

Decision 00-01-019 January 6, 2000

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.

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)

O P I N I O N

On August 9, 1999, Cox California Telcom, L.L.C., dba Cox Communications (Cox), filed a motion for mediation with Pacific Bell (Pacific) pursuant to the terms and conditions of the interconnection agreement between Cox and Pacific and Decision (D.) 95-12-056. Cox seeks to secure the participation of the California Public Utilities Commission (Commission) to resolve a dispute between the parties with regard to the delivery of telephone directories to Cox's customers. Pursuant to the interconnection agreement, Pacific is required to deliver the appropriate white and yellow page directories to each Cox customer. Cox claims, however, that Pacific has refused to timely deliver telephone directories to Cox's customers. Cox seeks Commission intervention to order Pacific to comply with its directory delivery obligations.

Summary of Dispute

On or about July 25, 1996, Cox and Pacific entered into a Local Interconnection Agreement (LIA). Pursuant to Section XII(B) of the LIA, Pacific Bell Directory Services (PBD) is required to deliver to each Cox telephone

customer one copy of the appropriate white and yellow page directories at no charge to Cox or the customer.

Beginning in or about August 1998, Cox began to receive reports from customers that PBD had failed to timely deliver the appropriate directories. In other cases, PBD had simply left copies of the directories at the gate of a gated community or at the entry to a multi-dwelling unit (MDU) property. At that time, Cox began working with PBD through its 800-number help line to secure the missed deliveries, but the defective delivery problems continued.

In or about November 1998, Cox escalated the resolution of the deliveries to its Pacific account manager, Harry Tom. About December 1998, Cox provided Mr. Tom with a study that showed a number of Cox customers had not received delivery of directories up to four months after Cox brought the problem to PBD's attention. By January of 1999, Mr. Tom admitted that a directory delivery problem existed, but Cox claims that he refused to assure Cox that PBD would delivery directories to those customers who had not received them. In addition, Cox claims Mr. Tom refused to assure Cox that Pacific and PBD would take steps to rectify this problem in the future.

On January 21, 1999, Cox's attorney, Lee Burdick, wrote to Pacific's Senior Counsel, Kristin Ohlson, asserting that Pacific had breached the LIA.

On February 12, 1999, at Cox's request, representatives of Cox and Pacific met to confer regarding how Pacific intended to rectify the problem with timely delivery of directories. As a result of this meeting, Cox and Pacific agreed to take certain prescribed steps to resolve the directory delivery problem and to cure Pacific's breach of the LIA. After the February meeting, the number of directory delivery complaints from Cox customers fell in the month of March. Cox did not track the number of complaints for April because Pacific had assured Cox's

representatives that Pacific would be performing a fresh drop of all directories beginning in April.

Beginning in May, the number of customer complaints received by Cox regarding directory delivery problems quadrupled compared to March. Cox discovered that one cause of the complaints was that Pacific had not delivered the Coastal directories to Cox's Newport Beach customers as promised. In June, Cox made several efforts to contact Pacific's representative regarding the directory delivery problems, but Cox's phone calls were not returned. Cox thus claims it has been completely unable to resolve the directory delivery problems.

In July, Cox discovered that at 23 MDU properties in Orange County Pacific had failed to deliver directories to one-third of Cox's customers responding to a survey. As a result of Pacific's continuing failure to properly delivery telephone directories, Cox has had to rely upon its own agents and employees to insure that its customers obtain the appropriate directories in a timely fashion.

In addition, PBD recently informed Cox that it would charge Cox for delivery of yellow page directories that were made following a request to PBD's 800 number, even though the LIA requires Pacific to make those deliveries free of charge.

Cox claims that its ability to compete with Pacific as a local exchange telephone service provider is being harmed by Pacific's continuing failure to timely deliver telephone directories.

Cox requests that the Commission assign an Administrative Law Judge (ALJ) in this docket to mediate the dispute between Cox and Pacific, and to issue a ruling resolving it in a manner consistent with the terms and conditions of the LIA and the facts to be presented during the mediation. Specifically, Cox requests that Pacific be required to ensure delivery of new directories to Cox's

customers within 72 hours of Pacific's receipt of a notice of new listing; that Pacific be required to confirm in writing to Cox that directory deliveries have been effected to Cox's customers; that Pacific be required to provide Cox with an ongoing inventory of all relevant directories so that Cox can complete deliveries when Pacific has failed; and such other relief as the Commission may deem just and proper.

Pacific's Position

Pacific filed a response to the Motion of Cox on August 24, 1999. Pacific disagrees with Cox's claim that Pacific has "failed and refused" to deliver telephone directories to Cox's customers as required by the parties under the LIA. Pacific claims its account team worked diligently with Cox to address Cox's concerns about the delivery of directories, established a special point of contact for Cox at PBD to handle Cox's alleged problems and made special deliveries of directories for Cox. Until receipt of Cox's motion, Pacific's account team had understood that Cox's alleged problems with directories were resolved to Cox's satisfaction.

While Pacific does not oppose the appointment of a mediator, it does not believe the Commission should have to become involved in a dispute where the parties are working to resolve it and where Pacific believed that Cox's problems were solved. Pacific claims Cox's filing is inconsistent with the alternative dispute resolution provisions of the LIA and that Cox's motion should be dismissed without prejudice, pending its exhaustion of the dispute resolution provisions of the LIA.

Pacific denies that there has been any breach of its LIA with Cox, but that Pacific's account team took the necessary steps to address and resolve Cox's concerns. Pacific investigated the ordering process based on data regarding customer complaints provided by Cox and arranged for special deliveries of over

500 directories to locations that Cox identified. Those directories were delivered to Cox as agreed, without regard to whether Cox had made errors in ordering directories or PBD had made errors in delivery.

Pacific claims it was never advised either in writing or verbally of any failure to comply with these arrangements. Pacific wrote Cox on May 27, 1999, identifying the steps that had been taken, noting that Cox's own delivery tally revealed only a "few no-delivery complaints by Cox's end user customers" and "to close on the issue related to the delivery of Pacific Bell directories." In Cox's response to this letter, Pacific claims the only concern raised was about a Cox customer who complained about a charge for an unidentified Yellow Pages directory that the Cox letter states PBD agreed to waive. The letter asks Pacific to "confirm in writing" that there would be no charge for one copy of white and Yellow Page directories. Pacific states that it complied with that request, pointing out that "Cox's operational contacts had reported that the [directory] issues were resolved."

Pacific argues that the Commission should deny Cox's motion without prejudice pending its exhaustion of the alternative dispute resolution provisions of the agreement.

Discussion

We conclude that while Cox has experienced difficulties with PBD in obtaining timely deliveries of directories to Cox's customers, it is premature at this juncture for the Commission to appoint an ALJ as mediator between Cox and Pacific. A review of the exchange of letters between the parties, as attached to the pleadings, reveals essentially a problem in the lack of communication rather than in any malicious refusal by Pacific to comply with its directory delivery obligations under the LIA.

By its recitation of events, Cox concedes that Pacific was responsive to the delivery problems encountered during 1998 through the remedial measures undertaken in February 1999. As a result, delivery complaints subsided during March and April. The dispute at this point involves a series of new delivery problems that occurred beginning in May 1999. Cox states that it made several efforts to resolve these problems through telephone calls to Pacific's representative during June 1999. Although Cox claims its telephone calls made during June 1999 to Walter Scroggy, the assigned PBD representative, "stopped being returned," Pacific did reply to Cox by letter from Jerry Gilmore, dated June 9, 1999. Moreover, there is no record that Cox made any attempt to reply to the June 28, 1999, letter from Jerry Gilmore, a member of Pacific's account team. In the June 28 letter, Mr. Gilmore stated his understanding that previous delivery issues had been resolved, based on reports from Cox's operational contracts. Mr. Gilmore offered to follow up on any unresolved delivery issues if Cox would provide the details to investigate.

In comments filed December 6, 1999, on the Draft Decision of the ALJ, Cox states that it has continued to work with Pacific since the June 28 letter from Jerry Gilmore to informally resolve the delivery problems and to insure that its customers received timely delivery of telephone directories. Nonetheless, Cox has continued to experience unresolved delivery problems. Cox reports that the most recent meeting to resolve the dispute occurred on October 8, 1999. After this meeting, the parties still remained in dispute according to Cox. Cox claims that Pacific is still not providing timely directory delivery to a significant number of Cox's customers. Cox and PBD have identified at least 45 Cox customers whose new listings were provided (and verified) to Pacific, and whose names were completely dropped off of Pacific's directory delivery lists.

In its comments filed December 13, 1999, Pacific does not dispute that directory delivery problems remain. Mediation is not necessary to establish this fact. Pacific argues, however, that the parties are continuing to work toward a resolution of the matter through the informal dispute resolution process. Pacific argues that the persistence of directory delivery problems is due to the complex nature of the directory delivery process, not because of Pacific's lack of trying to meet its obligations under the LIA.

Given the fact that meetings are already in progress between the parties to trouble shoot the technical factors that appear to be causing the delivery problems, those meetings should be allowed to reach their conclusion before the appointment, if any, of a Commission mediator.

Rather than appointing an ALJ to get involved in a mediation at this point, the more efficient course is for the parties to make more concerted efforts to continue diligently the trouble shooting process to identify and correct promptly the cause or causes of the delivery failures. The Jerry Gilmore communication of June 28 indicates Pacific's acknowledgement of its delivery obligations and its offer to deal with any delivery failures if Cox will provide the details for an investigation. The next step is up to Cox to respond to Pacific's offer to work toward a resolution of the delivery problems, and to agree upon remedial measures to resolve them. This process was successful between the parties earlier this year when the parties met in February to devise a plan to resolve failed deliveries. Continued communications between the parties now should hopefully produce similar solutions.

Under Section XXXII of the contract, if either party believes the other has breached the agreement or otherwise violated the law, it shall give the party written notice of the breach in writing and allow the other party 60 days from receipt of the notice to cure the alleged default. Thereafter, the contract

prescribes that the parties shall employ the dispute resolution procedures set forth at pages 36-39 of D.95-12-056. These procedures require the parties to attempt to informally resolve their dispute through good faith negotiations before formally filing a motion seeking Commission mediation of the dispute.

In this case, the next step is for the parties to seek continued efforts toward informal resolution of the dispute concerning the outstanding directory delivery problems. If Cox is unsuccessful in working out a corrective plan of action with Pacific that successfully resolves the delivery problems after a reasonable attempt at good faith negotiations, Cox may renew its filing seeking the appointment of a mediator to resolve the dispute.

Cox also indicates an apparent dispute over Pacific's intention to charge for yellow page directory deliveries following a request to PBD's 800 number. The LIA is clear on this point. No mediation is necessary to resolve this matter. Pacific is obligated to deliver to Cox customers "at no charge one copy of appropriate white and yellow page directories." If the customer in question has not previously received a copy of the directory, then Pacific is prohibited under the LIA from charging for the delivery. If one directory copy has previously been delivered to the customer, then the LIA does not preclude Pacific from charging for delivery of a second copy, whether in response to a request to PBD's 800 number or by other means.

Comments on Draft Decision

The draft decision of ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code Section 311(g) and Rule 77.1 of the Rules and Practice and Procedure. Comments were filed by Cox on December 6, 1999, and reply comments were filed by Pacific on December 13, 1999. We have taken the comments into account in finalizing the decision.

Findings of Fact

1. Under the LIA between Pacific and Cox, Pacific is obligated to deliver free-of-charge one copy each of its white and yellow page directories to Cox's customers.

2. During August 1998, Cox received reports from certain of its customers indicating failure to timely deliver appropriate directories

3. In response to claims that Pacific had breached the LIA and at the request of Cox's counsel, representatives of Pacific and Cox met in February 1999, and reached agreement on certain prescribed steps to rectify the directory delivery problems.

4. The number of directory delivery complaints dropped during the month of March 1999 following implementation of the remedial measures by Pacific.

5. The number of directory delivery complaints rose again beginning in May and continued to occur through July.

6. Although Cox claims its telephone calls made during June 1999 to Walter Scroggy, the assigned PBD representative, "stopped being returned," Pacific did reply to Cox by letter from Jerry Gilmore, dated June 28, 1999.

7. There is no record that Cox made any attempt to reply to the June 28, 1999, letter from Jerry Gilmore, a member of Pacific's account team.

Conclusions of Law

1. It is premature at this time to appoint an ALJ to mediate the dispute since Cox has not yet exhausted its remedies for internal dispute resolution under the LIA.

2. Cox should first exhaust the remedies available to it for internal dispute resolution under its LIA with Pacific before the Commission considers appointing an ALJ to mediate the parties' dispute.

3. If Cox is unsuccessful in working out a corrective plan of action with Pacific after a reasonable attempt at good faith negotiations, Cox may renew its filing seeking the appointment of a mediator to resolve the dispute.

O R D E R

IT IS ORDERED that:

1. The motion of Cox California Telcom, L.L.C. (Cox) for mediation with Pacific Bell (Pacific) to resolve a dispute under their local interconnection agreement is denied without prejudice.

2. If Cox is unsuccessful in working out a corrective plan of action with Pacific after a reasonable attempt at good faith negotiations, Cox may renew its filing seeking the appointment of a mediator to resolve the dispute.

This order is effective today.

Dated January 6, 2000, at San Francisco, California.

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

I abstain.

/s/ LORETTA M. LYNCH
Commissioner