

WILLKIE FARR & GALLAGHER

ORIGINAL

Washington, DC
New York
London
Paris

DOCKET FILE COPY ORIGINAL

RECEIVED

JUN 19 1997

Federal Communications Commission
Office of Secretary

June 19, 1997

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: CC Docket No. 96-115

Dear Mr. Caton:

The Association of Directory Publishers ("ADP") hereby brings to the Commission's attention the attached May 21, 1997 decision of the California Public Utilities Commission ("CPUC") wherein the CPUC granted ADP's petition to modify the CPUC's earlier conclusion that LECs' provision of subscriber listing information was not an essential service. As discussed below, the CPUC agreed with ADP that its finding that the provision of LEC subscriber listings was not an essential facility was erroneous because (1) the record did not support such a conclusion and (2) parties had no notice that this issue was being considered by the CPUC. Consequently, the CPUC vacated its conclusion that LEC provision of subscriber listings was not an essential facility and directed the ALJ to institute proceedings on that very issue.

Relevant language from the CPUC order is supplied below.

A. The Record Fails To Show That LEC Provision Of Listings Is Not An Essential Facility.

"As noted by ADP, the preliminary test for an essential facility is whether a competitor is able practically or reasonably to duplicate a facility. Evidence has not been presented in this proceeding to support a finding that this preliminary test is met with respect to the provision of LEC subscriber listings." See CPUC Decision at 9.

No. of Copies made
10/1/97

022

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Telex: RCA 229800
WU 89-2762
Fax: 202 887 8979

Mr. William Caton
June 19, 1997
Page 2

B. Proper Notice Was Not Provided To Parties That The Essential Nature of Listings Was At Issue.

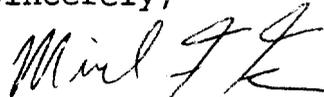
"We agree with ADP that the issue of whether the provision of subscriber listings of the LEC constitute provision of an 'essential facility' was not properly noticed as an issue to be resolved [in this proceeding]."
. . . . We did not [] specifically call for comments on the issue of whether or not LEC subscriber listings constituted an 'essential facility.'" See CPUC Order at 8.

* * *

"Parties had no notice [] that the Commission specifically sought comments as a basis to reach a determination as to whether LEC subscriber listings constituted an 'essential facility.'" Id. at 9.

Pursuant to the Commission's *ex parte* rules, two copies of this submission are being filed with the Secretary's Office. Should you have any questions concerning the CPUC's decision or otherwise, please feel free to contact the undersigned.

Sincerely,



Michael F. Finn

Enclosures

CC:

Bill Kehoe
Dorothy Attwood
Florence Setzer

ALJ/TRP/wav *

Mailed

MAY 23 1997

Decision 97-05-091 May 21, 1997

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 February 23, 1996, the Commission issued Decision (D.) 96-02-072 in Phase II of this proceeding which, among other things, established rules for third-party provisioning of subscriber listings for purposes of competing in the directory publishing market.

On November 13, 1996, the Association of Directory Publishers (ADP) filed a petition to modify Conclusion of Law (COL) 29 of D.96-02-072.¹ COL 29 states:

"Access to the LEC's [local exchange carrier] subscriber information database and provision of subscriber listings by the LEC is not an essential service." (Emphasis added.)

ADP seeks to modify COL 29 to delete the text highlighted in boldface above.

¹ On March 29, 1996, ADP and the California Telecommunications Coalition filed an application for rehearing of D.96-02-072 and specifically, the entire aforementioned COL. On September 20, 1996, by D.96-09-102 (the Rehearing Decision), the Commission denied the application for rehearing. On or about October 23, 1996, ADP timely filed a Petition for Writ of Review of the Commission's Decision and Rehearing Decision. The Commission's legal staff joined with ADP to request that the Supreme Court delay review of that Petition for Writ of Review pending its disposition of the instant Petition for Modification.

Parties' Positions

In seeking the requested modification, ADP makes reference to the Commission's decision (D.96-09-102) denying ADP's Application for Rehearing of D.96-02-072 in which ADP sought rehearing on the entirety of COL 29. ADP notes that as a basis denial in D.96-09-102 of ADP's application for rehearing, the Commission stated that "[i]n D.96-09-072, we concluded that LEC line information data is a competitive service which the CLCs [competitive local carriers] can access through self-provisioning, third-parties or the LECs. This is a policy judgment that we made based on the record." (Decision at 3).

