

STATE OF MINNESOTA  
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger  
David C. Boyd  
J. Dennis O'Brien  
Betsy Wergin  
Nancy Lange

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of Rules Requiring Distribution of  
Residential White Pages Directories

MPUC Docket No.: P999/R-13-459

**INITIAL COMMENTS OF MINNESOTA TELECOM ALLIANCE**

The Minnesota Telecom Alliance (MTA) submits these comments to the Minnesota Public Utilities Commission (Commission) in response to the Commission's Request for Comments. The MTA supports the Commission's initiative to amend Minnesota Rules 7810.2900, 7811.0600, and 7812.0600 (Directory Publication Rules). For the reasons more fully explained in these Comments, the MTA recommends the following:

- The Commission should eliminate the requirement that Local Exchange Carriers (LECs) publish directories. Major market and technological changes, including the dramatic increase in cellular usage as a replacement for landline usage, have substantially reduced the need for and value of landline directories:
- The Commission should not add further complications and obligations in the form of customer opt-out options that would significantly increase the cost of publishing directories.

The remainder of these Comments provides a discussion of:

- (A) Background for the Commission's initiative, including a description of the very substantial changes that have occurred, an explanation of why these changes support

allowing LECs to make directory decisions, and a brief summary of the First Amendment factors that underlie telephone directory publication;

- (B) Comments on the specific factors identified by the Commission;
- (C) A response to the specific questions identified by the Commission; and
- (D) Specific suggestions regarding the draft amendments.

**A. BACKGROUND.**

**1. Substantial Technological And Market Changes Have Occurred.**

The Commission's decision to consider amending the current Directory Publication Rules is appropriate given the dramatic technological and market changes that have occurred in the decades since adoption of those rules. The two most significant changes are: (a) the proliferation of alternative sources of directory listing information, primarily through the Internet and other electronic media; and (b) residential competition from wireless carriers and the substantial growth in the number of persons who have cellular-only service from wireless providers that not subject to traditional telephone regulation, including the Directory Publication Rules. Because of these technological and market changes, the context today differs dramatically from the circumstances that existed in the 1980s when the Commission adopted its original directory publication rules (Minn. Rules, Part 7810.2900). Today's market also differs substantially from the situation that existed in the mid-1990s when the Commission adopted its local competition rules requiring provision of an annual white pages directory (Minn. Rules, Parts 7811.0600, and 7812.0600).

The value of and need for white page directories has been reduced substantially by the emergence of the Internet and on-line access to a panoply of information, including directory listings. When the Commission's initial directory rule, Part 7810.2900, was adopted in the

1980s, there was no meaningful Internet usage. Even by the mid-1990s when the Commission's local competition rules were adopted, on-line Internet usage was minimal with approximately 10% of the population using the Internet.<sup>1</sup> In contrast, Internet usage has increased to approximately 80% today.<sup>2</sup>

The usefulness of white page directories has also been greatly diminished by the emergence of a large number of cellular-only residences. Nationwide as of December 2012, approximately 38% of households did not have landline service and the percentages of wireless-only households is steadily increasing. In contrast, wireless substitution for landline service did not exist to any meaningful degree when the Commission adopted its local competition rules in the 1990s. Even as recently as 2003, less than 5% of U.S. households had substituted wireless for their residential landline service.<sup>3</sup> Importantly, cellular numbers are not generally available to LECs and are not generally included in directories published by the LECs. Public policy not support continuing to require LECs to provide directories that do not include approximately 2 of 5 residents. Nor does public policy support continuing to impose a directory requirement on LECs when that same requirement does not apply to wireless carriers.

These technological and market changes support eliminating the rule requirement that LECs continue distributing directories. At the same time, to the extent that any LEC elects to continue distributing white page directories, those directories are subject to the full protections of the First Amendment. While customer preferences and environmental concerns are valid policy considerations, neither meet the compelling interest standard needed to prohibit distribution of

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<sup>1</sup> Since 1995, Internet usage has increased from approximately 10% of the U.S. population to nearly 80%. See *Pew Internet, Main Report* (2013), Pew Internet & American Life Project, <http://pewinternet.org/Reports/2012/Digital-differences/Main-Report/Internet-adoption.aspx>.

<sup>2</sup> *Id.*

<sup>3</sup> *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Sixteenth Report (March 21, 2013) at. p. 26.

printed materials through a mandated customer choice approach. Further, recycling of printed directories has evolved substantially in recent years to address environmental concerns.

Telephone directories are now classified as newsprint, which facilitates recycling by consumers and limits the environmental implications of publishing directories.

**2. The LECs Should Be Allowed To Decide Whether And How To Distribute Directories.**

The emergence of the Internet and competitive wireless alternatives for residential telecommunications services clearly support a rule change. Importantly, cellular service providers are under no obligation to provide any form of directories to their customers. LECs should have the same range of decisions and alternatives as those enjoyed by their cellular competitors with respect to directories. Competitive market forces should determine the levels and forms of directory information and services that are provided – both for wireless and landline LEC providers. The combination of market forces, which include expenses, revenues and customer preferences, should determine the levels and forms of directory information and services that will be provided by LECs.

Market forces are not the same in all markets. For example, large urban markets typically feature very large, multi-page directories, often separated into residential and business volumes, with and without separate yellow page advertising directories. In many smaller urban and rural markets, all residential, business and yellow page listings are combined in a single modestly sized volume. These factors have significant impacts on the economics of directory publication and distribution and on the related environmental implications.

Expenses also have a significant impact on the distribution of directories, which must be balanced with the environmental and social benefits of providing customer choice. While there is a general assumption that customer choice provides a significant benefit, there are impacts on

both the customer and the directory publisher. If a customer receives a printed directory that the customer does not want, the environmental and convenience implications on the customer are limited by the fact that directories are now fully recyclable as newsprint. This means that telephone directories can be recycled in the same way as newspapers and other publications, limiting both environmental and convenience implications of distribution.

The cost implications of selective limitations on distribution are more complex. The general assumption is that there are significant cost savings that are proportional to the number of directories that are distributed. However, the overall cost of publishing and distributing directories may increase if selective customer opt-outs are required, especially for smaller directories that are typically delivered by US. Postal Service bulk mail.

The costs of publishing directories include costs of layout, printing, and distribution of the book. While the printing cost goes down as the number of directories distributed goes down, it does not go down at the same rate. There are fixed costs associated with printing and binding that are the same no matter how many pages are printed and no matter how many pages are in a book. Layout costs are also more or less fixed.

While there is an expectation that distribution costs would be reduced if the number of copies is reduced, that is true for some forms of distribution and not others. Delivery costs for a commercial distribution service used to deliver large directories may be reduced if the number of directories is reduced. However, distribution costs for smaller directories may increase if there is a requirement of selective distribution because the least expensive form of delivery (US. Postal Service bulk mail) is made unavailable if less than full coverage of a postal area is required.

Two examples illustrate the point. For a directory with a distribution of about 2,700 copies, postage was approximately \$975.00 for US. Postal Service Standard Flat rate, or about

\$0.36 per copy. If selective distribution was required, US. Postal Service bulk mail would not be available and First Class Mail would be the next best alternative. Using First Class Mail would increase the cost to approximately \$7,100 or about \$2.63 per copy, an increase of \$6,125 or over 6 times the original cost.

A directory with a somewhat larger circulation of about 37,000 copies would also experience very substantial increases. For that directory, postage as Bound Printed Matter Irregular Parcel was approximately \$27,700, or about a \$0.75 per copy. Since this directory is over a pound, it would not qualify for First Class Mail and would be moved into the next class of mail, Parcel Post. The total cost of that would be approximately \$216,500, or about \$5.85 per directory, an increase of almost 8 times the original cost. There is no justification for imposing cost increases of these magnitudes.

There are also substantial differences in demand for white page listings and in the level of interest of advertisers in obtaining full distribution of yellow page directories. All of these factors have substantial implications for the publication of directories. It is probable that the combination of these market forces will cause many LECs to continue to provide printed directories and electronic directories in much the same way as are provided currently. Options that require limitations on distribution of the printed directories (opt-ins only receive it, printed bill customers only receive it, etc.) could reduce revenues from sales of advertising even faster than they are now going down now.

In this context, it is clear that additional obligations, including customer polling regarding preferences, are not appropriate.

### 3. Directories Are Protected Speech.

Any changes to the Directory Publication Rules should reflect the fact that directories, even yellow page directories, qualify for full protection under the First Amendment, as the Federal 9<sup>th</sup> Circuit Court of Appeals recently made clear in *Dex Media West, Inc. vs. City of Seattle (Dex)* where limitations on the distribution of printed directories were found to be invalid.<sup>4</sup> The point is clear that “noncommercial speech” is entitled to full protection of the First Amendment and that telephone listings and community information are noncommercial speech.<sup>5</sup> The decision in *Dex* indicates that legal obligations cannot be imposed that would allow persons obtaining directories to limit the right of a directory publisher to make decisions regarding the manner of distribution. Under *Dex*, the absence of literary or artistic quality does not eliminate the full protection of the First Amendment for directories.<sup>6</sup> Similarly, the full protection of the First Amendment remains despite economic motivations of the publishers.<sup>7</sup>

#### B. SPECIFIC FACTORS IDENTIFIED BY THE COMMISSION.

The Commission’s Request for Comments identified many of the pertinent considerations relating to a possible amendment of the Directory Publication Rules, stating in part:

*[T]he Commission would find it helpful for comments to address the following considerations in conjunction with any recommendation:*

- *the expense, materials, effort, and environmental consequences of distributing printed directories;*

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<sup>4</sup> *Dex Media West, Inc. vs. City of Seattle*, 696 F3d 592 (2012) (*Dex*).

<sup>5</sup> *Dex* at 957 (“It is just as readily apparent that telephone listings and community information contained in the directory constitute noncommercial speech.”)

<sup>6</sup> *Dex* at 964 (“The First Amendment does not make protection contingent on the perceived value of certain speech.”) *See also*, *Dex* at 965 (“Both newspapers and yellow pages directories contain noncommercial speech; a distinction in treatment on the basis of the perceived difference in worthiness of that noncommercial speech is not permitted.”)

<sup>7</sup> *Dex* at 965 (“Ultimately, we do not see a principle reason to treat telephone directories differently from newspapers, magazines, television programs, radio shows, and similar media that does not turn on an evaluation of their contents. A profit motive and the inclusion or creation of noncommercial content in order to reach a broader audience and attract more advertising is present across all of them. We conclude, therefore, that yellow pages directories are entitled to full First Amendment protection.”)

- *the effect on customers who may prefer to receive printed directories, and on customers who may prefer to receive electronic directories;*
- *the privacy issues that may arise from electronic publication of directory information;*
- *the economic effects, including identifying any other federal or state regulations that may have a cumulative effect;*
- *any other issue the Commission should consider.*

1. **Expense, materials, effort, and environmental consequences of distributing printed directories.**

As explained above, significant expense, materials, and effort are involved in the publication of telephone directories. In a market where revenues and profits are under increasing pressure, there is little justification for imposing added costs on the segment of the market that is losing market share (the LECs) while the segment that is gaining market share (cellular providers) remain without any obligations.

2. **Effects on customers.**

Market conditions indicate that the LECs should be allowed to make all decisions regarding whether to publish directories. However, as noted above, market forces are likely to cause many LECs to maintain all current options and customers should be allowed to keep their telephone numbers unlisted. Further, many LECs may be able to respond to customer requests as to the form of directories to be received. However, the convenience effects on customers do not support limiting First Amendment rights to communicate information even to customers that do not need or want the information. The ready availability of directory recycling alternatives also limits both customer convenience and environmental concerns. Even if the Commission decidesto require some form of customer choice, customers could be allowed to change their decisions, but annual polling by the LECs should not be required.



### **3. Privacy issues.**

Customers are allowed to choose to have unlisted numbers excluded from published directories and that same right should apply to electronic directories. However, the publication of electronic directories by LECs does not require or warrant any further protections than are now in place, which allow customers to select to have unlisted telephone numbers. While the LECs could be restricted from sales of such listings to persons for purposes not reasonably related to directory publication, LECs should certainly not be required to attempt to limit the actions of other persons with respect to gathering electronic listings that are appropriately published by the LECs.

### **4. Economic effects, including other regulations.**

As explained above, very substantial market and technological changes have occurred in the telecommunications market that make it inappropriate to continue mandatory directory publication for LECs while cellular competitors with very substantial market share have no obligations. The different treatment of the LECs and cellular competitors are the direct result of different regulatory regimes.

### **5. Other issues**

As summarized above, the Commission should consider the very substantial technological and market changes that have occurred. The Commission should also recognize that large urban markets have characteristics that are very different from smaller urban and rural markets. Similarly, the Commission should recognize that directory publication has very different implications in these very different markets. Accordingly, any remaining mandates pertaining to telephone directories should be limited and concerns pertaining to urban markets should not be extended to other markets without careful evaluation.

**C. SPECIFIC COMMISSION QUESTIONS.**

*1. Should the Commission establish by rule whether electronically published directories should be accessible to the public or to a limited class of persons such as customers? If so, what should the Commission require? The working draft leaves this determination to each local service provider.*

**Response of MTA:**

The Commission should not expand the scope of obligations in the current rules and should not require that an electronically published directory be made available generally to the public. If a LEC chooses to publish an electronic directory, there should be no requirement to provide availability beyond the LEC's customers.

*2. Should the Commission establish by rule the "default" format of directories (that is, the format of directories provided to customers who do not notify their local service provider of their preference)? If so, what should the Commission require? The working draft leaves the format determination to each local service provider for customers that do not specify a preferred format.*

**Response of MTA.**

The Commission should not establish by rule the default format of directories. The format of delivery of directories should be determined by the LECs based on pragmatic considerations, sound public policy, and constitutional standards.

*3. Should the Commission's rule distinguish between Business and Residential customers, either by requiring different default directory formats or by permitting local service providers to provide Business and Residential listings in different formats? The working draft leaves the default format determinations to each local service provider, and allows local service providers to publish some listings electronically, and others in print, if a customer does not specify a preferred format.*

**Response of MTA.**

As explained above, LECs should be allowed to make all format determinations, which includes publication of Business and Residential listings and distribution to Business and Residential customers in different formats or in the same format.

**D. MTA COMMENTS ON DRAFT RULES**

The following are MTA comments for changes regarding specific sections of the draft rules.

**1. Rule 7810.0100 DEFINITIONS**

As further explained in these Comments, the MTA believes that market conditions support elimination of any obligation of LECs to publish local directories. In any event, the MTA believes that the LECs should be allowed to determine the area to be included in the local directory because the LECs should be allowed to make the decisions pertaining to costs, competitive considerations, and other matters pertaining to the publication of directories which are fully protected by the First Amendment. While such protection would support the elimination of any content requirements, the MTA respectfully limits its comments to the selection of the format of the distribution. Accordingly, the MTA does not propose any specific amendments to Rule 7810.0100.

**2. Rule 7810.2900 FORM AND CONTENT OF DIRECTORIES.**

In the event the Commission requires the LECs that publish both printed and electronic formatted directories to determine customer preference: (1) LECs should not be required to limit delivery of their directories in their preferred format; and (2) any mandatory added burdens of soliciting customer preferences should be limited, eliminating at a minimum the requirement for annual notices to customers.

Requirements that limit the method of delivery of directories have been held to be invalid. Specifically, a Seattle Ordinance that required the publishers of yellow page directories to refrain from delivery of printed versions was found to violate the First Amendment by the Federal 9<sup>th</sup> Circuit Court of Appeals in *Dex*. The same would be true of a Minnesota Rule that

required LECs to refrain from delivery of white page directories in a printed format if that was the format preferred by the LEC.

It is certainly correct that the considerations are not political or artistic, but are rather economic. However, that fact does not diminish the protection of speech provided by the First Amendment. If it did, no communication by a magazine, newspaper or commercially published book would be protected.

It is also clear that the content of white page directories are protected speech. While LECs may have substantial incentives to accommodate customers preferences, that accommodation should not and cannot lawfully be made a part of Minnesota law. It should not be made a part of Minnesota law because there are no policy reasons that justify imposing additional obligations on LECs in the context of the current market conditions. It cannot be made a part of Minnesota law because doing so would violate the First Amendment. Customer preferences and environmental considerations do not override First Amendment rights.

Accordingly, the MTA proposes the following specific amendments to Rule 7810.2900:

**7810.2900 FORM AND CONTENT OF DIRECTORIES.**

***Subpart 1. Basic Requirements.***

*Telephone directories shall be regularly compiled and shall contain each customer's name, telephone number, and, if practical, address, except they shall not contain public telephone numbers or telephone numbers that are unlisted at the customer's request. Upon issuance, a local service provider shall distribute to all customers served by that directory a complete directory in the format determined by the LEC, whether printed or electronic. ~~consistent with the customer option provisions of Rule 7810.2950.~~ Upon commission request, a local service provider shall furnish to the commission a copy of each directory issued, whether printed or electronic.*

***Subp. 2. Printed Directories.***

*Telephone directories shall be regularly published, listing the name, address when practical, and telephone number of all customers, except public telephones and numbers unlisted at customer's request. The name of the telephone utility, the area included in the directory, the year and month of issue, shall appear on the*

*front cover. Information pertaining to emergency calls such as for the police and fire departments shall appear conspicuously in the front part of the directory pages. The directory shall contain such instructions concerning placing local and long distance calls, calls to repair and directory assistance services, and location of telephone company business offices as may be appropriate to the area served by the directory. Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the commission, upon request.*

*Printed directories shall:*

*A. display on the front cover the name of the local service provider, the area included in the directory, and the year and month of issue;*

*B. display in the front portion of the directory information pertaining to emergency calls, including information for police and fire departments; and*

*C. contain instructions, appropriate to the area served by the directory, concerning placing local and long distance calls, calls to repair and directory assistance services, calls to local, state, and federal government offices, and the location of telephone company business offices;*

***Subp. 3. Electronically Published Directories.***

*Electronically published directories shall:*

*A. display the name of the local service provider, the area included in the directory, and the date the directory information was last updated;*

*B. display information pertaining to emergency calls, including information for police and fire departments, prior to each directory search;*

*C. contain instructions, appropriate to the area served by the directory, concerning placing local and long distance calls, calls to repair and directory assistance services, calls to local, state, and federal government offices, and the location of telephone company business offices;*

*D. be prominently displayed on, and accessible to customers from, the company's website; and,*

*E. prohibit automated remote access, including but not limited to automated remote access made by a search engine indexer or data aggregator.*

**3. Rule 7810.2950 DIRECTORIES: CUSTOMER OPTION.**

As explained above, given current conditions including the rapid increase in the number

of households that do not have landline service and the absence of any publishing obligations for cellular service providers, the decision of whether and how to publish directories should be made by the LECs. Accordingly, the MTA proposes the following specific amendments to Rule 7810.2950:

**7810.2950 DIRECTORIES: CUSTOMER OPTION.**

**Subpart 1. Customer Option.**

~~A Local Service Provider may publish printed or electronic directories, or some combination thereof. Local service providers that do not intend to electronically publish directories shall distribute a printed directory to each customer, except where an offer is made and explicitly refused by the customer. A Local Service Provider that publishes an electronic directory must deliver a printed directory if that is the customer's format preference. Local service providers shall make available a complete directory to each customer., and shall:~~

~~A. conduct an initial survey of existing customers' directory format preference prior to any directory format change;~~

~~B. present each new customer an opportunity to establish a directory format preference;~~

~~C. permit a customer to establish or change their directory format preference at any time;~~

~~D. annually notify customers of the directory format preference on record and how to change it;~~

**~~Subp. 2. When No Customer Option is Specified.~~**

~~Local service providers shall determine whether customers who do not state a directory format preference will receive a printed directory, have access to an electronically published directory, or a combination thereof. Local service providers shall notify customers how the completed directory will be provided, including how to access any electronically published portion.~~

**4. Rules 7811.0600 and 7812.0600 0.2950 BASIC LOCAL SERVICE REQUIREMENTS.**

As explained above, given current conditions including the rapid increase in the number of households that do not have landline service and the absence of any publishing obligations for

cellular service providers, the decision of whether and how to publish directories should be made by the LECs. Accordingly, the MTA proposes the following specific amendments to Rules 7811.0600 and 7812.0600:

**7811.0600 BASIC LOCAL SERVICE REQUIREMENTS.**

**Subpart 1. Required services.**

~~F. one white pages complete directory per year for each local calling area, which may include more than one local calling area, consistent with the customer option provisions of part 7810.2950 and, upon a customer request and in the customer's preferred format, one copy of any other directory within the local calling area or except where an offer is made and explicitly refused by the customer;~~

**7812.0600 BASIC SERVICE REQUIREMENTS.**

**Subpart 1. Required services.**

~~F. one white pages complete directory per year for each local calling area, which may include more than one local calling area, consistent with the customer option provisions of part 7810.2950 and, upon a customer request and in the customer's preferred format, one copy of any other directory within the local calling area or except where an offer is made and explicitly refused by the customer;~~



Dated: December 6, 2013

By \_\_\_\_\_  
Richard J. Johnson

Moss & Barnett  
A Professional Association  
4800 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-4129  
Telephone: (612) 877-5000

Attorneys on Behalf of Minnesota Telecom  
Alliance