

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations, Practices, and Conduct of Comcast Phone of California, LLC (U-5698-C) and its Related Entities (Collectively "Comcast") to Determine Whether Comcast Violated the Laws, Rules, and Regulations of this State in the Unauthorized Disclosure and Publication of Comcast Subscribers' Unlisted Names, Telephone Numbers, and Addresses.

FILED
PUBLIC UTILITIES COMMISSION
OCTOBER 3, 2013
SAN FRANCISCO OFFICE
I.13-10-003

ORDER INSTITUTING INVESTIGATION
INTO THE UNAUTHORIZED DISCLOSURE AND PUBLICATION OF
UNLISTED TELEPHONE NUMBERS BY COMCAST

I. SUMMARY

By this Order, the Commission institutes an Investigation ("OII") into whether Comcast Phone of California, LLC, U-5698-C, ("Comcast Phone") and its affiliates (collectively "Comcast") violated any laws, rules, and regulations of this State in disclosing and publishing the names, telephone numbers, and addresses of Comcast residential subscribers who had paid to have that personal information "unlisted."¹ Because of an admitted error by Comcast, over 74,000 Comcast residential subscribers had their confidential information made public through different directories, i.e., directory assistance services, phone books, and/or the Internet. This confidential customer information was erroneously published for 27 months, from July 2010 through December 2012, before detection

¹ "Unlisted" refers to both "non-published" and "non-listed" telephone numbers. The term "non-published" means a customer's customer list information (e.g., name, address, and telephone number) is withheld from published directories and directory assistance. "Non-listed" means a customer's list information is withheld from published directories but available in directory assistance.

(Footnote continued on next page)

by Comcast. Comcast alleges it only became aware of the erroneous publication of its subscribers' unlisted information after receiving two customer complaints in early October 2012. On January 9, 2013, Comcast notified the Commission for the first time of this admitted error.

We are greatly concerned about the potential breach of customers' right of privacy, as well as the significant delays with respect to both the detection and reporting of Comcast's admitted failure to guard the identities of its unlisted subscribers. We will therefore investigate this matter further, and consider whether the Commission should impose a fine or order other remedies for Comcast's apparent actions in violation of the privacy-related laws described below.

II. STAFF INVESTIGATION

The Commission's Safety and Enforcement Division (SED) has completed an initial investigation into the unauthorized disclosure and publication of unlisted subscriber names, telephone numbers, and addresses by Comcast. A copy of SED's Staff Report (Public Version) will be placed in the docket for this proceeding and made available to the public.

A. Comcast Admits to Publishing the Names, Telephone Numbers, and Addresses of its Unlisted Subscribers.

On January 9, 2013, Comcast reported to Commission staff that since June 2011 it had erroneously posted on its Internet directory, Ecolisting (www.ecolisting.com), the names, telephone numbers, and addresses of approximately 50,000 California residential subscribers who paid Comcast for an unlisted telephone number.² According to Comcast, some of the erroneously

(Continued footnote from previous page)

Staff Report at 2.

² Staff Report at 2.

published unlisted telephone numbers belong(ed) to individuals with domestic violence concerns or other personal safety issues.³

Comcast later corrected its statement in data responses, noting that the erroneous postings first began in early July 2010, rather than June 2011, and that its error affected over 74,000 California customers, rather than 50,000.⁴

B. Comcast's Explanation: Data Base Errors Led to Dissemination of Directory Lists that Erroneously Included Confidential Unlisted Subscriber Information.

According to Comcast, beginning in July 2010 Comcast implemented a new process for producing and disseminating listing information for its residential subscribers.⁵ That "new process" included extracting listing information for use by third party publishers, directory assistance providers, and Comcast's online directory (Ecolisting, www.ecolisting.com) from a data table in Comcast's billing system.⁶ However, this data table did not reflect subscribers' "unlisted" status as it should have.⁷ As a result, when Comcast produced and released its directory lists to third parties for directory publications, those lists erroneously included the confidential information of subscribers who had paid Comcast for an unlisted telephone number.⁸

³ Staff Report at 2.

⁴ *Id.* at 3.

⁵ *Id.* at 4.

⁶ *Id.* at 4-5.

