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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1058

In the Matter of the Investigation into the)
Use of Virtual NPA/NXX Calling Patterns.) ORDER

DISPOSITION: REHEARING DENIED

In Order 03-329, entered May 27, 2003, the Commission concluded that the recent opinion of the Ninth Circuit Court of Appeals,¹ (the Opinion), precluded the Commission from adopting generic rules for the compensation of carriers for the transport of VNXX-based, ISP-bound traffic.

On July 25, 2003, a group of incumbent local exchange carriers (ILECs)² filed the Petitioning ILEC's Application for Rehearing (Application) of Order No. 03-329 (the Order). On August 8, 2003, a group of competitive local exchange carriers (CLECs)³ filed a Joint Reply to the Petitioning ILEC's Application for Rehearing (Reply).

Standards for Rehearing. OAR 860-014-0095(3) provides that the Commission may grant an application for rehearing or reconsideration if the applicant shows that there is either "(a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before the issuance of the order; (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision; (c) An error of law or fact in the order which is essential to the decision; or (d) Good cause for further examination of a matter essential to the decision."

¹ *Pacific Bell, et al v. Pac-West, et al*, No. 01-17161, D.C. No. CV-99-04480-CW; *Verizon California, Inc., et al v. California Telecommunications Coalition, et al*, No. 01-17166, D.C. No. CV-99-03973-CW; *Pacific Bell, et al v. California Public Utilities Commission, et al*, No. 01-17181, D.C. No. CV-99-04479-CW.

² Qwest Corporation (Qwest), Verizon Northwest Inc. (Verizon), CenturyTel of Oregon, Inc., and CenturyTel of Eastern Oregon, Inc. (CenturyTel), and the Oregon Telecommunications Association (OTA), except its member Sprint Corporation and its affiliates.

³ Pac-West Telecomm, Inc., XO Oregon, Inc., Priority One Telecommunications, Inc., Time Warner Telecom of Oregon, Inc., WorldCom, Inc. and AT&T communications of the Pacific Northwest, Inc.

Discussion. The ILECs assert that the Order is wrong as a matter of law in its interpretation of the scope of the FCC’s preemption of state authority⁴ and that it is an unreasonable and unlawful exercise of the Commission’s authority “because it requires ILECs to provide *free* interexchange transport of calls delivered to distant ISPs ...”.⁵ The ILECs assert that the Ninth Circuit Opinion is inapposite because it did not address VNXX-enabled “non-local” calls; it only dealt with calls delivered to local ISPs. The change in the “division of labor” caused by the passage of the Act did not extend so far as to deprive the Commission of jurisdiction to regulate “non-local” ISP-bound traffic.⁶

The point of law on which the Order turned did not relate to our analysis of the role of the Commission in the division of labor under the Act, which led us to exercise our authority. Quite the opposite. We fully appreciated the position in which the ILECs were placed and our decision was reached with neither pleasure nor enthusiasm:

“We believe that the Commission should have an important policy role in making decisions having such profound effects on the provision of telecommunications services in Oregon. Nevertheless, we find that the recent decision by the United States Court of Appeals for the Ninth Circuit has essentially deprived us of that role.”⁷

We then proceeded to quote extensively from the Circuit Court’s Opinion, noting that OTA had asked the Commission to undertake a generic proceeding. We further noted that the Ninth Circuit Court was quite explicit with respect to the determination as to what constituted interstate traffic.⁸ The Ninth Circuit Court further unequivocally said that state commissions were not granted general rulemaking authority over interstate traffic, but were granted the authority to act in the role of arbitrator in individual interconnection agreements.⁹ Our ruling did not even require us to reach the

⁴ Such an assertion would appear to be a subsection (c) ground.

⁵ Application, p. 2, emphasis in text. Since the ILECs are discussing effects rather than interpretations of law, this would appear to be a subsection (d) ground for rehearing.

⁶ *Id.*, pp. 3-5.

⁷ Order, p. 7.

⁸ The Ninth Circuit Opinion, at pp. 4674-5 specifically states: “the FCC and the D.C. Circuits have made it clear that ISP traffic is ‘interstate’ for jurisdictional purposes...Indeed, the FCC recently reaffirmed its position that ‘ISP-bound traffic is jurisdictionally interstate.’” No distinctions are made by the Ninth Circuit as to the intrastate source of such ISP-bound traffic, whether it be “local” or “non-local.”

⁹ The language is so explicit that it hardly leaves room for argument: “The Act did not grant state regulatory commissions additional general rulemaking authority over interstate traffic...Thus, the CPUC’s resort to its general rulemaking authority under California law to issue a generic order applicable to all interconnection agreements between telecommunications companies in California is precluded by §252.” (*Opinion*, pp. 4676-7).

“local” versus “non-local” intrastate traffic distinction; the fact that OTA requested a generic proceeding, rather than have one of its members bring the matter to us for arbitration, was, itself, dispositive.

CONCLUSION

In matters of interpretation of federal law, the Ninth Circuit Court of Appeals is the highest authority in the State of Oregon, save the Supreme Court of the United States. The ILECs have failed to demonstrate to us that we have misinterpreted or misconstrued the meaning or scope of the Ninth Circuit’s recent Opinion to which we must give deference. The ILECs have also failed to show good cause for further examination of a matter essential to our decision.

ORDER

The Petitioning ILEC’s Application for Rehearing of Order No. 03-329 is DENIED. Our Order providing that any rules or policies promulgated in this docket relating to terms and conditions for compensation and transport under interconnection VNXX agreements, shall not apply to VNXX-based ISP-bound traffic, is AFFIRMED.

Made, entered, and effective _____.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may appeal this order to a court pursuant to applicable law.