

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Nos. 95-70470 and Consolidated Cases

PEOPLE OF THE STATE OF CALIFORNIA, et al.,  
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION, and the  
UNITED STATES OF AMERICA,  
Respondents

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On Petitions for Review of an Order  
of the Federal Communications Commission

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JOINT BRIEF OF INTERVENORS SUPPORTING  
PETITIONER CALIFORNIA

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## **BRIEF FOR STATE INTERVENORS**

The Consumer Federation of America, Consumer Action, the Southern California Coalition for Battered Women, the National Association of Social Workers, the California Alliance Against Domestic Violence, the Family Violence Prevention Fund, Toward Utility Rate Normalization, the National Association of Regulatory Utility Commissioners and the Pennsylvania Public Utility Commission (hereinafter collectively referred to as "State Intervenor(s)") hereby submit this opening Joint Brief of Petitioners Supporting California on petition for review of an order of the Federal Communications Commission ("FCC" or "Commission").<sup>1</sup>

### **STATEMENTS OF INTEREST**

#### **Consumer Federation Of America And Consumer Action**

Consumer Federation of America ("CFA") is a national federation of about 240 consumer organizations, with a combined membership of approximately 50 million people, that represents the interests of consumers in a wide variety of matters. CFA's co-intervenor in this action, Consumer Action, is a consumer education and advocacy organization that represents the interests of low income and limited English speaking consumers on telephone utility matters. CFA and Consumer Action were both participants in the California Public Utilities Commission's ("CPUC" or "California PUC") initial proceedings in California and in the FCC proceedings below.

CFA and Consumer Action have a strong interest in protecting the privacy and safety of their members, an interest that could be seriously impaired if the FCC's order is allowed to stand. In California, many consumers have chosen to pay an extra amount each month for the privacy that an

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<sup>1</sup>While several of State Intervenor(s) Motions for Intervention have not yet been granted by the Court, the Clerk's Office indicated that as the Motions are unopposed and likely to be granted by the Court in the near future, all State Intervenor(s) supporting Petitioner California could sign onto this Brief.

unpublished telephone number affords. The FCC's preemption of California's default per-line blocking policy jeopardizes this privacy and interferes with the consumers' reasonable expectation of privacy.

Evidence presented in the proceedings below related to California demonstrates that any education campaign concerning implementation of caller ID, as envisioned by the FCC's order, will be inadequate to inform consumers of the significant change in privacy protection resulting from the availability of caller ID. That evidence demonstrates that it is virtually impossible to effectively convey information to all affected telephone consumers in California. For example, persons who pay to have their telephone number unlisted -- and who will continue to pay under the new program -- have a reasonable expectation that their number will not be released by their telephone service provider. Even if they receive notice of a change in policy, these consumers may disregard or misconstrue the notice, reasonably assuming that the notice does not apply to them precisely because their payment of the extra fee provides them privacy protection.

For these reasons, the members and constituents of CFA and Consumer Action have a direct interest in the complete implementation of the California PUC's determination of how best to secure the privacy of its residents.

**The California Alliance Against Domestic Violence and  
the Family Violence Prevention Fund**

The California Alliance Against Domestic Violence ("CAADV") is a statewide coalition created in 1976 responding to the needs and interests of battered women and their children. It is one of the largest domestic violence groups in California. Through legislative and public policy reform, CAADV has improved system response to women and their children who have been victimized by domestic violence. The CAADV was an active participant in the CPUC's caller ID proceedings and

presented testimony and arguments in those proceedings in favor of a per line blocking default.

The Family Violence Prevention Fund ("FUND") is a national non-profit organization founded in 1980 that focuses on the prevention of domestic violence through education and public policy. Throughout its history the FUND has developed pioneering prevention strategies in the justice, public education, and health fields. The FUND created the San Francisco Family Violence Project, which provides a full spectrum of direct services to more than 2,400 San Francisco battered women each year. The FUND does not normally participate in litigation, but the serious privacy concerns raised by the instant case, in the view of its board of directors, warrant this exceptional participation to protect the privacy and safety interests of its constituents.

The CAADV and the FUND support the CPUC's position that the FCC was ill-advised in preempting California's requirements of a per line blocking default for nonpublished subscribers. Studies show that many subscribers who pay their telephone companies each month for a private telephone number may not receive adequate notice that would enable them to protect their private numbers from being released indiscriminately. These subscribers, who have specifically paid for protection of their phone numbers but are unaware of the blocking requirements, would be left with a false sense of security.

The per line blocking default is particularly crucial to victims of domestic violence, whose nonpublished telephone numbers would be passed to everyone they call if they failed to receive notice regarding blocking. Without the default, the caller ID feature would make it possible for batterers to locate their victims. There has already been one case in which a victim was located and killed by her batterer because of caller ID.

The CAADV and the FUND believe that the FCC, although well-intentioned, failed to consider the implications of preempting California's per line blocking default, especially with regard

to the safety and well-being of victims of domestic violence. It is, therefore, the CAADV and the FUND's interests that this Court reinstate California's requirements of a per line blocking default for nonpublished subscribers.

### **Southern California Coalition on Battered Women**

The Southern California Coalition on Battered Women ("SCCBW") is a non-profit, California organization which has as its mission the elimination of domestic violence and the empowerment of all women and children. The SCCBW represents the interests of battered women and children and the service providers who serve them. Founded in 1976 by a small group of people who were frustrated by the lack of community resources for victims of domestic violence, the SCCBW was formed to keep members informed about available resources, coordinate the efforts of the numerous constituent agencies and individuals, help start new programs, and to work toward legislative change. Today, the SCCBW has 72 members including individuals, domestic violence shelter providers, social services agencies, legal services providers, and health care professionals. This diverse group of individual and organizational members share the common goal of providing services to battered women and their children, preventing domestic violence whenever possible, and to impact systems and institutions that affect these women and their children by representing their interests. Therefore, the SCCBW felt that it was vital to intervene in this case regarding caller ID which may have a dangerous, potentially fatal impact on many of the victims and survivors of domestic violence as well as their service providers.

The SCCBW believes that the FCC's decisions regarding caller ID may endanger battered women and their children by inadvertently revealing their location. In addition, domestic violence shelters rely upon having their location remain confidential in order to safely serve women who are fleeing their abusers. Caller ID as allowed by the FCC decision threatens that confidentiality. The

SCCBW believes that the CPUC regulations allow for a caller ID program that will be safer for women and their children by not requiring a special code to enable blocking before each call. SCCBW believes that the CPUC has a better understanding of the privacy and safety needs of women and children, particularly those who have experienced domestic violence. While the FCC may have an understanding of the legal issues surrounding caller ID, it has demonstrated a clear lack of understanding of the practical aspects of the privacy and safety issues involved. For these reasons, the SCCBW's interests lie in persuading this court to invalidate the FCC order which preempts California's ruling regarding caller ID.

### **Toward Utility Rate Normalization**

Toward Utility Rate Normalization ("TURN") is a California-based nonprofit organization that advocates on behalf of consumers of telephone service and other essential utility services. TURN has approximately 30,000 dues-paying members throughout California. As revealed in a survey, a substantial majority of TURN's members are concerned about the loss of privacy occasioned by the introduction of caller ID.

TURN was a major participant in the California PUC's extensive proceedings in 1991 and 1992 that led to California's rule requiring default line blocking for nonpublished and unlisted customers. Those proceedings were characterized by an unusual outpouring of views from thousands of consumers and an array of several consumer organizations. In 1991, the CPUC held 12 public participation hearings in six different locations around California in which the CPUC heard live statements from hundreds of California citizens. Also in 1991, the CPUC conducted 21 days of evidentiary hearings in which dozens of witnesses were required to respond to cross-examination regarding their written testimony. Among the consumer representatives participating in those hearings were TURN, the California Alliance Against Domestic Violence, Computer Professionals

for Social Responsibility, the CPUC's Division of Ratepayer Advocates, Consumer Action, the National Fair Housing Alliance, California's Department of Consumer Affairs, and Bay Area Citizens Against Pornography. By the time the case was decided, the CPUC had received 3,900 letters from concerned Californians.

TURN believes the CPUC's proceedings did an admirable job of exploring the difficult policy, technical, and legal issues associated with caller ID. Equally important, the CPUC heard first-hand the significant concerns of many California consumers and consumer representatives about caller ID. The FCC did not, and could not, conduct such an extensive effort to hear the views of California citizens or the citizens of any other States. TURN believes that the California Commission has a better understanding of the privacy needs and expectations of California citizens than the FCC. In particular, the CPUC recognized that California's nonpublished customers exhibit a heightened expectation of privacy with respect to their telephone numbers and that serious negative consequences would flow from the inevitable inadvertent disclosure of nonpublished telephone numbers. TURN's interest, therefore, lies in persuading this Court to invalidate the FCC order insofar as it preempts California's well-considered ruling.

#### **National Association of Social Workers**

The National Association of Social Workers, Inc. ("NASW"), a nonprofit professional association with over 150,000 members, is the largest association of social workers in the world. The California Chapter has over 11, 800 members

NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession, and to improving the quality of life through utilization of social work knowledge and skills. NASW is deeply committed to the protection of individual rights and personal privacy.

NASW's policy on "Confidentiality and Information Utilization" originally adopted in 1973 and updated in 1993 states, in part, that the "...confidential nature of communications between social workers and their clients has been a cardinal principle of the social work profession from its earliest years and, indeed, undergirds the therapeutic worker-client relationship." Thus, the NASW is concerned about any business practices such as revelation of non-published telephone numbers that might interfere with or inadvertently violate the privacy of communications with or related to clients basic to social work practice whether in the public or private sector and wishes to protect against the revelation of telephone numbers contrary to specific orders of the parties.

### **The National Association Of Regulatory Utility Commissioners**

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. Members include the governmental bodies engaged in the regulation of carriers and utilities from all fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands. NARUC's mission is to improve the quality and effectiveness of public utility regulation in America. Specifically, NARUC is composed of, *inter alia*, State regulatory agencies and territorial officials charged with the duty of regulating intrastate telecommunications providers and services within their respective jurisdictions. As part of this responsibility, NARUC's members have an obligation to ensure that such telecommunications services and facilities are available to meet the public interest, convenience and necessity, and, that service is furnished at reasonable rates.

NARUC has participated in the FCC's caller ID proceeding since the docket's inception in 1991, and presented substantial evidence in the proceeding rebutting the assertions of Pacific Bell and others that State caller ID regimes granting the option of per line blocking demean the service or render it uneconomic to deploy. The FCC accepted NARUC's position. See Order at para. 94.

Based upon a recent July, 1995 resolution, NARUC joins only the arguments concerning the appropriate interpretation of the United States Supreme Court decision in Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) and its progeny. Specifically, NARUC believes that given the circumstances of this case, the FCC is precluded by Louisiana from further preemption of California's per line blocking regime.

### **The Pennsylvania Public Utility Commission**

The Pennsylvania Public Utility Commission ("PaPUC") is the agency charged with regulating intrastate telecommunications providers and services in the Commonwealth of Pennsylvania. In 1993, the Pennsylvania legislature enacted a law which made the offering of caller ID lawful in the Commonwealth as long as customers were given the option of both per call and per line blocking. Caller ID has been offered by Bell Atlantic in most of its service areas in Pennsylvania since September, 1994. The PaPUC's primary interest in this case is its opposition to the FCC's preemption of state privacy policies such as California's. Accordingly, like NARUC, the PaPUC joins only in those sections of the Brief addressing the preemption issue. The PaPUC agrees with NARUC that given the circumstances of this case, the FCC is precluded from preempting California's per line blocking regime.

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## **JURISDICTION**

The Petitioners in these consolidated cases seek review of the FCC's "Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking" ("Order") adopted May 4, 1995 in In The Matter of Rules and Policies Regarding Calling Number Identification Service -- Caller ID, docketed at CC Docket 91-281 (FCC 95-187). This decision, released on May 5, 1995, was publicly noticed in the June 5, 1995 edition of the Federal Register, 60 Fed. Reg. 29489.

The FCC asserted jurisdiction of the issues resolved in the Order under 47 U.S.C. Sections 151, 154, 201-205, 218 and 220.

The Order is a final agency ruling and is ripe for review under 47 U.S.C. Section 405 and 47 C.F.R. Sections 1.103(b) and 1.4(b)(1).

The issues posed on appeal were raised in comments before the FCC and ruled upon in the challenged Order at Paragraphs 52-95.

The FCC's Order was timely appealed with the 60 day deadline set forth at 28 U.S.C. Section 2342 by the CPUC on June 7, 1995.

This Court has jurisdiction of this matter under 28 U.S.C. Section 2342 and 47 U.S.C. Section 402(a).

## **ISSUE PRESENTED**

The Order under review preempts State regulation of matters reserved to the States by Section 152(b) of the Communications Act of 1934 ("Act"). The issue presented is as follows:

Whether the FCC's orders are arbitrary and capricious or otherwise in violation of the standards of review set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. Section 706(2)(A)-(F), in preempting California's per line blocking default for unlisted and nonpublished

subscribers.

The State Intervenors contend that the FCC exceeded its authority by acting in an arbitrary and capricious fashion without record support.

### **STATEMENT OF THE CASE**

The State Intervenors adopt Petitioner California's Statement of the Case.

### **SUMMARY OF THE ARGUMENT**

As discussed in Petitioner California's Statement of the Case, the FCC's Order establishes a minimum per call blocking standard on interstate calls and otherwise defers to the blocking regimes of the originating States, except for "default" blocking options such as California's which it specifically preempts. The FCC describes its proposed preemption at paragraph 84 of the Order, mimeo at 30-31:

Although we have modified our federal interstate policies to accommodate as many facets of states' caller ID policies as we can and still maintain our federal goals, there is one facet of California's intrastate policy -- its per line blocking default policy -- that we believe will impede the accomplishment of those goals. California has directed carriers within its jurisdiction to assume that unless a customer with an unlisted or nonpublished phone number [footnote omitted] affirmatively elects not to block passage of CPN for calls placed from that number, the customer has chosen to have his line blocked. Pacific states, and California has not refuted, that California's...policy makes the offering of caller ID in that state infeasible.

State Intervenors contend that the portion of the FCC's Order preempting California's default per line blocking policy is arbitrary and capricious, not in accordance with the law and without record support.

## ARGUMENT

### I. Standard Of Review

The standard of appellate review is established by the Administrative Procedures Act ("APA"), Section 706(2), 5 U.S.C. Section 706(2) (1988), which requires the reviewing court to set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

A reviewing court must find that the agency examined the relevant factors and has articulated a satisfactory basis for its action based upon evidence in the record. As this Circuit noted in a previous case involving preemption of State policies enacted under Section 152(b) of the Act, California v. FCC, 905 F.2d 1217 (9th Cir. 1990)("California I"):

Under the APA, an agency's discretion is not boundless, and we must satisfy ourselves that the agency examined relevant data and articulated a satisfactory explanation for its action based upon the record. We must find the agency action to be in violation of the APA if the agency has 'failed to consider an important aspect of the problem' or has 'offered an explanation for its decision that runs counter to the evidence before the agency.'<sup>2</sup>

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<sup>2</sup>California I, 905 F.2d at 1230, quoting Motor Vehicles Manufacturers Association v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43-44 (1983). Accord Arkansas v. Oklahoma, 503 U.S. \_\_\_, 117 L. Ed. 2d 239 at 259, 112 S.Ct. \_\_\_ (1992), Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962), (noting the agency must find a "rational connection between the facts found and the choices made), Bowman Transportation Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974), and Citizens to Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402 (1971).

## **II. The FCC Order Nullifies California's Effort to Protect the Legitimate Privacy Protections of California's Nonpublished Customers.**

### **A. California's Nonpublished Customers Have a Legitimate and Well-founded Expectation That They Will Decide Who Gains Access to Their Telephone Numbers.**

Many Californians pay their local telephone company an extra sum of money each month to prevent the general public from obtaining their telephone number.<sup>3</sup> "Nonpublished service," as it is called by telephone companies, ensures that a customer's telephone number will not appear in any telephone directory, street address directory, or in the directory assistance records available to the general public.<sup>4</sup> The very fact that customers are willing to pay a notable portion of their local telephone bill for this service demonstrates that these customers are very concerned about controlling who obtains their telephone number. Review of the telephone company tariffs shows that these customers have good reason to believe that the phone company will never allow their telephone number to be disclosed to any other businesses<sup>5</sup> or members of the general public.

Pacific Bell's nonpublished tariff contains several provisions designed to assure nonpublished customers that the utility will not reveal their telephone numbers without their consent, except in the

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<sup>3</sup>Pacific Bell's customers pay \$.60 per month, and GTE California's customers pay \$1.50 per month.

<sup>4</sup>See, e.g., Pacific Bell's Nonpublished Service Tariff, Schedule Cal. P.U.C. No. A2, Section 2.1.34, See California's Motion for Judicial Notice ("CMJN") 219-223. Some local telephone companies allow customers to choose a service, often termed "unlisted service" by utilities, which prevents numbers from appearing in all directories, but which allows a number to appear in the directory assistance records. Unlisted service has proven far less popular with customers. GTE California, California's second largest local telephone company, only began offering its own version of unlisted service at the beginning of 1995.

<sup>5</sup>Except to long-distance telephone companies for their billing and collection and other administrative needs. Schedule Cal. P.U.C. No. A2, Section 2.1.34A.1.a (3rd revised sheet 140), CMJN 223.

most compelling circumstances.<sup>6</sup> Pacific Bell's tariff provides that the utility can only disclose a nonpublished number "in response to legal process," or to certain authorized governmental agencies, "provided the requesting agency complies with the rules herein established for the release."<sup>7</sup> The tariff then sets forth a carefully defined and finite list of agencies authorized to receive nonpublished information.<sup>8</sup> As a further set of safeguards to prevent an unjustified disclosure of a nonpublished number and to limit the scope of disclosure, the tariff specifically enumerates the persons within an authorized agency to whom the utility may release the nonpublished number and requires the request to be in writing and signed by a previously authorized individual.<sup>9</sup> In sum, while the tariff allows the utility to release a nonpublished number for certain carefully prescribed law enforcement or social welfare reasons, even these disclosures are carefully regulated to protect customers' expectations that their nonpublished numbers will not be revealed to the general public.

Pacific Bell's tariff contains another provision that buttresses the heightened privacy expectations of nonpublished customers. "Nonpublished Number Report" service is designed to address the situation when a person feels they have an urgent need to reach a nonpublished customer but lack the private telephone number. The calling party may ask the utility to contact the nonpublished customer on the calling party's behalf. The nonpublished customer then has the choice of contacting the calling party or having the utility inform the calling party that she does not wish to

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<sup>6</sup>The tariff references that follow can all be found in CMJN 219-225.

<sup>7</sup>Schedule Cal. P.U.C. No. A2, Section 2.1.34.A.1.a (1st revised sheet 136), CMJN 219.

<sup>8</sup>Schedule Cal. P.U.C. No. A2, Section 2.1.34.A.1.b (2nd revised sheet 137), CMJN 220.

<sup>9</sup>Schedule Cal. P.U.C. No. A2, Section 2.1.34.A.1.c (1st revised sheet 138), CMJN 221.

speak with the calling party.<sup>10</sup> There is no additional charge to the non-published customer for this protection; the calling party is charged \$2.50. This service puts the nonpublished customer in complete control of the release of her telephone number. For example, in the case of a domestic violence victim who is being stalked by her batterer, this service assures the victim that she, not the phone company, will decide whether to disclose her phone number to her abuser.

Finally, Pacific Bell's nonpublished service tariff provides that the utility will not use the nonpublished number for unsolicited sales efforts.<sup>11</sup> Thus, a nonpublished customer has a legitimate expectation that the telephone company will not allow her telephone number to be used for unwanted telemarketing.

Unless per line blocking is established as the default for California's nonpublished customers, the privacy they thought they were getting when they signed up for nonpublished service will be vitiated for a significant group of these customers. As the State of California demonstrated below and as it will demonstrate in its opening brief to this Court, it is an unavoidable fact that a substantial portion of nonpublished customers will not appreciate that the onset of caller ID threatens to undermine all of the privacy protections associated with nonpublished service. No matter how widespread the customer notice campaign, there will always be nonpublished customers (or their family members or guests) who will either not hear about the impact of caller ID or will not fully understand the changes it has caused. For example, many nonpublished customers will not realize that caller ID operates invisibly and affects everyone, not just caller ID subscribers. Moreover, by virtue of their subscription to nonpublished service, many nonpublished customers will have a false

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<sup>10</sup>Schedule Cal. P.U.C. No. A5, Section 5.8.2 (1st revised sheets 524 and 525), CMJN 224-225.

<sup>11</sup>Schedule Cal. P.U.C. No. A2, Section 2.1.34.A.1.h (3rd revised sheet 140), CMJN 223.

sense of security. They will understandably believe that, as long as the utility continues to accept their \$.60 per month (or \$1.50 in GTE California's case), the utility will continue to provide the careful protection against disclosure of their telephone number that is described in the tariffs. They will not realize that, by failing to affirmatively choose per line blocking, they will have inadvertently allowed the telephone company to reveal their number to anyone they call. In short, they will not realize that their nonpublished service has become only an illusion of privacy protection.

**B. The Inadvertent and Unwanted Disclosure of Nonpublished Telephone Numbers Will Lead to Serious Invasions of Privacy With Potentially Life-Threatening Consequences.**

Many nonpublished customers pay to keep their telephone number private not as a matter of convenience or preference, but as a matter of necessity. Victims of domestic violence need to guard the privacy of their telephone numbers to prevent being found by their batterers. Social workers who work out of their homes need to keep their telephone numbers out of the hands of clients and others who, in possession of a telephone number or address, could harass the social worker. Law enforcement personnel and others working in the judicial system, such as parole officers and judges, have similar needs. In our increasingly violent society, many public figures, such as celebrities and public officials, need to be careful to keep their telephone numbers out of the public domain. People who are alone at home for significant periods of time, such as children and the elderly, often have important security reasons for wanting to avoid disclosing their telephone numbers to people they may call.

Medical and other professionals often need to call their patients or clients without allowing other members of the clients' household to know that the client has sought their assistance. For example, a nurse needing to schedule an appointment with a teenager seeking drug abuse counseling

would compromise the teenager's confidential treatment if she placed an unblocked phone call to the teen's home. A suspicious household member could call the number displayed on the caller ID screen and find out who was trying to reach the teenager.

For many people, the need to keep their telephone number private is heightened by the fact that release of one's telephone number can easily lead to discovery of one's address (and much more information). With a telephone number, an individual can gain access to a person's complete file with a credit reporting bureau, such as Equifax or TRW. The file typically contains the individual's home and business address and detailed information about the individual (e.g., income, mortgage, credit card payments, purchase habits). Such information quickly provides a peephole into the intimate details of a person's lifestyle. Thus, an inadvertent failure to block the release of one's number can cause a nonpublished customer to reveal not just her location, but considerable information that she may not confide to even her closest friends.

In addition, the privacy that is compromised when one's number is disclosed through caller ID exceeds the privacy that is lost when one's telephone number is simply available through a telephone directory. With caller ID, the person's telephone number is linked with the context and content of the call. For example, an unblocked call to a used car dealer inquiring about the price of a car allows the dealer to add the telephone number (and other information available through secondary sources) to a list of people who are interested in buying a car. A nonpublished customer who is not adequately informed about caller ID may wind up inviting telemarketing calls, notwithstanding her belief that her nonpublished status is protecting her from such annoyances. As another example, an AIDS patient who wants anonymously to determine through a telephone survey how different health insurers cover AIDS could inadvertently be putting her name on an industry list

of AIDS sufferers. This loss of privacy is far more severe than if the AIDS patient simply allowed her telephone number to be listed.

In each of the situations described above, nonpublished customers have paid for and relied upon nonpublished numbers for important reasons that society has a strong interest in honoring. California has sought to honor the heightened privacy needs of such citizens by preventing the inadvertent disclosure of personal information. It is not hard to recognize that many socially undesirable consequences -- such as renegade telemarketing, telephone harassment, and physical abuse -- could result when a person using the phone of a nonpublished customer unknowingly fails to take the affirmative step of blocking delivery of the supposedly private telephone number. In fact, police in San Antonio, Texas have documented a case in which a man used caller ID to track down and murder his ex-girlfriend.<sup>12</sup>

The FCC Order's discussion of the preemption of California's rule makes no effort to consider the serious societal harm that California's rule attempts to prevent. The FCC simply substitutes an unsubstantiated hope that all nonpublished customers will know how to preserve their existing privacy for the California Commission's recognition that perfection in educating telephone customers about such a dramatic change is impossible. The FCC has failed to offer any reasonable justification for preventing California from taking steps it finds to be necessary to protect the health and security of its citizens.<sup>13</sup>

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<sup>12</sup>CMJN 227. ("Man Charged in Caller ID Killing"; Dallas Morning News, March 30, 1995, page 33A).

<sup>13</sup>It is noteworthy that, in California's proceedings, the California Bankers Clearing House Association, an organization comprised of large commercial banks, ultimately adopted the position that nonpublished and unlisted customers should be afforded per line blocking on a default basis. Thus, a major representative of commercial interests did not accept the view that the commercial benefits of caller ID warranted the inadvertent disclosure of personal information.

### **III. The FCC Order Does Not Contain a Legitimate Basis for Preemption of California's Well-Considered Privacy Policy.**

As mentioned, supra, the FCC has generally allowed State regulatory regimes providing for per line blocking to remain intact. The FCC found that its decision to use \*67 and \*82<sup>14</sup>, and otherwise defer to the blocking regimes of the originating State, "maximizes consumer choice, is the federal policy least disruptive to state policies and goes the farthest to eliminate customer confusion." Order at para. 80.

However, the FCC's Order results in the unlawful preemption of per line blocking policies such as California's. As discussed below, the FCC's Order is internally inconsistent, fails to identify any valid federal goal that is negated by California's policy, contradicts the record evidence, and therefore, is unlawful.

#### **A. Case Law Does Not Support the FCC's Preemption In This Case.**

At issue in this case is a State's authority under Section 152(b) of the Act to determine what privacy policies are most appropriate in conjunction with the offering of intrastate communications services within its jurisdiction. Section 152(b), 47 U.S.C. Section 152(b) provides:

[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier...

The lead case interpreting State/federal jurisdiction under Section 152(b) of the Act, 47 U.S.C. Section 152(b)(1990) and the FCC's authority to preempt lawful State regulatory initiatives

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<sup>14</sup>Under the FCC's Order, a customer dialing \*67 before placing a call will block passage of calling party number ("CPN") on that call only. A customer with per line blocking, may use \*82, on the other hand, to selectively pass CPN on calls which would otherwise be automatically subject to CPN blocking.

is Louisiana Public Service Commission v. FCC ("Louisiana"), 476 U.S. 355 (1986). According to the Supreme Court, this section not only imposes jurisdictional limits on the power of the FCC, "but also...provid[es] its own rule of statutory construction." Louisiana, 476 U.S. 355, 373, 376 n.5 (1986); California I, 905 F.2d 1217 (9th Cir. 1990).

Louisiana makes clear that preemption is not allowed except in very limited circumstances. Even when given the most expansive construction supporting FCC authority to preempt, Louisiana only permits narrowly-tailored preemptive federal policy where: (a) state regulation totally negates a valid federal policy,<sup>15</sup> and, (b) it is not possible to separate the interstate and intrastate components of the federal regulations.<sup>16</sup>

The FCC's Order fails to meet any of the prerequisites for preemption set forth in Louisiana or California. First, as discussed in Section (B) infra, the FCC has failed to sufficiently articulate a valid federal goal that is impeded by the California policy. Second, as discussed in Section (C) infra, and inextricably intertwined with the absence of a "valid federal goal", is the FCC's failure to draw a legally sustainable rationale for not deferring to California's proposed approach, particularly in light of the clear record evidence indicating that: (a) a significant percentage of California consumers will not actually receive notice that their unlisted or nonpublished number is being revealed each time they call, and, (b) the absence in the record of any empirical evidence indicating that the presence of per

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<sup>15</sup>Compare, the FCC's formulation of the Louisiana test in paragraph 62 of the Order: "The Supreme court has made clear that where necessary to preserve Commission goals against conflicting state rules that thwart valid federal communications policies, the FCC may preempt state regulation if it is 'not possible to separate the interstate and intrastate components of the asserted FCC regulation.'"

<sup>16</sup>See also People of the State of California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990); Public Service Commission of Maryland v. FCC, 909 F.2d 1510, 1516 (D.C. Cir. 1990); (Order must be narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals).

line blocking has any adverse impact on caller ID service penetration rates.

Even if we assume, arguendo, that the FCC's objectives somehow reach the minimum threshold of the Louisiana test, fatal internal inconsistencies remain. The most obvious is that the presence, or absence, of the "default" aspect of per line blocking does not change the "rationale" supporting preemption at all. Persons with per line blocking in California are no more "deprived" of the "benefits" of caller ID services than are persons with per line blocking in other States. The impact of the presence of a per line block option, whether by "default" or by "assent", is identical. As the FCC itself acknowledges in its Order, as long as the consumers have the ability to unblock their lines on a per call basis, the putative federal policy is served. Californians will have that ability.

The FCC obviously recognized this major contradiction inherent in its efforts to preempt the "default" approach because it subtly modified its rationale to suggest that the service would not be offered in California because of the "default" option and unlawfully attempts to shift the burden of proof on the issue to California. Specifically, at paragraph 84 of the Order, mimeo at 31, the FCC notes: "Pacific states, and California has not refuted, that California's... policy makes the offering of caller ID in that state infeasible."

As we noted, supra, even under the most expansive interpretation of Louisiana, State regulatory initiatives targeting intrastate services, or the intrastate aspect of "mixed" services, are presumptively valid, i.e., "...the FCC bears the burden of justifying its entire preemption order by demonstrating that the order is narrowly tailored to preempt such State regulations as would negate valid FCC regulatory goals."

As discussed further below, the FCC has not identified any valid federal policy that would be negated by California's default per line blocking policy, and, its arguments in support of preemption

in this instance are arbitrary and capricious and otherwise not consistent with the record.

**B. California's Default Blocking Regime Does Not Impermissibly Impede any Valid Federal Goal.**

The FCC's Order does not identify any valid federal goal which California's default blocking regime impermissibly impedes. Accordingly, the FCC's preemption of California's default blocking regime is improper and must be set aside.

The relevant discussion appears at paragraphs 86 and 87 of the FCC's Order:

California's default policy thwarts and impedes our federal goals for interstate CPN-based services. Initially, to the extent California's default policy prevents the deployment of calling party number identification services in California, it deprives the residents of, and callers to, that state of access to the benefits we have determined in this proceeding are associated with such interstate services. It does this in a number of ways. First, unless carriers in California enable the lines of residents in that state to receive interstate CPN, these residents will be unable to realize the efficiencies and new service opportunities we believe will flow from interstate CPN-based services. Second, callers to California from other states also would be denied the benefits of these new services and opportunities when they made calls to businesses or residents in California. For example, callers to businesses would be subject to longer order processing times, longer credit verification processes, and more cumbersome call routing techniques. Similarly, absent number identification services, callers to residents are likely to have fewer completed calls than if they are calling residents who are able to recognize the [\*69] calling party's number, and want to receive their call. The negative impact on interstate CPN policies is exacerbated because residents in California receive and transmit more interstate calling minutes than the residents of any other state. n124. Depriving parties participating in those calls from the benefits we anticipate of the deployment of interstate CPN-based services necessarily thwarts and impedes the accomplishment of our objectives, particularly the development of interstate CPN-based services.

California's policy also deprives both parties on an interstate call from California of choice, an important element in our balancing of the rights and expectations of the calling and called parties. First of all, we have determined that as a matter of federal policy, the called party should have access to incoming CPN unless the calling party has exercised his right not to have his CPN revealed. While we have carefully balanced the privacy interests of the calling party with the expectation of the called party to receive CPN, California's default policy upsets this balance on an interstate call.

According to the FCC, the primary federal goal impeded by California's default per line blocking policy for nonpublished numbers is that it prevents the deployment of calling party number identification services in California, and therefore deprives residents of, and callers to, that state of access to the benefits that it has determined are associated with such interstate services. State Intervenors respectfully suggest that it is not the policy of the CPUC that is impeding deployment of caller ID. Indeed, the CPUC enacted rules in June, 1992, which permit the offering of caller ID within California, subject to certain safeguards determined to be necessary on the basis of an extensive record developed before the CPUC.<sup>17</sup> While the CPUC has not done anything to impede the offering of caller ID, Pacific Bell has impeded the FCC's federal goal of nationwide deployment of caller ID services, by voluntarily refusing to provide the service. Pacific Bell has chosen not to offer caller ID not because of its asserted prohibited cost brought about by the CPUC's intrastate policies, but because of a disagreement over the CPUC's legitimate policy determinations. If the FCC's preemption is upheld in this case, anytime a carrier disagrees with State policy-making, the carrier could refuse to offer the service and argue for preemption at the federal level on the grounds that the State law or regulation was obstructing the federal policy of "interstate or nationwide service deployment."

That California's default per line blocking policy imposes no economic burden on carriers so as to make deployment impossible is also supported by the record. The evidence shows that CPN passage is an inherent part of the network and that the costs associated with its transmission are de minimis. The FCC itself notes that:

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<sup>17</sup>In Re Pacific Bell, CPUC Decision No. 92-06-065, 44 Cal. P.U.C.2d 694, 134 PUR4th 184 (June 17, 1992) on rehearing, In Re Pacific Bell, CPUC Decision No. 92-11-062, 46 Cal. P.U.C.2d 482 (Nov. 23, 1992).

"[t]he cost of providing per line blocking appears to be small for carriers having call set up capability, and we believe that the interstate portion of these costs would be de minimis. Given that we have required free per call blocking and we have modified our privacy mechanism to accommodate states that have per line blocking, permitting per line blocking without a charge appears consistent with our policies.."

In further attempting to justify its preemption, the FCC argues that California's policy deprives both parties on an interstate call from California of "choice". To the contrary, nonpublished customers in California have exercised their choice to keep their telephone numbers private. Therefore, the CPUC's policy actually furthers the privacy choices of California residents.

Beyond the stated objective of nationwide deployment of caller ID which cannot logically be held to justify preemption in this case, the FCC does not identify any other valid federal goals which would justify preempting California's default per line blocking policy.

**C. The FCC's Order is Arbitrary and Capricious, and Does Not Comport With the Record Evidence.**

The FCC's decision to preempt California's default per line blocking policy is arbitrary and capricious, and is not based upon the record evidence.

The linchpin of the FCC's argument that caller ID services will not be offered in California if the default option remains is not supported by the record. To "support" that argument, the FCC is content to find Pacific Bell's "evidentiary" submissions sufficient - submissions that basically consist of self-serving and unsworn company assertions - while ignoring: (1) the empirical evidence in the record, (ii) the internal logical inconsistencies of its action, and, (3) unlawfully shifting the burden to California.

For instance, at paragraph 87 of its Order, the FCC states that it is reluctant to conclude that California is correct, since "[t]he record indicates that the general availability of per line blocking

adversely affects the penetration of CPN-based services." State intervenors respectfully suggest that the record as a whole indicates, if anything, that per line blocking has no impact on caller ID deployment or that the evidence is inconclusive to-date. The statistics found in the record of the two jurisdictions that have the highest caller ID penetration rates, also coincidentally have free access to per line blocking. The Nevada statistics (contained in NARUC's August 17, 1994 Reply Comments) indicate both a higher caller ID penetration rate and a higher per line blocking subscription rate (as well as a much, larger number of subscribers with unlisted numbers). In a trial by Pacific Telecom, which also provided free per line blocking, (cited in NARUC's Petition for Review at p. 9), the penetration rate was 11%. In fact, the June 1993 Pacific Telecom presentation - authored by Mr. Brian D. Thomas and based upon surveys and data generated from its Washington State caller ID service trial - concludes that "[t]he value of caller ID to customers is not diminished by the availability of free line blocking." Mr. Thomas' conclusions are even more significant when one considers that this document was generated voluntarily by a carrier with an obvious financial stake in the viability of caller ID.

The FCC's Order also presumes that carrier notice and education requirements will be sufficient to protect the privacy expectations of California subscribers with nonpublished numbers. However, the evidence in the record suggests that even the best notice and educational efforts will not be sufficient to ensure that the legitimate privacy expectations of many of these customers will be met.

The FCC Order further implies that California's policy is unreasonable or unnecessary since other States have not adopted a per line blocking default option for nonpublished customers. It is not surprising that California, as opposed to other States, would attempt to specifically address the

needs of these customers, given the extremely high percentage of nonpublished customers in California. Nonpublished customers comprise over 40% of Pacific Bell subscribers. California's policy reflects a careful weighing and balancing of the rights and obligations of the affected parties given circumstances within its particular jurisdiction.

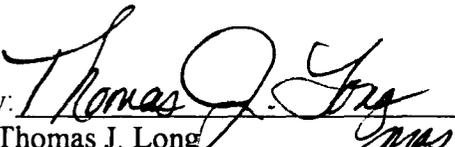
Additionally, the FCC argues that "...California provides no evidence that a caller who chooses to have an unlisted or nonpublished number also wants per line blocking." Order at para. 87. State intervenors suggest that customers who subscribe to nonpublished telephone number service have already indicated a "choice" not to have their telephone numbers revealed. As discussed in Section I supra, nonpublished customers in California have a legitimate expectation of privacy on all of their calls. They have essentially entered into a contract with the carrier, the terms and conditions of which are contained in the carrier's tariff, for telephone number privacy in exchange for a recurring charge paid to the carrier. Whether the telephone number is revealed in the white page listings of the local exchange carrier's telephone directory or over a monitor attached to the called parties telephone -- the result is the same. Information that the customer has specifically requested, and therefore, reasonably expects to be kept private, has been conveyed.

Finally, as discussed in Section II(A) supra, the impact of the per line blocking option is the same whether the per line blocking is available by default or through the subscriber's affirmative action. As long as consumers in California have the ability to unblock their lines on a per call basis, the FCC's policy goals are served. The FCC's Order is internally inconsistent when it suggests that the availability of per line blocking in California alone will deprive customers of the benefits of caller ID.

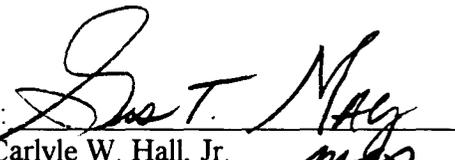
**CONCLUSION**

The FCC's preemption of California's default per line blocking policy is arbitrary and capricious and otherwise not in accordance with established legal principles. California's well-considered privacy policy does not negate a valid federal goal or policy. Additionally, the FCC's arguments to justify preemption of California's policy are not supported by the record. Accordingly, State Intervenor submit that the Court must reverse that portion of the Order which preempts California's default per line blocking policy.

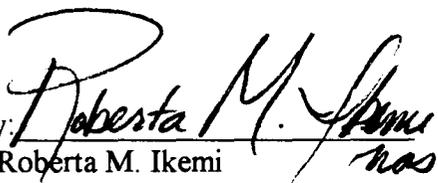
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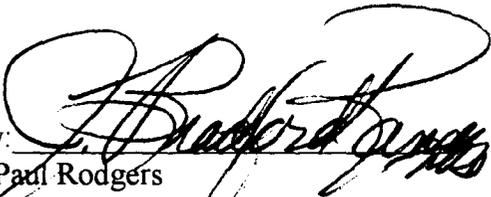
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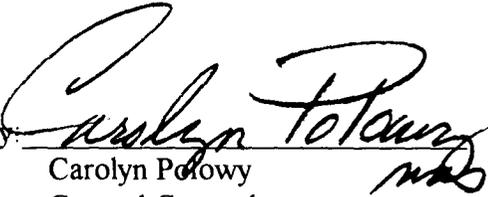
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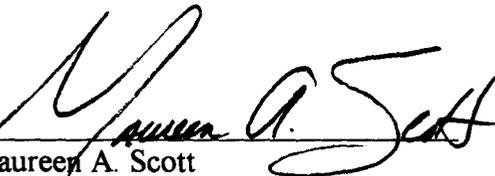
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**STATUTORY ADDENDUM**

**5 U.S.C. § 706:**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall --

- (1) compel agency action unlawfully withheld or unreasonable delayed; and
- (2) hold unlawful and set aside agency action, *findings*, and conclusions found to be -
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**47 U.S.C. § 151: Purposes of chapter; Federal Communications Commission created.**

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

**47 U.S.C. § 152: Application of chapter**

**(a) Applicability to interstate and foreign communications or transmissions of energy originating in or received within the United States by wire or radio: Canal Zone exception; cable services**

The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and the licensing and regulation of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States providing such service, and to the facilities of the cable operators which relate to such service, as provided in subchapter V-A of this chapter.

**(b) Exceptions to Federal Communications Commission Jurisdiction**

Except as provide in sections 223 or 224 and 225 of this title and subject to the provisions of section 301 of this title and subchapter V-A of this chapter, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to

(1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or

(2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or being controlled by, or under direct or indirect common control with such carrier, or

(3) any carrier engaged in interstate or foreign communications solely through connection by radjo, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), or

(4) and carrier to which clause (3) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico,; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

THE PEOPLE OF THE STATE OF	:	
CALIFORNIA, et al.,	:	
	:	
Petitioners	:	
	:	
v.	:	No. 94-70197
	:	
FEDERAL COMMUNICATIONS	:	
COMMISSION, et al.,	:	
	:	
Respondents	:	
	:	
_____	:	No. 95-70470
AND CONSOLIDATED CASES.	:	No. 95-70519
	:	No. 95-70571
_____	:	

CIRCUIT RULE 28-2.6 STATEMENT OF RELATED CASES

State Intervenors are unaware of any related case presently pending in this Court.

Dated: August 17, 1995

**CERTIFICATE OF SERVICE**

I, Maureen A. Scott, certify that I have served two copies of the foregoing Joint Brief of Intervenors Supporting Petitioner California on all the parties on the attached service list either by personal/courier or same day/overnight service, this 18th day of August, 1995.

  
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