In its Petition for Modification of COL 29, ADP does not dispute the Commission's finding that LEC line information database can be accessed by sources other than the LEC, itself. Accordingly, ADP does not seek modification of the portion of COL 29 which addresses the competitive access to LEC line information (i.e., the subscriber information database).

In seeking modification of the decision, therefore, ADP's interest is not focused on third parties' ability to periodically access certain information contained in the LEC database. While third parties may access such data remotely, the database, itself, remains under the ownership and control of the LEC. ADP is concerned instead with the specific issue of the ability of third parties to obtain independent ownership of the LEC directory listings, themselves, in contrast to the mere ability to gain periodic remote access to a subscriber information database which is owned and controlled by the LEC.

ADP argues that the Commission's policy judgment regarding the ability of third parties merely to seek access to the LEC line information database is a separate and distinct issue from the question of the LECs' obligations to actually provide the LEC subscriber listings, themselves, to third parties in an ownership capacity. It is this provisioning by the LEC of its actual directory listings to third parties which is the focus

of ADP's Petition for Modification. We shall accordingly limit our inquiry in this decision only to the portion of COL 29 which is contested by ADP in its Petition.

ADP believes that the bold section of text highlighted above should be deleted from the COL on the grounds that the parties to this proceeding were provided no notice of opportunity to be heard on the factual questions or legal basis for the conclusion that the provision of subscriber listings by the LEC is not an essential service. ADP argues that the Commission should therefore modify COL 29 to read as follows:

"Access to the LEC's subscriber information database is not an essential service."

ADP argues that the Commission's Rulemaking/Investigation in this proceeding did not call either for comments on, or request for identification of, factual disputes for hearing, concerning whether the provision of LEC subscriber listings is an essential service. ADP states that no party in this proceeding asked the Commission to render COL 29. Rather, the language found in COL 29 corresponds to a proposed Finding of Fact (FOF) 5 in Pacific Bell's (Pacific) October 10, 1995, Comments.

ADP claims that no party could have effectively requested a hearing, presented factual evidence, or filed comments on this issue, since no notice was provided by the Commission that this issue was under consideration. ADP denies that such lack of notice and opportunity to be heard can be cured merely by Pacific proposing a FOF, even if that proposal is misconstrued as a "comment." (See *MCI Telecommunications Corporation v. F.C.C.*, 57 F.3d 1136 (D.C. Circuit 1995), where the United States Court of Appeals rejected the Federal Communications Commission's argument that its failure to provide adequate notice was cured by the fact that a few parties commented on the issue in question.)

ADP also claims the Commission erred by failing to make separate FOFs on all material issues, but instead combining access to LEC databases with the provision of listing information, citing *City of Los Angeles v. Public Utilities Commission*, 7 Cal.3d 331,

102 Cal.Rptr. 313, 497 P.2d 785 (1972), citation at p. 337, other citations omitted. *See also Greyhound Lines, Inc. v. Public Utilities Commission*, 65 Cal.2d 811; *Southern Pacific Company v. Public Utilities Commission*, 68 Cal.2d 243 (1968). Here, ADP claims there is no FOF, no record evidence, and no support for the COL, as it pertains to LEC provision of subscriber listings.

ADP claims that failure to grant its Petition will deny its members due process rights and will violate Public Utilities (PU) Code § 1701 and Article I, § 7 of the California Constitution.

A response in opposition to ADP's Petition was filed by Pacific on December 13, 1996.

Pacific opposes ADP's Petition, arguing that ADP was provided ample notice and opportunity to discuss whether or not provision of subscriber listings by LECs is "an essential service." Pacific further argues the COL 29 is based on a complete record and is in accord with prior Commission decisions and other legal authority. Pacific claims that notice is not legally required when the Commission merely repeats established law.

Pacific contends that the parties (including both ADP and Pacific) have filed several sets of comments on the proposed rule concerning access by ADP's members to subscriber listing information. Pacific cites parties' comments in response to the Commission's proposed Rule 11H(1) which required LECs to provide access to subscriber listings "on the same terms and conditions and price available to the competitive businesses of the LECs or their affiliates."

In its comments on the proposed rule, Pacific suggested that the Commission should identify the information essential to competitive directory providers. Thus, Pacific claims that it did raise the issue of whether subscriber listings were "essential."

Pacific also claims that the Commission decision in the Donnelley complaint case² provided support for COL 29. The Commission found in that case that "complainants had not carried their burden of proof that differences which existed in access to information had a real and substantial adverse impact on their ability to compete fairly." FOF 4 of the Donnelley decision further stated:

"Independent directory publishers are able to provide their directories without having access to LEC subscriber information databases or obtaining subscriber listings directly from the LEC."

Pacific claims this FOF addresses the issue of whether the subscriber listing information is "essential." ADP filed a one-page reply to all October comments, did not respond to Pacific's proposed FOF, and did not request hearings.

Pacific further cites parties' comments filed in October 1995 in response to an Administrative Law Judge (ALJ) Ruling of September 29, 1995, in which ADP alleged that LECs "bundled" subscriber listing information "with unnecessary or unneeded information." (ADP Comments at 2.) Pacific interprets the quoted phrase to imply that ADP claimed the *other* information obtained from the LECs was "necessary" and "needed" by ADP's members, i.e., it was "essential." While ADP did not further discuss what portion of the subscriber listing information was essential and what was not, Pacific argues that ADP had the opportunity to address this topic.

In its own filed comments on the proposed rules, Pacific stated that, "These proposed rules and findings are included to determine whether factual disputes remain as to these issues. If, as we expect, these rules and findings are contested, then it will be apparent that factual issues do remain and that evidentiary hearings will be necessary." (Pacific Bell's October Comments at 2.) Pacific claims this statement provided ample

² The Donnelley complaint case against Pacific was brought by Reuben H. Donnelley Corporation et al. in 1988. Donnelley, an independent publisher, complained that it did not have adequate access to Pacific's business subscriber information. In D.91-01-016 (39 CPUC2d 209), the Commission denied the complaint.

notice to ADP that it should indicate disagreement and seek evidentiary hearings if ADP disputed Pacific's proposed findings.

ADP filed a reply to Pacific's response on December 20, 1996, disputing Pacific's claims. ADP argues that the only issue noticed by the Commission in Phase II was the adoption of the general rule governing LEC provision of subscriber list information. Whether the provision of that information was an essential service was not at issue, claims ADP, because the determination of the specific fair, nondiscriminatory rates, terms, and conditions of such provision were to be disposed of in further Commission proceedings, as noted in the November 15, 1996 draft ALJ decision regarding directory listings issues in this proceeding.³

ADP argues that certain parties' description of the information to be provided under the proposed rule as "essential" in the May 1995 comments in the instant proceeding did not constitute proper notice that the question of whether LEC provision of subscriber list information is an essential service was an issue to be determined in this proceeding. ADP claims it is the Commission, not the parties, that must provide notice of the issues for disposition and the opportunity to be heard thereon.

(D.94-10-040.)

ADP denies Pacific's claim that the Commission had evidence to support its COL in its Findings and in the earlier Commission Donnelley decision. ADP argues that the Commission limited the findings in the Donnelley case to the specific complaint adjudicated and did not make any determination as to whether the subscriber list information requested by Donnelley was an essential service vis a vis Donnelley, specifically, or the independent directory publishing industry, generally.

³ The language in the ALJ decision regarding subsequent disposition of the rates, terms, and conditions of the provision of LEC directory listings was subsequently adopted by the Commission in its D.97-01-042, dated January 23, 1997.

The Commission opened a separate Order Instituting Investigation (OII) governing the generic question of how subscriber list information should be provided in the future. Thus, ADP contends that the findings in the Donnelley decision have no bearing on determining, after proper notice and opportunity to be heard, the issue of whether LEC provision of subscriber list information is an essential service.

ADP cites the decision of *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1132-33 (1983) *cert. denied*, 464 U.S. 891 (1983) as a basis for determining whether an "essential facility" exists. In that decision, the preliminary test for an essential facility is whether a competitor is unable "practicably or reasonably to duplicate a facility."

ADP claims that the Commission could not have made this determination in this proceeding because it lacked an evidentiary record on this issue, and the essential-facility determination is a fact-laden endeavor. *See, e.g., BellSouth Advertising & Publishing v. Donnelley Information Publishing*, 933 F.2d 953, 961 (11th Cir. 1991).⁴ ADP claims that factual determination goes not just to the duplication of the essential facility, but to a determination of the fair, nondiscriminatory rates, terms, and conditions under which it is supplied to competitors, citing *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Terminal Railroad Association*, 224 U.S. 383 (1911); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (1977).

Discussion

Two related defenses are raised by ADP in support of its Petition. First, ADP claims that there was no proper notice that the Commission intended to determine in Phase II of this proceeding whether LEC subscriber listings are an "essential facility." Second, ADP claims that, as a result of improper notice, the record was not developed to support the contested portion of COL 29.

⁴ In the *BellSouth* case, U S WEST filed an Amicus Motion stating that subscriber listings are an essential facility or bottleneck and that it "would be virtually impossible" for a competing directory publisher to issue a directory without up-to-date listings supplied by LECs.

We agree with ADP that the issue of whether the provision of subscriber listings of the LEC constitute provision of an "essential facility" was not properly noticed as an issue to be resolved in Phase II. The fundamental importance of parties' rights to proper notice has been acknowledged by the United States Supreme Court. In *Lambert v. California*, 355 U.S. 255 (1958), the court stated:

Ingrained in our concept of due process is the requirement of notice. . . . Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.

The scope of the directory-listing issues subject to resolution in Phase II was framed by the proposed rules issued for comment on April 26, 1995, in which the Commission instituted this proceeding. Among those proposed rules was Rule 11H(1) which dealt in broad terms with nondiscriminatory access to LEC subscriber information associated with publishing and telephone directories, subject to PU Code § 2891 and § 2891.1 requirements. We did not, however, specifically call for comments on the issue of whether or not LEC subscriber listings constituted an "essential facility." As noted by ADP, the latter issue goes beyond the limited requirements set forth in Rule 11H(1) to include comprehensive determination of the fair, nondiscriminatory rates, terms, and conditions under which LEC subscriber listings are to be supplied to competitors. We did not make such a comprehensive determination in our Phase II decision. The precise terms of third-party access to LEC subscriber listings, and the pricing of that access, remain to be determined by this Commission. The determination of whether LEC subscriber listings constitute an "essential facility" could have a bearing on what precise terms of access and pricing are ultimately established for the provision of LEC subscriber listings to third parties.

Although both Pacific and ADP made references to certain subscriber information being "essential" or "unneeded" in their Phase II comments, such references were in the context of the parties' discussion of the proposed rule on access

to LEC subscriber information. Parties had no notice, however, that the Commission specifically sought comments as a basis to reach a determination as to whether LEC subscriber listings constituted an "essential facility." As noted by ADP, the preliminary test for an essential facility is whether a competitor is able practically or reasonably to duplicate a facility. Evidence has not been presented in this proceeding to support a finding that this preliminary test is met with respect to the provision of LEC subscriber listings. The fact that independent directory vendors may obtain certain information from alternative sources to produce and publish directories does not necessarily lead to the conclusion that independent vendors can duplicate the directory listings produced by the LECs.

Pacific proposed in its Phase II comments that the Commission adopt as a FOF the assertion that the provision of subscriber listings by the LEC is not an essential service. Pacific's proposal for adoption of this FOF does not constitute proper notice that this assertion had become a designated issue for resolution in Phase II of the proceeding. We agree with ADP that it is the Commission—not individual parties—which frames the scope of issues subject to comment and the timing of resolution of such issues.

Although the Commission incorporated the assertion that providing subscriber listings is not an essential service as a COL, it more properly constitutes a FOF. The assertion was proposed by Pacific as a FOF. Yet, a complete factual record to support such a FOF was not developed in Phase II. Although Pacific presented claims in its Phase II comments that the directory publishing industry was competitive, such unilateral claims made by one party do not constitute a complete record regarding the competitiveness of the directory publishing industry, nor whether LEC directory listings are an "essential facility." A complete record requires that all parties have a notice of opportunity to be heard based on due process. Since there was no proper advance notice by the Commission that the "essential facility" issue was to be resolved in Phase II, parties were not provided a proper opportunity to be heard and present

opposing evidence refuting Pacific's claims regarding directory-publishing-industry competitiveness. Consequently, the record on this issue has not been properly developed.

Contrary to Pacific's claim, we cannot simply rely on the findings reached in D.91-01-016 (the Donnelley complaint case) as a basis to make a generic policy determination in this proceeding that the provision of LEC directory listings is not "essential" to third-party vendors. The findings reached in the Donnelley case were specific to that proceeding, and were not intended to serve as precedent for general rulemaking purposes. We specifically opened the List OII (Investigation (I.) 90-01-033)⁵ to examine questions relating to the provision of LEC subscriber lists on a generic basis. As we stated in D.91-01-016:

"We acknowledge that changes to them [the Pacific tariffs] may be needed to comport to our policies regarding directory listing to the principles of the new regulatory framework as promulgated in D.90-10-091. In particular, we opened I.90-01-033 to affirmatively review our policies in light of the alleged connective changes in the nature of the directory listings market. While we do not prejudge the outcome of that review, we believe it possible that our policies could be changed as a result."
(D.91-01-016, mimeo. at 4.)

Accordingly, we conclude that the proper foundation has not been laid to support the contested portion of COL 29. We therefore shall grant ADP's Petition for Modification and shall delete the contested language from COL 29. We shall provide all parties an opportunity to be heard as to whether the provision of LEC directory listings constitutes an "essential facility" before making a determination of this issue. We direct

⁵ In D.97-01-042, we formally moved the issue of competitive access to telecommunication directory information from I.90-01-033 to the local competition rulemaking and investigation to resolve the related issues which are common to these separate proceedings.

Because I.90-01-033 has been an inactive docket for a number of years, we also expressed our intention to review any remaining issues in I.90-01-033 to determine if they should be reassigned to another proceeding, or otherwise disposed of, and whether to merge the List OII with this proceeding or to close the List OII proceeding.

the assigned ALJ to issue a procedural ruling addressing what further actions may be necessary to develop an adequate record for the Commission to make a determination concerning whether LEC directory listings constitute an "essential facility."

Findings of Fact

1. D.96-02-072 stated in COL 29 that the provision of LEC subscriber listings is not an essential service.
2. COL 29 incorporated language which had been included in Phase II comments by Pacific as a proposed FOF.
3. No notice was provided by the Commission that it intended to make a determination in Phase II as to whether providing LEC subscriber listings constitutes an essential service.
4. Although Pacific unilaterally offered claims in its Phase II comments that the directory publishing industry was competitive, no comprehensive record was developed in Phase II as a basis to determine whether the provision of LEC subscriber listings was an essential service.
5. The findings reached by the Commission in the Donnelley complaint case (D.91-01-016), relating to the provision of LEC directory listings to third-party directory vendors, was not intended to be used as a precedent for future rulemaking purposes.
6. The Commission instituted a generic investigation (I.90-01-033) to review its policies in light of alleged competitive changes in the directory-publishing market.

Conclusions of Law

1. The issue of whether LEC subscriber listings are an "essential facility" should be decided based upon a properly developed factual record.
2. The test for an essential facility includes a determination of whether a competitor is unable practically or reasonably to duplicate a facility.
3. The record underlying D.96-02-072 lacks a proper factual basis upon which to find that LEC subscriber listings do not constitute an essential facility.

4. The portion of COL 29 which determines that provision of LEC subscriber listings is not an essential service should be deleted from D.96-02-072.

5. The Commission should provide due notice and opportunity to be heard on the issue of whether LEC subscriber listings constitute an essential service before rendering a determination on this question in accordance with PU Code § 1701 and Article I, § 7 of the California Constitution.

O R D E R

IT IS ORDERED that:

1. The Petition to Modify Decision (D.) 96-02-072, Conclusion of Law 29, as filed by the Association of Directory Publishers is granted.

2. Conclusion of Law 29 of D.96-02-072 shall be modified to read:

"Access to the LEC's [local exchange carrier] subscriber information database is not an essential service."

3. The assigned Administrative Law Judge is directed to issue to procedural ruling addressing what further action is appropriate to provide parties an opportunity to be heard on the issue of whether the provision of subscriber listings by the LEC is an essential service.

This order is effective today.

Dated May 21, 1997, at Sacramento, California.

P. GREGORY CONLON
President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners