

Decision 00-05-052

May 18, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Consider Adoption of Rules Applicable to Interexchange Carriers for the Transfer of Customers Including Establishing Penalties for Unauthorized Transfer.

Rulemaking 97-08-001
(Filed August 1, 1997)

Investigation on the Commission's Own Motion to Consider Adoption of Rules Applicable to Interexchange Carriers for the Transfer of Customers Including Establishing Penalties for Unauthorized Transfer.

Investigation 97-08-002
(Filed August 1, 1997)

**ORDER DENYING APPLICATIONS FOR REHEARING OF
DECISION 00-03-020, AND ORDERING THE APPLICATION FILED
JOINTLY BY AT&T COMMUNICATIONS OF CALIFORNIA, INC.,
MCI WORLD COM, INC., AND SPRINT COMMUNICATIONS
COMPANY L.P. RE-DOCKETED AS A PETITION FOR MODIFICATION**

I. SUMMARY

On March 6, 2000, we adopted rules designed to protect consumers from slamming and cramming. Final Opinion on Rules Designed to Deter Slamming, Cramming, and Sliding (Decision (D.) 00-03-020) ("the Decision").¹ Two applications for rehearing of this decision were filed: one by AT&T Communications of California, Inc., MCI WorldCom, Inc., and Sprint Communications Company L.P. (collectively, "the AT&T applicants"), and another by OAN Services, Inc., Billing Concepts, Inc., and The Coalition to

¹ "Slamming" refers to the unlawful practice of switching a customer's long-distance carrier without the customer's authorization. "Cramming" is unauthorized billing: for example, for services customers have not requested, or for services that were not provided. "Sliding" is the use of dated transfer authorization forms signed by customers.

Ensure Responsible Billing (collectively, "the Billing Agents"). Both applications will be denied.

The AT&T applicants do not argue that the decision is unlawful or erroneous. Accordingly, they have failed to demonstrate any basis for granting rehearing. The AT&T applicants do request modification of the decision, however, on other grounds. For the convenience of the parties, we will re-docket their application for rehearing as a petition for modification, and handle it accordingly.

The Billing Agents contend that we failed to give adequate notice that we were contemplating adopting rules that would impose obligations on billing agents. Due to this lack of adequate notice, they contend, they were deprived of an opportunity to comment on the Subscriber Complaint Rules adopted in the Decision, which denied them due process. They claim, in addition, that the Decision lacks sufficient findings. The record does not support these contentions. Accordingly, we will deny the Billing Agents' application for rehearing.

II. DISCUSSION

A. AT&T Application

An application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful." Public Utilities Code § 1732; see also Commission Rules of Practice and Procedure 86.1. The AT&T applicants do not contend that D.00-03-020 is unlawful or erroneous. Rather, they ask the Commission to modify certain reporting requirements set forth in the new rules, not because they are unlawful, but because they are onerous or unnecessary. This request would be more appropriately set forth in a petition for modification. See Public Utilities Code §§ 1708, 1708.5; Commission Rules of Practice and Procedure 47. Accordingly, we will deny the application for rehearing, but we will re-docket it as a petition for modification and handle it accordingly.

B. Billing Agents' Application

1. Notice

The Billing Agents contend that the Subscriber Complaint Reporting Rules (see Appendix B of the Decision) were adopted without adequate notice that Billing Agents' "...rights and obligations were under consideration in a Commission proceeding." (Billing Agents' Application for Rehearing, p. 11.) In support of this contention, they state that "[w]ithout any prior notice, and for the first time, the second draft decision in this proceeding included rules to implement ... legislation [addressing unauthorized transfers and unauthorized billing of telecommunications customers.]" (Application for Rehearing, p. 5.) Based on this characterization of the record, they contend that the Commission's adoption of the Reporting Rules:

...was an abuse of discretion, a failure to proceed in the manner required by law, a decision not supported by the findings, and a decision violating Applicants' rights to due process under the California and U.S. Constitutions, and on all of those grounds subject to reversal pursuant to Section 1757.1 of the California Public Utilities Code. (Application for Rehearing, p. 2.)

These claims are without merit.

As a preliminary matter, we note that one of the applicants, OAN, is a party to this proceeding.² OAN does not claim that it was not served with the rulings, orders, comments, motions, and draft decisions that have issued in this

² Billing Concepts and The Coalition to Ensure Responsible Billing are not parties and did not participate in these proceedings. Therefore, they have no standing to request rehearing of the decision under Public Utilities Code section 1731(b). Normally, we would treat an application for rehearing by an entity that lacked standing as a petition for modification. Because this application was filed jointly with OAN, which is a party, we will in this instance consider the arguments raised by Billing Concepts and The Coalition for Responsible Billing in our disposition of OAN's application for rehearing.

proceeding. (Application for Rehearing, p. 5).³ The Billing Agents claim that OAN "had not been actively participating in the proceedings prior to the second draft decision, due to the proceeding's focus, since early 1999, on the local service disconnect issue." (Id.) For this reason, they claim, and because the second draft decision issued "in the midst of the December holiday season . . . it was not until after the deadline for filing comments on the draft decision had passed, in early January, that OAN recognized the serious burdens the second draft decision would impose on billing aggregators by its promulgation of the new Subscriber Complaint Reporting Rules." (Id.)

The Subscriber Complaint Reporting Rules should have come as no surprise to OAN. The purpose of this proceeding has been, from the beginning, to fashion rules designed to deter cramming and slamming. From the beginning, the need to include billing aggregators in these rules in order to provide effective deterrence and enforcement has been recognized

This proceeding began in August 1997 with the issuance of an Order Instituting Rulemaking and an Order Instituting Investigation (collectively, the Rulemaking). The Rulemaking clearly identified unauthorized billing as an issue the Commission would consider in this proceeding. (Rulemaking, pp. 10-11.) The Commission stated outright that it was inquiring into the level of responsibility of billing agents, and the Commission's jurisdiction over them. (Rulemaking, pp. 11-12.) The Rulemaking included an entire section on "Billing Issues," which noted an "...increasing number of complaints from subscribers alleging that they are being billed for services that they never ordered." (Rulemaking, p. 10.) To address that problem, the Rulemaking asked parties to "...comment on the Commission's jurisdiction over the various entities involved

³ Moreover, we note that information about these proceedings was available to The Coalition for Responsible Billing and to Billing Concepts from OAN, as well as from the Commission directly. OAN and Billing Concepts are both members of The Coalition. (Application for Rehearing, p. 3.) In fact, according to industry reports, they are founding members of The Coalition. See PR Newswire, Inc., Financial News (July 13, 1998).

in the billing process and what level of responsibility each of these entities should have to assure that a subscriber is only billed for services the subscriber ordered.” (Rulemaking, p. 11.) The Rulemaking asked the parties, “Are billing agents subject to Commission jurisdiction? If not, does the Commission have sufficient jurisdiction over the underlying interexchange transaction sufficient to require the billing agent to comply with Commission directives?” (Rulemaking, p. 12.)

The Rulemaking was served on all certificated competitive local carriers, nondominant interexchange carriers, local exchange companies, Latino Issues Forum, TURN, The Greenlining Institute, Public Advocates, Consumer Action, and Utility Consumers Action Network. It was also posted on the Commission’s website. (Rulemaking, p. 13.)

In September 1997, a pre-hearing conference was held on the Rulemaking. This pre-hearing conference was open to anyone with an interest in the subject matter. At the conclusion of the pre-hearing conference, Administrative Law Judge Maribeth Bushey informed the parties that:

[t]he process that we agreed upon was that Commissioner Neeper and I would draft a ruling setting out the process and substance that we will be following, in essence, a charter for this proceeding. And we will be supplying that to the parties and taking some limited comment on that, and then we will proceed. (Tr., PHC, p. 69.)

On February 11, 1998, an Assigned Commissioner’s and Assigned Administrative Law Judge’s Ruling (the Ruling) issued. It included a section entitled, “Billing Issues: Request for Draft Rules” which, in turn, included the following discussion:

We would like to consider draft rules which may, for example, impose record-keeping and reporting responsibilities on incumbent local exchange companies and billing service providers. Although incumbent local exchange companies actually issue all the bills, our staff’s understanding is that the companies do not have full information on the

underlying carrier or service provider because some billings are submitted by firms which aggregate bills for many interexchange carriers or other service providers. These firms are often referred to as "billing aggregators" or "billing agents." Thus, to follow the billing error rate of all carriers and other services providers that have access to incumbent local exchange companies' billing services, we understand that the *billing aggregators must also be included in the draft rules.*

(Ruling, pp .7-8, emphasis added.) Thus, it was clear from the inception of this proceeding that rules affecting billing agents were contemplated.

In March 1998, a workshop was held to discuss draft rules to address the unauthorized transfer of customer service and the unauthorized billing of services. In July 1998, the "Workshop and Third Party Compliance Survey Report and Staff Recommendations to the Assigned Commissioner on Unauthorized Transfer of Service and Billing" (Workshop Report) was released. It included a discussion of pending legislation that would "...require a consumer's authorization prior to billing for a product or services" [and] "...clarify the Commission's jurisdiction over third-party billing issues." (Workshop Report, p. 14.)

On January 1, 1999, new legislation designed to protect consumers against cramming went into effect. See Public Utilities Code §§ 2889.9, 2890. These new code provisions directed the Commission to adopt rules requiring billing entities to keep records of consumer complaints, and to report those complaints to the Commission, and gave the Commission limited jurisdiction over billing agents.

On February 3, 1999, the first Draft Decision of ALJ Bushey issued. This draft discussed the additions and amendments to the Public Utilities Code relating to unauthorized billing. (See pp. 9-10.) As noted in the First Draft Decision, Section 2889.9 of the Public Utilities Code directed the Commission to:

...establish rules that require each billing telephone company, billing agent and company that provides products or services that are charged on subscribers' telephone bills, to provide the commission with reports of complaints made by subscribers regarding the billing for products or services that are charged on their telephone bills as a result of the billing and collections services that the billing telephone company provides to third parties, including affiliates of the billing telephone company. (Public Utilities Code Section 2889.9 (d).)

Pursuant to Section 2889.9, the First Draft Decision proposed rules requiring each billing entity, including billing agents, to maintain records of consumer complaints and to provide to the Commission reports on those complaints. (First Draft Decision, p. 10; p. 34 (Conclusion of Law #1); and Attachment B (Subscriber Complaint Reporting Rules).) Thus, complaint reporting requirements (the "Reporting Rules") did *not* appear for the first time in the Second Draft Decision, as the Billing Agents assert. (*See* First Draft Decision, Attachment B, Subscriber Complaint Reporting Rules #3, 4, 5, and Second Draft Decision, Attachment B, Subscriber Complaint Reporting Rules, #2, 3, 5.)

Parties had an opportunity to file comments on the Reporting Rules in March and again in April 1999. ORA, TURN, Pacific Bell and GTE-California did so. (*See* Opening Comments of ORA, Appendix C; Reply Comments of ORA, p. 4; Opening Comments of TURN, p. 12, Opening Comments of Pacific, p. 9; Opening Comments of GTE-California, pp. 8-9.)

On November 16, 1999, the Second Draft Decision of ALJ Bushey issued. The Second Draft Decision, like the First Draft Decision, includes an analysis of the Commission's limited jurisdiction over billing agents, and the legislative directive to the Commission to establish rules for each billing entity to provide reports of consumer complaints. (Second Draft Decision, pp. 15-16.) The Commission's authority and responsibilities with regard to billing agents is, again, summarized in the Conclusions of Law, and the Proposed Rules are set forth in an

Attachment. (Second Draft Decision, p.52, Conclusion of Law #1, and Attachment B.) Again, parties had an opportunity to file comments and reply comments.

OAN acknowledges that it is a party to this proceeding, but states that it "...had not been actively participating . . . prior to issuance of the second draft decision . . . due to the proceeding's focus, since early 1999, on the local service disconnect issue." OAN's perception of the "focus" of the proceeding and its decision not to participate does not constitute legal or factual error by the Commission. It was made perfectly clear in these proceedings that the local service disconnect issue was only one of the issues to be addressed. As noted above, in the Order Instituting Rulemaking itself, the Commission stated clearly that it would be inquiring into unauthorized billing and that it would "...consider adopting rules which may allow the Commission to better meet its goals of protecting fair competition and customer choice." (Rulemaking, pp. 11, 13.) At the pre-hearing conference, the Commission notified all parties that parallel issues could be considered. (Attachment to PHC Transcript.) In early 1998, the Assigned Commissioner and ALJ issued a Ruling discussing the imposition of record-keeping and reporting responsibilities on billing agents. (Ruling, pp. 7-8.) This Ruling was served on OAN. In January 1999, legislation granting the Commission jurisdiction over billing agents became law. In February 1999, Reporting Rules similar to those adopted in D.00-03-020 were mailed to the parties, including OAN.

Clearly, notice "reasonably calculated" to inform interested parties that this proceeding was pending, and to provide the necessary information to enable them to present their objections, was provided. (See Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306, 318, 70 S.Ct. 652, 659.) The Billing Agents' failure to pay attention to the development of the Reporting Rules cannot be blamed on lack of notice.

2. Lack of Findings

The Billing Agents argue that "...no findings of fact were reached to justify the[] adoption...." of the Reporting Rules, and that the decision "...includes only one relevant conclusion of law." (Application for Rehearing, p. 12.)

As the Billing Agents note, Conclusion of Law No.1 cites Public Utilities Code Section 2889.9, which requires the Commission to:

... establish rules that require each billing telephone company, *billing agent*, and company that provides products or services that are charged on subscribers' telephone bills to provide the commission with reports of complaints made by subscribers regarding the billing for products or services that are charged on their telephone bills (Public Utilities Code Section 2889.9, emphasis added.)

Section 2889.9 goes on to state that "[t]he commission may adopt rules, regulations and issue decisions and orders, as necessary to safeguard the rights of consumers and to enforce the provisions of this article." (Public Utilities Code Section 2889.9(i).)

This legislative mandate is sufficient to justify the adoption of the Subscriber Complaint Reporting Rules. In addition, the Decision includes findings of widespread consumer frustration with unauthorized charges on telephone bills. And the Billing Agents themselves concede that "billing aggregators play a critical role in ensuring that consumers are protected from cramming." (Application for Rehearing, p.3) We do not see a need for additional findings.

Accordingly, **IT IS HEREBY ORDERED:**

1. The application for rehearing of D.00-03-020 filed jointly by AT&T, MCI, and Sprint is denied. The application shall be re-docketed as a petition for modification, and will be processed accordingly.

2. The application for rehearing filed jointly by OAN, Billing Concepts, and The Coalition for Responsible Billing is denied.

This order is effective today.

Dated May 18, 2000, at San Francisco, California.

LORETTA M. LYNCH

President

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

CARL W. WOOD

Commissioners