ALJ/MCK/hkr *

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Decision 01-11-062 November 29, 2001

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)

James B. Young, Gregory L. Castle, Attorneys at Law, for Pacific Bell Telephone Company, and Lee Burdick, Attorney at Law, for Cox California Telcom., L.L.C., intervenors.

INTERIM DECISION RELIEVING PACIFIC BELL TELEPHONE COMPANY AND COX CALIFORNIA TELCOM., L.L.C. OF OBLIGATION TO UNDERTAKE ADDITIONAL MEASURES TO RECLAIM TAINTED SAN DIEGO DIRECTORIES

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Introduction and Summary

This decision brings to a close the special phase of this proceeding that began on June 2, 2000, when Commission President Loretta Lynch issued a President's Ruling Granting Motion for a Temporary Restraining Order (TRO Ruling) in this docket. The TRO had been sought by Cox California Telcom., L.L.C. (Cox), which alleged that Pacific Bell Telephone Company (Pacific) had wrongfully resumed the distribution of "tainted" white pages directories for South and East San Diego County. The directories were considered tainted because, as a result of processing errors, they contained the numbers of Cox customers who had requested unlisted or non-published numbers. The TRO Ruling directed Pacific to "cease all deliveries of these directories until further notice by [the Commission,] or until a ruling is issued on Cox's motion for a preliminary injunction, whichever occurs first." (*Mimeo.*, p. 1.)

Cox and Pacific reached a settlement of their dispute on June 8, 2000, so the preliminary injunction hearing was never held. Instead, on June 12, 2000, the Commission heard testimony on the Cox-Pacific plan to reclaim the tainted directories, and then print and distribute new, corrected directories.

For the reasons set forth below, we conclude that the reclamation effort carried out by Pacific and Cox during the Summer of 2000 has apparently achieved as good a result as could reasonably be expected. Further, we agree that based on a survey conducted for Cox and Pacific by Field Research Corporation (Field Research), there is good cause to believe that the number of tainted directories removed from circulation is in fact much higher than the

results of the formal retrieval effort would suggest. Under these circumstances, we agree with Pacific and Cox that little would be gained by ordering them to undertake further retrieval efforts at this time.

In the Proposed Decision (PD) that was mailed to the parties on August 21, 2001, the assigned Administrative Law Judge (ALJ) concluded that there was good cause to believe that during the period before issuance of the TRO Ruling, both Pacific and Cox had failed to meet their respective duties under the Public Utilities Code and relevant Commission decisions, and that a new phase of this proceeding should therefore be opened to consider what penalties, if any, should be imposed on the two carriers.

On September 10, 2001, both Cox and Pacific submitted comments on the PD. Both carriers argue that penalties are inappropriate here, because (1) they have already spent millions of dollars carrying out the reclamation program agreed to in the settlement of June 8, 2000, (2) both have incurred significant additional expenses in defending and settling civil litigation brought on account of the distribution of tainted directories, and (3) opening a penalty phase at this time—nearly 18 months after distribution of the tainted directories—would serve only to reawaken public anxiety about the issue. Although we agree with the ALJ that the conduct of Cox and Pacific during the period before issuance of the TRO Ruling fell short of what it should have been, we have been persuaded by the comments of Cox and Pacific that little purpose would be served in opening a penalty phase at this time. Accordingly, we will not pursue the matter further.

Background

The motions that led to this phase of this proceeding were filed on May 31, 2000, when Cox filed papers seeking both a TRO and preliminary injunction

against Pacific, as well as a request for mediation pursuant to the terms of Cox's interconnection agreement with Pacific.[1] Specifically, Cox sought to enjoin Pacific "from any further delivery of its White Pages directories that Pacific knows contain listings for Cox's customers who have requested that their listings be kept private." Cox alleged not only that it was likely to prevail on the merits, but also that "Cox and its customers will be irreparably harmed if Pacific is permitted to continue to deliver the tainted directories and does not expeditiously print new directories." (Cox TRO Motion, p. 1.)

The declarations attached to Cox's papers set forth an extensive history of the dispute, which arose out of Cox's obligation under its interconnection agreement to transmit listings for all of its customers to Pacific. It is Pacific that prints and distributes the White Pages directory used by all telephone customers in the San Diego area.

According to Cox's declarations, the problem began in August 1999, when new software deployed by Cox began failing to place a "customer privacy designator" on the names of Cox customers who had requested unlisted or non-published listings. Cox apparently did not become aware of this problem until May 4, 2000, when it began receiving calls from San Diego customers who had requested unlisted or non-published numbers but whose names and numbers appeared in the new directories that Pacific was distributing.

Both parties agree that Cox informed Pacific of the problem the next day, May 5, but by then approximately 100,000 of the tainted directories had already been distributed. On May 12, 2000, the problem came to the attention of a Pacific

[1] Cox requested mediation on the issue of whether Pacific's conduct in the San Diego directory matter breached various provisions of the interconnection agreement, which is dated July 25, 1996 and was approved by the Commission in Decision (D.) 96-10-040.

vice president, Cynthia Marshall, who ordered an immediate cessation of any further distribution of the tainted directories.

During the next two and one-half weeks, Cox and Pacific discussed options for handling the problem, including the viability of alternatives to reprinting the directory. Eventually, Pacific pressed Cox to assume all of the costs associated with printing and distributing a corrected directory—which were estimated at $4 to $5 million—but Cox declined to assume this obligation. Finally, Pacific informed Cox that if it did not agree to pay the costs of reprinting and redistribution, Pacific would be obliged to resume distribution of the tainted directories, since its schedule for printing and distributing the many other directories used by its California customers allegedly would not allow the matter to drag on indefinitely.

The issue came to a head on May 31, 2000. That morning, Cox learned from a newspaper reporter that Pacific intended to resume distribution of the tainted directories that very day. When counsel for Cox telephoned counsel for Pacific to inquire if this was true, Pacific's counsel confirmed that this was Pacific's intention.[2] Later in the day on May 31, Cox filed the motion for a TRO and preliminary injunction (and request for mediation) described above. After learning of these motions, the Commission's Chief Administrative Law Judge (ALJ) telephoned senior officials at Pacific and requested that they immediately cease distribution of the tainted directories. Pacific's officials agreed, and asked that they be granted until noon the next day, June 1, to file a response to Cox's

[2] Declaration of Lee Burdick In Support of the Motion of Cox California Telcom., L.L.C. for a Temporary Restraining Order/Preliminary Injunction, dated May 31, 2000, ¶11.

motions. The Chief ALJ agreed to this request.[3]

On June 2, 2000, President Lynch issued the TRO Ruling referred to above. The TRO Ruling ordered Pacific to cease "any further delivery of White Pages directories in the South and East San Diego region that contain the unlisted and non-published numbers of Cox's customers" until further notice, or until issuance of a ruling on Cox's motion for a preliminary injunction. (*Mimeo.*, p.1.) The TRO Ruling also urged both Cox and Pacific to "focus on and mutually work toward the common goals of recovering *all* of the tainted directories that have been disseminated both in print form and electronically and of destroying tainted directories." (*Id.* at 12.)[4]

The June 12 Hearing on the Reclamation and Reprinting Plan

A ruling on Cox's preliminary injunction motion was never issued, because on June 8, 2000, Cox and Pacific agreed to settle their dispute. Pacific and Cox stated that as part of the settlement, they had "agreed on an extensive program to recover and destroy promptly the tainted directories and to correct third-party listings. In addition, the agreement includes a plan for an accelerated reprinting and republication of new, corrected directories."[5]

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[3] In its June 1 response, Pacific reiterated that the problem with transferring customer data originated with Cox, and noted that other competitive local exchange carriers (CLECs) had not encountered similar difficulties. Pacific also argued that Cox's delay and ultimate refusal to pay the cost of printing and distributing corrected directories had prejudiced other customers of Pacific who were waiting for new directories in their regions. However, Pacific did not dispute that on May 31st, it resumed distribution of the tainted directories that had been suspended on May 12th.

[4] At its meeting of June 8, 2000, the Commission issued D.00-06-042, which ratified and confirmed the TRO Ruling.

[5] Joint Stipulation of Cox California Telcom., L.L.C. and Pacific Bell Telephone Company Agreeing to Continuation of Temporary Restraining Order and Withdrawing

Footnote continued on next page

On June 12, 2000, a hearing that had originally been scheduled to consider Cox's preliminary injunction motion was instead devoted to receiving testimony on the details of the reclamation and reprinting plan. Under the plan (the actual implementation of which is described more fully below), Cox and Pacific proposed to send customers a letter along with a special bag into which the customers could insert the tainted directory, which would then be picked up. Cox and Pacific also proposed to make several follow-up visits to ensure that they could retrieve as many of the tainted directories as possible, followed by a distribution of new, corrected directories.

The hearing witnesses could not state precisely when the corrected directories would be available, because Pacific was still trying to purchase on the spot market the large quantity of paper needed to reprint the directories. Pacific witness Henry Arnold also testified that in a routine redistribution situation—which this obviously was not—a retrieval rate of 30 to 50% could be expected for old directories. (Tr. 7584.)

At the conclusion of the hearing, the assigned ALJ instructed Pacific and Cox to file weekly status reports on the progress of their retrieval and redistribution plan. The first of these reports was filed on June 19, 2000.

Cox's Offer to Customers Whose Listings Were Erroneously Published

At about the same time the Commission was hearing testimony on the joint plan for the reclamation and reprinting of directories, Cox filed its Advice Letter No. 50, which (1) described the special measures Cox was prepared to offer customers whose numbers had been inadvertently published, and (2) sought

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Cox's Motions for A Preliminary Injunction and for Mediation, filed June 8, 2000, page 3.

permission for Cox to deviate from its tariffs for the purpose of making these offers.

The advice letter proposed two basic options for customers whose numbers had been erroneously published. For those customers who wanted to *change* to a new unlisted telephone number, Cox proposed to undertake this change without charge, and to give such customers 120 prepaid minutes to contact people who needed to know about the change. For customers who wanted to *retain* their old number, Cox proposed to offer a special package of free services until April 30, 2001, approximately one year after the first tainted directories had been distributed. These services—all of which were offered for the purpose of helping the customer screen out unwanted calls—included Caller ID, Call Waiting ID and Selective Call Acceptance and Rejection.

In addition to these two basic options, Cox proposed to offer "escalation procedures" for customers—such as judges and correctional officers—who had reasonable concerns about their safety as a result of the distribution of tainted directories. Cox divided these customers into four levels and sought the advice of a panel of law enforcement, domestic violence and privacy experts as to the measures appropriate for each level; it then offered to pay the customers an amount designed to cover (or help defray) the cost of the measures. The highest level included customers "who have received particular, directed threats from a specific person in the past," while the lowest level included persons "who may have security concerns, but not as a result of occupational choice." The amount Cox was prepared to offer each level of customer was filed under seal with the Telecommunications Division.

Efforts to Retrieve the Tainted Directories and the Evolution of the Survey Proposal

By mid-August of 2000, it was evident from the weekly status reports filed

by Pacific and Cox that the directory retrieval efforts had not been as successful as the two companies had hoped. Even though the retrieval program had been well publicized and Pacific had completed distribution of the new, reprinted directories by August 16, the reports showed that only 28% of the tainted directories had been retrieved.

During an off-the-record meeting with Assigned Commissioner Bilas on August 18, 2000, representatives of Cox and Pacific acknowledged their disappointment with the 28% figure. However, they stated that there was anecdotal evidence to suggest that the percentage of tainted directories that had actually been removed from circulation was significantly higher than 28%. They also sought permission to submit a survey that, they believed, would confirm this anecdotal evidence.

On August 30, 2000, Commissioner Bilas sent a letter to Pacific and Cox stating that he was open to the idea of a survey, but that he could not give his approval without receiving (1) details as to the retrieval program Cox and Pacific had already implemented, (2) a description of the additional efforts Pacific and Cox might undertake to increase the retrieval rate, (3) a description of the proposed survey and the identity of the firm that would conduct it, and (4) the proposed sample size for the survey.

On September 8, 2000, Cox and Pacific filed a formal response to Commissioner Bilas's August 30 letter.[6] The September 8 Response stated that Cox and Pacific intended to hire Field Research to conduct the proposed survey, for which the proposed telephone script and overall plan were attached. Pacific

[6] *See*, Joint Response of Cox California Telcom., L.L.C. and Pacific Bell Telephone Company to Commissioner Bilas's August 30, 2000 Letter, filed September 8, 2000 (September 8 Response).

and Cox also indicated that at least 900 people would be sampled. (September 8 Response, pp. 8-9.)

As requested, the September 8 Response also included a detailed description of Cox's and Pacific's efforts to retrieve the tainted directories and to distribute corrected ones, broken down separately for residential customers, "general business" users and "large business" users. (*Id.* at 2-6.) The description indicated that these efforts had been extensive, especially for residential customers.

For residential customers, Pacific's distribution vendor had begun by visiting each home that had received a tainted directory and leaving a copy of a letter about the directory problem, along with a specially-printed envelope into which the customer could insert the tainted directory. The vendor then returned 3-5 days later to retrieve the tainted directories that had been put in the envelopes. 283,900 such visits were made by the vendor, followed by another 283,900 visits to retrieve the pickup bags.[7]

The September 8 Response also evaluated three additional reclamation measures that might be implemented—undertaking door-to-door solicitation, offering a monetary reward for returning directories, and sending a first-class letter with a prepaid return envelope for return of the directory—and concluded that none of these measures should be undertaken. First, Cox and Pacific asserted that the measures were not likely to increase the retrieval rate significantly. In addition, Pacific and Cox argued that each measure was likely to raise one or more special problems, such as intruding unacceptably on customer

[7] At about 88,000 of these residences—those that did not respond to the first letter—a second letter was left, along with another pickup bag. Both the first and second vendor visits occurred before the distribution of the corrected directories.

privacy, introducing problems of equity, or unnecessarily reawakening customer anxiety about the tainted directories. (*Id.* at 9-14.)

On September 27, 2000, Commissioner Bilas sent a letter to Cox and Pacific making a few suggestions for revising the telephone survey script, and directing that the raw survey results should be made available to the Commission. Otherwise, however, the September 27 letter approved the survey proposal. Commissioner Bilas did not order Pacific and Cox to undertake any additional retrieval efforts, but stated that the Commission might still require additional reclamation efforts after reviewing the survey results. Upon receiving the September 27 letter, Pacific and Cox directed Field Research to proceed with the survey immediately.

The Results of the Field Research Survey

On November 20, 2000, Pacific and Cox filed the results of the Field Research survey, along with their last weekly status report.[8] The survey was restricted to residential customers, since 338, 244 of the total of 454,000 tainted directories (*i.e.*, about 74.5%) had been distributed to residences. The survey results were based on a sample of 1269 households with listed telephone numbers, of which 826 had *not* left their tainted directory out for pickup during the formal retrieval program.

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[8] On the same day the survey results were filed, the ALJ issued a ruling relieving Cox and Pacific of the obligation to file further status reports on the retrieval effort. In his ruling, the ALJ noted that the survey results were expected to be available "soon," and that the percentage of directories being retrieved had not increased significantly since August. *See,* Administrative Law Judge's Ruling Relieving Pacific Bell Telephone Company and Cox California Telcom, L.L.C. of the Requirement of Filing Weekly Status Reports Concerning Their Reclamation and Reprinting Efforts for San Diego Directories, and Unsealing Pages from the Transcript of the June 12, 2000 Hearing, issued November 20, 2000.

Given the sample size, the survey results are considered accurate with a 95% level of confidence, which is a generally accepted standard for such surveys. The survey results indicate that seventy-three per cent (73%) of the tainted directories distributed to residential customers have been taken out of circulation, as a result of either (1) self-help by the survey respondents, (2) the formal retrieval efforts of Pacific and Cox, or (3) because the respondent cannot now locate the tainted directory. This means that of the 338,244 directories distributed to residential customers, about 246,918 have apparently been taken out of circulation, and about 91,326 remain in circulation.

In the cover letter accompanying the survey results, Cox and Pacific argue that based on the 73% out-of-circulation rate, the Commission should not order them to undertake any additional retrieval efforts:

> "[T]aken in [their] entirety, the efforts the [c]ompanies have undertaken to respond to the concerns of customers impacted by the inadvertent publication of their listing data in certain San Diego telephone directories, to retrieve the tainted directories, and to educate the general public about this matter have addressed most, if not all, overriding concerns for the safety and privacy of the impacted customers. The companies believe that, given the results of these efforts, it is neither efficacious, necessary, nor in the public interest for the Commission to order further directory retrieval efforts."

Cox and Pacific support this argument with a numerical analysis based on the results of the Field Research survey, an analysis that they also presented to Commissioner Bilas during a briefing on November 28, 2000. In the briefing, Pacific and Cox stated that from the sample chosen for the Field Research survey, only 18.4% of the residences that were telephoned were reached, willing to be interviewed, and said they had *not* returned the tainted directory to Pacific. Since the total number of tainted residential directories is 338,244, this suggests that the

total number of unreturned, tainted directories that might be recovered through a phone contact similar to the Field Research survey would not exceed 62,237 (*i.e.*, 18.4% of 338,244).

However, since only 35.8% of those interviewed by Field Research stated that they still had the tainted directory, this means that the maximum number of tainted directories that might actually be recovered through a second telephone contact is 22,281 (*i.e.*, 62,237 x 35.8% = 22,281). Further, while 87% of those interviewed by Field Research in October 2000 said they were willing to return the tainted directory, only 64% of this number actually put the directory out for pickup. Thus, of the 22,281 additional directories that might theoretically be retrieved, Field Research's experience suggests that only about 12,400 actually would be (*i.e.*, 22,281 x 87% x 64% = 12,406). This number, Pacific and Cox point out, represents only 4.6% of the 270,139 directories distributed to residences that were not reclaimed through the formal retrieval program, and only 3.7% of *all* the tainted directories distributed to residences.[9]

Discussion

Based on the estimate given by Cox and Pacific of how many additional directories might be retrieved through a second telephone contact, we agree that it does not make sense to order such a contact. As Pacific and Cox pointed out in their September 8 Response, awareness of the tainted directories appears to have faded as an issue for San Diego residents. Thus, any additional retrieval

[9] The percentages and numbers used in this paragraph were taken from an information sheet used by Pacific during the November 28, 2000 briefing for Commissioner Bilas. On February 8, 2001, counsel for Pacific sent a copy of this information sheet (along with a cover letter) to the assigned ALJ and Commissioner Bilas's telecommunications advisor.

measures that we ordered might serve only to reawaken the issue, and to compromise the privacy of Cox customers whose listings were erroneously included in the tainted directories. In view of the meager number of additional directories that are likely to be retrieved through a second telephone contact, we agree that it is not worth running this risk.

Moreover, as to other possible retrieval measures discussed in the September 8 Response—door-to-door solicitation, making direct payments to those who return directories, and sending out a prepaid return envelope to *all* those who received tainted directories—we agree that none of these measures are justified, either. There can be little doubt, for example, that door-to-door solicitation would be highly invasive of customers' privacy, and might provoke a hostile response in some cases. In view of these disadvantages, we agree that it is very doubtful whether door-to-door solicitation would yield a significant number of additional directories, and thus we agree with Cox and Pacific that this measure should not be undertaken.

We also agree that a program of making payments to customers who return their tainted directories should not be adopted. As the September 8 Response points out, making such payments would raise serious issues of equity, since payments would "only serve to reward customers who chose not to act [earlier] out of a sense of civic responsibility." (*Id.* at 12.) In addition, it is questionable whether a payment program would lead to the retrieval of significantly more directories, since the public was told during the reclamation efforts in the summer of 2000 that a charitable contribution would be made for each directory that was returned. (*Id.*)

Finally, we agree with Cox and Pacific that it would not be efficacious to send an explanatory letter and prepaid envelope for return of the directory to all customers who had received tainted directories. As the September 8 Response

puts it, "if users had not been motivated to return the tainted directories after two or three pick-up bags were hand-delivered in previous reclamation efforts, it is doubtful they would find it any more appealing to take the time to return the directory by mail." (*Id.* at 13.)

Our comfort level with these conclusions is increased by the fact that—although a significant number of tainted directories remain in circulation—Cox has been extremely successful in contacting its affected customers and resolving the concerns of most of them. In the November 20, 2000 cover letter that accompanied the survey results, Cox noted that it has been able to contact 10,778 (or about 94%) of the 11,478 customers whose listing information was improperly published. According to Cox, 71% of these customers have selected one of the offerings that we approved in Resolution T-16432, while most of the remaining customers "have chosen to voluntarily turn down Cox's offers as unnecessary." (November 20 cover letter, p. 3.)[10]

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[10] More recently, Cox has stated that 3082 customers, or nearly 27% of those whose listing information was erroneously published, declined as unnecessary the two basic options set forth in Advice Letter No. 50. The "escalation procedures" set forth in Advice Letter No. 50 for persons with reasonable concerns about their safety were requested by 206 customers. Of this 206, seventy-four (74) subsequently rejected the escalated offerings and relied on their status as plaintiffs in one of the class actions filed as a result of distribution of the tainted directories. *See* May 24, 2001 letter of Lee Burdick to ALJ Kirk McKenzie.

On April 16, 2001, Cox filed its Advice Letter No. 75, which requested that the Commission extend the deadline for the basic options (but not the escalation procedures) approved in Resolution T-16432 for customers whose listing information was inadvertently published. Advice Letter No. 75 notes, among other things, that an extension of the deadline is needed to effectuate the settlement terms approved in certain class actions brought on account of the tainted directories. The class actions, which were brought in San Diego County Superior Court, were entitled *Valdez, et al.* v. *Cox California Telcom., L.L.C., et al.* (Case No. GIC755582) and *Wilson, et al.* v. *Cox Communications, et al.* (Case No. G10740090). Eventually, the *Wilson* plaintiffs agreed to

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Little Purpose Would Be Served by Imposing Penalties on Cox and Pacific at This Time

In the PD that was mailed to the parties on August 21, 2001, the assigned ALJ concluded that based on the declarations submitted by Cox and Pacific in connection with the TRO motion, it was appropriate to open a new phase of this proceeding to determine whether any penalties should be imposed on the two carriers.

Although he noted that neither Cox nor Pacific had yet had an opportunity to present any defenses (because of the settlement of June 8, 2000), the ALJ pointed out that the declarations suggested several violations of law had occurred. In Pacific's case, the ALJ concluded that the decision to resume distribution of the tainted directories on May 31, 2000 appeared to violate Pacific's duties under Sections 2891.1(a) and 451 of the Public Utilities Code, as well as several Commission decisions. Section 2891.1(a) provides that "a telephone corporation selling or licensing lists of residential subscribers shall not include the telephone number of any subscriber assigned an unlisted or unpublished access number." Section 451 requires public utilities to provide "such adequate, efficient, just and reasonable service" as is necessary to promote the "safety, health, comfort and convenience" of the utility's customers and the public. The PD concluded that the violation of § 2891.1(a) appeared clear-cut, and that there had been an apparent violation of § 451 because the decision to

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become part of the *Valdez* class. On March 30, 2001, Judge J. Richard Haden approved a settlement in the *Valdez* class action, and on May 29, 2001, that settlement became final.

On September 6, 2001, the Commission issued Resolution T-16570, which granted Cox the authority sought in Advice Letter No. 75. Under Resolution T-16570, Cox is authorized to continue offering affected customers the basic options until May 31, 2002.

resume distribution on May 31 imperiled the safety of law enforcement personnel, judges and other persons who had requested unlisted numbers.

As for Commission decisions, the PD pointed out that under D.92860, 5 CPUC2d 745 (1981), all residential telephone customers who pay the appropriate fee are entitled to "nonpublished" (which includes unlisted) service. Moreover, under D.96-10-066, 68 CPUC2d 524, 673 (1996), both incumbent local exchange carriers (ILECs) such as Pacific and CLECs such as Cox are required to provide their customers with a "free white pages telephone directory." The PD concluded that under these decisions, Pacific was obliged to omit from the directory it provided to Cox customers (pursuant to its interconnection agreement with Cox) the names of those customers who had requested unlisted or nonpublished service. The PD also concluded that under Section 2107 of the Public Utilities Code, the Commission was authorized to impose fines on Pacific for the apparent violations of these Commission decisions.

In Cox's case, the analysis was less complex. The PD concluded that because of Cox's apparent negligence in transmitting customer listing data to Pacific, and because of Cox's failure to discover these errors for nearly nine months, it was appropriate to consider whether fines should be imposed pursuant to § 2107 on the ground that Cox had "neglect[ed] to comply" with a relevant order, decision, rule or requirement of the Commission.

In their September 10, 2001 comments on the PD, both Pacific and Cox argue strongly that no penalties should be imposed on account of their actions regarding the tainted directories. Pacific bases its argument largely on legal analysis. With respect to § 2891.1(a), Pacific maintains that the provision is inapplicable because (1) in resuming distribution of the tainted directories, Pacific was not engaged in the sale or licensing of residential subscriber lists; and (2) in any event, legislative history shows that the requirements of § 2891.1(a) were

intended to apply only to lists of the ILEC's *own* residential subscribers. With respect to § 451, Pacific argues that no violation has occurred because § 451 incorporates a "reasonableness" standard, and the record shows that Pacific reasonably balanced the competing factors it was required to consider when it made the decision on May 31 to resume distribution. (Pacific Comments, pp. 6-13.)

Unlike Pacific, Cox bases its arguments against a penalty phase on policy grounds. In addition to pointing out that it is not aware of any customers who "suffered any physical harm to their person or property as a result of the erroneous publication," Cox states:

> "Regulatory penalties generally serve to punish past behavior, deter future behavior or both. In this case, [Cox and Pacific] have been punished enough as a result of the extraordinary business costs associated with the inadvertent publication of Cox's customers' private directory listings. The direct costs Cox has incurred as a result of this event alone exceed $13 million. Furthermore, there is no need for the Commission to act to deter a similar event from happening in the future. Since the inadvertent publication of the private listings, two new White Pages directories have been published for the East and South San Diego counties, neither of which contained private listings . . .
>
> "In addition, the public interest demands that no penalty phase be opened in this proceeding. The [PD] clearly recognizes that any action that would increase public awareness of the issue that tainted directories were circulated (and that some may remain in circulation) could only fuel the dying embers of the safety concerns over these issues. A penalty phase, which will be highly publicized, could only serve to reignite the safety concerns of the affected customers.
>
> "Finally, because the erroneous publication of the listings was the result of an effort to establish automated processes for the passing of competitively sensitive information from a competitive carrier to an

> incumbent carrier, regulatory penalties would only serve to penalize competition." (Cox Comments, pp. 1-2.)

Although we do not agree as a general matter with Pacific's constricted interpretations of §§ 2891.1(a) and 451,[11] there is no need to reach the detailed legal issues that Pacific raises. The reason for this is that we have been persuaded by the argument that a penalty phase in this case would be both unnecessary and unwise. There can be little doubt, for example, that the $13 million in costs Cox claims to have incurred as a result of the tainted directories represents as substantial a deterrent as any fines we would be likely to impose under § 2107. While Pacific's costs in dealing with the tainted directory problem have been smaller than Cox's (about $2 million), these costs have still been substantial enough to give Pacific an incentive not to repeat the kind of heavy-handed, ultimatum-based conduct that characterized its decision to resume distribution on the morning of May 31.[12]

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[11] In particular, we do not agree with the suggestion in Pacific's comments that in a situation where a utility is required to balance competing factors, we should uphold the utility's decision under § 451 unless it is plainly unreasonable. (Pacific Comments, pp. 10-11.) As the California Supreme Court noted in *San Diego Gas & Electric Co.* v. *Superior Court (Covalt),* 13 Cal. 4th 893 (1996), under § 451 "the commission has broad authority to determine whether the service or equipment of any public utility poses any danger to the health or safety of the public, and if so, to prescribe corrective measures and order them into effect." (13 Cal. 4th at 923-24.) After noting the Commission's broad powers under § 701 of the Code to do "all things . . . which are necessary and convenient" to "supervise and regulate" public utilities, the Court added that "the commission has *comprehensive jurisdiction* over questions of public health and safety arising from utility operations." (*Id.* at 924; emphasis added.) The case cited by Pacific, *Victor* v. *Pacific Lighting Corp.,* D.88-01-038, 27 CPUC2d 306 (1988), is not to the contrary.

[12] In its September 10 comments on the PD, Pacific gave the following description of its costs:

> "Pacific has spent a substantial amount of money on retrieval, destruction,

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In addition to arguing that the costs of the directory retrieval effort and related litigation have punished it enough, Cox notes that the parties have taken steps to reduce the chance that such mishaps will occur in the future, and to increase the likelihood that any future problems will be dealt with promptly. On these questions, Cox states:

> "The companies have carefully worked out their processes and verification procedures such that listing information can be exchanged with an assurance of accuracy regarding privacy indicators. Moreover, the companies have been working in this context and in others . . . to better establish rapid escalation procedures for customer-affecting events. While the early stages of this case do not exemplify a quick consensus as to how to respond to the listings publication problem, the companies have worked together to improve those communications and continue to

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> republication and redistribution of the tainted directories and for follow-up surveys to guage the effectiveness of the process. Pacific has also made a number of charitable contributions, in conjunction with the retrieval and redistribution process. In addition, Pacific [has] been subjected to multiple class action lawsuits related to distribution of the tainted directories. Attorneys' fees and costs to defend against these lawsuits have been considerable. Likewise, Pacific must pay settlement costs associated with some of the lawsuits. Pacific has also suffered financial losses resulting from the delay in directory distribution. For example, Pacific has paid significant sums in offsets to advertisers for not distributing directories on the projected May 2000 distribution date. Furthermore, Pacific is subject to at least one lawsuit brought by an advertiser dissatisfied with the distribution delay and will have to pay the costs of defending or settling that suit. All told, Pacific is facing a financial 'penalty' of several millions dollars, for a cascade of events initiated by another telephone provider's computer glitch." (Pacific Comments, pp. 14-15.)

In a November 13, 2001 follow-up letter to the assigned ALJ, counsel for Pacific states that its "net costs incurred . . . are in excess of $2 [million], with the major costs attributable to further efforts to reclaim more books and payments to advertisers for delays in distributing directories."

> cooperate to ensure rapid resolution of any future issues before they become customer affecting events." (Cox Comments, p. 8.)

We also think there is merit in Cox's argument that a penalty phase might have the perverse effect of reawakening public anxiety about the tainted directory problem. As noted above, the results of the Field Research survey indicate that of the tainted directories distributed to residences, 27% may remain in circulation. Under these circumstances, it is difficult to disagree with the following assertion in Cox's comments:

> "History has shown that the press highly publicizes ALJ rulings merely proposing penalties[,] without regard to whether the penalties are ultimately adopted by the Commission. Such publicity of a penalty phase in this case could stand only to bring the issue of the erroneous directory listings . . . back to the public eye. Cox's customers stand to be further harmed as a result of the attendant publicity." (*Id.* at 9; footnote omitted.)

Our decision not to pursue penalties here should not be taken as an indication that we approve of Pacific's or Cox's handling of the directory problem prior to the request of the Chief ALJ on the afternoon of May 31, 2000 that distribution be suspended. Despite Pacific's efforts to argue in its comments that its decision to resume distribution represented a reasonable weighing of all the circumstances, it is difficult to escape the impression that this decision—which represented a 180 degree turnaround from Pacific's May 12 decision to suspend distribution—was motivated principally by financial concerns. As for Cox, it claimed never to be satisfied with the cost estimates it received from Pacific for reprinting and redistributing the directories, even though these estimates stayed within a fairly narrow range throughout the two companies' discussions in May 2000. Cox is surely understating the case when it observes in its comments that "the early stages of this case [did] not exemplify a quick consensus as to how to respond to the listings publication problem." (*Id.* at 8.)

Although one can certainly fault their conduct prior to the afternoon of May 31, Cox and Pacific have apparently handled the directory problem well since then. Their efforts to publicize the problem, retrieve the tainted directories, distribute new directories, and measure the success of their retrieval efforts appear to have been conducted professionally and skillfully. This good track record, along with the more than $15 million they claim to have spent, their representation that mechanisms are now in place to deal promptly with any future "customer-affecting events," and the likelihood that a penalty phase would serve to reawaken public anxiety, have persuaded us that it would not be appropriate to impose penalties on Cox and Pacific in this case.

Comments on Proposed Decision

The PD of ALJ McKenzie in this matter was mailed to the parties on August 21, 2001 in accordance with Pub. Util. Code § 311(d) and Rule 77.1 of the Rules of Practice and Procedure. Comments concerning the PD were filed by both Cox and Pacific on September 10, 2001. Changes reflecting these comments have been made at several points in this decision, especially in the preceding section.

Findings of Fact

1. In early May of 2000, Pacific distributed white pages directories for South and East San Diego County that inadvertently contained listings for Cox customers who had requested unlisted or non-published numbers. These directories have come to be known as "tainted" directories.

2. The tainted directories contained listings for unlisted and non-published numbers because, beginning in August 1999, the software used by Cox to transmit white page listings to Pacific sometimes failed to place a "customer privacy designator" next to the names of Cox customers who had requested unlisted or non-published numbers.

3. According to Cox, it first became aware of the problem on May 4, 2000, when some Cox customers in San Diego who had requested unlisted or non-published numbers began complaining to Cox that the white pages directories they had just received contained listings for them.

4. Cox first informed Pacific of the tainted directory problem on May 5, 2000.

5. Between May 5 and May 12, 2000, personnel at Cox and Pacific discussed how to deal with the tainted directory problem.

6. On May 12, 2000, the tainted directory problem came to the attention of Pacific vice president Cynthia Marshall, who ordered that distribution of the tainted directories should stop immediately.

7. Between May 12 and May 31, 2000, Cox and Pacific continued to negotiate over how to deal with the tainted directory problem.

8. During these negotiations, Pacific took the position that Cox should pay for all the costs of reprinting and redistributing a new white pages directory to take the place of the tainted directory, and that if Cox would not agree to do so, Pacific would have to resume distribution of the tainted directories, because the printing of new white pages directories for other areas of California could not be held up any longer.

9. By the close of business on May 30, 2000, Cox had not agreed to pay all of the costs of reprinting and redistributing a new, corrected directory to take the place of the tainted directories.

10. On the morning of May 31, 2000, counsel for Pacific confirmed to counsel for Cox that Pacific intended to resume distribution of the tainted directories later that day.

11. Distribution of the tainted directories did resume during the morning of May 31, 2000.

12. At about 3:45 p.m. on May 31, 2000, Cox filed with the Commission a

motion seeking a preliminary injunction and an order temporarily restraining Pacific from continuing to distribute the tainted directories, as well as a motion requesting mediation of the directory dispute pursuant to Cox's interconnection agreement with Pacific.

13. At about 4:15 p.m. on May 31, 2000, the Chief ALJ telephoned senior officials of Pacific to request that they cease distribution of the tainted directories, pending a ruling on the TRO motion. The Pacific officials agreed, and the Chief ALJ in turn agreed that Pacific could have until noon on June 1, 2000, to file papers responding to Cox's two motions.

14. On June 1, 2000, Pacific filed a response to Cox's motion for a TRO. The response did not dispute the chronology of events set forth in Findings of Fact (FOFs) 1-11.

15. On June 2, 2000, President Lynch issued a President's Ruling Granting Motion for a Temporary Restraining Order (TRO Ruling).

16. Among other things, the TRO Ruling ordered Pacific to cease distribution of the tainted directories until further notice, or until a ruling was issued on Cox's motion for a preliminary injunction. The hearing on the preliminary injunction motion was set for June 12, 2000.

17. On June 8, 2000, Cox and Pacific informed the Commission that they had reached a settlement of their dispute, and filed a stipulation in this docket reflecting the settlement.

18. On June 12, 2000, a hearing was held to receive evidence concerning the steps that Pacific and Cox intended to take to retrieve the tainted directories and to print and distribute new, corrected white page directories for South and East San Diego County.

19. For residential customers, Cox and Pacific proposed to send each customer a letter about the tainted directory problem, along with a special envelope into

which the customer could place the tainted directory for pickup. Cox and Pacific also proposed follow-up visits to the homes of residential customers so that as many of the tainted directories could be retrieved as possible prior to the distribution of new, corrected directories.

20. On June 19, 2000, Pacific and Cox filed the first of a series of weekly status reports summarizing the steps they had taken in the previous week to retrieve the tainted directories and to distribute new, corrected directories.

21. On June 21, 2000, Cox filed Advice Letter No. 50-A, which together with Advice Letter No. 50, set forth two basic option packages for Cox's customers whose listings had inadvertently appeared in the tainted directories. In addition to these two basic packages, Cox proposed to offer "escalation measures" to customers (such as judges and law enforcement officials) who had reasonable concerns about their safety as a result of the inadvertent publication of their unlisted or non-published numbers in the tainted directories.

22. As part of their program to retrieve the tainted directories and distribute new, corrected directories, Pacific and Cox caused to be destroyed, all copies of the tainted directories that they either had on hand or had retrieved.

23. By mid-August of 2000, only 28% of the tainted directories had been retrieved through the program described at the June 12 hearing, even though the Pacific-Cox retrieval plan had been well-publicized, and the distribution of new, corrected directories had been completed.

24. On August 18, 2000, Pacific and Cox requested permission from Assigned Commissioner Bilas to conduct a survey that the two companies hoped would demonstrate that the actual percentage of tainted directories taken out of circulation by customers was significantly higher than 28%.

25. On September 8, 2000, Pacific and Cox submitted a formal proposal for a survey along the lines described on August 18. The survey was to be conducted

by Field Research. Cox and Pacific also proposed that pending receipt of the survey results, they should not be required to undertake additional measures to retrieve more tainted directories.

26. On September 27, 2000, Assigned Commissioner Bilas sent Cox and Pacific a letter approving their survey proposal with minor modifications, and agreeing that until the survey results had been reviewed, Pacific and Cox should not be required to undertake additional measures to retrieve more tainted directories.

27. The survey proposed by Pacific and Cox was conducted by Field Research during October of 2000.

28. On October 19, 2000, the Commission issued Resolution T-16432, which approved with modifications the proposals in Cox Advice Letter Nos. 50 and 50-A.

29. On November 20, 2000, Cox and Pacific submitted the results of the Field Research survey along with their final weekly status report.

30. Based upon a sampling size allowing for a 95% level of confidence, the survey results indicated that of the 338,244 tainted directories distributed to residential customers, 73% had been removed from circulation as a result of either the formal retrieval efforts of Cox and Pacific, self-help by survey respondents, or the inability of the survey respondents to locate their copies of the tainted directory.

31. Based on the results of the Field Research survey, it is unlikely that the number of additional tainted directories that would be recovered through a telephone contact similar to the survey would exceed 12,400. This number represents 3.7% of the total number of tainted directories distributed to residences.

32. On November 20, 2000, the assigned ALJ issued a ruling that, among other things, relieved Cox and Pacific of the obligation to continue filing weekly status

reports about their efforts to retrieve tainted directories.

33. Awareness of the tainted directory issue has faded for San Diego residents, and ordering additional retrieval measures at this time might serve only to reawaken public anxiety about the issue.

34. If the Commission were to order Pacific and Cox to go door-to-door in an attempt to retrieve additional tainted directories, it is likely that the personnel doing this work would encounter a hostile response in some cases.

35. If the Commission were to order Pacific and Cox to make payments to customers who agreed to return their tainted directories, it is unlikely that such a new program would lead to the retrieval of significantly more directories, since the public was told during the retrieval efforts in the summer of 2000 that a charitable contribution would be made for each directory returned.

36. If the Commission were to order Cox and Pacific to send all customers an explanatory letter and prepaid envelope for return of the tainted directory, it is unlikely that such a new program would lead to the retrieval of significantly more directories, since customers who were not motivated to return tainted directories by using the special pickup bags distributed to homes during the summer of 2000 would also be unlikely to take the time to return the tainted directory by mail.

37. Cox has been able to contact 10,778 of the customers who had requested unlisted or non-published numbers and whose listings appeared in the tainted directory, which represents 94% of the total number of customers whose listings were inadvertently published.

38. Cox states that of the 10,778 affected customers, 71% of them accepted one of the special offerings approved in Resolution T-16432.

39. Cox states that of the 10,778 affected customers, 3082 (or nearly 27%) declined as unnecessary any of the special offerings approved in Resolution

T-16432.

40. Cox states that of the 10,778 affected customers, 132 accepted one of the special escalated offerings approved in Resolution T-16432 for customers with reasonable concerns about their safety as a result of the inadvertent publication of their listing information.

41. On April 17, 2001, Cox filed its Advice Letter No. 75, which requested an extension of the time authorized in Resolution T-16432 for deviation by Cox from its tariffs, so that the basic option packages approved in Resolution T-16432 (but not the escalation procedures) could be included in the settlement of a class action pending against Cox.

42. Cox states that it has spent over $13 million in carrying out its obligations under the program it agreed to with Pacific for retrieving the tainted directories and distributing new, corrected directories, and in defending and settling related litigation.

43. Cox states that it has agreed with Pacific on measures to be implemented promptly in the future in the event of a mishap that could affect customers like that described in FOFs 1-2.

44. Pacific states that it has spent over $2 million in carrying out its obligations under the program it agreed to with Cox for retrieving the tainted directories and distributing new, corrected directories, and in defending and settling related litigation.

Conclusions of Law

1. If Pacific and Cox were ordered to make payments to customers who agreed to return their tainted directories now, such an order would raise serious questions of equity, in view of the fact that customers who returned their tainted directories during the summer of 2000 did not receive such payments.

2. In view of Field Research's conclusion that 73% of the tainted directories

distributed to residences have been removed from circulation, and the likelihood that ordering additional retrieval measures would not result in the recovery of significantly more tainted directories for the reasons set forth in FOFs 34-36, Pacific and Cox should not be ordered to undertake additional retrieval measures at this time.

3. The $15 million that Cox and Pacific have spent in carrying out their respective obligations under their agreement to retrieve the tainted directories and distribute new, corrected directories, and in defending and settling related litigation, has served to deter future conduct that could adversely affect customer privacy and safety as effectively as any fines the Commission might impose on Pacific and/or Cox pursuant to Section 2107 of the Public Utilities Code.

4. In view of the deterrent effect described in Conclusion of Law 3, it would not be appropriate to commence a new proceeding to determine whether penalties should be imposed on Cox or Pacific due to distribution of the tainted directories.

5. In view of the fact that awareness of the tainted directory issue has faded for San Diego residents, commencing a new proceeding at this time to determine whether penalties should be imposed on Cox or Pacific due to the tainted directories might serve only to reawaken public anxiety.

INTERIM ORDER

IT IS ORDERED that:

1. The temporary restraining order issued by President Lynch in this docket on June 2, 2000, which was confirmed and ratified by the Commission in Decision 00-06-042, is hereby dissolved.

2. This phase of this proceeding, which has been concerned solely with determining the responsibility for dealing with problems arising out of the

distribution of tainted directories (as defined in Findings of Fact 1-2), is closed. The proceeding remains open for all other purposes previously specified by the Commission.

This order is effective today.

Dated November 29, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners