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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.

FILED
PUBLIC UTILITIES COMMISSION
AUGUST 1, 1997
SAN FRANCISCO OFFICE
RULEMAKING 97-08-001

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AUGUST 1, 1997
SAN FRANCISCO OFFICE
INVESTIGATION 97-08-002

**ORDER INSTITUTING RULEMAKING
AND ORDER INSTITUTING INVESTIGATION**

Background

To encourage full and fair competition in the long-distance telecommunications marketplace, as well as to ensure customer protection, the California State Legislature and the Commission have adopted laws and regulations which set out specific requirements for obtaining customer authorization to transfer presubscribed service between interexchange carriers. See, e.g., Public Utilities (PU) Code § 2889.5.

Unauthorized customer transfer, referred to colloquially as slamming, undermines the Commission's goals of fair competition and customer choice in the telecommunications industry. The records of our enforcement actions and complaints lodged with the Commission demonstrate that customers who are the victims of unauthorized transfer are deeply offended upon discovery that their carrier has been changed without their knowledge or consent.

To enforce the applicable statutes and regulations, the Commission and its staff have undertaken numerous informal investigations of telecommunications carriers alleged to have transferred customers without authorization. Several of these informal investigations have resulted in formal investigations with the Commission staff

requesting and the Commission issuing orders instituting investigation to prosecute firms that appeared to have engaged in wide-spread violations.

In *Sonic Communications, Investigation (I.) 95-02-004*, the Commission investigated an interexchange carrier that was accused of transferring large numbers of customers without authorization. These transfers were particularly egregious because Sonic's rates were substantially higher than the rates the customers had been paying to their chosen carrier. Although the Commission actively prosecuted Sonic, customers did not receive any refunds as Sonic sought federal bankruptcy court protection.

In *Cherry Communications, I.95-10-007*, the Commission received evidence that Cherry had engaged in misleading and anti-competitive tactics to obtain customers. The Commission prohibited Cherry from submitting further changes in customers' presubscribed interexchange carriers (PICs) directly to the local exchange company. Cherry and the Commission's Safety and Enforcement Division subsequently reached a settlement, which the Commission approved, that required Cherry to essentially cease doing business in California for 24 months and pay \$20 to each customer that had disputed a PIC change. *Cherry Communications, Decision (D.) 96-09-041*.

In *Communications TeleSystems International (CTS), I.96-02-043*, the Commission staff alleged that CTS had an excessively high PIC dispute rate, that it tended to target customers who preferred a language other than English, and that nearly 30,000 customers had filed PIC disputes with their local exchange carriers (LECs). The Commission also imposed a PIC change prohibition on CTS. On May 21, 1997, the Commission suspended CTS' operating authority for three years, imposed a PIC change prohibition for two additional years, ordered a refund of nearly \$2 million to customers, and fined CTS \$2 million. *Communications TeleSystems International, D.97-05-089*.

In *Heartline Communications, I.96-04-024*, the Commission's enforcement staff alleged that Heartline Communications (Heartline) and its affiliate, Total National Telecommunications (TNT) (collectively, Heartline/TNT), had switched the long distance carriers of more than 100,000 customers without proper authorization. The Commission forbade Heartline from submitting PIC changes to the LECs. The Commission subsequently approved a settlement agreement between the Consumer

Services Division (the former Safety and Enforcement Division) and Heartline/TNT which suspended Heartline/TNT's operating authority for 40 months and required Heartline/TNT to pay \$20 to each customer that had submitted a PIC dispute to the LECs. *Heartline Communications*, D.96-12-031.

The Commission has found prosecution of these cases to consume a great deal of both time and staff resources. While the Commission is satisfied that the results in these particular cases furthered the public interest (other than the lack of refunds in *Sonic*), the Commission is not satisfied that it is fully accomplishing its dual goals of protecting customer choice and promotion of a fair marketplace by reliance on this case-by-case approach.

The Commission has found that the limited evidence available to support allegations of slamming complicates these prosecutions. Customers who believe that they have been transferred without authorization can be returned to their carrier of choice through two means: a request directly to their carrier of choice or to their LEC. Of these two means, only requests to the LEC in which the customer specifically alleges unauthorized transfer are compiled and reported as PIC disputes.

Discussion

California seeks to protect consumers against the unauthorized changing of their telephone provider while still making it easy for customers to exercise their choice which will enhance vigorous competition. This Commission must balance these interests. The Commission must protect consumers against slamming in a way that does not unduly burden the vast majority of customer switches that are legitimate expressions of the consumers' right to choose a telecommunications provider in a competitive market. We must assure that our protections do not diminish the level of competition in these markets.

The long distance market has been open to competition even before the divestiture of the Bell system. Customers have been able to presubscribe to long distance carriers since 1984. The occurrence of widespread slamming is a relatively recent phenomenon, one apparently unrelated to any change in our regulation of the

long distance industry. The rules and regulations governing entry and regulation of non-dominant interexchange carriers have not changed substantially in the last 10 years, yet we perceive that slamming is an increasing problem for consumers. If we are to protect consumers from slamming and those firms that engage in slamming, we need a better understanding of the root causes of the problem. Then, and only then, can we develop rules and enforcement techniques that will address the problem without having unnecessary consequences.

There are those that would argue that slamming is a result of recent changes in regulation. We seek comment on which, if any, recent changes in regulation have affected the occurrence of slamming. Some suggest that slamming is a result of the increasing level of competition in the long distance market. To some extent this is true because absent competition and the customer choice inherent in it, slamming could not exist at all, because a priori there would only be a single provider. We seek comment as to how this Commission can act to prevent slamming without reducing the natural evolution of competition in the market place and without unduly burdening consumers in the exercise of their ability to choose a long distance carrier.

Still others argue that the rise in slamming that we perceive is a direct result of lax regulatory enforcement by the Commission and the Federal Communications Commission (FCC). They argue that due to the rather lax enforcement in the late 1980's and early 1990's, unscrupulous providers sought to take advantage of California customers because they felt that they could escape penalties or regulatory punishment. Also, proponents of this school of thought point out that these bad actors represent a significant problem, but are a minuscule representation of the PIC change universe. We seek comment as to whether the apparent rise in slamming is due, at least in part, to lax enforcement by this Commission and the FCC. We note that the investigation of Sonic Communications (I.95-02-004) did not begin until February of 1995. We seek comment as to whether the rise in slamming we presently witness is related to any enforcement policies of this Commission and/or the FCC. We also seek comment as to whether our recent vigorous and stepped-up enforcement of slamming has had a positive effect on the level of slamming in California. The Commission has recently created a Consumer

Services Division. We seek comment as to the effect of creating such a division may have on the ability of this agency to protect consumers against slamming. In addition, this Commission has, as described above, issued several recent decisions. (See, *Cherry Communications*, (D. 96-09-041), *Heartline Communications* (D.96-12-031), *Communications TeleSystems International*, (D.97-05-089).) We seek comment as to the effect these recent decisions have had on the level of slamming and whether these actions deter slamming. Finally, we seek comments as to what enforcement activities should this Commission actively engage to punish those providers and individuals who are abusing customers by slamming them and serve as a deterrent to other firms from using this abusive practice.

Passage of Senate Bill (SB) 1140.

On August 17, 1996, Governor Wilson signed SB 1140 into law, authored by Senator Steve Peace (D-Chula Vista), which prohibits a residential subscriber's local exchange telephone corporation from making any change in the subscriber's provider of telephone service, except upon independent verification by a third party.

SB 1140, effective January 1, 1997, rewrote PU Code § 2889.5 with new language. As of July 1, 1997, this new code section has been in place only six months. This legislation was enacted to protect consumers from the unauthorized switching of telecommunications customers. We seek comment on the appropriateness and the need for the Commission to add further requirements in light of the legislature's actions in this arena. We seek the input of parties as to whether the commission has the jurisdiction to impose additional requirements beyond that encompassed by PU Code § 2889.5.

We note that the slamming cases we have prosecuted to date involve slamming that occurred prior to the adoption of SB 1140. Some parties argue that it is appropriate to allow time for the effects of SB 1140 to be fully felt, before this commission seeks to impose even more stringent and possibly burdensome rules on the industry. Do parties support the notion of a wait-and-see period of a predetermined time frame, such as a year, before any new restrictions are put into place?

It is our tentative assessment that SB 1040 will result in less slamming and has increased the level of protection afforded telecommunications customers. We seek comments regarding which, if any, specific Commission rules and policies need changing in light of the passage of SB 1140. We do not seek comment as to how the law might be amended, that is not the focus of our inquiry here. The legislature has articulated clearly and in great detail these anti-slamming protections and it is not our intent to second guess their judgment. Rather we seek to ensure that Commission rules are modified to ensure the effective and efficient application of the law.

Jurisdiction

The long distance marketplace has both an intrastate and interstate component. Carriers generally provide both interstate and intrastate services, many provide international services as well. As such, state regulation of these carriers must not frustrate federal policies nor should they necessarily make doing business in California more burdensome, when compared to other states. We seek comment on how California can best protect against slamming, while at the same time not infringing on the jurisdiction of the Federal Communications Commission.

The evidence gathered in some of the slamming cases that have come before us suggests close scrutiny to arrest any semblance of a growth trend. The cases cited above are only those that came before us through informal investigations which led our staff, based on a critical mass of disputes and complaints, to issue an order instituting investigation or order to show cause to investigate alleged violations. Those investigations resulted in sanctions that range from hundreds of thousands to millions of dollars and included suspensions of operating licenses for egregious providers. We believe that these actions are instructive not just to the alleged violators but also to other carriers. We, however, remain concerned that we are seeking solutions to only the most extreme problems that come to our attention.

We would like to ensure that California is the most hospitable state in the nation to expand and build utility business. We believe that competition in telecommunications and other regulated utility services is an essential force that will

serve California's consumers well, both in quality and price of services. However, it is essential that entrants into this market must know unequivocally that this Commission has zero tolerance for business strategies that are abusive of consumer rights. With this objective in mind, we intend to look broadly at enforcement of consumer protection rules. We will focus on slamming related rules and policies in particular and the development of policies that will allow the Commission to establish graduated and progressive enforcement techniques to improve detection of violations at an early stage and more effectively police the competitive market.

Specifically, the Commission is opening this rulemaking to receive and consider proposed rules which will enable the Commission to better and more efficiently achieve its goals of protecting and policing customer choice in a fair market. The Commission is particularly interested in rules which will result in evidentiary simplification. The Commission encourages interested parties to propose rules which will set defined standards for PIC dispute levels which will result in clearly-stated and immediate consequences.

The Commission is also aware of the pivotal role that the LECs play in receiving and compiling this data. We are interested in any ideas the LECs or others may have as to how this data collection may be enhanced. We would also like the parties to consider this role of the LECs as local competition increases. The LECs should also state any concerns that they might have regarding the burdens this data collection places on them.

The topics set out below are intended to be merely beginning points for this rulemaking. We are interested in any other topics and ideas that the parties feel may further our goals of protecting customer choice and a fair market.¹

As a means of organizing these proposed rules, we have developed the following lead questions based on the chronological steps in transferring a customer's PIC.

¹ This proceeding will have no effect on currently pending prosecutions.

1. Customer Solicitation

- a. Are customers being fully informed as to the identity of the service provider? Should the interexchange carriers be required to maintain a current list of all names under which it is doing business? Are customers confused about the role major facilities-based carriers play in resale transactions? Do customers need to know the role of facilities based carriers play in a resale transaction?
- b. Should the Commission adopt rules specifically applicable to sales agents and marketers?
- c. Should the Commission require that each interexchange carrier establish its own unique "Carrier Identification Code" for interactions with the LECs and on bills to the customers? Does the commission have the jurisdiction to order that each carrier have its own unique "CIC" code? How else could the Commission accurately track PIC dispute rates for each interexchange carrier?
- d. Should the Commission require interexchange carriers to use their Commission-established "U number" in communications, including all advertising, with customers?

2. Customer Authorization for Transfer

- a. Should the Commission adopt rules specifying exactly who may validly authorize a change in presubscribed interexchange carrier?
- b. Should the Commission adopt rules specifying how such authorization must be memorialized, e.g., in writing, or confirmed in writing if by telephone solicitation?
- c. Are the current practices for verification of customer authorization sufficient? If not, should the Commission prescribe detailed procedures for verification?

3. Submission of PIC Change to LEC

- a. Should the Commission require that an independent firm, unaffiliated with any telecommunications provider, process all PIC changes? Is this technically possible?

4. Notification of PIC Change

- a. Prior to a carrier-initiated PIC change becoming effective, should the customer receive notice of the impending change? If so, how?
- b. Would delaying the change-over be unfair to those customers that are seeking to change carriers? Do we risk frustrating customer choice and the wishes of the majority of customers that are not slammed to protect against the possibility that a few customers might be slammed?

c. How effective would such a notice in preventing slamming?

5. PIC Disputes

- a. Should the Commission require the LECs and/or interexchange carriers to periodically file standardized PIC dispute reports? If so, how often and in what form?
- b. Should the Commission audit the LECs' PIC dispute data collection process?
- c. Should the Commission undertake a study to statistically validate the relationship between PIC disputes and unauthorized transfer of customers?
- d. Should the PIC dispute fees paid by the interexchange carriers be increased to make unauthorized transfer less attractive to interexchange carriers? Should the fee structure include progressively increasing fees based on PIC dispute rates, such that firms with higher PIC dispute rates will pay a higher fee per dispute?
- e. Should the above-cost component of any such increased fee be used to fund consumer education? If so, what should be the focus of the customer education? Would it be more appropriate to use these funds for improved investigation and enforcement activities by the Commission?
- f. Should the authority to institute the PIC Locks be limited to the customer?
- g. Should the Commission establish maximum dispute rates which when exceeded can lead to actions by the Commission? If so, what should the threshold dispute rate be?
- h. Should the Commission adopt rules for the tracking and periodic reporting of complaints and PIC dispute rates for customers whose language preference is other than English?

6. Penalties

- a. Should the Commission establish standards for the suspension of carrier-initiated PIC change privileges?
- b. If so, upon what measure should the standard be based? PIC disputes submitted to the LECs? Complaints to the Commission? Some other measure?
- c. Should the suspensions be self-effectuating if a predetermined level is reached?

- d. Should the Commission establish guidelines for the revocation of Certificates of Public Convenience and Necessity due to unauthorized transfer of customers?
- e. Should the Commission establish defined monetary penalties for specific frequencies of unauthorized customer transfer, and delegate authority to Staff to impose these penalties?
- f. Should the Commission create a trust fund or organization to fund and oversee community education on customer choice issues?

7. Subsequent Reporting Duties

- a. Should all officers and shareholders in any interexchange carrier which has had penalties imposed for unauthorized transfer of customers be required to reveal such penalties in any subsequent request for operating authority?
- b. Should any interexchange carrier which reaches the PIC suspension standard be prohibited from using the advice letter process for PU Code §§ 851-854 transactions?

8. IntraLATA Services

- a. Should all of these rules be applicable to resale- and facilities-based providers of intraLATA toll and local exchange services? If not, what changes would be necessary to conform these rules to the realities of these two markets?
- b. How do the consumer protection rules adopted in R.95-04-043 work in conjunction with the rules proposed herein?
- c. If the market, as expected, moves to a one-stop-shopping format, how should the proposed rules be modified to accommodate this transition?

Billing Issues

The Commission's Consumer Affairs Branch is seeing an increasing number of complaints from subscribers alleging that they are being billed for services that they never ordered. These complaints are coming from both individual consumers and businesses alike and cover many different situations. One business recently alleged that it was being billed for calling cards that the business never ordered. Apparently, a number of the corporation's employees had been entering sweepstakes contests to win some type of prize and had been entering the employees' business telephone number on the sweepstakes forms. The fine print on the back of the sweepstakes entry form

authorized a company to charge the corporations' telephone number a minimum charge of 20¢ a day for a calling card. Thus the subscriber, in this case the business, was billed for calling cards that it never ordered.

Consumers are also complaining that they are being billed for collect calls and long distance calls billed to a third number where an operator services company, on behalf of a nondominant interexchange carrier (NDIEC), considers answering of the telephone by an automated answering machine or voice mail as de facto approval to accept the charges.

These practices greatly annoy consumers and businesses and violate their rights as consumers. If the charges are relatively small in contrast to the total monthly bill, odds are that many business and consumers will not notice them for months. The present arrangements between LECs and the NDIECs or billing agent call for the LEC to accept billings from NDIECs, other telecommunications services providers, or from their designated billing agents, and bill consumers and collect. We seek comment on the Commission's jurisdiction over the various entities involved 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 that the subscriber ordered.

Billing Questions

1. Does the Commission need to establish a rule that would require telecommunications corporations to obtain the subscriber's informed, affirmative consent before the subscriber can be billed for a telecommunications service?
2. Should the telephone company that issues a bill to the subscriber for telecommunications services provided to the subscriber by another entity have some level of responsibility to assure that telecommunications services billed were authorized by the subscriber? For example, should the Commission require a tariff rule or contractual requirement that the telephone company will only bill for telephone services that subscriber affirmatively and knowingly ordered?

CORRECTION !!

*THE PREVIOUS DOCUMENT(S) MAY HAVE
BEEN FILMED INCORRECTLY*

RESHOOT FOLLOWS

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3. 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?

SB 960 (Ch.96-0856)

We are currently conducting an experimental implementation of procedures that will become mandatory for our proceedings, effective January 1, 1998, pursuant to SB 960. We propose to consider these proceedings under the Experimental Rules and Procedures, adopted in Resolution ALJ-170.

Pursuant to Experimental Rule 2(e), we identify this rulemaking and this investigation as candidate proceedings to be processed under the experimental rules. We preliminarily determine the categorization of the rulemaking proceeding to be "quasi-legislative," and the investigation proceeding to be "ratesetting," as those terms are defined in Experimental Rule 1(e) and (d), respectively. In the rulemaking we will consider the rules proposed by parties for applicability to a class of regulated entities in the context of the guidance we provided earlier in this order. We propose to reserve the investigation for the consideration of issues which rescind, alter, or amend a Commission decision, which decisions we expect will involve a specifically named utility.

A workshop and prehearing conference (PHC) for both proceedings will be held on September 4, 1997, at 9:00 am in the Commission Courtroom, State Building, 505 Van Ness Avenue, San Francisco, California, unless otherwise scheduled by the assigned Administrative Law Judge (ALJ). At the PHC, we will establish a service list and a procedural schedule. The workshop will be held to discuss and define the issues that will be addressed in these proceedings.

Interested parties should file PHC statements with the Commission Docket Office no later than August 28, 1997. Copies should also be served on the assigned Commissioner and ALJ that day, as well as all potential parties included on the service list used for this decision. The PHC statements shall provide a proposed scoping memo, as described in Experimental Rule 3(c). The scoping memo should also delineate the

authorized a company to charge the corporations' telephone number a minimum charge of 20¢ a day for a calling card. Thus the subscriber, in this case the business, was billed for calling cards that it never ordered.

Consumers are also complaining that they are being billed for collect calls and long distance calls billed to a third number where an operator services company, on behalf of a nondominant interexchange carrier (NDIEC), considers answering of the telephone by an automated answering machine or voice mail as de facto approval to accept the charges.

These practices greatly annoy consumers and businesses and violate their rights as consumers. If the charges are relatively small in contrast to the total monthly bill, odds are that many business and consumers will not notice them for months. The present arrangements between LECs and the NDIECs or billing agent call for the LEC to accept billings from NDIECs, other telecommunications services providers, or from their designated billing agents, and bill consumers and collect. We seek comment on the Commission's jurisdiction over the various entities involved 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 that the subscriber ordered.

Billing Questions

1. Does the Commission need to establish a rule that would require telecommunications corporations to obtain the subscriber's informed, affirmative consent before the subscriber can be billed for a telecommunications service?

2. Should the telephone company that issues a bill to the subscriber for telecommunications services provided to the subscriber by another entity have some level of responsibility to assure that telecommunications services billed were authorized by the subscriber? For example, should the Commission require a tariff rule or contractual requirement that the telephone company will only bill for telephone services that subscriber affirmatively and knowingly ordered?

issues that the party would like addressed in these proceedings. Experimental Rule 2(e) provides for comments and objections to the inclusion and categorization of a proceeding in the first responsive pleading. Any party wishing to set forth any comments or objections regarding inclusion in the sample and the categories for the proceedings shall include them in the PHC statement. All parties filing PHC statements should bring 25 extra copies to the PHC.

Findings of Fact

1. Unauthorized transfer of telecommunications customers undermines the Commission's goals of fair competition and customer choice.
2. The Commission has engaged in case-by-case prosecution of firms alleged to have transferred customers without proper authorization.
3. The Commission is interested in implementing a more efficient and effective means of eradicating this practice.
4. Opening this Investigation and Rulemaking will enable the Commission to consider adopting rules which may allow the Commission to better meet its goals of protecting fair competition and customer choice.

Conclusions of Law

1. PU Code § 2889.5 prohibits the unauthorized transfer of customers from one telecommunications provider to another.
2. The Commission is charged with protecting the public interest in telecommunications field.

Therefore, **IT IS ORDERED** that:

1. This Order Instituting Rulemaking/Order Instituting Investigation shall be served on all certificated competitive local carriers, nondominant interexchange carriers, local exchange companies, and the following consumer groups: Latino Issues Forum, The Utility Reform Network, The Greenlining Institute, Public Advocates, Consumer Action, and Utility Consumers Action Network, and it shall be posted on the Commission's Worldwide Web Home Page.

2. This rulemaking and investigation shall be processed under the Commission's Senate Bill 960 experimental rules as adopted in Resolution ALJ-170.

3. The rulemaking is preliminarily categorized as quasi-legislative, as defined in Experimental Rule 1(e).

4. The investigation is preliminarily categorized as ratesetting, as defined in Experimental Rule 1(d).

5. Interested parties shall file a prehearing conference (PHC) statement with the Docket Office no later than August 28, 1997, which shall include a scoping memo as described in Experimental Rule 3(c) and a list of issues the party recommends that the Commission address.

6. A workshop and PHC shall be held on September 4, 1997, at 9:00 am, unless otherwise scheduled by the assigned Commissioner or Administrative Law Judge (ALJ). At the workshop the interested parties and the assigned Commissioner and ALJ shall informally discuss the submitted issues lists and will endeavor to establish an issues list for the proceeding. At the PHC, the assigned Commissioner and ALJ will set the procedural schedule for the rest of this proceeding.

This order is effective today.

Dated August 1, 1997, at San Francisco, California.

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