

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 12R-1248T

IN THE MATTER OF THE PROPOSED AMENDMENTS TO RULES REGULATING
TELECOMMUNICATIONS PROVIDERS, SERVICES, AND PRODUCTS, 4 CODE OF
COLORADO REGULATIONS 723-2, § 2307.

**DECISION DENYING REQUEST FOR REHEARING,
REARGUMENT, OR RECONSIDERATION**

Mailed Date: January 27, 2014
Adopted Date: January 22, 2014

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of the application filed by Dex Media East, Inc. (Dex) on December 31, 2013, requesting rehearing, reargument, or reconsideration (RRR) of Decision No. C13-1526 (Application). Specifically, Dex requests reconsideration and revision of the requirement under Rule 2307(a)(III)(C)(vi) of the Commission's Rules Regulating Telecommunications Providers, Services, and Products,

4 *Code of Colorado Regulations* (CCR) 723-2, for local exchange carriers (LECs) to provide, in an “alternative printed form,” the information required by Rules 2307(b)(III) through (VI) to a customer that requests not to receive any directory.

2. Being fully advised in the matter we deny the Application for RRR.

B. Background

3. The Commission issued a Notice of Proposed Rulemaking (NOPR) on December 12, 2012, by Decision No. C12-1404, and assigned this proceeding to an Administrative Law Judge (ALJ) to propose modifications to Rule 723-2-2307 (Directories for Basic Local Exchange Service) and conforming amendments related to the publication and distribution of White Pages telephone directories.

4. Attached to the NOPR, the Commission proposed rules that allowed customers the option of receiving White Pages directories “upon request.” The proposed rules attached to the NOPR also provided revisions to Rule 2307(a)(III), which required that – if a directory is not distributed to all customers “automatically” – customers shall continue to receive the information required by subparagraphs 2307(b)(III) through (VI) (Information Pages)¹ in either: (1) a directory distributed to all customers (except those who affirmatively request not to receive directories); or (2) an “alternative printed form.”

¹ For both the rules proposed in the NOPR and the rules recommended by the ALJ by the Recommended Decision, Rules 2307(b)(III) through (VI) include the following: emergency numbers; alternative emergency numbers; instructions for placing local calls and long distance calls; instructions for placing calls to repair and directory assistance services; the business office website, if applicable; the telephone number of the LEC’s business offices appropriate to the area served by the directory; and the Commission’s toll free number and notice of the right to make inquiries regarding telecommunications services to the Commission.

5. The ALJ held hearings on January 28, 2013, and July 11, 2013. On September 27, 2013, the ALJ issued her Recommended Decision, Decision No. R13-1205, that adopted amendments to Rule 4 CCR 723-2-2307, and to related Rule 4 CCR 723-2-2504.

6. The rules proposed in the Recommended Decision permit a LEC to elect a process in which all of its customers use an “opt in” means of requesting paper White Pages directory services (*i.e.*, by default, the LEC will *not* deliver, or cause to be delivered, a paper directory to the customer unless the customer affirmatively requests delivery), or an alternative process in which all of the LEC’s customers use an “opt out” process of requesting a paper copy of the White Pages directory (*i.e.*, by default, the LEC will deliver, or cause to be delivered, a paper directory to the customer unless the customer affirmatively declines delivery). As proposed by the Recommended Decision, both the opt-in and opt-out processes require the LEC to ensure the delivery of the Information Pages to all customers – either by White Pages directory delivery or by an alternative printed form.²

7. On October 17, 2013, Dex filed exceptions to the Recommended Decision challenging the rule requiring a LEC to provide the Information Pages to customers that opt out of *all* directories. Dex submitted the following language to revise Rule 2307(a)(III)(C)(vi):³

[E]xcept for customers who opt-out of all telephone directories, each customer served by a White Pages telephone directory shall receive the information required by subparagraphs 2307(b)(III) through (VI). This information shall be contained in a White Pages telephone directory that is provided to a customer or in an alternative printed form that is provided to all customers that choose not to receive a White Pages telephone directory....

(Emphasis added.)

² The information required by Rules 2307(b)(III) through (VI) may be included in Yellow Pages directories, which would qualify as an “alternative printed form” if the Yellow Pages directory is delivered to the customer but the customer does not receive a printed White Pages directory.

³ By Decision No. C13-1526, the Commission revised the rule numbering due to the rules attached to the Recommended Decision containing two Rule 2307(a)(III) subsections.

8. In support of this suggested change, Dex stated that it believes the requirement to provide the Information Pages to *all* customers does not take into account consumer desires. It argued that the proposed requirement could expose a LEC or its directory distributor to potential liability for trespass or other claims. Dex also contended that its proposed revision “strikes the appropriate balance between the rights of customers to opt-out and the need to assure widespread distribution of the information pages to customers who may want them.” Exceptions at 5.

9. By Decision No. C13-1526 issued December 12, 2013, the Commission denied Dex’s exceptions, noting that it agreed with the “critical importance” of the Information Pages stated by the ALJ and her rationale, including the statement that “[a] change in White Pages telephone directory distribution should not affect, and certainly should not reduce or eliminate, customers’ ready access to this information.” Decision No. C13-1526, ¶ 10 (citing Recommended Decision, ¶ 57). The Commission also agreed with the ALJ’s reasoning that, “given the importance of the information required by proposed Rules 2307(b)(III) through 2307(b)(VI) and given the advisability of having this information as widely and readily available as possible, the ALJ finds that customers must have access to the information *in some printed form*, either the White Pages telephone directory or the alternative printed form.” *Id.* (Emphasis added.)

C. Application for RRR

10. In its Application, Dex reiterates its objections with the requirement to provide the Information Pages in an alternative printed form to customers who opt out of receiving *all* directories. Dex requests that the Commission reconsider its policy decision and revise Rule 2307(a)(III)(C)(vi) with the same language suggested on exceptions.

11. Dex also states that, per the Administrative Procedure Act (APA), § 24-4-103(4)(b)(I), C.R.S., it does not believe “[t]he record of the rule-making proceeding demonstrates the need for the regulation...” and that the requirement is “based on supposition and presumption.” Application at 2. It argues that, had it been “given the opportunity to address this assumption in comments and at the hearings,” it would have shown how its six years of directory industry experience with opt-out programs show no need for the rule as recommended by the ALJ. *Id.* at 3.

12. Through the Application, Dex explains its experiences with opt-out processes and why it disagrees with the Commission’s policy decision. Dex argues that the new rule: (1) adds substantial costs; (2) intrudes upon privacy and disrespects the choices of Colorado consumers; (3) may put distributors of directories at risk of liability for civil or criminal trespass; and (4) may be difficult to implement because mechanisms do not exist to comply with the new regulation.

D. Findings and Conclusions

13. First, we disagree with Dex that these proceedings did not provide it with an opportunity to address the issue of distribution of Information Pages. The issue of providing Information Pages in an alternative printed form when White Pages directories are no longer provided in print to all customers was proposed in the original NOPR as attached to Decision No. C12-1404, mailed December 12, 2012. Proposed Rule 2307(III)(B) stated that, if a directory

required by this rule is not distributed “automatically” to all customers, then the LEC or its directory publisher shall:

... provide all customers in a directory that is distributed automatically to all customers (except those who affirmatively request not to receive directories) *or alternative printed form* the information required by subparagraphs 2307(b)(III) through (VI).

(Emphasis added.)

14. Participants took positions both for and against proposed opt-in and opt-out processes, and the requirement for Information Pages in an alternative printed form.⁴ After comment and two hearings, the rules proposed by the ALJ allow for electing either the opt-in and opt-out processes at the discretion of the LEC, but require that the Information Pages continue to be provided in a directory or alternative printed form when printed White Pages are not provided to customers; *i.e.*, in both processes. For the opt-out process, recommended Rule 2307(a)(III)(C)(vi) requires that:

[E]ach customer served by a White Pages telephone directory shall receive the information required by subparagraphs 2307(b)(III) through (VI). This information shall be contained in a White Pages telephone directory that is provided to a customer or in an alternative printed form that is provided to all customers that choose not to receive a White Pages telephone directory....

15. This recommended language clarifies the language proposed in the NOPR and is almost identical to Rule 2307(a)(III)(B)(iv), which requires an alternative printed form when the LEC chooses the opt-in process.⁵ Dex does not oppose the language in 2307(a)(III)(B)(iv) with the parallel opt-in requirement.

⁴ See, e.g., CenturyLink Reply filed January 23, 2013, at 4-5; BRETSA Comments filed January 9, 2013, at 7; Dex Comments filed January 9, 2013, at 3-4.

⁵ Rule 2307(a)(III)(B)(iv) requires that “each customer served by a White Pages telephone directory shall receive the information required by subparagraphs 2307(b)(III) through (VI). This information shall be contained in a White Pages telephone directory that is provided to a customer on request or in an alternative printed form that is provided to all customers other than those that request a White Pages telephone directory....”

16. Proposed Rule 2307(a)(III)(C)(vi) was made part of the record by the Recommended Decision prior to the rule becoming final. Dex had the opportunity, *and did*, oppose this policy determination and propose alternative rule submissions through both exceptions and the Application.

17. We also disagree with Dex's contention that the revised rule is not supported by the record. Per the APA, "[t]he rules promulgated by the agency shall be based on the record, which shall consist of proposed rules, evidence, exhibits, and other matters presented or considered, matters officially noticed, rulings on exceptions, any findings of fact and conclusions of law proposed by any party, and any written comments or briefs filed." Section 24-4-103(4)(a), C.R.S.

18. The Commission has discretion when making policy determinations it finds that promote the public interest. When an administrative agency adopts a rule based on a policy judgment, particularly within the expertise of the agency, and not involving controverted questions of critical fact, it is not incumbent on the agency to present evidence in support of the proposed rule. *Citizens for Free Enterprise v. Dept. of Revenue*, 649 P.2d 1054, 1063 (Colo. 1982); *accord Regular Route Common Carrier Conference v. Pub. Util. Comm'n*, 761 P.2d 737, 743 (Colo. 1988). As long as such a proposed rule is made part of the record and there is a rational basis for the agency's action, "the agency can choose to reject any adverse submissions and adopt the proposed rule." *Regular Route Common Carrier Conference*, 761 P.2d at 743. In other words, "the fact that the agency exercised its discretion in a manner contrary to that advocated by the objectors [does] not mean that the agency action was not 'based on the record.'" *Citizens for Free Enterprise*, 649 P.2d 1054, 1063. Furthermore, a rule adopted pursuant to a statutory rulemaking proceeding is presumed to be valid, and the burden is upon

the challenging party to demonstrate "that the rule-making body acted in an unconstitutional manner, exceeded its statutory authority, or otherwise acted in a manner contrary to statutory requirements." *Regular Route Common Carrier Conference*, 761 P.2d at 743.

19. The ALJ correctly stated that the rulemaking proceeding at issue here is primarily a policy decision. Recommended Decision, ¶ 19 (citing *Citizens for Free Enterprise*, 649 P.2d 1054). We also note that the Commission has an independent duty to determine matters that are within the public interest. *Caldwell v. Pub. Util. Comm'n*, 692 P.2d 108, 1089 (Colo. 1984). This Commission is not bound by the participants' proposals and may promulgate rules it deems necessary to assure the result is in the public interest.

20. Dex does not challenge any factual determinations relied on by the ALJ. The ALJ explained her rationale for requiring the alternative printed form when White Pages directories are not distributed to all customers, including consideration of participant positions. Recommended Decision, ¶¶ 55-60. The findings of fact relied on are presumed conclusive unless, pursuant to § 40-6-113(4), C.R.S., a participant requests a transcript for the specific findings it seeks to amend, modify, annul, or reverse in its first pleading. Dex did not request a transcript to challenge the ALJ's factual findings.

21. We do not find Dex's additional policy arguments persuasive. Cost concerns raised by Dex in the Application are addressed in the ALJ's determination not to dictate the cost allocation by rule, but rather to allow the LEC and directory publisher to negotiate these costs. See Recommended Decision, ¶¶ 54, 59. Similarly, a LEC who chooses to use the opt-out process has discretion in how it provides, or causes to be provided, the Information Pages; e.g., via direct mailing as opposed to personal delivery. While we have considered Dex's alternative submission of rule language both on exceptions and through this Application, we continue to agree with the

ALJ's reasoning in the Recommended Decision for promulgating Rule 2307(a)(III)(C)(vi), including, but not limited to, her determination that the Information Pages contain critical information that, at present, should be provided in printed form to customers.

22. The Application filed by Dex requesting RRR is denied.

II. ORDER

A. The Commission Orders That:

1. The application filed by Dex Media East, Inc. on December 31, 2013, requesting rehearing, reargument, or reconsideration of Decision No. C13-1526 is denied, as discussed above.

2. This Decision is effective upon its Mailed Date.

B. **ADOPTED IN COMMISSIONERS' WEEKLY MEETING January 22, 2014.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners