGB and FGD switched access services that Citizens provided to Westcom. At the time C.92-03-049 was filed, Westcom subscribed to FGB and FGD services from Citizens' Susanville office, and also subscribed to FGB and FGD services from Citizens' Elk Grove office.

During the time period covered by Westcom's complaint, Citizens had adopted and concurred in most of the provisions contained in PacBell's access service tariff No. 175-T for its California access services. (See Citizens Tariff No. 4973-T, Schedule No. B-2.)[17] At the time the complaint was filed, Citizens' subscribed to the National Exchange Carriers Association's (NECA) tariff provisions for interstate access services that were filed with FCC. (See 2 R.T. 149-151, 155-156; Exhibits 28, 34 and 38.)

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[16] 126 exhibits were identified in C.92-09-006 and C.92-09-025. The exhibit numbers in those two proceedings start with Exhibit 1 and end with Exhibit 127. Exhibit number 100 was never assigned to any exhibit. In C.92-03-049, 47 exhibits were identified, and range from Exhibit 1 to Exhibit 47.

[17] This tariff page was identified as Exhibit 1 and official notice of this tariff was taken.

Switched access service provides the "ability to originate calls from an End User's premises to a customer's designated premises, and to terminate calls from a customer's designated premises to an End User's premises in the LATA where it is provided." (PacBell 175-T Tariff, § 6.1.) For purposes of the 175-T tariff, the customer is defined as follows:

> "The term 'Customer(s)' denotes any individual, partnership, association, joint-stock company, trust corporation, or governmental entity or any other entity which subscribes to the services offered under this tariff, including both interexchange carriers … and end users." (PacBell 175-T Tariff, § 2.6.)

An end user is defined in the 175-T tariff as follows:

> "The term 'End User' denotes any customer that purchases intrastate telecommunications for its own use and not for the purposes of resale or sharing, and is not a carrier, except that a carrier shall be deemed to be an 'end user' to the extent that such carrier uses a telecommunications service for administrative purposes, without making such service available to others, directly or indirectly." (PacBell 175-T Tariff, § 2.6.)

FGB access service is a trunk side connection which provides an IEC with access to the LEC's end office switch for originating and terminating communications. Under FGB, the end user dials 950-XXXX in order to access the IEC. The XXXX are the access code digits which connect the end user to the FGB service of the IEC of the end user's choice. The end user then enters an authorization code and the IEC's switch then produces a dial tone, which allows the end user to dial the telephone number the end user is calling, i.e., the called number. FGB service was the normal method of providing end use customers with access to IECs prior to equal access. (Ex. 6, Tab 5, p. 7-2; 3 R.T. 106.)

FGD access service provides trunk side access to the LEC's end office switches. FGD is used for providing end use customers with equal access to their IECs, i.e., the end use customer is presubscribed to a particular IEC. (Ex. 6, Tab 5, p. 7-3; 3 R.T. 86, 89-90.)

C. Feature Group B Services

1. FGB Alleged Overcharges

a. Introduction

In resolving this dispute, the Commission needs to make clear the extent of the Commission's power to adjudicate some of the billing discrepancies raised in this proceeding. There is a need to address this jurisdictional issue because the FGB access services provided to Westcom by Citizens were billed entirely at the interstate tariff rate on file with the FCC. (See Exhibits 27 and 36.) As discussed below, the FCC tariff provisions are beyond this Commission's jurisdiction to adjudicate.

This jurisdictional issue was first raised by Citizens when it filed its motion to strike the FGB billings from Westcom's complaint. As we indicated in D.92-08-028, the assigned ALJ properly denied Citizen's motion to strike the portions of Westcom's amended complaint. The reason for allowing those allegations to be litigated at the hearing was because Westcom had alleged that Citizens had notice that Westcom was using the FGB services for intrastate purposes as well, and should have been applying PacBell rate elements. Until evidence was presented at the hearing on those issues, it was premature to strike those allegations from the complaint.

b. Position of Westcom

Westcom argues that the Commission has jurisdiction and regulatory authority over the FGB services that Citizens provided to Westcom

because the FGB trunks carried intrastate traffic. In addition, Westcom contends that it has paid taxes on its intrastate gross revenues to the Commission.

Westcom further argues that the submission of an updated PIU factor "is only necessary for the purpose of allocating costs and charges between interstate and intrastate jurisdiction." (Westcom Opening Brief, p. 2.) Westcom contends that Citizens never formally requested an updated PIU factor from Westcom. Westcom also argues that Citizens did not request an audit of Westcom's PIU factor as allowed by tariff.

Westcom also contends that the rates charged by Citizens for its services under the intrastate and interstate tariffs are nearly identical, as shown in Exhibit 29, and thus there was no motivation on Westcom's part not to supply an updated PIU factor. Westcom also argues that it was to Citizens' advantage to bill using the interstate tariff because the assumed 8,700 minutes of use was a higher number than the assumed 4,076 minutes of use permitted by the intrastate tariff. As a result of using the 100% PIU, Westcom contends that Citizens gained additional revenue.

Westcom also argues that the access service requests (ASRs) that it submitted were for new service, and that Westcom could not predict intrastate and interstate usage prior to the installation of the new service. Westcom also contends that Citizens refused to request a start up audit as provided for in Citizens' tariff.

Westcom also asserts that Citizens had constructive notice of Westcom's intrastate traffic through the FGD billings in mid 1991 which showed intrastate usage. (2 R.T. 33.) Westcom argues that "If FGD trunks carry intrastate traffic, it only makes common sense that FGB do also." (Westcom Opening Brief, p. 4.) Westcom asserts that Citizens had actual notice of intrastate

traffic usage on the FGB circuits when Westcom mailed a letter to Carl Swanson of Citizens on May 14, 1991. (2 R.T. 34, 57-58, Exhibit 5, § 11.)

Westcom also contends that Citizens subjected it to abusive and discriminatory practices on an intrastate and interstate basis. Westcom asserts that the Commission has the authority to investigate the alleged interstate discriminatory practices of Citizens pursuant to § 703.

c. Position of Citizens

Citizens argues in its opening brief that the allegations concerning the FGB services are outside the Commission's jurisdiction because those services were billed under the interstate tariff. Citizens asserts that its FGB service did not allow it to determine the jurisdictional nature of the traffic. Instead, Citizens had to rely on Westcom's ASRs, which reported Westcom's interstate usage as 100%. Citizens also claims that the obligation was on Westcom, as the IEC customer of the FGB access services, to notify the LEC of the correct PIU. Since the FGB bills are based on the interstate tariffed rate, Citizens argues that the FGB billing disputes must be adjudicated by the FCC rather than by this Commission.

d. Discussion

In resolving this jurisdictional issue, we point out that this Commission has complete control over the rates charged by public utilities operating within the state. (Cal. Const., art. XII, § 3; Pub. Util. Code § 216.) However, the issue that needs to be resolved is whether the FCC tariff or the state tariff applies to the rates charged by Citizens. If the FCC tariff applies, then the Commission has no jurisdiction to adjudicate the matter.

Both the interstate and intrastate access tariffs provide that when a customer orders FGB switched access service, the customer is required to submit a PIU factor to the LEC.[18] The PIU factor is used to determine the percentage of traffic that is to be billed under the interstate and intrastate tariffs. The NECA FCC tariff provides:

> "When a customer orders … Feature Group B Switched Access Service the customer shall, in its order, state the projected interstate percentage for interstate usage for each … Feature Group B Switched Access Service group ordered." (NECA FCC Tariff No. 5, § 2.3.11(C)(2)(b).)

The PacBell tariff provides in part:

> "When a customer orders … Feature Group B … Switched Access Service the customer shall provide a Percent Interstate Usage (PIU) factor to the Utility as described in (A)(6) following. The PIU will be used by the Utility to appropriately apportion the use and/or charges between intrastate and interstate." (PacBell 175-T, § 2.3.14(A)(1).)

The "ASR Preparation Guide" instructs the IECs on how to fill out an access service request (ASR). At page 1-41 of the guide, the PIU field is described as:

> "Identifies the expected Interstate usage for the access service on this request. Both Interstate and Intrastate may be ordered on a single Access Service Request by specifying the applicable % of Interstate usage."

[18] The term "customer" was defined earlier in Section 2.6 of PacBell's 175-T tariff.

The ASR Preparation Guide also states that a valid percentage entry for FGB is 000 to 100% for the line/trunk group. (Exhibit 6, Tab 5, p. 1-41.)

At the hearing, the Citizens' witnesses testified that for FGB service, it was unable to detect whether the final called number dialed by the end-user was an interstate or intrastate call. That is because FGB service allows the originating caller to place a call which terminated at the IEC's 950-XXXX number. The witnesses for Citizens claim that once the originating caller accessed the IEC's switch after having dialed 950-XXXX, Citizens' switch did not have the ability to detect what the final called number was. (2 R.T. 186; 3 R.T. 18, 86-89.)

Both the NECA and PacBell tariffs provide that if measured access minutes are not used, the PIU factor reported on the jurisdictional report shall be the percentage that the LEC uses for interstate and intrastate billing purposes. That PIU will be used until the IEC reports a different percentage. (NECA FCC Tariff No. 5, § 2.3.11(C)(1); PacBell 175-T, § 2.3.14(A)(5).) Since Westcom submitted ASRs that reflected 100% interstate usage for FGB service, and because Citizens could not detect the amount of interstate and intrastate traffic on FGB service, Citizens billed Westcom under its interstate tariff. (3 R.T. 139-140; Ex. 27.)

Regarding Westcom's argument that the FGD billings provided Citizens with constructive and actual notice that the FGB trunks would also carry intrastate traffic, the question raised in our minds is why Westcom consistently listed 100% interstate use on the ASRs that it submitted to Citizens for FGB service? Westcom's actual behavior was contrary to its argument in its opening brief that it had "every motivation to declare low interstate usage/high intrastate use" and that "There is no motivation for Westcom to withhold an updated PIU." (Westcom Opening Brief, p. 15.) If one is to accept Westcom's

argument that it was in Westcom's best interest to report low interstate usage and a high intrastate use, we must question why Westcom did not do so.

Certainly Westcom knew of its intrastate usage but failed to promptly notify Citizens of this fact. As testified to by Westcom's President, Westcom's percentage of intrastate use for FGB was approximately 70 to 80% which mirrored Westcom's intrastate traffic usage for FGD. (1 R.T. 55; 2 R.T. 34-35; Exhibit 5, § 11.) Sunde also testified that if FGD trunks carry intrastate traffic, one would expect the FGB trunks to do likewise. (2 R.T. 57, 60.) During 1991, Westcom received monthly FGB bills from Citizens showing that the billing was done on a 100% interstate basis. (See Exhibit 36.) However, it does not appear that Westcom complained to Citizens about the FGB bills being billed entirely at the interstate tariff rate. Despite Westcom's own knowledge of its intrastate usage on FGB, in the May 14, 1991 letter to Citizens, Westcom appeared to be unwilling to give Citizens an accurate estimate of its current PIU. (Exhibit 5, § 11; See 1 R.T. 11; 2 R.T. 57-62.) The May 14, 1991 letter states:

> "As we discussed on the telephone yesterday although Westcom's switch does not have the ability of automatically calculating our PIU, we could, with some effort, manually calculate said PIU. It would be necessary for us to add the total call records for customers in Susanville and add the individual call records for interstate calls and then subtract this total from the total of all call records.
>
> "I cannot answer your question as to how long this process would take since we have not been required to do this before.
>
> "We also cannot give you an accurate estimate of current PIU. Some of our other California locations have intrastate usage as high as 70%-80%; some are as low as 30%-40%.

> "Please call me when you decide what will be acceptable to Citizens." (Exhibit 5, § 11.)

Furthermore, Westcom's argument that it was up to Citizens to request an updated PIU factor from Citizens is contrary to Westcom's argument that it had every incentive to report a low percentage of interstate use. If Westcom wanted to report a low percentage of interstate use, Westcom was free to do so. Westcom did not have to wait for Citizens to make a request of Westcom to submit an updated PIU. Under both the PacBell 175-T tariff and NECA tariff, it is up to the IEC to provide an updated PIU. (See 1 R.T. 54; 2 R.T. 27-28.) Section 2.3.14(A)(6) of the 175-T tariff provides that "The customer shall provide the PIU in writing to the Utility at least once every six months." The NECA tariff provides that the IEC is to report the percentage of interstate use, and that such report will be used for billing purposes until the IEC reports a different projected interstate percentage. The NECA tariff also provides that the IEC is to update the interstate and intrastate jurisdictional report on a quarterly basis. If these reports are not supplied, the IEC "will assume the percentages to be the same as those provided in the last quarterly report." In "those cases in which a quarterly report has never been received from the customer, the [LEC] will assume the percentages to be the same as those provided in the order for service…." (NECA FCC No. 5, § 2.3.11(C)(1).) As Citizens witness Innes stated, "Citizens has no requirement to request PIU's." (2 R.T. 192.)

Westcom also asserts that Citizens could have requested an audit of the PIUs submitted by Westcom, but failed to do so even after Citizens had received notice of Westcom's intrastate traffic. This argument of Westcom would shift the responsibility to Citizens to ferret out those access customers who are not reporting the correct PIU. The PacBell tariff provides that if the LEC

disputes the reasonableness of the PIU, the LEC may audit the PIU in question. (PacBell 175-T, § 2.3.14(B).) The NECA tariff provides that:

> "[I]f a billing dispute arises concerning the projected interstate percentage, the [LEC] will ask the customer to provide the data the customer uses to determine the projected interstate percentage."

In this case, Citizens did not dispute the PIU reported by Westcom. Instead, it was Westcom who sought to have the FGB billing reevaluated using the intrastate rate elements. Since the tariff placed the responsibility on Westcom to notify the LEC of any changes in the PIU, we are not convinced by Westcom's argument that Citizens should have audited the PIU that Westcom reported to Citizens.

Westcom also argues in its opening brief at page 16 that Citizens had the ability to measure FGB terminating traffic, and that Westcom had been assured by Carl Swanson of Citizens and in a letter from Swanson dated June 9, 1989 that Citizens would measure FGB service. (Ex. 4, pp. 25-26.) This letter was responding to Westcom's request for FGB service from the Susanville tandem.

The pages of Exhibit 4 that Westcom seeks to rely on were part of the exhibits attached to a complaint (C.89-08-035) that Westcom filed against Citizens in 1989, but which was subsequently settled. (See D.91-09-018.) The ALJ took official notice of the previously filed complaint, but did not admit Tab 2 of Exhibit 4 into evidence. The parties were permitted, however, to argue in their briefs how the 1989 complaint related to the present complaint. (See 1

R.T. 39-40.)[19] Citizens stated in the fourth paragraph of that June 9, 1989 letter that: "We will bill Assumed Minutes of Use until the software is changed out sometime in the future in the Susanville Tandem. (Ex. 4, Tab 2, p. 25.) There is nothing in this letter to suggest that Citizens had the ability in 1989 to actually measure FGB terminating traffic.

Swanson was not called as a witness by Westcom or Citizens at the hearing in C.92-03-049. Swanson was deposed by Westcom in preparation for the hearings in C.92-09-006 and C.92-09-025. However, Sunde did not ask Swanson in the deposition whether Swanson had indeed assured Westcom that it would provide measured service for FGB terminating traffic. (See Ex. 111 in C.92-09-006 and C.92-09-025.)[20]

Gladys Foote testified in the second hearing that she told Sunde prior to the equal access cutover that Citizens would measure FGB terminating service, and that shortly after, Westcom ordered two way service. However, Foote's knowledge of Citizens' measuring capability came from others at Citizens, and she did not inform any other carriers of this alleged capability. (4 R.T. 159, 182-184.)

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[19] Westcom's opening brief at page 1 seeks to include the complaint because "they show past illegal and fraudulent billing practices of Citizens." In Citizens' reply brief, it objected to Westcom's inclusion of this material and argued that no evidentiary weight should be given to these materials. We are not using this material as evidence in support of Westcom's allegation that Citizens engaged in illegal and fraudulent billing practices. Instead, the material is relevant to the issue of whether Citizens could measure its FGB service.

[20] Westcom and Citizens agreed to the use of depositions as exhibits in C.92-09-006 and C.92-09-025. (5 R.T. 378-379, 390.)

The testimony and documents that Westcom presented during the hearing do not demonstrate that Citizens had the capability in its switches to measure the FGB terminating usage of Westcom. Westcom has failed to meet its burden of proof with respect to this issue. As discussed later in this decision, the additional evidence presented by Westcom in the C.92-09-006 hearing does not change our evaluation of the evidence regarding the FGB measurement capability of Citizens' switch.

Westcom also raises the argument in its opening brief that Citizens is subverting the intent of the tariffs with regard to measurement capability. In essence, Westcom asserts that Citizens should not be allowed to continue to bill on an assumed minutes of use basis when Citizens can purchase the software necessary for FGB measuring capability, the cost of which can quickly be recovered. Such an argument, however, ignores both the NECA and PacBell tariff provisions which provide that when there is no measurement capability, assumed measurement can be used.

Westcom's argument that Citizens had actual and constructive notice of Westcom's intrastate usage is not very persuasive based on the discussion above. It was Westcom who failed to correctly report to Citizens the PIU for FGB services that it ordered, and to notify Citizens of any changes in its PIU. Both the NECA and the PacBell tariff provisions place the obligation on the IEC to submit an updated PIU factor. Westcom should not be able to take advantage of its own inaction to excuse itself from having to pay the FGB charges. As the California Appellate Court noted, "He who practices bad faith ought not to be permitted to invoke the doctrine of constructive or imputed notice to aid his wrongdoing." (Jackson v. Meinhardt (1929) 99 Cal.App. 283, 287.)

Westcom contends that the submission of an updated PIU is only necessary for the purpose of allocating costs and not for determining jurisdiction.[21] However, when Westcom reported its PIU factor as 100%, that factor was used by Citizens, in accordance with both the state and FCC tariff provisions, to apply the FCC tariff elements to Westcom's bills. (2 R.T. 212; 3 R.T. 16.) Even Westcom acknowledged in an answer to Citizens' data request that:

> "Intrastate tariffs should be applied to Westcom's FGB and FGD service based upon prorated intrastate usage." (Ex. 25.)

Since Westcom did not report any intrastate usage on the PIU form, the FCC tariff was used. As shown in Exhibits 27 and 31, all of the FGB bills from March 1991 through April 1992 were based entirely on the interstate tariff rate. (2 R.T. 209.)

We do not believe that we should interfere with how Citizens applied the interstate rate elements to the FGB bills. We reach this conclusion because Westcom consistently reported that its FGB usage was 100% interstate. Since Westcom never bothered to change the PIU factor for FGB service, we are not in any position to review the FGB billings and reapportion the bills that were billed using the interstate tariff.[22] Nor are we in a position to interpret the NECA

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[21] Interestingly, Westcom takes the opposite approach in its answer to Citizens' complaint in C.92-09-025. Westcom asserts as a defense that "to the extent the Complaint involves charges for interstate calls, the Commission lacks jurisdiction over the Complaint." (Westcom Answer to C.92-09-025, pp. 8-9.)

[22] Even if we could resolve the FGB billing, it does not appear that the NECA tariff permits the bill to be reapportioned on the basis of interstate and intrastate usage. The

Footnote continued on next page

tariffs that were filed with the FCC in order to reach a decision on whether Citizens properly applied each of the interstate rate elements to the FGB billings.

Westcom also contends that the Commission has jurisdiction over these billing discrepancies because Citizens subjected Westcom to abusive and discriminatory practices. Westcom cites Section 703 in support of its argument.[23]

Prior to January 1, 2000, Section 703 states as follows:[24]

> "The commission may investigate all existing or proposed interstate rates, fares, tolls, charges, and classifications, and all rules and practices in relation thereto, for or in relation to the transportation of persons or property or the transmission of messages for conversations, where any act in relation thereto takes place within this State and when they are, in the opinion of the commission, excessive or discriminatory or in violation of the Interstate Commerce Act, or any other act of Congress, or in conflict with the rulings, orders, or regulations of the Interstate Commerce Commission, the commission may apply for relief by petition or otherwise to the Interstate Commerce Commission or to any court of competent jurisdiction."

NECA tariff provides that no prorating or back billing will be done based on a revised jurisdictional report. (NECA FCC Tariff No. 5, § 2.3.11(C)(1).)

[23] Although § 453 was not cited by Westcom, that code section prohibits a public utility from subjecting any corporation or person to any prejudice or disadvantage.

[24] Section 703 was amended by Chapter 1005, Section 32 of the Statutes of 1999 by deleting the reference to the Interstate Commerce Act and Interstate Commerce Commission, and substituting the phrase "federal agency." However, that amendment does not change the outcome of our discussion.

Westcom's contention that § 703 provides the Commission with jurisdiction over the FGB services is mistaken. First, § 703 provides that if the Commission finds that an interstate rate is excessive or discriminatory, the Commission can pursue relief before the Interstate Commerce Commission or in any court of competent jurisdiction.[25] The code section does not give the Commission jurisdiction over the tariff provisions that have been filed with the FCC. Second, § 703 provides that the "commission may investigate" when the rates or charges are excessive or discriminatory. The Commission has not opened a separate investigation into Citizens' interstate access rates, nor has the Commission decided that Citizens' interstate rates are excessive or discriminatory. In addition, Westcom did not allege that the interstate FGB tariff was excessive or discriminatory.

Third, assuming that § 703 or § 453 applies, Westcom has not presented any evidence that Citizens subjected Westcom to abusive and discriminatory practices. As discussed above, Citizens merely applied the interstate tariff based on the PIU factor reported by Westcom, and as discussed later in this decision, Citizens utilized and applied the other tariff provisions permitted under its tariffs. Furthermore, the rates charged by Citizens for access services under its interstate tariff were not excessive when compared to the rate charged under its intrastate tariff. This conclusion is supported by the testimony of Citizen's witness, who testified that the intrastate access rates have pretty much equalized with the interstate access rates. (2 R.T. 154-156; Exhibit 29.)

[25] As amended, § 703 provides that if this Commission finds that an interstate rate is in violation of federal law, or in conflict with the rulings, orders, or regulations of a federal agency, the Commission may apply for relief to the federal agency or to a court of competent jurisdiction.

Westcom contends that Citizens was able to earn more revenue because it was able to use the higher interstate assumed minutes of use tariff to bill. However, we do not find that Citizens' application of the interstate tariff was discriminatory since it was Westcom who reported a PIU factor of 100%. Based on the evidence presented, we cannot conclude that Citizen's interstate access rates were excessive or discriminatory. Nor was any evidence presented by Westcom to show that Citizen's interstate access tariff was in violation of or in conflict with any federal provisions. Thus, the Commission will not pursue the avenues for relief provided for in § 703.

We conclude that the alleged overcharge of Westcom by Citizens for FGB services billed at the interstate rate in the amount of $35,168.12 is an issue that this Commission has no jurisdiction over. (See Schell v. Southern California Edison Company (1988) 204 Cal.App.3d 1039, 1045.) Accordingly, this decision does not resolve any of the disputed FGB bills prior to June 1, 1992 since all of those charges were based on the interstate NECA tariff. Thus, there is no need for us to address the testimony regarding Citizens billing of its FGB terminating traffic on an assumed minutes of use basis, and how the timing differences may have accounted for the alleged discrepancies in the FGB bills.

2. FGB Keddie Charges

a. Position of Westcom

Westcom alleges that from September 1990 through June 1991, Citizens overcharged Westcom $2,754.52 for circuits to the Keddie wire center that it did not order and which Citizens did not install. Westcom alleges that it simply requested Citizens to "open" the Keddie exchange to allow Westcom's 950-1459 access number to pass on to Westcom. These alleged

overcharges and Westcom's request to Citizens to open the Keddie wire center are reflected in Exhibit 20.

b. Position of Citizens

Citizens asserts that Westcom ordered access services into the Keddie wire center. The bills which Citizens rendered to Westcom assumed usage at this office in accordance with its applicable tariffs.

c. Discussion

Tab 1 of Exhibit 20 summarizes the bills that Westcom received from Citizens for FGB service from the Keddie wire center from September 1990 through June 1991. Pages 2 through 30 of Exhibit 20 clearly show that the switched access charges for the Keddie wire center pertain to FGB service, and that all of the charges were based on the interstate tariff charge for FGB service. For the reasons discussed earlier, since the $2,754.52 at issue is based on the interstate tariff, we lack jurisdiction to address those alleged overcharges.

Even though we have no jurisdiction over the Keddie charges, we briefly address Westcom's assertion that it only wanted to "open" Keddie to pass Westcom's 950 access number. In Westcom's letter of December 18, 1989 to Citizens, which is attached to page 32 of Exhibit 20, it stated:

> "Your central office in Keddie (916-281) apparently is not yet programmed to pass our 950 number. Would you please address this and advise me when completed."

Citizens' responded to Westcom's letter in a letter dated December 21, 1989, which is attached to Exhibit 20 at page 35. That letter stated in pertinent part:

> "This is in response to your letter of December 18, 1989, concerning Feature Group 'B' (950) service from Keddie, California (916-281).
>
> "The Access Facility route for Keddie is to Pacific Bell's Access Tandem at Chico, California (CHICCA0188T). To obtain Keddie Feature Group 'B' service, it will be necessary to submit Access Service Requests (ASR) through the normal channels."

Westcom then submitted an ASR to open Keddie to the PacBell tandem in Chico on December 26, 1989, and another ASR for the same purpose on August 10, 1990. (1 R.T. 140-141.)[26]

Sunde claims that Westcom was not told, nor did it understand or even believe that it would be charged for circuits to open up a particular prefix to allow the 950 access number to pass. Instead, all that Westcom wanted to do was to connect Keddie to the Chico tandem. Sunde's understanding of the tariff was that this change might involve some transport charges, but he did not expect to be billed as though he had three complete trunks. Sunde testified that Westcom had one customer in Keddie who wanted access to Westcom's services. Westcom asserts that it ended up being billed $298 a month to gain access to a customer that only spent $120 a month. (1 R.T. 137-138, 141.) Sunde admitted that he was only vaguely familiar with how the tariffs are applied to access services when they are jointly provided by PacBell and Citizens. (2 R.T. 43.)

[26] Sunde could not recall why he had to submit two separate ASRs in two different time periods to open the Keddie office. (1 R.T. 140-141.)

The above correspondence and the ASRs suggest that Westcom ordered FGB access service from the Keddie wire center, and did not merely ask Citizens to "open" the Keddie wire center to Westcom's 950 access number. Westcom's actions were contrary to what one would have expected of someone who did not order FGB access service. Instead of objecting to the Keddie bill when Citizens first billed Westcom for those charges in September 1990, Westcom waited to include those charges as part of its complaint that it filed on March 30, 1992. (1 R.T. 137.)

3. Back Billing Charges

a. Position of Westcom

As part of its amended complaint and during the hearing, Westcom alleged that some of the disputed amounts may have been attributable to back billing on the part of Citizens.[27] If some of the disputed amounts were actually back billed, Westcom contends that Citizens back billed beyond the time limit permitted by Commission decision, and failed to properly identify the back billed amounts. (1 R.T. 45-52, 57-58.)

b. Position of Citizens

During the hearing, Citizens' witness, Ronald Ottaway, testified that Citizens had only back billed Westcom for late payment charges and for changes as a result of an access service request that Westcom submitted to Citizens. (3 R.T. 48-49, 67; Exhibits 46 and 47.)

[27] In Westcom's amended complaint at page 5, Westcom specifically identified the back billing of the installation charges as an item of dispute.

c. Discussion

Westcom did not present any evidence which demonstrates that part of the disputed access service amounts were due to back billing. The only evidence of any back billed amounts was testified to by Citizens' witness. That evidence shows that only a small fraction of the amounts in dispute involved back billed amounts. In response to some questions by the ALJ of Citizens' witness Ottaway, he was asked to identify whether any back billing had occurred in the monthly bills that were attached to Exhibits 36 and 37. (See 3 R.T. 47-49.) Ottaway testified that any back billed amount would show up in the non-recurring charge portion of the monthly bill. (2 R.T. 209, 212; 3 R.T. 46.) At the request of the ALJ, Citizens provided Exhibits 46 and 47 to show what back billings were issued. (3 R.T. 49.) Westcom did not raise any objections to either of these two exhibits. (See 3 R.T. 142.)

Exhibit 46 reveals that for FGD, late charges totaling $622.94 were back billed for the months of February, March and April of 1992. A "trunk install" fee of $648 and a "service order" fee of $104 were also backbilled for the month of March 1992.[28] In footnote (a) of that exhibit, it states: "Back billed trunk installation, amount was accurate but should have appeared on FGB bill." In the non-recurring charges section of the bill for April 10, 1992, which is found in Exhibit 37, it appears that the service order fee of $104 should have also appeared on the FGB bill since it appears the service order fee was related to the trunk install fee.

[28] The FGD bills which correspond to these back billed amounts are found in Exhibit 37 for the "bill date" of March 10, 1992, April 10, 1992 and May 10, 1992. These back billed amounts appear on the first page of the three bills under the "other charges and credits" and on the last page of each bill under "non-recurring charges."

Exhibit 47 shows that for FGB, a total of $1,120.75 in late charges were back billed for the months of February, March and April of 1992.[29]

A review of the other bills in Exhibits 36 and 37 do not show any other back billed amounts. Thus, Westcom's argument that the access service charges may have been back billed has no basis in fact.

With respect to Westcom's argument that the back billed amounts exceeded the limitation period for back billing, we do not have to address that argument for the FGB late charges ($1,120.75), the trunk installation fee ($648), and the service order fee($104). That is because all of the back billed amounts identified by Citizens were for FGB services, for which Westcom reported an interstate usage of 100%.[30]

As for the FGD late charges which are shown on Exhibit 46, and which are itemized in Exhibit 37, the three bills in question show that the late charges were based on the interstate tariff provision. Footnote (b) of Exhibit 46[31] also establishes that the late charges for FGD were based on the interstate tariff because Westcom had reported an interstate usage of 100%. Since the FGD late charges were based on the interstate tariff, we lack the authority to adjudicate those late charges as well.

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[29] The FGB bills which correspond to these back billed amounts are found in Exhibit 36 for the "bill date" of March 20, 1992, April 20, 1992 and May 20, 1992.

[30] The interstate back billing tariff provision is found in the NECA FCC Tariff No. 5, Section 2.4.1(B).(2). (See Ex. 34; 3 R.T. 3-4.)

[31] Footnote (b) of Exhibit 46 states: "Because Westcom's FGD trunks were all ordered on ASRs indicating a PIU of 100%, Westcom's billing was administered as interstate service in our billing system and notice was limited to that required by the NECA tariff."

Even if the FGD late charges were billed pursuant to the intrastate tariff provisions, Westcom's contention that the 90 day back billing limitation applies to access service billings is in error. The decision which Westcom relies upon, D.86-12-025, only established a 90-day back billing limitation for telephone subscribers, i.e., the end use telephone customer. (23 CPUC2d 24, at pp. 33, 35.) For the purposes of the intrastate access services tariff, the LEC's customer is the entity that ordered the access service from the LEC, which in most cases is the IEC.[32] In D.88-09-061, the Commission declined to adopt a proposal which would have imposed a 90-day limit on the LEC to back bill its access service customer. (D.88-09-061, pp. 14-15; 29 CPUC2d 404.) Thus, contrary to Westcom's assertion, intrastate back billing by Citizens was not limited to 90 days.

D. Equal Access FGD 916 Calls

1. Position of Westcom

Westcom alleges that at the time of the equal access cutover, Citizens failed to properly route to Westcom's switch the 916 calls that Westcom's customers made on the FGD trunks. This allegedly resulted in the failure of the calls in Westcom's switch.[33] Westcom requests $15,000 for the revenues it allegedly lost as a result of those lost calls. Westcom also seeks to recover the cost of the calls made over its 800 line as a result of Westcom's callers allegedly complaining to Westcom about Citizens' failure to properly route the 916 calls.

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[32] The definition of a "customer" for the purpose of the intrastate access service tariff is found in Section 2.6 of PacBell's 175-T tariff, which was described earlier in this decision. The ALJ took official notice of that definition. (2 R.T. 183.)

[33] The alleged failure to send the 916 prefix was referred to as "stripping" or "stripping off" the prefix.

Westcom also alleges that "due to the problems of initial connection and the problem of 916 calls not completing properly," that there should be an additional credit of $400 for these problems. Westcom also claims that it was billed by Citizens for all of the failed call attempts that its customers attempted to make. (See Exhibit 6, pp. 3-4; 1 R.T. 73-75.)

In support of Westcom's allegations, Westcom relies on the Equal Access Translations Questionnaire (Translations Questionnaire) that it filled out prior to equal access, certain statements that Citizens provided prior to the hearing and at the hearing, and certain testing which Westcom performed.

Westcom first asserts that the intrastate tariff provides that 1 + 7 or 1 + 10 digits are to be forwarded automatically to the IEC. (Ex. 6, Tab 6.) Prior to the equal access cutover, Citizens sent out a Translations Questionnaire to all of its access service customers. (See Exhibits 21 and 22; 1 R.T. 149-150; 3 R.T. 71.) Sunde testified that he received the Translations Questionnaire from Citizens, filled it out, and returned it to Citizens. (1 R.T. 149-154.) Westcom asserts that it informed Citizens in its ASR that it wanted to receive 1 + 7 and 1 + 10 calls. (1 R.T. 156.) Thus, if a Westcom customer in Citizen's service territory dialed an interLATA 916 call using 1 + 7 or 1 + 916 + 7, Westcom contends that "It was Citizens responsibility to include the 916 since that is what Westcom ordered via the Translations Questionnaire." (Westcom Opening Brief, p. 8; 1 R.T. 160.)

Westcom further argues that the Translations Questionnaire asked the customer to list any class of service that the customer wanted to restrict from accessing the customer's service. Westcom contends that if a call type was not listed as restricted, that the Translations Questionnaire specifically stated: "Assume all remaining Classes of Service are allowed." (Ex. 21, p. 17.) Westcom contends that the "Class of Service Routing" section of the Translations Questionnaire states that it is the policy of the LEC to route "(1) + 7/10 digit"

calls to the IEC. (Ex. 21, p. 17.) Thus, Westcom contends that Citizens should have passed all 1 + 916 + 7 digit calls to Westcom.

Contrary to Citizens' statement that it was not routing interLATA calls to any carrier with the 916 prefix attached, Westcom contends that certain tests conducted by Westcom revealed that Citizens did send the 916 prefix to Westcom.

2. Position of Citizens

Citizens takes the position that Westcom was not familiar with the mandatory California dialing patterns, and that Westcom required a non-standard dialing arrangement at the time of the equal access conversion but failed to timely advise Citizens of its needs. Citizens also asserts that whatever string of digits that Westcom's customer dialed was relayed to Westcom's switch without any stripping.

Citizens contends that the dialing party who dials an interLATA call within the 916 area code[34] must dial 1 + 7. If the dialing party dials a call outside the 916 area code, Citizens contends that the mandatory dialing plan is to dial 1 + the non-916 area code + the 7-digit called number. Citizens contends that these two dialing plans are part of the Standard California Dialing Plan and that Westcom should have been familiar with this protocol as set forth in Exhibit 23.

When Citizens was told that interLATA 916 calls of Westcom's customers were failing, it took immediate steps to investigate the problem. Citizens attempted to configure its switch to automatically add the 916 prefix to a

[34] The phrase "within the 916 area code" refers to an intraHNPA call. The HNPA is the acronym for the home numbering plan area. (2 R..T. 161)

7-digit call made by a Westcom customer. After Citizens consulted with its switch manufacturer, Citizens determined that this could not be done. Citizens then performed translations in its switch which allowed the 1 + 916 + 7 digits to be dialed by the end use customer and passed on to Westcom's switch.

Citizens also asserts that Westcom was to blame since Westcom failed to prepare its own equipment to properly route incoming calls. That is, Westcom's own switch was unable to automatically recognize a 1 + 7 call as coming from a 916 customer of Westcom. At the request of Westcom, Westcom's switch software vendor was able to take corrective action to fix this problem.

Citizens also asserts that Westcom is not owed any reparations for the failed 916 area code customer calls. Had Westcom's customers dialed 1 + 916 + 7, Citizens contends that these call attempts would never have seized a Westcom trunk, and would not have accumulated access minutes of use. Instead, the call would have failed in Citizens' switch and would have been sent to a recording that the call could not be completed. Thus, no charges would have been billed. In addition, Citizens contends that no money is owed to Westcom for the 800 calls to Westcom because Westcom's 800 call detail shows that it did not receive hundreds of customer complaints as Westcom had alleged.

3. Discussion

a. Background

Prior to the equal access cutover, all of the IEC customers of Citizens were sent the Translations Questionnaire. A Translations Questionnaire was completed by Westcom and returned to Citizens. (3 R.T. 71-72) The equal access cutover occurred in Citizens' Susanville office on June 11, 1991, and the cutover of Citizens' Elk Grove office occurred on June 12, 1991. (3 R.T. 71; Ex. 6,

p. 306.) As a result of the cutover, Westcom experienced problems with calls from its customers who dialed 1 + 7 and 1 + 916 + 7 calls.

Westcom assumed that because the Translations Questionnaire stated "Assume all remaining classes of service are allowed," that it would continue to receive all 1 + 7 calls and all 1 + 916 + 7 calls made by its customers in Citizens' service territory. (1 R.T. 154-156; Exhibit 21.)

When the equal access cutover took effect in Susanville and Elk Grove, if a Westcom customer in Citizens' service territory dialed 1 + 7 digits, the call was not completed as an interLATA intraHNPA call. If the customer dialed 1 + 916 + 7, the call never reached Westcom's switch. Instead, this call went to a Citizens recording which would have either said that the call could not be processed or that the 916 need not be dialed. Sunde testified that these dialing problems lasted at least two or three days, but probably less than 10 days, before Westcom's Susanville and Elk Grove customers could terminate their calls to other exchanges in the 916 area code. (2 R.T. 10) We first address the 1 +7 digit call problem.

b. 1 + 7-Digit Call Problem

When the 1 + 7 problem first arose, Westcom contacted Citizens in an attempt to have Citizens include the 916 automatically into the 1 + 7 call stream. According to the testimony of Citizens' witnesses, the automatic inclusion of the area code to the 1 + 7 call could not be done to Citizens' switches, and Citizens informed Westcom of this. (3 R.T. 72-73; Exhibit 6, p. 307.) In order to fix this problem, Westcom had to contact its switch provider. According to Sunde, the 1 + 7 problem was remedied by modifying Westcom's switch to include the 916 in any 1 + 7 call that it received from a Westcom customer in Citizens' service territory, and to include the area code for

Nevada, 702, in any 1 + 7 call that it received from a Westcom customer in Nevada. (2 R.T. 8-9, 75-76, 81.) After this software modification took place, Westcom did not experience any further problems with a 1 + 7 call. (1 R.T. 75.)

Citizens points out that at the time of the equal access cutover, and according to Exhibit 23, the mandatory California dialing pattern for an interLATA intraHNPA call was to dial 1 + 7 digits. Citizens contends that Westcom's switch was not configured correctly to recognize and process the 1 + 7 call as an interLATA intraHNPA call. (Exhibit 6, p. 305; 2 R.T. 160; 3 R.T. 73, 77-79, 81.)

According to the testimony of the witnesses for Citizens, Citizens passed on to Westcom the 1 + 7 that a Westcom customer dialed from Citizens' service territory. (1 R.T. 75; 3 R.T. 77-78.) Westcom did not ask Citizens to block 1 + 7 calls on the Translations Questionnaire. (1 R.T. 155.) According to Sunde's testimony, Westcom appears to have received the 1 + 7 from Citizens. (2 R.T. 8, 14.) At the time of the equal access cutover, Westcom's switch was not set up to translate, i.e., recognize, the 1 + 7 as an interLATA, intraHNPA call. (1 R.T. 75-76; 2 R.T. 11; 3 R.T. 78, 84, 107; Exhibit 6, p. 305.) However, after Westcom modified its switch to "automatically add" the 916 into any 1 + 7 call dialed from Citizens service territory, the call was able to connect through Westcom's switch. (1 R.T. 75, 159; 2 R.T. 9; 3 R.T. 79, 93.) Based on Sunde's testimony, Westcom appears to have experienced the same 1 + 7 problem with its Nevada customers as well. (2 R.T. 9.) All of the evidence presented shows that the problem with the 1 + 7-digit calling was in Westcom's switch rather than Citizens' switch.

Westcom also appears to argue that because its Translations Questionnaire wanted 1 + 7 and 1 + 10 dialing to pass through to Westcom's switch, that Citizens should have added the 916 to a 1 + 7 call. (See 2 R.T. 7-8; 3 R.T. 77-79, 85, 93.) Such an argument must fail. If Westcom's customer in

Citizens' service territory only dialed 1 + 7 to access Westcom's switch, there was no obligation for Citizens to include the 916 before the seven digit stream because Westcom's customer did not dial the 916 as part of the customer's dialing stream. The PacBell 175-T tariff does not state that the LEC is to add the area code to a 1 + 7 call. Citizens was only obligated to pass on the 1 + 7 that the customer dialed, which appears to be what Citizens did. After learning of Westcom's inability to process the 1 + 7 at the time of the equal access cutover, Citizens contacted Northern Telecom to determine if Citizens could prefix the 916 into a 1 + 7 call. Citizens was informed that it could not do this with the type of trunk group that Citizens had. (3 R.T. 73.)

c. 1 + 916 + 7-Digit Call Problem

We next turn to the 1 + 916 + 7-digit call problem.[35] Westcom asserts that Citizens stripped the 916 off of the dialing stream that Westcom's customers called. Westcom argues that since it did not seek to block 1 + 10 calling on the Translations Questionnaire that it submitted to Citizens, that according to PacBell's 175-T tariff, Citizens should have passed all 1 + 10 calls to Westcom.

In order to resolve this issue, we must take a look at the applicable tariff and the mandatory dialing procedures which Citizens contends that industry participants should have been familiar with. The California tariff provision regarding FGD service states in pertinent part:

> "Where no access code is required, the number dialed by the customer's end user shall be a seven or ten-digit number for calls in the North American

[35] This type of call pattern is also referred to as a 1 + 10 call.

> Numbering Plan (NANP)." (PacBell 175-T Tariff, § 6.2.4 (A)(6); See Ex. 6, Tab 6.)

Donald Innes, a witness for Citizens, testified that at the time of the equal access cutover, that the industry standard was to dial 1 + 7 when a call is made within the NPA, i.e., the HNPA. In order to dial a FNPA number, the mandatory standard is to dial 1 + 10.[36] Innes testified that Exhibit 23, which is entitled "Pacific Bell Current California Dialing Patterns," shows the standard dialing patterns in California. (2 R.T. 160-161, 167; 3 R.T. 77, 79, 81; Ex. 40.)

According to Marr's testimony, the dialing patterns are governed by the regional Bell operating companies (RBOCs). The RBOCs have control over the assignment of the dialing plan within their respective LATAs. (3 R.T. 76.) The calling pattern for the 916 NPA is shown in Exhibit 23 under the column where the 916 NPA appears. (3 R.T. 76-77.) Marr testified that this was the standard numbering plan used throughout the nation until a few years ago, at which time some areas started to implement ten digit dialing on a permissive basis. (3 R.T. 131.)

Innes testified that the other companies who returned the Translations Questionnaire apparently understood the mandatory dialing patterns because none of the other companies encountered call problems. Innes also stated that anyone familiar with the practices in the industry should have understood that Section III. 1.A. of Exhibit 21, the Translations Questionnaire, referred to the HNPA and FNPA relationship. (2 R.T. 164, 167.)

Sunde was handed a copy of Exhibit 23 during the hearing. He testified that he understood some of the notations and patterns listed on that

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[36] The FNPA refers to a foreign numbering plan area. (2 R.T. 161.)

exhibit, but had not seen the document before. He also acknowledged that Exhibit 23 contained a reference to 1 + 7 and the HNPA. (2 R.T. 5) Sunde testified that since he did not restrict 1 + 10 calls on the Translations Questionnaire, he assumed that such a dialing pattern would be passed on to Westcom's switch. His assumption was based on the statement in Exhibit 21 in Section III which reads: "Assume all remaining Classes of Service are allowed." Sunde testified that since he did not ask Citizens to block 1 + 7 or 1 + 10 calls, he assumed that these types of calls would be allowed as provided for in the class of service routing shown at the top of page 17 of Exhibit 21. (1 R.T. 155-156.) He also testified that under the tariff, Citizens is supposed to send Westcom 1 + 7 or 1 + 10 digits. (1 R.T. 73-74.)[37]

The PacBell tariff does not specify what the mandatory dialing pattern is for a FNPA call and a HNPA call. That is, the tariff is silent on the subject of how many digits must be dialed if a call is made outside the HNPA (i.e., a FNPA call), or if an interLATA intraHNPA call is dialed. Instead the tariff provides that "the number dialed by the customer's end user shall be a seven or ten-digit number…." The tariff language suggests that Westcom's customer should be able to dial 1 + 7 or 1 + 10 to access Westcom's switch.

No evidence was presented during the hearing by Westcom to suggest that the standard dialing patterns for California was different from

[37] Sunde also testified that Westcom always advised its customers to dial the area code when using Westcom's services, and referred to Tab 12 of Exhibit 6 to support his statement. (1 R.T. 78, 91, 157-158; 2 R.T. 77-78.) However, Tab 12 of Exhibit 6 shows that the area code is to be dialed in conjunction with a FGB 950 access number. Equal access does not require that a 950 access number be dialed. (See 2 R.T. 131-132.)

what Citizens had described at the hearing, and which appears in Exhibit 23. However, it appears that this "industry" practice was not known to Westcom.

Although the witnesses for Citizens testified that persons in the telecommunications industry should have known about the mandatory dialing patterns, Westcom's two technical witnesses, Sunde and Benson,[38] were not familiar with the specifics of PacBell's dialing protocol. In addition, the mandatory dialing patterns shown in Exhibit 23 were never mailed to Westcom. (1 R.T. 161; 2 R.T. 113; 3 R.T. 131.) Despite Marr's testimony that the mandatory dialing patterns were included in Exhibit 21 "in context," the Translations Questionnaire, and Exhibit 22, the instructions for completing the Translations Questionnaire, the tariff did not specifically refer to the mandatory dialing pattern for HNPA and FNPA calls. (2 RT. 163; 3 R.T. 133-134.) Given the evidence that was presented, Westcom's assumption that it would receive all 1 + 10 calls at the time of the cutover was not unreasonable. Since the tariff provides that the calling party shall dial a seven-digit or 10-digit number for FGD service, we conclude that Citizens should have allowed its switch to pass on a 1 + 916 + 7 to Westcom's switch at the time the equal access cutover took effect.[39]

The next issue to address is whether Citizens stripped off the 916 digits from the 1 + 10 that Westcom's customers may have dialed. We do not believe that Citizens stripped off the 916 from a 1 + 10 call. This is evident from

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[38] Benson was not working for Westcom when the equal access cutover problems occurred. (2 R.T. 112.)

[39] As discussed earlier, the 1 + 7 digit calls failed at the time of the cutover due to Westcom's failure to configure its switch.

Innes' testimony that Citizens sent 1 + 10 to Westcom for any calls that went outside the 916 NPA. (2 R.T. 160.) Marr testified that at no point did Citizens ever remove the 916 digits from the call.[40] If the Westcom customer dialed 1 + 916 + 7, Citizens killed the call by sending it to a recorded announcement. (3 R.T. 80, 84.)

The reason why a 1 + 916 + 7 call was not sent to Westcom was because Citizens was following the dialing pattern set forth in Exhibit 23. Accordingly, when equal access took effect, all 1 + 916 + 7 calls were blocked and went to a recorded announcement. Depending on the telephone exchange and equipment used, the recording would say: "You cannot complete the call as dialed," or it would say that you don't need to dial the area code before the digits. (2 R.T. 160; 3 R.T. 77, 79-81, 94; See 1 R.T. 160-161.)[41] Based on the Translations Questionnaire and industry practice at the time of the equal access

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[40] Westcom contends that Marr's statement in Exhibit 6 at page 307 and 310 that "We are not sending the 916 NPA to any carriers and have not since Equal Access cut into service between June 8, 1991 and June 13, 1991" was in conflict with Citizens' statements that the 916 NPA was never stripped from a 1 + 10 call. Westcom infers in its opening brief at page 9 that Marr's testimony is suspect because he changed his testimony with regard to the statement found in Exhibit 6 at page 307. (See 1 R.T. 89.) We are not persuaded by Westcom's argument and testimony in this regard. Marr's statement in Exhibit 6 at page 307 must be viewed in context with Marr's statement in Exhibit 40. (3 R.T. 74-75, 126.) When these two statements are read together, it is clear that the 916 was passed to Westcom, but because it was a HNPA call, the call failed and went to a recording. Westcom also relies on tests that it conducted after Citizens' switch allowed permissive dialing of 1 + 916 + 7 in an attempt to establish that Citizens was indeed passing 1 + 10 digit calls to Westcom. However, none of those tests were performed by Westcom at the time the stripping off of the 916 from the call stream allegedly occurred. Instead, those tests were conducted on May 27, 1992, almost one year after the equal access cutover. (See 1 R.T. 85-89; 2 R.T. 100-102; Ex. 6, pp. 313-314.)

[41] The blocking of the 1 + 916 + 7 calls appears to be consistent with the language that appears at the bottom of page 13 of Exhibit 22, the instructions for completing the

Footnote continued on next page

cutover, Citizens expected Westcom to follow the 1 + 7 digit calling pattern for an interLATA intraHNPA call instead of dialing 1 + 916 + 7. (See 2 R.T. 164, 167.)

After Citizens became aware of Westcom's problem with the 1 + 916 + 7 dialing pattern, Citizens investigated the problem and determined that Westcom was not following the mandatory dialing pattern. Citizens developed a solution a "few days"[42] after the problem was discovered by making changes to its switch to "assist Westcom with their dialing practices." Citizens did so by allowing the permissive dialing of 1 + 916 + 7-digit calls to be sent to Westcom. (3 R.T. 79-80, 85; Ex. 6, p. 305; Ex. 40.) After the permissive dialing of 1 + 916 + 7 was allowed, this calling problem disappeared.

There is no evidence to suggest that Citizens stripped off the 916 from the 1 + 916 + 7 dialing pattern. After Westcom and Citizens reconfigured their respective switches after the cutover, a Westcom customer within Citizens' service territory could dial an interLATA intraHNPA call by dialing either 1 + 7 or 1 + 916 + 7.

d. Reparations

The next issue to address is whether Westcom should be entitled to any reparations for the problems resulting from the 1 + 7 and 1 + 916 + 7 calling problems. Reparation has been defined as a refund or

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Translations Questionnaire. Under the "Class of Service Restriction and Blocking" the instructions state in pertinent part: "It will be a practice to block unwanted parcels of equal access traffic as close to the source as possible rather than higher in the exchange access or IXC networks. Accordingly, subject to the desires of each individual IXC and the ability of the telephone company to comply, we will block unwanted parcels of traffic to an appropriate recorded announcement."

[42] Neither Westcom nor Citizens could pinpoint the exact date on which the 1 + 916 + 7 problem was corrected. (See 1 R.T. 80-81; 2 R.T. 10; 3 R.T. 73, 80.)

adjustment of part or all of the utility charge for a service or a group of related services. (See 57 CPUC 519, 521; 72 CPUC 505, 509.)

Westcom's amended complaint at page 2 alleges that as a result of the 916 dialing problems:

> "… Citizens charged Westcom for the switched access costs for these call attempts, even though the failure for these calls was due to failure by Citizens. Westcom received hundreds of customer complaints due to this problem and suffered serious financial losses as well. Westcom was forced to absorb the cost of these hundreds of calls placed to Westcom toll free 800 lines; and Westcom lost many thousands of dollars of lost revenues because 916 calls were not routed to us properly by Citizens."

We first note that Westcom's request for reparations is in the nature of a request for damages. In D.79124 (72 CPUC 505 at 509), the Commission stated: "Consequential damages … is an amount of money sufficient to compensate an injured party for all the injury proximately caused by a tortious act, or to replace the value of performance of a breached obligation."

The loss of revenue that Westcom alleges is not related to a refund or adjustment of what Westcom was charged. Instead, Westcom seeks to recover damages that were allegedly caused by Citizens' failure to route the 916 calls.

According to Sunde's testimony, "thousands and thousands of 916 calls" failed as a result of the 916 dialing problems. (1 R.T. 74.) However, Sunde later acknowledged that only about 150 to 160 calls per day routed to the 916 area from Citizens to Westcom's FGD trunks. (2 R.T. 14-15.)

As discussed above, the 1 + 7 problem was the result of Westcom's failure to properly configure its switch at the time of the equal access cutover. Since the problem was the fault of Westcom, it should not be entitled to any compensation for any interLATA intraHNPA calls that failed from the time of the cutover until the 1 + 7 problem was remedied.

Regarding Westcom's request for reparations for calls that failed due to the 1 + 916 + 7 problem, Sunde testified that the failed 1 + 916 + 7 calls would spend time in Westcom's switch before being kicked out. Westcom did not present any other evidence which corroborates its allegations that Citizens charged Westcom for the 916 calls that failed. (See 1 R.T. 74-75.) To the contrary, Marr testified that the 1 + 916 + 7 calls were never sent to Westcom. Instead, those calls were stopped in Citizens' switch from completing, sent to a recording, and never accumulated access charges. (3 R.T. 79-80, 94; See Ex. 22, pp. 13-14.) Westcom has failed to prove that any portion of the $5028.37 in the June 1991 bill, when the cutover to equal access occurred, was attributable to failed 916 calls.

Of the 150 to 160 FGD calls per day, some of those calls were likely to have been 1 + 7 calls while others would have been 1 + 916 + 7 calls. If we assume that approximately half of the calls were 1 + 916 + 7 calls, and that the problem lasted for three days, there would have been about 240 (80 x 3 days) 1 + 916 + 7 calls that would have failed. Although Westcom alleges that "many thousands of dollars of lost revenues" resulted because the 916 calls were not routed properly, Westcom has not offered any proof that it lost thousands of dollars as a result of the 916 call problems that lasted from the time of equal access to a few days afterwards. In addition, the allegations concerning lost revenues are a request for damages, rather than reparations. Thus, we conclude

that Westcom is not entitled to any reparations for lost revenues, and that the Commission does not have the jurisdiction to award damages.

Westcom's allegations that it had to pay for "hundreds of calls placed to Westcom toll free 800 lines" as a result of the failed 916 calls is not supported by the evidence. Westcom's 800 number bill for the month of June 1991 was admitted into evidence as Exhibit 24. That bill includes all of the days in June when toll free calls were made to Westcom, including the days before and after the cutover to equal access occurred. An examination of Exhibit 24 reveals that there were not "hundreds of calls" placed to Westcom's 800 lines after equal access took effect. The cutover in Citizens' Susanville and Elk Grove took place on June 11 and June 12, respectively. Only 34 calls were made to Westcom from Citizens' service territory over Westcom's 800 line from June 11 to June 17, and not the hundreds of calls that Westcom alleges occurred.[43]

After Sunde was cross-examined on Exhibit 24, he testified on redirect that it would "probably be more accurate to state that … [the] hundreds of call … did not all come in on the 800 number." Sunde then testified that there were a "total of several hundred telephone calls complaining about the type of problems people were experiencing" and that sometimes "people dialed our direct 702 area code number" at their own expense "to place the trouble reports that we're having with regard to the 916 calls." (2 R.T. 59, 62.)

Although hundreds of calls were not made over Westcom's 800 number during the equal access problems, Exhibit 24 does show that of the

[43] Since the evidence indicates that the calling problems lasted no less than two days but no more than 10 days, the eight days present a reasonable time frame for judging how many 800 calls may have been made to Westcom as a result of the calling problems that its customers experienced.

34 calls that were made during this eight day period, a total of $23.20 was charged to Westcom for these calls. However, some of those calls may have been about the 1 + 7 calling problem rather than the 1 + 916 + 7 problem. Consequently, Westcom should be credited $20 for the toll free calls that it had to pay for as a result of the calls that may have been calling about the 1 + 916 + 7 calling problem.

E. FGD Alleged Overbillings

1. Position of Westcom

Westcom's amended complaint requests a credit in the amount of $8,075.71 and additional amounts to be determined for the months of March and April 1992. Westcom asserts that the credit is due because: "This overbilling was caused by Citizens backbilling beyond that allowed by CPUC order and tariffs." (Amended Complaint, pp. 3-4.) In support of this allegation, Westcom attached "audit records" to its complaint. These records were admitted into evidence as part of Tab 1 of Exhibit 6.

At the hearing, Sunde testified that this overbilling issue could be attributable to billing and timing errors between Westcom and Citizens, or because of back billing. (1 R.T. 41.) In Westcom's opening brief at pages 7 and 8, and at the hearing, it alleges that the June 1991 "overbilling resulted from Citizens improperly sending calls to Westcom without the 916 area code attached and improperly measuring the minutes." As for the bills for the months of July 1991 through January 1992, Westcom alleges that the usage exceeded what was recorded by Westcom. The bill for February 1992 included 8236 minutes of terminating usage, but Westcom contends that it did not send any terminating traffic over its FGD trunks. (1 R.T. 69-70, 83.)

2. Position of Citizens

Citizens argues that no back billing occurred, except for the non-recurring charges which were authorized by the applicable tariff provisions, and which were discussed earlier in this decision. (Citizens Opening Brief, pp. 11-12, 26-31.)

As for the discrepancies in the usage recorded by Citizens and Westcom, Citizens contends that the joint testing demonstrated that Westcom's switch usage measurements were inaccurate and inconsistent. In addition, Citizens contends that Westcom failed to recognize that many of the calls are originated and terminated in Citizens' operating area, and that two call records with associated access usage will be recorded as a result. Citizens contends that Westcom's records only recorded a portion of the originating access. Citizens also argues that Westcom failed to recognize that Citizens can bill Westcom for access minutes for calls dialed by Westcom customers which reach busy signals and for other types of incomplete calls. (Citizens Opening Brief, pp. 20-25.)

3. Discussion

We first note that Westcom's allegations regarding the FGD billings have taken the form of several different arguments at various points in this proceeding. Initially, in Westcom's amended complaint, Westcom took the position that a credit was due because the bills were back billed beyond the time period provided for in Commission decisions. (Amended Complaint, p. 4.) However, in the July 26, 1991 and March 19, 1992 letters from Westcom to Citizens, the back billing issue was not described at all. Instead, in both of those letters, Westcom stated that credit was due because of the "problems of initial connection and the problem of 916 calls not completing properly" and "the failure of your central office not sending 916 prefixs [sic] to us in both Elk Grove and Susanville." (Ex. 6, Tab 1, pp. 2, 4.) This second argument is also the

position that Westcom adopted in its opening brief at pages 7 to 8 with regard to the bill for the month of June 1991.

During the hearing, Sunde testified that the FGD credits that Westcom was requesting were due to the 916 problem, overbilling, and billing for terminated calls that were not terminated at all by Westcom. (1 R.T. 69-70.) In Westcom's opening brief, it made separate arguments for the bills for the months of July 1991 through January 1992, and for the February 1992 bill. Westcom contends that the FGD usage for the months of July 1991 through January 1992 exceeded the usage recorded by Westcom. For the February 1992 billing, Citizens billed Westcom for 8,236 minutes of terminating usage. Westcom asserts, however, that it did not route any terminating traffic over its FGD trunks.

As discussed earlier in this decision, there is no evidence to suggest that any of the FGD access service charges were back billed. Thus, Westcom's argument that it should receive a credit of more than $8,075.71 because Citizens back billed Westcom for access service charges beyond the time limit permitted by Commission decision is without merit.

If Westcom's argument is that the credit of more than $8,075.71 is due to the 1 + 7 and 1 + 916 + 7 calling problems, no credit is due for the reasons stated earlier in our discussion regarding the calling problems.

Thus, the FGD bills must be reviewed in light of Westcom's other argument regarding timing differences, i.e., that the usage recorded and billed by Citizens exceeded what was recorded by Westcom.

Tab 1 of Westcom's Exhibit 6 purports to be the records which support Westcom's contention for credits to its FGD billings. Westcom contends that its switch records were submitted to Citizens, and that its records do not match what was billed by Citizens for FGD services. (1 R.T. 58-70.) Westcom

appears to have transmitted these records to Citizens on July 26, 1991, March 18, 1992 and March 19, 1992. (Ex. 6, Tab 1, pp. 2, 4; Citizens' 4/20/92 Answer To Westcom's Complaint, Ex. I(3).)

A review of Westcom's switch records show monthly usage totals from June 1991 through January 1992, and daily usage totals for the month of February 1992. (Exhibit 6, Tab 1, pp. 3-159.) Westcom contends that because its switch records show lower usage, or no usage, as compared to what Citizens billed Westcom, that Westcom was overbilled by Citizens.

Citizens witnesses Innes and Ottaway testified that Westcom's switch records could not be reconciled with Citizens' records because the records of Westcom did not record the time period, the time of day, or the calling points that were involved. As a result, Citizens had no way of determining from Westcom's switch records what telephone traffic was involved. According to Innes, Westcom's switch records are simply summaries of accumulations of usage. (2 R.T. 138-139, 151, 174-175,177-178; 3 R.T. 38; Ex. 44, Citizens Response No. 11.)

Contrary to Westcom's assertion in its complaint that Citizens did not respond to its request for FGD credits, Citizens responded to Westcom's request on at least three occasions. In a Citizens' interoffice correspondence memorandum dated August 9, 1991, it stated that Gladys Foote had spoken with Sunde on August 7, 1991 to discuss payment of the FGB invoices, and that the FGD usage for June 1991 was being disputed. The memorandum also stated that she would advise Citizens' staff of her investigation results. Sunde was copied with the memorandum. (Citizens' 4/20/92 Answer To Westcom's Complaint, Ex. B(2).)

On March 12, 1992, Citizens sent a letter to Sunde, which stated in part:

> "I understand from a conversation you had with Marilyn Youmans that you are disputing billed amounts on several invoices and have 'taken credits'
>
> adjusting the billed amount. Without solid documentation from you regarding your dispute, we cannot conduct a reasonable analysis. The documentation you submitted with your recent payment is not adequate to evaluate your concerns.
>
> "We are willing to work with you to resolve disputed amounts. A complete audit of your circuits and traffic, including joint testing may be required. Please contact our office immediately to initiate an audit." (Citizens' 4/20/92 Answer To Westcom's Complaint, Ex. G.)

On March 27, 1992, Citizens sent another letter to Sunde. That letter responded to the various letters that Westcom had sent. With regard to Westcom's concerns about the accuracy of Citizens recording and processing of Westcom's traffic, the letter stated:

> "Our intention is to verify timing of test calls placed from our network center against the timing of the same calls as recorded in your switching equipment. However, on March 26, 1992, when our technician attempted to set up the coordination of such tests you refused to allow the tests or to explain your refusal to cooperate with these efforts to resolve your complaint. With your refusal to allow comparative timing tests you leave the company no other course but to proceed to complete our verification of the timing parameters in our switches without through testing. If our switches prove to be timing according to industry standards we will provide notification via certified mail." (Citizens' 4/20/92 Answer To Westcom's Complaint, Ex. J; See 2 R.T. 58, 169-170.)

In a letter dated March 31, 1992 from Citizens to Sunde, Citizens stated that its technicians had verified the proper measurement of access usage in Citizens' central offices, and that Westcom's "refusal to cooperate in joint testing precludes the development of comparative timing data between your equipment and ours." The letter then went on to state that since Citizens' equipment was operating in compliance with tariff measuring parameters, there was no "further reason to withhold any of the billed amounts due to timing disputes." (Citizens' 4/20/92 Answer To Westcom's Complaint, Ex. J; 2 R.T. 58; See 3 R.T. 128.)

Sunde testified that based on the March 1992 letter from Citizens to Westcom: "There was complete refusal on the part of Citizens to try to discuss the records." (2 R.T. 38-39, 52, 58.) Sunde also testified that Westcom refused to do the testing after it had already drafted the complaint, and had either filed it or was preparing to file it. Westcom felt that it wouldn't do any good to do testing at that point in time. (2 R.T. 54-55.)

A review of Westcom's switch records reveal that Exhibit 6 does not provide sufficient data for Citizens to check its timing and billing records. The switch records of Westcom did not list the time the disputed calls were originated or terminated, or the path of these calls, i.e., the telephone numbers of the calling party and the called party. Although Citizens informed Westcom about the lack of information, Westcom refused to permit any testing of Westcom's switch equipment before the complaint at issue was filed. Nor has Westcom provided Citizens with any detailed call records for any of the disputed calls.

This lack of detailed call records is similar to what occurred in another complaint case between an IEC which purchased interexchange telecommunications services from US Sprint (Sprint). The IEC in C.90-08-010 alleged that Sprint had billed the IEC for substantially more minutes of usage

than actually occurred. The Commission dismissed the IEC's complaint because the IEC did not furnish the call detail requested by the defendant prior to the hearing. The Commission stated:

> "Given these circumstances, when a question of overbilling by the wholesaler arises, we believe that specific demonstration of the alleged overbilling is required. It is not enough, in our view, that the retailer merely show indications of overcharge in general terms. Specificity is required if complainant is to carry its burden of proof." (D.92-08-018 [45 CPUC2d 258, 261].)

The situation in D.92-08-018 is analogous to the evidence that was presented in this proceeding. Westcom's "audit reports" are simply monthly or daily accumulations of usage as recorded in Westcom's switch. This type of data is insufficient to allow Citizens to review its records. Since Westcom has not presented any specific call detail in this proceeding to support its allegations that overbilling occurred, Westcom "has not carried its burden of proof that overbilling has occurred." (45 CPUC2d at 261.)

After the evidentiary hearing was concluded, Westcom and Citizens agreed to some joint tests. However, these tests did not attempt to match the specific call records of Westcom with the call records of Citizens for the disputed period of June 1991 to March 1992.

Westcom contends that the alleged overbillings are due in part to Citizens assertion that Westcom's call setup time averaged 30 seconds. (1 R.T. 94; Ex. 7, Tab 1, p. 1.) Westcom asserts in its opening brief that its call setup time averages 7.1 seconds as shown in Tab 5 of Exhibit 5, and that in the joint testing

performed after the close of evidentiary hearings, that the call setup time was "approximately 5-7 seconds" as shown in Exhibit A of its opening brief.[44]

It is clear from Tab 1 at page 1 of Exhibit 7 that Citizens was referring to a 30-second call setup time for FGB calls in that memorandum, and was not referring to FGD calls. This reference to the call setup time for FGB calls also appears in Citizens' response to Westcom's data request 3.c. (Ex. 7, Tab 2.). Exhibit 45-B, Westcom Testing Documents, shows that Westcom's internal call setup time averaged 7.84 seconds "on originating FGD trunks," not FGB trunks. (Emphasis added.) Thus, Westcom's argument that Citizens' erroneously calculated Westcom's call setup time as 30 seconds, has no bearing on the FGD bills because the call setup time of 30 seconds was referring to the FGB calls.

The joint testing which took place on July 28, 1992 involved representatives from Westcom, Citizens, and the Telecommunications Branch of the Commission. These representatives were located at Westcom's office in Zephyr Cove, Nevada, and at Citizens' offices in Elk Grove.[45] The testing also

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[44] Exhibit A of Westcom's opening brief appears in Exhibit 45-B. We note that the placement of the line and arrow pointing to the 7.84 seconds as shown on Exhibit 45-B, is different from the placement of the line and arrow pointing to the 7.1 seconds as shown in Tab 5 of Exhibit 7. Based on the description of how the call setup test was done, as described in the "Joint Timing Tests Between Westcom And CUCC" shown in Exhibit 45-C, Sunde's testimony at pages 100 to 101 of Volume 1 of the Reporter's Transcript, and Benson's testimony at pages 96 to 97 of Volume 2 of the Reporter's'Transcript, it is clear that the correct placement of the line and arrow for Westcom''s call setup time is shown in Tab 5 of Exhibit 7. That is, Westcom's internal call setup time is measured beginning at the "Westcom Wink to LEC" until the "Call Setup completion."

[45] Westcom apparently elected not to have its representatives present at the offices used by Citizens for testing. (See Ex. 45-A.)

involved other Citizens personnel located in Susanville and Ferndale. Exhibit 45, which is made up of 45-A, 45-B, and 45-C, contains the results of the joint testing.

The July 21, 1992 letter from Citizens to Sunde, and the "Joint Timing Tests Between Westcom And CUCC, Exhibits 45-A and 45-C, respectively, provide a description of how the joint testing was done. Exhibit 45-B contains the results of the tests that were initiated from Westcom's office at Zephyr Cove, and Westcom's switch printouts. The switch printouts show the number called, the location of the called number, the date, time, and duration of the call, and the cost of the call. In addition to Citizens' description of the joint testing, Exhibit 45-C consists of eight pages of forms entitled "Westcom Dialplan Test - Originating Calls." Those eight pages show the originating telephone numbers of the offices of Citizens which were used to dial some of the test calls, the telephone numbers that were dialed, and the time of the call. Exhibit 45-C also consists of three pages of AMA (automated message accounting) call records which recorded the originating number and the called number, and the elapsed time of the call. The remaining six pages are the terminating call records that are associated with at least 19 of the test calls.

The Westcom Dialplan Test, the AMA call records, and the terminating call records have handwritten circled numbers ranging from 1 to 18. A review of these circled numbers on each of the three different pages provide a paper trail of what telephone numbers were dialed, and the time and duration of the test calls. Based on the information in Exhibit 45-C, and the information provided in Exhibit 45-B, we can associate many of the handwritten circled numbers to the records which appear in Exhibit 45-B.

A review of the "manually time length of call," as reflected in Exhibit 45-B, as compared to the time recorded by Citizens in the AMA call records closely approximate each other. The "time billed by Westcom" was less

than the manual time reflected in Exhibit 45-B. In addition, Westcom's recording of the test calls was off by a greater magnitude than the time recorded by Citizens for the same calls. (See Ex. 45-B and Ex. 45-C.) As pointed out by Citizens in Exhibit 45-C, two similar calls (53.80 and 52.97 seconds as manually timed) dialed from 916 685-3838 to 707 786-0011 at approximately 11:15 and 11:16, resulted in a Westcom recorded timing of 42 seconds for the first call, and 32 seconds for the second call.

Based on the data presented in Exhibits 45-B and 45-C, and the other testing performed by Citizens in March 1992 (Citizens' Answer to Westcom Complaint, Ex. J.), we cannot conclude that the alleged FGD billing errors were due to timing-related problems in Citizens' switching and billing systems.

Westcom contends that in order for Citizens billings to be correct, Westcom's recorded usage would have been higher than the usage recorded by Citizens. Westcom asserts that even though it starts its timing later than Citizens, it rounds up to the next highest 6 seconds or full minute, which would result in a higher recorded usage than what was recorded and billed by Citizens. (1 R.T. 97-98, 103-105, 109; 2 R.T. 99.) However, since no timing errors are evident with respect to Citizens' equipment, we are not persuaded by Westcom's argument that because the usage recorded by Westcom, as shown in Exhibits 6 and 9, were substantially less than what Citizens recorded and billed, that Citizens' billings must be incorrect.

Westcom also presented evidence that its billings for FGB and FGD services from other carriers were not disputed by Westcom, or that the carriers agreed to Westcom's adjustments. (Ex. 13; Ex. 14; 1 R.T. 117-126.) However, those billings are not relevant to this complaint case because they do not provide any direct evidence about the FGD billings that are in dispute with Citizens.

Based on the above discussion, we conclude that Westcom has not proved that it was overbilled by Citizens on its FGD billings.

F. PacBell Rate Elements

1. Position of Westcom

Westcom contends that Citizens charges Westcom for PacBell rate elements, and that these rate elements are not contained in Citizens' tariffs. In Westcom's letter dated March 19, 1992 to Citizens, Sunde wrote: "I do not understand why you have added PacBell rate elements to my billings. Please explain this to me." (Amended Complaint, p. 4, Exhibits 11-13.)

2. Position of Citizens

Citizens contends that it has the right under its tariffs to bill for access charges provided by PacBell which terminates in Citizens' service territory. Citizens asserts that Westcom's records (Exhibits 6 and 12) did not consider any of the terminating traffic in Citizens' territory which went through PacBell's tandem facilities. Citizens also points out that Westcom did not deny that it terminate traffic to Citizens from PacBell tandems.

3. Discussion

During the hearing, Sunde sought to remove from the complaint the allegations concerning the PacBell rate elements which appear in Item 11 at page 4 of the complaint, but wanted to be able to ask questions of Citizens' witnesses during the hearing. The ALJ ruled that those allegations should remain if Westcom was going to ask questions of Citizens' witness about these issues. (1 R.T. 140.)

Citizens witness Innes testified about meet point billing. Meet point billing is authorized in both the NECA and PacBell tariffs which Citizens participated in at the time of this dispute. (See PacBell No. 175-T, Section 2.4.8.)[46] Meet point billing occurs when there is jointly provided access service. The route that is used is divided in accordance with the joint ownership of that route. When access usage occurs on a jointly owned route, Citizens will charge its access rates for the percentage it owns, and the remainder will be charged at the access rate of PacBell or whoever the other owner is. (2 R.T. 142-145.)

Sunde testified that Westcom's switch records did not necessarily show all calls made to Susanville and Elk Grove. Sunde states that the calls could have terminated on some other carrier's facility. According to Sunde, Westcom's switch records "would only include calls through Citizens' facilities through our switch on our trunks." He also responded that he was only vaguely familiar with how the tariffs are applied to access services which are jointly provided with PacBell. He also understood that if PacBell does terminate a call in Citizens' territory through a PacBell tandem, that Westcom could be billed for that call. (2 R.T. 39-44.)

In Citizens' March 27, 1992 response to Westcom's March 19, 1992 letter regarding the PacBell rate elements, it explained how the meet point billing was done. Citizens also stated that it had thoroughly investigated the issue, that Westcom's claim was without merit, and that Citizens considered the issue fully resolved. (Citizens' Answer To Complaint, Ex. J.)

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[46] Since the disputed FGB bills were billed in accordance with the interstate tariff, for the jurisdictional reasons stated earlier, we decline to address those billings. (See Citizen's Answer To Complaint, Ex. J.)

Westcom has not demonstrated that Citizens' application of the meet point billing tariff was contrary to any tariff.[47]

G. Elk Grove FGD Lines 96, 97 and 100

Westcom alleges in its amended complaint that it advised Citizens on three or four separate occasions that it was receiving no traffic on its FGD trunks in Elk Grove on Lines 96, 97 and 100. In support of those allegations, Westcom attached to its original complaint a March 19, 1992 letter to Citizens, and a Westcom switch report for the month of February 1992. (Westcom Complaint, Ex. 14.) Westcom's letter states in pertinent part:

> "As the enclosed audit report shows, Westcom does not receive any traffic on lines 96, 97 and 100 (FGD Elk Grove). We have called your central office personnel many times but have never obtained proper service or assistance in solving this problem. During this extended period of time we have received hundreds of complaints from our customers regarding busy signals. Citizens has also sent us overflow reports on these circuits indicating customer inability to access our system.
>
> "As a result of the improper attention of your technicians we have suffered losses."

Westcom's "audit report" shows that it did not experience any incoming or outgoing minutes of use on Lines 96, 97 and 100 for February 1992. Westcom

[47] Westcom also argued that even if the PacBell rate elements were proper, that this would not account for the differences in the amount billed by Citizens for FGD service. (3 R.T. 123-124; See Exhibits 26, 31, 33 and 39.) However, this argument does not change our conclusion that Westcom has not proved that Citizens' timing and billing equipment were not operating properly.

did not present any other evidence during the hearing to support this allegation.[48]

Citizens' witness, Jean Russell, testified that the usage on Westcom's FGD trunks in Elk Grove was minimal. As a result there was no blockage on Westcom's trunks in Elk Grove, and these trunks were fully capable of generating traffic. (3 R.T. 137-138; Ex. 6, Tab 8.) Westcom did not cross examine Russell regarding her testimony. (3 R.T. 141.) Russell's testimony about minimal usage on these three trunk groups is corroborated by numbered paragraph 2 in a Citizens memo. (Ex. 6, Tab 8.)

Westcom has failed to meet its burden of proof with respect to its allegation that it did not receive any traffic over its FGD lines in Elk Grove. Therefore, Westcom's request for reparations for "customer complaints[49] and lost customer goodwill associated with Citizen's failure to route calls to Westcom on Westcom trunks 96, 97, and 100, in the amount of $5000.00" is denied.[50] (See Amended Complaint, p. 6.)

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[48] Westcom did refer to these three lines when it presented testimony regarding the billing of terminating usage for February 1992. Sunde testified that Westcom did not terminate any traffic to Elk Grove over its FGD trunk groups since September 1991. (2 R.T. 37-38.)

[49] We do not have to address the allegation regarding "hundreds of complaints" about busy signals because Westcom has failed to meet its burden of proof. The evidence suggests, however, that the complaints about busy signals were due to Westcom's overflow conditions on its Susanville trunks as shown in Exhibit 43 and as testified to by Citizens witness Russell. (3 R.T. 138-139.)

[50] We also note that the loss of customer goodwill is in the nature of damages, which as discussed previously, the Commission has no authority to award.

H. Late Charges

Exhibit 19 reflects the late charges that were assessed against Westcom by Citizens. The late charges reflected in Exhibit 19 amount to $1417.91 in interest. Westcom contends that if the Commission agrees with Westcom's argument that Citizens overcharged or improperly rendered services to Westcom, that the Commission should also reconsider the amount of interest that has been assessed by Citizens. (1 R.T. 135-136.)

Citizens' exhibits show that Westcom owes an additional $325.78 in late charges. This is reflected in Exhibit 46 in the amount of $138.78, and in Exhibit 47 in the amount of $187.[51]

As noted earlier, the late charges for FGB service were based on a PIU of 100%. Also, as footnote b of Exhibit 46 notes:

> "Because Westcom's FGD trunks were all ordered on ASRs indicting a PIU of 100%, Westcom's billing was administered as interstate service in our billing system…."

Since the late charges for both FGB and FGD service were based on the interstate tariffs, we decline to review the late charges associated with the interstate tariffs.

I. Conclusion

Based on all of the evidence that was presented, we only find in favor of Westcom on two issues. First, we agree with Westcom's interpretation that under the PacBell tariff, the language of the tariff suggests that 1 + 10 digit dialing should have been passed by Citizens' to Westcom's switch at the time of the equal access cutover. However, Westcom's allegation that it lost "many

[51] The late charges for FGD shown on Exhibit 46 also appear in Exhibit 37 for the bills dated 3/10/92, 4/10/92 and 5/10/92. The late charges shown in Exhibit 47 also appear in Exhibit 36 in the bills dated 3/20/92, 4/20/92 and 5/20/92.

thousands of dollars of lost revenues" as a result of the 1 + 10 calling problem, is a request for damages rather than reparations, which the Commission has no authority to award. In addition, Westcom did not offer any proof that it lost thousands of dollars as a result of the 916 call problems.

Second, we find that Westcom is entitled to a credit of $20 for the toll free calls that it had to pay as a result of the customer calls that may have been made to Westcom over its toll free number to report the 1 + 10 calling problem.

As for all of the other issues alleged by Westcom in C.92-03-049, we find in favor of Citizens. Westcom's request for a permanent injunction was previously denied in D.92-08-028. Except for the $20 credit for the toll free calls that may have been made, we deny all the other relief sought by Westcom in connection with its allegations in C.92-03-049.

The Commission is holding a deposit from Westcom in the amount of $12,608.79. Exhibit 72 in C.92-09-006 and C.92-09-025 reflects an outstanding balance of $14,200.51 for FGD service. Except for the $20 credit for the toll free calls, no other reparations to Westcom have been ordered. Since the dispute over the FGD bills has been fully adjudicated, the Fiscal Office is directed to transmit the amount on deposit with the Commission to Citizens. Citizens is directed to credit Westcom's account in accordance with this decision.

IV. C.92-09-006 And C.92-09-025

A. Introduction

The allegations in C.92-09-006, as amended, and the allegations in C.92-09-025 are closely related. Many of the events alleged in C.92-09-006 were repeated in C.92-09-025, but from a different perspective. Since the issues raised in both cases are interrelated, we will set forth the positions of both parties in each complaint case first, followed by a discussion of all of the issues.

B. Westcom's Complaint In C.92-09-006

1. Original Complaint

Westcom's original complaint, filed on September 3, 1992, alleges that on or about August 20, 1992, Westcom sent Citizens "equal access change requests" for all of its customers in Citizens' service territory. Westcom alleges that these changes were to change current Westcom customers to Westcom's new network, and that no carrier change was involved. On August 25, 1992, Westcom alleges that Citizens disconnected circuits on Westcom's former network, and that as of August 28, 1992, Citizens had still not processed Westcom's requests. As a result, Westcom alleges that Westcom's customers in Citizens' service territory were unable to place any interexchange long distance calls because of Citizens' refusal to process the changes requested by Westcom.

Westcom alleges that on August 25, 1992, it advised its customers to call Citizens directly and request that Citizens change their IEC to Westcom's new network, which Westcom referred to as "Com Systems 266." Westcom alleges that Citizens refused to process those direct customer requests in a timely manner. Westcom also alleges that Citizens advised these customers that: Westcom was out of business; the list of possible IECs read off by Citizens did not mention Com Systems as a possible carrier; Com Systems did not have facilities out of the Susanville area, and therefore Citizens would not process the customers' requests; and that Citizens told some customers that the charge to make this change would be $13.50, and that it told others that the charge would be $11.00.

Westcom contends that Citizens' refusal to accept residential customers in the Susanville area for Com Systems was not justified. Westcom asserts that the evidence shows that Exhibit 68 only applied to the Elk Grove exchange. Westcom asserts in its opening brief that "virtually all of Westcom's

customers were not located in Elk Grove, but rather were in the Susanville area," and asserts that Com Systems most likely ordered both residential and business service in the Susanville area. (Westcom Opening Brief, pp. 78-79.)

Westcom alleges that Citizens' actions are in violation of the antitrust laws, Business and Professions Code Sections 17095 and 17096, as well as various sections of the Public Utilities Code. Westcom argues in its opening brief that Citizens' actions were "an illogical, unlawful, abusive campaign to disrupt Westcom's business interests." (Westcom Opening Brief, p. 5.) Westcom contends that the letters which Citizens sent to Westcom's customers portrayed Westcom improperly, and that its customers were driven away by such techniques. Westcom contends that the goal of Citizens "was to cause Westcom irreparable harm and to eventually force Westcom out of business in CUCC's territories." (Westcom Opening Brief, p. 58.)

Westcom requests a permanent injunction[52] against Citizens and others acting for, under or in concert with Citizens, from engaging in the following: refusing to make any equal access changes requested by Westcom's customers; telling any customer that Westcom is out of business; telling any customer that Com Systems does not have facilities in the Susanville area; discriminating against any IEC by not advising its customers of all the IECs that are capable of providing service to its customers; and quoting incorrect charges for changing the equal access provider.

Westcom's complaint also requests that "reparations" be paid for the following: to Westcom for lost customers, lost revenue, slander, damage to

[52] Westcom's request for a temporary restraining order and a preliminary injunction in connection with C.92-09-006 was denied in D.92-12-038.

customer goodwill and reputation, and other damages in the amount of $100,000; to "Citizens'/Westcom's' customers" for the loss of long distance service in the amount of $250,000; and to Com Systems in the amount of $100,000 for Citizens' refusal to convert customers to Com Systems, and Citizens' refusal to list Com Systems as a choice among the long distance carriers.

Westcom also requests that the Commission issue penalties pursuant to § 2100, and following, against Citizens and its employees, officers, and agents in the amount of $1.2 million.

2. First Amended Complaint

Westcom's First Amended Complaint relates to events and testimony which were the subject of C.92-03-049, and certain events that occurred after the evidentiary hearing in C.92-03-049 had concluded.

Westcom alleges that following the filing of C.92-03-049, and prior to the evidentiary hearings in that case, Citizens changed Westcom's FGB billings without notice. This resulted in additional monthly charges to Westcom of $6,000 to $7,000 per month. Westcom alleges that Citizens refused to discuss or explain the new billings due to the pending litigation. According to the First Amended Complaint: "Westcom thus entered the hearing blind, with no knowledge or information to explain this very sudden billing change." Westcom also asserts in its opening brief that this unlawful billing procedure forced Westcom out of business in Citizens' service territory.

Westcom alleges that during the hearing in C.92-03-049, employees of Citizens testified that this new billing was based on the "Assumed Billing Method," even though the billings for March, April and May of 1992 did not state that. Westcom alleges that Citizens testified at the C.92-03-049 hearing that the "earlier 1991 bills" did contain the statement "Assumed Billing Method."

Westcom also alleges that Citizens' testimony in the C.92-03-049 hearing stated that Citizens "did not have the ability to measure FGB terminating traffic in Susanville and Elk Grove, but did have measurement capability on originating FGB and could measure originating and terminating on FGD (Equal Access)."

Westcom alleges that following the hearings, Westcom uncovered documents "which directly contradict Citizen's testimony at the Hearing wherein Citizens's employees testified that Citizen's does not now insert on the FGB billings the message 'Assumed Minutes of Use Method.' " (First Amended Complaint, p. 3.) Those documents were attached to Westcom's Petition to Set Aside Evidentiary Hearing, which was denied in an ALJ ruling dated July 31, 1992.

Westcom alleges that the lack of the "Assumed Minutes" on Westcom's billings, and Citizens' refusal to explain the billings, were prejudicial to Westcom and subjected it to a disadvantage in violation of § 453. Had Westcom known that the "latest FGB billings" were based on an assumed minutes of billing method, it alleges that it could have changed these circuits to one way at an earlier date, and eliminated this increase.

Westcom also alleges that following the hearing in C.92-03-049, Westcom submitted ASRs to Citizens, which were dated June 4, 1992. According to Citizens, these ASRs attempted to change Westcom's FGB trunks to one-way, originating only. Westcom alleges that Citizens responded with a letter dated June 5, 1992 in which it refused to institute the change order. Westcom alleges that when Sunde called Innes, that Innes "refused to fully disclose his reasons for refusal other than to reference a lack of PIU" and that Sunde informed Innes that Westcom would provide an updated PIU. Before Westcom could update its PIU, Westcom alleges that Citizens sent it another letter dated June 8, 1992. That letter

refused to process any change orders until Westcom paid a deposit of $23,390 to Citizens. Westcom alleges that Citizens takes the position "that a 'change order' constitutes new services wherein a deposit may be required." (First Amended Complaint, p. 4.) Westcom disputes this position, and alleges that the tariff sections covering deposits were intended to apply to orders for new service only, and not to change orders.

Westcom contends that Sunde "offered to prepay the non-recurring installation charges" in order to change its FGB trunks to one-way, but that Innes refused to accept the payment. Westcom asserts that:

> "Apparently, it was acceptable to CUCC to bill Westcom an additional $5-7000. or more per month for services Westcom attempted to disconnect, but would not either bill nor accept prepayment of the $1500-$2000. one-time installation charges…." (Westcom Opening Brief, p. 61.)

Westcom asserts that Citizens' refusal to change Westcom's FGB trunks resulted in the continuation of Westcom's FGB billings, and that Citizens did so "for the purpose of running up Westcom's bill in their efforts to put Westcom out of business in CUCC territories." (Westcom Opening Brief, p. 62.) Westcom also states:

> "Westcom reminds this Commission that Westcom showed its good faith when it paid all disputed billings ($12, 500.) over to the Commission pending resolution of Westcom's complaint process. This amount was being held by this Commission when CUCC unilaterally refused to change Westcom's trunks to one-way and CUCC had full knowledge of this payment. Additionally, CUCC **threatened to disconnect Westcom's services,** so as to prevent an increase in billings to Westcom, but then refused to disconnect portions of those very same services when requested to

> by Westcom. The portion of the services Westcom requested CUCC to disconnect (change from two-way to one-way because of excessive assumed billing on the terminating side), were those services and charges that were disputed by Westcom. Westcom attempted to mitigate its losses, but CUCC refused to comply with that request." (Westcom Opening Brief, pp. 60-61, original emphasis.)

Westcom alleges that it submitted new PIUs to Citizens on June 12, 1992, but in a June 15, 1992 letter from Citizens to Westcom, Citizens rejected the submission. Westcom alleges that it resubmitted its PIU changes again on June 22, 1992 with the audit records requested by Citizens. According to the First Amended Complaint, Citizens then accepted Westcom's PIU changes.

Westcom alleges that the acceptance of the PIU changes contradict Citizens' refusal to accept Westcom's request to change its FGB services to one-way, originating only traffic. Westcom alleges that Citizens accepted the PIU change without a security deposit. Westcom alleges that the reason that Citizens did so was because the acceptance of the PIU change did not reduce the amount that Citizens could bill Westcom. However, Westcom's request to change its FGB service to one-way, originating only, would have caused a significant reduction in Westcom's billings from Citizens. Westcom asserts that it was in Citizens' interest to continue billing on assumed measurement rather than actual measurement, and that Citizens' actions were extremely discriminatory.

Westcom further alleges that it was assured verbally by Carl Swanson of Citizens in May 1989, and by letter on June 9, 1989, that Citizens would measure FGB service. Westcom alleges that during the C.92-03-049 hearing:

> "Testimony at the Hearing indicated that Citizens can measure FGD originating and terminating but only measures FGB originating and bills FGB terminating 'Assumed Minutes,' even though the FGB and FGD are measured in the same tandem switch. FGB is not measured at end office switches as claimed by Citizens, it is measured at the tandems." (First Amended Complaint, p. 6.)

Westcom alleges that Citizens' switches possess the capability to measure FGB terminating traffic, or that Citizens has chosen not to purchase the "NTX Feature Package" to do so.[53] Westcom alleges that during the C.92-03-049 hearing, "Citizens testified that the … software for their Northern Telecom DMS 100 switches was BCS 31 (Generic Level 31)." According to the First Amended Complaint, when Citizens was "repeatedly questioned about any further description they denied that there was any further description of their software." Westcom alleges that "additional NTX feature packages must be purchased with each BCS release." Westcom alleges that if Citizens is able to bill $40,000 to $50,000 per month using assumed billing, and the purchase cost of FGB measurement software is $50,000 or $100,000, Citizens "is subverting the true intent of 'having measurement capability' as outlined in Citizen's tariffs." (C.92-09-006, First Amended Complaint, p. 6.)

Westcom contends in its opening brief at page 34 that Exhibits 107 through 110 represent Westcom's itemization of the overbillings by Citizens for the months of May 1992 through June 1992 in the amount of $12,997.

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[53] In its opening brief at page 3, Westcom asserts that Citizens "possessed complete measurement capability, without any limitation, since June of 1991," and that Citizens has admitted to this capability in a data request and through several employees of Citizens.

These exhibits are essentially the same kind of "audit reports" that Westcom submitted during the hearing in C.92-03-049. (6 R.T. 416-417.)

Westcom asserts in its opening brief that billing FGB terminating usage is only permitted when the end offices are not equipped with measurement capabilities. Westcom contends that the entry switches for FGB service were the Susanville and Elk Grove tandems, and that the evidence shows that Citizens had the "capability to measure FGB terminating at these entry switches" and that "additional measurement at the subtending end offices is unnecessary." (Westcom Opening Brief, pp. 31-32.) Westcom also contends in its opening brief at page 2, that the record reflects that Citizens "sponsored evidence and testimony that contained an immeasurable number of inconsistent and contradictory facts" regarding Citizens' switching capabilities.

The First Amended Complaint also alleges at page 7 that Westcom has "attempted to have Citizens allow the mandated 700 calling on its FGD trunks," but that Citizens has refused to do so without payment of a deposit.[54] Westcom alleges that 700 calling is "automatically part of FGD" service, and that Citizens' refusal discriminated against Westcom. Westcom also alleges that Citizens blocked customers from using the 700 feature for the purpose of causing disruptions to Westcom's services and customers. Westcom also alleges that Citizens changed its testimony and admitted that the 700 service was an automatic feature of FGD service.

[54] In its opening brief, Westcom also contends that Citizens demanded that an ASR order be submitted and that "Westcom's balance of $34,478.59" be paid in full prior to providing 700 service. (Westcom Opening Brief, p. 49.)

Westcom alleges that pursuant to the authority in § 703, the Commission has the authority to investigate the "apparent discriminatory practices of Citizens."

The First Amended Complaint also alleges that:

> "Westcom's investigation disclosed that one customer Citizens provides service to is allowed to terminate switched access services on standard business lines in violation of Citizen's tariff and Commission rules and orders. This is clearly discriminatory, is in restraint of trade and violates antitrust laws, both State and Federal, and is the subject of another major Commission Complaint, 92-07-045."

Westcom alleges that the actions of Citizens against Westcom were unlawful and discriminatory, that Citizens intended great and irreparable harm to Westcom, and that Citizens caused serious prejudice and disadvantage to Westcom. Westcom requests that the Commission grant the relief requested in the other complaints. Westcom also requests that Citizens' FGB billings to Westcom, which were based on assumed terminating traffic, be disallowed. Westcom also requests that Citizens be ordered to disconnect all exchange services that have been used to unlawfully transport interexchange services, and order other relief that the Commission determines is just and reasonable.

During the evidentiary hearing, and in its opening brief, Westcom also argued that Citizens violated Section 203(b)(1) of Title 47 of the United States Code, § 532, and Rule 23 of the Commission's Rules of Practice and Procedure (Rules). (5 R.T. 398-399; Westcom Opening Brief, p. 32-33.)

3. Second Amended Complaint

The Second Amended Complaint states that in C.92-03-049, Westcom alleged that Citizens engaged in overbilling and other improper billing practices. Westcom alleges in the Second Amended Complaint that:

> "Citizens caused Westcom's customers calls to be sent to and/or billed by MCI in error. Westcom further alleges that although Citizens was aware of this problem for an extended period of time, Citizens failed to properly correct this problem. Citizens was grossly negligent in not solving this problem in a timely manner."

Westcom also asserts that page 13 of Exhibit 27 shows that a Westcom customer had a call routed to MCI, even though the customer was on the Com Systems network. (Westcom Opening Brief, p. 86.)

Westcom's request for relief in the Second Amended Complaint is unchanged from what is contained in the First Amended Complaint.

During the hearing and in Westcom's opening brief, Westcom contends that Citizens had other "serious billing problems and fraudulent billing practices." At page 6 of Westcom's opening brief, it states:

> "Westcom uncovered documents that exposed an inordinate number of billing problems experienced by CUCC during the past several years. Included in these problems were several unlawful, absolutely fraudulent billing practices engaged in by CUCC." (Westcom Opening Brief, pp. 38-48.)

Westcom further contends in its opening brief that Gladys Foote and Ronald Ottoway, who were Citizens employees when C.92-03-049 was filed, had knowledge of these various billing problems. Westcom states that Exhibit 76 referenced "several such billing problems, without limitation, a double billing

problem that likely impacted Westcom's billings, improper billings to MCI, a billing error to AT&T and application of an improper rate element."[55] (Westcom Opening Brief, p. 38.) Although Foote was not called to testify in C.92-03-049, she was a witness in the second hearing. Westcom implies that her testimony is trustworthy because Citizens had wanted her to testify in C.92-03-049 and that Citizens exerted "excessive pressure … on Mrs. Foote to testify and further to testify untruthfully."[56] Westcom asserts that the testimony of Foote and Ottaway confirm that Citizens experienced an "unusually high number of billing problems" and that Citizens covered up these problems "at a very high management level." (Westcom Opening Brief, pp. 38-39.)

C. Position of Citizens in C.92-09-006

Citizens contends that Westcom is at fault for the problems that Westcom's customers experienced as a result of the cutoff of service to Westcom on August 25, 1992. Citizens contends that Westcom did not contact Citizens prior to, or after, the cutoff of service to Westcom on August 25, 1992. Instead, Citizens received the letters of agency (LOAs) from Com Systems.[57] Due to the suspect nature of the LOAs, Citizens was not able to verify the validity of the LOAs until Citizens received a call from Com Systems on August 25, 1992.

Citizens asserts that Westcom sent two inflammatory and misleading notices to its customers in Citizens' service territory instead of contacting

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[55] Exhibit 76 was received into evidence and sealed by the ALJ. (See 8 R.T. 692-693.)

[56] Westcom's opening brief ignores the fact that Foote answered "No" when she was asked at the hearing "Did anybody ever ask you to lie under oath." (4 R.T. 198.)

[57] Citizens witness Diane Campbell testified that the actual LOAs are not sent by the long distance carrier to the LEC. Instead, the "Paper Input LOA" is sent to the LEC. (7 R.T. 636-637, 642-643.)

Citizens. Citizens contends that the first notice was sent out by Westcom on the day of the cutoff, and described a merger with an unknown carrier. Citizens also contends that the notice indicated that Citizens was not processing the primary interexchange carrier (PIC)[58] changes to the new carrier in a timely manner. Citizens asserts that the second notice urged Westcom's customers to file a complaint against Citizens with the Commission for failing to process the PIC changes.

Citizens does not dispute that some of Westcom's customers were confused during a one- or two-day period after Citizens terminated Westcom's access services. However, Citizens contends that this confusion and inconvenience were caused directly by Westcom's failure to contact Citizens' Carrier Access group with information about the Com Systems' arrangement, Westcom's misleading notices, and Westcom's deliberate and willful violation of D.92-08-028.

Contrary to Westcom's assertions that a Citizens' employee informed Westcom's customers that Westcom was "out of business," Citizens contends that the depositions of numerous customers revealed that those customers were under the assumption that Westcom was no longer in business as a result of reading the merger notice. Citizens asserts that the depositions show that these customers were not able to distinguish between an economic merger of two companies and a merger of transmission networks.

Citizens contends that Westcom's excuse for its failure to comply with the Commission decision was that it disagreed with the decision. However,

[58] The "PIC" acronym is also used interchangeably with "presubscribed interexchange carrier."

Citizens points out that Westcom never filed for rehearing or modification of the decision, and did not contact the ALJ. Although Westcom repeatedly availed itself of the Commission's processes, Citizens contends that Westcom chose not to challenge the order, but instead willingly violated the Commission's order.

Regarding Westcom's allegation that Citizens failed to process its PIC changes, Citizens contends that the request for "a change in a carrier identification code is a change in carrier." (Citizens Opening Brief, p. 5.) Citizens asserts that the FCC "did not contemplate bizarre arrangements where customers are 'PIC'ed to one carrier but billed by another carrier." (*Ibid.*) In addition, the interstate and intrastate tariffs which apply to Citizens, contain a description of the process for handling LOAs, which Citizens asserts it followed.

Citizens contends that it did not mistakenly inform residential customers in Citizens' service territory that Com Systems was not available as an IEC choice. Citizens asserts that Com Systems had indicated to Citizens at the time of the equal access cutover, that it would only accept business customers. It was not until August 26, 1992, one day after the cutoff of Westcom's access service, that Com Systems told Citizens that it would accept residential customers.

Citizens asserts that in some cases, the inability of Westcom's customers to make long distance calls was directly caused by Westcom's failure to reprogram or disconnect the autodialers, which were located on the customers' premises, and which automatically dialed Westcom's carrier code number.

Citizens asserts that the dispute between Citizens and Westcom centers around the following: (1) whether Citizens had the ability to measure all FGB terminating traffic at the time Westcom was an access customer of Citizens; (2) whether sufficient data was accumulated at the tandem switch during the period in question to bill traffic that terminates at subtending Stromberg Carlson

end offices that home off the tandem; and (3) whether Citizens' Northern Telecom DMS-10 switches can measure FGB terminating traffic. Citizens contends that the answer to all three issues is no. Citizens asserts that its technical experts testified that the Northern Telecom DMS 100/200 tandem switch of Citizens had the technical ability to measure FGB terminating traffic for calls terminating at the tandem. The two former employees of Citizens, who were called to testify by Westcom, testified that the actual call records during this period did not produce the information necessary to bill all the IECs for terminating FGB usage.

Citizens points out that the outside technical experts relied on by Westcom were only familiar with one vendor, Northern Telecom. The Northern Telecom employee who testified at the hearing on behalf of Westcom indicated that he had no familiarity with Citizens' California network. The other person from Northern Telecom whom Westcom relied on, submitted an unsworn, handwritten affidavit, on the last day of the hearing. Citizens asserts that since Westcom did not make that person available for cross-examination, the affidavit cannot be given any evidentiary weight.

Citizens asserts that both the federal access tariff and the state access tariff allow the billing of assumed minutes when measurement is not possible. According to Citizens, the tariff requires measurement at the entry switch or the first point of switching. For calls that traverse the tandem but go to a distant end office, the entry switch is the end office switch. Citizens contends that Exhibits 9, 10 and 11 all indicate that the DMS 10 and Stromberg Carlson DCO end office switches did not have the software to support the measurement of FGB terminating traffic. Citizens contends that the billing of assumed usage for terminating FGB traffic was strictly within the language of the tariffs.

If Westcom wanted to have measurement of all of its terminating traffic, Citizens asserts that Westcom had the right under the federal and state tariffs to order direct trunks to Citizens' end offices. Westcom instead chose to order access to the tandem. Citizens contends that the burden is on the IEC to order access facilities which best suit the needs of the individual carrier, and that the LEC is not in a position to second guess those needs.

After Citizens' management was changed in l991, an internal investigation was launched to determine if Citizens was billing access revenues in accordance with all applicable rate elements. Citizens asserts that during this investigation, it discovered that it had not been billing terminating FGB access as permitted by the tariff. Citizens therefore began to bill for FGB terminating usage starting with the February 1992 usage.

Citizens asserts that the use of the word "assumed" was only placed on a bill if assumed usage was being used to bill both originating and terminating traffic. If the IEC was being billed in only one direction on the basis of assumed usage, the word "assumed" did not appear on the bill. Had the word "assumed" been added to Westcom's bill, Citizens contends that the bill would not have been any clearer because originating FGB traffic was billed on the basis of actual measurement.

Citizens contends that the Commission is without jurisdiction to grant Westcom's request for reparations for the assumed billing of FGB terminating traffic because it is a request for damages.

Citizens contends that due to Westcom's payment history, Citizens demanded a deposit when Westcom submitted an ASR to change its trunks, and when Westcom attempted to order 700 service by itself. Citizens asserts that under both its interstate and intrastate access tariffs, it can request a deposit before processing a service order from a carrier with a bad payment history.

Contrary to Westcom's assertion, Citizens contends that Westcom never offered to pay any charges. Since it had no reasonable expectation of getting paid by Westcom, Citizens asserts that it had a right to require a deposit in order to protect its ratepayers from further subsidizing Westcom.

Citizens internal investigation of its billing practices during the late 1991 to early 1992 timeframe also uncovered some billing errors. Contrary to Westcom's attempt to portray Citizens as having major billing problems, Citizens asserts the these problems were not supported by the record, and that the errors were of an insignificant magnitude. In addition, Citizens contends that every billing error that was uncovered was corrected, and that every affected carrier received either a refund or a credit, including Westcom. Citizens also contends that Westcom has no standing to raise billing error issues on behalf of other carriers.

D. Citizens' Complaint in C.92-09-025

Citizens' complaint concern allegations regarding events that took place after the Commission issued D.92-08-028. In that decision, Citizens was authorized to terminate its access services to Westcom. The decision also ordered that if Westcom did not tender the full amount in dispute in C.92-03-049 within two weeks to either Citizens, or to the Commission to hold in escrow, that Westcom was to send a letter to all of its California customers in Citizens' service territory using the following text:

> "Dear Customer:
>
> "Due to a billing dispute with the access service provider, Westcom will be unable to process your long distance calls beginning [date fourteen days after the mailing date of this decision]. You should make arrangements with another long distance carrier before this date so that your long distance service will not be interrupted.
>
> "We apologize for any inconvenience that this may cause you."

Citizens alleges that after it determined that Westcom made no payments to either Citizens or to the Commission, Citizens terminated its access services to Westcom on August 25, 1992.

On August 26, 1992, Citizens received from one of its customers, a copy of a letter that it had received from Westcom, and which is attached to Citizens' complaint as Exhibit A. Citizens alleges that the Westcom letter did not conform to the language mandated by the Commission in D.92-08-028, and that the letter contained substantial misinformation. Citizens alleges that Westcom willfully and flagrantly violated D.92-08-028, and that Westcom admitted that it failed to follow the Commission's order to notify its customers. Citizens contends that Westcom's only justification for violating D.92-08-028 was that Westcom did not agree with the order.

Citizens also alleges that the letter which Westcom mailed to its customers stated that Westcom had advised Citizens to convert Westcom's customers to the newly merged network. Citizens asserts that no such contact occurred. Citizens further alleges that mass changes between IECs are forbidden by the FCC, unless each customer specifically authorizes the change of carrier. Citizens alleges that these same requirements and guidelines to change a

customer's IEC are also contained in PacBell's 175-T tariff, which Citizens concurs in.

When Citizens began to receive the PIC requests to move former Westcom customers to Com Systems, Citizens alleges that the requests did not have the customer signature as required by the applicable tariffs and FCC rulings. When Citizens tried to verify the change requests with Com Systems, Westcom issued another customer notice which stated that Citizens had refused to honor the change orders, and urged its customer to complain to the Commission about their inability to place calls using Westcom's new carrier. (Citizens' Complaint, Ex. D.) Citizens contends it followed the appropriate procedure in verifying and processing the LOAs.

Citizens asserts that Westcom's argument that its networking arrangements with Com Systems did not constitute a change in carrier is unsupported. Citizens contends that the PIC represents the carrier identification code, and a change in that code represents a change in carrier. Citizens points out that the FCC rules have nothing to do with what carrier ultimately bills the end use customer, and that the FCC never contemplated the arrangement between Westcom and Com Systems.

Citizens alleges that Westcom's disregard for the Commission order created great confusion and denied customers their right to freely choose their IEC. Citizens also alleges that Westcom's letters disclosed the use of slamming techniques. To ensure that Westcom's former customers were advised of their right to freely choose their IEC, Citizens sent out a notice correcting the statements contained in Westcom's letter, and provided contact numbers for customers to call to change their IEC. (Exhibits E and F of Complaint.) Citizens contends that since it is indifferent to which carrier a customer chooses, Citizens

had no incentive to cause inconvenience to any customer or to inhibit their choice of carrier.

Citizens alleges that Westcom's refusal to pay its access service bills has caused Citizens' ratepayers to subsidize Westcom's access services. Citizens contends that it is unfair that its ratepayers continue to bear the unnecessary costs caused by Westcom's unlawful activities and its violation of Commission orders.

Citizens also alleges that Westcom is failing to comply with D.88-09-009. That decision granted Westcom's application for a certificate of public convenience and necessity (CPCN) to provide interLATA message toll service. Citizens alleges that Westcom is reselling switched access services as part of its provisioning of message toll services to Citizens' local exchange customers. Citizens contends that the resale of switched access services is prohibited by D.89-10-031 and D.84-06-113.

Citizens further alleges that Westcom is holding itself out to the public as a provider of intraLATA services, and that it solicited the local exchange customers of Citizens to use Westcom for their intraLATA calling. Citizens alleges that D.88-09-009 specifically prohibited Westcom from holding out to the public the provisioning of intraLATA services, and that Westcom was to advise its customers that intraLATA communications should be placed over the facilities of the LEC. Citizens also asserts that Westcom's alleged intraLATA activities were contrary to the settlement reached with Westcom in C.89-10-027.

Citizens complaint alleges that the calling data provided by Westcom to Citizens shows that 43% of all calling for Westcom's customers in the Susanville exchange is intraLATA in nature. Citizens contends that this far exceeds any "incidental" usage. Citizens also contends that Westcom trained its marketing representatives to solicit business on the basis of intraLATA savings, and that it

preprogrammed the autodialers for its customers for the sole purpose of bypassing Citizens and routing intraLATA calls directly to Westcom's switch. In addition, Westcom sent out notices to its customers advising them to use 700 access for intraLATA calling.

Citizens contends in its opening brief that these cases are a culmination of a series of complaints filed by Westcom against Citizens over the past few years, and that Westcom has never been willing to resolve the issues short of litigation. Citizens contends that Westcom "deliberately caused" its customers inconveniences for the sole purpose of filing another complaint against Citizens, and exhibited improper conduct and a pattern of harassment against Citizens' employees at the depositions and hearings. Westcom's allegations have resulted in thousands of hours of labor and hundreds of thousands of ratepayer dollars to investigate Westcom's complaints. In the meantime, Citizens contends that Westcom has not paid the access bills owed to Citizens, even for those amounts that are not in dispute. Citizens asserts that Westcom's behavior and vexatious litigation tactics should not go unpunished.

Citizens requests that Westcom be permanently enjoined[59] from: (1) purchasing and reselling switched access services; (2) holding itself out to the public as a provider of intraLATA services and requiring Westcom to advise its subscribers that intraLATA calls are to be handled by the LEC; (3) providing incorrect information to Citizens' local customers regarding Westcom's service and informing Westcom's customers of the unlawful nature of its prior notices; and (4) soliciting intraLATA business from the public and to inform the public

[59] Citizens' request for a preliminary injunction in connection with C.92-09-025 was denied in D.92-12-038.

and all of Westcom's customers of the unlawful nature of Westcom's past advertising. Citizens also seeks an order that Westcom pay Citizens reparations in the amount of $35,000 for the cost of the customer notices prepared and sent by Citizens, and for time spent by Citizens' employees to correct the misinformation created by Westcom. Citizens also requests that the Commission issue penalties against Westcom, and its officers and agents, for the willful violation of Commission orders in the amount of $1,000,000 and for other relief as the Commission deems proper.

E. Position of Westcom in C.92-09-025

Westcom asserts that upon realizing at the hearing in C.92-03-049 that Citizens was billing assumed usage for Westcom's terminating FGB trunks, Westcom submitted an order to Citizens to change those trunks from two-way to one-way. Westcom argues that Citizens refused to process this change "claiming Westcom would not pay the $1,500-$2,000 one-time installation charges, even though Westcom had offered to prepay those charges." (Westcom Opening Brief, p. 4.) Citizens then continued to bill Westcom on a two-way basis.

Westcom asserts that Citizens' refusal to accept the installation charge, and its refusal to change Westcom's FGB trunks to one-way, were unlawful and constitute "an unconscionable, unlawful adhesive contract." (*Id.* at p. 5.) Westcom asserts that the tariffs should be liberally interpreted in favor of the customer. Westcom also states:

> "CUCC's tariffs were written by CUCC and Westcom was afforded no opportunity to negotiate or bargain for terms favorable to Westcom. Because of CUCC's monopoly position in the provisioning of switched access service to Westcom, CUCC's tariffs were imposed on Westcom on a take-it-or-leave-it basis. Since Westcom could not obtain these services elsewhere, Westcom was forced to accept the contract (tariffs) offered by CUCC…." (*Id.* at p. 62.)

Westcom also asserts that Citizens' tariffs prevented Westcom from being able to disconnect the terminating portion of its FGB trunks. Westcom contends that the tariff is unjust and unreasonable under § 451, and therefore unenforceable.

Westcom contends in its opening brief that despite Westcom's deposit of $12,500 with the Commission in C.92-03-049, D.92-08-028 ordered that Citizens be allowed to disconnect Westcom's trunks, and that Westcom be required to send a letter to its customers in the text prescribed by the decision. Westcom asserts that this text was not discussed with Westcom, and that:

> "Westcom has since asserted that the Commission erred in requiring that particular text because the loss of Westcom's trunks did not, in and of itself, require Westcom to 'go out of business.' "(Westcom Opening Brief, p. 1.)

Westcom also contends that the notice ordered by the Commission had the effect of ordering Westcom out of business without due process.

Westcom did send a notice to its customers "containing text developed by Westcom." (*Id.* at p. 2.) According to Westcom, the notice stated that Westcom had merged its transmission network into the transmission network of another carrier and that it would continue to provide service in Citizens' service territory. Westcom contends that the notice was sent with "the intent to save as many customers as possible," and to advise its customers as to the status and changes in Westcom's services. (*Ibid.*) Westcom admits in its answer to the complaint that the letter that the Commission ordered in D.92-08-028 was not in the form prescribed by the Commission, but denies that the letter contained any misinformation.

Westcom contends that its conversion notice, Exhibit 46, did not contain any misstatements, as alleged by Citizens. Westcom asserts that it was merging

"its transmission network into the network of a major westcoast carrier," as opposed to the merger of two companies. (Westcom Opening Brief, p. 55.) Westcom asserts that Exhibit 103 shows that Com Systems verified Westcom's use of their network facilities.

Westcom contends that Citizens "embarked upon an unlawful and irrational campaign to disrupt Westcom's business relationships with its customers, whose intended purpose was to indeed put Westcom out of business." Westcom asserts that with the coming deregulation of intraLATA long distance calling, Citizens "has concluded that it alone will retain the bulk of intralata income, even if it must engage in predatory and unlawful behavior to accomplish this goal." (*Ibid.*) Westcom asserts that:

> "In order to cover its predatory practices, CUCC developed, prepared and then sponsored one set of fabrications after another, a virtually incalculable number of times. CUCC has now accomplished their goal--Westcom has been forced out of business in CUCC territories at a loss to Westcom of approximately $50,000. in monthly revenue." (Westcom Opening Brief, p. 87.)

Westcom asserts that it is authorized to operate as a switchless reseller, and that when Westcom converted to the Com Systems' network in August 1992, it was operating as such in full compliance with FCC and Commission rules and regulations. Westcom contends that Citizens was under the false assumption that Westcom was acting unlawfully as a reseller, and that Citizens "sent letters to Westcom's customers advising these customers that Westcom was not allowed to remain in business and suggesting that Westcom had otherwise committed several unlawful acts." Westcom also contends that Citizens "then went about convincing Westcom's customers to consider choosing another long distance carrier other than Westcom." (Westcom Opening Brief, pp. 4, 54.)

Westcom contends that Exhibit 102, a letter sent to Westcom's customers from Citizens, contained a reference to Citizens "rightfully rendered bills." Westcom asserts that this left the inference that "Westcom had lost in the complaints filed against CUCC and imparted an extremely negative connotation to Westcom's business practices." (Westcom Opening Brief, p. 57.)

In Westcom's answer to the allegation that it willfully and flagrantly violated the Commission's order, Westcom stated:

> "The notice specified by the Commission, referenced in Paragraph 8 by Citizens, inappropriately required Westcom to leave the long distance business in Citizens' territories. The Commission failed to recognize that Westcom had other options available to it. Westcom, therefore, believes the Commission erred in its decision and should have worded the letter requirements somewhat differently. Due to time constraints (Westcom has less that [sic] 14 days to save its customer base in Citizens' territories) Westcom was unable to appeal the wording required by the Commission." (Westcom Answer to C.92-09-025, p. 2.)

Westcom also contends in its opening brief "that the Commission erred in ordering Westcom to go out of business." (Westcom Opening Brief, p. 54.)

Westcom contends that a "mere pic code change" did not amount to mass changes between IECs, and that such changes are not prohibited by the FCC. Westcom contends that its customers were not changed to a new carrier, but rather, "only the network was changed." Westcom contends that the carrier prior to submission of the PIC code changes was Westcom, and that after the submission of the PIC code changes, the carrier was still Westcom. Westcom contends that a change of carrier is defined by the FCC as "leaving your current carrier and choosing a new long distance carrier." All that occurred, asserts Westcom, is that there was "only a change in trunking and network access."

Westcom further asserts that its customers had already selected Westcom, and that Citizens' allegation that Westcom's customers were slammed and denied their right to freely choose their long distance company is ludicrous. (Westcom Answer, p. 3; Westcom Opening Brief, pp. 5, 74-75.)

Westcom further contends that the PIC change charge was correctly reported by Westcom as $5.00, instead of the $5.26 which Citizens alleges is the correct charge.

Westcom asserts that contrary to Citizens' assertion in Exhibit 47, Westcom did advise Citizens to converts its customers to the new Com Systems' network. Westcom contends that the evidence shows that Citizens received the PIC order changes from Westcom. Westcom also asserts that Sunde personally called Citizens and advised them that the LOAs were from Westcom. (Westcom Opening Brief, p. 56.)

Westcom asserts that Citizens has failed to show that it was Westcom's intent to solicit intraLATA traffic. Westcom contends that the letter informing customers about 700 dialing was only sent to 40 or fewer California customers. Westcom further contends that Citizens only produced evidence that one Westcom customer, Greg Short, was directly solicited by Westcom's salesman. Westcom also states that the call records attached to Short's deposition in Exhibit 23 did not contain any intraLATA calls. Westcom also contends that the depositions of the other Westcom customers did not reflect any intraLATA usage through Westcom as well. Westcom also points out that when Short was solicited as a customer by Westcom's representative, Scott Madison, Short was subscribed as an equal access customer. This had the effect of routing all of Short's intraLATA calls through Citizens. Westcom also asserts that after Madison left Westcom's employment, that Madison "improperly used

confidential Westcom customer lists to re-solicit Westcom's customers for his own network…" (Westcom Opening Brief, pp. 70-71.)

As for the "700 intralata dialing list," Exhibit 61, that Citizens presented, Westcom contends that the Citizens witness on cross examination "reluctantly admitted most calls on the list were in fact interlata calls." (Westcom Opening Brief, p. 5.)

Westcom also contends that the point of origin from where a phone call is made cannot be determined by simply looking at phone call records. Westcom asserts that what may appear to be an intraLATA call was actually a call from outside the caller's local calling area using Westcom's 950 access number or 800 number.

Westcom also contends that it filed an intraLATA tariff with the Commission during the time that Westcom improperly assumed that intraLATA competition was scheduled to begin in the near future. Westcom asserts that many other IECs also filed intraLATA tariffs "because they also believed intralata was to begin soon." (Westcom Opening Brief, p. 70.) Westcom states that its intraLATA filing was withdrawn at the request of the Commission staff.

F. Discussion

1. FGB Allegations

Although the record was closed in C.92-03-049, Westcom was permitted to present evidence on issues relating to the FGB services that it had ordered from Citizens during the 1989 to 1992 timeframe. However, for the reasons stated in the discussion portion of C.92-03-049, we decline to address the FGB billings prior to June 1, 1992, because at the time those disputed bills arose, Westcom reported 100% interstate usage for its FGB services. (7 R.T. 557) Since the interstate usage was reported as 100%, Citizens, in accordance with its tariff,

applied the FCC NECA tariff to Westcom's FGB services. Since the FCC tariff was used, we have no jurisdiction to address the disputed FGB billings for the usage period from February 1992 through May 1992. We do, however, have the authority to review the usage from June 1992 until service was terminated on August 25, 1992 since Westcom changed its PIU to reflect intrastate usage. We also have the authority under § 453 to investigate Westcom's allegations regarding discriminatory practices with respect to the provisioning of FGB services.[60]

Since we have no jurisdiction to address the FGB billing prior to June 1, 1992, the following issues do not have to be resolved by the Commission in this decision: whether the evidence developed in C.92-09-006 and C.92-09-025 proves that Citizens was able to measure FGB terminating service at the time the disputed billings at issue in C.92-03-049 occurred; and whether Westcom was entitled to measured FGB terminating usage since Westcom had allegedly been assured that such measurement would occur.[61] Although we do not have to resolve those two issues, we believe that it would be beneficial for the Commission to note in this decision our impressions about Citizens' FGB

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[60] In C.92-09-006, Westcom alleged that the Commission had the authority to investigate the discriminatory practices of Citizens pursuant to § 703. However, as discussed in the C.92-03-049 section, Westcom has not alleged that the interstate FGB tariff is excessive or discriminatory.

[61] During the hearing, Sunde testified that he had spoken to a Mr. Howell and Foote about Exhibit 58, Westcom's request for measured FGB terminating service. Westcom's complaint alleges that Westcom had been assured by Swanson about the measurement of FGB terminating service. As noted earlier, although Swanson's deposition was taken and entered into evidence as Exhibit 111, Swanson was not asked by Sunde whether Swanson had indeed assured Westcom that such measurement would take place.

measurement capability. We believe that this digression is necessary so that anyone who reads the record in this proceeding will have a balanced and complete view of all of the evidence that was presented.

We do not believe that the evidence presented by Westcom in C.92-09-006 and C.92-09-025 has established that Citizens had FGB "full measurement capability" during the time period in question. Despite Westcom's assertion in its opening brief that Citizens was "fabricating one story after another," and that there was "an 'immeasurable' number of contradictory, inconsistent and wholly incredulous statements by CUCC employees," a careful review of the record shows otherwise. (Westcom Opening Brief, pp. 6-7.)[62]

The witnesses who testified on behalf of Westcom regarding the switching capabilities of Citizens, had either no personal knowledge of all the various switches in Citizens' California network or the capabilities of the various switches. Foote and Ottaway testified that the usage records were not accurate and consistent enough to use for billing purposes. The switch materials and brochures that Sunde testified about came from the switch manufacturers, but none of those switch manufacturers testified, except for one Northern Telecom employee. (See 4 R.T. 181-184, 218-220, 225-228, 231-232, 244-248, 253, 259; 7 R.T. 633-634; 8 R.T. 664-671, 677-678; Ex. 1, pp. 26-27, 38-39, 49, 59, 65-66; Ex. 2, pp. 49-50, 61-62, 65-71, 73, 81-87, 89-91, 102, 104; Ex. 113, pp. 23-24.)

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[62] We note that there are some inconsistent and contradictory statements in the testimony of the witnesses for both Westcom and Citizens. However, the burden in a complaint case is on the complainant. A thorough examination of all of the evidence shows that Westcom has not met its burden of proof, and that the weight of the evidence supports Citizens' position.

To the extent Westcom relied on Exhibits 9 and 126 to demonstrate how the DMS 100/200 switch interacted with the end office switches, the person who allegedly drafted those two documents, Randall Robertson, "Westcom's expert witness," was not made available by Westcom for examination. Westcom seeks to use Robertson's "affidavit" to prove that Citizens could measure FGB terminating traffic. (Westcom Opening Brief, pp. 11, 29-30; 5 R.T. 327-328, 331; 8 R.T. 667-671, 694; Ex. 9; Ex. 126.)

Rule 64 provides that although the technical rules of evidence ordinarily need not be applied, "the substantial rights of the parties shall be preserved." Westcom would like the Commission to give added weight to Robertson's affidavit, rather than to other testimony that was presented. However, Robertson was not made available as a witness by Westcom. For the Commission to give weight to Exhibits 9 and 126, without affording anyone the opportunity to cross-examine the person who prepared these exhibits, would not preserve the substantial rights of the parties.

William Diduch, a Northern Telecom employee, was called to testify on behalf of Citizens at the second hearing. Diduch, however, testified that without looking at the software listing for a given end office, he did not know whether Citizens had CAMA (centralized auto message accounting) recording capability in its DMS 100/200 switch. According to Diduch, the "use of CAMA is to track calls placed from a local calling area to a … nonlocal calling area." In addition, he did not know whether Citizens' end offices in California had billing and recording functions. He also agreed that given his lack of familiarity with the details of Citizens' California network, and with the call structure codes for FGB and FGD, that he was not in a position to render an opinion on the ability of Citizens to measure FGB terminating traffic in its switches and end offices in California. (6 R.T. 532-533, 539-541.)

The testimony of the witnesses for Westcom, need to be compared with the testimony of the witnesses for Citizens. If an IEC did not order direct trunks to a specific end office for FGB service, then Citizens used combined trunks to provide the FGB service. The testimony of the Citizen witnesses established that Citizens DMS 100/200 switch did not use CAMA trunks or CAMA reporting. Without that type of capability, Citizens would not be able to record a terminating FGB AMA record from the end office**.** In addition, the end offices which used the DMS-10 switches did not have the software to generate a Call Structure Code 135. A Call Structure Code 135 refers to a terminating FGB AMA record. Without this code from a DMS-10 switch, there would be no way of measuring the call as a FGB type call. Other end offices used the Stromberg Carlson DCO switches. The DCO switch at generic level 14 did not have the capability to generate a Call Structure Code 135 unless there were direct trunks. If Westcom had ordered direct trunks to the end offices, rather than to the tandem, then measurement of Westcom's terminating usage could have taken place. (5 R.T. 281-283, 332, 335-338; 6 R.T 496-510, 516-517, 519, 522, 524, 546; 7 R.T. 556, 573-574, 597-600, 634; 8 R.T. 682-683; Ex. 1, p. 49; Ex. 8, p. 12, 15-17, 20-23, 26-28, 30; Ex. 12, pp. 17-24, 34-38; Ex. 59; Ex. 65, pp. 1, 3; Ex. 66; Ex. 69; Ex. 70; Ex. 75, p. 19; Ex. 127, Responses to 5b and 11; See 3 R.T. 109-113, 137-141.)

Based on the evidence presented in all three complaint cases, we cannot conclude that Citizens had the ability to actually measure Westcom's FGB terminating usage during the time period at issue in the complaints before us.

Westcom asserts that when it submitted Exhibit 38 to Citizens, it specifically requested that its trunks be changed to two-way and that it be

measured.[63] Since Westcom's ASR included the words "measured billing," it contends that measured billing should have been provided. Westcom contends that this "ASR constitutes a contractual agreement between the parties," and that Citizens' "inability to provide the service as ordered by Westcom … constitutes an unlawful, unilateral change in the contract terms."

The following is the evidence that was produced on this issue. Sunde testified during the second hearing that he spoke to Howell and Foote about Exhibit 38, Westcom's order to change its FGB circuits to two-way "with measured billing." Sunde testified that "I was assured that it would be processed properly and that, yes, they felt measurement was going to be provided." (5 R.T. 402-403.)

Foote testified that prior to the equal access cutover, she told Sunde that Citizens could measure FGB terminating usage. Her understanding of this capability came from a Citizens engineer, Roy Ledford. She also testified that the other staff "was under the impression that at cutover we would have this capability." This impression came from the assumption that the new equipment that Citizens had purchased would provide the capability to measure FGB terminating usage. (4 R.T. 159, 182-184.)

Jean Russell, a Citizens employee, testified that Exhibit 58 came from Westcom, and that the second page of the ASR indicated that Westcom wanted two-way trunking. Even though the ASR indicated "measured calling," Russell agreed that those words had no meaning from the standpoint of the engineering department. Instead, she said it is the tariff which governs how traffic will be

[63] The documents that Citizens received from Westcom are shown in Exhibit 58. The first two pages of Exhibit 58 are identical to Exhibit 38, which is made up of two pages.

measured off a particular access route. (6 R.T. 512-514.) Innes also agreed that whether a service is measured or not is determined by the capability of the LEC, and not by the order of the IEC. (7 R.T. 556.)

A review of Exhibit 58 shows that the changes were to the Susanville and Elk Grove access tandems. Even though Foote indicated to Westcom that the FGB terminating traffic could be measured, Westcom did not order any direct trunks to the end offices so that actual measurement could take place.

We are also not convinced by Westcom's argument that billing FGB terminating usage on an assumed basis was in Citizens' financial interest. Prior to July 1, 1992, Citizens subscribed to the NECA tariff. Whatever money that was collected on the basis of the interstate tariff went back into the NECA pool. According to Foote's testimony, the "companies then get back their expenses, cost and profit." (3 R.T. 6-7; 4 R.T. 194-195, 269.) She also replied "No" to the following question asked by Sunde:

> "Would a company that participates in the NECA pool benefit by billing one method under a tariff or another; for instance, the assumed minutes of use or the actual usage." (4 R.T. 195.)

2. FGB Bills for June 1992 Through August 1992

We first note that neither Westcom nor Citizens sought to introduce the FGB billings from Citizens to Westcom for FGB usage for May through August 1992, and there was no testimony on what tariffs were used to bill the intrastate portion during that time period. Based on Exhibit A to Westcom's First Amended Complaint to C.92-09-006, and Citizens' answer to that amended complaint that Westcom submitted a new PIU, and that "notification was issued to Westcom on July 6, 1992 that the PIU would be instituted effective with the June Usage (July Bill) 1992 FGB billing," we assume that the FGB bills for usage

from June through August 1992 were partially billed using PacBell's 175-T tariff on file with this Commission.

With that assumption in mind, we first address Westcom's argument that Citizens waived its right to bill FGB terminating usage on an assumed minutes of use basis. In June 1992, Westcom changed its PIU to reflect intrastate usage of 83% in the Elk Grove area and 90% in the Susanville area. (7 R.T. 557-558, 560.) According to page 2 of Exhibit A in Westcom's First Amended Complaint, Citizens applied a 13% PIU to Westcom's FGB billing effective with the June 1992 usage. Thus, this waiver issue needs to be resolved in the context of the FGB bills that were rendered by Citizens to Westcom for usage in June through August 1992.[64]

PacBell's 175-T tariff allows the use of assumed measurement when there is no measurement capability available. Since this tariff was in existence throughout the 1989 to 1992 timeframe, Citizens had the right to bill Westcom using assumed measurement for FGB terminating usage. Westcom's waiver argument must also fail because Citizens had the right to back bill, as we discussed in the C.92-03-049 discussion. We therefore conclude that Citizens did not waive its right to bill Westcom for FGB terminating usage on an assumed minutes of use basis for the period from June through August 1992.

[64] We do not need to resolve that issue for the FGB usage that occurred during February through May 1992 because prior to June 1992, Westcom reported a PIU of 100%. (7 R.T. 557.) Since the interstate usage was reported at 100%, Citizens applied the FCC tariff.

The second issue that arises in the context of the FGB bills for this time period is whether Westcom has proven that it is entitled to a credit of $12,997. Exhibits 107 through Exhibit 110 are patterned after the same kind of documents which Westcom used to support its claim for credits in C.92-03-049, and which were discussed in the C.92-03-049 section of this decision. Exhibits 107 through 110 lack the call detail necessary to allow Citizens to audit its calling records. In addition, the joint timing tests that were conducted in connection with C.92-03-049 did not reveal any problems with Citizens' recording and billing capabilities. Therefore, we conclude that Westcom has not met its burden of proof regarding the FGB billings for June through August 1992.

The third issue is whether the FGB bills for June through August 1992 should be rendered void because of Citizens refusal to change Westcom's FGB service to originating only. As discussed later, in order to effectuate the change sought by Westcom, Citizens, in accordance with the tariff, demanded a deposit from Westcom due to its late payment history. Westcom failed to tender the requested deposit. We therefore find that to the extent that FGB terminating usage was billed to Westcom on an assumed minutes of use basis for the period from June through August 1992, Westcom could have avoided those bills by tendering to Citizens the deposit that Citizens demanded.

We note that Westcom's opening brief at pages 34 to 38 reargued the evidence that was presented in C.92-03-049. Since Westcom had a previous opportunity to argue the evidence developed in the first hearing, and because the record was closed in that proceeding, we will ignore the arguments contained in the sections labeled "Westcom Switch Timings" and "Prior Testimony In C.92-03-049" to the extent they simply reargue how the evidence in C.92-03-049 should be interpreted.

3. Allegations Regarding Discrimination

a. Billing Assumed FGB Termination Usage

We next address Westcom's allegation that Citizens discriminated against Westcom by billing FGB terminating usage on an assumed minutes of use basis.

According to Citizens, the tariff requires measurement at the entry switch or the first point of switching. Marr testified that if a carrier had ordered their circuits connected to the tandem, the entry switch would be the tandem. But if common trunks[65] are used to carry the traffic to the end office, the tandem would not be able to derive individual billing for each carrier that uses the common trunks to terminate FGB traffic. If the IEC ordered direct trunks into an end office, the recording would take place at the end office. Marr is not aware of Westcom ordering circuits to places other than the tandem. (5 R.T. 324, 332, 340-344; See Ex. 3.) Russell corroborated Marr's testimony by stating the access tandem measures minutes for the end offices for the NXXs located within the 100/200 switch. But if the NXXs are located outside the location of the access tandem, i.e., the call is going through the tandem to another location, the access tandem "is not able to record it because the carrier identification information is not passed on to the end office." The end office can only record FGB if it is a dedicated trunk. (6 R.T. 505-506, 522, 524.) As discussed earlier, the switch at the end offices did not have FGB terminating measurement capability during the time period in question unless the IEC ordered direct trunks to the end office, which Westcom didn't.

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[65] Common trunks are used to carry more than one type of traffic or more than one carrier's traffic. If multiple carriers were using the same trunk group, they would probably be carrying the same type of traffic. (5 R.T. 324, 339-340.)

In late 1991 and the early part of 1992, Citizens management determined that some FGB terminating usage had not been billed since the equal access cutover. Ottoway testified that from the information he obtained in various meetings with different departments, Citizens did not have the proper configuration or translations to provide accurate measurements for billing purposes for FGB terminating traffic. (4 R.T. 218-219.) He further stated that if there is a problem with the software, or with the actual records, or any type of errors, then an accurate billing to the IEC could not be prepared. (4 R.T. 226.) Foote also testified that the call records for the terminating side "is where most of the problems were." She stated that "I doubt whether we have got a good, clean terminating Feature Group B report." (Ex. 1, pp. 58-59, 61, 65.) She was also at meetings with others from Citizens where they discussed whether they were receiving correct measured usage or not. If they were not, "then you have to fall back on assumed usage."[66] (Ex. 1, pp. 23-24, 31-32, 38-39.) As a result of these kinds of inconsistencies, Citizens made a decision "around the first part" of 1992 to bill according to the tariff, which allowed the use of assumed minutes for FGB terminating usage when actual usage could not be measured. This became effective in February 1992. (3 R.T. 27; 4 R.T. 231-232; 6 R.T. 545-546; Ex. 75, p. 26; Ex. 111, p. 15; Ex. 112, pp. 29-30; Ex. 113, pp. 24-25; See Ex. 33, § 6.6.4.)

According to Ottaway, all carriers whose FGB terminating usage could not be actually measured, were billed on an assumed minutes of use basis. (4 R.T. 231-232; Ex. 2, pp. 74, 78-79, 98; See Ex. 112, p. 35.) Since all

[66] Westcom's assertion at pages 39 to 40 of its opening brief that Citizens billed "actual in some instances and assumed in others, based merely on CUCC's arbitrary decision to generate the greatest revenue possible," has no basis in fact, and is not supported by the evidence.

carriers whose terminating FGB traffic could not be measured, were billed on an assumed minutes of use beginning with the February 1992 usage, we conclude that Citizens did not grant any preference or advantage to another carrier, or subject Westcom to any prejudice or disadvantage in violation of § 453.

b. Placing "Assumed" on the FGB Bills

The next § 453 issue is whether Westcom was prejudiced or disadvantaged by the failure to include the words "assumed method" on Westcom's bill for FGB services.

Ottaway testified that Citizens only inserted the word "assumed" on a bill if both the originating and terminating usage were being billed on an assumed minutes of use basis. (4 R.T. 248; Ex. 2, pp. 93-94, 98-99.) At the hearing Foote testified that Citizens chose not to insert the word "assumed" on the bill because there was a mixture of actual measurement and assumed measurement. She explained that "saying assumed was no more correct than just leaving it alone." (4 R.T. 186.) In her deposition, she said: "You can't say assumed minutes on the front of the bill when it is part measured and part assumed, then you are not wrong and you are not right." (Ex. 1, pp. 32-34.) Foote also acknowledged that at the time Citizens began billing Westcom terminating usage on FGB, there was a mixture of both assumed terminating usage and actual measurement of originating usage. (4 R.T. 186-187.)

Sunde testified that the insertion of the words "Assumed Minutes of Use Method" could have been easily inserted on the FGB bills, as he

tried to demonstrate with the use of Exhibits 5 and 37.[67] However, Westcom's insertion of these words onto a monthly bill only demonstrates that it was easy to insert the words using the software program. It does not demonstrate that Citizens should have or was obligated to insert such words onto the face of the bill.

We conclude that Citizens did not subject Westcom to any prejudice or disadvantage by not including anything on Westcom's FGB bills which would have indicated that some of the usage was being billed on an assumed minutes of use basis. Based on Ottaway's testimony, it appears that the same policy applied to other carriers who were billed assumed terminating FGB usage.

c. Notice of the Billing of Assumed FGB Terminating Usage

Westcom contends that it had no notice that it was being billed on an assumed minutes of use basis until the hearing was held in C.92-03-049 in June 1992. Westcom asserts that Citizens should have sent out notices informing its customers that billing of FGB terminating usage had begun.

As we discussed earlier, Citizens' access service tariff provisions permit the use of assumed measurement when there is no measurement capability. These tariff provisions were in effect at the time Citizens started to bill for assumed terminating FGB usage. Since it appears that

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[67] We first note that Exhibits 5 and 37 are identical. Second, the ALJ denied the admission of these two exhibits into evidence because Sunde acknowledged that Westcom generated this pseudo-bill only for the purpose of illustrating that the words could be inserted onto a real bill. (5 R.T. 400-401; 6 R.T. 408; 8 R.T. 690-691; Ex. 1, p. 32-34; Ex. 112, p. 38.)

Citizens did not inform any of its switched access customers that it planned to start billing in this manner, Citizens' failure to send advance notice to Westcom of its intention to bill FGB terminating usage on an assumed basis did not subject Westcom to any prejudice or disadvantage.

d. Citizens' Demand for a Deposit

The next § 453 issue is whether Citizens request for a deposit from Westcom subjected it to prejudice or a disadvantage. PacBell's access service tariff provides in pertinent part:

> "The Utility will, in order to safeguard its interests, only require a customer which has a proven history of late payments to the Utility or does not have established credit, to make a deposit prior to or at any time after the provision of a service to be held by the Utility as a guarantee of the payment of rates and charges." (PacBell, CPUC No. 175-T, § 2.4.1(A).)

The NECA tariff, which Citizens subscribed to, contains a similar deposit requirement. (See NECA FCC No. 5, § 2.4.1(A).)

We first address Westcom's argument that the tariff sections covering deposits were intended to apply to orders for new service only, and not to change orders. A review of the PacBell tariff and the NECA tariff establishes that Westcom's argument is without merit. Both tariffs provide that whenever there is a proven history of late payments to the utility, a deposit can be required "prior to or at any time after the provision of a service." That tariff language clearly allows a deposit to be collected before a service is started, or any time after the service is provided. In addition, the provisions of § 2.1.8 of both the NECA tariff and the PacBell 175-T tariff specifically provide that LEC can "refuse to complete any pending orders for service."

As noted in D.92-08-028 at page 14, Citizens sent two notices to Westcom on February 26, 1992. Those notices informed Westcom that "current and future service may be discontinued upon 30 days receipt of this notice," and that a "deposit may be required to reinstate service." The letters also stated: "be advised that no further contact or notice is required prior to discontinuance of service if payment is not received as specified in the above notice." (Westcom Complaint In C.92-03-049, Ex. 1; Citizen Answer To C.92-03-049, Ex. D.) Thus, Westcom was informed by Citizens in late February or early March 1992 that it could "refuse additional applications for service and/or refuse to complete any pending orders for service, and/or discontinue the provision of service to the customer." (FCC No. 5, § 2.1.8; See PacBell 175-T, § 2.1.8.)

Sunde acknowledged on cross-examination that Exhibit 72 showed that Westcom did not pay its bills in a timely manner. Sunde also testified that Westcom did not pay nondisputed charges in a timely manner. (6 R.T. 429-431)

We conclude that Citizens did not subject Westcom to any prejudice or disadvantage when it demanded a deposit from Westcom.

e. Citizens' Refusal to Change the FGB Service to Originating Only

We next address Westcom's contention that Citizens' refusal to process Westcom's request to change its FGB trunks from two-way to originating only, but its acceptance of Westcom's PIU change, subjected Westcom to a disadvantage or prejudice. A brief review of the exhibits and testimony is needed in order to address this issue.

Exhibit 32 is page 5 of Citizens's answer to Westcom's first amended complaint in C.92-09-006. Exhibit 32 reflects the position that Citizens'

took with respect to why Citizens accepted Westcom's change in the PIU, but did not process Westcom's request to change its FGB trunks to one-way. Citizens' answer states in pertinent part:

> "CUCC denies Westcom's allegation that CUCC's acceptance of Westcom's change of PIU contradicted CUCC's position regarding acceptance of a change order. CUCC considered Westcom's request to update their PIU, strictly a part of their responsibility as an interexchange carrier under applicable tariff provisions. Westcom's request for changing their trunks to one-way originating, however, requires issuance of an ASR and a definite change of service. Westcom's request for change of trunking would also result in billing of service order and installation charges for which CUCC had no reasonable expectation of collecting."

In Westcom's letter to Citizens dated June 4, 1992, Westcom requested that its FGB trunks in Susanville and Elk Grove be changed to originating only as soon as possible. This occurred following the last day of hearing in C.92-03-049 and after Westcom "ascertained what Citizens was doing to us as far as our billing was concerned." (5 R.T. 392-293.) Attached to the letter were three ASR pages. (Ex. 29.) Someone at Citizens received the June 4, 1992 letter. (7 R.T. 569.)

On June 5, 1992, Innes replied to Westcom's June 4, 1992 letter, which Sunde acknowledges receiving. (5 R.T. 393; 7 R.T. 570.) In that letter, Citizens stated in part:

> "However, the ASRs attached to your letter, are not properly completed and do not comply with tariff provisions for ordering Feature Group B service. Therefore, we request that you resubmit your ASR's, complying with all applicable tariff requirements. To aid you in rectifying your omissions, I am

> enclosing, as Attachment A, copies of the applicable NECA tariff sheets governing ordering of access service.
>
> "Upon receipt of properly initiated requests, we will be happy to provide the estimated due dates you requested in your letter. Please note that Citizens' normal service interval is 30 working days and customer requests for expedited provisioning will normally cause the application of the expedited order charges cited in the tariff. Please consider this when redrafting your ASRs.
>
> "Please note that you were previously notified of the Company's rights under Section 2.1.8 of the NECA tariff. (See Attachment B.) That section allows the company to refuse additional applications for service when a carrier is not in compliance with tariff rules. Citizens has in no way waived its rights under Section 2.1.8 of the tariff. " (Ex. 30.)[68]

After reading the June 5, 1992 letter, Sunde called Innes and asked him what he thought was missing. Innes informed him that the PIU was missing. Sunde replied that Westcom would provide it. (5 R.T. 393.)

On June 8, 1992, Innes again wrote to Westcom. (7 R.T. 570.) Sunde acknowledges receiving a copy of this letter. (5 R.T. 394.) The June 8, 1992 letter stated that Citizens had the right under its tariffs to require any customer with a history of late payments to post a cash deposit, and that such a deposit may not exceed two month's actual or estimated rates and charges for service. Based on Westcom's latest bills, two months' of charges amounted to $23,392.11.

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[68] Although the text of Exhibit 30 referred to "Attachment A" and "Attachment B," neither of those attachments were included as part of Exhibit 30.

Citizens demanded that Westcom deposit the sum of $23,390. The letter also informed Westcom that the "failure to render this payment will result in Citizen's refusal to process any further orders for access service, as provided in Section 2.1.8 of the NECA tariff and Section 2.1.8 of the Pacific Bell tariff 175-T." (Ex. 31.)

After receiving the June 8 letter, Sunde called Innes and asked him about Citizens' demands. Sunde testified that the attempt to reduce Westcom's monthly bill by $6,000 to $8,000 per month by changing its FGB trunks to originating only was refused, even though Sunde "offered to pay the $1500 or so [in] nonrecurring charges to cover the installation at that point in time." As a result, Citizens continued to bill Westcom "as much as possible." (5 R.T. 394-395.)

Innes testified that he decided to reject Westcom's ASRs because:

> "Our tariffs, both the NECA tariff and the 175-T tariff, which were then in effect permit the company to either deny service or refuse to process any new requests for service for any customer who fails to meet payment arrangement as described in the tariff.
>
> "Westcom had failed to do or to meet those requirements for several months. Therefore, to protect the interests of the company and its customers, we refused to process any further service orders for Westcom." (7 R.T. 553-554.)

Although Sunde testified that he "offered to pay the $1500 or so" in non-recurring charges, Innes does not recall Sunde ever offering to pay the non-recurring costs associated with the ASRs. (5 R.T. 394; 7 R.T. 554; Ex. 75, p. 22.)

As discussed in the C.92-03-049 discussion, the obligation to change the PIU rests with the IEC. If the PIU reflects intrastate usage, then the billing for the service must reflect the appropriate percentage of intrastate use. Thus, Citizens' acceptance of the PIU change was consistent with the PIU tariff provisions.

Citizens had the right to refuse Westcom's request to change its FGB service to originating only when Westcom failed to tender the deposit that Citizens demanded. Westcom had notice in late February or early March 1992 that Westcom's current or future service could be terminated and that a deposit could be requested. In June 1992, Citizens demanded a deposit of $23,390 in accordance with the tariff provisions. This deposit amount was not tendered to Citizens, and in accordance with its tariffs, Citizens refused to process Westcom's order.

Even if Westcom had offered to pay $1500 to $2000 to Citizens to change its FGB trunks from two-way to one-way, Citizens was within its rights under the tariffs to refuse to process Westcom's order because Westcom's offer of $1,500 was less than the required deposit amount. Accordingly, we conclude that Citizens' refusal to process Westcom's request to change its FGB trunks to one-way, but its acceptance of the PIU change, was in accordance with its tariff provisions, and that Citizens did not subject Westcom to any prejudice or disadvantage.

Westcom's argument that it attempted to mitigate its FGB terminating usage liability by submitting its request to change its trunks to one-way, does not change our view of the deposit demanded by Citizens. Under the tariff, Citizens had the right to demand a deposit. Westcom's failure to tender the deposit authorized by tariff should not operate in a manner which mitigates Westcom's liability for FGB terminating usage.

We next address Westcom's argument that Citizens' refusal to change its FGB trunks from two-way to one-way was "unconscionable" and "an unlawful adhesive contract,"and that the tariff provisions were unjust, unreasonable and unlawful. (Westcom Opening Brief, pp. 5, 62-64.) Westcom's arguments ignore the fact that the laws pertaining to tariffs apply, and that the contract issues which Westcom raised with regularity in its opening brief, do not apply to filed tariffs.[69] Since the tariff has the force and effect of law, it is the tariff, and not contract law, which governs the terms and conditions of service.[70] (Trammell v. Western Union Telegraph Company (1976) 57 Cal.App.3d 538, 549-551; Dyke Water Co. v. Public Utilities Commission (1961) 56 Cal.2d 105, 123; Dollar-A-Day Rent-A-Car Systems, Inc. v. Pacific Telephone (1972) 26 Cal.App.3d 454, 457.) As the courts of this states have held, tariffs are strictly construed and no understanding or misunderstanding of either or both of the parties is enough to change the rule. (Transmix Corp. v. Southern Pacific (1960) 187 Cal.App.2d 257, 264.)

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[69] The two California Supreme Court cases and the Commission decision cited by Westcom at pages 64 and 65 of its opening brief are not applicable to the issues before us. In those two Supreme Court cases, the issues involved tariff language which limited liability. (See E. B. Ackerman Importing Co. v. City of Los Angeles (1964) 61 Cal.2d 595, 597-598; Waters v. Pacific Telephone Co. (1974) 12 Cal.3d 1, 5-6.) There are no issues before us that concern a tariff provision limiting liability. In the Commission decision cited by Westcom, it involved an unclear tariff provision. (See 6 CPUC2d 432, 437.) Westcom has not alleged that Citizens' deposit requirement was unclear. Nor do we find that Citizens' tariff provision regarding deposits was unclear.

[70] Westcom's complaint did not have the number of signatures required by § 1702 to challenge the deposit tariff requirement as unjust or unreasonable. In addition, Westcom could have challenged Citizens access tariffs at the FCC or at this Commission when Citizens initially tendered its tariffs for filing. Therefore, we end our inquiry into whether the deposit requirement was just or reasonable.

As discussed above, Citizens actions were in accordance with the tariff. A deposit can be required of a carrier with a proven history of late payments "prior to or at any time after the provision of a service." The deposit requirement, which was contained in the tariffs that Citizens subscribed to, applied to all access service customers, and did not single out Westcom. Thus, Westcom's adhesion and unconscionability arguments must fail.

f. Credit Check of Westcom's Customers

Westcom alleges that its customers were asked for credit information. The only evidence that Westcom provided on this issue is contained in the last page of Exhibit 27. The pertinent portion of Exhibit 27 states:

> "When Citizens finally agreed to change me to ComSystems they required full credit information prior to changing my long distance carrier. They asked for Social Security No., Drivers license No. and other information."

Susan Hughes, the Business Office Manager for Citizens, testified both in her deposition and at the hearing that when a customer makes contact with Citizens' business office, the customer's history screen is accessed. If there is no current credit history, or it appears that the credit history has not been updated for some time, the service representatives are to obtain current customer information. That is true for any contact with the customer billing office, irrespective of whether it has to do with any PIC change or not. (7 R.T. 616-617; Ex. 114, p. 27.)

Based on the evidence presented, we conclude that Citizens did not disadvantage or prejudice any Westcom customer by requesting credit information from the customer.

g. 700 Dialing

We turn next to Westcom's allegations regarding 700 service. Two issues have been raised about 700 service. The first issue is that "Innes demanded payment of a deposit of $23,390. and Westcom's balance of $34,478.59 in full prior to providing 700 service to Westcom." (Westcom Opening Brief, p. 49.) Westcom cites Exhibit 42, the June 8, 1992 letter from Innes to Sunde, in support of this assertion. Westcom points out that Innes stated in this exhibit: "I have been advised that 700 service can be made available if properly ordered and your account is brought into compliance with tariff provisions regarding payment arrangements and deposits." The letter also demanded an ASR, and that Citizens would not be able to advise Sunde about the timing of the 700 availability until Westcom submitted a completed ASR. Westcom also points out that in Citizens'Answer to Westcom's First Amended Complaint, Citizens admitted that Westcom's request for 700 service was refused. Westcom contends that 700 service is automatically included as part of FGD service, that Innes' letter constituted "an unlawful, extortionist demand, and that Innes' later testimony contradicted Citizens' earlier position.

The second 700 service issue concerns alleged blocking of this service by Citizens. This 700 dialing problem first came to Citizens' attention on or about June 6, 1992. Although none of the parties made Westcom's June 6, 1992 letter to Citizens an exhibit in this proceeding, Innes' letter of June 8, 1992 (Exhibit 42) and his testimony described what Westcom had requested in the June 6, 1992 letter. Innes' testified as follows regarding Sunde's letter of June 6, 1992:

> "Then we received in a letter dated June 6th, addressed 'Dear Sir,' the assertion that Citizens is not currently passing 700 numbers through your switch in Susanville, parenthetically, and probably Elk Grove as well, close parens. This is required for equal access customers to identify their long distance carrier. Please program that capability as soon as possible." (7 R.T. 555.)

Innes testified that this letter was received shortly after a "flurry of activity" following the hearing in C.92-03-049. Citizens first heard from Sunde asking for a change in his trunking. Citizens then heard from Sunde regarding a change in his PIU. Then Sunde's letter of June 6, 1992 was received. (7 R.T. 554-555.)

Innes testified that when Citizens investigated the letter, it found that the 700 service was functioning perfectly in both Elk Grove and Susanville. When Innes received a telephone call from Sunde regarding his request to provide Westcom with 700 service, Innes knew that Westcom already had 700 service and that it was operating properly. Innes further testified:

> "Due to the flurry of activity and, I guess, my concern that we had an allegation here that was untrue, that 700 was not working properly, I asked Mr. Sunde to redo his request in writing in the form of an ASR, that it could be properly processed and examined by the company.
>
> "In the letter back to Mr. Sunde, I also reminded him that I had previously sent a letter to him demanding a deposit for $23,000 and that 700 service was not be be used for intraLATA calling." (7 R.T. 555-556.)

The other 1 + 700 dialing problems came up during the hearing. Exhibit 27 is a collection of "trouble reports" that Sunde testified that he

compiled as a result of conversations he allegedly had with Westcom's customers. Some of these trouble reports were signed by the customers, and others were not. (5 R.T. 375-378, 380-382.) Five of the trouble reports specify problems with 1 + 700 dialing.

The 700 dialing problem was also addressed during the hearing by Allen Royce, a witness called by Westcom. He testified that around November 11, 1992, he experienced difficulty dialing long distance numbers. He was using the "speed dialing" on his phone to place the call. Exhibit 28 is the "Trouble Report" that Westcom apparently recorded in connection with the problems encountered by Royce. (5 R.T. 350-360.) Exhibit 28 described problems with 1 + 700 dialing, that long distance calls could not be made, that the 10266 (Com Systems) dialing was blocked with a message of "916257," and that when 10288 (AT&T) plus the number was dialed, the call went through. Royce also testified that he spoke to someone from Citizens that afternoon, who said he was a switch operator, and that he had inadvertently interrupted Royce's service, and asked him to try it again. After that call, Royce's phone worked properly. (5 R.T. 355-356.) Exhibit 28 also reflects that Citizens corrected the problem.

Some of the 700 dialing problems contained in Exhibit 27 appear to have occurred around the same time that Royce was encountering problems, and which were brought to Citizens' attention by Westcom in Exhibit 105. (5 R.T. 382.)

We first address Westcom's contention that Exhibit 42 was nothing but an "unlawful, extortionist demand" since 700 dialing was already part of Westcom's FGD service.

The evidence is clear that 700 dialing is included as part of FGD service. In Citizens' answer to Westcom's First Amended Complaint, which was filed December 30, 1992, Citizens admitted at page 6 that:

> "CUCC has included 700 dialing as a part of its FGD service and at no time has 700 dialing been blocked in CUCC's system. Any inability by Westcom's customers to dial 700 is the result of flaws in Westcom's system, not CUCC's.

Innes' had his deposition taken, and he also testified at the second hearing. In his testimony, he acknowledged that 700 dialing was part of FGD service. (7 R.T. 555-556; Ex. 75, p. 14-15.) This testimony is consistent with Citizens' answer to Westcom's First Amended Complaint. Ottaway's deposition also corroborates Innes' understanding. Ottaway stated that Innes had told him that Westcom was attempting to order 700 service, and that Westcom already had that service but didn't realize it. (Ex. 2, pp. 27-28.)

Westcom's argument that Exhibit 42 subjected Westcom to an unlawful demand by requiring a deposit, is without merit. Out of concern that Westcom was alleging that 700 dialing was not working, Innes asked Westcom to submit an ASR. Although Citizens could have written its letter differently to recognize that 700 dialing was already available, the demand for a deposit was not unlawful, as discussed earlier in this decision.

Nor are we persuaded by Westcom's argument that Exhibit 42 demanded that Westcom's balance of $34,478.59 be paid in full. There are two sentences in Exhibit 42 which address the "customer deposit" and "payment arrangements and deposits." Those sentences state:

> "For this reason, I refer you to the NECA tariff for ordering instructions and my letter of June 8, 1992, for our request for customer deposit which will be necessary due to Westcom's continuing refusal to pay Citizen's bills.

> "I have been advised that 700 service can be made available if properly ordered and your account is brought into compliance with tariff provisions regarding payment arrangements and deposits." (Ex. 42.)

The NECA and PacBell tariffs regarding deposits are located under the general heading of "Payment Arrangements and Credit Allowances" and the subheading of "Payment of Rates, Charges and Deposits." (See NECA FCC No. 5, § 2.4; PacBell No. 175-T, § 2.4.) The reference in the second sentence quoted above to "payment arrangements and deposits" appears to be a summary and combination of the general heading and subheading of the applicable tariffs. Although the second sentence quoted above could be read to imply that "payment arrangements" means the disputed amounts, the first sentence quoted above puts Exhibit 42 into perspective. When the deposit "letter of June 8, 1992," Exhibit 31, is read in conjunction with Exhibit 42, it is clear that Exhibit 42 was only referring to a deposit of $23,390 and not to Westcom's balance of $34,478.59 in full as asserted by Westcom.

Even though Exhibit 42 suggests that 700 service would not be made available unless a deposit was tendered, Westcom was not subjected to any prejudice or disadvantage under § 453 as a result of Citizens' demand for a deposit. That is because Westcom's 700 service was functioning perfectly, according to Innes.

The alleged blocking of Westcom's customers from using 700 dialing is based upon Westcom's letter of June 6, 1992, and several pages in Exhibit 27. Exhibit 27 is a "combination of trouble reports" that Sunde filled out when he talked to the people listed on the reports. With the exception of James Jeskey, no depositions were taken of the persons whose names appear in Exhibit 27. (5 R.T. 375, 380; See Ex. 17.) Westcom argues in its opening brief that

the last page of Exhibit 27 shows that Robert Meacher, a Westcom customer, had called Citizens on or about September 16, 1992 because the 700 number was not working.[71] According to that document, "Citizens told me that the California Public Utilities Commission had authorized Citizens to block the 700 number due to pending litigation."

Additional evidence of the 700 dialing issue can also be found in Exhibit 2. During the deposition of Ottaway by Sunde, Exhibit D was used as an exhibit in Ottaway's deposition. Exhibit D is a Citizens' "Incident Report" which shows that on November 11, 1992, Sunde called Mark Shine of Citizens to report blocking of 700 and 10266 calls. 266 is Com Systems' PIC number, which Westcom used after Citizens terminated Westcom's access services. According to Exhibit D, Citizens ran a test on November 11, 1992 by using a telephone with a Com Systems 266 PIC. When the number 1+ 700 + 555 + 4141 was dialed, "the call routed to ComSystems correctly and the ComSystems greeting was received." Additional test calls were made the following day.[72] When calls were placed by dialing 10266 + an interLATA call, Citizens reached a message which stated: "Welcome to ComSystems, please dial 1+ 800 + XXX + XXXX to establish service." When attempts were made to dial 10266 + an intraLATA call, it resulted in a recorded announcement at the Susanville tandem (916)257. The Incident Report concludes by stating:

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[71] As noted on the top of that document, this call to Citizens took place after Westcom's access service had been terminated by Citizens, and Westcom was using "its new network, described as Com Systems 266."

[72] It appears that Exhibit D of Exhibit 2 was Citizens' investigation into the problems that Royce and others were experiencing on or about November 11, 1992.

> "These test call results indicated that on an intraLATA call, the customer will get a recorded announcement when dialing 10266 + because Interexchange carriers are not currently allowed to carry intraLATA traffic. Dialing 10266 + for interLATA calls is not blocked at the Susanville tandem, but reaches a recording at ComSystems facility."

Innes testified that after receiving Westcom's June 6, 1992 letter, Citizens investigated Westcom's 700 dialing allegation, and found it to be working in both Elk Grove and Susanville. (7 R.T. 555.) This was also supported by the testimony of Raymond Harrell, who stated that Citizens could not selectively block 700 access to individual customers wanting to use 700 access.

Harrell also testified that he undertook a study of 700 calling on behalf of Citizens. Harrell asked Citizens' MIS department to obtain some data from 459 PIC customers regarding their use of 700 dialing. A 459 PIC customer is a Westcom customer. Harrell randomly selected a date. Exhibit 61 is a list of the calls that the MIS department generated in response to Harrell's request. The first record shown on Exhibit 61 had the date of July 10, 1992, and the last record had the date of July 16, 1992. Harrell testified that Exhibit 61 shows 200 calls being made during that timeframe from telephone numbers within Citizens' territory using the 700 number to make intraLATA calls. (7 R.T. 602-603.)

All of the evidence mentioned above suggests that Citizens was not blocking Westcom's customers from 700 dialing. Although some of Westcom's customers may have experienced 700 dialing problems around the early part of June 1992, around September 16, 1992, and November 11, 1992, the evidence is insufficient to allow us to find that Citizens blocked 1 + 700 dialing

while Westcom was still an access service customer, and after Westcom started to use Com Systems' 266 PIC.

Citizens contends that the blocking of the 700 dialing was a result of the use of autodialers by Westcom's customers. A former Westcom employee, Arthur Scott, was called to testify on Citizens' behalf. He worked for Westcom for about 18 to 20 months, and his employment ended around March 1992. Scott has over 15 years of telephone experience. While employed by Westcom, he was responsible for installing and maintaining auto dialing equipment. The autodialers were used to route 1 + calls to Sunde's switch. Scott testified that the autodialers that he worked on had the ability to activate themselves to dial the access number to Sunde's switch after a 1 + call is dialed. Both 1 + 10 and 1 + 7 calls were routed to call Westcom's switch. Scott testified that a 1 + 7 call would be an intrastate as well as an intraLATA call. Scott testified that Sunde never told him not to program the autodialers so that they would not be able to pass the digits necessary for an intraLATA call. Scott's rough estimate is that "around 70 percent" of Westcom's customers had autodialers in the 1991 to 1992 timeframe. He was also "sure that almost every business customer, especially in the over-$100-bill-a-month category, would have had a dialer installed." (7 R.T. 586-588.)

Scott was asked to describe what would happen if Westcom's access service was terminated, and one of the preprogrammed autodialers was still in use at the time that Westcom's customers were switched over to Com Systems. Scott replied:

> "Well, the dialer would still see the 1, and it would seek to route it to Mr. Sunde's switch, and of course be denied because there was no connection between, let's say, Citizens and Mr. Sunde's switch, but the dialer would still be trying to send it there. So therefore, the call could not be completed."

Scott went on to state that even if a PIC change was made to a customer, the autodialer doesn't care about the PIC, and it would still dial the access number. In addition, if a customer tried to dial the PIC number (10XXX) to access the long distance carrier, the autodialer would recognize the "1" and activate and try to send the call to Sunde. (7 R.T. 589-590; See 8 R.T. 656.)

On rebuttal, Sunde disputed Scott's estimate of the number of Westcom customers who had autodialers. Sunde stated that only about 12 to 15% of its customers had autodialers. (8 R.T. 653, 656; See 6 R.T. 470.) Sunde also denied that he provided any special assistance to Scott to program the autodialers for intraLATA purposes. Sunde also stated that he personally did "not know how to program any of those dialers," and that the Westcom installers obtained "dialer programming instructions directly from the factory" to learn how to program the dialers. (8 R.T. 658.)

Instead of autodialers, Sunde states that he purchased hundreds of phones with memory for his customers, as shown in Exhibit 121. That exhibit shows that approximately 190 phones were purchased during the 1989 to 1990 timeframe. Sunde said that the customers used these phones to access Westcom's network. (8 R.T. 653-654.) Of the 10 Westcom customers that Citizens deposed, five of the ten testified that they did not have autodialers or equipment installed by Westcom. (See Ex. 17, p. 7; Ex. 18, p. 9; Ex. 20, p. 6; Ex. 21, p. 8; Ex. 25, p. 14.)

We do not find convincing Westcom's argument that the 700 blockage was caused by Citizens. The testimony shows that Citizens investigated the blocking allegations, and could not detect any problems with Citizens' equipment. The problem appears to have been with a Citizen "switch operator" as alluded to in Royce's testimony, or in the way in which Westcom's customers were trying to dial an operable access number, or an intraLATA call.

The evidence shows that of the ten Westcom customers who were deposed, three of the four business customers had autodialers with certain preprogrammed telephone number settings to access Westcom's switch. (See Ex. 19, pp. 10-12, 19-20; Ex. 22, pp. 11-13, 15; Ex. 24, pp. 8, 26-27.) Royce, another business customer of Westcom, also testified that he had an autodialer as well. (5 R.T. 352, 356, 360.)

The use of autodialers with the preprogrammed access numbers may have caused the blocking problems encountered by Westcom's customers when they started to use 1 + 700 dialing to make calls. Exhibit 60, which was mailed out by Westcom to "perhaps 20 or 30 or 40" of its customers described how customers could use 1 + 700 dialing to make intraLATA calls. (6 R.T. 462-464.) Exhibit 60, which is undated, appears to have been mailed out by Westcom prior to July 9, 1992. (See Westcom Answer To C.92-09-025, Exhibits H and I.) Exhibit 60 specifically references autodialers by stating:

> "The new 700 procedure now works in many areas and should work in all areas shortly. The end result of this new, easier dialing protocol is that auto dialers have now become obsolete and unnecessary. Westcom will begin removing all auto dialers very shortly." (Ex. 60.)

Exhibit 60 supports Citizens' contention that some of Westcom's customers were still using autodialers prior to July 9, 1992. Sunde's

testimony also reveals that Westcom began to reprogram the autodialers around the time frame when the cutover to Com Systems occurred in August 1992. Sunde also acknowledged that a customer could"have had certain difficulties making calls if the dialer had not been either removed or reprogrammed…." (6 R.T. 471-472.)

As for the problem experienced by Royce and others around November 11, 1992, Citizens appears to have investigated the problem and nothing wrong could be detected. It also appears that a Citizens' "switch operator" or repair person inadvertently turned off Royce's long distance service, but turned it back on in the afternoon.

We also note that Sunde's testimony regarding his lack of knowledge about programming the autodialers is inconsistent with other parts of his rebuttal testimony. Sunde testified that Westcom was in the remanufacturing business for autodialers, and once had 10,000 to 12,000 automatic dialers. According to Sunde, Westcom regularly sold dialers to other long distance carriers in the 1988 to 1991 timeframe. Sunde also sponsored Exhibit 124, which he explained are sample programming sheets which indicate how to bypass the autodialers. Sunde also testified about how the autodialers could be bypassed. (8 R.T. 655-657; 6 R.T. 488.) We find it difficult to believe that Sunde lacked the knowledge of how to program the autodialers when Westcom was involved in that kind of business, and supplied the programming sheets to show how the autodialers could be bypassed.

Based on all of the evidence presented on the 700 blocking allegation, we cannot conclude that Citizens blocked the 700 dialing for Westcom's customers during the June 1992 through November 1992 timeframe. Since the weight of the evidence shows that 700 dialing was available to

Westcom's customers and that there was no blocking by Citizens, Westcom did not suffer any prejudice or disadvantage as a result.

4. Events Related to the Cutoff of Service

a. Introduction

We now turn to certain events which occurred after the issuance of D.92-08-028. These events concern the requirements of D.92-08-028, the letter which Westcom sent to its customers informing them about the merged network, the submission of the LOAs by Com Systems to Citizens, the processing of the LOAs, and the information that was given out by Citizens' employees to Westcom's customers.

The events which took place after the issuance of D.92-08-028, and which are the subject of the allegations in C.92-09-006 and C.92-09-025, could have easily been avoided had Westcom tendered all of the disputed sums to either the Commission or to Citizens pending a final decision. Westcom elected not to do so. The events which occurred afterwards need to be considered in light of Westcom's choice.

b. Westcom's Violation of D.92-08-028

Westcom took the position in C.92-03-049 that it could withhold all of the disputed monies from Citizens, while it continued to receive switched access service. On the final day of hearing in C.92-03-049, the ALJ heard argument on why an interim decision should not issue on whether Citizens could terminate service to Westcom pending the resolution of the underlying complaint, or whether Westcom could continue to withold the disputed amounts while the provisioning of access services continued. Westcom opposed the issuance of an interim decision on the grounds that there was no tariff requiring that the disputed amounts be deposited with the Commission or paid to Citizens.

The ALJ ruled that an interim decision should issue, and two months later, D.92-08-028 was issued. (3 R.T. 142-143, 147-149.)

In D.92-08-028, the Commission addressed Westcom's argument that it had a right to withhold payment of the disputed amounts and have its access services continued. The Commission stated:

> "An absurd and unreasonable result would occur if the Commission were to interpret Section 2.4.1(B)(3)(b) as providing that service should remain in effect during the period that disputed monies are being withheld by the customer. Such an interpretation would mean that the access service provider remains obligated to provide service for an indefinite period of time while the customer could withhold payment and still receive service. The customer would be generating revenues from its customers who subscribed to its interLATA service, but the local exchange carrier who provides the access service would not see any of those revenue paid over to it for providing the access service. This could lead to a situation where the interexchange carrier disputes the access service charges every month, withholds payment, and continues to receive access service without any threat of having its service terminated. That means the access service provider would have to bear the cost of providing the service to the nonpaying customer. Such a result is absurd and unreasonable." (D.92-08-028, pp. 13-14.)

D.92-08-028 gave Westcom the option of tendering the monies in dispute to Citizens pending a final decision in C.92-03-049, or to deposit the disputed amounts with the Commission. In order to protect Westcom's customers, D.92-08-028 stated:

> "As a public utility subject to the jurisdiction of this Commission, and to protect Westcom's customers from suffering undue harm, we will require Westcom to send a notice within seven days of the mail date of this

> decision to all of its California customers in Citizens' service territory if it decides not to pay the disputed amount to the Commission or to Citizens." (D.92-08-028, p. 16.)

D.92-08-028 ordered Westcom to send the following notice to its customers if Westcom decided that it would not pay the disputed amounts:

> "Dear Customer:
>
> "Due to a billing dispute with the access service provider, Westcom will be unable to process your long distance calls beginning [date fourteen days after the mailing date of this decision]. You should make arrangements with another long distance carrier before this date so that your long distance service will not be interrupted.
>
> "We apologize for any inconvenience that this may cause you." (D.92-08-028, p. 16.)

Westcom decided not to deposit the disputed amounts with the Commission or to tender the disputed amounts to Citizens. Instead of preparing the notice in the manner prescribed by D.92-08-028, Westcom prepared its own notice which stated:

> "NOTICE
>
> "TO: Westcom customers located in Citizens Utilities areas
>
> "Westcom is please to announce that Westcom has merged its transmission network into the network of a major Westcoast carrier. In addition to obtaining some cost efficiencies Westcom will now be able to offer many new, enhanced telecommunications services, which will be announced in the near future. An additional important advantage is that calls may now

> be routed automatically without the need for autodialers or programmed phones.
>
> "Westcom has instructed Citizens Utilities to convert your equal access number(s) to this new network. Should a conversion charge of $5.00 appear on your Citizens billing please contact our office to obtain a credit.
>
> "Although Citizens has an obligation to process these equal access conversion orders promptly, we cannot assure you that they will do so. If you are unable to use Westcom, you may still place calls temporarily though AT&T by dialing: 10288 + area code + number. Westcom will issue credits for calls placed temporarily thru AT&T.
>
> "Should you desire to use TRAVELCARD service on the new network it will be necessary for you to call the office for assignment of a new TRAVELCARD authorization code. As previously, there is no additional charge for using this service, other than the cost of calls you make.
>
> "Please call our office at 1-800-662-8938 if you have any questions." (Ex. 46.)

Westcom's notice was undated, and according to Sunde, was mailed to its customers a few days prior to August 26, 1992. (6 R.T. 491.) Westcom and Sunde admit that D.92-08-028 required that Westcom's notice contain specific language, and that the notice that Westcom mailed "was not in the form prescribed by the Commission." (Westcom Answer To C.92-09-025, p. 2; 6 R.T. 440-441.)

Westcom asserts in its opening brief at page 1 that the Commission did not discuss the notice language in D.92-08-028 with Westcom,

and that the "Commission erred in requiring that particular text" be mailed to its customers. Sunde testified that he did not feel that D.92-08-028 took into consideration that it could operate as a switchless reseller, and that he felt that the Commission did not have the authority to order him to go out of business without first holding hearings.

We first address Westcom's argument that the Commission did not discuss the notice in D.92-08-028 with Westcom before the decision was issued. The Commission was under no obligation to discuss the notice or what course of action the Commission was planning to take with Westcom before D.92-08-028 was issued. Once the Commission adopted the decision, any perceived deficiency with the required notice should have been raised by Westcom in an application for rehearing. Regardless of Westcom's view of D.92-08-028, as a public utility subject to our jurisdiction, Westcom was obligated to "obey and comply" with D.92-08-028.[73]

At the close of the hearing in C.92-03-049, following the ALJ's ruling that an interim decision would be prepared, the ALJ made Westcom aware of its right to file for rehearing by stating:

> "I would note for Mr. Sunde's benefit that any decision issued by the Commission can be the subject of an application for rehearing, which is contained in the rules of the Commission." (3 R.T. 149.)

[73] Section 702 provides in pertinent part: "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission … or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

Westcom, however, failed to file an application for rehearing of D.92-08-028. (6 R.T. 441.) During the C.92-09-006 and C.92-09-025 hearings, and in its brief, Westcom took the position that it did not agree with D.92-08-028 and that the Commission had erred.

We are not sympathetic to Westcom's excuse "that due to serious time constraints" it did not have time to challenge the wording in D.92-08-028. (Westcom Opening Brief, p. 1.) Westcom ignores the fact that it could have avoided the cutoff of its access services on August 25, 1992 by simply tendering the disputed monies with the Commission or to Citizens pending a final decision. A deposit of the disputed amounts would have also allowed Westcom to avoid sending the required notice to its customers. D.92-08-028 clearly provided Westcom with this flexibility, but Westcom failed to exercise its available options. Westcom could have also filed an application for rehearing of D.92-08-028 or a petition to modify the decision, but failed to do so.

In D.92-12-038, the Commission discussed Westcom's assertion in its answer to C.92-09-025 as to why it was unable to appeal the notice language in D.92-08-028. The Commission stated in footnote 2 of D.92-12-038:

> "We are not persuaded by Westcom's argument that it did not have time to appeal the wording in D.92-08-028. Given the numerous filings that Westcom has made recently in several different proceedings, Westcom appears to have no problem in availing itself of the Commission processes."

Our view of Westcom's claim that it did not have time to file for rehearing of D.92-08-028 remains unchanged from D.92-12-038.

Since Westcom failed to apply for rehearing of D.92-08-028, its argument that the Commission committed legal or factual error in D.92-08-028

need not be addressed in this decision. Furthermore, this argument cannot be used by Westcom to justify its non-compliance with a Commission decision.[74]

Ordering Paragraph 5 of D.92-08-028 states:

> "If Westcom decides to withhold payment of any portion of the amount in dispute, Westcom shall send a letter to all of its California customers in Citizens' service territory within seven days from the mailing date of this decision. Such a letter shall use the same text as described in the discussion portion of this decision, and a copy of such letter shall be forwarded to the Telecommunications Branch of the Commission's Advisory and Compliance Division on the same date the letters are mailed to Westcom's customers." (D.92-08-028, pp. 19-20.)

Westcom's failure to tender the disputed amounts to the Commission or to Citizens triggered the operation of Ordering Paragraph 5 of D.92-08-028, i.e., Westcom was obligated to provide the notice set forth in D.92-08-028. Westcom and Sunde admitted that the notice (Exhibit 46) that Westcom mailed to its customers was not in the format required by D.92-08-028. We therefore conclude that Westcom failed to obey and comply with ordering paragraph 5 of D.92-08-028, and that Westcom's failure resulted in a violation of § 702.

Contrary to Westcom's argument that "the inherent affect (sic) of the Commission's text was to order Westcom out of business, without an

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[74] Section 1735 provides: "An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission by order directs."

investigation or public hearing in violation of Westcom's rights to due process," we note that Westcom had ample opportunity to avoid having to issue the notice. (Westcom Opening Brief, p. 1; 6 R.T. 440-441.) As mentioned earlier, Westcom chose not to deposit the monies, failed to comply with ordering paragraph 5 of D.92-08-028, and failed to file an application for rehearing of D.92-08-028.

In addition, based on the date (July 28, 1992) of the Reseller Agreement between Westcom and Com Systems in Exhibit 67, it appears that Westcom was contemplating its network merger about a month before Westcom's access services were cut off by Citizens. If indeed Westcom contemplated such an agreement in July, Westcom's excuse that it didn't have time to file for rehearing of D.92-08-028 seems even more tenuous. That is, if Westcom was planning to carry its customer traffic over Com Systems' network before D.92-08-028 was even issued, once the decision was issued, Westcom could have immediately applied for rehearing and informed the Commission of its plan to operate as a switchless reseller.

Prior to January 1, 1994, § 2107 provided for a penalty of "not less than five hundred dollars ($500), nor more than two thousand dollars ($2,000)" for each violation of a Commission decision or rule. (Stats. 1951, ch. 764, p. 2098, § 2107.) Westcom should be penalized $2000 for its failure to comply with D.92-08-028. However, since Westcom is no longer operating in California, we do not see much value in imposing a monetary penalty at this time for Westcom's violation of § 702 for its failure to obey and comply with D.92-08-028, or to revoke Westcom's CPC&N at this time. We will therefore suspend the imposition of a penalty upon Westcom for this violation, and deny Citizens' request to revoke Westcom's CPC&N. If, however, the circumstances decribed in the "Miscellaneous Issues" section of this decision arise, we will direct the staff

to take action to impose and collect the penalties from Westcom, and to open an Order Instituting Investigation (OII) as to why Westcom's CPC&N should not be revoked.

c. The LOAs

Westcom contends that when it merged its network with Com Systems, Westcom was simply acting as a switchless reseller. (Westcom Opening Brief, pp. 1, 52-53.) Sunde admitted, however, that at the time Westcom entered into the agreement with Com Systems, Westcom was "not a totally switchless reseller…." (6 R.T. 492.)

Citizens alleges in C.92-09-025 at page 7 that the "purchase and resale of originating switched access services is in direct violation of D.89-10-031 and D.84-06-113."

We do not believe that the resolution of the allegations in C.92-09-006 and C.92-09-025 are dependent upon whether Westcom was a switchless reseller. Rather, the issues that concern us are what effect Westcom's "merger" had on the provisioning of access services supplied by Citizens to Westcom, and what the merger meant to Westcom's customers.

In order for customers of Westcom to change to Com Systems' network, Citizens had to initiate a change in the PIC code for each customer. This change in PIC code represented a change in the IEC from Citizens' perspective, as demonstrated by the introductory language in § 2889.5 as it existed in August 1992: [75]

[75] The current version of § 2889.5 is found in the Statutes of 1996, chapter 358, as amended by the Statutes of 1998, chapters 671 and 672.

> "No interexchange telephone corporation, or any person, firm, or corporation representing an interexchange telephone corporation, shall authorize a local exchange telephone company to make any change in a residential telephone subscriber's presubscribed long-distance carrier until all of the following steps have been completed." (Stats. 1990, ch. 564.)

We are not persuaded by Westcom's arguments that the merging of the network was merely a change in routing, rather than a change in carrier. In addition, we are not persuaded by Westcom's argument that Citizens should have processed the changes before Citizens terminated services to Westcom on August 25, 1992.

The evidence shows that Westcom did not send any LOAs to Citizens. Sunde himself acknowledged that Westcom "submitted the letters of agency through Com Systems to Citizens Utilities to change our carriers to the new network." (6 R.T. 416.)[76] Com Systems then sent Citizens PIC changes for approximately 242 customers using the "Paper Input LOA." As shown in the handwritten notation at the top of Exhibit 51, Citizens received the LOAs from Com Systems on Friday, August 21, 1992. (7 R.T. 637-638.)

Sunde testified that Westcom did not send a written notice to Citizens informing it of Westcom's new network arrangements, nor did Westcom

[76] The second paragraph of Westcom's "Special Notice To Telephone Subscribers" also acknowledges that it was the "new carrier" who submitted the change orders to Citizens. (Ex. 54, p. 3.)

send a copy of Exhibit 46 directly to Citizens. (6 R.T. 447-448.)[77] This contradicts Westcom's statement in its undated notice (Exhibit 46) to its customers that "Westcom has instructed Citizens Utilities to convert your equal access number(s) to this new network." (See Exhibits 46, 47 and 104.)

Diane Campbell, a Citizens' employee, was responsible for processing the LOAs. She reviewed the LOAs, and questioned whether they were complete since the reseller's name was not on the form. She testified that normally the reselling company's name would be on either a cover sheet, or on each LOA. In addition, some of the LOAs had the date of "5-20-91" which made her question how current the LOAs were. Campbell then called Jimmy Howell at Com Systems, whose name appeared on many of the LOAs. Although she asked Howell for the name of the reseller, Howell could not provide her with the reseller's name. All of the LOAs indicated that the IEC was Com Systems with a PIC code of 266. (7 R.T. 636-640, 644-645; Exhibits 51- 53, 106; See Exhibit 114, p. 18.)

On Tuesday, August 25, 1992, Campbell testified that she received a telephone call from Denise Alexander of Com Systems. Alexander informed Campbell that the LOAs were valid, and that Com Systems was acting as the reseller. (7 R.T. 641.) After receiving this verification, Citizens immediately began to process the LOAs. The processing of the LOAs was

[77] We are not persuaded by Westcom's argument that Citizens had constructive notice of Westcom's new network arrangement as a result of a Westcom customer sending a copy of Exhibit 46 to Citizens. (See 6 R.T. 484.) The operation of a telephone network cannot be arranged by this kind of third party notice, especially when the LEC is an integral part of arranging the access services which enable the network to operate.

completed in the business office on August 26, and in the plant service center on August 27, 1992. (7 R.T. 642.)

The above sequence of events establishes that Com Systems was submitting the PIC changes on behalf of Westcom's former customers so that these customers could utilize Com System's network to place telephone calls. In order to merge Westcom's network with Com System's network, each of Westcom's customers had to be changed from Westcom's PIC number to Com System's PIC number of 266. (See Exhibits 52, 53, 57, 106.) Westcom was not asking Citizens to change its customers to Westcom's new network, but instead it was Com Systems who was requesting the change.

Despite Westcom's assertion that no carrier change was involved, two documents from Com Systems, Exhibits 52 and 103, suggest that a change in carrier PIC was needed. In the first paragraph of Exhibit 52, which is dated August 26, 1992, Com Systems wrote to Citizens: "please put the paper work in place to allow both business and residential customers to request ComSystems (Pic 266) for their long distance carrier." Exhibit 103, which is dated August 31, 1992, clarified that Westcom was still the long distance carrier of Westcom's customers, and that Westcom was a wholesale customer of Com Systems. Exhibit 103 also stated: "that there should be no problem in converting the Westcom customers over to a 266 PIC since there is no change in the long distance carrier to the customer." Thus, even though Westcom had entered into an agreement with Com Systems whereby Com Systems would carry Westcom's traffic, a carrier change did occur because a PIC change to Com Systems' PIC number was needed, even though Com Systems treated the end-user as Westcom's customer. (See Ex. 2, pp. 129-130; Ex. 112, p. 29; Ex. 113, 20-22, 27; Ex. 114, pp. 25-26.) Westcom also apparently asked some of its customers to call

Citizens and to request Com Systems as their LEC. (Ex. 22, pp. 7-8; Ex. 27, pp. 2, 10, 21, 23; Ex. 96, pp. 25-27.)

Although Westcom contends that this change in network routing did not result in a change in carrier, subsequent Commission decisions have held that:

> "A 'PIC change' is a request transmitted by an interexchange carrier in writing or electronically to a local exchange carrier to change a customer's presubscribed (or primary) interexchange carrier." (66 CPUC2d 286, 292, fn. 2; 67 CPUC2d 399, 405, fn. 1.)

That is exactly what happened when Com Systems submitted the LOAs to Citizens. The LOAs requested a change of IEC for each customer from Westcom to Com Systems. Although Westcom argues that this arrangement was a switchless reseller arrangement, Westcom overlooks the fact that when it merged its network, Westcom was converting from a facilities-based IEC, to a switchless reseller. This conversion resulted in a change in carrier when the PIC numbers of Westcom's customers were changed from Westcom to that of Com Systems. The ramifications of such a change are discussed below in the processing of the LOAs by Citizens, and in the slamming discussion.

Westcom asserts that Citizens should have processed the LOAs in a more timely fashion because the LOAs were received by Citizens prior to terminating Westcom's services on August 25, 1992. We are not persuaded by this argument.

Since Com Systems submitted the LOAs to Citizens, from Citizens' perspective, it was Com Systems who was the switched access customer. Citizens had legitimate questions regarding the dates on the LOAs, and the volume of customers being switched, and asked Com Systems to clarify

the validity of the LOAs. It was not until Tuesday, August 25, 1992, that Com Systems informed Citizens that the LOAs were indeed valid. Since a PIC change was needed to transfer Westcom's customers to Com Systems, it was the responsibility of Com Systems to verify the appropriateness of the PIC changes.

Campbell also testified that the processing of the LOAs, from their receipt in the business office, to making the changes known to the technical representatives who do the reprogramming, was a 24-hour process. (7 R.T. 641.)

Although Sunde testified that he spoke with someone at Citizens on August 25, 1992 about the LOAs, he could not remember who he spoke with. (6 R.T. 415-416, 446-447.) If indeed this contact occurred, it would have taken place on the 14th day after D.92-08-028 was issued, the same day that Citizens was authorized to terminate service to Westcom. This contact would have also been too late to have made any difference with respect to the cutoff of service, since Westcom did not tender the disputed sums to Citizens or to the Commission in the time allotted.

Westcom also argues that Citizens knew the LOAs were from Westcom customers when Campbell checked the computer screen for all of the LOAs. (Westcom Opening Brief, p. 78; See 7 R.T. 644.) However, this argument ignores the fact that it was Com Systems, and not Westcom, who submitted the LOAs to Citizens.

Based on the evidence presented, we conclude that Citizens did not delay or refuse to process the PIC changes at issue in this proceeding, and that no reparations are due to Westcom, Com Systems, or any of their customers.

d. Slamming Allegation

Citizens alleges in C.92-09-025 that Westcom changed the IEC of its customers without their authorization and verification when the LOAs were

submitted to Citizens for processing. This type of activity is commonly referred to as "slamming," i.e., the switching of a consumer's presubscribed long distance telephone carrier to another carrier without the consent of the consumer. (See Pub. Util. Code § 2889.5.)

Westcom contends that the letters which Citizens sent to Westcom's customers portrayed Westcom improperly, and that as a result, Westcom lost customers and was eventually forced out of business in Citizens' service territory.

The issue of whether Westcom slammed its own customers by submitting the 242 LOAs to Com Systems, for forwarding to Citizens, makes for an interesting debate. However, we do not have to decide in this decision whether all 242 customers were slammed because the evidence presented by both sides is insufficient for us to make such a determination. Of the 242 LOAs that were received by Citizens, only one Westcom customer testified at the hearing, and 11 other customers had their depositions taken. As discussed below, the depositions revealed some slamming on the part of Westcom.

In order to understand how we have addressed Citizens' allegation of slamming, and Citizens' letters to Westcom's customers, we believe it is necessary to understand the perspective of Westcom, Com Systems, Citizens, and the end-use customer.

Although there seems to have been some initial confusion on Com Systems' part,[78] Westcom and Com Systems both appear to have

[78] In Exhibit 57, a letter from Com Systems to Citizens, Com Systems appeared ready to take on new customers, and that its "new customer base in that area seems very patient."

contemplated that Westcom's merger of its network with Com Systems would still retain the current customer relationship between the end user and Westcom. Westcom and Com Systems apparently viewed that this customer relationship was still intact even though Westcom apparently told some of its customers to call Citizens and request Com Systems, and Com Systems had requested that the LOAs be changed to Com Systems' PIC code. (See Exhibits 27, 57, 67, 103; 5 R.T. 377.)

Citizens appears to have initially viewed the arrangement between Westcom and Com Systems as a change in carrier for each customer listed on the LOAs. Sometime between August 26 and August 31, 1992, Citizens apparently gained a better understanding of the arrangement that Westcom and Com Systems had entered into. (See Exhibits 57 and 103.)

As for the customers whose LOAs were submitted to Citizens, none of them apparently knew that PIC changes were being submitted on their behalf since Westcom did not obtain any authorization from those customers. Sunde testified that since they were Westcom customers to begin with, and there was no underlying change of carrier, Westcom did not seek their authorization. (6 R.T. 442-443; Ex. 18, p. 4; Ex. 23, pp. 18-19; Ex. 24, p. 9; Ex. 26, p. 7.)

Based on the depositions that Citizens took of some of Westcom's customers, some of the customers appeared willing to retain Westcom as their IEC, while others wanted to switch to another IEC. The depositions also revealed that prior to August 25, 1992, some of Westcom's former customers had already selected an IEC other than Westcom or Com Systems. These customers were James and Linda White, Greg Short, Troy Todd, and Christine Geffre. With Com Systems' submission of the LOAs to Citizens, these customers were switched to Com Systems/Westcom without the consent of the customers. (Ex. 18, pp. 4-5, 10; Ex. 23, pp. 10, 18-19; Ex. 24, pp. 6, 8, 25; Ex. 26, pp. 5-7; Ex. 92.)

The company that Sue Cady worked for also had its IEC switched to Com Systems without their consent when a Westcom employee reconnected the autodialer that her company used to use before switching to AT&T. (Ex. 19, pp. 10-12, 19-20; Ex. 91.)

Sunde testified that slamming "happens all the time," and that Westcom slammed these customers inadvertently and did not do it on purpose. (6 R.T. 483-484.) Sunde's testimony is not an excuse for the slamming which occurred.

We find that Westcom switched the IEC of five customers without their authorization. Pursuant to § 2107, we shall impose a penalty of $1000 for each slammed customer. However, we will suspend imposition of the slamming penalties. Should the circumstances addressed in the "Miscellaneous Issues" section of this decision arise, the Commission will lift the suspension and take action to impose and collect the penalty of $5000 for Westcom's slamming.[79]

We next turn to the letters which Citizens mailed to Westcom's customers on August 27, 1992 (Ex. 101) and September 1, 1992 (Ex. 102). Westcom contends that:

> "These documents clearly show that Citizens made serious efforts to persuade Westcom's customers that they had other alternatives other than to use Westcom." (6 R.T. 414-415.)

Exhibits 101 and 102 cannot be judged in isolation. Rather, those two exhibits must be viewed alongside Exhibits 46 and 54. Exhibit 46 was sent

[79] In D.98-12-075, the Commission adopted criteria to consider in determining the appropriate fine. Since the slamming occurred prior to D.98-12-075, we have not discussed the fine criteria in this decision.

out by Westcom to its customers on or about August 25, 1992. (6 R.T. 491.)[80] The "Special Notice To Telephone Subscribers," which appears on the third page of Exhibit 54, appears to have been mailed out by Westcom to its customers around the August 27, 1992 timeframe. (6 R.T. 457-458.)

Exhibit 101 was an August 27, 1992 notice that Citizens mailed to Westcom's customers. This notice was responding to Westcom's Exhibit 46. Exhibit 101 sought to clarify the information contained in Exhibit 46. Exhibit 101 states in pertinent part:

> "Recently, you may have received a notification from Westcom regarding a change in your long distance carrier choice. Some of the information contained in this letter is incorrect. Westcom is no longer a long distance carrier in Citizens territory.
>
> "Citizens can only change your choice of carrier with specific instructions from you directly or through a letter of agency which you have sent to your new long distance carrier. If you wish to change your carrier choice, please contact our Business Office. We will be happy to establish long distance service for you with any carrier you choose, however Citizens will no longer be able to offer Westcom Long Distance as an option.
>
> "Additionally, Citizens is unable to offer you the 'credit' referred to in the Westcom notice. Any refund due must be obtained directly from Westcom." (Ex. 101.)

As we explained earlier, D.92-08-028 authorized Citizens to terminate Westcom's access services. Once Citizens terminated these services on

[80] The pertinent language of Exhibit 46 was quoted earlier in the section entitled "Westcom's Violation Of D.92-08-028."

August 25, 1992, Westcom was no longer an access service customer of Citizens, and therefore could no longer be selected as a valid IEC option. Thus, Exhibit 101 did not portray Westcom unfairly.

Exhibit 102 was mailed out by Citizens to correct or clarify "factual errors" in the special notice (Exhibit 54) that Westcom mailed to its customers. The special notice found in Exhibit 54 states in pertinent part:

> "In March of 1992, Westcom … filed a complaint against Citizens … with the … Commission…. In this complaint Westcom alleges abusive, discriminatory and illegal business practices and billing practices.
>
> "Realizing that we could no longer do business with Citizens, Westcom began to merge its network with a large, Westcoast carrier. This new carrier submitted change orders to Citizens to effectuate this change, however, Citizens has refused to process those orders. Westcom considers this refusal by Citizens to be improper.
>
> "Citizens has also informed many Westcom customers that Westcom is 'out of business.' This is not true -- Westcom is still in business and will remain in business in Citizens areas, much to their dissatisfaction!
>
> "Westcom urges you to write and complain about your inability to make long distance calls through Westcom's new, assigned carrier." (Ex. 54, p. 3.)

Exhibit 102 states in pertinent part:

> "It has come to our attention that you may have received a special notice from your long distance carrier, Westcom…. That notice contained factual errors which Citizens believes should be corrected or clarified.

> "During March 1992, Westcom did, indeed, file a … CPUC Complaint containing the allegations cited in the special notice. However, to date, none of the Westcom complaints have been upheld by the CPUC. Instead, on August 11, 1992, the CPUC issued an interim order authorizing Citizens to disconnect Westcom's access service due to Westcom's non-payment of rightfully rendered bills.
>
> "In the same order the Commission urged Citizens to delay service disconnection for two weeks to allow Westcom time to notify its customers. The order also directed Westcom to notify its customers of possible service termination and to seek another long distance carrier. Westcom did not issue the customer notice as specifically required by the CPUC. Nor did they comply with the requirement that the notice be issued on the date specified by the CPUC. When no payment was received from Westcom, and after a delay of two weeks, Citizens terminated Westcom's access services on August 25, 1992.
>
> "In the past few days, Citizens has received incomplete letters of agency requesting that many Westcom customers be moved to Com Systems, another long distance carrier. Citizens is processing those requests but has some concerns regarding their origin and legality.
>
> "It is IMPORTANT THAT YOU KNOW YOUR RIGHTS. The rules governing carrier changes stress that such changes should never occur without the knowledge and consent of the customer. If you have any questions aobut your right to freely choose your long distance company, please call Citizens' business office." (Ex. 102.)

Also attached to Exhibit 102 was an explanation of how an end use customer could select the IEC of their choice.

In our opinion, Exhibit 102 did not portray Westcom unfairly. All of the information contained in Exhibit 102 is consistent with D.92-08-028, as well as the evidence presented in these proceedings. As for Westcom's contention that Exhibits 101 and 102 were designed to persuade its customers to choose an IEC other than Westcom, we do not agree. Citizens was authorized to terminate access services to Westcom. Once service was terminated, Westcom was no longer a valid IEC choice for end-use customers. In addition, Citizens was clearly within its rights to advise end users of their freedom to select the IEC of their own choosing.

Westcom's allegation that it lost customers, and was forced out of business as a result of Exhibits 101 and 102, are issues which this Commission does not have jurisdiction over. The type of injuries which allegedly resulted are not reparations, but rather are in the nature of damages, which this Commission has no authority to adjudicate.

e. Information Provided by Citizens' Service Representatives

(1) The Availability of Com Systems as an IEC Choice

Westcom alleges that Citizens' service representatives made several misrepresentations to customers of Westcom around the time Citizens terminated access services to Westcom, or shortly afterwards.

The first misrepresentation which Westcom asserts Citizens engaged in was that it told callers that Com Systems was not available as an IEC choice. Sunde testified that Westcom was not aware until August 25, 1992, that Com Systems had previously indicated to Citizens that they would only accept business customers within Citizens' service territory. (6 R.T. 451-452.)

The evidence presented at the hearing suggests that prior to August 25, 1992, Com Systems had only asked to accept business customers. Exhibit 68, the "Allocation Participation Form" dated February 6, 1991, shows that Com Systems would only accept business customers from the four Elk Grove offices of Citizens. Exhibit 57, a letter from Com Systems to Citizens dated August 26, 1992, also indicates that Com Systems used to only accept business customers, but was now requesting that residential customers, as well as business customers, be allowed "to request ComSystems (Pic 266) for their long distance carrier." This is also supported by the attachment to Exhibit 114, which is a memorandum dated August 26, 1992 to S.K. Hughes from M. Youmans. That memorandum states that the Com Systems information in the CRIS manuals should reflect that Com Systems has service in the Susanville, Burney and Elk Grove tandems, and that any customer, business or residence, "can PIC their long distance service from any exchange served by these offices." This is also substantiated by the attachment to Exhibit 114 which is dated August 26, 1992, and states "Read Now" at the top. Hughes testified that when she got a copy of Exhibit 57 from Youmans, she immediately prepared a memorandum ("Read Now" attachment to Ex. 114) for the business office representatives so that customers could select Com Systems as their IEC choice. (7 R.T. 615-616; Ex. 114, pp. 19-20.)

Westcom contends in its opening brief at pages 78 to 79 that Citizens "refused to produce the allocation form for the Susanville area." Westcom argues that the lack of a document similar to Exhibit 68 for the Susanville area suggests that Com Systems "most likely" had business and residential service in the Susanville area prior to the cutoff of access service. We are not persuaded by Westcom's argument. First of all, there is nothing to suggest in the record that Citizens refused to produce the allocation form for the

Susanville area. Second, Westcom did not cross-examine the Citizens' witness about the lack of an allocation form for the Susanville area. (See 7 R.T. 614, 621-623, 626.)

The weight of the evidence suggests that until August 26, 1992, Com Systems was willing to accept only business customers. (See Exhibit 57, and Attachments to Exhibit 114.) Thus, callers who may have contacted Citizens on August 25, 1992 about the selection of Com Systems as an IEC, might have been told that Com Systems was not available as a choice. When Citizens learned of Com Systems' willingness to accept residential customers, Citizens' service representatives were informed of this, and Com Systems was made available as an IEC choice on August 26, 1992. (7 R.T. 615-616; Ex. 96, pp. 25-27.)

(2) Informing Callers that Westcom Was Out of Business

The second misrepresentation which Westcom alleges that Citizens' service representatives engaged in, is that they told some of the customers who called that Westcom was out of business.

Westcom contends that the depositions of the following four customers demonstrate that Citizens told these customers that Westcom was out of business: Debbie Dean, Irene Joseph, Richard Rose, and Randy Falstad.[81] The depositions of Dean, Joseph, and Falstad demonstrate that when they called Citizens, they were told by a Citizens' employee that "Westcom was out of business," or that Westcom was "going out of business," or "There is no such

[81] In the deposition of Rose, he stated that it was his wife who made the call to Citizens,and that she was told that "Westcom had gone out of business, or whatever the language they used." (Ex. 25, pp. 6-7.)

company as Westcom." (Ex. 21, pp. 4-5; Ex. 22, pp. 7, 16, 19, 22; Ex. 96, pp. 21-22.) Westcom also relies on 11 signed and unsigned statements that Sunde wrote down when Westcom's customers called Westcom. Although these statements state that they were told by Citizens that Westcom had gone out of business, none of these customers had their depositions taken, nor did they testify during the hearing. (Ex. 27, pp. 1 (Doyle Realty), 4 (Azevedo), 5 (Eagle Lake Resorts), 6 (Strassburg), 9 (Heard Realty), 12 (Mike's TV Repair), 16 (Feather Publishing),[82] 17 (Lenox), 18 (Gerlach), 19 (Morgan), 21 (Genesee Store.).)[83]

Westcom also asserts that the attachment to Exhibit 114, which is entitled "Read Now," demonstrates that customers of Westcom were told that Westcom was out of business. That attachment states in pertinent part:

> "You are not to be guided in any way through conversations to admit knowledge of Westcom's financial condition or ability to provide service. Some customers have been told that Westcom is bankrupt. Information given out, whether right or wrong, could jeopardize legal proceedings currently in progress between Westcom and Citizens Utilities.

[82] Citizens' records show that when Strassburg spoke with Citizens, he was advised by Citizens that Westcom was no longer in service and that the customer would need a new carrier. When Citizens spoke to Eve of Feather Publishing on August 25, 1992, she claimed that Citizens had indicated that Westcom was out of business. When the Citizens' representative asked Eve if she actually spoke with a Citizens' representative about this, Eve replied "no," and stated that she had just heard this. (Ex. 85; 7 R.T. 619-621, 623-624.)

[83] The statement of Mike's TV Repair states that he was told that "Westcom is no longer offering long distance service in this area."

A. Reminder from special memo from Anita Arsenault dated August 21, 1992:

1. Inform the customer: 'Your long distance carrier is no longer in service, you will need to select another carrier for your long distance service.'

2. Under no circumstance should these customers be informed why Westcom is no longer in service. If the customer asks why the carrier is no longer in service, you should respond with 'I do not know,' or you may refer the customer to Lori at Westcom at 1-800-662-8938."

The depositions of the other Westcom customers indicate that the callers were not told by Citizens' representatives that Westcom was out of business. Instead, the callers were told something like Westcom was no longer available, or that "Westcom was no longer allowed to use the Citizens lines." (Ex. 17, pp. 12-13; Ex. 23, p. 9; Ex. 24, p. 24; Ex. 26, p. 13.)

The August 21, 1992 Citizens' memorandum entitled "Westcom Disconnect," which is an attachment to Exhibit 114,[84] shows that Citizens' service representatives were instructed to follow certain guidelines when speaking with Westcom's customers in the event Westcom's access services were terminated. The four guidelines included the two guidelines contained in the "Read Now" memorandum quoted above.

The evidence shows that Citizens' service representatives were instructed to inform the caller that Westcom was "no longer in service" and

[84] This memorandum is also part of Exhibit 44.

that the caller would "need to select another carrier for your long distance service." Despite these instructions, the evidence establishes that some of Westcom's customers were told by representatives of Citizens that Westcom was out of business or going out of business.

However, these representations appear to have affected only a small number of Westcom customers, and they appear to have been limited in duration. From Citizens' perspective, once access services were terminated to Westcom, Westcom was no longer an active access service customer of Citizens. A day after Westcom's access services were terminated, Citizens apparently discovered that some callers were being told that Westcom was out of business or bankrupt. As evidenced by the "Read Now" memorandum, Citizens immediately informed its service representatives to follow the guidelines set forth in the August 21, 1992 memorandum regarding the "Westcom Disconnect." This was reiterated in the August 28, 1992 Citizens' memorandum. (Ex. 56; 7 R.T. 611-612.)

As part of Westcom's request for relief associated with this misrepresentation, Westcom requests the following relief:

> "(1) order reparations be paid to Westcom for lost customers, lost revenue, slander, damage to customer goodwill and reputation, unfair trade practices, negligence, fraud, trade defamation, intentional interference with economic relations, breach of contract, breach of implied covenant of good faith, and fair dealing and other damages in the amount of $2,000,000.;
>
> …
>
> "(4) issue penalties against Citizens Utilities and Citizens employees, officers, agents as set forth in Section 2100 et al in the amount of $5.0 million;

…

> "(31) rule that CUCC unlawfully disrupted Westcom's customers during the changeover to Com Systems' network;
>
> …
>
> "(34) rule that CUCC slandered and defamed Westcom and committed unfair trade practices in the letters CUCC mailed to Westcom's customers and through statements made to Westcom's customers, without limitation, that Westcom was bankrupt, that Westcom was out of business, that Com Systems was not a valid carrier choice in Susanville." (Westcom Opening Brief, pp. 88, 92.)

We deny Westcom's request for "reparations" for the actions related to callers being told that Westcom was out of business, or that it was "bankrupt," or for a loss of customers. What Westcom characterizes as reparations is nothing more than a request for damages.[85] Indeed, the type of actions that Citizens allegedly engaged in, are tort or contract actions in which the Commission has no jurisdiction to award damages. We also note that Westcom's request for reparations for "negligence, fraud, trade defamation, intentional interference with economic relations, breach of contract, breach of implied covenant of good faith, and fair dealing," were not alleged in C.92-09-006 or in its amended complaints. In addition, as discussed earlier, we do not find that Citizens' actions interfered with or disrupted Westcom's

[85] In Westcom's answer to C.92-09-025 at page 8, Westcom acknowledges that the Commission "is without jurisdiction to award damages," and that the Commission lacks the "authority to award damages disguised as reparations."

conversion to Com Systems, or that under the circumstances, Citizens' actions slandered or defamed Westcom, or that Citizens engaged in unfair trade practices.

We also deny Westcom's request that penalties be imposed against Citizens and its employees regarding these alleged misrepresentations. The evidence shows that prior to the cutoff of Westcom's access services, Citizens instructed its service representatives to state that "Your long distance carrier is no longer in service, you will need to select another carrier for your long distance service." Such a statement was consistent with what the Commission ordered in D.92-08-028.

Although it appears that some misrepresentation about Westcom was given out, given the August 21, 1992 instructions, the August 26, 1992 reminder, the August 25, 1992 cutoff date, the limited duration of when the misrepresentations may have been made, and the circumstances of the events leading up to the cutoff of Westcom's access services, we conclude that no penalties are warranted.

(3) Charge for Switching IECs

In C.92-09-006, Westcom alleges that Citizens told some customers that the charge to switch to a new IEC would be $13.50, and that Citizens told other customers that the charge would be $11.00. Citizens alleges that Westcom's Exhibit 46 "contained substantial misinformation," including a reference to a $5.00 conversion charge, instead of the correct charge of $5.26. (Ex. 47.)

Westcom did not produce any evidence to support its allegation that Citizens informed Westcom's customers that the cost to switch to a different IEC would be $13.50 or $11.00. In Exhibit 46, the notice that Westcom

sent to its customers in advance of the cutoff of service, Westcom referred to a conversion charge of $5.00.[86] Sunde testified that Citizens claimed that a $5.26 charge applied, and on other occasions, claimed that a charge of $5.00 applied. (6 R.T. 412-414.) Citizens asserts that the correct intrastate charge was $5.26 as shown in Exhibits 47 and 48, and that the correct interstate charge was $5.00. Since Westcom claimed 83% to 90% intrastate usage beginning in June 1992, Citizens contends that the intrastate charge of $5.26 applied. (7 R.T. 558.)

There is insufficient evidence to conclude that Citizens told some customers that the charge to switch the customer's IEC would cost $13.50 or $11.00. There is also insufficient evidence to conclude that Westcom misrepresented the amount of the switch charge in Exhibit 46 since Westcom offered to reimburse its customers for any conversion charge that might be imposed. (Ex. 46.)

(4) Blocking of Calls Through AT&T

Westcom alleges that during the cutoff of access services to Westcom, and following the changeover to Com Systems, that Citizens "deliberately and systematically disrupted Westcom's customers' services for the sole purpose of causing Westcom great harm and to further their goal of putting Westcom out of business." (Westcom Opening Brief, p. 83.) Among the types of calls that Citizens allegedly blocked were outgoing calls through AT&T's network, i.e., 10288 dialing.

[86] At page 6 of Citizens' answer to C.92-09-006, Citizens stated that the "tariffed PIC change charge is $5.00" as shown in Exhibit K of its answer.

The only evidence of 10288 calls being blocked are contained in three of the statements in Exhibit 27 at pages 1, 9, and 20.[87] Two of the three customers whose statements appear in Exhibit 27 did not testify at the hearing, and did not have a deposition taken. The third customer, James Jeskey, was asked in his deposition if he had signed the statement which appears in Exhibit 27. He replied that was his statement and signature. Jeskey's statement states that they tried to place calls through AT&T by using the 10288 command, but the calls could not go through (Ex. 17, pp. 11-12; Ex. 27, p. 20.) The depositions of the other customers related that they had problems of one to two days when they could not make any long distance calls.[88] (Ex. 19, p. 11, 15-16; Ex. 20, pp. 18-19; Ex. 22, pp. 9-10; Ex. 24, p. 10.) However, it is not clear from those depositions whether they tried to use the 10288 dialing pattern during this time.

The problems that Jeskey encountered, and the other customers who experienced calling problems following the cutoff of access services to Westcom, were due to Westcom's failure to send out the notice required by D.92-08-028, and Westcom's failure to make the necessary arrangements with Com Systems and Citizens. Had the appropriate notice been mailed out in a timely manner, Westcom's customers would have had the

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[87] Royce also testified that he had problems placing calls through AT&T. However, as discussed earlier, his problems occurred around November 1992, and not during the late August 1992 timeframe. (See Ex. 28; 5 R.T. 351, 354-355.)

[88] One witness testified that she could not make any calls for three days, but acknowledged that the outage may have just been two days. (Ex. 21, pp. 4, 8-9.) The other evidence presented suggests that the call blocking problems only lasted for two days.

opportunity to select an IEC before Westcom's access services were terminated. In addition, Westcom did not ensure that its network merger with Com Systems was seamless. Com Systems did not verify that the LOAs were valid until August 25, 1992, and it did not start to accept residential customers until August 26, 1992.

Westcom also alleges that Citizens told its customers that if they chose Com Systems, that they could no longer use AT&T. However, the only evidence which supports this assertion is found in the Bill Battagin statement in Exhibit 27.[89] Battagin did not testify at the hearing or have his deposition taken. Exhibit 77, which was prepared by Hughes after reviewing Citizens' customer service records for Battagin's account, determined that Battagin had never been an IEC customer of either Westcom or Com Systems. (7 R.T. 618, 620-621.)

Three other customers who had their depositions taken were also asked if anyone at Citizens told them that if they used Westcom or Com Systems, that they would not be able to use AT&T. All three of these customers stated that they could not recall ever being told this. (Ex. 17, p. 14; Ex. 19, p. 17; Ex. 20, p. 16.) We conclude that Westcom has failed to prove that Citizens told callers that if they chose Com Systems, they could no longer use AT&T.

[89] In Westcom's opening brief at page 83, Westcom cited the statement of Mike's TV Repair in Exhibit 27 in support of its assertion. However, a review of Exhibit 27 shows that the only person who allegedly made such a statement was Battagin.

5. Antitrust and Business and Professions Code Allegations

Westcom alleges in C.92-09-006 that the activities that Citizens engaged in "are in violations of antitrust laws and violate California Business and Professional (sic) Code Sections 17095 and 17096…." (C.92-09-006, p. 3.)

To the extent that Westcom seeks to have the Commission determine whether a violation of the antitrust laws or the Unfair Practices Act (Bus. & Prof. Code § 17000 et seq.) occurred, the Commission is without jurisdiction to determine such violations, or to award damages. (See Pub. Util. Code § 2106; Masonite Corporation v. Pacific Gas and Electric Company (1976) 65 Cal.App.3d 1, 7-8; Vila v. Tahoe Southside Water Utility (1965) 233 Cal.App.2d 469, 479.) In Northern California Power Agency v. Public Utilities Commission (1971) 5 Cal.3d 370, 377, the California Supreme Court recognized that regulatory agencies, such as the Commission, do not have jurisdiction to determine violations of the antitrust laws. (See Cellular Plus, Inc. v. Superior Court (1993) 14 Cal.App.4th 1224, 1247; D.95-05-020 (59 CPUC2d 665, 684.) .) A review of the Unfair Practices Act reveals that any injunctive relief, or a request for damages, for a violation of the act, is to be addressed in a civil court proceeding. (See Bus. & Prof. Code §§ 17070, 17203; Chicago Title Insurance Company v. Great Western Financial Corporation (1968) 69 Cal.2d 305, 317-318.)

The Commission does have the authority to consider the effects of antitrust behavior or unfair practices in certain situations. For example, the Commission has the obligation to consider the antitrust implications of applications that are filed with the Commission, or when competitive abuses or anticompetitive effects may be present. (See Northern California Power Agency v. Public Utilities Commission, supra, 5 Cal.3d at p. 377; D.88-12-083 (30 CPUC2d

189, 226-227); D.92-09-080 (45 CPUC2d 541, 561-562); D.93-10-016 (51 CPUC2d519, 523-524); D.95-05-020 (59 CPUC2d 684-685).)

Westcom contends that Citizens' actions were anticompetitive and unfair, and that Citizens' engaged in such activities to drive Westcom out of business so as to retain the bulk of the intraLATA income when the intraLATA market is opened to competition. (Westcom Opening Brief, pp. 2-3, 5, 74, 80--86.)

As discussed above in the various sections of this decision, we are not persuaded by Westcom's arguments that Citizens' actions were anticompetitive or unfair business practices. In determining whether a particular business practice is unfair, the Commission needs to balance the impact on the alleged victim, and the reasons, justifications, and motives of the alleged wrongdoer. (51 CPUC2d 524-525, fn. 9.) Based on our review of the evidence in these complaint cases, and the circumstances which led to Citizens' actions, we cannot conclude that Citizens' activities were anticompetitive or unfair.

6. Other Alleged Billing Errors

Westcom alleges in its Second Amended Complaint that Citizens caused the calls of Westcom's customers to be sent to MCI, and that MCI may have billed Westcom's customers in error. Except for Exhibit 27 and Exhibit 45, some brief testimony by Sunde, and some questions of Foote, Ottoway and Innes in their depositions, Westcom did not establish that any of the calls of Westcom's customers were ever sent to MCI, or that MCI billed Westcom's customers. (See 6 R.T. 411-412; Ex. 1, pp. 20-23; Ex. 2, pp. 41-42, 44-48; Ex. 45; Ex. 75, pp. 16-17; Ex. 111, p. 14; Ex. 112, p. 23; Ex. 113, pp. 13-18.) Although Exhibit 27 shows that the Brian McKernan bill from Citizens contained long distance calls carried by MCI, McKernan did not testify or have his deposition taken. It cannot be

determined if McKernan voluntarily used MCI to make the calls shown in this exhibit. (See 5 R.T. 375-382.) The only other evidence in this record that refers to MCI are some questions and answers regarding an MCI back billing problem. (See 4 R.T. 173-174, 195-196, 235, 253, 270-273; 6 R.T. 411-412; Ex. 7; Ex. 112, pp. 23-24.)[90] We conclude that Westcom failed to meet its burden of proof with respect to the allegations contained in its Second Amended Complaint to C.92-09-006.

Exhibit 6 refers to a "logic error" that was discovered in a computer program around May 1992. According to the exhibit, the impact of the error was the possibility that the billing of terminating access may have been done incorrectly, and that some carriers may have been billed terminating access that actually belonged other carriers for the period from June 1991 to the present. Foote assumed that the logic error was corrected, but did not know whether credits were issued after she left Citizens. Ottoway testified that he was aware of the logic error, but did not know if Citizens solved the problem or made any retroactive adjustments to any carriers' bills. (4 R.T. 189-192, 239-243; Ex. 6.)

Innes testified that a rerun of the data was done for the logic error using the corrected computer program. He testified that the carriers were impacted for a "very brief period of time," and that only those carriers who had both FGB and FGD service were impacted. Only four carriers were impacted, including Westcom. Citizens issued credits to the carriers, and on September 10,

[90] The testimony reveals that this MCI back billing issue involved a billing to MCI from Citizens for the amount of approximately $2 million. MCI paid this bill. (See 4 R.T. 173-174, 195-196, 234-235, 273; Ex. 1, p. 22; Ex. 75, pp. 16-17.)

1992, Westcom's account was credited for $1304.94. (6 R.T. 548-550; 7 R.T. 552-553, 566-568; 8 R.T. 680-681; Ex. 97; Ex. 116.)

Westcom contends that there was a billing problem involving a Citizens' customer called "CAL-NET." When Foote was asked about this at her deposition, she stated that "Ron Ottaway advised me to make a change in billing and Don Innes did not want that change." She could not remember the actual change. She stated that she wished she had some records she could review, and stated that "Nothing is coming to me." All she could remember was that there was a conflict and believed that it involved CAL-NET around July 1992. (Ex. 1, pp. 13-14.) However, when she was asked about this at the hearing, she was able to provide more details and stated that she received actual measured reports from data management, thought the usage was on the low side, and went ahead and billed it as actual measured terminating usage. She stated that it involved FGB terminating service. According to Foote, Innes was upset and had wanted it to be billed assumed rather than actual. To Foote's knowledge, CAL-NET did not complain to Citizens about this. (4 R.T. 169-170, 199.)

When Ottaway was asked about the CAL-NET problem, he agreed with Foote's testimony regarding the problem, but could not remember if the bill was for FGB terminating, and did not remember if there were conflicting orders as to how the CAL-NET billing should be billed. (4 R.T. 222-223.)

Westcom argues that the CAL-NET billing problem proves that Citizens did have the capability to measure FGB terminating traffic. We note however, that when Foote was asked about this problem during her deposition, she could not remember the details of the problem. Although she stated during the hearing that it involved FGB terminating usage, Ottaway could not remember. Given the other testimony regarding Citizens' lack of FGB measurement capability, we are not persuaded by Westcom's argument that this

CAL-NET problem proves that Citizens was able to measure FGB terminating traffic.

Westcom also argues that the attempt to bill CAL-NET on an assumed basis, rather than actual, violates the FCC tariffs because it creates more revenue for Citizens. As discussed earlier, prior to June 1992, all of Westcom's FGB bills were billed based on the interstate tariff because Westcom had reported 100% interstate use. Since it involved the interstate tariff we do not need to resolve the issue.[91] In addition, since CAL-NET is not a party to this proceeding, Westcom has no standing to represent CAL-NET's interests in this proceeding.

Execuline was allegedly billed by Citizens for FGB terminating service after Foote was told to "bill everyone" for terminating service. Although the bill involved a FGB bill, Foote testified that Execuline never ordered the service. Westcom argues that the billing problem with Execuline shows that Citizens engaged in a fraudulent billing practice. (Westcom Opening Brief, pp. 44-45.)

In response to a question from Citizens, Foote testified that she did not know whether the Multiple Exchange Carrier Access Billing guidelines allowed the billing of terminating usage even when a carrier did not specifically order the service. (4 R.T. 161-162, 204-205; Ex. 1, pp. 40-42.) The alleged billing problem with Execuline does not shed any light on the FGB measurement capability at issue in this proceeding. Nor does Westcom have any standing to represent the interests of Execuline in this proceeding.

[91] We note that any monies generated by those billings prior to July 1, 1992 went into the NECA pool.

Westcom also contends that PacBell was able to actually measure traffic, and that this data was forwarded to Citizens and then billed the actual usage. Westcom contends that it is "inconceivable" that Citizens could bill actual measurement of PacBell traffic, but that it refused to bill its own actual measured traffic. (Westcom Opening Brief, p. 45.) However, when Ottaway was questioned by Sunde about PacBell's ability at Ottaway's deposition, Ottaway stated that Citizens was not able to process and bill the usage through Citizens' switch because of the internal problems that Citizens was having. (Ex. 2, pp. 81-82.) The billing of the traffic measured by PacBell does not prove that Citizens had the same kind of measurement capability as PacBell.

7. Solicitation of IntraLata Traffic

Citizens alleges in C.92-09-025 that Westcom violated D.88-09-009,[92] and the settlement agreement that Westcom entered into in C.89-10-027[93] in which Westcom agreed to cease soliciting intraLATA business in Citizens' service territory. Citizens asserts that the activities that Westcom engaged in cannot be construed as merely incidental intraLATA traffic. Instead, Citizens alleges that Westcom sent out customer notices informing customers that they could use "700 access service to make intraLATA or service area calls. (Ex. 60.) After PacBell complained to Westcom about Westcom's 700 notice,

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[92] D.88-09-009 is the decision which granted Westcom authority to operate as an IEC, and which imposed certain restrictions regarding the provisioning of intraLATA services.

[93] Citizens' citation to C.89-10-027 in its complaint was apparently meant to refer to C.89-08-035, and the decision which approved that settlement agreement, D.91-09-018. (See Citizens' Opening Brief, p. 9.)

Westcom sent out a notice (Ex. 123) dated July 9, 1992 correcting the 700 notice. (Ex. 123; Westcom Answer To C.92-09-025, Ex. H; 6 R.T. 462-464.)

Citizens also alleges that even after the settlement was entered into in C.89-08-035, Westcom continued to engage in the marketing of intraLATA services to prospective customers. In addition, Citizens alleges that the majority of Westcom's larger customers were given preprogrammed autodialers to automatically route intraLATA calls over Westcom's network. Citizens further alleges that its audit of 700 access calls for a one week period in July 1992 indicate that an overwhelming amount of the calls placed over Westcom's network were intraLATA calls. (Ex. 61; 7 R.T. 601-603.)

In its answer to Citizens' complaint at page 5, Westcom admits to "improperly sending notice to approximately one-third (1/3) of its California customers regarding intralata calls."[94] Westcom further states that it "improperly assumed that since applications for intralata service have recently been required by the Commission that the service was to become effective momentarily."

At the time Citizens filed C.92-09-025, IECs were prohibited from soliciting intraLATA calls or holding themselves out as providers of intraLATA long distance service. Westcom's authorization to operate as an IEC was:

[94] Sunde testified at the hearing that Exhibit 60 was "only sent to a very, very small portion of our customer base," and that "perhaps 20 or 30 or 40 customers" received Exhibit 60. (6 R.T. 462-465.) Sunde also testified that the correction notice, Exhibit 123, was sent to all of its customers. (8 R.T. 673.)

> "[S]ubject to the condition that applicant refrain from holding out to the public the provision of intraLATA service and subject to the requirement that it advise its subscribers that intraLATA communications should be placed over the facilities of the local exchange company." (D.88-09-009, p. 3.)

It was not until January 1, 1995, that the IECs were authorized by the Commission to compete in the intraLATA market. (D.94-09-065 [56 CPUC2d 117, 147, 285].)

In its opening and closing briefs, Westcom shifted the focus away from its admission that it sent Exhibit 60 to some of its customers. Instead, Westcom asserts that its actions were "incidental" in nature, and that Westcom lacked the "affirmative intent" needed to bring its actions within the prohibition against soliciting intraLATA traffic or to hold itself out as a provider of intraLATA long distance service.

Westcom further asserts in its opening brief at page 5 that the only evidence that Citizens could produce regarding Westcom's direct solicitation of an intraLATA customer was the letter that was sent to Greg Short. Scott Madison, a former Westcom sales representative, testified that he wrote portions of the letter (Ex. 73) to Short. He testified that the letter was "a standard Westcom marketing material letter," a "canned letter," which he personalized and sent it to prospective customers. That letter referred to the "TAKE 30" program. (7 R.T. 578- 580.) In the paragraph starting with "FREE CALLING CARD," the letter stated:

> "What's even better, is you can use this calling card to save 30% when making those expensive service area long distance calls. This is a service that AT&T, Sprint, and MCI will not provide you." (Ex. 73, p. 3.)

Madison testified that the "service area long distance calls" referred to intraLATA calls. (7 R.T. 579-580.)

Madison also testified that Sunde approved all of the marketing materials that were sent out under Westcom's letterhead, and that he worked under the direction and control of Sunde. He also testified that he had received training from Sunde and John Roberts, a senior sales representative of Westcom. Madison recalls that Sunde "taught me how to analyze a long distance bill, which included both intraLATA as well as the interLATA calling." (7 R.T. 576-577.)

Sunde acknowledged that Westcom did have a "TAKE 30" program, but the 'TAKE 30" letter shown in Exhibit 73 was not a product of Westcom or of Sunde. Since Sunde did not send Exhibit 73, he testified that he had to assume that Exhibit 73 was unauthorized. (6 R.T. 467-469.) Sunde also denied that he "assisted Mr. Madison in analyzing intraLATA bills," or that he wrote the canned letter. Sunde further stated that he did not approve or even review Madison's personal solicitation letters before Madison sent them. In addition, most of the customers that Madison signed up were equal access customers. (8 R.T. 661, 663, 677.) Sunde testified that if a customer is on equal access, "intraLATA calls are automatically forced through the local exchange carrier." (6 R.T. 469-469.) Sunde also defined a "service area call" as an "intraLATA call," and that the purpose of 700 dialing is "to identify who your long-distance carrier is." (6 R.T. 466; 8 R.T. 672.) Sunde also testified that Westcom "did not actively solicit intraLATA business." (6 R.T. 488.)

We first address whether Westcom actively solicited intraLATA calls or held itself out as a provider of intraLATA long distance service. These kinds of activities are to be distinguished from incidental intraLATA traffic, which the Commission has allowed. (D.92-01-020 [43 CPUC2d 100, 101].) In

determining whether the intraLATA traffic is incidental or not depends upon the carrier's intentions. If the carrier exhibits "an affirmative intent to hold out the offering of intraLATA traffic," then the intraLATA traffic is not incidental. (43 CPUC2d at pp. 101-102; D.84-06-113 [15 CPUC2d 426, 465-466].)

It is undisputed that Westcom sent Exhibit 60 to at least some of its customers prior to July 9, 1992. That exhibit stated in pertinent part that easier dialing procedures are available "due to recent intralata approval by the California Public Utilities Commission." (Ex. 60, emphasis added.) Exhibit 60 also stated that for those customers signed up for Westcom's equal access service, they could "dial intralata calls within your area code" by dialing "1-700-xxx-xxxx," instead of the "regular area code." The call would "then be routed automatically." Exhibit 60 went on to state that:

> "This new 700 procedure now works in many areas and should work in all areas shortly. The end result of this new, easier dialing protocol is that auto dialers have now become obsolete and unnecessary. Westcom will begin removing all auto dialers very shortly."

Although Westcom sent a correction to Exhibit 60 in the form of Exhibit 123 after PacBell complained to Westcom, Exhibit 60 evidences an affirmative intent on Westcom's part to solicit intraLATA traffic. This intent is found in Exhibit 60 wherein it states that the easier dialing procedures, including the 700 dialing procedure, was "due to recent intralata approval" by the Commission. This language implies that the Commission approved intraLATA competition, even though the Commission did not authorize intraLATA competition until D.94-09-065 was issued in September 1994.

Further evidence of Westcom's affirmative intent to solicit intraLATA traffic can also be found in Exhibit 73, a letter which was mailed to a

prospective customer prior to February 28, 1992. The third and fourth paragraphs of the "TAKE 30" sheet of Exhibit 73 describe that if the calling card is used by a Westcom customer, one can:

> "[S]ave 30% when making those expensive service area long distance calls. This is a service that AT&T, Sprint, and MCI will not provide you."

The fifth page of Exhibit 73 also encourages the use of the calling card to make "toll calls inside your service area."[95]

Although Sunde denies that he wrote Exhibit 73, or assisted Madison in analyzing the intraLATA bills of prospective customers, we find Sunde's denial unconvincing. Both Exhibits 60 and 73, Westcom's admission in its answer to Citizens' complaint, as well as Madison's testimony, strongly suggest that Sunde and Westcom were fully aware of the Take 30 program and its marketing of the use of the calling card to make "service area long distance calls."

Exhibit 61 also demonstrates that despite Westcom's mailing of Exhibit 123 sometime around July 9, 1992, some of Westcom's customers continued to use the 700 dialing procedure for purposes other than determining who their IEC was. Although Sunde pointed out that many of the calls in Exhibit 61 were not intraLATA long distance calls, Exhibit 61 still shows that many of the calls placed by Westcom's customers using the 700 dialing procedure were intraLATA calls. (Ex. 61; 8 R.T. 651-653, 683-689.)

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[95] By using the calling card, a Westcom customer is able to access the 950 number of Westcom's FGB service, as opposed to the FGD equal access service. (See Exhibit 6, Tab 5, p. 7-2 and Tab 12 in C.92-03-049; 1 R.T. 78, 157-158; 2 R.T. 130-132; 3 R.T. 106.)

Exhibits 63 and 64, and the testimony of Innes, also suggest that a high percentage of calls from Westcom's customers involved intraLATA calling. (7 R.T. 559-560.) Westcom contends in its opening and closing briefs that one cannot determine where a call is originating from when a calling card is used, and therefore Exhibits 61, 63 and 64 cannot be used to prove that the calls were intraLATA calls since some of those calls may have originated from outside the LATA. Even if we accept Westcom's argument that some of the calling card calls may have originated outside the LATA, one cannot reasonably dispute, based on the evidence in Exhibits 60, 61, 63, 64 and 123, that some of the calls placed by Westcom's customers were intraLATA calls.

With respect to Citizens' allegation regarding Westcom's use of autodialers to allow its customers to make intraLATA calls, the evidence is inconclusive.

Based on the evidence presented, we conclude that Westcom affirmatively intended to solicit intraLATA traffic. The wording of Exhibits 60 and 73 do not suggest to us that Westcom's solicitation of intraLATA traffic was only incidental in nature.

Having concluded that Westcom intended to solicit intraLATA traffic, the second inquiry is whether such actions violated D. 88-09-009 and D.91-09-018. In D.91-08-018, the decision specifically stated that the motion to adopt the settlement agreement was:

> "[I]n the public interest because it provides clarification of Westcom's advertising and customer relations practices, i.e., that Westcom will not solicit intraLATA business nor hold itself out as an intraLATA carrier. The Settlement Agreement maintains that the public will further be served by Westcom's agreement to notify customers that intraLATA calls should be placed through Citizens." (D.91-08-018, p. 1.)

The Commission adopted the Settlement Agreement entered into between Westcom and Citizens as a condition of the dismissal of C.89-08-035. (*Ibid.*)

In both D.88-09-099 and D.91-08-018, Westcom was prohibited from holding out to the public that it could provide intraLATA service, and that it was to advise its subscribers that intraLATA communications should be placed through the local exchange company. Exhibits 60 and 73 evidence an intent by Westcom to actively solicit intraLATA traffic. Since both of these exhibits were sent to Westcom's customers prior to D.94-09-065, we conclude that Westcom's actions with respect to Exhibits 60 and 73 failed to comply with D.88-09-099 and D.91-08-018, and that Westcom's failure to abide by these two decisions resulted in a violation of § 702.

The final issue to address regarding Westcom's solicitation of intraLATA traffic is what the penalty should be for Westcom's failure to comply with D.88-09-099 and D.91-08-018, and its violation of § 702. Clearly, Westcom's refusal to abide by the restrictions in both of these decisions cannot be taken lightly, even though the Commission did eventually open up the intraLATA market to competition. Westcom's violation of these decisions are clearly reflective of Westcom's fitness to continue as an IEC in California. Since Westcom is no longer operating in Citizens' service territory, any effort to revoke Westcom's operating authority at this point would be somewhat redundant. If, however, Westcom decides to commence operations again in California, the Commission should take efforts to determine why Westcom's operating authority should not be revoked. In the section entitled "Miscellaneous Issues" we have described what actions the Commission should take in the event Westcom decides to become active in California again, or if Westcom's President or other officers or shareholders of Westcom seek authorization to operate in California as a telecommunications provider using a different entity.

We will impose a penalty of $2,000 for Westcom's failure to comply with D.88-09-099, and a penalty of $2,000 for Westcom's failure to comply with D.91-08-018. Since Westcom is no longer operating in California, we will suspend imposition of the $4000 in penalties for Westcom's failure to obey and comply with D.88-09-099 and D.91-08-018 in violation of § 702. Should the circumstances described in the Miscellaneous Issues arise, this proceeding shall be reopened, and the suspension lifted, and the appropriate penalties shall be imposed for Westcom's failure to comply with D.88-09-099 and D.91-08-018.

8. Miscellaneous

Since Westcom's complaint case does not involve the filing of any application on the part of Citizens, Westcom's argument that Rule 23 somehow applies to these complaint cases is without merit. Similarly, Westcom's argument that § 532 applies is also without merit.[96] (See Westcom Opening Brief, p. 32.) At the time the various complaints at issue in this proceeding were filed, Citizens tariffs were already in existence and on file with this Commission and the FCC. Citizens had the right under its filed tariffs to bill terminating usage on an assumed minutes of use basis if measurement capability was not available in the end offices.

[96] Rule 23 describes what must be attached to a rate increase application filed pursuant to § 454. The first sentence of Rule 23 provides: "This rule applies to applications for authority to raise any rate, fare, toll, rental or charge, or so to alter any classification, contract, practice, or rule as to result in such an increase." Section 532 provides in pertinent part: "Except as … otherwise provided, no public utility shall charge, or receive a different compensation for any product or commodity furnished or to be furnished, or for any service rendered or to be rendered, than the rates … and charges applicable thereto as specified in its schedules on file and in effect at the time…."

Westcom's argument regarding the applicability of 47 USC § 203(b)(1) need not be addressed by this Commission since that federal code section involves fee schedules before the FCC.

Westcom alleges in its First Amended Complaint that a Citizens customer unlawfully terminated switched access services on standard business lines. Westcom also alleges that this issue "is the subject of another major Commission Complaint, 92-07-045." Westcom did not produce any evidence in this proceeding to support this allegation. Accordingly, no further inquiry into this allegation is necessary as part of this proceeding.

In D.92-12-038, the Commission denied Westcom's request for a temporary restraining order and preliminary injunction in C.92-09-006, and denied Citizens' request for a preliminary injunction in C.92-09-025. The Commission's reasoning for denying the respective requests was because:

> "It is unlikely that any problems like those alleged in C.92-09-006 and C.92-09-025 will occur in the future because any Westcom customer in Citizens' service territory prior to August 25, 1992, in all likelihood has secured Westcom or another IEC to carry the customer's interLATA calls." (D.92-12-038, pp. 9-10.)

Since Westcom is no longer operating in Citizens' service territory, and because Citizens is not engaging in any unlawful activities, as alleged by Westcom, Westcom's request for a permanent injunction in C.92-09-006 is denied.

With respect to Citizens' request for a permanent injunction in C.92-09-025, we deny that request because Westcom is no longer operating in California as an IEC.

If, however, Westcom commences operations again in California using its existing authority granted in D.88-09-009, we direct the

Telecommunications Division to open up an OII[97] as to why Westcom's operating authority should not be revoked, and for the Commission to lift the suspension of the penalties, and to take action to impose and collect the appropriate penalties from Westcom for slamming, and for its violations of § 702 for its failure to comply with D.92-08-028, D.88-09-009 and D.91-09-018.

In addition, if Westcom's President or other officers or shareholders of Westcom become involved with an entity that seeks authorization to operate in California as a telecommunications provider, the Telecommunications Division and the ALJ Division are directed to review the application and to bring this to the Commission's attention in order to determine whether the application should be granted. The staff should also take steps to determine whether an OII should then be opened to consider revocation of Westcom's operating authority. The staff shall also take action to impose and collect the penalties from Westcom for its failure to obey and comply with D.92-08-028, D.88-09-009 and D.91-09-018, and for slamming.

V. Westcom's Request for Compensation

As noted earlier in the Procedural Background section of this decision, Westcom seeks compensation under three theories of compensation.

Citizens opposes Westcom's request on the grounds that it is not eligible for compensation because Westcom's complaints were "filed solely for Westcom's economic gain, are of benefit only to Westcom and are of no societal or public policy importance." (Citizens Opposition To Westcom's Amended Request, p. 2.)

[97] If an OII is opened, C.92-09-006 and C.92-09-025 should also be reopened.

We first examine the intervenor compensation provisions contained in § 1801 and following. Section 1804(a)(1) requires that a customer who seeks an award for intervenor compensation, "shall, within 30 days after the prehearing conference is held, file and serve on all parties to the proceeding a notice of intent to claim compensation." Westcom did not file its initial request for compensation until June 3, 1993, more than five months after the prehearing conference.

In Westcom's initial request, it stated that: "Westcom believes that, at this stage, it can be found eligible to request compensation from either the common fund or the Advocate' Trust." Westcom inserted footnote 1 at the end of this quoted sentence, which stated:

> "At this stage, it does not appear that Westcom's complaint will satisfy the requirement for compensation under Article 18.7 that participation in CPUC proceedings be 'for the purpose of modifying a rate or establishing a fact or rule that may influence a rate.' "

It is apparent that when Westcom filed its initial request, Westcom's footnote was relying on an out-of-date citation to § 1803. Prior to January 1, 1993, § 1803 read as follows:

> "The commission may award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of participation or intervention in a hearing or proceeding <u>for the purpose of modifying a rate or establishing a fact or rule that may influence a rate</u> to any customer who complies with Section 1804 and satisfies all of the following requirements:
> (a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.
> (b) Participation or intervention without an award of fees or costs imposes a significant financial hardship."
> (Stats. 1984, ch. 297, emphasis added.)

In Chapter 942 of the Statutes of 1992, which became effective on January 1, 1993, § 1803 was amended to delete the underlined quotation cited in the preceding quote. As amended, § 1803 now reads:

> "The commission shall award reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs of preparation for and participation in a hearing or proceeding to any customer who complies with Section 1804 and satisfies both of the following requirements:
> (a) The customer's presentation makes a substantial contribution to the adoption, in whole or in part, of the commission's order or decision.
> (b) Participation or intervention without an award of fees or costs imposes a significant financial hardship." (Stats. 1992, ch. 942.)

Thus, when Westcom filed its initial request for compensation on June 3, 1993, the current versions of §§ 1803 and 1804, as quoted above, were in effect. Notwithstanding Westcom's statement in footnote 1 of its initial request, Westcom's initial request was not timely filed as a notice of intent for the purpose of claiming intervenor compensation pursuant to § 1801 and following.

Furthermore, Westcom's filing of its second amended request did not cure the late filing of the initial request. The second amended request stated: "Westcom believes that, at this stage, it can be found eligible for compensation from either the common fund, the Advocate's Trust or Article 18.8 (PUC Sections 1801-1812.)" Despite Westcom's attempt to amend its request to include an intent to claim compensation under the intervenor compensation provisions, the second amended request was not filed until February 16, 1995. As noted in the March 20, 1995 ALJ ruling:

> "To the extent that the second amended request was intended by Westcom to serve as a notice of intent to claim compensation pursuant to PU Code Section 1804(a)(1), with the expectation that a preliminary ruling would issue pursuant to PU Code Section

> 1804 (b)(1), Westcom's notice of intent is void and of no effect. It is void because Westcom did not timely submit the notice of intent. … Even if Westcom's submission of its second amended request was allowed to relate back to June 3, 1993, the date when Westcom's initial request was filed, the notice of intent to claim compensation under Article 18.8 would still have been late because the initial request was filed five months after the date of the prehearing conference.
>
> "In addition, Westcom's second amended request should be considered void and without effect because it was not submitted for filing until February 16, 1995, some 20 months after the initial request was filed and after the evidentiary hearings had concluded."

Based on the preceding discussion, Westcom is ineligible for intervenor compensation under the provisions of § 1801 and following.

Westcom also seeks compensation from "a common fund of reparations or other sums that may be generated" as a result of Westcom's complaint. (Westcom Initial Request, p. 2.) Under the common fund theory, compensation is awarded to one who has incurred attorneys' fees or fees and expenses from representing oneself. The compensation is paid for out of the fund that is created as a result of the litigation and which benefits others. These fees "are awarded in only the most meritorious cases," and the decision to award the fees is within "the sound discretion of the commission." (Consumers Lobby Against Monopolies vs. Public Utilities Commission (1980) 25 Cal.3d 891, 907-909, 914-915.)

The core of Westcom's allegations have to do with billing disputes, measurement capability, and the events which arose after Citizens terminated Westcom's access services. Although Westcom alleges that reparations are due to its customers and to other access service customers of Citizens, Westcom has not met its burden of proof with respect to most of the allegations it raised. In

those instances where Westcom's allegations were found to have merit, the circumstances giving rise to Citizens' behavior did not merit any reparations. Since no reparations are due from Citizens, no common fund of reparations benefiting Westcom's customers or Citizens' access service customers has been created.

Since the common fund theory is rooted in the courts of equity,[98] in order to be awarded compensation under a common fund theory, the requesting party's hands must be clean. To award Westcom compensation when it intentionally violated a Commission decision would send the wrong message to parties who participate in proceedings before this Commission. Westcom's failure to abide by the decisions discussed earlier leaves it with unclean hands, which should bar any request for compensation. Accordingly, Westcom's request for compensation under the theory of a common fund is denied.

Westcom also seeks compensation under the Advocates Trust Fund. In order to receive an award of fees from the Advocates Trust Fund, the following must be met:

> "[W]here complainants have generated a common fund but that fund is inadequate to meet reasonable attorney or expert witness fees, where a substantial benefit has been conferred upon a party or members of an ascertainable class of persons but no convenient means are available for charging those benefitted with the cost of obtaining the benefit, or where complainants have acted as private attorneys general in vindicating an important principle of statutory or constitutional law, but no other means or fund is available for award of fees." (D.92-92-07-051, App. B, § 1.3.)

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[98] Consumers LobbyAgainst Monopolies vs. Public Utilities Commission, supra, at p. 906.

No common fund has been generated as a result of Westcom's complaints. Since no common fund has been created, no fees can be awarded to Westcom from the Advocates Trust Fund. Therefore, Westcom's request for compensation from the Advocates Trust Fund is denied.

Findings of Fact

1. C.92-03-049, C.92-09-006, C.92-09011 and C.92-09-025 were consolidated as a result of the ALJ ruling of October 2, 1992.

2. C.92-03-049, C.92-09-006, C.92-09011 and C.92-09-025 were consolidated as a result of the ALJ ruling of October 2, 1992.

3. D.92-12-038 denied the interim relief sought by Westcom in C.92-09-006, and denied the Citizens' motion to dismiss C.92-09-006.

4. D.92-12-038 also denied the interim relief sought by Citizens in C.92-09-25, and granted Citizens' motion to dismiss C.92-09-011.

5. C.92-03-049 was filed by Westcom against Citizens on March 30, 1992, and an amended complaint was filed on May 18, 1992.

6. An evidentiary hearing in C.92-03-049 was held on June 2, 1992 through June 4, 1992.

7. One of the issues of contention in C.92-03-049 was possible recording and timing differences between the switching and billing equipment of Westcom and Citizens.

8. Westcom and Citizens agreed to joint testing on July 28, 1992, and Exhibit 45 memorialized the results of the joint testing.

9. After the close of evidentiary hearings in C.92-03-049, Westcom filed a petition to set aside submission and to reopen the proceeding, which was denied in an ALJ ruling dated July 31, 1992.

10. C.92-03-049 was submitted on August 25, 1992.

11. D.92-08-028 denied Westcom's request for injunctive relief in C.92-03-049, and held that Citizens could immediately terminate service to Westcom for Westcom's failure to pay in accordance with the applicable tariff payment provision.

12. A copy of a complaint case, C.89-10-027, that Westcom filed against Citizens in 1989, was attached to Tab 2 of Exhibit 4.

13. In C.92-09-011, Westcom realleged the same allegations it had made in C.89-10-027.

14. In D.92-12-038, the Commission dismissed C.92-09-011 with prejudice because Westcom failed to allege any new information.

15. In response to an agreement reached between Westcom and Citizens prior to the hearing, Westcom deposited with the Commission the sum of $12,608.79 in C.92-03-049.

16. C.92-09-006 was filed by Westcom against Citizens on September 3, 1992.

17. Westcom's filing of its First Amended Complaint and Second Amended Complaint sought to incorporate by reference C.92-03-049, C.92-09-006 and C.92-09-011.

18. The issues raised in Westcom's petition to set aside submission and reopen C.92-03-049 were subsequently incorporated by Westcom into C.92-09-006 and its amended complaints.

19. A prehearing conference was held on January 22, 1993 in C.92-09-006, C.92-09-025 and C.92-09-011, and five days of evidentiary hearings were held in C.92-09-006 and C.92-09-025 in June 1993.

20. On September 16, 1992, Citizens filed C.92-09-025 against Westcom.

21. C.92-09-006 and C.92-09-025 were submitted upon the filing of reply briefs on August 27, 1993.

22. Westcom filed three requests for findings of eligibility for compensation on June 3, 1993, June 17, 1993, and February 16, 1995.

23. Citizens filed an opposition to the initial request and first amended request on June 28, 1993, and to the second amended request on March 13, 1995.

24. The proposed decision of the ALJ was mailed to the parties on August 8, 2000.

25. Westcom contends that it is entitled to a total credit of $41,983 in C.92-03-049, and reparations for calls made to Westcom over its 800 lines.

26. When the hearing concluded in C.92-03-049, Citizens claimed that Westcom owed a total of $47,751.05.

27. At the second hearing in C.92-09-006 and C.92-09-025, Exhibit 72 reflects that Westcom owes Citizens an outstanding balance of $73,525.84.

28. Westcom subscribed to FGB and FGD access services from Citizens.

29. During the time period covered by C.92-03-049, Citizens had adopted and concurred in most of PacBell's access service tariff for California access service, and Citizens concurred in the NECA tariff provisions on file with the FCC for interstate access services.

30. Switched access service provides the ability to originate calls from an end user's premises to a customer's designated premises, and to terminate calls from a customers's designated premises to an end user's premises in the LATA where it is provided.

31. FGB access service allows an end user to dial 950-XXXX in order to access the IEC.

32. FGB service was the normal method of providing end use customers with access to IECs prior to equal access.

33. FGD access service allows an end use customer to be presubscribed to a particular IEC.

34. Both the interstate and intrastate access tariffs provide that when a customer orders FGB switched access service, the customer is required to submit a PIU factor to the LEC.

35. The PIU factor is used to determine the percentage of traffic that is to be billed under the interstate and intrastate tariffs.

36. The evidence shows that for FGB, Citizens was unable to detect the final called number dialed by the end user.

37. Both the NECA and PacBell tariffs provide that if measured access minutes are not used, the PIU factor reported on the ASR shall be the percentage that the LEC uses for interstate and intrastate billing purposes.

38. Since Westcom submitted ASRs that reflected 100% interstate usage for FGB, and because Citizens could not detect the amount of interstate and intrastate traffic on FGB service, Citizens billed Westcom under its interstate tariff.

39. Westcom's submission of its ASRs for FGB with a factor of 100% PIU was contrary to Westcom's argument that it had every motivation to declare low interstate usage and high intrastate use.

40. Westcom knew of its intrastate usage, but failed to promptly notify Citizens of this fact.

41. Although Westcom received monthly FGB bills from Citizens in 1991, which reflected billing of 100% at the interstate tariff rate, it does not appear that Westcom complained to Citizen.

42. If Westcom wanted to report a low percentage of interstate use, Westcom was free to do so under the tariffs.

43. Citizens did not dispute the PIU reported by Westcom.

44. There is nothing in Citizens' letter of June 9, 1989 to suggest that Citizens had the ability in 1989 to actually measure FGB terminating traffic.

45. Westcom and Citizens agreed to the use of depositions as exhibits in C.92-09-006 and C.92-09-025.

46. Exhibits 27 and 31 show that all of the FGB bills from March 1991 through April 1992 were based entirely on the interstate tariff rate.

47. The Commission should not interfere with how Citizens applied the interstate rate elements to the FGB bills because Westcom consistently reported that its FGB usage was 100% interstate.

48. The Commission has not opened a separate investigation into Citizens' interstate access rates, nor has the Commission decided that Citizens' interstate rates are excessive or discriminatory.

49. Citizens' application of the interstate tariff rate was not discriminatory because it was Westcom who reported a PIU factor of 100%.

50. The Commmission will not pursue the avenues for relief provided for in § 703.

51. Since the Keddie charges are based on the interstate tariff rate, the Commission lacks the jurisdiction to address those alleged overcharges.

52. Instead of objecting to the Keddie bill when Citizens first billed Westcom for those charges in September 1990, Westcom waited to include those charges as part of C.92-03-049 that it filed on March 30, 1992.

53. Only a small fraction of the amounts in dispute involved back billed amounts.

54. A review of the access service bills does not support Westcom's argument that the access service charges may have been back billed.

55. In D.88-09-061, the Commission declined to adopt a proposal which would have imposed a 90 day limit on the LEC to back bill its access service customer.

56. The equal access cutover occurred in Citizens' Susanville office on June 11, 1991, and the cutover of Citizens' Elk Grove office occurred on June 12, 1991.

57. As a result of the cutover, Westcom experienced problems with calls from its customers who dialed 1 + 7 and 1 + 916 + 7 calls.

58. When the equal access cutover took effect, if a Westcom customer in Citizens' service territory dialed 1 + 7 digits, the call was not completed as an interLATA, intraHNPA call.

59. When the equal access cutover took effect, if a Westcom customer in Citizens' service territory dialed 1 + 916 + 7, the call never reached Westcom's switch and went to a Citizens' recording.

60. Sunde testified that these dialing problems lasted at least two or three days, but probably less than 10 days, before Westcom's Susanville and Elk Grove customers could terminate their calls to other exchanges in the 916 area code.

61. After Westcom modified its switch to include the 916 in any 1 + 7 call that it received from a Westcom customer in Citizens' service territory, Westcom did not experience any further problems with a 1 + 7 call.

62. The evidence presented shows that Westcom's switch was not set up to translate the 1 + 7 as an interLATA, intraHNPA call.

63. The California tariff provision regarding FGD service states that "the number dialed by the customer's end user shall be a seven or ten-digit number for calls in the North American Numbering Plan."

64. Exhibit 23 shows that to reach a FNPA from the 916 area, it is mandatory for the caller to dial 1 + 10, and for someone calling within the 916 area, it is mandatory to dial 1 + 7.

65. Sunde assumed that because he did not restrict 1 + 10 calls on the Translations Questionnaire, that these kinds of calls would be passed on to Westcom's switch.

66. The PacBell tariff does not specify what the mandatory dialing pattern is for a FNPA call and a HNPA call.

67. The mandatory dialing patterns shown in Exhibit 23 were never mailed to Westcom.

68. Based on the Translations Questionnaire and industry practice at the time of the qual access cutover, Citizens expected Westcom to follow the 1 + 7 digit calling pattern for an interLATA intraHNPA call instead of dialing 1 + 916 + 7.

69. Neither Westcom nor Citizens could pinpoint the exact date on which the 1 + 916 + 7 problem was corrected.

70. After Citizens became aware of Westcom's problem with the 1 + 916 + 7 dialing pattern, Citizens developed a solution by allowing the permissive dialing of 1 + 916 + 7 digit calls to be sent to Westcom.

71. After the permissive dialing of 1 + 916 + 7 was allowed, this calling problem disappeared.

72. There is no evidence to suggest that Citizens stripped off the 916 from the 1 + 916 + 7 dialing pattern.

73. The Commission decisions have defined reparation as a refund or adjustment of part or all of the utility charge for a service or a group of related services.

74. The lost revenues alleged by Westcom is not related to a refund or adjustment of what Westcom was charged, but instead is a request for damages that were allegedly caused by Citizens' failure to route the 916 calls.

75. Sunde acknowledged that only about 150 to 160 calls per day were routed to the 916 area from Citizens to Westcom's FGD trunks.

76. Since the 1 + 7 problem was the result of Westcom's failure to properly configure its switch at the time of the equal access cutover, it should not be entitled to any compensation for any interLATA, intraHNPA calls that failed.

77. Westcom has failed to prove that any of the amount billed in the June 1991 bill was attributable to failed 916 calls.

78. Westcom has not offered any proof that it lost thousands of dollars as a result of the 916 call problems that lasted from the cutover to equal access to a few days afterwards.

79. Only 34 calls were made to Westcom from Citizens' service territory over Westcom's 800 line from June 11 to June 17, 1991, and not the hundreds of calls that Westcom alleges occurred.

80. Westcom should be credited $20 by Citizens for the toll free calls that Westcom had to pay as a result of the calls that may have been made to Westcom about the 1 + 916 + 7 calling problem.

81. Westcom's contention is that because its switch records show lower usage, or no usage, as compared to what Citizens billed Westcom, that Westcom was overbilled by Citizens.

82. Westcom's switch records could not be reconciled with Citizens' records because Westcom's switch records did not list the time the disputed calls were originated or terminated, or the telephone numbers of the calling party and the called party.

83. The lack of detailed call records in another complaint case involving alleged overbilling led to a dismissal of the complaint.

84. Westcom's audit reports are simply monthly or daily accumulations of usage as recorded in its switch.

85. The joint testing conducted by Westcom and Citizens in C.92-03-049 did not attempt to match the specific call records of Westcom with the call records of Citizens.

86. Based on the data presented in Exhibit 45-B and 45-C, and the other testing performed by Citizens in March 1992, this Commission cannot conclude that the alleged FGD billing errors were due to timing-related problems in Citizens' switching and billing systems.

87. Since no timing errors are evident with respect to Citizens' equipment, we are not persuaded by Westcom's argument that because its usage was substantially less than what Citizens recorded and billed, that Citizens' billing must be incorrect.

88. Westcom has not demonstrated that Citizens' application of the meet point billing tariff was contrary to any tariff.

89. Westcom's request for a permanent injunction in C.92-03-049 was previously denied in D.92-08-028.

90. The allegations in C.92-09-006 , as amended, and the allegations in C.92-09-025 are closely related.

91. Westcom's request in C.92-09-006 for a temporary restraining order and a preliminary injunction was denied in D.92-12-038.

92. Citizens' request in C.92-09-025 for a preliminary injunction was denied in D.92-12-038.

93. It would be beneficial for the Commission to note in this decision its impressions about Citizens' FGB measurement capability.

94. Rule 64 provide that although the technical rules of evidence ordinarily need not be applied, the substantial rights of the parties shall be preserved.

95. Although Westcom seeks to use Robertson's Exhibit 126 to prove that Citizens could measure FGB terminating traffic, Robertson was not made available as a witness by Westcom.

96. Based on the evidence presented in all three complaints cases, we cannot conclude that Citizens had the ability to actually measure Westcom's FGB terminating usage during the time period at issue in the complaints.

97. Even though Foote indicated to Westcom that the FGB terminating traffic could be measured, Westcom did not order any trunks to the end offices so that actual measurement could take place.

98. Based on the record in this proceeding, we assume that the FGB bills for usage from June through August 1992 were partially billed using PacBell's 175-T tariff.

99. In June 1992, Westcom changed its PIU to reflect intrastate usage of 83% in the Elk Grove area, and 90% in the Susanville area.

100. Westcom could have avoided the FGB billings that were billed on an assumed minutes of use basis from June through August 1992 by simply tendering the deposit requested by Citizens pursuant to the tariff.

101. Sunde acknowledged that Exhibit 72 showed that Westcom did not pay its bills in a timely manner.

102. Citizens had a right to refuse Westcom's request to change its FGB service to originating only when Westcom failed to tender the deposit that Citizens demanded.

103. The deposit requirement contained in the tariffs that Citizens subscribed to, applied to all access service customers and did not single out Westcom.

104. 700 dialing is included as part of FGD service.

105. When Exhibit 31 is read in conjunction with Exhibit 42, it is clear that Citizens was only referring to the deposit amount.

106. There is insufficient evidence to find that Citizens was blocking Westcom's customers from 700 dialing.

107. The use of autodialers with preprogrammed access numbers may have caused the blocking problems encountered by Westcom's customers.

108. The events which took place after the issuance of D.92-08-028, and which are the subject of the allegations in C.92-09-006 and C.92-09-025, could have easily been avoided had Westcom tendered all of the disputed sums to either the Commission or to Citizens pending a final decision.

109. D.92-08-028 gave Westcom the option of tendering the monies in dispute to Citizens pending a final decision in C.92-03-049, or to deposit the disputed amounts with the Commission.

110. In order to protect Westcom's customers, Westcom was ordered in D.92-08-028 to send a specific notice to its customers if it decided not to pay the disputed amounts to the Commission or to Citizens.

111. Westcom decided not to deposit the disputed amounts with the Commission or to tender the disputed amounts to Citizens.

112. Instead of preparing the notice in the manner prescribed by D.92-08-028, Westcom prepared its own notice.

113. Westcom and Sunde admit that D.92-08-028 required that Westcom's notice contain specific language, and that the notice that Westcom mailed was not in the form prescribed by the Commission.

114. At the close of the hearing in C.92-03-049, the ALJ made Westcom aware of its right to file for rehearing.

115. Westcom failed to file an application for rehearing of D.92-08-028.

116. A deposit of the disputed amounts would have allowed Westcom to avoid sending the required notice to its customers.

117. Westcom's failure to tender the disputed amounts to the Commission or to Citizens triggered the operation of ordering paragraph 5 of D.92-08-028.

118. Prior to January 1, 1994, § 2107 provided for a penalty of not less than $500 but no more than $2,000 for each offense.

119. The resolution of the allegations in C.92-09-006 and C.92-09-025 are not dependent upon whether Westcom was a switchless reseller.

120. In order for customers of Westcom to change to Com System's network, Citizens had to initiate a change in the PIC code for each customer.

121. Westcom did not send any LOAs directly to Citizens.

122. We are not persuaded by Westcom's argument that Citizens had constructive notice of Westcom's new network arrangement as a result of a Westcom customer sending a copy of Exhibit 46 to Citizens.

123. Com Systems was submitting the PIC changes on behalf of Westcom's former customers so that these customers could utilize Com System's network to place telephone calls.

124. Other Commission decisions have held that a PIC change is a request by an IEC to change a customer's presubscribed interexchange carrier.

125. Citizens had legitimate questions of Com Systems regarding the LOAs.

126. It was the responsibility of Com Systems to verify the appropriateness of the PIC changes.

127. Slamming is the switching of a consumer's presubcribed long distance telephone carrier to another carrier without the consent of the consumer.

128. Citizens apparently gained a better understanding of the arrangement that Westcom and Com Systems had entered into sometime between August 26 and August 31, 1992.

129. Westcom switched the IEC of five customers without their authorization.

130. Exhibits 101 and 102 must be viewed together with Exhibits 46 and 54.

131. Once Citizens terminated Westcom's access services, Westcom was no longer an access service customer of Citizens, and therefore was no longer a valid IEC option.

132. Exhibits 101 and 102 did not portray Westcom unfairly.

133. Citizens was within its rights to advise end users of their freedom to select an IEC of their own choosing.

134. The evidence suggests that until August 26, 1992, Com Systems was willing to accept only business customers.

135. Despite the instructions in Exhibit 114, the evidence establishes that some of Westcom's customers were told by representatives of Citizens that Westcom was out of business or going out of business.

136. The problems that Jeskey encountered, and the other customers who experienced calling problems following the cutoff of access services to Westcom, were due to Westcom's failure to send out the notice required by D.92-08-028, and Westcom's failure to make the necessary arrangements with Com Systems and Citizens.

137. Had Westcom mailed out the appropriate notice in a timely manner, Westcom's customers would have had the opportunity to select an IEC before Westcom's access services were terminated.

138. Westcom did not ensure that its network merger with Com Systems was seamless since Com Systems did not verify that the LOAs were valid until August 25, 1992, and Com Systems did not start to accept residential customers until August 26, 1992.

139. According to Citizens' customer service records, Battagin had never been an IEC customer of either Westcom or Com Systems.

140. Given the other testimony regarding Citizens' lack of FGB measurement capability, we are not persuaded by Westcom's argument that the CAL-NET problem proves that Citizens was able to measure FGB terminating traffic.

141. The alleged billing problem with Execuline does not shed any light on the FGB measurement capability at issue in this proceeding.

142. The alleged billing problem with Execuline does not shed any light on the FGB measurement capability at issue in this proceeding.

143. Westcom admits to improperly sending Exhibit 60 to approximately one-third of its California customers regarding intraLATA calls.

144. Westcom acknowledges that it improperly assumed that intraLATA service by IECs was to become effective momentarily.

145. When C.92-09-025 was filed, IECs were prohibited from soliciting intraLATA calls or holding themselves out as providers of intraLATA long distance service.

146. IECs were not authorized to compete in the intraLATA market until January 1, 1995.

147. In determining whether intraLATA traffic is incidental or not depends upon the carrier's affirmative intent to hold out the offering of intraLATA traffic.

148. In both D.88-09-099 and D.91-09-018, Westcom was prohibited from holding out to the public that it could provide intraLATA service, and that it was to advise its subscribers that intraLATA communications should be placed through the LEC.

149. In D.92-12-038, the Commission denied Westcom's request for a temporary restraining order and preliminary injunction in C.92-09-006, and denied Citizens' request for a preliminary injunction in C.92-09-025.

150. Section 1804(a)(2) requires that a customer who seeks an award for intervenor compensation shall within 30 days after the prehearing conference is held, file and serve on all parties to the proceeding a notice of intent to claim compensation.

151. Westcom did not file its initial request for compensation until June 3, 1993, more than five months after the prehearing conference.

152. Section 1803 was amended by Chapter 942 of the Statutes of 1992, with an effective date of January 1, 1993.

153. Westcom's filing of its second amended request did not cure the late filing of its initial request for compensation.

154. Under the common fund, the compensation is paid for out of the fund that is created as a result of the litigation and which benefits others.

155. Fees and expenses from a common fund are awarded in only the most meritorious cases, and the decision to award the fees is within the sound discretion of the Commission.

156. Since no reparations are due from Citizens, no common fund of reparations benefiting Westcom's customers or Citizens' access service customers has been created.

157. In order to receive an award from the Advocates Trust Fund, a common fund must be generated.

Conclusions of Law

1. Exhibits 26, 27, 28, 34 and 39 are received into evidence.

2. What was submitted as Late-Filed Exhibit No. 37 and Late-Filed Exhibit No. 39 shall be relabeled as Exhibit 46 and Exhibit 47, respectively, and shall be received into evidence.

3. The objection of Westcom to the admission of Exhibit 29 is overruled, and Exhibit 29 shall be received into evidence.

4. Exhibit 45 shall be received into evidence.

5. The transcript corrections submitted by Citizens in a letter dated July 29, 1992 shall be accepted and the corrections shall be made to the reporter's transcript.

6. Westcom's motion in its opening brief to "admit all documents contained in Westcom's Exhibit 4, including Tab 2" is denied.

7. Westcom's First Amended Complaint and Second Amended Complaint shall be treated as amendments to C.92-09-006 only.

8. Westcom's motion for the Commission to issue a decision is moot.

9. There is a need to address the Commission's power to adjudicate the FGB access services because many of the bills were billed entirely at the interstate tariff rate on file with the FCC.

10. Although the Commission has complete control over the rates charged by public utilities operating within the state, if the FCC tariff applies, then this Commission has no jurisdiction to adjudicate the matter.

11. Both the PacBell tariff and the NECA tariff provide that it is up to the IEC to provide an updated PIU.

12. Since the tariff provisions place the obligation on the IEC to submit an updated PIU factor, Westcom should not be able to rely on its inaction to excuse itself from having to pay the FGB charges.

13. Westcom has failed to meet its burden of proof that Citizens had the capability to measure the FGB terminating usage of Westcom.

14. Westcom's contention that § 703 gives the Commission jurisdiction to address the FGB services is mistaken because that code section used to provide that the Commission can pursue relief before the Interstate Commerce Commission or to any court of competent jurisdiction, and as amended, provides that the Commission can pursue relief before the federal agency or a court of competent jurisdiction.

15. The alleged overcharge of Westcom by Citizens for FGB services that were billed at the interstate rate is an issue that this Commission has no jurisdiction over.

16. The Commission lacks the authority to address Westcom's argument that the back billed amounts exceeded the limitation period for back billing because all of the back billed amounts were billed at the interstate tariff rate.

17. Westcom's argument that the 90-day back billing limitation applies to access service billings is in error because D.86-12-025 only established a 90 day back billing limitation for the end use telephone customer.

18. The California tariff provision regarding FGD service suggests that Westcom's customer should be able to dial 1 +7 or 1 + 10 to access Westcom's switch.

19. Citizens should have allowed its switch to pass on a 1 + 916 + 7 digit call to Westcom's switch at the time the equal access cutover took effect.

20. Westcom is not entitled to any reparations for lost revenues, and the Commission has no jurisdiction to award damages.

21. Since Westcom has not presented any specific call detail to support its allegations that Citizens overbilled Westcom for FGD, Westcom has not carried its burden of proof that the overbilling took place.

22. Westcom failed to meet its burden of proof with respect to its allegation that it did not receive any traffic over its FGD lines in Elk Grove, and therefore its request for reparations is denied.

23. Since the late charges for both FGB and FGD service were based on the interstate tariffs, we decline to review the late charges associated with the interstate tariffs.

24. The Fiscal Office should be directed to transmit to Citizens the full amount that Westcom has on deposit with the Commission in C.92-03-049.

25. The Commission has the authority to review the FGB usage from June 1992 until service was terminated on August 25, 1992 because Westcom changed its PIU to reflect intrastate usage.

26. The Commission has the authority under § 453 to investigate Westcom's allegations regarding discriminatory practices with respect to the provisioning of FGB services.

27. For the Commission to give weight to Exhibits 9 and 126 without affording anyone the opportunity to cross examine the person who prepared these exhibits, would not preserve the substantial rights of the parties.

28. Since PacBell's 175-T tariff regarding the use of assumed measurement, when no measurement capability was available, was in existence throughout the 1989 to 1992 timeframe, and because Citizens had the right to back bill Westcom, we conclude that Citizens did not waive its right to bill Westcom for FGB terminating usage on an assumed minutes of use basis for the period from June through August 1992.

29. Westcom has not met its burden of proof that it is entitled to a credit of $12,997 for the FGB billings for June through August 1992.

30. Since all carriers whose terminating FGB traffic could not be measured, were billed on an assumed minutes of use beginning with the February 1992 usage, we conclude that Citizens did not grant any preference or advantage to another carrier, or subject Westcom to any prejudice or disadvantage in violation of § 453.

31. Since it appears that Citizens uniformly applied the same policy of not including anything on FGB bills which would have indicated that some of the usage was being billed on an assumed minutes of use basis, we conclude that Citizens did not subject Westcom to any prejudice or disadvantage.

32. Citizens' failure to send advance notice to Westcom of its intention to bill FGB terminating usage on an assumed basis did not subject Westcom to any prejudice or disadvantage.

33. Westcom's argument that the tariff sections covering deposits were intended to apply to orders for new service only is without merit because the tariff language clearly allows a deposit to be collected before a service is started,

or any time after the service is provided if there is a proven history of late payments.

34. Citizens did not subject Westcom to any prejudice or disadvantage when it demanded a deposit from Westcom.

35. Citizens' acceptance of the PIU change was consistent with the PIU tariff provisions.

36. Citizens did not subject Westcom to any prejudice or disadvantage when it accepted Westcom's PIU change, but not its request to change its FGB service.

37. Westcom's failure to tender the deposit authorized by tariff should not operate in a manner which mitigates Westcom's liability for FGB terminating usage.

38. Since the tariff has the force and effect of law, it is the tariff, and not contract law, which governs the terms and conditions of service.

39. Tariffs are to be strictly construed and no understanding or misunderstanding of either or both of the parties is enough to change the rule.

40. Based on the evidence presented, Citizens did not disadvantage or prejudice any Westcom customer by requesting credit information from the customer.

41. The demand for a deposit for 700 service was not unlawful.

42. Citizens did not subject Westcom to any prejudice or disadvantage as a result of Citizens' demand for a deposit for 700 service because the service was functioning properly.

43. The Commission was under no obligation to discuss the notice or what course of action the Commission was planning to take with Westcom before D.92-08-028 was issued.

44. Once the Commission adopted D.92-08-028, any perceived deficiency with the required notice should have been raised by Westcom in an application for rehearing.

45. As a public utility subject to this Commission's jurisdiction, Westcom was obligated to obey and comply with D.92-08-028.

46. Since Westcom failed to apply for rehearing of D.92-08-028, its argument that the Commission committed legal or factual error in D.92-08-028 need not be addressed in this decision.

47. Westcom's argument that the Commission committed legal or factual error in D.92-08-028 cannot be used to justify Westcom's non-compliance with a Commission decision.

48. Westcom failed to obey and comply with Ordering Paragraph 5 of D.92-08-028, and this failure resulted in a violation of § 702.

49. Westcom should be penalized $2000 for its failure to comply with D.92-08-028.

50. The imposition of a penalty for Westcom's violation of § 702 for its failure to obey and comply with D.92-08-028 should be suspended.

51. Citizens' request to revoke Westcom's CPC&N should be denied at this time.

52. Although Westcom had entered into an agreement with Com Systems, whereby Com Systems would carry Westcom's traffic, a carrier change occurred because a PIC change to Com System's PIC number was needed.

53. Citizens did not delay or refuse to process the PIC changes at issue in this proceeding, and no reparations are due to Westcom, Com Systems or any of their customers.

54. Westcom should be penalized $1,000 for each customer that Westcom slammed for a total penalty of $5,000.

55. The imposition of a penalty for Westcom's slamming should be suspended.

56. The type of injuries which allegedly resulted as a result of Exhibits 101 and 102 are issues which this Commission has no jurisdiction over, and are in the nature of damages.

57. Westcom's request for reparations in connection with Citizens' alleged misrepresentations should be denied because it is nothing more than a request for damages for which this Commission has no jurisdiction to award.

58. Westcom's request that penalties be imposed against Citizens and its employees for the alleged misrepresentations should be denied.

59. There is insufficient evidence to conclude that Citizens told some customers that the charge to switch the customer's IEC would cost $13.50 or $11.00.

60. There is insufficient evidence to conclude that Westcom misrepresented the amount of the switch charge in Exhibit 46 since Westcom offered to reimburse its customers for any conversion charge that might be imposed.

61. Westcom has failed to prove that Citizens told callers that if they chose Com Systems, they could no longer use AT&T.

62. The Commission is without jurisdiction to determine whether a violation of the antitrust laws or the Unfair Practices Act occurred.

63. The Commission has the authority to consider the effects of antitrust behavior or unfair practices in certain situations.

64. In determining whether a particular business practice is unfair, the Commission needs to balance the impact on the alleged victim, and the reasons, justifications, and motives of the alleged wrongdoer.

65. Based on a review of the evidence, and the circumstances which led to Citizens' actions, we cannot conclude that Citizens' activities were anticompetitive or unfair.

66. Westcom failed to meet its burden of proof with respect to the allegations contained in its Second Amended Complaint to C.92-09-006.

67. Exhibits 60 and 73 evidence an affirmative intent on Westcom's part to solicit intraLATA traffic.

68. Based on the evidence presented, Westcom affirmatively intended to solicit intraLATA traffic.

69. Westcom's actions with respect to Exhibits 60 and 73 failed to comply with D.88-09-099 and D.91-08-018, and Westcom's failure to comply with those two decisions resulted in a violation of § 702.

70. Westcom's violation of Commission decisions are clearly reflective of Westcom's fitness to continue as an IEC in California.

71. Westcom should be penalized $2,000 for its failure to comply with D.88-09-099 and $2,000 for its failure to comply with D.91-08-018.

72. The imposition of the $4000 in penalties for Westcom's failure to obey and comply with D.88-09-099 and D.91-08-018 should be suspended.

73. Westcom's request for a permanent injunction in C.92-09-006, and Citizens' request for a permanent injunction in C.92-09-025 should be denied.

74. Westcom is ineligible for intervenor compensation under the provisions of § 1801 and following.

75. Since the common fund theory is rooted in the courts of equity, the requesting party's hands must be clean.

76. Westcom's failure to abide by the Commission decisions leaves it with unclean hands, which should bar any request for compensation.

77. Since no common fund has been created, no fees can be awarded to Westcom from the Advocates Trust Fund.

FINAL ORDER

IT IS ORDERED that:

1. Westcom Long Distance, Inc.'s (Westcom) request for a preliminary and permanent injunction in Case (C.) 92-03-049 was previously denied in Decision (D.) 92-08-028. Except for a $20.00 credit for the calls that may have been made over Westcom's 800 number, Westcom's remaining requests in C.92-03-049 for reparations and relief are denied.

   a. The Commission's Fiscal Office is directed to tender the $12,608.79 that Westcom previously deposited with the Commission, to Citizens Utilities Company of California (Citizens).

   b. Citizens shall credit Westcom's account for the $20.00 and the $12,608.79.

2. Westcom's request for a temporary restraining order and a preliminary injunction in C.92-09-006 was previously denied in D.92-12-038. Westcom's request for a permanent injunction in C.92-09-006 is denied, and its remaining requests for reparations and relief are denied.

3. Citizens' request for a preliminary injunction in C.92-09-025 was previously denied in D.92-12-038. Citizens' request for a permanent injunction in C.92-09-025 is denied, and except as provided for in Ordering Paragraphs 4, 5 and 6 below, its remaining requests for reparations and relief in C.92-09-025 are denied.

4. Westcom's failure to comply with the notice required by D.92-08-028, its failure to comply with the intraLATA restrictions contained in D.88-09-009 and

D.91-09-018, and its slamming of five of its former customers, warrant that penalties in the total amount of $11,000 be imposed on Westcom.

a. The monetary penalties of $11,000 shall be suspended unless either of the following conditions arise:

(1) If Westcom resumes activities in California as an interexchange carrier (IEC), the suspension of the penalties shall be lifted, and the Commission shall take action to impose and collect the $11,000 in penalties from Westcom; or if

(2) Any Westcom officer or shareholder becomes involved with an entity that seeks to operate as a provider of telecommunications services in California, the Commission staff is directed to bring this to the Commission's attention, and action shall be taken to impose and collect the $11,000 in penalties from Westcom.

5. If Westcom decides to commence operations again in California as an IEC under its present operating authority, the Telecommunications Division of the Commission is directed to take action to open an Order Instituting Investigation (OII) into why Westcom's operating authority should not be permanently revoked for its failure to comply with Commission decisions and for slamming.

6. If any of Westcom's officers or shareholders becomes involved with an entity that seeks to operate as a provider of telecommunications services in California, the Commission staff shall bring this to the Commission's attention, and the Telecommunications Division shall then take action to open an OII into why Westcom's operating authority should not be permanently revoked for its failure to comply with Commission decisions and for slamming.

7. Westcom's request for compensation under the intervenor compensation statutes, the common fund theory, and the Advocates Trust Fund is denied.

8. C.92-03-049, C.92-09-006 and C.92-09-025 are closed.

This order is effective today.

Dated September 21 , 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners