

Decision 11-03-031

March 10, 2011

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Consumer Protection Rules Applicable to All Telecommunications Utilities.
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Rulemaking 00-02-004 (Filed February 3, 2000)
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**ORDER DENYING REHEARING  
OF DECISION (D.) 10-10-034**

**I. INTRODUCTION**

In Decision (D.) 10-10-034, (or "Decision,") this Commission revised Part 4 of General Order (G.O.) 168, *Market Rules to Empower Consumers and to Prevent Fraud – Rules Governing Cramming Complaints*. The adopted rules address the responsibilities and procedures that Billing Telephone Corporations ("BTCs") must follow, including rules that require them to submit quarterly reports with respect to unauthorized charges of Service Providers included on telephone bills prepared by BTCs. As adopted in Rule 11.6 of G.O. 168, Part 4, the decision provided exemptions from the reporting rules for two types of carriers – (a) pre-paid wireless carriers and (b) carriers that provide services only to business and wholesale customers.

Cox California Telecom, LLC (d/b/a Cox Communications) and Cox TMI Wireless, LLC (collectively, "Cox") timely filed an application for rehearing of D.10-10-034. Cox provides services to both business and residential customers. In its rehearing application, Cox argues that we erred in adopting Rule 11.6, and asks for a modification thereof, on the grounds that Rule 11.6 is unfair, discriminatory and inconsistent with the State's pro-competitive policies because it does not extend reporting exemptions to all carriers that provide services to businesses. (Rehrg. App., p. 6.)

Further, Cox contends that the record does not support the Rule 11.6 limitations to types of carriers as opposed to types of services. (Rehrg. App., pp. 5 and 7.) Cox also asks that D.10-10-034 be modified to add a reference to the “Report of Consumer Complaints,” which it says was inadvertently left out.

We have reviewed each and every issue raised in the application for rehearing of D.10-10-034. For the reasons discussed below, we are of the opinion that good cause does not exist for the granting of a rehearing. Therefore, we deny the application for rehearing filed by Cox.

## II. DISCUSSION:

### A. Cox’s allegation of unlawful discrimination has no merit.

Cox argues that the Rule 11.6 reporting exemption should be expanded to apply to any BTC that provides services to businesses or wholesale customers. It argues that carriers such as itself, who provide services to both business and residential customers, are being unreasonably discriminated against without any basis for the “disparate treatment.” (Rehrg. App., p.6.) We find no merit in this argument.

In determining whether an action is discriminatory, we have held: [I]t is not sufficient to merely show that rates, charges, or services, etc. differ. To constitute unlawful discrimination, the treatment must “draw an unfair line or strike an unfair balance” between similarly situated entities, and there must be no rational basis for the different treatment for those similarly situated. (*Application of Pacific Gas and Electric Company for Adoption of its 2006 Energy Resource Recovery Account (ERRA) Forecast Revenue Requirement and for Approval of Its 2006 Ongoing Competition Transition Charge (CTC) Revenue Requirement and Rates (“Order Denying Rehearing of Decision (D.) 05-12-045”)* [D.06-04-041] \_\_\_ Cal.P.U.C.3d \_\_\_, at pp. 5-6 (slip op.))<sup>1</sup>

<sup>1</sup> See also, *Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill IX and Decision 01-09-060 (“Order Modifying and Denying Rehearing of D.02-11-022”)* [Decision 02-12-027] (2002) \_\_\_ Cal.P.U.C.3d \_\_\_, citing

(footnote continued on the next page)

Therefore, to establish unlawful discrimination, Cox must first show that Cox and the exempted carriers are similarly situated, which they are not. The exempted and non-exempted carriers adopt different marketing models. The Cox-type carriers provide services to residential customers in addition to business customers, and often provide billing and collection services for third parties. The exempted carriers, on the other hand, cater to businesses only and tend not to serve residential customers. (See D.10-10-034, at pp. 13, 15 & 17.) Consequently, the first prong of the unlawful discrimination analysis cannot be met, as Cox and the exempted carriers are not similarly situated.

Furthermore, even if they were similarly situated, Cox's unlawful discrimination argument fails because there is a rational basis for not requiring cramming-related reports from those carriers who cater only to business or wholesale customers. Based on the evidence (see discussion, *infra*), the rational basis for different treatment is that the customers of exempted carriers are more sophisticated, and are better able to detect and correct unauthorized billings with their carrier. (See D.10-10-034, at pp. 13, 15 & 17.) The non-exempt carriers, however, deal with a broad range of customers, many of whom are vulnerable to cramming.

Since the exempt and non-exempt carriers are not similarly situated, there is no unlawful discrimination. Even if they were similarly situated, there is a rational basis for treating them differently in relation to their reporting requirements. Accordingly, Cox's discrimination argument has no merit.

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*Griffin v. Superior Court* (2002) 96 Cal.App.4th 757, 775 [“[F]or the prohibition of undue discrimination to apply, the customers must be similarly situated.”]; *Toward Utility Rate Normalization v. Pub. Utilities Com.* (1978) 22 Cal.3d 529, 543-544 [Discrimination between such customers is lawful if there is a rational basis for the different treatment in the Commission's economic regulation.]

**B. Record evidence shows a rational basis for providing a reporting exemption to carriers that offer service only to business and wholesale customers.**

Cox complains that we ignored its comments and contends that the record does not support Rule 11.6's limitations to types of carriers as opposed to types of services. (Rehrg. App., pp.5 & 7.) These arguments have no merit, because the parties' comments in the record on this issue support our determination to provide a reporting exemption to carriers that offer services only to business and wholesale services. The Decision specifically cites to the comments of at least three parties, all of whom support the decision's reporting exemptions. (See D.10-10-034, pp. 13, 15, 17, & 39.)

In their comments, the California Association of Competitive Telecommunications Companies ("CALTEL"), advocated for the reporting exemption, arguing that "CALTEL's members have few if any complaints of unauthorized charges, and customers with billing disputes have the business sophistication to address the dispute directly with their provider," and that including them in the cramming reporting rules was "overkill" that will impose unnecessary expense on the providers with no public benefit. (See CALTEC Comments, filed March 22, 2010, pp. 3-5; see also, D.10-10-034, p. 13.) Cbeyond Communications ("Cbeyond") recommended that we focus our resources on carriers with a history of applying or allowing unauthorized charges on residential and small business customer bills, rather than on carriers that serve larger businesses. (See Cbeyond's Comments, filed March 22, 2010, pp. 1-2; see also, D.10-10-034, p.15) In addition, tw telecom of California, ("tw telecom") emphasized that its business customers have equal bargaining power when entering into these contracts and have appropriate civil law remedies. It argued that we should exempt these carriers from the proposed rules as we did with the in-language rules in another phase of the Commission's consumer protection docket, D.07-07-043. Tw explained that there is no record that business or wholesale customers are the target for cramming abuses or that they are at a disadvantage in bargaining power when seeking wholesale or business

services, and, as a result, an exemption is merited. (tw telecom's Comments, filed March 22, 2010, p. 2; see also, D.10-10-034, p. 17.)

Based on the above, there is a record to support our determination to provide a reporting exemption to carriers that offer service only to business and wholesale customers. Thus, Cox's evidentiary challenge has no merit.

Nor is there merit to Cox's claim that we ignored its comments. We considered the comments filed by all parties, but rejected Cox's recommendation to modify Rule 11.6(b) to exempt types of services rather than types of carriers.

**C. Cox's request to further expand the exemptions to add a reference to the "Report of Consumer Complaints" is denied as it runs counter to Commission precedent and the Decision itself.**

We hereby deny Cox's request to expand the exemptions to "add a reference to the 'Report of Consumer Complaints' such that wireline carriers may obtain an exemption from submitting such a report." (App. Rehr., p.2.) We did not intend to create reporting exemptions for wireline BTC's and their Billing Agents, such as Cox, who remain subject to complaint reporting requirements adopted in D.00-03-020. Cox's assertions (App. Rehr., p.8.) that "the reference to the 'Report of Consumer Complaints' that wireline carriers must file was inadvertently omitted" ignores explicit language in the decision. On this issue, we stated as follows:

For the wireline Billing Telephone Corporations and their Billing Agents, we retain the current complaint reporting requirements adopted in D.00-03-020. As noted by AT&T, these requirements have been in place since 2000, and there is insufficient basis to conclude that they are deficient.

(D.10-10-034, p.37.)

As such, Cox's request contravenes our clear intent in the Decision to maintain the status quo for wireline BTC's and their Billing Agents. Therefore, its request is denied.

### III. CONCLUSION

Based on the discussion above, good cause does not exist that would warrant the granting of a rehearing of D.10-10-034. Therefore, Cox's application for rehearing of D.10-10-034 is hereby denied.

**THEREFORE, IT IS ORDERED** that:

1. Rehearing of D.10-07-038 is hereby denied.
3. This proceeding, R.00-02-004, is hereby closed.

This order is effective today.

Dated March 10, 2011, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

Commissioners