

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, SECTION 2307.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
ADOPTING AMENDMENTS TO
RULE 4 CCR 723-2-2307 AND TO
RULE 4 CCR 723-2-2504**

Mailed Date: September 27, 2013

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I. STATEMENT

1. On July 13, 2012, Dex Media East, Inc. (Dex Media), filed a Petition for Rulemaking in which Dex Media asked the Commission to open a rulemaking proceeding to modify Rule 4 *Code of Colorado Regulations* (CCR) 723-2-2307.¹ That filing was made pursuant to § 24-2-103, C.R.S., and Rule 4 CCR 723-1-1306² and commenced Proceeding No. 12M-817T, *In the Matter of the Petition to Dex Media East, Inc., to Open a Rulemaking Docket, Issue a Notice of Proposed Rulemaking, and Amend 4 CCR 723-2, § 2307*. On October 22, 2012, Dex filed an Amended Petition for Rulemaking (Amended Petition).

2. On December 5, 2012, by Decision No. C12-1402 and as pertinent here, the Commission granted the Amended Petition and stated that it would issue a Notice of Proposed Rulemaking (NOPR) based on the rule language contained in the Amended Petition. By that Decision, the Commission also closed Proceeding No. 12M-817T.

3. On December 12, 2012, by Decision No. C12-1404, the Commission issued its NOPR regarding proposed amendment of Rule 4 CCR 723-2-2307 (Rule 2307). The proposed amendment in legislative drafting (*i.e.*, red-lined) format was appended to the Decision as Attachment A. Proposed Rule 2307 as it would be published if adopted was appended to the Decision as Attachment B. In that Decision, the Commission assigned this rulemaking proceeding to an Administrative Law Judge (ALJ).

4. Decision No. C12-1404 scheduled a January 28, 2013 rulemaking hearing. The Decision included dates for submitting written comments on the proposed amendment.

¹ This Rule is found in the Rules Regulating Telecommunications Providers, Services, and Products, Part 2 of 4 *Code of Colorado Regulations* 723.

² This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* 723.

5. On December 12, 2012, as required by statute, the Commission submitted a draft of the proposed amendment and a statement concerning the proposed amendment to the Office of the Executive Director in the Department of Regulatory Agencies.

6. Notice of the rulemaking and of the January 28, 2013 hearing was published timely in *The Colorado Register*.

7. The following participants submitted initial comments on the proposed amendment to Rule 2307: Boulder Regional Emergency Telephone Service Authority (BRETSA); Dex Media East, Inc. (Dex Media); and Qwest Corporation, doing business as CenturyLink QC, El Paso County Telephone Company, CenturyTel of Colorado, Inc., and CenturyTel of Eagle, Inc.³

8. The following participants submitted reply or response comments addressing the initial comments on the proposed amendment to Rule 2307: BRETSA, Colorado Telecommunications Association (CTA), CenturyLink, and Dex Media.

9. At the time and place noticed, the ALJ called the January 28, 2013 rulemaking hearing to order.⁴ The ALJ heard oral comments from Jerry Enright of Commission Staff;⁵ Brooks E. Harlow, Esquire, on behalf of Dex Media; Timothy J. Goodwin, Esquire, on behalf of CenturyLink; Richard L. Corbetta, Esquire, on behalf of CTA; and Michael L. Glaser, Esquire, on behalf of BRETSA. The ALJ admitted Exhibits No. 1, No. 2, and No. 3 into the rulemaking record.

³ In this Decision, Qwest Corporation, doing business as CenturyLink QC, El Paso County Telephone Company, CenturyTel of Colorado, Inc., and CenturyTel of Eagle, Inc., collectively, are referred to CenturyLink.

⁴ This was the first of two rulemaking hearings in this Proceeding. The transcript for this rulemaking hearing has been filed in this matter.

⁵ Mr. Enright is employed in the Commission's Telecommunications Section and is acting in this Proceeding in an advisory capacity. His comments provided the procedural background of this rulemaking.

10. On April 16, 2013, Dex Media submitted a Notice of Supplemental Authority.

11. On May 24, 2013, by Decision No. R13-0628-I, the ALJ scheduled a July 11, 2013 rulemaking hearing. The Interim Decision identified issues on which the ALJ asked for additional comment. In addition, the Interim Decision identified two documents that the ALJ had reviewed on a website;⁶ notified the participants of the ALJ's action; and advised the participants of their opportunity to address or to respond to the information. Finally, the Interim Decision included dates for submitting additional written comments.

12. Notice of the rulemaking and of the July 11, 2013 hearing was published timely in *The Colorado Register*.

13. The following participants submitted initial comments in response to Decision No. R13-0628-I: BRETSA; CenturyLink; and Dex Media.

14. The following participants submitted response/reply comments addressing the initial comments submitted in response to Decision No. R13-0628-I: BRETSA, CenturyLink, CTA, and Dex Media.

15. At the time and place noticed, the ALJ called the July 11, 2013 rulemaking hearing to order.⁷ The ALJ heard oral comments from Brooks E. Harlow, Esquire, on behalf of Dex Media; Timothy J. Goodwin, Esquire, on behalf of CenturyLink; Richard L. Corbetta, Esquire, on behalf of CTA; and Joseph P. Benkert, Esquire, on behalf of BRETSA. The ALJ admitted Exhibits No. 4 and No. 5⁸ into the rulemaking record.

⁶ The documents are found on a website identified, and referred to, in written comments filed in response to Decision No. C12-1404.

⁷ This was the second of two rulemaking hearings in this Proceeding. The transcript for this rulemaking hearing has been filed in this matter.

⁸ These exhibits are the two documents identified and discussed in Decision No. R13-0628-I.

16. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this Proceeding along with a written recommended decision.

II. FINDINGS AND DISCUSSION

17. In accordance with § 24-4-103(2.5)(a), C.R.S., on December 12, 2012, the Commission submitted a draft of the proposed amendment to Rule 2307 to the Office of the Executive Director of the Department of Regulatory Agencies for a determination whether “the proposed ... amendment may have a negative impact on economic competitiveness or on small business in Colorado.” Had the Executive Director of the Department of Regulatory Agencies, or her designee, determined that the proposed amendment to Rule 2307 may have such a negative impact, that individual could have directed the Commission to perform a benefit-cost analysis of the proposed amendment. Neither the Executive Director of the Department of Regulatory Agencies nor her designee directed the Commission to perform a benefit-cost analysis of the proposed amendment. The Commission did not prepare a benefit-cost analysis of the proposed amendment.

18. No one requested, pursuant to § 24-4-103(4.5)(a), C.R.S., that the Commission issue a regulatory analysis of the proposed amendment to Rule 2307. The Commission did not prepare a regulatory analysis of the proposed amendment.

19. Rulemaking is a quasi-legislative function. Rulemakings encompass a range of administrative agency determinations: at one end of the continuum are regulations based principally on policy considerations, and at the other end of the continuum are regulations the need for which, or the language of which, turns upon proof of discrete facts. *Citizens for Free Enterprise v. Department of Revenue*, 649 P.2d 1054 (Colo. 1982). The rule at issue in this rulemaking falls toward the policy end of that continuum.

20. The statutory authority for the amended Rule 2307 adopted by this Decision is found in §§ 24-4-103, 40-2-108, 40-3-101, 40-15-101, and 40-15-201, C.R.S.

21. As pertinent here, § 40-15-201(2), C.R.S., lists the services and products that are regulated by the Commission pursuant to part 2 of article 15 of title 40, C.R.S. Among those services and products is “white pages directory listing” (§ 40-15-201(2)(d), C.R.S.).

22. Rule 4 CCR 723-2-2308(a) contains the basic local exchange service standard. By that Rule and as pertinent here, the Commission requires each Local Exchange Carrier (LEC)

[to] construct and [to] maintain its telecommunications network so that the instrumentalities, equipment, and facilities within the network [are] adequate, efficient, just, and reasonable in all respects in order *to provide the following services ... to each of its customers within its service area:*

* * *

(XI) White pages directory listing as described in [Rules 2307(a) and 2307(b)];

* * *

(Emphasis supplied.)

A. Rule 2307 and Identification of Provisions at Issue.

23. At present, Rule 2307(a)(I) requires each LEC to cause to be published annually a telephone directory containing, for each exchange served by the LEC, listings⁹ for all basic local exchange customers served by that exchange except for those customers who request that their listings not be included (White Pages telephone directory). Each White Pages telephone directory must include a list of all exchanges in the local calling area.¹⁰ This is the White Pages

⁹ A listing includes the following information: name, address, and telephone number.

¹⁰ As defined in Rule 4 CCR 723-2-2001(ccc), a local calling area is: “the geographic area approved by the Commission in which customers may make calls without payment of a toll charge for each call. The local calling area may include exchange areas in addition to the serving exchange area.”

telephone directory publication requirement. Except for wording changes to clarify the Rule, this provision is not the subject of this rulemaking.

24. Rule 4 CCR 723-2-2001(v) defines customer as “a person who is currently receiving jurisdictional telecommunications service.” Consistent with the definition of customer in Rule 4 CCR 723-2-2001(v), the mandated White Pages telephone directory contains listings for residential basic local exchange service customers *and* for business basic local exchange service customers. At present, Rule 2307(a)(I) neither differentiates between listings for residential customers and listings for business customers nor requires two White Pages telephone directories (one residential, one business) for an exchange. The White Pages telephone directory publication requirement does not change under the proposed amendments to Rule 2307.

25. Some commenters state, assume, or suggest that the proposed Rule 2307 amendments, if adopted, will apply only to *residential* White Pages telephone directories. The ALJ finds this position untenable in light of the Rule 4 CCR 723-2-2001(v) definition of customer. The White Pages telephone directory publication requirement is for one White Pages telephone directory, and that directory contains listings for both residential and business basic local service customers. In addition, in the NOPR, the Commission did not propose to amend Rule 2307(a)(I) to change the White Pages telephone directory publication requirement. Further, the ALJ notes that no commenter provides language, and arguments in support, that would amend the White Pages telephone directory publication requirement to mandate two White Pages telephone directories: one for residential customer listings and one for business customer listings. Finally, the ALJ finds little or no public benefit in amending Rule 2307 to mandate a White Pages telephone directory for residential customer listings and a separate White Pages telephone directory for business customer listings. The current practice, which appears to be

working well, is to have one White Pages telephone directory. There is little evidence in the rulemaking record on this issue as the commenters do not discuss whether amending the White Pages telephone directory publication requirement would be in the public interest.

26. In addition to listings for all basic local exchange service customers and the information and instructions required by Rule 2307(b), each White Pages telephone directory must contain the content specified in Rule 4 CCR 723-2-2504(l)(VI).¹¹ That Rule requires that each Incumbent Local Exchange Carrier, referred to in the Rule as the White Pages provider,

provide space in the customer guide pages of the “White Pages” telephone directory for the purpose of notifying customers how to reach LECs to:

- (A) Request service;
- (B) Contact repair service;
- (C) Dial directory assistance;
- (D) Reach an account representative;
- (E) Request buried cable local service; and
- (F) Contact the special needs center for customers with disabilities.

This provision is not the subject of this rulemaking.

27. White Pages telephone directories may include a separate section (commonly referred to as the Blue Pages) in which listings for federal, state, and local governmental agencies are found. The Blue Pages are not the subject of Rule 2307 and are not the subject of this rulemaking.

28. In addition to the mandated White Pages telephone directory, one or more Yellow Pages directories may be published and distributed. A Yellow Pages directory contains listings

¹¹ Rule 4 CCR 723-2-2504 is an interconnection rule and addresses the arrangements between telecommunications carriers and the responsibilities and obligations that telecommunications carriers have to one another.

and advertising paid for by businesses and professional services and may contain other information. The Yellow Pages directory is not the subject of Rule 2307 and is not the subject of this rulemaking.

29. At present, Rule 2307(a)(II) establishes the requirement for annual revision of a LEC's White Pages telephone directory and provides a mechanism by which the LEC can obtain an extension of time for that annual revision. Except for wording changes to clarify the Rule, this aspect of Rule 2307 is not the subject of this rulemaking.

30. At present, Rule 2307(a)(III) requires each LEC to provide, free of charge, White Pages telephone directories to the Commission; to provide, upon request and free of charge, additional White Pages telephone directories to customers with more than one access line; and to provide to public libraries, upon request, "free copies of the directories for all exchanges served by the LEC within the state." Except for wording changes to clarify the Rule, this aspect of Rule 2307(a)(III) is not the subject of this rulemaking.¹²

31. At present, Rule 2307(a)(III) requires each LEC to cause the White Pages telephone directory to be distributed "free of charge to all customers served by that directory."¹³ This aspect of Rule 2307(a)(III) is the White Pages telephone directory distribution requirement and is the subject of this rulemaking.

32. At present, Rule 2307(b) specifies information that the White Pages telephone directory must contain and where in the White Pages telephone directory that required information must be found. This provision is the subject of this rulemaking.

¹² The amendments to Rule 2307(a) move these requirements to Rule 2307(a)(IV) but do not change the pertinent language of existing Rule 2307(a)(III).

¹³ During the rulemaking and in this Decision, this requirement sometimes is referred to as saturation distribution or saturation delivery.

33. At present, Rule 2307(c) addresses directory assistance and intercepts. Except for clarifying changes to the Rule, this aspect of Rule 2307 is not the subject of this rulemaking.

B. Rule 2307(a)(III).

34. The proposed amendments to Rule 2307(a)(III) focus on the White Pages telephone directory distribution requirement. In Decision No. C12-1404 (the NOPR), the Commission retained the White Pages telephone directory distribution requirement and proposed to amend Rule 2307(a)(III) to give a LEC the option of satisfying that requirement by informing customers that they will not receive a White Pages telephone directory unless they request delivery of the White Pages telephone directory (the opt-in process).

35. As set out in Attachment A to the NOPR, the Commission proposed this language, shown in legislative drafting format, for Rule 2307(a)(III):¹⁴

(III) Upon issuance, the LEC shall ~~cause a copy of the published directory to be distributed free of charge to all customers served by that directory.~~ ensure that all customers served by that directory have access to the directory. A LEC satisfies this requirement if it, or its directory publisher, offers customers the option to receive the directory upon request, free of charge, and within a reasonable time of the request. If a directory required by this rule is not distributed automatically to all customers, then the LEC or its directory publisher shall:

(A) notify customers of the option to request the directory, and

(B) 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).

Decision No. C12-1404 at Attachment A at 1.

36. One commenter suggests that no amendment to Rule 2307(a)(III) is needed because the rulemaking record contains little Colorado-specific information showing that an

¹⁴ As discussed above, a portion of current Rule 2307(a)(III) is now Rule 2307(a)(IV).

amendment is warranted or is in the public interest. The proposed amendment to the Rule rests on policy considerations and serves to give LECs increased flexibility with respect to satisfying the White Pages telephone directory distribution requirement. For these reasons, the ALJ finds that the presence or absence of Colorado-specific information is not persuasive or dispositive with respect to whether to amend Rule 2307(a)(III) as proposed. In addition, the ALJ finds that the rulemaking record includes Colorado-specific information. The ALJ will consider the proposals to amend Rule 2307(a)(III).

37. By far the most contentious aspect of the proposed Rule 2307(a)(III) amendment is whether the Rule should contain the opt-in process proposed in the NOPR or an opt-out process. Under an opt-in process, a customer will not receive a White Pages telephone directory unless the customer requests the directory. Under an opt-out process, a customer will receive a White Pages telephone directory unless the customer requests *not* to receive the directory.

38. In support of the *opt-in process*, commenters state: (a) while White Pages telephone directories are a valuable source of information to their users, their usefulness is reduced because the way in which customers access listing information has changed, and is changing, as a result of telecommunications technology changes, customers' environmental concerns, and customers' reliance on other directories (*e.g.*, specialty or organizational directories); (b) White Pages telephone directory users have access to the Internet and other sources for obtaining, at no cost, the listing information found in the White Pages telephone directory; (c) the experience in other states is that, when there is an opt-in process, a significant and growing percentage of basic local exchange customers elect not to receive White Pages telephone directories; (d) there is customer interest in avoiding delivery of often-bulky White Pages telephone directories that the customer neither wants nor uses; (e) the number of telephone

customers who are “cord-cutting” (that is, relying exclusively on cellular telephones) is increasing, and there is a concomitant reduction in the usefulness of the White Pages telephone directory because the directory often does not contain listings for cellular telephones; (f) the general public has an interest in avoiding the waste and cost associated with printing, recycling, and disposing of unwanted White Pages telephone directories; (g) where the White Pages telephone directory distribution requirement is retained, state regulators have tended to move from saturation delivery to an opt-in process; and this transition has occurred without significant complaints from affected customers; and (h) amending Rule 2307(a)(III) to include the opt-in process does not diminish the pro-customer provisions and public safety information required by Rule 2307 because they are retained and must be provided to all customers.

39. In support of an *opt-out process*, commenters state: (a) White Pages telephone directories continue to be a valuable source of information to their users and should be distributed or available to the greatest extent possible; (b) many White Pages telephone directory users in Colorado may not have access to the Internet or alternative sources for obtaining, free of charge, the listing information found in the White Pages telephone directory, and, often, those without access are the most vulnerable populations (*e.g.*, elderly individuals; low-income individuals); (c) irrespective of what other states may have done or experienced, Colorado has experience only with saturation delivery; (d) given that Colorado has experience only with saturation delivery, customers may be confused or frustrated by a flash-cut transition from saturation delivery to an opt-in process; (e) customers may focus any directory-related confusion and frustration on the LEC and, in Colorado’s competitive telecommunications environment, a LEC cannot afford to have its customers displeased with any aspect of its service because the customers may choose another provider; and (f) in light of the foregoing, if the Commission

determines that there should be an opt-in process to satisfy the White Pages telephone directory distribution requirement, the better course of action is to have a transition period of one or two years during which a LEC could use an opt-out process and at the end of which the Commission could assess the impact of that option.

40. As the Commission recently found, “[t]he ability of customers to list their name, address, and phone number in the white pages directory is an *essential service* for customers.” Decision No. C13-0203 at ¶ 28 (emphasis supplied).¹⁵ Because the directories are so important, the Commission ruled that

“white pages directory listings” remain under Part 2 [of article 15, title 40, C.R.S.], even in ECA [Effective Competition Area] designated areas, and the LECs in ECAs are obligated under Rule 2307 to publish and [to] distribute directories.

Id. The participants in this rulemaking agree that White Pages telephone directories are important and serve necessary purposes. As a result, they did not question the need for the White Pages telephone directory.

41. The issue for the rulemaking participants is *distribution* of White Pages telephone directories. More specifically, the participants principally debate about the type of White Pages telephone directory distribution requirement that best satisfies the public interest.

42. The ALJ agrees that Rule 2307(a)(III) focuses on the White Page directory distribution requirement. In reaching her decision with respect to amending this Rule, the ALJ balanced the following considerations: (a) the White Pages telephone directory is an essential telecommunications service; (b) customers have an interest in easy access to emergency

¹⁵ The Commission issued this Decision on February 12, 2013, in Proceeding No. 12R-862T, *In the Matter of the Proposed Rules Regulating Telecommunications Providers, Services, and Products*, 4 Code of Colorado Regulations 723-2.

telephone numbers, residential listings, and business listings; (c) wherever possible, it is best to avoid customer confusion or uncertainty; (d) many Colorado customers, often very vulnerable populations or populations with a greater need for the White Pages telephone directory, have no or limited access to the Internet; (e) an individual customer likely has an interest in avoiding delivery of one or more White Pages telephone directories that the customer does not want; (f) the way in which people obtain information is changing, and White Pages telephone directory listings are available, at no cost, on-line; (g) the percentage of Colorado telephone customers who are “cord-cutting” has increased, and there is a concomitant reduction in the usefulness of the White Pages telephone directory to the extent the directory does not include listings for cellular telephones; (h) there is a general public interest in reducing the waste and cost associated with printing, recycling, and disposing of unwanted White Pages telephone directories; and (i) to the extent possible, an amendment to Rule 2307 must minimize the loss of the valuable consumer protection and safety information that, pursuant to current Rule 2307, must be in the White Pages telephone directory.

43. The ALJ finds that it is not necessary to choose either the opt-in process or the opt-out process. The ALJ finds that the better resolution, and the resolution that is in the public interest, is to amend Rule 2307(a)(III) to include both options. With the inclusion of both options, amended Rule 2307(a)(III) allows a LEC to have the flexibility to select the option that, in the LEC’s opinion, is best suited to its customers and to each White Pages telephone directory.¹⁶ In addition, the existence of additional options does not require a LEC to use one of

¹⁶ Under the amended Rule, for example, a LEC may choose to use a different option for different White Pages telephone directories in its service territory.

the additional new options; if it elects to do so, the LEC may continue to use saturation delivery throughout its service territory.

44. New Rule 2307(a)(III)(B) contains the *opt-in process*. Under that process, the presumption is that, absent action by the customer, the customer will not receive a White Pages telephone directory. As proposed, Rule 2307(a)(III) provides these requirements and customer protections: (a) the customer has the option to receive the White Pages telephone directory upon request, free of charge, and within a reasonable time of the customer's request; (b) the customer receives notice of the option to request a White Pages telephone directory;¹⁷ and (c) each customer receives the information required by Rules 2307(b)(III) through 2307(b)(V) in written form, either in the White Pages telephone directory provided to the customer upon request or in the alternative printed form that is provided to all customers other than those who request a White Pages telephone directory. Decision No. C12-1404 at Attachment A at 1. In Rule 2307(a)(III) as adopted, the ALJ amplifies and clarifies the requirements and customer protections as follows: (a) the customer notice of the opt-in process must include written instructions concerning how to request delivery of a White Pages telephone directory; (b) the customer notice of the opt-in process must be written and must be verifiable; (c) the customer's request for delivery of a White Pages telephone directory must be verifiable; (d) the LEC must maintain records with respect to delivery of the alternative printed form to customers who do not receive a White Pages telephone directory and must maintain records with respect to delivery of a White Pages telephone directory to a customer that requests a White Pages telephone directory.

¹⁷ Implicitly, this includes instructions concerning how to request a White Pages telephone directory.

45. By design, new Rule 2307(a)(III)(B) specifies neither the means by which written notice is given to the customer nor the means by which the customer requests delivery of a White Pages telephone directory. The LEC will determine the mechanics of implementing the opt-in process.

46. As amplified and clarified, the ALJ finds that the opt-in process requirements and customer protections are necessary and reasonable. The ALJ will include them in amended Rule 2307(a)(III)(B).

47. New Rule 2307(a)(III)(C) contains the *opt-out process*. Under that process, the presumption is that, in the absence of action by the customer, the customer will receive a White Pages telephone directory free of charge. With respect to the opt-out process, the ALJ finds that the following requirements and customer protections are necessary and reasonable: (a) unless the customer chooses not to receive a White Pages telephone directory and informs the LEC of that choice, the customer will receive the White Pages telephone directory free of charge; (b) each customer receives written and verifiable notice that the customer may request that a White Pages telephone directory not be delivered, receives written instructions as to how to inform the LEC that the customer chooses not to receive a White Pages telephone directory, and receives written notice that the customer later may choose to receive a directory; (c) the customer's notice of election not to receive a White Pages telephone directory must be verifiable; (d) a customer that chooses not to receive a White Pages telephone directory later may request a White Pages telephone directory; (e) the customer's request for a directory must be verifiable; (f) a customer that requests a White Pages telephone directory will receive the directory free of charge and within a reasonable time of the customer's request; (g) each customer receives the information required by Rules 2307(b)(III) through 2307(b)(V) in written form, either in the

White Pages telephone directory provided to the customer or in the alternative printed form that is provided to all customers who choose not to receive a White Pages telephone directory; and (h) the LEC must maintain records with respect to delivery of the alternative printed form to all customers who request that a White Pages telephone directory not be provided and must maintain records with respect to delivery of White Pages telephone directories to all other customers served by the White Pages telephone directory. The ALJ will include these customer protections in new Rule 2307(a)(III)(C).

48. By design, new Rule 2307(a)(III)(C) specifies neither the means by which written notice is given to the customer nor the means by which the customer requests delivery of a White Pages telephone directory. The LEC will determine the mechanics of implementing the opt-out process.

49. Commenters raise the issue that amending Rule 2307 may increase a LEC's costs. The ALJ addresses below the financial impacts of amended Rule 2307(a)(III) on a LEC.

50. All LECs are subject to the Rule 2307 White Pages telephone directory requirements. There are two types of LECs: Incumbent Local Exchange Carriers (ILECs) and Competitive Local Exchange Carriers (CLECs). An ILEC¹⁸ can meet the Rule 2307(a) White Pages telephone directory requirements by: (a) publishing and distributing itself the White Pages telephone directory; or (b) entering into a publication and distribution contract with a directory publisher. A CLEC can meet the Rule 2307(a) White Pages telephone directory requirements by: (a) publishing and distributing itself the White Pages telephone directory; (b) relying on the

¹⁸ As discussed above, the ILEC is the White Pages provider and has the obligations listed in Rule 4 CCR 723-2-2504(I).

ILEC in accordance with Rule 4 CCR 723-2-2504(l); or (c) entering into a publication and distribution contract with a directory publisher.

51. As pertinent to this discussion, proposed Rule 2307(a)(III) states:

Upon issuance, the LEC shall ensure that all customers served by that directory have access to the directory. A LEC satisfies this requirement if it, *or its directory publisher*, offers customers the option to receive the directory upon request, free of charge, and within a reasonable time of the request. If a directory required by this rule is not distributed automatically to all customers, then the LEC, *or its directory publisher*, shall

(Emphasis supplied.)

52. One commenter observes that, with respect to White Pages telephone directories, the Commission: (a) has jurisdiction over, and regulates, LECs and places on LECs the obligation to publish and to distribute White Pages telephone directories; (b) does not have jurisdiction over, and does not regulate, directory publishers; and (c) does not regulate the contractual relationship between a LEC and the directory publisher with which the LEC may contract for directory-related services. The commenter states that the proposed amendment to Rule 2307 references a directory publisher and, as worded, could leave the impression that the White Pages telephone directory distribution obligation rests, at least in part, on the directory publisher, an entity not regulated by the Commission. To eliminate ambiguity and possible confusion, the commenter suggests that, if amended, Rule 2307(a)(III) contain no reference to directory publisher.

53. The ALJ agrees with the commenter that the Commission has jurisdiction over LECs and that LECs have the responsibility, and the legal obligation, to publish and to distribute White Pages telephone directories. The ALJ also agrees that, as proposed by the Commission, amended Rule 2307(a)(III) is unclear as to the person who has the obligation to distribute the White Pages telephone directory. As a result, the ALJ agrees with the commenter that amended

Rule 2307(a)(III) should not reference the directory publisher. As amended, Rule 2307(a)(III) contains no reference to directory publisher.

54. One commenter notes the existence of costs associated with implementing the proposed opt-in process,¹⁹ notes that proposed Rule 2307(a)(III) does not address the question of which entity (LEC or directory publisher) is responsible for those costs, and requests that the Commission make clear in an amended Rule that the LEC is protected against any adverse financial impact that may result from the rule amendment. The ALJ finds that revising Rule 2307(a)(III) to remove the reference to directory publisher addresses the financial impact issue. The LEC will choose the method it will use to comply with the White Pages telephone directory distribution requirement. This means that the LEC controls, or has the opportunity to address, the costs associated with its choice. Thus, for example, if a LEC chooses to publish and to distribute itself its White Pages telephone directory and if the LEC chooses to use either the opt-in process or the opt-out process, the LEC has decided to absorb the related costs. On the other hand, if a LEC chooses to enter into a contract with a directory publisher and if the LEC chooses to use either the opt-in process or the opt-out process, the issue of the entity that will bear the related costs is an issue that can be negotiated.

55. One commenter questions the need for a separate alternative printed form that contains only the information required by Rules 2307(b)(III) through 2307(b)(VI) and that,

¹⁹ The costs include, for example and without limitation: (a) printing and distributing materials that inform customers that they will not receive a White Pages telephone directory unless they request delivery of the directory; (b) creating and maintaining the mechanism customers use to request White Pages telephone directories; (c) accurately and timely processing requests for White Pages telephone directories; and (d) timely delivering requested White Pages telephone directories to customers. The ALJ notes that at least some of these costs are incurred when an opt-out process is used.

pursuant to proposed Rule 2307(a)(III)(B), will be provided to a customer that chooses not to receive a White Pages telephone directory. This commenter states: (a) this requirement appears to create a new category or class of directories: the emergency information directory, a directory that contains only the information required by Rules 2307(b)(III) through 2307(B)(VI); (b) the new emergency information of directory has different publication and distribution requirements and rules than does the White Pages telephone directory; (c) the customer need for, and the customer interest in receiving, an emergency information directory are not established; (d) providing a separate and unrequested emergency information directory to customers who have elected not to receive a White Pages telephone directory has the potential to irritate those customers and to diminish the benefit realized from reducing the waste and cost associated with printing, recycling, and disposing of unwanted White Pages telephone directories; and (e) the cost of publishing this new class of directory will fall on ILECs, which (according to the commenter) serve less than one-third of the telecommunications market in Colorado, and on no other telecommunications carriers. If the Commission includes the alternative printed form requirement in amended Rule 2307(a)(III), the commenter requests that the Commission make it clear that the alternative printed form is the obligation of the directory publisher.

56. Other commenters take the position that the separate alternative printed form is necessary, serves an important public safety and customer protection function by providing important information to customers who do not receive a White Pages telephone directory, and is in the public interest. They state: (a) the public safety benefit and the customer protection benefit of having the information required by Rules 2307(b)(III) through 2307(b)(VI) readily available to customers are unquestioned; (b) the elimination of saturation distribution of the White Pages telephone directory means that customers who do not receive the directories will

not have ready access to that important information; and (c) the alternative printed form is an effective way in which to assure that all customers have access to the information, either in the White Pages telephone directory or in the alternative printed form.

57. The ALJ will retain the alternative printed form as proposed. First, there is no dispute about the critical importance of the information required by Rules 2307(b)(III) through 2307(b)(VI), which is the information the alternative printed form will contain. Second, at present, due to the White Pages telephone directory saturation delivery requirement, every customer has access to information required by existing Rule 2307(b) (I) through 2307(b)(III), which is the same information as that required by proposed Rules 2307(b)(III) through 2307(b)(VI). A change in White Pages telephone directory distribution should not affect, and certainly should not reduce or eliminate, customers' ready access to this information. Third, 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.

58. The ALJ finds the argument that the alternative printed form requirement affects only ILECs to be unpersuasive. As discussed above, all LECs have the Rule 2307 White Pages telephone directory publication and distribution obligation.

59. The ALJ will not adopt the suggestion that the Commission make it clear that the alternative printed form is the obligation of the directory publisher. As discussed above, the Commission cannot place an obligation on a directory publisher that is not a LEC. In addition, as discussed above, LEC has control of this issue. If a LEC elects to use a directory publisher, the question of financial responsibility for costs can be addressed in contract negotiations. If a

LEC decides to publish itself and to distribute itself the White Pages telephone directory, the LEC has full knowledge of the associated costs and makes its decision after taking those costs, among other factors, into consideration.

60. The ALJ finds that, for these reasons and for others discussed above, proposed Rule 2307(a)(III)(B) is necessary; is reasonable; and is in the public interest.

61. Consistent with the discussion above, the ALJ finds that the proposed Rule 2307(a)(III) language should be changed. The ALJ finds that Rule 2307(a)(III), as set out in the appendices to this Decision, should be adopted.

C. Rule 2307(b).

62. The proposed amendments to Rule 2307(b) focus on the non-listing content of the White Pages telephone directory. As set out in Attachment A to the NOPR, the Commission proposed this language, shown in legislative drafting format, for Rule 2307(b):

(b) Directory information and instructions. Each directory shall include:

(I) On the front cover, A~~an~~ indication of the area included in the directory and the month and year of issue or alternatively, the month and year through which the directory is effective, ~~shall appear on the front cover. The phone service pages must include~~⁴ ~~information on every ILEC and CLEC with listings included in the directory. Information pertaining to emergency calls, such as police and fire departments, shall appear conspicuously in the front part of the directory.~~

(II) Phone service pages including information on every ILEC and CLEC with listings in the directory.

(III) On the front page of the directory, information pertaining to emergency calls, such as for the police and fire departments, including “9-1-1.”

(IV) If provided by governmental public safety agencies, alternative numbers to use in case of an outage of the 9-1-1 system and non-emergency numbers to reduce inappropriate use of 9-1-1, either contained or referenced in the front part of a directory.

(H-V) ~~The directory shall include:~~ ⁱInstructions for placing local and long distance calls; instructions for placing calls to repair and directory assistance

services; the business office website, if applicable; and the telephone number of the LEC's business offices appropriate to the area served by the directory- or alternative information publication.

(H-VI) ~~Each directory shall include,~~ In a prominent manner in the instructional section of a directory, notice of the Commission's current toll free telephone number and the customer's right to make inquiries regarding telecommunications services to the Commission.

Decision No. C12-1404 at Attachment A at 2.

63. All commenters support the proposed amendments.

64. One commenter suggests one change to proposed Rule 2307(b)(IV): require that, if provided by the agencies, non-emergency telephone numbers for public safety agencies (*e.g.*, Public Safety Answering Points (PSAPs)) be on the first page of a White Pages telephone directory and in the alternative printed form. In support of its proposal, the commenter states: (a) although there will be costs associated with this addition, the benefits of the enhanced public safety outweigh the costs; (b) placing the non-emergency telephone numbers on the first page of the directory will reduce 9-1-1 calls that pertain to non-emergency situations, and reducing the number of non-emergency calls will free up 9-1-1 lines and will allow PSAP dispatchers more quickly to answer 9-1-1 calls that pertain to emergency situations and to dispatch first responders; and (c) placing the non-emergency telephone numbers on the first page of the directory will provide an alternative telephone number for individuals to call in the event that, due to a system outage or other reason, they cannot reach 9-1-1 to report emergency situations.

65. Other commenters oppose this suggested change, at least insofar as it concerns the White Pages telephone directory.²⁰ These commenters state: (a) proposed Rule 2307(b)(IV) addresses all public safety concerns because the White Pages telephone directory and the

²⁰ There appears to be no opposition with respect to putting non-emergency telephone numbers for public safety agencies in the alternative printed form.

separate printed form will include, if provided by the agencies, non-emergency telephone numbers for public safety agencies; (b) the disagreement pertains to how specific Rule 2307(b)(IV) must be with respect to where in the White Pages telephone directory the non-emergency telephone numbers will appear; (c) putting non-emergency telephone numbers for public safety agencies with or near 9-1-1 information on the first page of the directory has the potential to dilute 9-1-1 messaging and to confuse those using the directory; and (d) BRETSA is the only public safety agency to participate in this rulemaking, and other members of the 9-1-1 community (for example, the 9-1-1 Task Force) should have an opportunity to consider the possible impact of, and to comment on, mandating that non-emergency telephone numbers for public safety agencies appear on the first page of a White Pages telephone directory.²¹

66. The ALJ will not adopt the suggested change to proposed Rule 2307(b)(IV). In reaching her decision on this issue, the ALJ balanced the following considerations: (a) proposed Rule 2307(b)(III) requires information pertaining to emergency calls, including 9-1-1, to be on the first page of the White Pages telephone directory; (b) there is a public safety benefit to providing to the public the non-emergency telephone numbers for public safety agencies; (c) there is an existing abbreviated dialing code (*i.e.*, 3-1-1) for “[n]on-emergency governmental police and other governmental service information” (Rule 4 CCR 723-2-2741(b)(II)) which appears to reduce the need for the suggested change to proposed Rule 2307(b)(IV);²² (d) wherever possible, it is best to avoid customer confusion, and there may

²¹ In addition to these arguments, the commenters that oppose the suggested change raise a First Amendment issue; the commenter supporting the suggested change disagrees with them on that issue. The First Amendment issue was discussed extensively in the June 2013 filings and at the July 2013 rulemaking hearing. Because the ALJ determines on other grounds not to adopt the suggested change, the ALJ does not discuss in this Decision the First Amendment issue; does not decide the First Amendment issue; and expresses no opinion with respect to the First Amendment issue.

²² The impact is unknown because no participant discussed the availability of 3-1-1 dialing.

be a risk of confusing White Pages telephone directory users if there is too much information on first page of the directory; (e) wherever possible, it is best to avoid customer uncertainty, and there may be a risk of diluting 9-1-1 messaging if there is too much, potentially conflicting, information on first page of the directory; (f) proposed Rule 2307(b)(IV) allows flexibility with respect to placement of the non-emergency telephone numbers, and nothing prevents a LEC from putting that information on the first page of the directory if it chooses to do so; and (g) BRETSA and its representative who made the oral presentation at the July 2013 rulemaking hearing are knowledgeable about the concerns of the 9-1-1 community; nonetheless, all members of the 9-1-1 community should have an opportunity to consider the possible impact of, and to comment on, mandating that non-emergency telephone numbers for public safety agencies appear on the first page of a White Pages telephone directory,²³ and that did not occur in this proceeding.

67. The ALJ finds that Rule 2307(b) as proposed is necessary; is reasonable; and is in the public interest.

68. Consistent with the discussion above, the ALJ finds that, with minor language changes, proposed Rule 2307(b) should be adopted. The ALJ finds that Rule 2307(b), as set out in the appendices to this Decision, should be adopted.

D. Additional Matters and Findings.

1. Rules 4 CCR 723-2-2504(l)(II) and 2504(l)(III).

69. As discussed above, Rule 4 CCR 723-2-2504(l) (Rule 2504(l)) is an interconnection rule that contains a White Pages telephone directory requirement. During the rulemaking, the participants noted that, if Rule 2307(a)(III) is amended, then Rule 2307(a)(III) and Rule 2504(l)(III) may be inconsistent with the amended Rule 2307(a)(III).

²³ This could be addressed, for example, in a future rulemaking proceeding.

70. To address this issue, one commenter proposes that Rule 2307(a)(III) be amended to add a reference to Rule 2504(l)(III) and that Rule 2505(l)(III) be amended as follows:

(III) Each LEC shall, in turn, cause a White Pages telephone directory to be delivered to ~~each of its customers (one directory per access line purchased)~~ in accordance with the requirements of rule 2307(a).

Dex Further Supplemental Comments and Proposed Rule Changes filed July 1, 2013.

71. Review of Rule 2504(l) reveals that, if Rule 2307(a)(III) and Rule 2504(l)(III) are amended, then Rule 2504(l)(II) may be inconsistent with both of those amended Rules. To address this issue, the ALJ will amend Rule 2504(l)(II) as follows:

(II) Unless the LEC provides written notice limiting the number of White Pages telephone directories it will receive, each ~~Each~~ White Pages provider shall cause each LEC to receive one directory for each access line the LEC serves in the directory provider's operating area.

72. The ALJ finds that amending Rules 2504(l)(II) and 2504(l)(III) in order to eliminate potential inconsistency among and between Rule 2307(a)(III), Rule 2504(l)(III), and Rule 2504(l)(II), all of which reference or concern the White Pages telephone directory distribution requirement, is within the scope of this proceeding. In addition, the ALJ finds that the changes to Rules 2504(l)(II) and 2504(l)(III) are reasonable; are necessary; and provide clarity with respect to the White Pages telephone directory distribution requirement. The ALJ will amend both Rules.

73. The amendments to Rules 2504(l)(II) and 2504(l)(III) as adopted by this Recommended Decision are shown in Appendix A to this Recommended Decision in legislative drafting format. In addition, Rules 2504(l)(II) and 2504(l)(III) as adopted by this Recommended Decision are contained in Appendix B as Rules 2504(l)(II) and 2504(l)(III) will read when published in *The Colorado Register* and the *Code of Colorado Regulations*.

2. Rule 2307(a) and Rule 2307(b).

74. In addition to the changes discussed above, the ALJ made wording changes to clarify Rule 2307(a) and Rule 2307(b). The wording changes are not substantive.

75. The amendments to Rule 2307(a) and Rule 2307(b) as adopted by this Recommended Decision are shown in Appendix A to this Recommended Decision in legislative drafting format. In addition, Rule 2307(a) and Rule 2307(b) as adopted by this Recommended Decision are contained in Appendix B as Rule 2307(a) and Rule 2307(b) will read when published in *The Colorado Register* and the *Code of Colorado Regulations*.

3. Additional findings.

76. The Commission has the necessary and proper authority to issue Rule 2307(a) and Rule 2307(b) attached to this Decision at Appendix A and Appendix B.

77. Rule 2307(a), Rule 2307(b), Rule 2504(l)(II), and Rule 2504(l)(III) attached to this Recommended Decision at Appendix A and Appendix B are consistent with the subject matter of this proceeding as established in Decision No. C12-1404, which initiated this Proceeding.

78. The record of this rulemaking demonstrates the need for, and supports, Rule 2307(a), Rule 2307(b), Rule 2504(l)(II), and Rule 2504(l)(III) attached to this Recommended Decision at Appendix A and Appendix B.

79. Rule 2307(a), Rule 2307(b), Rule 2504(l)(II), and Rule 2504(l)(III) attached to this Recommended Decision at Appendix A and Appendix B are reasonable.

80. Rule 2307(a), Rule 2307(b), Rule 2504(l)(II), and Rule 2504(l)(III) attached to this Recommended Decision at Appendix A and Appendix B provide guidance to, and provide guidelines for, jurisdictional public utilities, customers of those utilities, and others.

81. Rule 2307(a), Rule 2307(b), Rule 2504(l)(II), and Rule 2504(l)(III) attached to this Recommended Decision at Appendix A and Appendix B are clearly and simply stated; and their meaning can be understood by any person required to comply with them.

82. Rule 2307(a), Rule 2307(b), Rule 2504(l)(II), and Rule 2504(l)(III) attached to this Recommended Decision at Appendix A and Appendix B do not conflict with any provision of law; do not duplicate any other rule; and do not overlap any other rule.

83. This Recommended adopts, with modifications, the proposed Rule 2307(a) and Rule 2307(b) noticed in Decision No. C12-1404 and its Attachments and adopts Rule 2504(l)(II) Rule 2504(l)(III), which are reasonably within the scope of the rulemaking as noticed in that Decision.

III. CONCLUSIONS

84. Rule 2307(a), Rule 2307(b), Rule 2504(l)(II), and Rule 2504(l)(III) attached to this Recommended Decision at Appendix A and Appendix B are reasonable.

85. Rule 2307(a), Rule 2307(b), Rule 2504(l)(II), and Rule 2504(l)(III) attached to this Recommended Decision at Appendix A and Appendix B are necessary.

86. Rule 2307(a), Rule 2307(b), Rule 2504(l)(II), and Rule 2504(l)(III) attached to this Recommended Decision at Appendix A and Appendix B meet the statutory requirements.

87. Rule 2307(a), Rule 2307(b), Rule 2504(l)(II), and Rule 2504(l)(III) attached to this Recommended Decision at Appendix A and Appendix B should be adopted in its entirety.

88. Pursuant to § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

IV. ORDER**A. The Commission Orders That:**

1. Rule 4 *Code of Colorado Regulations* 723-2-2207(a) contained in Appendix A and Appendix B to this Recommended Decision is adopted.
2. Rule 4 *Code of Colorado Regulations* 723-2-2307(b) contained in Appendix A and Appendix B to this Recommended Decision is adopted.
3. Rule 4 *Code of Colorado Regulations* 723-2-2504(l)(II) contained in Appendix A and Appendix B to this Recommended Decision is adopted.
4. Rule 4 *Code of Colorado Regulations* 723-2-2504(l)(III) contained in Appendix A and Appendix B to this Recommended Decision is adopted.
5. The rules adopted by this Decision shall be effective 20 days after publication in *The Colorado Register* by the Office of the Secretary of State.
6. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules adopted by this Decision.
7. A copy of the rules adopted by this Decision shall be filed with the Office of the Secretary of State for publication in *The Colorado Register*.
8. The rules adopted by this Decision shall be submitted to the appropriate committee of the Colorado General Assembly if it is in session at the time this Decision becomes effective, or for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.
9. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.
10. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

11. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

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 GRANTING, IN PART, AND
DENYING, IN PART, EXCEPTIONS**

Mailed Date: December 12, 2013
Adopted Date: December 4, 2013

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Decision No. R13-1205 (Recommended Decision). Both Dex Media East, Inc. (Dex) and the Boulder Regional Emergency Telephone Service Authority (BRETSA) timely filed exceptions on October 17, 2013. Dex filed a response in opposition to BRETSA's exceptions on October 31, 2013, which response was joined, in part, by the Colorado Telecommunications Association (CTA).

2. Being fully advised in the matter: (1) Dex's exceptions are granted, in part, and denied, in part; (2) BRETSA's exceptions are denied, with clarification; and (3) we revise the proposed rules on our own motion as discussed.

B. Procedural History

3. The Commission issued a Notice of Proposed Rulemaking (NOPR) on December 12, 2012, by Decision No. C12-1404, and assigned the proceeding to an Administrative Law Judge to propose modifications to 4 Code of Colorado Regulations (CCR) 723-2-2307 (Directories for Basic Local Exchange Service) and conforming amendments related to the publication and distribution of white page telephone directories.

4. The Administrative Law Judge held hearings on January 28, 2013, and July 11, 2013. On September 27, 2013, the Administrative Law Judge issued her Recommended Decision that adopted amendments to Rule 2307, and to related Rule 2504.

5. The proposed rules would permit a local exchange carrier (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 to all customers certain information required by Rule 2307(b)(III) through (VI) (Information Pages), including emergency and non-emergency phone numbers,¹ in printed form – either by White Pages directory delivery or by an alternative printed form.²

C. Exceptions from Dex

6. On exceptions, Dex first requests the Commission revise numbering in proposed Rule 2307(a) due to the inadvertent duplication of the numbering of subpart (III). We note that the first instance of subparagraph (a)(III) contains duplicative language of the second instance in subparagraph (a)(III). Therefore, we delete the first subpart (III). The rules are revised and attached to this Decision, accordingly.

7. In its second request on exceptions, Dex challenges the rule requiring the provision of Information Pages in an alternative printed form to those customers who opt out of receiving *all* directories. In its exceptions, Dex argues that the Commission should add the following language to Rule 2307(a)(III)(C)(vi):

Except 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....

¹ Rule 2307(b)(III) through (VI) includes 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.

² As discussed further herein, 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.

8. Dex claims that this change would harmonize the impact of the proposed rules with the stated intent of the Recommended Decision, which it argues was to “retain the alternative printed form *as proposed*.” Recommended Decision, ¶ 57 (emphasis added). Dex argues that the participants did not intend that an opt-out process would require delivery of an “alternative printed form” to all customers, including those who opt-out of receiving *all* directories. Dex states that the intent of requiring an alternative printed form was “to cover a much narrower and remote contingency; *i.e.*, that one day LECs and directory publishers may no longer distribute Yellow Pages on a saturated basis.” If widespread distribution of both the White Pages and Yellow Pages did not occur, Dex contends that, as intended by participants, widespread distribution of the Information Pages would likewise no longer occur.

9. Dex argues that, by requiring the Information Pages in an alternative printed form to customers who have opted out of all directories, the Recommended Decision did not take into account the differences between consumer desires and behavior. Dex argues that “the opt-out customer does not want a telephone directory at all...” and that “it is not in the public interest to force unwanted paper on customers who have affirmatively requested not to receive it.”

10. We agree with the ALJ’s careful consideration of this matter and her determination that the Information Pages be contained in an alternative printed form should the customer opt out of White Pages directory delivery. In the Recommended Decision, the ALJ recognizes the “critical importance” of the Information Pages and elaborates 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.” Recommended Decision, ¶ 57. The ALJ further noted 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). We agree with the ALJ and do not revise the rule language as suggested by Dex.

11. We also find that customers that choose to opt out of White Pages telephone directories should be aware that the Information Pages shall continue to be provided in an alternative printed form; *i.e.*, through the Yellow Pages or otherwise if the customer opts out of all directories. We therefore modify Rule 2307(a)(III)(C) to include notice to customers as follows:

(ii) customers served by a White Pages telephone directory shall receive written and verifiable notice of the option not to receive a directory; shall receive written instructions informing them how to request that a White Pages telephone directory not be provided; ~~and~~ shall receive written notice that, if they choose, they later may request a White Pages telephone directory and instructions informing them how to make that request; and shall receive written notice that, even if they choose to opt out of all telephone directories, information required by subparagraphs 2307(b)(III) through (VI) shall continue to be provided in an alternative printed form. This information shall be contained in one notice; ...

12. Both the opt-in and opt-out processes require the LEC to provide an alternative printed form for the Information Pages.³ Therefore, similar notice to customers shall be added to Rule 2307(a)(III)(B)(ii) regarding the opt-in process in the revised rules attached to this Decision.

D. BRETSA Exceptions

13. BRETSA first requests that the Commission add language to the rules requiring that the process by which customers opt in to receiving the White Pages directory be provided without cost and without a requirement that customers have access to the Internet.

³ Dex makes clear in its exceptions that it does not take issue with use of the alternative written form as proposed in the opt-in process. For consistency, regardless of whether the LEC chooses the opt-in or opt-out process, customers shall be notified that this information will continue to be provided in an alternative printed form.

In its response, Dex opposes this exception, arguing that the rules already require the option “free of charge.” Dex adds that customers have access to a toll free number for requesting directories and that LECs are required to have toll free numbers for customers to contact their local company at no cost.

14. We agree with Dex that the rules, as amended, already require that the White Pages directories be provided to customers “free of charge.”⁴ Further, the rules require that the LEC make such options “verifiable.”⁵ The ALJ made clear that she intentionally left the explicit process out of the rules and that the LEC would determine the mechanisms of how it implemented the opt-in processes. Recommended Decision, ¶ 45. We agree that the rules need not dictate the means by which the LEC implements how to verify, free of charge, the customer’s preferred option. BRETSA’s exception is denied.

15. Second, BRETSA argues that the ALJ erred by not requiring inclusion of alternative emergency numbers and non-emergency numbers on the *first page* of the White Pages directories, as opposed to the “front part,” which is prescribed in the proposed rules. BRETSA recognizes that the ALJ considered and rejected BRETSA’s proposal to include these non-emergency numbers on the first page, but sets forth arguments disagreeing with the ALJ’s reasoning. Dex opposes BRETSA’s exception, arguing that the ALJ fully considered and rejected BRETSA’s arguments and notes that this inclusion would expose the Commission unnecessarily to First Amendment concerns that were considered by the ALJ. CTA joins in Dex’s opposition to this exception.

⁴ Rule 2307(a)(III)(A)

⁵ Rule 2307(a)(III)(B)(iii)

16. We agree with the ALJ's rejection of BRETSA's arguments. However, while the ALJ indicated the importance of these non-emergency numbers by requiring that they be included in the "front part" of the directory, we clarify that these numbers, in addition to being in the front part of the directory, should be easily identified and accessible. We therefore modify Rule 2307(b)(IV) as follows:

If provided by governmental public safety agencies, alternative numbers to use in case of an outage of 9-1-1 system and non-emergency numbers to reduce inappropriate use of 9-1-1; this information shall be contained in, or shall be referenced conspicuously in, the front part of the directory.

E. Clarification and Non-Substantive Revision

17. We find that the rules should indicate clearly that the LEC may perform, or *cause to be performed*, such as through a contract directory publisher, the requirements set forth for publication. We therefore modify, on our own motion, Rule 2307(a)(III) as follows:

A LEC satisfies this requirement if it does, or causes to be done, one of the following....

18. Non-substantive and typographical corrections are made as necessary and are reflected in the attached revised rules adopted by this Decision.

II. ORDER

A. The Commission Orders That:

1. The exceptions to Decision No. R13-1205 filed on October 17, 2013, by Dex Media East, Inc., are granted, in part, and denied, in part, as discussed above.

2. The exceptions to Decision No. R13-1205 filed on October 17, 2013, by the Boulder Regional Emergency Telephone Service Authority are denied, with clarification, as discussed above.

3. Revisions to the proposed rules are made on the Commission's own motion, as discussed above.

4. The adopted rules in legislative (*i.e.*, strikeout/underline) format (Attachment A) and in final format (Attachment B) are attached to this Decision and are available through the Commission's Electronic Filings (E-Filings) system at:

www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=12R-1248T

5. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

6. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 4, 2013.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners

Decision No. C13-1526-E

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.

ERRATA NOTICE

**DECISION GRANTING, IN PART, AND
DENYING, IN PART, EXCEPTIONS**

Errata Mailed Date: December 17, 2013
Original Decision No. C13-1526 mailed: December 12, 2013

1. The original mailing of Commission Decision No. C13-1526 failed to include Appendix B that was indicated in the Order at paragraph II.A.4 to be attached as Attachment B.
2. Commission Decision No. C13-1526 is corrected by the inclusion of the attached Appendix B as Attachment B to the decision, adopted rules in final format.

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

DOUG DEAN

Director
Dated at Denver, Colorado this
17th day of December, 2013.

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