

ORDER NO. 04-704

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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: APPLICATION FOR CLARIFICATION GRANTED IN PART AND DENIED IN PART; ORDER CLARIFIED

**Background.** By Order No. 04-504, entered September 7, 2004, the Public Utility Commission of Oregon (the Commission) closed Docket UM 1058, the Investigation into the Use of Virtual NPA/NXX Calling Patterns (Closing Order). We determined that the Investigation was not a suitable means for dealing with the issue of Virtual NPA/NXX usage for reasons we described as follows:

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:

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.<sup>1</sup>

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<sup>1</sup> 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.

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.<sup>2</sup>

**Positions of the Parties.** On November 8, 2004, WorldCom, Inc., n/k/a MCI (MCI); Time Warner Telecom of Oregon, LLC (TWT) and Pac-West Telecomm, Inc. (Pac-West) (“the Joint CLECs”), filed an Application for Clarification or, Alternatively, Rehearing of Order No. 04-504 (Application). The Application states that “it is not clear from the text of the Order whether the Commission is suggesting that the issue of whether there has been a certificate violation would be treated as ‘res judicata’ in any such future proceeding.”<sup>3</sup> The Joint CLECs asked the Commission to clarify that “Order No. 04-504 does not have the weight of precedent in any pending or future PUC proceedings, and that parties will be permitted to present evidence and argument on the issue of certificate violations in any pending or future proceedings involving this issue.... In the alternative, the Commission should reopen docket UM 1058 and grant rehearing regarding the issue of whether VNXX arrangements may violate any of the conditions contained in a carrier’s certificate of authority.”<sup>4</sup>

On November 22, 2004, the Commission staff (Staff) filed a Response to Joint CLECs’ Motion for Clarification or, Alternatively, Rehearing of Order No. 04-504 (Staff Response). Although Staff stated that “procedural concerns raised by the Joint CLECs are overstated and do not warrant clarification or rehearing.... Staff does, however, believe the Order could be clarified to make clear:

1. The Commission has not concluded that VNXX per se is a violation; and
2. In any complaint alleging violation of a certificate of authority by means of VNXX arrangements, the burden remains on the complainant to show an actual violation.”<sup>5</sup>

On November 23, 2004, Verizon Northwest Inc., the Oregon Telecommunications Association, Qwest Communications and CenturyTel of Oregon, Inc. (collectively, the ILECs), filed a Response to CLECs’ Application for Rehearing (ILEC Response). The ILECs offer several reasons for denying the CLECs’ Application. First, the ILECs argue that a rehearing is improper because the CLECs failed to comply with the requirements of OAR 860-014-0095

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<sup>2</sup> Closing Order, p. 5.

<sup>3</sup> Application, p. 4.

<sup>4</sup> *Id.*, pp. 4-5.

<sup>5</sup> Staff Response, p. 1.

because they fail to allege new facts, changes in law, legal or factual errors, or good cause for further examination.<sup>6</sup> The ILECs further claim that the Commission rules do not provide for a “clarification” of an order on the basis that the order should not be followed in future proceedings,<sup>7</sup> and that the Commission’s assertion that standard operating certificates do not permit VNXX services is not itself challenged by the ILECs.<sup>8</sup> Finally, the ILECs argue that the proper course of action is for the CLECs to seek to amend their operating certificates whose provisions they are currently violating and for the Commission to open an investigation into CLEC provision of VNXX services to determine their effect on universal service.<sup>9</sup>

**Discussion.** We terminated this investigation because we were convinced that the procedural path had significant infirmities. We made neither findings of fact nor conclusions of law with respect to the matters encompassed by the investigation. In our Order closing the investigation, we made clear our view that, if there were an aggrieved party (most likely a carrier) alleging that another carrier was improperly offering VNXX services, the filing of a complaint or a request for arbitration would be the appropriate means for addressing the allegations. For reasons already discussed in previous orders, the parties were explicitly advised to seek neither a declaratory ruling nor the opening of a generic investigation to resolve the dispute.

When a complaint or request for arbitration is filed, the Commission or Arbitrator shall receive the allegations and the facts *de novo* and make factual findings and legal conclusions in the ordinary course of proceedings. The parties shall be free to present and argue the totality of the case and the factual and legal burdens shall not be altered by the subject matter of the proceeding.

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<sup>6</sup> ILEC Response, p. 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, p. 4.

<sup>9</sup> *id.*, pp 5-7.

**ORDER**

IT IS ORDERED that the Application for Clarification or, Alternatively, Rehearing of Order No. 04-504, filed November 8, 2004, is GRANTED to the extent indicated above and DENIED in all other respects.

Made, entered, and effective \_\_\_\_\_.

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**Lee Beyer**  
Chairman

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**John Savage**  
Commissioner

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**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.