⁷ *Ibid.*

⁸ *Ibid.*

C. Comcast Phone of California, LLC's Role in the Production and Dissemination of the Erroneous Directory Lists

1. Company Background

Comcast Phone of California, LLC (“Comcast Phone”) holds a certificate of public convenience and necessity (CPCN), U-5698-C, from the Commission to provide facilities-based and resold local exchange and interexchange telecommunications services in California as a competitive local exchange carrier (CLEC).⁹ According to Comcast, Comcast Phone is primarily a wholesale provider offering interconnection and other regulated services, of which Comcast IP Phone II, LLC (“Comcast IP”) receives through an interconnection agreement with Comcast Phone.¹⁰ Comcast further claims that Comcast Phone does not offer any retail services to residential customers, but does have retail business customers.¹¹

Comcast maintains that it provides residential telephone service through its affiliate Comcast IP; this service is known as XFINITY Voice.¹² However, Comcast advertises XFINITY Voice on its website simply as a “Comcast” service, rather than one specifically provided by Comcast IP.¹³

⁹ See D.08-04-042, footnote 1: “The certificate of public convenience and necessity (CPCN) was originally granted to TCI Telephony Services of California, Inc. in D.96-10-064. The facilities-based CPCN was acquired from AT&T Corp. by the renamed AT&T Broadband Phone Company of California, Inc. (AT&T Broadband Phone) in the above-cited D.99-03-019. In D.02-11-025, AT&T Broadband Phone merged with Comcast Business Communications, Inc. and became Comcast Phone-CA. Comcast Phone-CA acquired additional limited facilities-based authority for the service territories of SureWest Telephone and Citizens Telephone Company (dba Frontier Communications Company of California) in D.05-12-031.”

¹⁰ Staff Report at 6.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

Similarly, the telephone bill for XFINITY Voice does not list Comcast IP anywhere.¹⁴ Rather, the bill indicates that it is from “Comcast.”¹⁵

Comcast Phone and Comcast IP have the same officers and principal place of business.¹⁶ Both entities also share some employees, though Comcast did not clarify the nature and extent of this commonality, generally stating that it is a complex question.¹⁷ Comcast also states that business operations staff from various Comcast entities supports both Comcast Phone and Comcast IP.¹⁸

Staff believes Comcast Phone obtains from the North American Numbering Plan (“NANP”)¹⁹ the 10-digit telephone numbers (also known as access numbers), which Comcast Phone then assigns to Comcast IP for use by its XFINITY Voice subscribers as their residential telephone numbers.²⁰ Currently, only a service provider (such as Comcast Phone) that has a license or authority issued by the FCC or a state regulatory body may obtain numbers from the NANP.²¹ Neustar, the FCC-delegated entity that administers the NANP,²² also owns Targus Information Corporation (“Targus”), the Comcast vendor that distributes and publishes Comcast’s directory listings.

¹⁴ Staff Report at 6.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Id.* at 7.

¹⁹ NANP is an integrated telephone numbering plan serving 20 North American countries, including the United States. AT&T developed the North American Numbering Plan in 1947 to simplify and facilitate direct dialing of long distance calls. Implementation of the plan began in 1951. NANP numbers are ten-digit numbers consisting of a three-digit Numbering Plan Area (NPA) code, commonly called an area code, followed by a seven-digit local number. See NANP website, at http://www.nanpa.com/about_us/abt_nanp.html (last visited August 26, 2013). NANPA, currently operated by Neustar, administers The North American Numbering Plan (NANP).

²⁰ Staff Report at 7; see also Staff Report, Attachment 10 (Comcast Phone and Comcast IP Interconnection Agreement).

²¹ 47 CFR § 52.15(g)(2)(i).

²² See fn. 19, *supra*.

2. Comcast Phone has a *Directory Listing License and Distribution Agreement* with a Third Party Vendor to Distribute and Publish Comcast's Residential Subscriber Directory Lists

Comcast has a contract (the *Directory Listing License and Distribution Agreement*) with Targus, a third party vendor, to distribute and publish Comcast's residential directory lists.²³ Pursuant to the *Directory Listing License and Distribution Agreement*, on behalf of Comcast's local exchange carrier affiliates, Targus distributes Comcast's residential directory lists to other third party directory publishers and for Ecolisting (www.ecolisting.com).²⁴ The contract's recitals emphasize that the *Directory Listing License and Distribution Agreement* is between Comcast, in its capacity as a local exchange carrier, and Targus, a distributor of directory listing information.²⁵ A representative of Comcast Phone, LLC, which owns Comcast Phone of California, executed the contract.²⁶

²³ Staff Report at 7-10. This contract was in effect during the period of Comcast's reported erroneous disclosures and publication of unlisted telephone numbers.

²⁴ *Ibid.*

²⁵ Staff Report at Attachment 11, *Directory Listing License and Distribution Agreement*, at p.1, stating:

WHEREAS, Comcast, in its capacity as a LEC, generates DL [directory listing] Information as a result of providing wholesale and retail telecommunications services; and

WHEREAS, Comcast's DL Information is used and useful in creating paper and electronic telephone directories, for providing directory assistance ("DA") services (i.e., 411), and for other purposes; and

WHEREAS, as a LEC, Comcast is obligated under Sections 251(b)(3) and 222(e) of the Act to provide DL information to eligible requesting LECs and directory publishers; and

WHEREAS, Targus is a distributor of DL information to LECs, directory publishers, and other users of DL information.

The *Directory Listing License and Distribution Agreement* further states that Targus is Comcast Phone's Distribution Agent. See Attachment 11 (*Directory Listing License and Distribution Agreement*, at p. 2).

²⁶ Staff Report at 8-9.

The *Directory Listing License and Distribution Agreement* includes language describing Targus as Comcast's agent.²⁷ As Comcast's agent, Targus is to provide Comcast's directory listing information to all eligible recipients as if Comcast provided the directory listings directly to them.²⁸ Indeed, before Targus became Comcast's agent for distributing and publishing Comcast's residential directory lists, Comcast Phone disseminated those residential lists to other local exchange carriers or their directory publishers on Comcast's behalf.²⁹

Comcast admits that it released to Targus/Neustar the erroneous residential subscriber list information pursuant to the *Directory Listing License and Distribution Agreement*.³⁰ In turn, Targus/Neustar distributed that information to directory publishers, including Comcast's online directory, Ecolisting.³¹

D. It took Comcast 27 Months to Detect the Unauthorized Disclosure and Publication of Unlisted Telephone Numbers

Comcast contends it did not discover the erroneous publication of confidential unlisted subscriber information until early October 2012, after it received two customer complaints on October 2 and 8, 2012.³² According to Comcast, it investigated these two complaints by opening trouble tickets.³³

Comcast also informs staff that it performs regular searches on the Internet for customer complaints.³⁴ Comcast then uses these results to identify and

²⁷ *Id.* at 9.

²⁸ *Ibid.*

²⁹ *Id.* at 9-10.

³⁰ *Id.* at 8.

³¹ *Ibid.*

³² *Id.* at 20-22.

³³ *Id.* at 21.

³⁴ Staff Report at 22.

help address customer concerns.³⁵ Comcast did not provide SED with results of its Internet searches because it purportedly does not save them.³⁶

E. The Affected Customers

To date, Comcast's admitted error has affected over 74,000 Comcast residential subscribers.³⁷ These subscribers paid Comcast from \$1.25 to \$1.50 per month to have an "unlisted" residential phone number (some affected subscribers had multiple numbers).³⁸ It appears over half of Comcast's subscribers with unlisted telephone numbers have been affected by Comcast's error.³⁹

1. Assurances by Comcast to Subscribers with Unlisted Numbers

On Comcast's website for XFINITY Voice, Comcast provides customers with information on how to keep their residential telephone numbers from being published on Comcast's Ecolisting online directory:

As an XFINITY Voice subscriber, you can choose to publish or not publish your number in our Comcast Ecolisting online directory. Here's everything you need to know about our directory listing guidelines.

If you want to keep your telephone number private, you can request "non-published status". This means your number will be made unavailable both in directories and directory assistance.⁴⁰

When Comcast advertised its new online directory assistance service, Ecolisting, Comcast told customers that Comcast would continue to ensure that

³⁵ *Id.* at 22.

³⁶ *Ibid.*

³⁷ *Id.* at 3.

³⁸ *Id.* at 10.

³⁹ *Id.* at 11.

⁴⁰ *Ibid.*

unlisted names and numbers would not be distributed to phone book publishers, online directories, or directory assistance.⁴¹

2. Customer Complaints

While Comcast objected to providing SED with lists of affected customers that had inquired or complained to Comcast about Comcast's unauthorized disclosure and publication of unlisted telephone numbers, SED nevertheless found some complaints on Comcast's own complaint forum.⁴² Some of the complaints posted date back to as early as March 2010 and as recent as August 13, 2013.⁴³ SED also found complaints posted on other online consumer forums, including a news article dating back to February 2012.⁴⁴

The Commission also received complaints, with one from January 2009.⁴⁵ Staff is in the process of reviewing other possible complaints related to Comcast's error.⁴⁶

Comcast provided staff with several complaints that were forwarded to Comcast from the Federal Communications Commission and the Better Business Bureau.⁴⁷

⁴¹ Staff Report at 11.

⁴² *Id.* at 12-18.

⁴³ *Id.* at 13.

⁴⁴ *Id.* at 13, 15.

⁴⁵ *Id.* at 18-19. The Commission's Consumer Affairs Branch (CAB) received this complaint on January 14, 2009. The notes from the CAB representative who handled the complaint stated: *Consumer complains that he pays Comcast for service and also for home phone number to be unlisted. Recently received new phone book and he found his name and number is listed in book. States he called Comcast and they do nothing. Requested to speak w/Supervisor and rep transfers call from one rep to another, never able to speak with Supervisor. Consumer did not want me to call utility - suggested he put complaint in writing to have on record.* *Id.* at 18.

⁴⁶ *Id.* at 18, fn. 69.

⁴⁷ Staff Report at 23; see also Staff Report, Attachment 23.

3. Customers Expressed Anger and Frustration that Comcast Disclosed Their Confidential Information, Some Fearing for Their Safety

In the complaints SED found, most customers expressed frustration and anger regarding their attempts to resolve the issues caused by Comcast's unauthorized disclosure of their unlisted information, some fearing for their safety.⁴⁸ For example, the April 9, 2012 complainant wrote, "They have put my life in danger & this is not the littlest bit of exaggerating....I'm tired of getting the runaround & have now contacted corporate office, being paraplegic already how am I suppose (sic) to protect myself from a man that has threatened to kill me with an ak57...."⁴⁹ The February 28, 2011 complainant wrote about paying for a service to assist with removing his or her unlisted information from the Internet, in addition to the hours spent, over the span of months, attempting to resolve this issue with Comcast.⁵⁰

Another subscriber declared, "I've called them [Comcast] numerous times" and exclaimed, "I paid for a service. I want my service!"⁵¹ Yet another subscriber, stated, "so he [Comcast customer service representative] is going to charge me and still he can't promise that my number is going to be unlisted...I am so angry."⁵²

Other complainants complained:

- *No explanation whatsoever, they ignore their mistakes completely. Asking for a supervisor as*

⁴⁸ Staff Report at 19-20.

⁴⁹ *Id.* at 15; see also Staff Report, Attachment 23 (e.g., FCC Complaint number 13-C00468870-1, February 4, 2013 ["The longer my information is out there, the worse the issue gets, yet still no action. I have paid for unpublishing my information for years as I testified in a murder trial. Now, my wife, children, and I are [a]ll in danger; and I have nowhere to turn. I live in California, but Ca PUC 2891.1 apparently has no teeth. Is there no recourse???"]).

⁵⁰ *Id.* at 14.

⁵¹ *Id.* at 15.

⁵² *Id.* at 14.

*the rep refused to explain what had happened I was put on hold for a while then told I would have to wait for a call back that never came;*⁵³

- *Why are you still charging me to have an unlisted number when you screwed up and published it anyway. Once you published a number, you cannot go back and undo it;*⁵⁴
- *Apologize my foot, they ought to reimburse me for the inconvenience and aggravation!!!;*⁵⁵
- *I am very upset because my information is in this book until 2013. I just came from an abusive relationship now my abuser can just pick up the YP book to find me....*⁵⁶

The Staff Report contains further examples of customer complaints.⁵⁷

4. Not All 74,650 Affected Customers May Be Aware that Comcast Erroneously Published Their Confidential Information

Comcast informs staff that it does not intend to make any public announcements of its error in publishing the unlisted subscriber information.⁵⁸ Comcast also states that it notified affected customers by letter or automated telephone calls.⁵⁹ Only current Comcast customers received both forms of notification.⁶⁰ For those customers who no longer subscribe to Comcast service, Comcast states it mailed them notices (presumably to their last known addresses),

⁵³ Staff Report at 16.

⁵⁴ *Id.* at 17.

⁵⁵ *Ibid.*

⁵⁶ *Id.* at 19.

⁵⁷ *Id.* at 13-20; see also Staff Report Attachments 20-23.

⁵⁸ *Id.* at 24.

⁵⁹ *Id.* at 24-26

⁶⁰ *Id.* at 24.

but those previous customers did not receive the automated phone calls.⁶¹ In sum, staff does not know whether all of the affected customers received actual notice; it is possible that some affected customers may not know that Comcast published their confidential information.⁶²

5. Comcast's Alleged Remedial Measures

Comcast states that as part of its remedial measures, it has issued credits and/or offered refunds to some portion of its affected customers.⁶³ In some instances, Comcast states it provided additional remediation to affected customers, but only upon the customer's request and upon the customer signing a general release form provided by Comcast.⁶⁴

III. DISCUSSION

A. Jurisdiction over Comcast Phone of California

The Commission has jurisdiction over Comcast Phone of California as a CPCN holder licensed by the Commission to provide telecommunications services as a competitive local exchange carrier ("CLEC"). Accordingly, the Commission may investigate Comcast Phone's role in the unauthorized disclosure and publication of confidential subscriber information and subsequently impose

⁶¹ Staff Report at 24.

⁶² *Ibid.*

⁶³ *Id.* at 26-27. Staff is still attempting to ascertain the total number of subscribers who actually received refunds and credits.

⁶⁴ *Id.* at 27; see also Staff Report, Attachment 23 (e.g., FCC Complaint number 13-C00471912-1, February 13, 2013 [The notes in the complaint state, in pertinent part: "[C]ustomer of Comcast XFINITY. He received a letter from the[m] stating that they had their unpublished, unlisted number inadvertently published in their online directory. He called Comcast and they confirmed this. What can the FCC do about this? The letter states that they have taken the appropriate corrective actions. They state that they have also credited his account accordingly. He now has a restraining order against a consumer in his town because of this. There are other consumers that are experiencing the same things. As a resolution, he would like Comcast to be held accountable for these actions. Offering a \$27 credit is not sufficient compensation."]).

any warranted fines or other sanctions for any wrongdoing the Commission may find as the result of this investigation.

Comcast admits that the *Directory Listing License and Distribution Agreement* governed the release of the erroneous directory lists by Comcast to its vendor, Targus/Neustar, who subsequently distributed them to other carriers and directory publishers. Comcast entered into the *Directory Listing License and Distribution Agreement* with Targus/Neustar on behalf of Comcast's local exchange carrier affiliates, of which Comcast Phone of California is one. The Comcast signatory on the contract is a representative of Comcast Phone, LLC, which owns Comcast Phone of California. The recitals in the contract indicate that the contract is for the benefit of Comcast Phone, as a local exchange carrier.⁶⁵ Accordingly, Comcast Phone appears to have been instrumental in releasing the erroneous directory lists containing confidential unlisted subscriber information.

Comcast Phone and Comcast IP may operate as an integrated entity. As discussed above, Comcast Phone provides the wholesale telecommunications transport used by Comcast IP. Comcast Phone also provides to Comcast IP the telephone numbers that are then assigned to XFINITY Voice customers.⁶⁶ Further, both Comcast Phone and Comcast IP have the same officers and principal place of business; they share some employees.⁶⁷

B. Privacy Protections for Subscribers Who Pay for an Unlisted Number

The unauthorized disclosure and publication of unlisted telephone numbers committed by Comcast, if true, may violate California's recognized constitutional right of privacy and Section 2891.1, governing the privacy right of a

⁶⁵ Staff Report at 8-9; see also fn. 25, *supra*.

⁶⁶ Staff Report at 7.

⁶⁷ *Id.* at 6-7.

subscriber to an unlisted telephone number.⁶⁸ The disclosure and publication of unlisted telephone numbers may also violate the “just and reasonable” standards of Section 451.

1. California Constitution, Article I, § 13

The California Constitution protects the privacy rights of telephone subscribers. Article I, § 13 of the California Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.⁶⁹

The California Supreme Court has found that a telephone subscriber has a reasonable expectation of privacy in his or her telephone call records and unauthorized disclosures of such records violate Article I, § 13.⁷⁰

At issue here is the alleged violation of the privacy right in an unlisted telephone number that the Supreme Court declared in *People v. Chapman* to be protected by the California Constitution. Consistent with *People v. Chapman*, the Commission, in D.01-07-032, denied a request by the California Narcotics Officers’ Association to modify a Commission decision that generally prohibited all public utilities from releasing customer information to law enforcement except pursuant to legal process. As part of our analysis, we

⁶⁸ Cal. Const. Art. I, § 1; P.U. Code § 2891.1(a).

⁶⁹ Cal. Const., Art. I, § 13.

⁷⁰ *People v. Chapman* (1984) 36 Cal.3d 98, 106-111 (reasonable expectation of privacy in unlisted name, address, and telephone number); *People v. Blair* (1979) 25 Cal.3d 640, 653-655 (hotel guest has reasonable expectation of privacy in hotel telephone records); *People v. McKunes* (1975) 51 Cal.App.3d 487, 492 (telephone company’s customer’s records).

recognized that utility customers “do enjoy privacy rights based on Article I, § 13 of the California Constitution.”⁷¹

Here, the customers affected by Comcast’s unauthorized disclosure and publication of unlisted telephone numbers, including the associated names and addresses, specifically paid an extra fee (\$1.25 or \$1.50) per month to have that information kept confidential. Under *People v. Chapman*, these subscribers had a reasonable expectation of privacy in their unlisted telephone numbers and therefore the California Constitution protected their identities from being disclosed without their consent. Accordingly, when Comcast produced and disseminated the erroneous residential directory lists that included unlisted subscribers’ confidential information without their knowledge or consent, Comcast may have violated the California Constitution.

2. P.U. Code Section 2891.1

In addition to the California Constitution, several provisions of the Public Utilities Code, Division 1, Part 2, Chapter 10, Article 3, entitled “Customer Right of Privacy,” protect the privacy of telephone customers.⁷² Section 2891.1(a), implicated here, states in part:

Notwithstanding Section 2891, a telephone corporation selling or licensing lists of residential subscribers shall not include the telephone number of any subscriber assigned an unlisted or unpublished access number. A subscriber may waive all or part of the protection provided by this subdivision through written notice to the telephone corporation. (§ 2891.1(a).)

Here, Comcast admitted that it released XFINITY Voice subscriber directory lists to a third party, Neustar/Targus, that included the phone number of its residential subscribers assigned an unlisted or unpublished residential telephone

⁷¹ D.01-07-032, *Slip. Op.*, at pp. 14-15, citing *People v. Blair, supra*, (1979) 25 Cal.3d 640, *People v. Chapman, supra*, (1984) 36 Cal.3d 98.

⁷² See §§ 2891 [CPNI] to 2894 *et seq.*.

number.⁷³ Comcast released these directory lists pursuant to the *Directory Listing License and Distribution Agreement* between Comcast Phone and Targus. These admitted disclosures by Comcast occurred for approximately 27 months. Staff alleges that Comcast violated Section 2891.1, regardless of whether the actions causing the violation were intentional or inadvertent.

Pursuant to Section 2101, the Commission is empowered to enforce provisions of the California Constitution, as well as the Public Utilities Code.⁷⁴ Any violation of the Public Utilities Code or a Commission decision or order is subject to fines of \$500 to \$50,000 for each violation, for each ongoing day, pursuant to Sections 2107⁷⁵ and 2108. Further, every corporation or person, other than a public utility “which or who aids or abets any violation of the California Constitution or Commission order, decision, rule, direction, or demand, or requirement of the [C]ommission” is subject to a penalty of \$500 to \$50,000 for each offense.⁷⁶

3. P.U. Code Section 451

Section 451 of the Public Utilities Code provides that all charges, services, instrumentalities, and rules of a public utility must be just and reasonable. Comcast’s conduct here may constitute breach of contract and defeat the reasonable expectations of privacy in those customers who specifically requested an unlisted telephone number. If so, such conduct cannot be considered just and reasonable.

⁷³ Staff Report at 7-10.

⁷⁴ Section 2101 states: “The commission shall see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected, and to this end it may sue in the name of the people of the State of California.”

⁷⁵ SB 879 became effective January 1, 2012, raising the fine amounts in Section 2107 to \$500-\$50,000. The prior range was \$500 - \$20,000 for each violation.

⁷⁶ § 2111.

C. Comcast May or Should Have Known About the Unauthorized Disclosure and Publication of Unlisted Telephone Numbers Earlier Than Reported

As discussed above, despite the unauthorized disclosure of confidential subscriber information first occurring in July 2010, Comcast told staff that it did not discover its error until it looked into two customer complaints it received in early October 2012. However, staff's investigation reveals that Comcast may have been aware of the problem much earlier than October 2012. The complaints posted on Comcast's own complaint forum date back as far as March 2010. In most of the complaints, the customer stated that he or she had contacted Comcast about the problem. Similarly, the Commission also received several Comcast customer complaints prior to October 2012 from customers unhappy that their unlisted telephone numbers had been published.⁷⁷

The Internet and Commission complaints show that Comcast received more than just the two complaints in October 2012 concerning its unauthorized disclosure and publication of unlisted telephone numbers. It is difficult to understand how or why Comcast was not alerted to its error much sooner, in light of the complaints staff found online and the fact that Comcast routinely searches the Internet for customer complaints. Staff alleges that Comcast knew or should have known about the unauthorized disclosure of confidential customer information earlier than October 2012 and should have reported its admitted error to the Commission considerably earlier than January 9, 2013.

D. Comcast IP and SB 1161

Comcast has contended in discussions with staff that the Commission is precluded from investigating this matter because of the strictures of Senate Bill (SB) 1161 (codified at Pub. Util. Code §§ 239 and 710). With certain

⁷⁷ See Staff Report at 17-19; see also *id.*, Attachment 22.

exceptions discussed further below, section 710 prohibits the Commission from exercising any “regulatory jurisdiction or control” over VoIP or other IP enabled services on or after its effective date of January 1, 2013.⁷⁸ Comcast contends that the affected individuals were customers of Comcast IP.

First, we note that Comcast’s reported unauthorized disclosure and publication of unlisted telephone numbers occurred prior to January 1, 2013, lasting from approximately July 2010 through December 2012. We find nothing in the plain language of SB 1161 that would make its effect retroactive. “[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the legislature or the voters must have intended a retroactive application.”⁷⁹ Therefore, we tentatively conclude that SB 1161 does not apply to the pre-SB 1161 violations alleged in this OII.

Second, even if SB 1161 is said to apply, it recognizes certain exceptions to the limits on the Commission’s jurisdiction over VoIP or IP enabled services.⁸⁰ Notably, section 710(d) makes clear that the prohibitions in section

⁷⁸ Section 710 states in relevant part:

- (a) The commission shall not exercise regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in subdivision (c). In the event of a requirement or a delegation referred to above, this section does not expand the commission's jurisdiction beyond the scope of that requirement or delegation.
- (b) No department, agency, commission, or political subdivision of the state shall enact, adopt, or enforce any law, rule, regulation, ordinance, standard, order, or other provision having the force or effect of law, that regulates VoIP or other IP enabled service, unless required or expressly delegated by federal law or expressly authorized by statute or pursuant to subdivision (c). In the event of a requirement or a delegation referred to above, this section does not expand the commission's jurisdiction beyond the scope of that requirement or delegation.

⁷⁹ *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209.

⁸⁰ See P.U. Code § 710, subsections (c)-(g).

710(a) and (b) concerning the Commission’s jurisdiction over VoIP or IP enabled services “does not affect the enforcement of any state or federal criminal or civil law or any local ordinances of general applicability, including, but not limited to, consumer protection and unfair or deceptive trade practice laws.”⁸¹ The violations alleged herein implicate a privacy right derived from the California Constitution, which undoubtedly applies to every California citizen. Thus, the laws at issue here appear to be laws of general applicability. As a result, section 710(d) appears to allow the Commission to pursue this OII, even if SB 1161 were given retroactive application or the violations were ongoing.

Third, we note the central and active role of Comcast Phone in the alleged violations, as discussed above.

Therefore, **IT IS ORDERED** that:

1. An investigation is instituted on the Commission’s own motion to determine whether Respondent Comcast Phone of California, LLC, in conjunction with other Comcast affiliates (including but not limited to Comcast Phone IP II, LLC) (collectively, “Comcast” or “Respondents”), violated any provision of the California Constitution, Public Utilities Code or Commission general orders, statutes, resolutions, directives, requirements in connection with the release of subscribers’ confidential information. As provided in P.U. Code § 2111, *inter alia*, any corporation or person which or who aids or abets any violation of the California Constitution or Commission order, decision, rule, direction, or demand, or requirement of the Commission is subject to penalties imposed by this

⁸¹ P.U. Code § 710(d). Section 710(d) states:

This section does not affect the enforcement of any state or federal criminal or civil law or any local ordinances of general applicability, including, but not limited to, consumer protection and unfair or deceptive trade practice laws or ordinances, that apply to the conduct of business, the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resource Code), local utility user taxes, and state and local authority governing the use and management of the public-rights-of-way.

Commission.” The following Comcast entities are hereby named as Respondents: Comcast Phone of California, LLC, Comcast Phone, LLC, Comcast Cable Communications Management, LLC, and Comcast IP Phone II, LLC.

2. The Commission may impose fines in this matter pursuant to Public Utilities Code Sections 2107 and 2108, *inter alia*, and may order the implementation of operational and policy measures designed to prevent release of subscribers’ confidential information pursuant to Public Utilities Code Section 761, *inter alia*.

3. Pursuant to Rule 7.1(c) of the Commission’s Rules of Practice and Procedure, this proceeding is categorized as adjudicatory. *Ex Parte* communications are prohibited. The categorization of this Order is appealable under Rule 7.6.

4. Pursuant to Rule 7.3, this Order constitutes a preliminary scoping memo. The issues of this proceeding are framed in the above order, which may be amended by subsequent order or ruling of the Assigned Commissioner or Administrative Law Judge. These issues will be heard in this proceeding without prejudice to any related proceedings.

5. A prehearing conference shall be convened before an Administrative Law Judge for the purpose of establishing a schedule in this matter including the exchange of prepared testimony, and the date, time, and location of an evidentiary hearing, and for good cause shown the ALJ and/or Assigned Commissioner may extend the deadlines specified herein, for any particular responses required.

6. To facilitate the completion of this investigation, and consistent with the provisions of P.U. Code Sections 311, 314, 581-82, and 584, staff shall continue discovery and investigation of the operations of Respondents. Comcast shall cooperate fully with staff’s inquiries and preserve all records related to the matters described above until the completion of this Investigation. Any data requests to staff shall be limited to matters discussed in this OII, the Staff Report, and any further prepared testimony offered by staff in this proceeding.

7. A copy of SED's Staff Report will be placed in the record of this proceeding.

8. We expect staff to bring any newly discovered information or alleged violations by Respondents to our attention. Staff may present additional allegations to the ALJ in the form of a motion to amend the scope of this proceeding, which shall be supported by a further staff report or declaration supporting the proposed amendments.

9. Pursuant to Public Utilities Code § 583, the Commission authorizes the disclosure of information obtained from Comcast in confidential data responses or other communications to staff, to the limited extent that such information is stated above.

10. The Executive Director shall cause a copy of this Order to be served by certified mail on Respondent Comcast:

CT Corporation System
(Registered Agent for:
Comcast Phone of California, LLC
Comcast Phone, LLC,
Comcast Cable Communications
Management, LLC, and
Comcast IP Phone II, LLC)
818 West Seventh Street, 2nd Floor
Los Angeles, CA 90017

Comcast Phone of California, LLC
1701 John F. Kennedy Blvd.
Philadelphia, PA 19103-2838

Comcast Phone, LLC
1701 John F. Kennedy Blvd.
Philadelphia, PA 19103-2838

Comcast Cable Communications
Management, LLC
1701 John F. Kennedy Blvd.
Philadelphia, PA 19103-2838

Comcast IP Phone II, LLC
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John Gutierrez
Director of Governmental Affairs
Comcast California
3055 Comcast Place
Livermore, CA 94551

Suzanne Toller, Esq.
Davis Wright Tremaine LLP
505 Montgomery Street
San Francisco, CA 94111-6533

This order is effective today.

Dated October 3, 2013, at San Francisco, California.

MICHAEL R. PEEVEY

President

MICHEL PETER FLORIO

CATHERINE J.K. SANDOVAL

MARK J. FERRON

CARLA J. PETERMAN

Commissioners