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Decision 98-01-057

January 21, 1998

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the
Commission's Own Motion into
Competition for Local Exchange
Service.

R.95-04-043
(Filed April 26, 1995)

Order Instituting an Investigation on the
Commission's Own Motion into
Competition for Local Exchange
Service.

I.95-04-044
(Filed April 26, 1995)

**ORDER DENYING REHEARING
AND MODIFYING DECISION 97-01-042**

An application for rehearing of Decision (D.) 97-01-042 was filed by GTE California Incorporated (GTEC) on February 24, 1997. D.97-01-042 is the decision in which we address the outstanding issues in the Commission's local competition rulemaking relating to subscriber directory listings and access to directory listing information. These issues were addressed at workshops in April, 1996. Parties were subsequently allowed an opportunity to file comments. In its Application For Rehearing, GTEC challenges the Commission's treatment of several issues. Responses to the Application For Rehearing were filed by the following parties: Pacific Bell (Pacific); AT&T Communications of California, Inc. and MCI Telecommunications Corporation; The Association of Directory Publishers; Infonxx, Inc.; Cox California Telecom, Inc. We have reviewed the allegations of error in the Application For Rehearing, and the arguments in the responsive pleadings. After thorough review we conclude as follows.

We reject GTEC's claim that the Decision improperly interprets the Telecommunications Act of 1996 (Act) as requiring GTEC to provide access to GTEC databases to third party database vendors. (Application, pp. 1-3.) Our decision does not depend upon an interpretation of Section 251 of the Act. We find that requiring nondiscriminatory access for third party vendors is consistent with the mandate of the California legislature to open all telecommunications markets to competition. (Public Utilities Code Section 709.5.) We believe that our action is also consistent with the intent of the Act.

GTEC asserts that the Decision impinges upon the privacy rights of GTEC customers by requiring the LECs and CLCs to provide third-party access to anonymous addresses of unpublished customers who change residences. We disagree with GTEC reasoning that this information is "demographic information" under P.U. Code Section 2891. We conclude that the mere provision of anonymous address information alone is not demographic information. Furthermore, to protect against potential intrusion on the privacy of subscribers the Decision prohibits the use of this anonymous address information by third-party vendors for any purpose beyond directory delivery. Subscribers are further protected from intrusion by the requirement that any directory publisher, including Pacific and GTEC, delivering directories to anonymous subscribers shall provide a toll-free number which the recipient can call to inform the vendor not to deliver its directory to the address in the future. (D. 97-01-042, Ordering Paragraphs 4, 5, and 6.)

While we reject GTEC's arguments, our review of the privacy issues raised by GTEC has led us to conclude that the Decision should be modified to strengthen the protections that are currently set forth in the Decision. Accordingly, we will order that the Decision be modified to require that the LECs and the CLCs shall require each third-party vendor to sign an agreement stating that the third-

party vendor will hold the anonymous unpublished addresses in strict confidence and will use the anonymous address information solely for the purpose of delivering that vendor's published directory. We will further order that any third-party vendor who is found by the Commission to have violated such agreement will be denied access to the anonymous addresses of unpublished LEC and CLC subscribers in the future. The allegation of a violation of the agreement may be brought to the attention of the Commission by subscribers, by the LECs, by the CLCs, or by the Commission staff. All such allegations will be investigated by the Commission to determine whether a violation has occurred, and whether the third-party vendor's access to anonymous address information should be revoked.

GTEC argues that requiring GTEC to provide a method for subscribers to "opt-out" of directory delivery is at odds with GTEC's basic franchise and carrier-of-last-resort obligations. We reject GTEC's reasoning. Allowing customers to elect to cancel delivery of directories has nothing to do with GTEC's service obligations. We also reject GTEC's claim that the opt-out provision is an impermissible and unequal restraint on trade. All directory publishers, not just the incumbent LECs, are required to provide a toll-free number that the recipient can call to discontinue further directory deliveries. (D.97-01-042, Ordering Paragraph 6.) This provision has been designed to mitigate the potential infringement that an anonymous subscriber might experience if unwanted directories are delivered. We find no conflict between the requirement of the opt-out procedure, and Public Utilities Code Section 728. The Decision is not an exercise over advertising practices. We find no support for the proposition that GTEC must be allowed unrestricted use of anonymous telephone listings information.

GTEC challenges the requirement that CLCs be allowed a two page limit in Pacific's and GTEC's directory informational listings to provide key

information regarding the CLC's offered services and to identify the CLC's local calling area. GTEC alleges a violation of First Amendment rights. We find no First Amendment violation because the information that the CLCs may place in the directories is content neutral. The Commission's order is narrowly tailored to promote the state's interest in ensuring that competition in the telecommunications market is fair, consistent with Public Utilities Code Section 709.5(a). Additionally, we find that there is no taking of GTEC's property because GTEC is permitted to charge the CLCs for the cost of including information in the GTEC directories, at the rate of GTEC's own costs. (D.97-01-042, Ordering Paragraph 11.)

GTEC states that the Decision should be modified to clarify that the obligations upon Pacific Bell and GTEC that are set forth in Ordering Paragraphs 4, 7, and 8 also apply to the CLCs. We agree that the Decision would benefit from clarification of this point. We will modify the Decision accordingly.

No further discussion is required of applicant's allegations of error. Accordingly, upon reviewing each and every allegation of error raised by applicant we conclude that sufficient grounds for rehearing of D.97-01-042 have not been shown.

Therefore, IT IS ORDERED:

1. Decision 97-01-042 is modified to add an additional ordering paragraph. This additional paragraph is added for purposes of clarification. This additional paragraph will be numbered Ordering Paragraph 8-A, and will appear on page 38, following Ordering Paragraph 8 and immediately preceding Ordering Paragraph 9. Ordering Paragraph 8-A shall read as follows:

"The rights and obligations set forth in Ordering Paragraphs 4, 7, and 8 shall apply to and be reciprocal as to the CLCs and the LECs."

2. Decision 97-01-042 is modified to add the following language after the last sentence of Ordering Paragraph 5:

“The LECs and CLCs shall require each third-party vendor to sign an agreement stating that the third-party vendor will hold the information in strict confidence and will use it solely for the purpose of delivering that vendor’s published directory to those addresses. Any third-party vendor who is found by the Commission to have violated such agreement will be denied access to the anonymous addresses of unpublished LEC and CLC subscribers in the future. The allegation of a violation of the agreement may be brought to the attention of the Commission by subscribers, the LECs, the CLCs, or by Commission staff. All such allegations will be investigated by the Commission to determine whether a violation has occurred, and whether the third-party vendor’s access to anonymous address information should be revoked.”

3. That the application for rehearing of D.97-01-042 filed by GTEC is denied.

This order is effective today.

Dated January 21, 1998, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners