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Decision 92-06-065 June 17, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Application of Pacific Bell (U 1001 C), a corporation, for approval of COMMSTAR[SM] Features.	Application 90-11-011 (Filed November 9, 1990)
In the Matter of the Application of Contel of California, Inc. (U 1003 C), a corporation, for approval of Custom Calling Plus Features.	Application 90-12-065 (Filed December 28, 1990)
In the Matter of the Application of GTE California Incorporated (U 1002 C), a corporation, for authority to provide SmartCall[SM] Services.	Application 91-01-039 (Filed January 31, 1991)

(Appearances are listed in Appendix A.)

I N D E X

I N D E X

INTERIM OPINION

Summary of Decision

Today we grant interim authority to Pacific Bell (Pacific), Contel of California, Inc. (Contel), and GTE California Incorporated (GTE) to provide certain new privacy related Custom Local Access Signaling Services (CLASS services or features), for a trial period of two years. We also grant authority to Pacific, Contel, and GTE for other nonprivacy-related CLASS services. Rejecting the recommendation of the administrative law judge's proposed decision, we also grant the requests of applicants to provide Caller ID service, finding, provisionally, that under the terms of the consumer protection, consumer education, and other requirements articulated in this decision, it is in the public interest and will not result in an unwarranted intrusion upon the privacy rights of California citizens.

Under the terms of our decision, Caller ID service is contingent upon each telephone subscriber having the option of selecting free per-call blocking, free per-line blocking, or free per-line blocking with per-call enabling. The default mode for subscribers who fail to make an election will be dependent upon the listed or published status of the subscriber's number. For those subscribers who currently hold unlisted or nonpublished numbers, or for certain emergency service organizations, the default mode will be free per-line blocking with per-call enabling. Free per-call blocking will be the default protection for all other subscribers.

The decision requires the deployment of a wide-ranging customer notice and education program by the applicants to facilitate universal awareness of the nature of the service and the means by which telephone users can protect their privacy and requires that such a program be submitted to CACD and approved by the Commission. Under the terms of our order, Caller ID service shall not be provided until the applicant has made a showing,

approved by Commission order, that the applicant has notified all of its customers of the nature of the service and the means by which they may protect their privacy and has undertaken the steps necessary to assure that for calls initiated from private telephones in California, the display of the calling party's number to the call recipient is the result of the calling party's informed consent.

Periodic compliance and tracking reports must be filed with CACD.

While we approve interim rates with pricing flexibility, we require that each of the applicants file a new application, no later than 90 days after the issuance of the Commission's decision in the Implementation Rate Design (IRD) phase of the Commission's Alternative Regulatory Framework proceeding, Investigation (I.) 87-10-033, seeking final pricing and cost categorization in conformity with the guidelines enunciated in IRD.

Background

This consolidated proceeding originated with the filing by Pacific of Application (A.) 90-11-011, requesting authority to provide seven new COMMSTAR Custom Calling Services, Pacific's marketing term for its CLASS services. CLASS is the industry term for these services, which applicants seek to provide through deployment of a new technology, Signaling System Seven (SS7).

Pacific seeks authority to provide seven new COMMSTAR Features--Call Block, Call Return, Call Trace, Caller ID, Priority Ringing, Repeat Dialing, and Select Call Forwarding--with Category II pricing classification, including floor and ceiling rates for all proposed features, and flexible pricing and volume discounts for five of the features. It also seeks approval of new proposed rates for existing COMMSTAR Features to reflect new floor, recurring, and nonrecurring rates, a volume discount approach, and introductory pricing which would waive tariff rates for nonrecurring charges during the initial offering of COMMSTAR

Features. In D.89-10-031, the Phase II decision of I.87-11-033, we identified Pacific's existing COMMSTAR Features as Category II services for pricing purposes, and, by Resolution T-14045 (Jan. 24, 1990), we placed those features in Category II. The existing COMMSTAR Features affected by Pacific's application are Call Waiting, Busy Call Forwarding, Busy Call Forwarding Extended, Delayed Call Forwarding, Call Forwarding, Three-Way Calling, Speed Calling 8, Speed Calling 30, and Intercom Plus. The other applicants did not seek approval for flexibility of existing services.

Contel filed a similar request, A.90-12-065, seeking approval of its new Custom Calling Plus Features. It proposes to introduce seven new Custom Calling Plus Features--Call Block, Return Call, Call Trace, Caller ID, Priority Call, Repeat Call, and Selective Call Forwarding. It also requests pricing flexibility for these features.

GTE filed a comparable application, A.91-01-039, requesting authority to provide nine new SmartCall Services--Automatic Busy Redial, Automatic Call Return, VIP Alert, Call Block, Special Call Forwarding, Special Call Waiting, Special Call Acceptance, Call Tracing Service, Calling Number ID (CNID), SmartCall PAK 4400, and SmartCall PAK 4900.[1] GTE also requests pricing flexibility authorization for Category II services under Decision (D.) 89-10-031. The three applications were consolidated by Administrative Law Judge (ALJ) John S. Lemke. After conducting duly noticed public participation hearings across the state,

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1 We note that each of the applicants has utilized distinctive product names, some of which are asserted to be protectable service marks, in packaging their CLASS services. In our view, it would be extremely helpful to consumers if the applicants could agree among themselves on a single and fairly descriptive name for corresponding offerings to be provided across the state. We encourage the applicants to do do.

reviewing some 3,900 letters from customers responding to the applications and to bill inserts explaining the proposed CLASS services, conducting some 21 days of evidentiary hearings and reviewing the voluminous briefs filed thereon, ALJ Lemke rendered a proposed decision which granted the authority requested, except with respect to Caller ID.[2]

We sustain the proposed decision insofar as it authorizes the CLASS services proposed by the applicants. We do not agree with the disposition of the Caller ID service contained in the proposed decision. Instead, we have concluded that the service may be offered on an interim basis, subject to the substantial consumer safeguards outlined below. We deem our order consistent with the public interest and the important privacy rights of California citizens.

As noted, the three applications are essentially similar. While we will discuss Pacific's proposal in some detail, we intend that our discussion be generally applicable to all three proposals.

Descriptions of the Products

Pacific contends that the proposed new services offer the ability to eliminate unwanted interruptions, improve the ability to complete calls, and increase options for handling abusive calls.

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2 The proposed decision, issued on January 21, 1992, found that Caller ID, even with a choice of all available blocking options, would constitute an unwarranted intrusion on the state and federal privacy rights of California citizens and would not be in the public interest because the detriments associated with the feature would outweigh its benefits. Pursuant to Rule 77 et seq., the following parties filed comments and replies to the proposed decision: applicants, AT&T, Consumer Action, California Alliance Against Domestic Violence, California Department of Consumer Affairs, California Bankers Clearing House Association, the Division of Ratepayer Advocates, Roseville Telephone Company, the smaller independent LECs, MCI, TURN, and UCAN. These comments have been considered in our decisionmaking process.

The services will be offered to residential and business customers under a flexible pricing structure.

The proposed CLASS services are some of the products evolving from the Common Channel Signaling System 7 (SS7) technology. SS7 is an internationally standardized network management system. It allows for network and traffic management by computers, making the network more efficient and flexible. The products are made possible by the intelligence and signaling capabilities residing in SS7 and the network hardware and software technology available in the central offices. The features are available when necessary equipment is placed in interoffice facilities and central offices.

The CLASS services can be segregated into two groups. Services proposed in the first group has capabilities that can reveal the telephone number of the calling party by means of a video display on a specially designed telephone set, an audio announcement, or printed on the called party's telephone bill. The second group does not reveal the number of the calling party to the called party.

Privacy Related Class Services

Call Block

Call Block allows the customer to automatically block the receipt of incoming calls from a list of up to ten telephone numbers specified by the customer. Calls can be blocked from selected telephone numbers, or from a number from which a customer has just received a call. The Call Block subscriber can automatically add the last incoming call to his or her list by pressing #01# When this is done, the system voices back the number just added to the list, or, when per-call blocking is used by the calling party, it indicates that the last number added is a "private entry." The list of numbers may be changed by the customer at any time. Blocked callers will receive a recorded

announcement stating "The party you are calling is not accepting this call." No toll charges will apply to the blocked call.

Call Return

The Call Return feature allows the subscriber to identify the number of the last person who called, unless that call is blocked as private. If the caller has requested that his number not be disclosed, the subscriber's Call Return announcement will state: "The number of your last incoming call is a private number and cannot be announced." Otherwise, when the subscriber activates the Call Return feature, the number of the last call made to the customer's line will be announced and redialed automatically if the customer so chooses. The last caller's number, if busy, will be rechecked every 45 seconds for up to 30 minutes. Similar to Repeat Dialing, the customer will be alerted with a distinctive ring when the customer's line and busy number are free.

Call Trace

With this feature, the customer may automatically request that the company record a caller's originating number and the date and time of the call, as well as the date and time of the customer-initiated trace. The information is securely stored by the company and disclosed only to a law enforcement agency for investigation purposes.

Caller ID

The Caller ID[3] feature displays to the call recipient, on a specially designed phone or a device attached to a phone, the phone number from which the call is initiated. Customers interested in Caller ID service will need to obtain a device that displays the calling party's phone number from a retailer or other

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3 As noted by the ALJ, Caller ID is actually a misnomer. The feature is a calling "number" identification service and does not disclose the identity of the individual making the call.

entity. If the caller has requested that his number not be displayed on the call recipient's display device, the Caller ID subscriber receiving the call will receive a "Private Number" message on his display device.

For ease of writing, the discussion of all privacy related CLASS services will be taken together and referred to as a group by the latter's name--Caller ID.

Nonprivacy Related Class Services

Priority Ringing

This service allows customers to distinguish incoming calls, from up to ten customer-prespecified numbers, by signaling the customer with a distinctive ringing pattern. If the customer also subscribers to Call Waiting, a distinctive tone is heard if an incoming call is one of the preselected set of priority numbers.

Repeat Dialing

Repeat Dialing permits the customer to have calls automatically redialed when calling a busy number. The busy line is checked every 45 seconds for up to 30 minutes. When the busy number and the customer's line are free, the customer is alerted by a distinctive ringing pattern. The customer can continue to make and receive calls while waiting for the distinctive ring.

Select Call Forwarding

This service permits a customer to forward calls from a preselected list of up to ten numbers. It can be used in conjunction with Call Forwarding. When used with Call Forwarding, the network first identifies any Select Call Forwarding numbers and routes them accordingly. Any incoming number not on the the Select Call Forwarding list will be forwarded according to the Call Forwarding instructions.

Summary of Services

A summary of a description of all the CLASS services and the different product names appears in Table 1.

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TABLE 1
CLASS SERVICES

SERVICE	IDENTIFIES CALLER TO CALLED PARTY	ID CAN BE BLOC
PRIVACY RELATED SERVICES		
1. CALL BLOCK: Allows customer to prevent unwanted calls by having them diverted.	Voice Announcement (PacBell)	Yes/cal
2. CALL RETURN: Allows customer to have last incoming call automatically returned.	Voice Announcement (PacBell/GTE) Billing* (All Applicants)	Yes/cal Yes/uti
3. CALL TRACE: Customer can have utility trace originating number of last call received.	No**	N/A
4. CALLER ID: Unless blocked, displays caller's number between first & second ring.	Visual Display (All Applicants)	Yes/cal
NONPRIVACY RELATED SERVICES		
5. PRIORITY RINGING: Incoming calls differentiated by distinctive ringing.	No	N/A
6. REPEAT DIALING: Busy number checked automatically and call completed.	No	N/A
7. SELECT CALL FORWARDING: Allows certain calls to be forwarded to third number.	No	N/A
(Following Services GTEC Only)		
8. SPECIAL CALL WAITING: Can have call waiting for certain numbers.	No	N/A
9. SPECIAL CALL ACCEPTANCE: Calls accepted only from certain numbers.	No	N/A

* Decision requires deletion of last four digits of phone number on billing for toll calls.

** Calling Party number disclosed to law enforcement agency.

Consumer Safeguards
Blocking Options

PU Code § 2893 requires that "every telephone call identification service offered in this state...shall allow a caller to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the individual receiving the call." Applicants propose to make available free per-call blocking, maintaining that this option satisfies the statutory blocking requirement. By entering an access code (*67)[4] before dialing any telephone number, delivery of the caller's number would be blocked for that call. The Caller ID subscriber would receive a "Private Number" message instead of the calling number on his display unit.[5]

Similarly, applicants believe that per-call blocking will protect the privacy of a caller's number when a called party subscribers to Call Block, Select Call Forwarding, and/or Priority Ringing. These features permit a subscriber to automatically add the last calling number to their feature list. If the caller activates per-call blocking, a subscriber will be permitted to add the caller's number to his list, but the number will not be disclosed. If the called party subscribes to the Call Return feature, he or she will be able to return the last incoming call even though the number is not disclosed. However, if the call is a toll call, the number returned through the use of the Call Return feature will, under the proposals submitted by the applicants, appear on the Call Return subscribers's bill.

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4 The per-call blocking code for rotary telephones would be 1167.

5 As will be discussed more fully below, some of the parties contend that other, more restrictive options for protecting calling party privacy, such a per-line blocking or per-line blocking with per-call enabling, should be required.

Customer Notification and Education

Applicants propose detailed and extensive customer education plans set forth in the applications. The primary focus of the notices will be education regarding the changing nature of telephone use. To maximize the effectiveness of these notices, they will be made through the same channels that applicants will use to advertise the features, including bill inserts, targeted newspapers and magazines, radio, and television as well as a community outreach program. Applicants' notification plans include proposed bill insert language, directory instructions, and customer contact information.

Consumer Protection for "Billed to ESP" Services

Pacific has structured three of the proposed services to use a billing option referred to as "Billed to ESP." When using this option, the enhanced service provider (ESP) takes an order from the end user and places the order with Pacific for providing the services on the end user's line. The unique characteristics of the ordering require terms and conditions to protect the end user. The Billed to ESP option can be used with Call Block, Priority Ringing, and Select Call Forwarding.

ESPs and end users must understand their responsibilities for the Billed to ESP services. An ESP requesting service on behalf of an end user must warrant that they have the authority from the end user to place an order for service on the end user's line. The ESP is responsible for all ordering, including disconnects, as well as for customer education. The ESP pays the Pacific charges associated with the services provided on the end user's line. The ESP is responsible for payment of all Bill to ESP charges, without regard to the status of the end user's line.

Pacific will send confirmation letters which acknowledge the order and any duplicative services. End users will be responsible for ordering the disconnect of potentially overlapping

and/or redundant Pacific services that may exist on their line. Pacific is not responsible for charges between an ESP and the end user.

To ensure that end users are aware that services have been ordered by an ESP on their behalf, Pacific will include a one-time notice on the end user's Pacific bill under "Explanations of Other Charges and Credits." The notice will state that the service has been activated on the end user's line but is billed to its ESP.

An ESP will be required to prominently provide the following notice (which we have slightly modified from the proposed notice) on all billing for enhanced services which utilize a Billed to ESP service.

"This service is privately provided by (NAME OF ESP). Complaints regarding billing or service should be directed to (ESP ADDRESS AND TELEPHONE NUMBER). The provider of this service does pay for the use of regulated telephone facilities to provide service to you. You may inform the California Public Utilities Commission, Consumer Affairs Branch, of any unresolved problems at:

"(Northern and Southern California Commission Offices)"

Deployment Limitations

The initial deployment by Pacific is dependent upon the current availability of necessary equipment. For this reason, deployment will be introduced in stages. In stage one the new services will be available to Numbering Plan Administration (NPA) 415 (415 and 510) and 408 in Local Access and Transport Areas (LATA) 1 and 818, and 213 in LATA 5 after October 1, 1991. Stage two will expand the intial service areas to include NPAs 714 and the LATA 5 part of 805. It will also add the 707 NPA in LATA 1. Service for the second stage will begin approximately December 1, 1992.

Service will be largely, but not exclusively, limited to intraLATA calls. Wide-scale interLATA service was not expected to occur before late 1991. Any interLATA traffic will be handled by

interexchange carriers. In all cases, the new features will only work when both caller and call recipient are served from capable switches interconnected by SS7 technology.

At introduction, the proposed features will not be technically compatible with the following services: Centrex, COMMSTAR II, Two-Party/Multi-Party Lines, Hotel/Motel and Hospital Lines, Manual and Direct Connections, Private Branch Exchange Service, lines served from some Remote Switching Systems, Foreign Exchange Lines, Wide Area Toll Service, and 800/900 Lines.

GTE's new CLASS features are ready for deployment now in many service areas extending from Lancaster and Montebello in the south, to Santa Maria, and also in Morgan Hill. Contel intended to deploy the new services in Gilroy in October 1991, and in its Victorville exchange service area in April 1992.

Per-Call Blocking and Caller ID Limitations

At the time the applications were filed, applicants were uncertain whether all telephone companies in other states will comply with per-call blocking requests on interLATA/interstate calls. Some interexchange companies (IECs) may not have the technical ability or business interest to receive and/or process the per-call blocking request. However, Pacific asserts it will work within a variety of national industry forums to have all companies adhere to the per-call blocking request.

Per-call blocking will only be available from telephones served from a capable switch. Callers attempting to use per-call blocking from outside the service area will receive a "reorder" signal (one which refers to a more rapid version of a busy signal indicating that the customer request could not be completed). Callers served from the capable switch will be able to use per-call blocking even for calls that travel outside the calling number delivery area.

Because of technical limitations, per-call blocking will not be available for calls from coin phones.[6] Pacific has requested switch vendors to determine when per-call blocking will be available for all coin phones. Pacific maintains, however, that since these phones are not "customer" phones within the meaning of PU Code § 2893, this switch limitation does not violate the current law.

Discussion

Caller ID

We must determine whether the provision of the proposed Caller ID service is in the public interest and, if so, whether the service can be offered to the public consistently with the privacy requirements established under state and federal law. After considering the evidence and arguments before us, we conclude that the public interest will be served by allowing the service to be offered on an interim basis for a period of two years, subject to reevaluation in light of experience. Our order is conditioned on the privacy considerations, customer education, and other requirements articulated in this decision.

Proponents of Caller ID contend that the service provides a greater degree of convenience, control, and personal security in the use of the telephone than without the service. They state that the service facilitates, inter alia, improved call screening and call management, the recordation of incoming calling party numbers for later use (even when the call is unanswered), the deterrence of obscene, threatening and harassing phone calls as well as calls by burglars or other parties engaged in criminal activities seeking to determine if a residence is occupied, the reduction of telephone fraud and nuisance or "junk" phone calls initiated by or against

6 Currently, the Digital Multi-Plex System 100 switch is unable to provide per-call blocking to coin phones.

businesses or individuals, the deterrence of false alarms and bomb threats, the identification of and provision of assistance to parties in circumstances of emergency or distress, the provision of assistance to people with disabilities and to the elderly, and the preservation of evidence which may be used both in investigating crimes and at civil and criminal trials. They assert that the service will facilitate a business' processing of telephone calls from customers by speeding the retrieval of customer information and the routing of calls to customer service personnel best able to assist the customer. They state that if the service is authorized, many of these benefits will be secured by all telephone subscribers, not merely those who subscribe to the service. Proponents also contend that most and perhaps all adverse impacts of the service on calling party privacy will be eliminated by the statutory blocking requirement.

Opponents of the service view it as being largely a marketing tool for businesses and argue that it will result in the routine infringement of calling party privacy rights. They contend that the service will facilitate the compilation, dissemination, sale, and abuse of personal information by individuals and businesses, particularly when used in conjunction with on-line directories and databases, and that it will encourage the creation and marketing of dossiers containing personal information about unwitting or unwary citizens as well as the initiation of widespread and largely unwanted telemarketing and "junk mail" campaigns. They state that the service is likely to facilitate subtle "redlining" practices involving unlawful discrimination, that it will expose victims of spousal or child abuse to undue risks of harassment and physical harm, that it will discourage the use of the anonymous crisis hotline services, such as those involving substance abuse, AIDS, rape, domestic violence, runaways, crime tips, abortion or pregnancy, suicide prevention, taxpayer assistance and the like, and that it will increase the risks of

harm arising from telephone communication between professionals, such as psychiatrists, probation officers, and lawyers, and their dangerous or mentally ill clients.

Opponents also argue that the service has limited value in screening abusive or threatening phone calls because such calls are likely to be made with the calling party's number blocked or from a telephone not associated with or difficult to trace to the caller. They claim that the deterrence of such calls is likely to be as great simply by reason of the approval of other CLASS features, such as Call Trace, and Call Return. They contend that answering machines and other CLASS services, such as Call Block, Call Return, Priority Ringing, and Call Trace, serve the purposes for which Caller ID is claimed to be useful or needed, and do so more effectively than does Caller ID. They contend that the per-call blocking option proposed by the applicants is inadequate to protect the privacy interests of California citizens, such as children, the elderly, the mentally disabled, and those whose familiarity with foreign telephone systems, whose lack of English-language skills or whose fears of technology stand as a barrier to their learning how to block effectively. And they argue that per-call blocking, which will necessitate the dialing of up to 14 digits in a split-area-code local calling area in order to block the calling party's number (*67-1-***-***-****), will be sufficiently inconvenient to chill or discourage the exercise of the calling party's free choice to block. They also argue that per-call blocking seriously undermines the privacy protections of subscribers with unlisted or nonpublished numbers who pay recurring charges for the express purpose of preserving the privacy of their telephone numbers.

There have been no formal market trials to reflect the attitudes of California customers toward CLASS services. Applicants have relied primarily upon surveys and studies conducted in Canada, New Jersey, Kentucky, and Rochester, New York, to

demonstrate customer interest in the services. They indicate that they expect to sell Caller ID to less than 5% of single-line residence and business users in California.

We begin our discussion by referencing California's policy for telecommunications embodied in PU Code § 709(b). That policy is "[t]o encourage the development and deployment of new technologies and the equitable provision of services in a way which efficiently meets consumer need and encourages the availability of a wide choice of state-of-the-art services." We fully subscribe to this policy and reaffirm our commitment to assure that California citizens have a breadth of access to telecommunications and information services that is second to none.

We note that many states have authorized the provision of intrastate Caller ID service, with various conditions, and that the Federal Communications Commission (FCC) has before it a rulemaking proceeding in which it has proposed to authorize the provision of interstate Caller ID service. See Notice of Proposed Rulemaking, In the Matter of Rules and Policies Regarding Calling Number Identification Service, CC Docket No. 91-281, released October 23, 1991. We are reluctant to deprive California citizens of a new service which is, or will soon, be available in many jurisdictions across the country and where, at least according to the applicants, the technology involved will ultimately support a wide range of Information Age services such as home banking and mechanized information retrieval. Nevertheless, the provision of the service will significantly change the way in which the telephone is used and will place a duty to understand how the service operates on subscribers who do not purchase the service in order to protect their privacy rights. As a result, the question of whether the Caller ID service is in the public interest is a much closer one than for the other proposed CLASS services.

Balancing the arguments for and against a determination that the service is in the public interest implicates a number of

significant concerns. The service involves a wide range of situations in which its availability would impose costs and confer benefits on calling and called parties. Many of these circumstances and situations are impossible to predict without the benefit of experience. Accordingly, the overall costs and benefits of the service are not as readily ascertainable as with other proposed CLASS services. In addition, the privacy implications of authorizing the service are necessarily part of our public interest analysis. Yet those implications vary depending on the nature of the blocking options we require, the extent of the customer notice and education program we require and the way we allocate the recovery of costs as between the calling and called parties. The intrusiveness of the service on the privacy interests cannot be divorced from the manner in which the service is provided.

We have concluded that the public interest is served by authorizing Caller ID service on an interim basis for a trial period of two years, after which we can reevaluate our ruling in light of experience. However, for the reasons that follow, we are convinced that the service can only be offered consistently with the privacy protections and other requirements enumerated in this decision.

The right of privacy establishes limits on the requirements a collective society may legitimately impose upon its individual members. It delineates a realm or zone within which individuals may exercise authority over their persons and lives without intrusion by the government or others.

Justice Louis Brandeis, in his oft-quoted dissent in Olmstead v. United States (1928) 277 U.S. 438, 478, described the right of privacy as "the right to be let alone--the most comprehensive of rights and the right most valued by civilized men." The Supreme Court has observed that the right includes both an "individual interest in avoiding disclosure of personal matters" and an "interest in independence in making certain kinds of

important decisions." Whalen v. Roe (1977) 429 U.S. 589, 599-600. In California our Supreme Court has identified a broad range of individual interests that have been accorded protection under the rubric of "privacy." City of Carmel-by-the-Sea v. Young (1970) 2 Cal.3d 259, 266-68.

We fully subscribe to these sentiments. Yet we find that they frame, rather than decide, the issue before us. The affirmative use of the telephone is a somewhat problematic setting for an assertion of the right to be "let alone...." One who desires solitude has a ready safe harbor in resisting the urge to reach out through the instrumentality of the telephone. Indeed, from a privacy perspective, the more apparent threat is suffered by the target of a call.[7] The person receiving a telephone call has an interest in not being imposed upon by those with whom he or she chooses not to associate.[8] This interest is not insubstantial. In a very real sense, the called party's zone of privacy (and ability to control the peaceful enjoyment of personal surroundings) is intruded upon whenever a calling party demands attention in response to the ring the telephone. And yet one may defend a perfect zone of privacy simply by deciding not to subscribe to any form of telephone service. The fact that such an alternative is not deemed practicable in an age of modern communications

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7 The person receiving a telephone call has an interest in not being imposed upon by those with whom he or she chooses not to associate. See, e.g., Rowan v. Post Office Department (1970) 397 U.S. 728, 736-37; and Martin v. Struthers (1943) 319 U.S. 141, 148. This interest is not insubstantial. In a very real sense, the called party's zone of privacy (and ability to control the peaceful enjoyment of his or her surroundings) is intruded upon whenever a calling party demands his or her attention in response to the ring of the telephone.

8 See, e.g., Rowan v. Post Office Department, supra, 397 U.S. at 736-37; and Martin v. Struthers, supra, 319 U.S. at 148.

illustrates the degree to which all persons surrender the privacy of a hermitage as the price of living in an inter-dependent society.

If the provision of Caller ID implicates the privacy interests of both the called party and the calling party, it threatens the anonymity of the caller, previously ensured by limitations on telecommunications technology. Yet caller anonymity has not always been the rule. In the earliest days of telephone communications a local operator connected every call. The operator was aware of the source of the attempted call as well as the intended target instrument. Mechanical switching was a technological innovation which happened to confer anonymity upon the party originating the call. No party has presented any evidence that this was an intentional consequence of political reform of the telephone service in this or any other jurisdiction. The intended consequence of the call number identification service proposed by the pending applications is a rebalancing of this equation. Because we subscribe not only to the value of the right of privacy, but also believe that it is implicated whenever a person reasonably believes that an inquisitive action has been taken, we must subject any rebalancing to a functional analysis based on teachings drawn from both constitutional and statutory sources.

While the subject has received little advocacy, the privacy concerns of a called party are drawn into the debate over the public interest in the availability of a Caller ID service. For reasons which we will not elaborate, we have concluded that the privacy interest of the called party with respect to Caller ID is of lesser significance than that of the calling party. Implementation of the disputed service will result in no diminution of the called party's privacy and, indeed, will enhance it. By contrast, the expectation of anonymity which has surrounded the

calling party since the advent of mechanical relay switches is directly threatened by the deployment of this new technology.

A factor to be weighed in determining the need for governmental protection is the ability of the individual citizen to guard the interest in question. In this connection, there are self-help steps available to the called party which are neither inconsiderable in dimension nor unknown in daily life. To begin with, if the called party prefers not to hear the message or the speaker, he may hang up the telephone, just as he may turn off the radio or television or change the channel in response to an unwanted broadcast, close his door to the uninvited guest or disregard undesired mail. See Consolidated Edison Co. v. Pub. Serv. Comm'n (1980) 447 U.S. 530, 542; Martin v. Struthers, supra, 319 U.S. at 146-147. In the alternative, such a party may protect his privacy from unwanted telephone calls, as many people do, by obtaining an nonpublished or unlisted telephone number and controlling its dissemination.

Similarly, nothing stops a called party from screening calls or protecting privacy through the use of an answering service, an answering machine, a voice mail service or other CLASS services, such as Priority Ringing, Call Return, Call Block or Call Trace. No one obtains telephone service without subjecting himself to the risk that he will at some time receive a call he would prefer not to answer, such as a wrong number. Such an infrequent nuisance is simply a cost of having telephone service and is hardly a serious infringement of the telephone user's privacy rights.

Repeated obscene, harassing or abusive telephone calls are, of course, another matter, yet there are a number of remedies, including the other CLASS services we authorize today, for dealing with such improper or unlawful use of the telephone. Moreover, the authorization of all CLASS services, including Caller ID, will likely deter such unlawful or improper practices to a fair degree

with respect to all telephone call recipients, whether or not they subscribe to the Caller ID service.

In the context of the Caller ID service, the privacy interest of the calling party is the individual's interest in controlling personal information--information which, though limited in scope, may facilitate the compilation and dissemination of additional personal information through the use of available directories and databases. Moreover, the uses to which such information may be put by the call recipient and other parties to whom the call recipient discloses it are essentially unlimited.

Several of the parties have contended that California has the most restrictive privacy laws of any state in the nation. It is not necessary that we join in this sweeping assertion in order to acknowledge that our fellow citizens place a high value on the protection of their interest in individual privacy. The constitution, statutory[9] and decisional laws of California all point to this conclusion. More directly relevant to the subject of telecommunications is the fact that more than one-third of California telephone subscribers pay a premium for nonpublished service, i.e., service which renders the subscriber's name,

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9 The legislative findings underlying PU Code § 2893--the California statute which address the issues surrounding the provision of calling number identification services such as Caller ID--support this view. The Preamble to that section, Stats. 1989, c. 483, § 1, provides:

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

address, and telephone number unavailable both in the telephone directory and through directory assistance. In many metropolitan areas, the percentage of nonpublished subscribers is significantly higher. Indeed, nine of the ten areas in the nation having the largest proportion of nonpublished telephone numbers are situated in California. Our Supreme Court has recognized a reasonable expectation of privacy in nonpublished information, including telephone numbers. See People v. Chapman (1984) 36 Cal.3d 98, 113.[10]

In November 1972, the People of California amended Article I, Section 1, of the California Constitution to include the right of "privacy" among the "inalienable" rights of "[a]ll people." Shortly thereafter, both the goals and scope of this amendment were considered by the California Supreme Court. White v. Davis (1975) 13 Cal.3d 757 featured a taxpayer's suit against the police chief of the City of Los Angeles seeking to enjoin the alleged illegal expenditure of public funds in connection with the police department's covert intelligence gathering activities which included using departmental personnel as secret informers and undercover agents. According to the complaint, such persons enrolled in classes at UCLA where, posing as students, they submitted reports to the police department of classroom discussions. (Id., at 762.) The Davis court was unanimous in concluding that:

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10 It is worthy of note, however, that the Chapman court was expressing itself in the context of a criminal prosecution. The Court concluded that a defendant had a reasonable expectation of privacy in the unlisted information which the telephone company disclosed to the police, and that this right was protected under Art. I, § 13 of the California Constitution which shields residents from a search or seizure without prior judicial approval. (36 Cal.3d 98, 105-108.) Caller ID services in the hands of the general public pose a lesser threat to the constitutional restraints on unsanctioned searches and seizures by the police.

> "...the surveillance alleged in the complaint also constitutes a prima facie violation of the explicit 'right of privacy' recently added to our state Constitution. As we point out, a principal aim of the constitutional provision is to limit the infringement upon personal privacy arising from the government's increasing collection and retention of data relating to all facets of an individual's life...." (Id., at 761, emphasis added.)

In subsequent discussion, the Court declared that "the moving force behind the new constitutional provision was a more focused privacy concern relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society." The ballot argument advanced by proponents of the constitutional initiative was then quoted as declaring that, "At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian."
Id. R 744.[11]

It will be noted that while Davis and Chapman were decided in the context of police information gathering and surveillance activities, the ballot argument swept beyond the information gathering activities of government to embrace those of "business." The issue which we must decide is whether the privacy concerns articulated by those opposed to the deployment of Caller ID fall within the ambit of the goals articulated by the voter-approved constitutional amendment or within the further goals

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11 The Davis court cited Carter v. Com. on Qualifications (1939) 14 Cal.2d 179 and other authorities for the proposition that it is legitimate to resort" ...to election brochure arguments as an aid in construing legislative measures and constitutional amendments adopted pursuant to a vote of the people." 13 Cal.3d 757, 775, fn. 11.

identified by our Supreme Court. The issue need not be decided on a "yes" or "no" basis, for it is possible for a privacy interest which was not expressly targeted for protection to be implicated by both the language and spirit of our evolving attitude toward privacy. Recognition of such an implication would then inform us of the degree to which we should condition our authorization of this service upon protective steps designed to secure an appropriate measure of privacy.

We have concluded that the authorities which speak most forcefully on the issue of privacy are directed at disciplining forces of government (especially the police) and protecting the right of citizens to engage freely in what we may term "political speech." By contrast, we have not been cited to, nor have we been able to discover, any precedent which balances the privacy interests of private parties in initiating or receiving residential telephone calls. For reasons which we shall now explain, we are not surprised at this paucity of authority, for we deem such activity to arise beyond the clear concern of privacy as a "constitutional right."

We begin with the Court's impressive teachings on the need to recognize a restraint upon the information gathering activities of government with respect to those items of personal information in which the citizen has a "reasonable expectation of privacy." Particularly instructive is the opinion by Justice Mosk writing for the court in Burrows v. Superior Court (1974) 13 Cal.3d 238. Burrows is significant for its clear holding that a citizen's privacy right as against government intrusion is not rooted in any specific place (e.g., one's home) but extends to any circumstances which the citizen reasonably expects to lie within a realm of personal privacy. While acknowledging that federal cases have been less generous in recognition of the scope of the privacy right, the Court concluded that in California bank statements and account records are protected notwithstanding the fact that they

remained in the bank's custody. Accordingly "...any bank statements or copies thereof obtained by the sheriff and prosecutor without the benefit of legal process were acquired as the result of an illegal search and seizure (Cal. Const., Art. I § 13)..." 13 Cal.3d at 245. In the same term the Court concluded that covert police surveillance in university classrooms "epitomizes the kind of government conduct which the new constitutional amendment condemns." White v. Davis, supra, 13 Cal.3d 757, 775. Five years later, the Court renewed its emphasis on the reasonable expectation of privacy theme. Again it spoke in the context of a criminal prosecution. In People v. Blair (1979) 25 Cal.3d 640, the Court concluded that the defendant had a reasonable expectation that credit card and telephone use records were private and thus protected from government intrusion absent judicial process. Building on an observation he had uttered in Burrows, Justice Mosk harmonized the Court's protective strategy. "No less than a bank statement, the charges made on a credit card may provide a 'virtual current biography' of an individual." 25 Cal.3d at 652.[12]

The "virtual current biography" theme was offered by the [Court as a means of harmonizing prior decisions in People v. Chapman, supra, 36 Cal.3d 98, 105-111. The Court concluded that a California citizen who had taken the trouble to purchase an unlisted telephone number has a "constitutionally protected expectation of privacy" which was invaded when the police obtained

12 The Blair court cited with approval at 1975 decision of the District Court of Appeal which had held that an individual's right to privacy was violated when telephone company records of his outgoing calls were disclosed to police officials who had not obtained a warrant. People v. McKunes (date) 1975 51 Cal.App.3d. 487, 490-91. 25 Cal.3d at 653-54.

her name and address from the telephone company without first obtaining a warrant.[13]

> "The holdings in Burrows and Blair compel one conclusion-that respondent McGee demonstrated a reasonable expectation of privacy in her unlisted name, address, and telephone number. Disclosure of her name and address to the telephone company was not volitional since it was prerequisite to obtaining a telephone. The disclosure was plainly made for the limited purpose of billing. Moreover, by affirmatively requesting and paying an extra service charge to the telephone company to keep her unlisted information confidential respondent took specific steps to ensure greater privacy than that afforded other telephone customers. Surely those steps entitle respondent to as great a degree of privacy at this court has extended to the customers in Burrows and in Blair.
>
> "[W]here "disclosure of the client's name might serve to make the client the subject of official investigation or to expose him to criminal or civil liability" (Hays v. Wood, supra, 25 Cal.3d at 785), the name itself may be protected by the privilege.
>
> "Here, it is the constitutional right to privacy rather than a privilege that is being invoked. However, the attorney-client privilege cases are analogous in that in both situations the government is seeking the name and address of a person about whom it already has a great deal of information. In many cases, it is seeking the name and address of a person in order to

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13 The Court again took the opportunity to indicate that the protected right of privacy in California was more extensive than has been recognized as mandated by the United States Constitution. United States v. Miller (1976) 425 U.S. 435, and Smith v. Maryland (1979) 442 U.S. 735, were cited for the proposition that there is no expectation of privacy in bank records or the record of outgoing telephone calls. The rejected rationale of these federal decisions was that the user voluntarily conveys this information to a third party such as the bank or telephone company.

> prove an essential link to establish a 'virtual current biography.' (Burrows v. Superior Court, supra, 13 Cal.3d at p. 247.) Thus, protection of the individual's name and address is the only way to protect the 'virtual current biography.'"[14]

As we have previously noted, current telecommunications technology provides anonymity to a party who elects to initiate a telephone call. Until the call is answered either personally or mechanically by the targeted number, the recipient has no means of discerning the source of the call and thus determining whether it is a welcome or obnoxious intrusion on solitude. To a greater degree than any of the other advanced calling gestures proposed by applicants, Caller ID threatens this equation. Some have urged that we recognize a constitutional right to remain anonymous and have cited decisional law containing language suggestive of such a right. We have read this cases and find that they speak to a right to engage in political speech, rather than other forms of speech, free of any government imposed condition that the speaker provide his or her name, address or other identification.[15]

In Talley v. California (1960) 362 U.S. 60, the Court invalidated a Los Angeles ordinance which forbade distribution, in any place and under any circumstances, any printed handbill which did not include on its face the name and address of the person who

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14 36 Cal.3d at 108, 110.

15 Commissioner Shumway's concurring opinion apparently rejects our readings of Talley and Huntley as charting the dimension of a right to remain anonymous. Yet no authority is cited for a more broadly cast (reading) than the one we have identified. Indeed, an attempt to extend Huntley beyond the context of political speech can only be undertaken if one ignores the explicit limitation placed by the Court on the result it announced. We are content to rely upon the views of the California Supreme Court as expressed at 69 Cal. 2d at 72-73.

prepared, printed or sponsored it. The petitioner was arrested and tried in municipal court for distributing a handbill which urged a consumer boycott against business entities which refused "equal employment opportunities to Negroes, Mexicans or Orientals." Id., at 61. While the handbill contained a reference to the "National Consumers Mobilization," and provided the address and telephone number of that organization, the municipal court concluded that it failed to meet the requirements of the ordinance that it identify the "person" who sponsored or effected the distribution.

The Court began by invoking an historic line of cases which had held void on their face ordinances which required a government license as a precondition to the distribution of public handbills or literature. Noting that such ordinances abridged constitutionally guaranteed rights of freedom of speech and press, the Talley Court characterized the issues as follows:

> "The board ordinance now before us, barring distribution of 'any handbill in any place under any circumstances,' falls precisely under the ban of our prior cases unless this ordinance is saved by the qualification that handbills can be distributed if they have printed on them the names and addresses of persons who prepared, distributed, or sponsored them...
>
> "There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' (citation.)
>
> "Anonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either approximately or not at all...It is plain that anonymity has sometimes been assumed for the most constructive purposes.

> "We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. [citations.] The reason for those holdings was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity. We hold that it...is void on its fact."[16]

Eight years after Talley, the California Supreme Court considered the validity of an order of this Commission approving tariff schedules which required that subscribers who used the telephone system to transmit recorded messages include in the recording the name and address of the individual or organization responsible for the message. The Commission order was assailed as violative of the freedom of speech guaranteed by the First and Fourteenth Amendments to the United States Constitution and by Article I, Section 9 of the California Constitution. The Court, speaking through Justice Peters, agreed and annulled our order. Huntley v. Public Utilities Commission (1968) 69 Cal.2d 67. Drawing upon numerous decisions of the Supreme Court of the United States, the Court made the following instructive points. It concluded that freedom of speech encompasses more than simply the right to be protected from censorship of content. It extends to communication in its most fundamental sense embracing both the right to disseminate information and the right to receive it. Improper restraints on communication are offensive in that they restrict the dissemination of ideas upon which a free society is ultimately dependent. In order to guard this free flow of ideas, those charged with the protection of constitutional rights must be

16 Id. at 64-65.

sensitive to subtle as well as patent restraints imposed by governmental interference. It continued:

> "There can be no doubt that disclosure requirements may deter free speech. It must be remembered that the right of freedom of speech is primarily intended to protect minority views...
>
> "The majority may freely assert its beliefs and is secured freedom of speech by the very fact of its mathematical majority. It is the minority, whether of the left of the right, which must overcome accepted views. To succeed, the minority must persuade others until, as is the nature of a democratic society, it hopefully attains the status of the majority. In doing so, the minority will frequently be subjected to criticism and debate, a necessary adjunct to the ascertainment of truth. But, depending upon the popularity of the minority position and the inviolability of the majority beliefs, the proponents of change may also be subjected to harassment, threats and violence.
>
> "In this context, as correctly contended by petitioners, anonymity may be an indispensable prerequisite to speech. When the content of speech may lead to harassment or reprisal, fear or apprehension may deter expression in the first instance. History is replete with unpopular ideas which now form the foundation of modern society's mores and laws, but which could only be asserted anonymously when first expressed." Id., at 72-73. (Emphasis added.)

In contrast to cases which defend privacy interests by warding off pervasive governmental intrusion and the compilation of "virtual current biographies" of its citizens, and apart from efforts to protect the vigorous exchange of political speech, the implementation of Caller ID posits rival privacy interests of private citizens. Thus we find instructive a line of cases which suggest a resolution of the competing rights of private citizens. Although rooted in fact patterns directly implicating the coercive

power of the state, we derive guidance from the court's decisions which have balanced the constitutional privacy interest of a plaintiff who commences civil litigation to withstand the demand of a defendant for compulsory discovery. In Britt v. Superior Court (1978) 20 Cal.3d 844, 859, the plaintiffs were property owners near on airport operated by the local port district. They commenced litigation against the district, asserting a diminution of property values, personal injuries, and emotional suffering occasioned by the proximity of the airport. Defendant sought to discover the plaintiffs' lifelong medical history including any treatment history for physical or emotional complaints or illness. The plaintiffs sought to resist these discovery requests by invoking their constitutional right to privacy. Defendant countered that such a right, if it otherwise obtained, had been waived with the commencement of the civil litigation. The Court responded:

> "...while the filing of a lawsuit may implicitly bring about a partial waiver of one's constitutional right of associational privacy, the scope of such 'waiver' must be narrowly rather than expansively construed, so that plaintiffs will not be unduly deterred from instituting lawsuits by the fear of exposure of their private associational affiliations and activities."

Accordingly, defendant's discovery rights were extended only to private matters directly relevant to the plaintiffs' claim and essential to the fair resolution of the lawsuit. The continued vitality of this balancing approach was affirmed as recently as 1987. See Vinson v. Superior Court (1987) 43 Cal.3d 833, 842.[17]

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17 "...We conclude that (plaintiff) has not waived her right to sexual privacy.

"But even though plaintiff retains certain unwaived privacy rights, these rights are not necessarily absolute. On occasion her

(Footnote continues on next page)

From these authorities we derive the following conclusions. First, we need not resolve the dispute over a federal constitutional right of privacy or its scope in relation to telecommunications. This is because we are convinced that the explicit right of privacy established by Article I, Section 1 of the California Constitution is broader in scope than the corresponding federal right. California v. Greenwood (1988) 486 U.S. 35, 43-44; Committee to Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252, 281; City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123, 130, fn.3; Urbaniak v. Newton (1991) 226 Cal.App.3d. 1128, 1136; American Academy of Pediatrics v. Van de Kamp (1989) 214 Cal.App.3d. 831, 841.[18] Accordingly, if the Caller ID service can be offered without contravening the state constitutional privacy right, a fortiori it does not violate federal constitutional privacy protections. Second, California's privacy protections are most intensely engaged when the threat is one of governmental gathering or compilation of information which our citizens reasonably expect to hold within a realm of personal privacy, or when there are state sponsored or sanctioned

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(Footnote continued from previous page)

privacy interests may have to give way to her opponent's right to a fair trial. Thus courts must balance the right of civil litigants to discover relevant facts against the privacy interests of persons subject to discovery."

18 Compare People v. Chapman, supra, 36 Cal.3d 98, People v. Blair (1979) 25 Cal.3d 640, Burrows v. Superior Court (1974) 13 Cal.3d 238, and People v. McCunes (1975) 51 Cal.App.3d 487, with Smith v. Maryland (1979) 442 U.S. 735, and United States v. Miller (1976) 425 U.S. 435.

inhibitions on freedom to engage in political speech.[19] We miss a sure foothold if we fail to grasp the context in which California voters, legislators, and judges have spoken to these concerns and if we employ their sentiments to decide matters manifestly beyond their contemplation. Notwithstanding this major limitation, the "reasonable expectation of privacy" test may embrace a state of mind fostered by technological conventions. Such is the case with caller anonymity. Even more clear is the teaching of People v.

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19 As Benjamin Cardozo noted, "The half truths of one generation tend in time to perpetuate themselves in law as the whole truths of another, when constant repetition brings it about that qualifications, once taken for granted, are disregarded or forgotten." Allegheny College v. National Chautauqua County Bank of Jamestown (1927) 246 N.Y. 369, 159 N.E. 173. Judge Cardozo was speaking of the common law contract doctrine of consideration. Yet his sentiment may be even more apt to concepts as vital as privacy and the terms of an explicit social contract embodied in a written constitution.

Commissioner Shumway's concurring opinion expresses the view that "a distinction between violations of privacy by the government and violations by private parties...is misplaced." From our perspective, we have not created this distinction. The proposition that our Constitution seeks to limit the power of government is rooted in the most fundamental notions of ordered liberty. To suggest otherwise is to omit the literal language of the First Amendment. Private wrongs are the object of civil litigation. To remove from context and extend on the wings of speculation the language of constitutional precedent is, to our minds, an assumption on the part of the Commission of "...the judicial power to determine the constitutional rights of California citizens." Such a right was emphatically denied by our Supreme Court in People v. Chapman (1984) 36 Cal.3d 98, 111, fn. 9. We have examined Chapman as well as the content of Section 1760 of the Public Utilities Code enacted some 33 years prior to the Court's remark. We have concluded that our deliberations will, from time to time, engage issues of constitutional interpretation. In such circumstances we are to seek guidance from the pronouncements of the Court with the knowledge that should we err, the Court will exert appropriate correction. See also, Pacific Tel. & Tel. Co. v. Public Util. Com. 62 Cal.2d 634, 646 (1965).

Chapman, supra, 36 Cal.3d 98, that a heightened expectation of privacy is to be recognized in the instance of those Californians who have taken the trouble and assumed the added cost to secure unlisted and published telephone service. To the extent that blocking options and educational efforts may redress this balance, we find no impediment to authorizing a two-year experimental deployment of Caller ID in California.

Blocking Options

As noted, the issue of whether to authorize Caller ID is inextricably linked with the issue of the manner in which the service is provided. The first inquiry we undertake is which of several blocking options should be provided. The three possible blocking options are:

1. Per-call blocking, as proposed by applicants;

2. Per-line blocking; and

3. Per-line blocking with per-call enabling.

Per-call blocking is activated by the calling party by pressing *67 on a touchtone phone before dialing, thereby blocking disclosure of the calling party's number. The Caller ID subscriber then would receive a "Private Number" message instead of the calling party's number on his or her display unit. If the calling party does not activate the *67 code, the calling party's number would be disclosed to the Caller ID subscriber. Per-line blocking precludes disclosure of the calling party's number for all calls made from a blocked access line. All parties with access lines would have a choice of per-line or per-call blocking. In per-line blocking with per-call enabling, a party could specify to the

telephone company that he or she wants all calls blocked, except those specifically unblocked by pressing a three-digit code.[20]

PU Code § 2893 requires us to assure ourselves, by rule or order, "that every telephone call identification service offered in this state by a telephone corporation...shall allow a caller to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the individual receiving the telephone call placed by the caller." The applicants state that this provision is intended to require per-call blocking and that such a blocking option satisfies all federal and state legal requirements.

We agree with the applicants that § 2893 may be interpreted as requiring the provision of per-call blocking. A per-call blocking option allows the caller "to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the individual receiving the telephone call." However, because the statute's broad and somewhat ambiguous description of a blocking mechanism fails to specify any particular blocking option, we read it requiring per-call blocking as the minimum privacy protection for the calling party's number. As we read the statute, it does not preclude us from requiring other, more restrictive blocking options to protect privacy in place of, or in addition to, per-call blocking.

Applicants argue that requiring blocking options more restrictive than per-call blocking will devalue the service. They contend that the fewer the instances in which a caller blocks the

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20 In some jurisdictions, the use of the *67 code for per-line blocking with per-call enabling has created confusion because it is the same code as that used for per-call blocking. We understand that the technological capability of using a per-call enabling code other than *67 is or soon will be available. When we refer to per-line blocking with per-call enabling, we mean per-call enabling which utilizes an enabling code other than *67.

display of his telephone number, the more valuable the service will be to the Caller ID subscriber that purchases the service and to the telephone company that sells it. Even if this were true, it is not our function to create economic value in the service by making it difficult or inconvenient for California citizens to exercise their right not to disclose their calling party numbers. If the service is to be offered consistently with constitutional guarantees and the public interest, it must be offered in a way that maximizes the ease and freedom with which California citizens may choose not to disclose their calling party numbers. We will not compromise an individual's free exercise of his or her right of privacy in order to place in the hands of the Caller ID subscriber a more valuable mailing list, a marginally better method of screening or managing telephone calls, or even a slightly more effective deterrent to unlawful or abusive uses of the telephone.

Moreover, it is by no means clear that the applicants' fears are justified. Centel Nevada has offered the service in Nevada with a choice of per-call or per-line blocking with no apparent devaluation of the service. It achieved a customer penetration rate between December 1990 and June 1991 of 5.1%--a penetration rate not significantly different than that anticipated by the applicants here. Moreover, if applicants' surveys and studies are to be credited, a substantial portion of the public sees no need to block and would presumably choose the per-call blocking option. It will be the applicants' challenge to persuade members of the public not to block by providing cogent reasons why it is not in their interest to do so. We will not assist the applicants' selling effort by infringing upon individual privacy rights.

Our goal must be to ensure, to the greatest extent possible, that the decision to allow a calling party's number to be displayed is the result of informed consent and a knowing and intelligent waiver of the right of privacy. To this end, we will

seek to maximize the ease and freedom with which a caller may choose not to disclose the telephone number from which he or she is calling.

We conclude that all three blocking options--per-call blocking, per-line blocking, and per-line blocking with per-call enabling--should be made available by each of the applicants and that the calling party should be permitted to choose among those options. Per-line blocking will provide protection for those who prefer not to disclose their calling party number under any circumstances and for those who need special protection. The privacy rights of subscribers with per-line blocking will not be violated as the calling party's number may not be transmitted over an access line with per-line blocking.[21]

Per-line blocking with per-call enabling will provide convenient protection for those who believe they would prefer to block their calling party number in most circumstances. There may well be circumstances in which a calling party with per-line blocking will desire to disclose his telephone number to the call recipient. Therefore, if we failed to require per-line blocking with per-call enabling as an option, subscribers desiring greater privacy protection might be discouraged from choosing per-line blocking without per-call enabling. This would create an incentive for those subscribers to choose the arguably lesser protection of

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21 We recognize that at present, GTE does not have the capability of providing per-line blocking without per-call enabling. We are troubled that GTE did not plan its network development to ensure the existence of a switching capability to provide such blocking. If GTE is to provide these services, it should develop a per-line blocking capability at the earliest opportunity. However, if it meets all other requirements for offering CLASS services, it may offer the services temporarily substituting per-line blocking with per-call enabling for those customers who choose per-line blocking. GTE shall include progress reports on this point in its periodic tracking reports.

per-call blocking. Thus failure to require per-line blocking with per-call enabling as an option would greatly reduce customer choice. The privacy rights of those subscribers with both per-line blocking and per-call enabling will not be violated because the calling party's number may not be transmitted unless the calling party affirmatively activates the enabling code to facilitate disclosure of his or her number. Such affirmative action manifests the calling party's informed consent to disclose his or her number and the knowing and intelligent waiver of his or her right of privacy.

Per-call blocking will facilitate a caller's protecting his or her privacy on a selective call-by-call basis by activating the *67 code. The privacy rights of those subscribers with per-call blocking will not be violated because, in affirmatively choosing the per-call blocking option, the subscriber assumes the burden of blocking the transmission of his or her number and also assumes the risk that he or she may fail to do so.

Providing customers with these alternatives will enable us to conclude in virtually all circumstances that where the calling party's number is disclosed, the disclosure is the result of informed consent. Since the calling party will have the choice of selecting per-line blocking, his or her choice of another option which may permit display of the calling party number in some circumstances means he or she voluntarily assumes the risk of failing to utilize the chosen option. So long as telephone subscribers are fully informed of the nature of the service and the nature of their blocking options, disclosure will be consensual and

will manifest a waiver of the calling party's privacy rights.[22]

Default Blocking Options

In our view, Article I, Section 1, of the State Constitution and PU Code § 2893 require that all telephone subscribers be given the capability of blocking display of the calling party's number. We must therefore address the default blocking option that will be provided to subscribers who fail to make a choice. Some of these subscribers may simply have determined not to exercise the right to choose, leaving that determination to the standards we announce today. Others, for reasons such as the failure to receive information about the service, language problems, or a failure to understand the nature of the service or their option to choose, may have involuntarily failed to choose.

We conclude that the default blocking option for subscribers who pay for unlisted[23] or nonpublished[24] telephone numbers and who affirmatively fail to choose a blocking option must

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22 In other contexts, the Commission, in collaboration with the Legislature, has taken steps to assure that intrusion into the privacy of telephone communications can result only where all parties to the call have consented. E.g., PU Code § 7906; General Order No. 107-B; Air Transport Ass'n v. Pub. Util. Comm'n (9th Cir. 1987) 833 F.2d 200, cert. denied (1988) 487 U.S. 1236; Re Monitoring of Telephone Conversations (1983) 11 Cal.P.U.C.2d 692, reh'g denied (1983) 13 Cal.P.U.C.2d 47; D.88232 (1977) 83 Cal.P.U.C. 149; D.73146 (1967) 67 Cal.P.U.C. 528; D.69447, (1965) 64 Cal.P.U.C. 526.

23 Unlisted numbers are those telephone numbers available only through directory assistance but do not appear in the white section of the telephone directory or street address directory. See, for example, Pacific Bell Schedule Cal.P.U.C. No. A5.7.1.B.1.

24 Nonpublished telephone numbers are not listed in any telephone directory, street address directory, or in the directory assistance records available to the general public. See, for example, Pacific Bell Schedule Cal.P.U.C. No. A2.1.34.A.

receive per-line blocking with per-call enabling. As we have noted, People v. Chapman, supra, 36 Cal.3d at 108, found a heightened expectation of privacy in unlisted telephone subscriber information. Thus, we think that subscribers with unlisted or nonpublished numbers who fail to make a choice should receive per-call blocking with per-call enabling as a default option. This will assure the privacy of the calling party in the absence of an affirmative act to disclose the calling party's number. Only such affirmative action will manifest the calling party's consent to the disclosure of his number.

Emergency service organizations, such as police departments and shelters for battered spouses or runaways, should receive the default protection of per-line blocking with per-call enabling. We deem it unlikely that such organizations will allow the determination of a blocking option to result by default. Still, these organizations may have special and legitimate reasons, such as the facilitation of undercover investigations or the protection of persons from bodily harm, for precluding dissemination of the calling party number without an affirmative act. The applicants shall include a definition of emergency service organizations entitled to such default protection in their tariff filings.

For other subscribers who fail to make a choice of blocking option, we conclude that the appropriate default blocking option is per-call blocking. The comprehensive customer notification and education program we outline below seeks to ensure that customers will be fully apprised of their options, so that a failure to make a choice will signify a determination to rely on the default options. To the extent the customer notification and education program meets its intended purpose, the privacy rights of those subscribers who receive default per-call blocking will not be infringed because the subscriber will have assumed the burden of activating the *67 code to block transmission of his or her number

and will have assumed the risk that he or she may fail to do so. However, as an added protection for these subscribers, we direct the applicants, prior to offering the service, to provide each telephone subscriber with a clear and easily understandable notice informing the subscriber (1) of the blocking option applicable to that party's telephone service, (2) whether that option was determined by choice or by default, (3) of the right of the subscriber to change the blocking option applicable to that subscriber's service one time free of charge, and (4) of the nature of the available blocking options to which the subscriber might wish to change.

All telephone users should be aware that with respect to telephones other than the customer's, any of the three blocking options may be involved. The blocking option applicable to a particular telephone will reflect the choice of the subscriber purchasing that service. Telephone users will therefore have to ascertain the nature of the option applicable to a particular telephone in order to assure that they are effectively blocking the calling party's number. We direct the applicants to ensure that there is a simple means of identifying the nature of the blocking option applicable to a particular telephone and that the public is fully informed of this means. Such a means might include a recorded message when access codes inappropriate to the relevant blocking option are undertaken, or the absence of a second dial tone either when the *67 code is entered on a line-blocked phone or when the per-call enabling code is entered on a phone not programmed for that option. The applicants should attempt to agree on the best means from the consumer's perspective, taking into account simplicity and reliability, and should attempt universal deployment of that means and a wide-ranging effort to publicize it. Information regarding the means of identifying the blocking option applicable to a particular telephone should be included in the customer notification and education program.

The record in this case suggests that coin phones and certain other configurations,[25] at least for the present, will not be capable of utilizing blocking. The applicants should widely publicize this fact and should undertake to ensure that all coin phones, and other blocking-incompatible configurations, under their control have affixed to them a notice informing the user that blocking of the calling party's number is not currently possible from that phone.[26]

Charge for Blocking Options

We conclude that each of the blocking options shall be provided free of charge to the subscriber for the initial selection (whether by affirmative choice or by default) and for one additional change of blocking option.[27] The applicant shall take steps to assure that any such change order is processed and effected expeditiously. If the subscriber should desire additional changes of blocking options, the applicant may impose a nonrecurring charge for each such change order not to exceed cost. PU Code § 2893(b) provides that "[t]here shall be no charge to the caller who requests that his or her telephone number be withheld from the recipient of any call placed by the caller." We think the provision of the initial selection and one change free of charge exceeds the statutory requirement. Moreover, we view this approach

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25 See discussion in "Deployment Limitations" above.

26 By this reference, we mean both coin phones and other blocking-incompatible services or equipment owned by the applicants and those provided to customers pursuant to tariff. To the extent necessary, the applicants shall amend their tariffs to assure that this protection is provided.

27 It is not our intention that there be a time limitation on a subscriber's one free change of blocking option, once the initial selection by choice or default has been made.

as consistent with our desire not to impose a cost on the exercise of the right of privacy by California citizens.

Customer Notification and Education Programs

This decision authorizing these new services will dramatically change the way in which both purchasers and nonpurchasers of the new services use telephones. We therefore view the customer notification and education program we establish here as a central and critical component of our decision to approve these services. We are committed to fully educating all Californians about the features and potential issues and problems raised by the introduction and availability of these services.

Utility Customer Notification and Education Program

We have examined the proposed customer education plans of Pacific, GTE, and Contel, and find them inadequate to the task at hand. However, rather than detail their shortcomings, we choose to outline the principles, goals, central messages, and methods of the kind of utility customer education plan we believe is essential to fully inform California citizens about the implications of these new services and enable them to protect their rights. We then direct the applicants to file and serve revised plans fashioned consistent with this opinion to the Commission. CACD shall review each plan, in consultation with the Public Advisor, and, if necessary an independent consultant,[28] and shall not recommend approval to the Commission unless it finds that the plan will likely result in the applicant's notifying all Californians of the nature of the service, and the means by which they can protect their privacy. CACD should also reasonably assure itself that, for calls initiated from private telephones in California, the display

28 The consultant will be chosen by CACD and paid for by the applicants.

of the calling party's number to the call recipient will be the result of the calling party's informed consent.

We conclude that the principles of an appropriate customer notification and education plan for the following CLASS services (Caller ID, Call Block, Call Trace, and Call Return) must include:

1. Complete information should be provided to all California ratepayers, not simply those in areas where the service is currently offered.

2. Additional efforts should be made in the new areas where the services will be offered, as they are added by the local exchange carriers.

3. The consumer education campaign should be most intensive in the first six months and then ongoing for as long as the services are being offered.

4. All utility consumer education efforts should use the same terminology and be as similar as possible.

5. Customer messages ordered by this decision shall not be sales messages. They shall provide objective, neutral information on both the services themselves and how consumers can make informed choices about these changes.

6. Written messages should state that they are provided by the local exchange carrier as required by the Commission.

7. The messages should be provided in many languages, so as to reach all Californians. The media used in the plan shall include, but not be limited to, the following: bill inserts, white pages information, brochures, sales representative scripts, and paid advertising.

8. The plan should make extra efforts to reach groups with special needs (such as seniors,

children, the limited English speaking, the disabled, those with nonpublished numbers).

9. The utilities shall establish a 24-hour toll-free number for consumers to get information about the services and how they are used.

10. The messages should tell consumers whom to contact if they have complaints about the way the service is being implemented (first the local exchange carrier, then the Commission's Consumer Affairs Branch).

11. Ordering per-line blocking or per-line blocking with per-call enabling should be as simple as possible. A request form should be included with the informational/educational material.

12. The codes used for per-call blocking should be distinctly different than those for per-call enabling.

13. The local telephone companies offering these services shall provide the following information to CACD in a periodic compliance report to be filed with the Director of the CACD every six months after the services are offered:

    a. Number of subscribers to each CLASS service;

    b. Number and nature of complaints concerning the service.[29]

    c. Number of subscribers choosing per-call blocking;

    d. Number of subscribers choosing per-line blocking;

    e. Number of subscribers choosing per-line blocking with per-call enabling;

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29 a and b refer to all CLASS services.

f. Number of subscribers assigned default per-line blocking with per-call enabling;

g. Number of subscribers assigned default per-call blocking;

h. Number of subscribers ordering a change from initial blocking option, broken down by option changed from and option changed to.

i. Number of subscribers with unlisted and nonpublished numbers, with a breakdown of those subscribers by choice of blocking option.

j. Number of subscribers with unlisted and nonpublished numbers assigned default per-line blocking with per-call enabling.

14. Within eighteen months of the date that the local telephone companies first provide the service, they shall serve and file with the Docket Office the interim compliance report required by this decision.

15. Consistent with PU Code § 2893(c)(1), the companies shall not offer the services until more than 30 days after they have notified their customers of the nature of the services they propose to provide.

16. Consistent with the spirit of PU Code § 2893(d)(4), the companies' education efforts shall include information the effect that under their current terms of service, telephone users may be communicating their calling party number to private businesses every time they call an 800 or 900 number through a service known as Automatic Number Identification (ANI), that there is at present no capability to block the communication of their calling party number through ANI, that many businesses receiving ANI have the software capability to call up on-screen database information about the calling party at the

time of the telephone call, and that these facts have not been well publicized.

17. The messages should make consumer aware of the effectiveness of all blocking options when making interstate calls.

The goals of the customer education efforts must be to ensure that all Californians are aware of the services and their implications (including understanding their options for maintaining their privacy as a calling party). We believe that a minimum level of consumer understanding must be achieved before the services are introduced.

The key basic concepts to communicate to the public shall be as follows:

1. The way we all use phone service has been changed. We must be aware of the changes and what it means to each customer.

2. The rights of the caller and the called party implicate different issues, concerns, and opportunities.

3. These new services can deliver the number of the caller's phone to the called party through a device called (The utilities shall propose a standardized term for this device that will be developed in the workshops ordered below).

4. There are ways to prevent disclosure of the caller's number. They include per-call blocking, per-line blocking, and per-line blocking with per-call enabling (or other standardized names which will clarify the concept and perhaps minimize any possible confusion with 900/976 blocking).

5. If you know that you never want your number revealed to the called party, then per-line blocking may be the best choice.

6. If you want your line blocked most of the time but may want to unblock the line under certain circumstances, then per-line

blocking with per-call enabling may be the best choice.

7. If you want your line unblocked most of the time and are willing to assume the responsibility of activating a three-digit code to block your line, then per-call blocking may be the best choice.

8. If you fail to make a choice of blocking option and have an unlisted or nonpublished number, or are a qualifying emergency services organization, the telephone company will give you per-line blocking with per-call enabling.

9. If you fail to make a choice of blocking option and do not have an unlisted or nonpublished number and are not a qualifying emergency services organization, you will be given per-call blocking.

10. All of these options will be provided free of charge.

11. If you decide to change your blocking option, you may do so once for free; additional change orders will incur a charge no greater than the telephone company's costs.

12. Since other people may choose less restrictive blocking options for their phones than you choose for your phone, you will need to ascertain what option is applicable to a particular phone you intend to use. There will be an easy way to do so: [The utilities shall develop a method and include it in the plan to be submitted to CACD].

13. Customers will be disconnected from basic service for failure to pay the charges for any CLASS service.

14. Coin telephones will not have the capability to block the transmission of the calling party number.

15. With the introduction of these new services, callers wishing to maintain their current level of privacy will have to take additional steps, regardless of whether they subscribe to the service or not.

We urge the applicants to work together and form a single plan which can be used by all utilities. We direct the utilities to consult extensively with community and consumer leaders in developing the plan. We direct the utilities to hold a workshop or series of workshops which will be open to all those interested, to review and comment on the utilities' plan prior to its filing. We expect that the utilities will modify their draft to reflect the comments received, prior to filing. The plan shall not be implemented until approved by the Commission. The Caller ID service shall not be provided by an applicant until the applicant has made a showing, approved by the Commission, that the applicant has notified all of its customers of the nature of the service and the means by which they can protect their privacy. The applicant's showing must also demonstrate that the applicant has taken the necessary steps to assure that, for calls initiated from private telephones in California, the display of the calling party's number to the call recipient is the result of the calling party's informed consent. Lastly, we direct the applicants to contract with a reputable independent public opinion survey company free of conflict of interest to monitor the ongoing level of consumer awareness and understanding that has been attained during the period extending from the date of this decision to the date of expiration of the two-year trial period established by the decision.

Commission Supplemental Education Program

At present, we feel that the utilities' education programs will be sufficient to inform all Californians of their rights under the CLASS services. However, it is crucial that everyone affected by the new services have full and accurate

information regarding the consequences of the introduction of the new services. The utilities should attempt to provide information to all Californians including individuals who, because of language barriers, fear of new technology, or any other obstacle, might not be reached through less rigorous educational efforts.

Should the Commission find that implementation of their programs proves to be inadequate for any reason, we may supplement the utilities' customer education programs with an education program run by CACD. This supplemental education program would seek to inform those citizens not reached by the applicants' education efforts, and would be funded by the applicants.

Anonymous Call Rejection or "Block the Blocker"

We have been urged to refuse authorization for the Anonymous Call Rejection or "Block the Blocker" component of Caller ID service. While no applicant has requested authority to provide Anonymous Call Rejection as a separate CLASS feature, the service was addressed on the record created before the administrative law judge. Given this procedural posture, we have no occasion to order the implementation of such a service and do not do so. However, concern for the most efficient utilization of Commission resources, and a desire to provide direction to an evolving industry prompt us to address an issue which need not occupy some future place on our crowded docket. Contrary to the views of our administrative law judge, we find no basis for concluding that this component of the technological rebalancing of competing privacy interests is contrary to our constitution, statutes, or concept of public policy. Accordingly, while we do not direct implementation, we grant permission to the applicants to offer Anonymous Call

Rejection during the trial period authorized by today's order.[30] We thus leave it to market forces and consumer choice to determine if the service is to be offered, and is so, whether Californians elect to subscribe to it.

Anonymous Call Rejection is not a blocking option but rather a technology designed to permit a subscriber to defend the privacy right which we have identified as an interest in solitude. If deployed by the applicants and purchased by a telephone subscriber an attempt to engage that number while blocking the display of the caller's number results in a computer intercept. The called party's number does not ring. Instead the central office equipment plays a recorded message informing the caller that the telephone subscriber is unwilling to receive calls unless the party initiating the communication permits a display of his or her number. Faced with such a rejection, the caller must decide to unblock the display or abandon the attempted telephonic communication.

Advocates opposed to the introduction of this feature advance numerous arguments. We are told that Anonymous Call Rejection will greatly inconvenience subscribers who happen to have per-line blocking (without per-call enabling), those who have unlisted or unpublished numbers, and those who simply would prefer not to disclose their numbers. It is insisted that such subscribers should not be put to the inconvenience of having to seek out a public or other telephone in order to attempt to preserve their privacy and complete the call. We are urged to

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30 Should an applicant decide to offer Anonymous Call Rejection, it is directed to file an advice letter under the provisions of General Order 96A. At that time, the public education program shall be enlarged to include a description of this service in a manner consistent with the informational goals identified in this opinion.

envision circumstances in which such inconvenience might rise to the level of intrusion on their freedom of speech, i.e., as in Huntley[31] and Talley[32], the compulsion to disclose the private information as a condition of speaking may cause the caller to elect not to speak at all. Finally, it is noted that even without Anonymous Call Rejection, the Caller ID subscriber need not answer blocked calls; the subscriber may merely observe on the Caller ID display unit that the calling party's number is blocked and choose not to pick up the receiver.

We find these arguments unpersuasive. Anonymous Call Rejection vindicates what we have identified as an important privacy interest of the called party, the interest in undisturbed solitude. Like the per-line blocking option which we authorize today, this feature merely automates a self-selected vindication of a privacy concern which might otherwise be defended on a call by call basis. Reliance upon Huntley and Talley is misplaced. As we have been careful to note, those decisions are plainly addressed to the defense of political speech. Only the most tortured reading could extend them to find a constitutionally protected right of anonymity in the simple act of placing a telephone call to an unwitting telephone subscriber.

State and Federal Wiretap Laws

The Federal Wiretap Act, 18 U.S.C. § 3121(a), with certain specified exceptions, prohibits the use of a "trap and trace device" without a court order. Assuming without deciding that Caller ID constitutes a "trap and trace device" within the meaning of the statute, see 18 U.S.C. § 3127(4), we think the statutory exceptions are applicable to Caller ID. The provision

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31 Huntley v. Public Utilities Commission, supra, 69 Cal.2d 67.

32 Talley v. California, supra, 362 U.S. 60.

enumerating the exceptions, 18 U.S.C. § 3121(b), excludes from the prohibition "the use of...a trap and trace device by a provider of electronic or wire communication service" (1) relating to "the protection of users of that service from abuse of service or unlawful use of service," (2) "to record the fact that a ...communication was...initiated or completed...to protect...a user of that service from fraudulent, unlawful or abusive service," or (3) "where the consent of the user of that service has been obtained." Each of these exceptions appears applicable to Caller ID service, as long as the reception of a telephone number on a Caller ID subscriber's display unit constitutes the use of the device "by a provider of electronic or wire communication service." We conclude that the use of the service by a subscriber who possesses the capability of receiving the calling party's number only because he has lawfully purchased the service from "a provider of electronic or wire communication service" pursuant to a duly-authorized tariff satisfies the exceptions of § 3121(b). Clearly, the widespread provision of Caller ID service to the public by telephone companies was not something that Congress sought to address when it enacted the statute. Nevertheless, we think that the statutory exceptions must be read to apply not just to the reception of calling party numbers by the "provider of...communication service" but also by subscribers who have lawfully purchased the capability of receiving such numbers from a "provider of...communication service." We perceive no violation of the Federal Wiretap Law in our authorizing the service.

In order to protect the right of privacy, several California statutes, i.e. Cal. Penal Code §§ 630, et seq., prohibit the wiretapping, interception, eavesdropping on, and recordation of confidential communications over the telephone. However, these statutes except from their prohibitions (1) activities undertaken with the "consent of all parties to the confidential communication" and (2) the use of any instrument, equipment, facility, or service

furnished and used pursuant to the tariffs of...a public utility." In view of the manner in which we are authorizing the provision of Caller ID service today, we perceive no violation of these penal statutes.

Redlining

We are sensitive to the possibility that Caller ID service could be used for "redlining" practices which might amount to unlawful discrimination. However, on this record, we believe that the concern is largely speculative. We also believe that if a business engages in such unlawful practices, that fact will be susceptible of proof. We direct our CACD to closely monitor any complaints of "redlining" or unlawful discrimination through the use of the Caller ID service and to bring the problem to our attention, along with recommendations as to how any such practices can be eliminated or controlled, should such become necessary. To assist CACD in this task, we direct the applicants, our Public Advisor, and our Consumer Affairs Branch to bring any complaints of "redlining" or unlawful discrimination to the attention of CACD without delay.

Other CLASS Features

The proposed CLASS services other than Caller ID appear to have great potential value, are in the public interest, and should be authorized. We therefore approve the provision of those services as provided in this decision.

Call Trace

After consideration, we believe that an appropriate charge for the provision of Call Trace by each of the three applicants should be $5. We see no need for a setup or nonrecurring charge in connection with this service. Such a charge is apparently not applicable in other jurisdictions. Our decision to not authorize the $10 nonrecurring charge requested by Pacific in also influenced by the testimony of GTE and Contel that a charge of $5 without a setup charge is adequate to protect their direct

embedded costs. The limit proposed by Pacific of a charge for two calls in a billing period from the same calling number is reasonable, because it will protect customers from excessive charges when involved with a particularly difficult harassing situation. Futhermore, the limit proposed by DRA of a maximum charge equal to the cost of five activations per month appears to be reasonable. DRA also believes that this charge would be sufficient to prevent abuse of the service. DRA stated that it believes only two groups of people would make more than five traces per month, those with a serious harassment problem and those who do not understand the service.

We consider the service to be discretionary at this time, because the existing Call Trap alternative, while perhaps somewhat less effective, will nevertheless continue to be available at no customer cost. In a future proceeding we can address the need to place Call Trace in Category I, with appropriate pricing. Applicants are not requesting pricing flexibility in connection with Call Trace. Call Trace is a better, somewhat different service than Call Trap, and may become essential. But there is little evidence that it is essential at this time. And there are alternatives to Call Trace, i.e., Call Trap, number changes and unlisted numbers. Moreover, we have not yet adopted criteria for establishing which services are essential. We expect to make that determination in the IRD phase of I.87-11-033.

In summary, we will authorize Call Trace for applicants as a Category II service, with a charge of $5 for each activation for Pacific and Contel. Customers of Pacific and Contel may request as many activations per month as desired, but will be billed for no more than two charges per month for the same number (a total of $10 for the same traced number) and five charges per month overall (a customer's bill for Call Trace is capped at $25 per month even if the customer activates Call Trace more than five times during the month). We will authorize a flat monthly charge

by GTE of $5, since GTE is technically unable to currently provide the service on a per-activation basis. The result we reach here, is simply due to GTE's inability to bill on a per-activation basis.[33]

We will require the applicants to track the results of this service so that we may have information regarding whether it should be recategorized as Category I and perhaps be made universally available as a replacement for Call Trap.

Because of the feature's particularly beneficial potential and disclosure of Calling Party numbers to a law enforcement agency, Call Trace should at least be the subject of bill insert information and instruction to consumers.

Call Return

Compared with the Caller ID and Call Trace features, little evidence has been presented concerning the public interest in the other CLASS features we authorize today. However, one of the features--Call Return--bears further discussion. This feature would include the telephone number of the calling party on the bill of the party activating Call Return, if the return call is made as a toll call. DRA urges that such number disclosure be suppressed. We believe that in circumstances where the Call Return service is utilized to place a return call to a party who called from a blocked number, and a toll charge for the return call is placed on the bill, the last four digits of the blocked number should not be disclosed. This will serve to protect the privacy of the party to whom the return call was placed, particularly if such party has an unlisted or nonpublished telephone number. We recognize that GTE is currently unable to suppress the calling party's billing number

33 GTE customers should not be charged for more than one month's Call Trace service unless they affirmatively request service for an extended period.

on Call Return calls; in order to do so, GTE would need to make major modifications to hardware and software systems; including its billing system. Since GTE has voiced no concern over this recommendation by DRA, we expect GTE to make such modifications as necessary and shall not offer this service until the modifications are completed.

As proposed, certain of the CLASS features, such as Call Return and Call Block, would provide a voice announcement of the caller's telephone number in certain situations. The CLASS features other than Caller ID are authorized subject to the limitation that calling party numbers not be delivered or announced to call recipients.

Cost and Pricing Issues

The applicants request Category II classification for all CLASS features, with pricing flexibility requested for most features. According to the Phase II decision (D.89-10-031), the Commission established criteria for Category II services.[34]

Category II services must either be partially competitive or discretionary, and prices for those services must be cost-based. A discretionary service must not be essential to basic service. We are currently conducting an investigation which will result in costing standards for Category II services in the Commission's Implementation and Rate Design (IRD) proceeding. Also in that

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34 In D.89-01-031 the Commission set out the criteria for a proposed service to be placed in Category II with pricing flexibility. The criteria include:

1. The service is discretionary by nature;
2. The service faces partial competition;
3. The service faces comparable alternatives;
4. The service is priced above cost.

D.89-10-031 requires that a proposed service meet criterion No. 4, and at least one of the first three of the above criteria.

proceeding, we will adopt a final definition for essential and discretionary services.

Until we complete the IRD phase of our Investigation (I.) 87-10-033, it is premature to grant permanent Category II status to CLASS services and premature to assert that the applicants have met the tests set forth in D. 89-10-031. We cannot determine, for example, if the prices presented here are cost-based in the absence of any adopted costing standards. Accordingly, we allocate CLASS services to Category II and set prices in this order on an interim basis only. We direct each of the applicants to file a new application herein no later than 90 days after issuance of our IRD decision. The applicant should seek final pricing and categorization for each of the services approved herein under the guidelines enunciated in IRD. These filings shall address fully the questions of whether CLASS services require or include any monopoly building blocks, as well as any other questions related to unbundling, nondiscriminatory access, imputation and categorization.

The applicants' proposed floor rates, initial rates, and ceiling rates for their CLASS features are set forth in their applications. Except as modified herein, we approve the applicants proposed rates stated in their applications as interim rates. Rates so modified are approved on an interim basis, as modified.

Allocation of Costs for SS7

After lengthy deliberation on the important question of cost allocation, we believe the applicants have sustained their specific burdens of showing that SS7 investment costs have been incurred with the intention of supporting some types of existing basic services as well as enabling the deployment of CLASS-type features. In the circumstances, we will adopt the embedded cost methodology utilized by the applicants and DRA for purposes of this CLASS proceeding. Given that our examination was explicitly limited to the allocation of SS7 of costs to CLASS services, our

decision here cannot be used as a generic standard for the allocation of investment costs to new services, nor does it necessarily determine the allocation of SS7 costs to other services in the future.

Tracking

Pacific recommends, based upon definitional and methodological uncertainties in implementing DRA's tracking proposal, that the tracking elements adopted should include total CLASS flexible pricing revenues and unit sales results on a semi-annual basis. Unit costs should be provided annually, Pacific maintains, and should include recurring and nonrecurring costs plus a description of extraordinary marketing and advertising costs. Pacific says it could also provide information on the number of informal complaints for these services on a semi-annual basis. It notes that its recommended tracking is consistent with the monitoring decision, D.91-07-056, and will provide adequate means of ongoing monitoring of the products.

After consideration, it appears that the tracking recommended by Pacific will provide data adequate to insure that the demand and cost estimates used by applicants in formulating their costs and price levels for these CLASS features are realistic and protect the floor prices applicable to each feature.

Interim Nature of Decision

We emphasize that our decision today is intended to be interim in nature. We intend to reevaluate our decision in light of experience within two years of the date of the date the new services are first provided.

To facilitate such reevaluation, we direct each applicant to file an interim compliance report with the Docket Office eighteen months from the date its Caller ID service and other new CLASS services are first offered. The report should address in detail and, to the extent possible, with evidence (1) the level of usage of the services, (2) the effectiveness and adequacy of the

privacy protections and education programs implemented under this decision, (3) the nature of the public response to the provision of the services, (4) whether there have been new developments which militate in favor of discontinuance or alteration of the services, and (5) any other matter relating to the services which the applicant desires to call to the Commission's attention. We direct each applicant to serve a copy of its report on all parties to this proceeding, and we will allow thirty days for the filing of responses. We invite the DRA, the Department of Consumer Affairs, consumer groups, and all other parties to file responses taking a position on each of the factual and policy matters by the applicants.[35]

We intend to address these filings in a written decision reevaluating this interim decision. We shall not hesitate to alter our decision if it is shown that the public interest and/or the Constitution and Laws of California require us to do so.

Pacific's Motion to Strike Portions of DRA Briefs

On October 25, 1991, Pacific filed a motion to strike portions of DRA's opening and reply briefs. The motion concerned DRA's references to certain bills introduced in the California Legislature, to a reference to a particular article relating to Caller ID in the Security Journal, Vol. 1, No. 3, in DRA's opening brief, and to recent newspaper articles concerning privacy and unlisted telephone numbers in California, in its closing brief. Pacific alleges that these references, if allowed, would violate its due process rights.

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35 Parties who have not previously participated in this matter may wish to intervene and participate in this proceeding in accordance with our Rules of Practice and Procedure.

The extra-record material contained in DRA's briefs is inadmissible, because Pacific has had no opportunity to cross-examine any witness on it. DRA contends that such material is simply argument. If that is so, it is not proper argument. The material serves no useful purpose because it cannot be considered by the Commission, either as fact or argument.

Pacific's motion to strike is therefore granted.

MCI's Motion for Declaratory Ruling or Other Relief

On December 11, 1991, MCI filed a motion requesting a declaratory ruling or other relief. It sought a declaratory ruling requiring Pacific, as part of its demonstration in the IRD proceeding, to identify the underlying functional network elements which are employed in providing COMMSTAR services. In the alternative, it sought a determination based on record evidence that Pacific has failed to meet its burden of proving in this proceeding that it has complied with mandated Commission safeguards on unbundling, nondiscriminatory access, and imputation for COMMSTAR Features, and that Pacific should therefore be denied pricing flexibility. MCI asserts that it filed its motion when it did because it has only recently determined that Pacific's filings in IRD are not in compliance with the terms of the agreement on these costing issues reached between MCI, DRA, and Pacific on July 8, 1991 (Exhibit 13).

Pacific replies that MCI's motion, filed two-and-a-half months after Pacific filed its direct testimony in IRD, is untimely. Pacific also maintains that since the briefing schedule for this proceeding was completed two months after the filing of its IRD testimony, MCI's motion is late in terms of the procedural status of this proceeding. Pacific contends that MCI should have raised its concerns earlier to allow the parties to address them within the procedural process already established and has waited

too long to request that the record be reopened and additional hearings held.

If MCI is dissatisfied with Pacific's presentation in the IRD proceeding, the appropriate proceeding in which to raise its concerns is IRD. If MCI wishes to have the Commission adopt a different presentation on these issues than the one proposed by Pacific, it will have a fair opportunity to make its own presentation in the IRD proceeding. If MCI requires more data from Pacific, it will have a fair opportunity to utilize the discovery processes available. There appear to be ample safeguards under the terms of the agreement between MCI, Pacific, and DRA to insure that price floors will be observed and that any changes proposed will protect those floors, since Pacific must provide DRA with adequate supporting workpapers and financial analyses justifying any rate change. MCI and other parties will also have access to those workpapers. We do not believe that MCI or monopoly ratepayers will be harmed by our granting interim authority in this decision to provide the proposed COMMSTAR services, with pricing flexibility, until the costing issues are resolved in the IRD proceeding. As we noted above, final costs and rates for CLASS services will be determined herein after the determination of the issues in the IRD proceeding. We must also concur with Pacific that MCI's motion is untimely in view of the lengthy period between the filing of Pacific's IRD testimony and the filing of MCI's motion.

Under the circumstances, MCI's motion is denied.

TURN's Motion for Sanctions

On May 4, 1992, TURN filed its Motion for an Order Imposing Sanctions Against Pacific Bell Pursuant to Commission Rule 1.5, seeking the imposition of punishment for Pacific's conduct concerning a February 26 ex parte communication that was disclosed by Pacific in a February 27 ex parte notice. TURN contends that the February 26 communication was an improper attempt to circumvent Commission Rules 1.2, 64, 77.2, 77.3, 77.5 and 84.

TURN requests a formal reprimand of Pacific and an order barring Pacific from initiating any further ex parte contacts for a period of one year.

Pacific contends that our ex parte rules adopted by D.91-10-049 permit any material to be presented to a Commissioner or other decision maker, so long as the presentation is disclosed and other parties have a reasonable opportunity to respond. The March 30, 1992 ruling of Assigned Commissioner Eckert set aside submission of the consolidated proceeding to allow parties desiring to file briefs responsive to the issues raised in the February 26 Notice an opportunity to do so. Responsive briefs were filed on April 8, 1992.

Commissioner Eckert's ruling stated in part as follows:

> "As Assigned Commissioner, I am concerned that both the perception and the reality of fairness are observed in this most important proceeding. The stakes are high for all parties involved in the proceeding and, under the circumstances, it is critical that the Commission's decisionmaking process is understood to be fair and credible.
>
> "All parties participating in the Commission's proceedings do so under the ground rules specified in the Commission's Rules of Practice and Procedure. It is unfair to effectively change these rules in midstream by failing to apply the rules governing briefing (Rule 75), the filing of comments (Rule 77.1, et seq.), and case submission (Rule 77) evenhandedly. The Commission has a responsibility to the parties to ensure that this occurs."

It is our understanding that the officially noticeable information furnished to the Commissioners by Pacific, involving the status of Caller ID in other jurisdictions and certain legal decisions, was requested by a Commissioner's Office. To the extent the information provided may have exceeded the scope of the request, it played no role in our decision, which necessarily rests on a construction of the California Constitution and a legal

analysis which goes significantly beyond that provided by any of the parties.

It would be manifestly unfair to sanction a party for providing material requested by a decisionmaker. While we wish to reaffirm that it is inappropriate to relitigate, ex parte, matters previously subject to briefing, we believe that under the circumstances the matter has been handed fairly and evenhandedly with respect to all parties. In the future, all information furnished to the Commission, whether requested or otherwise, should be provided with appropriate observance of our Rules of Practice and Procedure.

TURN's motion for sanctions is denied.

Findings of Fact

1. Applicants (Pacific, GTE, and Contel) have requested authority to provide several new CLASS features, as well as approval of rates and Category II pricing classification for those services, including floor and ceiling rates and flexible pricing for several of the services, and volume discount pricing therefor.

2. Pacific's application covers seven new COMMSTAR Custom Calling Services (Call Block, Call Return, Call Trace, Caller ID, Priority Ringing, Repeat Dialing, and Select Call Forwarding).

3. Contel's application covers the following new Custom Calling Plus Features: Call Block, Return Call, Call Trace, Caller ID, Priority Call, Repeat Call, and Selective Call Forwarding.

4. GTE's application covers nine new SmartCall Services (Automatic Busy Redial, Automatic Call Return, VIP Alert, Call Block, Special Call Forwarding, Special Call Waiting, Special Call Acceptance, Call Tracing Service, Calling Number ID (CNID), SmartCall PAK 4400, and SmartCall PAK 4900).

5. The industry term for these new services is CLASS, and applicants seek to provide these services through deployment of a new technology known as Signaling System Seven (SS7), which is an

internationally standardized network management system allowing for network and traffic management by computers.

6. While each applicant has used distinctive product names in packaging its CLASS services, consumers would be well served if applicants would agree among themselves on a single and fairly descriptive name for the corresponding offerings to be provided in this state.

7. Pacific also requests approval of new proposed rates for its existing COMMSTAR Features to reflect new floor, recurring and nonrecurring rates, a volume discount approach, and introductory pricing which would waive tariff rates for nonrecurring changes during the initial offering of COMMSTAR Features; the other applicants do not seek approval for flexibility of existing services.

8. D.89-10-031 established certain categories with respect to pricing policy, and determined that Category II should include discretionary or partially competitive services for which LECs retain significant market power. The decision provided that Category II services may be flexibly priced, and that rate floors therefor should be based on direct-embedded costs.

9. The CLASS features sought to be offered by applicants in these proceedings are discretionary and/or partially competitive, and properly included in Category II. The price floors developed for the proposed CLASS and existing COMMSTAR services reflect the direct-embedded costs applicable to each feature, as well as those costs applicable on the volume discount bases requested by applicants.

10. The Caller ID feature displays to the call recipient, on a specially designed phone or a device attached to a phone, the phone number from which the call is initiated.

11. If the caller has requested that his/her number not be displayed on the call recipient's display device, the Caller ID

subscriber receiving the call will receive a "Private Number" message on the display device.

12. There have been no formal market trials to reflect the attitudes of California customers toward CLASS services, and applicants have relied upon surveys and studies conducted in Canada, New Jersey, Kentucky, and Rochester, New York, to demonstrate customer interest in these services; applicants expect to sell Caller ID to less than 5% of single-line residence and business customers.

13. California's telecommunications policy encourages the development and deployment of technologies and the equitable provision of services in order to efficiently meet customer needs and encourage the availability of a wide choice of state-of-the-art services.

14. The Commission is committed to assuring that Californians have a breadth of access to telecommunications and information services that is second to none.

15. Caller ID service, however, will significantly change the way the telephone is used and will impose upon subscribers who do not purchase the service a duty to understand how the service operates in order to protect their privacy rights; the question of whether Caller ID is in the public interest is a much closer one than for the other proposed CLASS services.

16. The privacy concerns of a called party are drawn into the debate over the public interest and availability of Caller ID; however, these concerns are less directly threatened than the privacy interests of the calling party.

17. Experience since the implementation of the mechanical switching has furnished the caller anonymity without according the called party any added measure of protection for his/her right to be let alone.

18. The privacy interest of the called party with respect to Caller ID is less significant than the interest of the calling

party, because if we were to authorize the Caller ID service, the called party's privacy would be protected no less than it presently is protected without the service.

19. The expectation of anonymity which has surrounded the calling party since the advent of mechanical relay switches is directly threatened by Caller ID.

20. The privacy interests of the calling party is to control personal information -- information which, though limited in scope, may facilitate the compilation and assimilation of personal information through the use of available directories and databases; the uses to which such information may be put by the call recipient and other parties to whom the call recipient discloses it are essentially unlimited.

21. The constitution, statutory, and decisional laws of California demonstrate that Californians place a high value on the protection to their interest in individual privacy.

22. More than one third of California telephone subscribers pay a premium for nonpublished service, i.e., service which renders the subscriber's name, address, and telephone number unavailable both in the telephone directory and through directory assistance.

23. Current telecommunications technology provides anonymity to a party who elects to originate a telephone call; however Caller ID threatens this equation.

24. As opposed to defending privacy interests against pervasive government intrusion, and apart from efforts to protect the vigorous exchange of political speech, the implementation of Caller ID requires the balancing of the rival privacy interests of private citizens.

25. If Caller ID service is authorized without strict consumer safeguards, there will be a risk that the calling party's privacy rights will be infringed.

26. A heightened expectation of privacy is to be recognized in the case of those Californians who have assumed the added cost of securing unlisted and nonpublished telephone service.

27. To the extent that blocking options and educational efforts may adequately balance the rival privacy interest of private citizens, this Commission finds no impediment to authorizing a two year experimental deployment of Caller ID in California; however the Caller ID service can only be offered if it is offered consistently with the consumer safeguards and other requirements enumerated in this decision.

28. It serves the public interest to authorize the provision of the Caller ID service on an interim basis for a trial period of two years, after which the Commission can reevaluate the service in light of experience.

29. Per-call blocking is activated by the calling party by pressing *67 on a touchtone phone before dialing, thereby blocking disclosure of the calling party's number.

30. Per-line blocking precludes disclosure of the calling party's number for all calls made from a blocked access line.

31. In per-line blocking with per-call enabling, a party may specify that he/she wants all calls blocked, except those specifically unblocked by pressing a three-digit code.

32. If Caller ID is to be offered consistently with constitutional guarantees and the public interest, it must be offered in a way that maximizes the ease and freedom with which Californians may choose not to disclose their calling party numbers.

33. Our goal is to ensure, to the greatest extent possible, that the decision to allow a calling party's number to be displayed is the result of informed consent and a knowing and intelligent waiver of the right of privacy.

34. All three blocking options --per-call blocking, per-line blocking, and per-line blocking with per-call enabling--should be

made available by each of the applicants, and the calling party should be permitted to choose among these options.

35. Per-line blocking will provide protection for those who prefer not to disclose their calling number under any circumstances and for those who need special protection.

36. Per-line blocking with per-call enabling will provide convenient protection for those who believe they would prefer to block their calling party number in most instances.

37. The failure to offer per-line blocking with per-call enabling as an option would greatly reduce customer choice, as those desiring greater privacy protection might be discouraged from choosing per-line blocking without per-call enabling due to the inflexibility of that option.

38. The privacy rights of customers who choose per-line blocking and per-call enabling will not be violated because the calling party's number may not be transmitted unless the calling party affirmatively activates the enabling code; such affirmative action manifests the calling party's informed consent to disclose his/her number and the knowing and intelligent waiver of his/her right of privacy.

39. The privacy rights of those subscribers who choose per-call blocking will not be violated because, in affirmatively choosing the per-call blocking option, the subscriber assumes the burden of blocking the transmission of his/her number and assumes the risk that he/she may fail to do so.

40. Article I, Section 1, of the State Constitution and PU Code § 2893 require that all telephone subscribers be given the capability of blocking display of the calling party's number, and therefore require adoption of a default blocking option.

41. Those who pay for unlisted or nonpublished telephone numbers, and who affirmatively fail to choose a blocking option, must receive per-line blocking with per-call enabling; this is

consistent with a heightened expectation of privacy in unlisted telephone subscriber information.

42. Emergency service organizations, as defined in applicant's tariffs, may have special and legitimate reasons for precluding dissemination of the calling party's number without an affirmative act; these reasons justify providing such organizations with the default protection of per-line blocking with per-call enabling.

43. Other subscribers who fail to make a choice of blocking option following the comprehensive customer notification and education program and the additional advance notice requirements specified in this decision, must receive per-call blocking.

44. Because subscribers who receive per-call blocking as a default option will have been notified that they must activate the *67 code to block transmission of the calling number, it is reasonable to conclude that such subscribers have assumed the risk for failure to activate the code.

45. The use of Caller ID service by a subscriber who possesses the capability of receiving the calling party's number only because he/she has lawfully purchased the service from "a provider of electronic or wire communication service" pursuant to a duly authorized tariff satisfies the exceptions of 18 U.S.C.Section 3121(b); we perceive no violation of the Federal Wiretap Law in our authorization of Caller ID service.

46. In view of the manner in which we are authorizing Caller ID service, there is no violation of California penal statutes prohibiting the wiretapping, interception, eavesdropping on and recordation of confidential communications over the telephone.

47. The evidence of "redlining" implications of Caller ID service is largely speculative; however we will monitor the situation closely in accordance with the provisions of this order.

48. A charge of $5 for each activation by Pacific and Contel for providing Call Trace will reflect the direct-embedded costs

incurred when providing such service, and is a reasonable charge. A cap equal to the charge for two activations from the same calling number in a billing period is also reasonable in connection with Call Trace service provided by Pacific and Contel, as is a charge equal to the charge for five activations from all numbers in the same billing period. A flat monthly charge of $5 by GTE for Call Trace will be reasonable, since GTE is technically unable to currently provide the service on a per-activation basis.

49. Call Return involves delivering to the party making a return call, the telephone number of the original calling party on the monthly billing statement, if made as a toll call; in circumstances where the Call Return service is utilized to place a return call to a party who called from a blocked number, and a toll charge for the return call is placed on the bill, the last four digits of the blocked number should not be disclosed, in the interests of privacy protection.

50. The CNEPs submitted with the applications involve principally the provision of Caller ID, and are not necessary in connection with the other CLASS features. However, customer notification and instruction in connection with Call Trace would be particularly beneficial because of the potential benefit associated with that service.

51. Issues involving unbundling, nondiscriminatory access, and imputation are being addressed in the IRD phase of the Commission's Alternative Regulatory Framework proceeding, I.87-10-033.

52. In the agreement (Exhibit 13) between MCI, Pacific, and DRA, Pacific is required to furnish supporting workpapers demonstrating that price changes between adopted floor and ceiling prices protect price floors. The agreement also provides that Pacific demonstrate in the IRD proceeding that rates and charges for new COMMSTAR Features comply with Commission-adopted principles for unbundling, imputation, nondiscriminatory access, and MBBs, as

set forth in D.89-10-031, and that if the Commission establishes different rules for unbundling, etc. in IRD, Pacific shall modify its rates for COMMSTAR services as part of that proceeding.

53. The agreement contains ample safeguards to insure that price floors will be observed, and that any proposed changes will protect those floors. Neither MCI or monopoly ratepayers will be harmed by our granting interim authority in this decision to provide the proposed COMMSTAR services, with pricing flexibility, until the unbundling, etc. issues are resolved in the IRD proceeding.

54. Pacific has requested Category II classification with pricing flexibility for all CLASS features except Caller ID and Call Trace. GTE and Contel have requested Category II classification with pricing flexibility for all proposed CLASS features, except that GTE has amended its original position and indicated that Call Trace could be placed in Category I.

55. GTE proposes to assess a charge for uncompleted calls in connection with Special Call Acceptance; such a charge would not be appropriate.

56. A charge of $2.50 for GTE's service of Special Call Acceptance will cover its floor price when GTE does not charge for uncompleted calls.

57. The charge of $40 assessed by Contel for service connection includes the cost of processing requests for CLASS features, and covers Contel's direct-embedded costs.

58. SS7 costs have been incurred by applicants with the intent to benefit the present and future basic rate infrastructure, as well as to enable the deployment of present and future CLASS-type infrastructure requiring the use of SS7. As such, the cost of SS7 is not directly attributable only to present CLASS features.

59. The direct-embedded cost methodology for calculating SS7 costs, and the cost allocation methodology utilized by applicants is appropriate for purposes of this proceeding.

60. Pacific recommends a tracking procedure in connection with the provision of CLASS services requiring the following:

a. Total CLASS-flexible pricing revenues and unit sales volume results on a semi-annual basis;

b. Unit costs to be provided annually, and include recurring and nonrecurring costs, plus a description of extraordinary marketing and advertising costs; and

c. The number of informal complaints received, if any, for CLASS features on a semi-annual basis.

61. The tracking procedure recommended by Pacific will provide data adequate to insure that the demand and cost estimates used by applicants in formulating their cost and price levels for CLASS are realistic, and protect floor prices applicable in connection with each CLASS feature.

Conclusions of Law

1. Subject to the requirements of this decision, the applicants should be authorized to provide the CLASS features as requested and described in the applications.

2. The floor, initial, and ceiling rates proposed by applicants for the existing and proposed CLASS features are reasonable for the present, and should be authorized, with pricing flexibility, on an interim basis. Final rates for these features should be determined based upon the guidelines adopted in IRD relating to unbundling, nondiscriminatory access, imputation, and the definition of MBBs, as well as how to impute tariffed rates of MBBs into tariffed CLASS features.

3. Article I, Section 1, of the California Constitution explicitly establishes the right of privacy as an inalienable right of all people.

4. The authorities which speak most forcefully on the issues of privacy are directed at disciplining forces of government

(especially the police) and protecting the rights of citizens to engage freely in "political speech."

5. The issues posed by balancing privacy interests of private parties who initiate or receive residential telephone calls arise beyond the clear concern of privacy as a "constitutional right."

6. California case law upholds the need to restrain the information activities of government with respect to those items of personal information wherein the citizen has a "reasonable expectation of privacy."

7. While some have urged that Caller ID implicates a constitutional right to remain anonymous, the authorities they cite refer to a right to engage in political speech free of any government imposed condition that the speaker provide his/her name, address, or other identification.

8. Freedom of speech encompasses more than the right to be protected from censorship of content. It extends to communication in its most fundamental sense embracing both the right to disseminate information and the right to receive it.

9. Improper restraints on communications are offensive because they restrict the dissemination of ideas upon which a free society is ultimately dependant.

10. Because the right of the freedom of speech is intended to protect minority views, anonymity may be an indispensable prerequisite to speech.

11. The explicit right to privacy established by Article I Section 1 of the California Constitution is broader in scope than the corresponding federal right; therefore, if Caller ID can be offered without contravening the state constitutional privacy right, it does not violate federal privacy restrictions.

12. While California's privacy protections are most intensely engaged when the threat is one of governmental gathering or compilation of information in which citizens have a reasonable

expectation of privacy, or when there are state sponsored or sanctioned inhibitions on freedom to engage in political speech, the "reasonable expectation of privacy" test advanced by the court may embrace a state of mind fostered by technological conventions. Such as the case with Caller ID.

13. PU Code § 2893, which requires that we assure ourselves "that every telephone call identification service offered in this state by a telephone corporation...shall allow a caller to withhold display of the caller's telephone number, on an individual basis, from the telephone instrument of the individual receiving the telephone call placed by the caller," may be interpreted as requiring the provision of per-call blocking; however the statute fails to specify any particular blocking option, and therefore is interpreted as requiring per-call blocking as the minimum privacy protection for the calling party's number.

14. Pursuant to PU Code § 2893, this Commission may require more restrictive blocking options to protect privacy, in place of, or in addition to, per-call blocking.

15. Article I, Section 1, of the State Constitution and PU Code § 2893 require that all telephone subscribers be given the capability of blocking display of the calling party's number, and therefore require adoption of a default blocking option.

16. The provision of the initial blocking selection and one change free of charge exceeds the requirement set for the in PU Code § 2893(b), which provides that "[t]here shall be no charge to the caller who requests that his or her telephone number be withheld from the recipient of any call placed by the caller."

17. In view of the manner in which we are authorizing Caller ID service, there is no violation of California penal statutes prohibiting the wiretapping, interception, eavesdropping on and recordation of confidential communications over the telephone.

18. Applicants' requests to provide Caller ID service should be granted on an interim basis, subject to the consumer safeguards and other requirements contained in this decision.

19. Pacific and Contel should be authorized to provide Call Trace service at a charge of $5 per activation, subject to a price cap equal to the charge for two activations from the same number in a billing period, and to a cap equal to the charge for five activations from all numbers in the same billing period. GTE should be authorized to provide Call Trace service at a charge of $5 per month. Applicants should provide customers notice and education regarding Call Trace consisting at least of bill insert information concerning the availability and applicability of the service. A copy of the proposed bill inserts and any additional materials should be furnished to and approved by the Commission's Public Advisor.

20. In connection with the service of Call Return, applicants should be required to withhold delivery of the original calling number from the monthly billing statements of subscribers to the service.

21. GTE should not be authorized to assess a charge for uncompleted calls in connection with Special Call Acceptance. GTE should be authorized to assess a charge of $2.50 for this service.

22. The service connection charge of $40 proposed by Contel should be approved on the basis of it's including the provisions of CLASS features.

23. The direct-embedded cost methodology for calculating SS7 costs, and the cost allocation methodology therefor utilized by the applicants should be approved.

24. The tracking procedure outlined in this decision should be approved for monitoring the CLASS services authorized pursuant to this decision. Applicants' first reports should be filed one year after commencement of the services.

25. The Motion of Pacific to strike portions of the DRA opening and closing briefs should be granted.

26. MCI's Motion Requesting Declaratory Ruling or Other Relief should be denied.

27. TURN's Motion for Official Notice of Recent Decisions of Other Commissions Regarding Caller ID and Pacific's related motion should be denied.

28. TURN's Motion for Sanctions should be denied.

INTERIM ORDER

IT IS ORDERED that:

1. Pacific Bell (Pacific), GTE California Incorporated (GTE), and Contel of California, Inc. (Contel) are authorized to provide the existing and proposed nonprivacy-related Custom Local Access Signaling Services (CLASS) features identified in the applications, on five days' notice; except that for a limited two-year trial period, Pacific, GTE, and Contel are authorized to provide privacy-related CLASS services (Call Return, Call Block, Call Trace, and Caller ID) on an interim basis, subject to the protections specified in this order for such privacy-related services. Pacific is authorized to provide existing COMMSTAR services in accordance with the terms and conditions of this decision.

   a. Tariffs implementing Call Trace shall not become effective until applicants have provided customers notice and education concerning the service, and shall be filed in accordance with the rates and conditions set forth in Conclusion of Law 19.

   b. GTE is authorized to file rates for Special Call Acceptance in accordance with Conclusion of Law 21.

   c. Applicants may file tariffs for the remaining services as set forth in the

proposed tariffs in their respective applications.

2. Prior to offering Call Return, Call Block, Call Trace, and Caller ID service, applicants shall provide each telephone subscriber with a clear and easily understandable notice informing the subscriber (1) of the blocking option applicable to that party's telephone service, (2) whether that option was determined by choice or by default, (3) of the right of the subscriber to change the blocking option applicable to that subscriber's service one time free of charge, and (4) of the nature of the available blocking options to which the subscriber might wish to change.

3. Prior to offering Call Return, Call Block, Call Trace, and Caller ID service, the applicants shall ensure that there is a simple means of identifying the nature of the blocking option applicable to a particular telephone and that the public is fully informed of this means. The applicants should attempt to agree on the best means from the consumer's perspective, taking into account simplicity and reliability, and should attempt universal deployment of that means and a wide-ranging effort to publicize it. Information regarding the means of identifying the blocking option applicable to a particular telephone shall be included in the customer notification and education program.

4. Prior to offering Call Return, Call Block, Call Trace, and Caller ID service, the applicants shall widely publicize the fact that coin phones and certain other configurations, at least for the present, will not be capable of utilizing blocking, and shall undertake to ensure that all coin phones under their control have affixed to them a notice informing the user that blocking of the calling parties' number is not currently possible from that phone.

5. Each of the blocking options shall be provided free of charge to the subscriber for the initial selection (whether by affirmative choice or by default) and for one additional change of

blocking option, and the applicants shall take steps to assure that any such change order is processed and effected expeditiously.

6. Call Return, Call Block, Call Trace, and Caller ID service shall not be provided until the applicants have filed (and served) revised customer notification and education plan(s) to be reviewed by the Commission Advisory and Compliance Division (CACD) (in consultation with the Public Advisor and, if necessary, an independent consultant chosen by CACD and paid for by applicants), and such plan(s) shall not be implemented until approved by the Commission. Subsequently, such privacy-related CLASS services shall not be provided until the applicants have made a showing in this proceeding, approved by Commission order, indicating compliance with the adopted customer notification and education requirements. An appropriate customer notification and education plan for the following CLASS services (Caller ID, Call Block, Call Trace, and Call Return) must conform to the following requirements:

a. Complete information shall be provided to all California ratepayers, not simply those in areas where the service is currently offered.

b. Additional efforts shall be made in the new areas where the services will be offered, as they are added by the local exchange carriers.

c. The consumer education campaign shall be most intensive in the first six months and then ongoing for as long as the services are being offered.

d. All utility consumer education efforts shall use the same terminology and be as similar as possible.

e. Customer messages ordered by this decision shall not be sales messages. They shall provide objective, neutral information on both the services themselves and how consumers can make informed choices about these changes.

f. Written messages shall state that they are provided by the local exchange carrier as required by the Commission.

g. The messages shall be provided in many languages, so as to reach all Californians. The media used in the plan shall include, but not be limited to, the following: bill inserts, white pages information, brochures, sales representative scripts, and paid advertising.

h. The plan shall make extra efforts to reach groups with special needs (such as seniors, children, the limited English speaking, the disabled, those with nonpublished numbers).

i. The utilities shall establish a 24-hour toll free number for consumers to get information about the services and how they are used.

j. The messages shall tell consumers whom to contact if they have complaints about the way the service is being implemented (first the local exchange carrier, then the Commission's Consumer Affairs Branch.

k. Ordering per-line blocking or per-line blocking with per-call enabling shall be as simple as possible. A request form shall be included with the information/education material.

l. The codes used for per-call blocking shall be distinctly different than those for per-call enabling.

m. The local telephone companies offering any services shall provide the following information to the Commission Advisory and Compliance Division in a periodic compliance report to be filed with the Director of the CACD every six months after the services are offered:

(1) Number of subscribers to each CLASS service.

(2) Number of subscribers choosing per-call blocking.

(3) Number of subscribers choosing per-line blocking.

(4) Number of subscribers choosing per-line blocking with per-call enabling.

(5) Number of subscribers assigned default per-line blocking with per-call enabling.

(6) Number of subscribers assigned default per-call blocking.

(7) Number of subscribers ordering a change from initial blocking option, broken down by option changed from and option changed to.

(8) Number of subscribers with unlisted and unpublished numbers with a breakdown of those subscribers by choice of blocking option.

(9) Number of subscribers with unlisted and unpublished numbers assigned default per-line blocking with per-call enabling.

(10) Number and nature of complaints concerning the service.

n. Within 18 months of the date that the local telephone companies first provide the service, they shall serve and file with the Docket Office the interim compliance report required by this decision. This report shall address in detail (1) the level of usage of the services, (2) the effectiveness of the privacy protections and education programs implemented under this decision, (3) the nature of the public response to the provision of the services, (4) whether there have been new developments which militate in favor of discontinuance or alteration of the services, and (5) any other matter relating to the services which the applicant desires

to call to the Commission's attention. A copy of that report shall be served on all parties to this proceeding. Parties shall have 30 days in which to file responses.

o. Consistent with PU Code § 2893(c)(1), the companies shall not offer the services until more than 30 days after they have notified their customers of the nature of the services they propose to provide.

p. Consistent with the spirit of PU Code § 2893(d)(4), the companies' education efforts shall include information to the effect that under their current terms of service, telephone users may be communicating their calling party number to private businesses every time they call an 800 or 900 number through a service known as Automatic Number Identification (ANI), that there is at present no capability to block the communication of their calling party number through ANI, that many businesses receiving ANI have the software capability to call up on-screen database information about the calling party at the time of the telephone call, and that these facts have not been well publicized.

q. The messages shall make consumers aware of the effectiveness of all blocking options when making interstate calls.

r. In their tariff filings, the applicants shall include a definition of "emergency service organizations" entitled to default protection of per-line blocking with per-call enabling.

7. In developing the customer notification and education plan, the applicants shall consult extensively with community and consumer leaders; applicants shall hold workshop(s) which will be open to all those interested, to review and comment on the plan prior to filing; we expect that applicants will modify their draft to reflect comments received, prior to filing. The plan shall not be implemented until approved by the Commission.

8. Call Return, Call Block, Call Trace, and Caller ID service shall not be provided by an applicant until the applicant has made a showing, approved by the Commission, that the applicant has notified all of its customers of the nature of the service and the means by which they can protect their privacy, consistent with the provisions of this order.

9. Applicants shall contract with a reputable independent public opinion survey company free of conflict of interest to monitor the ongoing level of consumer awareness and understanding that has been attained during the period extending from the date of this decision to the date of expiration of the two-year trial period established herein.

10. Should we find that the utilities' implementation proves to be inadequate for any reason, we may supplement the customer notification and education plans with the program administered by the Commission Advisory and Compliance Division (CACD).

11. We direct CACD to closely monitor any complaints of "redlining" or unlawful discrimination through the use of Caller ID service, and to bring the problem to our attention along with recommendations as to how any such practices can be eliminated or controlled as necessary.

12. Call Trace shall be the subject of bill insert information and instruction to consumers.

13. GTE shall not offer Call Return until it has made the modifications to its hardware and software systems, including its billing system, necessary to suppress the calling parties' billing number on Call Return calls.

14. The privacy-related CLASS features other than Caller ID are authorized subject to the limitation that calling party numbers not be delivered or announced to call recipients.

15. Final rates for the existing and proposed features identified and authorized in this decision will be established based upon the determinations made in the Implementation Rate

Design (IRD) phase of the Commission's Alternative Regulatory Framework proceeding, (I.) Investigation 87-10-033, regarding unbundling, imputation, nondiscriminatory access, and monopoly building blocks (MBBs).

16. Within 90 days after issuance of the decision in the IRD phase of the Commission's Alternative Regulatory Framework proceeding, I.87-10-033, regarding unbundling, imputation, nondiscriminatory access, and MBBs, Pacific, GTE, and Contel shall file advice letters, with appropriate rates, for the services authorized by this decision.

17. The Motion of Pacific to strike portions of the opening and closing briefs of the Division of Ratepayer Advocates is granted.

18. The Motion of MCI Requesting Declaratory Ruling or Other Relief is denied.

19. The Motion of Toward Utility Rate Normalization requesting notice of recent decisions of other Commissions relating to Caller ID and Pacific's related motion, are denied.

20. The first tracking report, as described in Finding of Fact 72, shall be submitted to the Commission 6 months after commencement of the proposed services.

21. The applications are granted, in part, and denied, in part, as set forth above.

This order is effective today.

Dated June 17, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

I will file a written concurring opinion.
/s/ JOHN B. OHANIAN
Commissioner

I will file a written concurring opinion.
/s/ NORMAN D. SHUMWAY
Commissioner

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director

APPENDIX A

List of Appearances

Applicants: Orrick, Herrington & Sutcliffe, by Robert J. Gloistein and Cynthia Weeks, Attorneys at Law, for Contel of California, Inc.; Mary L. Vanderpan and Marlin Ard, Attorneys at Law, for Pacific Bell; and John F. Raposa and Robert Herrera, Attorneys at Law, for GTE California Incorporated.

Protestants: Armour, Goodin, Schlotz & MacBride, by John L. Clark, Attorney at Law, for Telephone Answering Services of California; Jackson, Tufts, Cole & Black, by Joseph S. Faber and Wm. H. Booth, Attorneys at Law, for California Bankers Clearing House Association; Mark E. Brown, Attorney at Law, for MCI Telecommunications Corporation; and Michael Aylwin, for himself.

Interested Parties: Beck, Young, French & Ackerman, by Jeffrey F. Beck and Sheila A. Brutoco, Attorneys at Law, for CP National, Evans Telephone Company, GTE West Coast Incorporated, Kerman Telephone Company, Pinnacles Telephone Company, Sierra Telephone Company, Inc., The Siskiyou Telephone Company, and Tuolumne Telephone Company; Cooper, White & Cooper, by E. Garth Black, Mark P. Schreiber, and Erin Daly, Attorneys at Law, for Roseville Telephone Company, Calaveras Telephone Company, California-Oregon Telephone Company, Ducor Telephone Company, Foresthill Telephone Company, Happy Valley Telephone Company, Hornitos Telephone Company, The Ponderosa Telephone Company, The Volcano Telephone Company, and Winterhaven Telephone Company; Morrison & Foerster, by Dhruv Khanna, Attorney at Law, for McCaw Cellular; Randolph W. Deutsch and William Ettinger, Attorneys at Law, for AT&T Communications of California, Inc.; William G. Irving, Attorney at Law, for the County of Los Angeles; L. Russell Mitten, Attorney at Law, for Citizens Utilities Company of California; Marla L. Scharf, Attorney at Law, for the Department of Consumer Affairs; Phyllis A. Whitten, Attorney at Law, for US Sprint Communication Company Limited Partnership; Cathy Jones, Attorney at Law, and Jon Rainwater, for California Alliance Against Domestic Violence; C. Hayden Ames, Attorney at Law, for Chickering & Gregory; Joanne Masokowski, for Bay Area Citizens Against Pornography; Thomas J. Long, for Toward Utility Rate Normalization; Ken McEldowney and Mark Foster, for Consumer Action; Michael Shames, for Utility Consumer Action Network; Arthur J. Smithson, for Citizens Utilities Company of California; Catherine Cloud, for National Fair Housing Alliance; and Jeffrey A. Johnson, for himself and Computer Professionals for Social Responsibility.

Division of Ratepayer Advocates: James Rood and Mary Mack Adu, Attorneys at Law, and Hassan Mirza.

(END OF APPENDIX A)

A.90-11-011, A.90-12-065, & A.91-01-039

Commissioner John B. Ohanian, Concurring

With this decision today, we authorize new innovative services and their underlying technology for the benefit of all Californians. CLASS services and Signalling System 7 meet two of the goals which we utilized to develop the regulatory framework that we adopted in D.89-10-031 (33 CPUC 2d 43) and also satisfy the policies for developing the telecommunications infrastructure contained in Public Utilities Code (PUCode) § 709(b).

In D.89-10-031, we recognized that the goals of Encouragement of Technological Advance and Full Utilization of the Local Exchange Network were important. Attainment of these goals will lead to lower costs and to new and better services. In addition, the legislature believed that telecommunications was important enough to add PUCode § 709 in 1987 "to encourage the development and deployment of new technologies and the equitable provision of services in a way which efficiently meet consumer needs and encourage the availabilty of a wide choice of state-of-the-art services."

We do not give this authorization for the CLASS services blindly. I am fully aware of the competing arguments of all the parties in this proceeding. The decision balances these interests with the various blocking options upon which we condition our authorization.

The words we issue here today, however, will be meaningless if they lie here bound in our official records. The key element of my support is premised on the understanding that these words will be disseminated to all of California and transformed into action. The decision acknowledges that the manner and way that people deal with telecommunications will change with these CLASS services. Thus, the need for a realistic and viable Customer Notification and Education program is essential for my support of this decision.

I am comfortable in that we have taken every reasonable measure to ensure that we will have a program that will work. At the risk of being redundant, I will reiterate those steps in order to emphasize their importance:

1. Creating various blocking options (per call, per line with per call enabling, and per line blocking) with different default conditions depending on the customer's situation,

2. Requiring the utilities to submit a Notification and Education program for Commission approval,
3. Requiring the utilities to verify that the program has been effective,
4. Reserving the option of having the Commission Advisory and Compliance Division implement the program if the utilities' programs are unsuccessful, and
5. Making the rates interim for two years with a status report filed in eighteen months.

The utilities should not find the additional conditions we impose here today burdensome. In one respect, it is fully consistent with my concurring opinion in D.89-10-031 when I said:

> Today's decision established our new regulatory framework for telecommunications. This is a dramatic change in orientation...This decision provides for a more streamlined system in order to grow and improve at the necessary pace to keep California the world leader in innovation and quality of life.
>
> ...Establishing California as a continued leader in communications into the next century is a benefit to all Californians.

Part and parcel of that orientation is being customer focused. Providing a service that disturbs those that do not want to participate in that service or surprises those that are unaware is not being responsive to customer needs. At one time, Henry Ford said that he would sell any color car as long as it was black. He later learned the weakness of that approach to marketing. I trust the telecommunications utilities realize that responding to customers' needs is more important than supplying a product customers don't want.

In meeting the demands of their customers, the utilities will not only have the opportunity to reap the financial benefits of their management decisions, but they will also know that they are participating in the economic development of California.

John B. Ohanian

San Francisco, California
June 17, 1992

Norman D. Shumway, Commissioner, concurring:

I concur in part with the result reached by the Commission in this case. I believe that it properly permits an offering of CLASS services consistent with the public interest and adopts sufficient safeguards to assure that the privacy rights of California citizens will not be infringed. I write separately, however, to express my view that we need not pronounce limitations or adopt a narrowing construction of Article I, § 1, of the California Constitution in order to reach the result we do in this case.

In this decision my colleagues conclude that "California's privacy protections are most intensely engaged when the threat is one of governmental gathering or compilation of information which our citizens reasonably expect to hold within a realm of personal privacy, or when there are state sponsored or sanctioned inhibitions on freedom to engage in political speech." Mimeo op., at 33-34 (footnote omitted); see also id., at 25, 28, 31. This emphasis, suggesting a distinction between violations of privacy by the government and violations by private parties, in my opinion, is misplaced.

In White v. Davis (1975) 13 Cal.3d 757, 774-75, the California Supreme Court made clear that the state constitutional right of privacy was enacted to restrain the information-gathering activities of "government and business." The decisions of the California Court of Appeal have consistently read White as establishing that nongovernmental parties may be found to violate the constitutional right of privacy. Park Redlands Covenant Control Committee v. Simon (1986) 181 Cal.App.3d 87, 98 ("[T]here is both Supreme Court and appellate authority to the effect that state action is not required to create a violation of the California Constitutional right of privacy."); Luck v. Southern

Pacific Transp. Co. (1990) 218 Cal.App.3d 1, 19; Semore v. Pool (1990) 217 Cal.App.3d 1087, 1094; Wilkinson v. Times Mirror Corp. (1989) 215 Cal.App.3d 1034, 1040.

In addition, many appellate decisions have found violation of the state constitutional right of privacy by private parties, including individuals, to be an actionable tort. In Porten v. University of San Francisco (1976) 64 Cal.App.3d 825, for example, the court stated:

> The constitutional right of privacy is self-executing; hence, it confers a judicial right of action on all Californians . . . . Privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone.

Id., at 829-30 (emphasis added); accord, Luck, supra, 218 Cal.App.3d at 19; Semore v. Pool, supra, 217 Cal.App.3d at 1094; Wilkinson v. Times Mirror Corp., supra, 215 Cal.App.3d at 1042-43; Cutter v. Brownridge (1986) 183 Cal.App.3d 836, 842; Park Redlands, supra, 181 Cal.App.3d at 98; Laguna Publishing Co. v. Golden Rain Foundation (1982) 131 Cal.App.3d 816, 851; Kinsey v. Macur (1980) 107 Cal.App.3d 265, 272; see also Chico Fem. Women's Health Center v. Butte Glenn Med. Society (E.D.Cal. 1983) 557 F.Supp. 1190, 1201-03.

While these decisions have been rendered by the Court of Appeal, the Supreme Court has not elected to order any of them depublished pursuant to Rules of Court 976 and 979. In fact it has ratified several of them, at least to the extent of citing them for other propositions. See, e.g., Tavernetti v. Superior Court (1978) 22 Cal.3d 187, 195 (involving the interception of a telephone communication by a telephone company linesman), which cites Porten with approval.

True, in Schmidt v. Superior Court (1989) 48 Cal.3d 370, 389, fn. 14, our Supreme Court, citing Porten, stated that it had "no occasion in this case to consider under what circumstances, if

any, purely private action by a property owner or landlord would constitute a violation of the state constitutional privacy provision." But as two subsequent Court of Appeal decisions found after exhaustively discussing the Schmidt footnote, the availability of redress for nongovernmental violations of the constitutional right of privacy is the law of California. Semore v. Pool, supra, 217 Cal.App.3d at 1084, quoting Wilkinson v. Times Mirror Corp., supra, 215 Cal.App.3d at 1043 ("[T]he courts [are] unanimous in holding that the state constitutional privacy provision provides some protection against nongovernmental intrusion."); Luck, supra, 218 Cal.App.3d at 19 ("Schmidt provides us too slim a basis to ignore the accepted principle of existing law that the right to privacy limits private as well as state action.").

Objectively, the decision's distinction between governmental and nongovernmental intrusions on privacy is dictum; here, as in Schmidt, state action is present. See, e.g., Huntley v. Public Utilities Com. (1968) 69 Cal.2d 67, 76, holding that a PUC tariff requiring speaker identification as a condition of communicating over the telephone (albeit by recorded message) violates the First Amendment. In Huntley the Court said:

> [T]he telephone company is a public utility subject to the control of the commission, a state agency. The proposed tariff is efficacious only because of state action. Constitutional scrutiny of state action is not predicated upon finding a direct restriction, there only need be a causative relation between the state action and the obnoxious result.

Id. (emphasis in original; citations omitted). But the presence of state action here is merely an additional reason why I would not reach out to make such a distinction.

Moreover, I do not find it necessary to posit a distinction between "political" speech and other speech for purposes of constitutional analysis. While it is true that the

recorded message in Huntley was political in nature, I do not read the Court's opinion as suggesting that any greater protection applies to political speech than other speech. The First Amendment protects the communication of information and ideas, whatever their content, and First Amendment problems arise when a speaker is compelled to identify himself, thus discouraging such communication. Huntley, supra, 69 Cal.2d at 72, 74. With extremely limited exceptions, such a content-based distinction is inimical to the fundamental application of the First Amendment.

The PUC tariff in Huntley was found to be impermissibly overbroad because its restriction on speech was not limited to evils such as obscenity, fraud, false advertising and libel. Id., at 74. Huntley thus suggests that the tariff's effect of inhibiting all other types of recorded telephone messages violates the First Amendment. Id. As noted in Huntley, 69 Cal.2d at 74, quoting Talley v. California (1960) 362 U.S. 60, 64, "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." (Emphasis added.) See also White v. Davis, supra, 13 Cal.3d at 765-73 (finding a First Amendment violation in government surveillance which would chill "the free expression of ideas" on a college campus).

In my view, Huntley is on all fours with the instant case: a PUC-approved tariff offering Caller ID service without the blocking requirements and other safeguards we announce today would be just as violative of the First Amendment (and the expanded protections of the state constitutional right of privacy[1]) as the PUC-approved tariff overturned in Huntley. That is so because a calling party number disclosure requirement would deter individuals

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1 See, e.g., City of Santa Barbara v. Adamson (1980) 27 Cal.3d 123, 130, fn. 3.

desiring to maintain the privacy of their telephone numbers from freely communicating information or ideas over the telephone.

It is worth noting that in Canon v. Justice Court (1964) 61 Cal.2d 446, the Supreme Court upheld a statute (Elec. Code, § 12047) prohibiting anonymous campaign publications. The Court found that the statute's purposes in requiring speaker identification -- facilitating the electorate's evaluation of the material by identifying its source, deterring irresponsible political attacks and enhancing a candidate's opportunity to rebut charges, thereby preserving the integrity of elections -- outweighed the statute's inhibitory effect on free speech. Id., at 452-54. Hence, the Court has upheld a speaker identification requirement which it found to limit political speech.

Indeed, even if the decision's political speech distinction were appropriate for purposes of First Amendment analysis, callers whose telephone numbers would be subject to compelled disclosure under unrestricted Caller ID would unquestionably be engaging in such speech on some occasions. Again, I do not find it necessary or appropriate to reach this point in the Commission's analysis of the right of privacy under Article I, § 1, of the California Constitution.

Finally, I do not find it necessary to raise the question of whether telephone callers have a "reasonable expectation of privacy" in the numbers from which they are calling. While that test may be appropriate for privacy analysis in an unlawful search and seizure context, see People v. Crowson (1983) 33 Cal.3d 623, 629, it is apparently not the relevant test where, as in White v. Davis, Huntley and the instant case, "First Amendment as well as right to privacy principles" are implicated, 33 Cal.3d at 629, fn. 5. In such circumstances, the test is more absolute and less subjective: it precludes any incursion into fundamental rights which is not narrowly tailored to serve a compelling state interest. White v. Davis, supra, 13 Cal.3d at 772, 775; Huntley,

supra, 69 Cal.2d at 78-79. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . . [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." West Virginia Board of Education v. Barnette (1943) 319 U.S. 624, 638. "Whatever role the subjective expectation of privacy may play in determining the extent of a constitutional right, '. . . the state cannot curtail a person's right to privacy by announcing and carrying out a system of surveillance which diminishes that person's expectations.'" People v. Chapman (1984) 36 Cal.3d 98, 113, quoting DeLancie v. Superior Court (1982) 31 Cal.3d 865, 875, fn. 11.

I also respectfully dissent from the decision's authorization of the CLASS feature known as Anonymous Call Rejection or "Block the Blocker." First, I consider the approval of this feature inappropriate because none of the applicants requested authority to offer it. Thus the issue is not properly before us.

Second, on the scant record available to us, I do not believe that the feature serves the public interest. Anonymous Call Rejection would allow a subscriber to tell the telephone company that he or she does not wish to receive calls from any caller who blocks the delivery of the calling party's number. Where a blocked cal is placed to the Anonymous Call Rejection subscriber, the subscriber's telephone does not ring. Instead, the call is mechanically intercepted at the central office, where a recording informs the caller that the party he is calling does not wish to receive calls from anyone blocking his number, but if the caller wishes to unblock by pressing the appropriate code, the call will go through to the called party, who may or may not answer.

Anonymous Call Rejection could greatly inconvenience subscribers who happen to have "firm" per-line blocking and cannot enable calling number disclosure, those who have unlisted or nonpublished numbers (which according to some studies exceed fifty per cent of subscribers in many metropolitan areas) and those who simply would prefer not to disclose their numbers as a condition of having the telephone of the party they are calling ring. Such subscribers should not be put to the inconvenience of having to seek out a public or other telephone in order to attempt to preserve their privacy and complete the call. In my opinion, there are many circumstances in which such inconvenience might rise to the level of intrusion on the rights of free speech and privacy. Indeed, as in Huntley and Talley, and to some extent White v. Davis, the compulsion to disclose private information as a condition of speaking may cause the caller to elect not to speak at all. Imagine, for example, the situation in which a caller with an unlisted telephone number legitimately desires to communicate important information and ideas over the telephone to an Anonymous Call Rejection subscriber. The caller is left with the Hobson's Choice of surrendering his heightened privacy in the unlisted number he has purchased or electing not to complete the call, thereby surrendering his right of free expression. Imagine, also, the situation in which a person attempts to make an emergency call to an Anonymous Call Rejection subscriber from a line-blocked telephone. The caller may be left with the alternative of running to the corner grocery store to find a telephone to deal with the emergency.

Without further consideration of all its ramifications, I do not believe that the telephone company should offer a service which intercepts phone calls before they reach the called customer's premises unless the caller relinquishes his right of privacy, even on instructions of the call recipient. I have misgivings about authorizing a service which conditions the

caller's desire to have his call go through to the called party's premises upon the surrender of fundamental rights. Anonymous Call Rejection seeks to facilitate call screening on the basis that there is something inherently wrong with a caller's exercising his right of privacy and blocking delivery of his number. We should exercise great care - more than was appropriate in this case where the service was not requested - before giving credence to this inference.

Finally, by authorizing CLASS services such as Caller ID, Call Block and Priority Ringing, as we do today, we grant call recipients significant added ability to protect their privacy from intrusion by unwanted telephone calls. Subscribers to Caller ID need never answer blocked calls; the subscriber may merely observe on the Caller ID display unit that the calling party's number is blocked and choose not to pick up the receiver.

I believe that the record before us is inadequate to facilitate the full airing of the implications of Anonymous Call Rejection. I therefore dissent from our authorizing the Anonymous Call Rejection feature at this time.

Despite these concerns, I believe that the Commission's decision authorizing CLASS services with safeguards is consistent with the public interest and the privacy requirements established by the California Constitution. I therefore concur in the result reached in the majority opinion.

NORMAN D. SHUMWAY
Commissioner

June 17, 1992
San Francisco, California