

Decision 99-01-016 January 20, 1999

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.

ORIGINAL

Rulemaking 95-04-043
(Filed April 26, 1995)

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

Investigation 95-04-044
(Filed April 26, 1995)

OPINION

By this decision, we deny the motion of the Association of Directory Publishers (ADP), filed on July 20, 1998, for a Commission order terminating the scheduled hearings in this proceeding concerning whether the provision of a directory listing information is an essential service. We disagree with ADP's claim that the ultimate outcome of such hearings is moot in light of intervening Commission decisions.

The hearings were originally scheduled pursuant to the following Commission actions. In Decision (D.) 96-02-072, issued on February 23, 1996, the Commission adopted Conclusion of Law (COL) 29, which stated, in part, that the "provision of subscriber listings by the LEC is not an essential service." ADP subsequently filed a petition to modify this conclusion, arguing that no record had not been developed in the proceeding to support the conclusion, and that it should not have been adopted by the Commission as part of its decision. By its D.97-05-091, issued on May 21, 1997, the Commission agreed. D.97-05-091 modified COL 29 of D.96-02-072 by deleting this language, and directed the assigned Administrative Law Judge (ALJ) to issue a procedural ruling addressing

what further actions might be necessary to develop an adequate record for the Commission to make a determination as to whether incumbent local exchange carrier' (ILEC) directory listings constitute an "essential facility." (D.97-05-091, pp. 10-11.)

On December 4, 1997, the ALJ issued a ruling setting forth a schedule for the submission of discovery, testimony and the holding of a hearing on this issue.

ADP claims that, based on the Commission's determinations in decisions subsequent to the issued ALJ ruling, the Commission has now completed its requirements for access to, and cost of directory for subscriber listings information provided by LECs. ADP cites D.98-01-022, as modified on rehearing by D.98-06-027, arguing that the Commission determined therein that the provision of directory listings and databases must be based on cost. D.98-01-022 at 5, D.98-06-027 at 2. Similarly, in D.98-01-057, the Commission affirmed its access rules adopted in D.97-01-042, governing the provision of directory listing information to third parties.

In light of these Commission determinations, ADP argues that holding hearings on whether such listings can reasonably be duplicated is superfluous, and that time would be better spent in the Open Access and Network Architectural Development proceeding determining the rates for the provision of that information based on cost. Thus, ADP requests that the presiding ALJ issue an order terminating any further hearings in this matter in the local competition docket.

A response in opposition to ADP's motion was filed by GTE California Incorporated (GTEC) on August 4, 1998. GTEC argues that the provision of directory listings to third parties for publishing purposes is still an issue which this Commission must address to enable it to make an appropriate determination as to the ILEC's pricing of directory listings to third parties. GTEC concurrently

filed a motion for extension of the procedural schedule for this matter on an interim basis pending a final decision on ADP's motion to terminate hearings. GTEC's motion for an extension in the procedural schedule was granted by ALJ ruling dated August 5, 1998, and the scheduled hearings were temporarily suspended pending a final ruling on the ADP motion.

GTEC argues that, to the extent ADP is correct in its contention that the D.98-01-022 and D.98-06-027 were intended to cover pricing to third parties, the decisions are in error for failure to consider the "essential facilities" issue first.

In addition, GTEC notes the decisions did not consider or address the subsidy issue that is raised if the ILEC is required to provide listings to third parties at rates based on cost. GTEC's current rates for such listings to third parties are market-based, and provide a subsidy to local services. If GTEC is required to lower these rates, this subsidy will be lost. Therefore, GTEC believes this proceeding should continue, and to the extent required, the Commission should readdress its findings in D.98-01-022 and D.98-06-027.

Pacific Bell (Pacific) filed a reply in opposition to ADP's motion on August 21, 1998. Pacific interprets ADP's motion as a withdrawal by ADP of its objection to the Commission's finding, that providing directory listings to third-party publishers is not an essential service. If the Commission intends, without further hearings, to reinstate the finding that directory listings service to third-party publishers is not an essential service, then Pacific has no objection to the termination of the hearings. If the Commission does not intend to reinstate its finding, then Pacific objects to ADP's motion. Pacific argues that terminating these hearings without reinstating a finding that providing directory listings to third-party publishers of directories is not an essential service will leave that service in limbo regarding the appropriate price to charge for the service, and cost imputation and price floor issues. Pacific thus asks the Commission to either

find that the service is not essential or else hold the hearings as previously planned.

Pacific disputes ADP's claim that previous Commission determinations have rendered moot the issue of whether the provision of directory listings to third-party directory publishers is an essential facility. Pacific argues that D.98-01-022 only addressed access to the directory listings database, not the provision of directory listings to third-party publishers. Pacific distinguishes between the information contained in the directory assistance database and the information provided for the publishing of directories.

Pacific argues that the ILEC's obligation to provide third-party publishers access to directory listings arises not out of Sections 153(45) and 251(c)(3) of the Act (which apply to Unbundled Network Elements or UNEs), but out of Section 222(e). Thus, Pacific argues, the rates for such listings to directory publishers are not subject to the "cost-based" standard applicable to UNEs as presented in Section 252(d)(1)(A)(i).

The pricing standard for subscriber publishing information set forth in Section 222(e) of the Act states:

"A telecommunications carrier that provides telephone exchange service shall provide subscriber list information ... on a timely and unbundled basis, under *nondiscriminatory and reasonable rates*, terms and conditions, to any person for the purpose of publishing directories in any format." (Emphasis added.)

In D.98-06-027, the Commission made a finding that the Act requires "rates for network elements, including directory publishing information, must be based on cost." Pacific claims that if this decision seeks to make directory publishing information (as opposed to access to the directory assistance data base) a UNE, it is in error. Pacific claims the Act has no requirements to make UNEs available to third parties that are not telecommunications carriers, such as directory

publishers, and any such expansion of the original decision from directory assistance database access to directory publishing information would occur without a factual basis to support it.

Discussion

We find that ADP has failed to justify its request to terminate further hearings on the issue of whether the provision of ILEC directory listings to third-party publishers is an essential service. As we stated in D.97-05-091, in modifying COL 29, the determination of whether such listings constitute an "essential facility" could have a bearing on what precise terms of access and pricing are ultimately established for the provision of ILEC subscriber listings to third parties. Evidentiary hearings were scheduled to develop a record on this issue. ADP now believes that the issue no longer needs to be resolved based on the premise that the Commission has already completed its determination of requirements for the terms of third-party access and pricing of ILEC directory subscriber listings. Hence, ADP finds no purpose in holding evidentiary hearings on this issue. We find ADP's assumptions to be in error.

We have not made final determinations concerning what rates should be set for the provision of directory listings to third-party publishers in any previously issued Commission order. In D.98-01-022, we merely concluded that "parties have raised valid questions over the reasonableness of the ILECs' directory-access rates." (Decision at 5.) We reached no final conclusions, however, resolving those questions, but merely provided for the booking of billed revenues subject to later true up. Nothing in D.98-01-022 disposes of the need for evidentiary hearings as previously set in the December 4, 1997 ALJ ruling.

Likewise, the requirement in the Act that rates for UNEs be based on costs only applies to CLCs' access to directory assistance databases, not to third-party

publishers' access to published directories. The provision of UNEs to CLCs entails different market considerations than does the provision of published directory listings to third-party publishers which are not engaged in offering telecommunications services. The cost-based provision of UNEs under the Act is only available to telecommunications carriers. There is no requirement under the Act that the separate provision of ILEC directory listings to third-party publishers of directories must necessarily be based on cost. As noted by Pacific, the pricing standard for subscriber publishing information is set forth in Section 222(e) of the Act which merely requires that rates be "nondiscriminatory and reasonable." We emphasize, through, that the Commission retains discretion to set cost-based rates for access to ILEC directory databases following the hearing to be held on this matter.

Therefore, we conclude that the Commission decisions cited by ADP do not constitute a final determination of reasonable prices, terms, and conditions for the provision of ILEC directory listings to third-party publishers. Consequently, the original determination set forth in D.97-05-091 that parties should be given an opportunity to be heard on the issue of whether the provision of directory listings is an "essential service" remains valid, and has not been rendered moot by any subsequent Commission actions to date. The resolution of this question still has a potential bearing on the final rates, terms, and conditions which should apply to the provision of directory listings to third-party publishers. Therefore, the ALJ ruling dated December 4, 1997, calling for evidentiary hearings to resolve the issue shall be reinstated. We direct the assigned ALJ to issue a new ruling setting a revised schedule for such hearings to be conducted.

Findings of Fact

1. In D.97-05-091, the Commission modified D.96-02-072, and directed that parties be heard on the issue of whether the ILECs' provision of directory subscriber listings to third-party publishers is an essential service.

2. Based upon pleadings submitted by parties, the assigned ALJ, by ruling dated December 4, 1997, scheduled evidentiary hearings, to address the issue as prescribed in D.97-05-091.

3. While previous Commission decisions prescribing certain measures relating to the provision of directory listings to third-party publishers have been issued, the Commission has not completed a final determination of requirements for third-party publishers' access, pricing, and other terms and conditions for directory subscriber listings published by the ILECs.

4. D.98-01-022 merely concluded that "parties have raised valid questions over the reasonableness of the ILECs' directory-access rates" but reached no final conclusions resolving those questions.

5. The provisions of the Act requiring that rates for UNEs be based on costs applies to directory assistance database access by telecommunications carriers, and does not apply to the provision of published directory listings to third-party publishers that are not telecommunications carriers.

6. The pricing standard for the provision of subscriber publishing information to third parties is set forth in Section 222(e) of the Act which merely requires that rates for such service be "nondiscriminatory and reasonable."

Conclusions of Law

1. The original determination in D.97-05-091 that parties should be given the opportunity to be heard concerning whether the provision of directory listings is an "essential service" has not been rendered moot by any subsequent Commission actions to date.

2. The factual determination as to whether the provision of ILEC directory listings constitutes an essential service is relevant in determining the appropriate prices, terms, and conditions for such service.

3. The Commission is not required, but has the discretion and authority, to set prices for access to ILEC directory listings based as cost.

4. The motion of ADP to terminate the hearings in this proceeding has not been justified, and should be denied.

O R D E R

IT IS ORDERED that:

1. The previously suspended schedule for evidentiary hearings shall be reinstated concerning whether the provision of directory listings to third-party publishers is an essential service.

2. The assigned Administrative Law Judge (ALJ) is directed to establish a new procedural schedule for evidentiary hearings on the above-referenced issue in accordance with the scope set in the ALJ Ruling dated December 4, 1997.

3. The motion of the Association of Directory Publishers to terminate hearings is denied.

This order is effective today.

Dated January 20, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners