

ORDER NO. 04-504

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BEFORE THE PUBLIC UTILITY COMMISSION**

OF OREGON

UM 1058

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

DISPOSITION: INVESTIGATION CLOSED

On May 20, 2002, the Oregon Telecommunications Association (OTA) filed a Petition for a Declaratory Ruling under ORS 756.450. According to OTA, some competitive local exchange carriers (CLECs) have been obtaining blocks of telephone numbers, as part of a business plan which would enable those CLECs to provide long distance-like services without long distance charges and without payment of access charges to local exchange carriers (LECs). A file was opened and the case was designated as DR 31.

At its regular Public Meeting held on August 6, 2002, the Commission adopted the Staff Recommendation and appended it to their Order No. 02-542 which was entered August 8, 2002. The Order denied the petition for Declaratory Ruling and, instead, ordered a generic investigation of the subject matter of the Petition, which was identified as “virtual NPA/NXX (VNXX) calling patterns.”

Background. “NXX” is a designation used throughout the telephone industry to indicate the second three digits in a party’s telephone number following the area code.¹ NXX codes are assigned to particular central offices within the state. The NXX codes are associated with specific geographic areas, typically an exchange or “rate center.” An exchange is a geographic area defined for the purpose of providing local exchange service.² A rate center is a geographic point within an exchange, or group of contiguous exchanges. (The rate center’s geographic coordinates are used to measure distance for rating long distance toll calls). Competitive local exchange carriers wishing to provide local service in multiple exchanges from a single central office need to have a separate NXX code for each rate center. Customers with the same NXX have their calls rated the same way. Calls from a

¹ The area code itself is sometimes referred to within the telephone industry as the “NPA” (number plan area). Thus, the generic telephone industry reference for a party’s telephone number is often “NPA-NXX-xxxx.”

² See ORS 759.005(2)(c).

customer with a particular NXX to another customer with that same NXX would thus have a geographic distance of zero, so no long distance charges would apply.³

The incumbent local telephone company does not have the exclusive right to assign specific phone numbers to specific customers. Competitive local exchange carriers (CLECs) are, by law, entitled to be assigned blocks of numbers in sequence, including entire NXXs. A “Virtual NXX” (VNXX) occurs when a CLEC assigns a “local” rate center code to a customer physically located in a “foreign” rate center. For example, a customer physically located in Portland might order a phone number from a CLEC with a Salem NXX rate center code. Calls between that Portland customer’s phone and other Salem area customers would be treated as if they were local calls, even though the calls between Salem and the customer’s physical location in Portland is a distance of some 50 miles. Thus, under a CLEC’s VNXX arrangement, all Salem customers would be paying a flat, monthly, local rate, even though they are calling the CLEC’s Portland customer. When those same customers call the ILEC’s Portland customers, served out of the same central office as the CLEC’s Portland customer, they are charged intraLATA toll charges.

This type of service was not unknown to the telephone industry prior to the arrival of CLECs. For many years, incumbent carriers offered foreign exchange (FX) services, which, for an additional monthly fee, also provided business customers served out of one central office with numbers from an NXX assigned to another central office, usually so that their customers could call them without incurring intraLATA toll charges. By Order No. 83-869, issued almost 21 years ago, the Commission prohibited incumbent carriers from offering FX services to any new customers or adding additional FX lines for existing customers.

The major concern of the ILEC petitioners was the loss of intraLATA toll access revenues associated with the CLEC utilization of VNXX, especially in light of the changing character of telephone traffic over the past decade. The rapid increase in internet-bound traffic has created major changes in ILEC-CLEC traffic exchange patterns. In many cases there is virtually a 100 percent one-way flow and far longer than voice call average holding times. Yet, from the beginning of this investigation, the Commission’s ability to address the matter was at issue. The Issues List adopted by Ruling of December 18, 2002, included the following:

5. (a) What is the extent of the FCC's preemption of state commission authority over traffic bound for internet service providers (ISPs)? (b) How does this FCC preemption, to the extent it exists, relate to the offering of VNXX service?

Our ruling on that issue radically altered the course of the investigation. In Order No. 03-329, entered May 27, 2003, we concluded that the recent opinion of the Ninth

³ See, e.g., *Rate Center Consolidation Investigation*, UM 953, Order No. 00-478, August 29, 2000.

Circuit Court of Appeals,⁴ (the Opinion), precluded the Commission from adopting generic rules for the compensation of carriers for the transport of VNXX-based, ISP-bound traffic. On rehearing,⁵ we noted that the point of law on which our Order turned did not relate to our analysis of the role of the Commission in the division of labor under the Telecommunications Act of 1996 (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 satisfaction 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.⁶

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.⁷ 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.⁸ Our ruling did not even require us to reach the "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. As we noted in the conclusion of the Rehearing Order, "[i]n 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."

⁴ *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.

⁵ Order No. 03-552, entered September 16, 2003 (Rehearing Order).

⁶ Order No. 03-329, p. 7.

⁷ 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."

⁸ 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).

In the 11 months since we denied rehearing of our decision on Issue 5, little of substance has occurred. All of the parties have agreed to delays in the proceedings while they assess the impact of our ruling and of the VNXX issue on their businesses. At the latest prehearing conference, held on June 8, 2004, it was agreed to continue to suspend the proceedings until another prehearing conference to be held on September 20, 2004.

We recently undertook a review of the record in this docket to determine whether, in light of the lack of progress on the issues, there might be a better means for the parties to pursue resolution of their differences, and allow the Commission to exercise its authority over policy matters with significant impact upon the public interest, than the conduct of a generic investigation which was subject to the impediments noted by the Ninth Circuit. We believe that the record provides us with just such a better alternative.

Commission Staff testimony⁹ provides the following question and answer:

Q: Are all telecommunications carriers that provide intrastate telecommunications service required to abide by the Commission designations of local exchange boundaries and EAS routes?

A: Yes. Existing local exchange boundaries and EAS routes established by the Commission apply to competitive telecommunications carriers as well as incumbents for the purpose of distinguishing between local and toll calling and for inter-company compensation. *See* PUC Order 96-021 (Docket CP 1, 14, and 15 at page 84.¹⁰ This has been a standard condition of granting certificates of authority to provide competitive local exchange service. Importantly, the PUC's authority to establish local/EAS calling areas for the purpose of distinguishing local and toll calling applies to interstate carriers as well. *See* Federal Communications Commission (FCC) Order 96-325, paragraph 1035 and Section 251(d)(3) of the 1996 Telecommunications Act (hereafter referred to as the Act).

In reaching the following conclusions, we do not rely on Staff's testimony. Rather, we take official notice of our prior Orders and those of the FCC cited therein. The language included in a certificate of authority is typically as follows:

⁹ Staff Testimony of Thomas A. Turner, Staff/1, Turner/5.

¹⁰ *See also* PUC Order No. 89-313 (Docket UM 165). The Commission ordered, in the case of Voice Express of Oregon, that it could not avoid the payment of toll/access charges by interconnecting EAS routes where the terminus points would have been an interexchange toll route.

7. For purposes of distinguishing between local and toll calling, applicant shall adhere to local exchange boundaries and Extended Area Service (EAS) routes established by the Commission. Further, applicant shall not establish an EAS route from a given local exchange beyond the EAS area for that exchange.

8. When applicant is assigned one or more NXX codes, applicant shall limit each of its NXX codes to a single local exchange or rate center, whichever is larger, and shall establish a toll rate center in each exchange or rate center proximate to that established by the telecommunications utility or cooperative corporation serving the exchange or rate center.¹¹

A plain reading of these conditions leads to the conclusion that any carrier engaging in the conduct described by OTA in its Petition would clearly be in violation of its certificate. Therefore, rather than requesting a declaratory ruling or a generic investigation, the most appropriate means for dealing with allegations relating to such activity would be in the context of a complaint or a request for arbitration.

¹¹ See *In the Matter of Petition from Oregon Exchange Carrier Association Requesting an Order to Implement Rate Center Consolidation*, Docket UM 953, Order No. 00-478, entered August 29, 2000.

ORDER

IT IS ORDERED that the Investigation into the Use of Virtual NPA/NXX Calling Patterns opened by Order No. 02-542, entered August 8, 2002, is CLOSED and this proceeding is TERMINATED.

Made, entered, and effective _____.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.