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Decision 88 07 040 JUL 8 1988

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application for Rehearing of
Resolution No. T-12077

)
) Application No. 88-04-060
) (Filed April 22, 1988)

In the Matter of Resolution
No. T-12077; Commission Rejection of
Pacific Bell Advice Letter No. 15358

)
) Application No. 88-04-077
) (Filed April 21, 1988)

In the Matter of Pacific Bell's Advice
Letter No. 15358

)
) Application No. 88-05-005
) (Filed May 4, 1988)

ORDER REAFFIRMING RESOLUTION No. T-12077

Applications for rehearing of Resolution No. T-12077 were filed by Omniphone, Inc. (Omniphone) and Carlin Communications, Inc. (Carlin). Assemblywoman Moore's filing was treated as a Petition for Modification. In its application, Omniphone asserts that Resolution No. T-12077 implies that Pacific Bell is a private party free to discriminate against, and censor the message of, information providers without regard for the First Amendment, the California Constitution or the Public Utilities Code. Assemblywoman Moore's Petition for Modification asserts that Resolution No. T-12077 violates the California Constitution and the Public Utilities Code. Finally, Carlin claims that Resolution No. T-12077 violates the Federal Constitution. We have reviewed each and every allegation in the Applications for Rehearing and Petition for Modification, and are of the opinion that Resolution T-12077 should be reaffirmed, albeit in modified form, to clarify our position and to reflect new legislative guidelines.

In making their claims, the parties assume that the Commission has endorsed the reasoning of Carlin Communications, Inc. v. Mountain States Tel. and Tel. Co., (9th Cir. 1987), 827 F.2d 1291, cert. denied, U.S. , (1988), and determined

that Pacific Bell is a private party under state and federal law rather than a party operating under the guise of state action, and is thus free to ban pornography from its 976 Information Access Services. The Commission in Resolution No. T-12077 merely noted the existence of the Mountain States Telephone precedent in dicta, and never reached the question of the application of that precedent to Pacific as it was not properly before the Commission. Rather, that question is before the federal court in Pacific Bell v. Epsilon Communications, Ltd., et al., No. C 88-101 EFL (N.D. Cal filed March 23, 1988). Thus, like Pacific and the 976 IAS providers, this Commission must look to the federal courts for a clarification of Pacific's rights as a private party. In Resolution No. T-12077, the Commission rejected Pacific Advice Letter No. 15358 because Pacific had violated the Commission's policy, articulated in D.87-01-042, that all tariff language related to 976 Information Access Services must be content neutral.

The Commission also notes the recent enactment of SB 679, which directs the Commission to require the telephone companies to provide separate prefixes for "sexually explicit messages" and non-sexual messages provided by information service vendors so that customers may block this separate prefix or other prefixes on an individual basis; defines "sexually explicit messages" as live or recorded information that is "harmful matter" as defined in Penal Code Section 313; and provides that any information service vendor who offers harmful matter on a prefix other than that designated for sexually explicit messages is in violation of Public Utilities Code Section 2111, which provides for civil penalties to be levied by the Commission. As a result of this new statute, the Commission will be required to review its content neutral policy.

Because of the misinterpretation of the scope of Resolution No. T-12077 by some parties and the new legislation we deem it appropriate to modify our previous Resolution to clarify that the sole purpose of the Commission's action was to reject Pacific's tariff as inconsistent with our current content neutral policy.

This is clearly an area of law and regulatory policy which is still evolving and our orders should not be so ambiguous as to lead some parties to conclude we have prejudged important issues yet to come before us.

Therefore, IT IS ORDERED that Resolution T-12077 is modified as follows:

1. The second through the sixth paragraphs on page two of the Resolution are deleted; and
2. The first paragraph on page 3 of the Resolution is deleted; and
3. Ordering paragraph 2 of the Resolution is deleted and Ordering paragraph 3 is renumbered to "2".

It is further ordered that Resolution T-12077, as modified, is reaffirmed, and the applications for rehearing as well as the petition for modification are denied.

This order is effective today.

Dated July 8, 1988, at San Francisco, California.

STANLEY W. HULETT
President
DONALD VIAL
G. MITCHELL WILK
JOHN B. OHANIAN
Commissioners

Commissioner Frederick R. Duda,
being necessarily absent, did not
participate.

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



Victor Weiss, Executive Director

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Decision _____

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