

ALJ/TRP/bwg

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Decision 98-07-096 July 23, 1998

**ORIGINAL**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the  
Commission's Own Motion Into Competition for  
Local Exchange Service.

R.95-04-043  
(Filed April 26, 1995)

Order Instituting Investigation on the  
Commission's Own Motion Into Competition for  
Local Exchange Service.

I.95-04-044  
(Filed April 26, 1995)

### **O P I N I O N**

On May 6, 1998, MediaOne Telecommunications of California, Inc. (MediaOne) filed an "Emergency Motion for Immediate Allocation of NXX Codes." MediaOne seeks an order immediately providing it with NXX codes in the 213, 310, 714, and 626 area codes.<sup>1</sup>

In Decision (D.) 96-09-087, the Commission adopted a lottery procedure to ration NXX codes in those numbering plan areas (NPA) subject to a freeze. The

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<sup>1</sup> In conjunction with MediaOne's Emergency Motion, MediaOne has submitted the Declaration of James Pierce and its motion that the Pierce Declaration be filed under seal. The Pierce Declaration identifies the number of NXX codes requested by MediaOne and the location of their associated rate centers. MediaOne says this information has strategic value in that it reveals the locations MediaOne expects to serve, so disclosure of the information would give MediaOne's competitors an unfair advantage.

MediaOne has stated grounds, under General Order 66-C and authority there cited, for the relief requested. The motion is unopposed, and a public hearing on the motion is not needed. The motion will be granted.

Commission adopted a procedure whereby 60% of all NXX codes allotted would be reserved as "initial" codes with the remaining 40% designated as "growth" or additional codes. (*Id.* at 24.) MediaOne asks for a Commission order granting a one-time exemption from the lottery for MediaOne and authorizing MediaOne an up-front allocation of NXX codes in each of the requested NPAs in order to begin service in its territory. In exchange for receiving the special immediate assignment of codes, MediaOne agrees to forgo participation in future lotteries. MediaOne claims that, by forgoing its claim on future codes, it will effectively replenish the codes to be assigned now, and thereby will not disadvantage other carriers.

#### **Positions of Parties**

MediaOne asserts that the current lottery process makes it impossible to accumulate enough NXX codes to offer ubiquitous competitive local exchange service in its service territory. When a new entrant wins a code, the code must be used within six months or returned (with a possibility of an additional six-month extension). Even if a carrier were to win a code a month, it could never accumulate more than 12 codes at a time, since a code must be used within six months (one year with extension) or be returned. Thus, a new entrant can only roll out service on a rate center basis, potentially stranding all investment outside that particular rate center. MediaOne argues that not only is this strategy irrational from a marketing and economic viewpoint, but it undeservedly tarnishes a new entrant's reputation, as customers and competitors make claims of spotty availability of service, undermining effective competition with the incumbent local exchange companies (ILEC).

MediaOne intends to offer ubiquitous residential facilities-based local exchange service in its cable franchise areas in greater Los Angeles. MediaOne began offering residential services in Culver City and West Los Angeles on

April 1, 1998. MediaOne believes it is the only facilities-based local exchange telephone corporation competing in the residential market in that service territory with ILECs GTE California Incorporated (GTEC) and Pacific Bell (Pacific). As indicated in the confidential Declaration of James Pierce, MediaOne must acquire enough NXX codes to cover all of the applicable rate centers in order to offer telephone service ubiquitously in the area, which spans five separate area codes: 213, 310, 714, 626, and 562. To date, MediaOne has obtained only nine codes, all of which have been obtained pursuant to Commission-sanctioned lotteries. In the event that the requested relief is not granted, MediaOne states it will remain constrained in its offering of service to residents now served by GTEC and Pacific, which do not have to compete for scarce initial codes.

AT&T Communications of California, Inc. (AT&T) and MCI Telecommunications Corporation (MCI) jointly filed comments in opposition to the MediaOne motion. Because MediaOne has not filed information publicly demonstrating that it has diligently pursued NXX codes in each month's lottery for each targeted NPA, AT&T argues that the MediaOne motion should be denied. While AT&T does not ask for identification of the specific rate centers for which MediaOne seeks code assignments, AT&T does believe MediaOne should at least state publicly the number of NXX codes it seeks for each of the subject NPAs. While opposing the specific exemption sought by MediaOne, AT&T expresses sympathy for MediaOne's plight, noting the motion highlights the need for immediate implementation of further code conservation measures.

Nextlink California, LLC (Nextlink) and Teleport Communications Group, Inc. jointly filed comments also in opposition to the MediaOne motion. Nextlink argues that MediaOne is not unique, but is facing the same predicament encountered by other entrants that cannot immediately obtain all the NXX codes

needed to provide service to customers over a broad service area. Nextlink opposes the granting of a special exemption from the lottery to MediaOne, arguing that such an exemption would eviscerate the competitive neutrality of the lottery and would trigger an onslaught of similar "one-time emergency motions" from other carriers. Nextlink is concerned that the granting of the special exemption to MediaOne would unfairly disadvantage other carriers that would have to wait even longer for NXX codes of their own.

California Cable Television Association (CCTA) supports MediaOne's motion in the interest of various member cable companies which, like MediaOne, have committed substantial resources to offer residential telephony, only to have those efforts thwarted by the lack of NXX codes. CCTA denies that an exemption for MediaOne will create harm for future entrants seeking codes since MediaOne would forgo participation in future lotteries, thereby replenishing code resources. CCTA also believes that the lottery process has become corrupted in that incumbent wireline and wireless carriers are permitted to draw from the "initial" code category. CCTA asks the Commission to explicitly limit the availability of "initial" codes to new entrants only, and not to incumbents. CCTA urges the Commission to act upon the requests regarding NXX code conservation measures set forth in the Coalition's comments filed on February 25, 1998 pursuant to an Administrative Law Judge ruling.

Cox California Telecom, Inc. (Cox) supports MediaOne's motion. Cox is similarly situated to MediaOne in the 714 and 619 NPAs, and believes that similarly situated competitive local carriers (CLCs) should be also be entitled to lottery exemptions. Cox argues that the limited allocation of NXX codes under the lottery just does not allow rapid enough accumulation of codes to effectively enter a market. Cox believes that the Commission must promptly adopt new

procedures for the assignment of NXX codes to competitive entrants, or else face the delay of facilities-based competitive entry for years.

Teligent, Inc. (Teligent) states that it faces precisely the same predicament that has given rise to MediaOne's motion, and has failed after repeated attempts to obtain initial NXX codes in crucial rates centers covering areas where it has constructed facilities to provide local service. In the event MediaOne's motion is granted, Teligent intends to seek a similar waiver.

While supportive of MediaOne's efforts to provide ubiquitous facilities-based residential service in the Los Angeles area, Office of Ratepayer Advocates (ORA) reluctantly opposes its motion. ORA believes the granting of the motion could impair the equitable allocation of remaining NXX codes by favoring one competitor over another, and would open the floodgates for increased litigation as other carriers contend for similar special preferences. ORA believes a more appropriate remedy is for the Commission to reexamine the generic procedures for allocating NXX codes through the lottery so all carriers are treated in a nondiscriminatory manner.

Pacific opposes the MediaOne motion, arguing that, under the Telecommunications Act of 1996 (Act) and the Federal Communications Commission's (FCC) *Second Report and Order On Local Competition*,<sup>2</sup> the Commission lacks authority to order assignment of telephone numbers to a specific carrier as requested by MediaOne. In the Act, Congress vested the FCC with jurisdiction over telephone numbering resources in the United States.<sup>3</sup> Although Congress expressly authorized the FCC to delegate "all or any part of"

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<sup>2</sup> 11 FCC Rcd 19392 (FCC 96-333) (Aug. 8, 1996).

<sup>3</sup> Codified at 47 U.S.C. § 251(e)(1).

this authority to state commissions, Pacific notes that the FCC affirmatively chose not to delegate its authority over assignment of telephone numbers to state commissions. In its *Second Report and Order on Local Interconnection*, the FCC codified its delegation of authority to the North American Numbering Council (NANC) to advise it on numbering issues, including number administration and assignment.<sup>4</sup> The FCC further delegated responsibility to perform number administration functions and implement FCC policies to the North American Number Plan Administrator (NANPA).<sup>5</sup>

The FCC delegated to state commissions only the authority "to resolve matters concerning the implementation of new area codes."<sup>6</sup> Pacific argues that if MediaOne's motion were granted, the Commission would have to direct the NANPA to assign a specific number of NXX codes to MediaOne, in direct contravention of the FCC's explicit refusal to delegate such number assignment authority to state commissions.

Pacific further submits that such a preference would violate the FCC rules. 47 C.F.R. § 52.9(a)(2) requires that the administration of telephone numbers "not unduly favor or disfavor any particular telecommunications industry segment or group of telecommunications consumers." State commissions must comply with FCC rules in exercising their delegated authority over implementation of new area codes.<sup>7</sup>

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<sup>4</sup> See 47 C.F.R. § 52.11.

<sup>5</sup> See 47 C.F.R. § 52.13.

<sup>6</sup> 47 C.F.R. § 52.19(a); see also 11 FCC Rcd at 19516-21.

<sup>7</sup> 47 C.F.R. § 52.19(b).

Pacific claims that the lottery is not harming MediaOne any more than any other carrier, and that new entrants, such as MediaOne, actually have an advantage over ILECs, with 60% of the codes being allocated to "initial" requests. Pacific claims the lottery is "foreclosing" it from the market as least as much, if not more, than MediaOne. With local number portability (LNP) scheduled to be in place shortly throughout the entire area where MediaOne wants to offer service. Pacific claims that MediaOne will be able to compete for all existing residential customers using those customers' existing telephone numbers. MediaOne could use NXX codes to provide service to new customers and to sell second lines.

A third-round reply was filed by MediaOne on June 1, 1998. MediaOne disputes Pacific's claim that the Commission lacks jurisdiction to grant the motion. MediaOne contends that the Commission has jurisdiction to establish lotteries and manage number resource issues as part of its authority to initiate and implement area relief remedies. MediaOne argues that the Commission has authority to grant its request for exemption from the lottery within the scope of its jurisdiction over implementation of area code relief on a competitively neutral basis.

MediaOne acknowledges that the granting of its motion may prompt other CLCs to seek similar exemptions from the lottery but does not view this result as undesirable. MediaOne claims there is no reason to believe the Commission cannot handle such requests, particularly if they are properly limited. Specifically, MediaOne proposes that such requests be limited to "initial" codes, and supported by sworn statements by the carriers that (1) they are ready to offer service in the affected rate center; (2) they will not oppose code conservation measures; and (3) they will verify to the Commission that they are offering or will

offer service in the affected rate center within six months or surrender the code(s) to the pool.

### **Discussion**

The filing of the MediaOne motion dramatizes the severity of the NXX code shortage problem, which represents a major impediment to facilities-based CLCs' ability to compete in the local exchange market. While we acknowledge that MediaOne needs the requested codes in order to offer local service in the Los Angeles region, we disagree with the approach proposed by MediaOne for obtaining the codes. The granting of MediaOne's motion to be assigned NXX codes ahead of all other carriers would undermine the principle of nondiscriminatory allocation of codes. Although MediaOne claims its request would not disadvantage other carriers, we are not so convinced. Other similarly situated carriers which seek the same sort of immediate code assignment sought by MediaOne could be disadvantaged if insufficient codes remained to grant their requests after the approval of MediaOne's motion.

The intent of the adopted lottery procedure is to provide a means for all similarly situated carriers to have an equal opportunity to receive the NXX codes needed to serve their customers. We are concerned that granting the MediaOne motion would establish an undesirable precedent and impair the equitable allocation of NXX codes by the lottery process, favoring one competitor over another in granting individual carriers special exemptions. It would defeat the purpose of using a lottery as a means of assuring an even-handed treatment among all carriers in the assignment of codes if we were to start circumventing it.

Moreover, the granting of MediaOne's motion would incite other carriers to file similar motions. Each carrier would seek to justify why it too should be exempted from the lottery. Such a case-by-case review of the merits of the motions of multiple carriers would lead to an unwieldy and time-consuming



method of determining the proper assignment of codes. If the number of filed motions for NXX codes were to exceed the number of available NXX codes within a given NPA, then we would again be faced with the same problem which originally led to the adoption of the lottery, namely, how to determine which carriers will be denied their code requests. Accordingly, we deny MediaOne's motion seeking a special exemption from the lottery.<sup>4</sup>

Rather than circumventing the lottery for selected carriers, a more equitable solution is to reform the lottery selection process to result in an allocation of codes that is more efficient for all carriers and promotes competition, but is still mindful of federal requirements. We shall address the concerns raised by MediaOne on a generic basis by setting as a high priority the reform of our existing lottery procedure, as well as consideration of further code conservation measures. We hereby provide parties with notice required under § 1708 of the Public Utilities (PU) Code that we may modify D.96-09-087 by considering ways of increasing the availability of NXX codes for new entrants poised to begin offering service that are unable to obtain requisite codes through the random draw of the lottery. For example, we will explore increasing the percentage of initial codes assigned from the lottery from the current 60% to a higher amount. In particular, we shall direct the assigned ALJ to consider whether facilities-based carriers seeking to offer residential service should be given priority in the lottery.

We also note the statement of CCTA regarding the lottery process becoming "corrupted" as unfounded. Since they already hold NXX codes in the rate centers in their service territories, ILECs are not eligible for initial codes in

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<sup>4</sup> Since we are denying the MediaOne motion, it is not necessary to address the merits of the jurisdictional arguments raised in Pacific's comments.

their service territory per our lottery rules. Hence, the only instance in which an ILEC can apply in the initial category for NXX codes within its service territory from an area code subject to the lottery is in the infrequent case of the opening of a new rate center. Although we find no "corruption" of the current lottery procedures, we shall investigate the limited issue of whether an ILEC should be eligible to apply for NXX codes in the initial category when a new rate center is opened.

### **Findings of Fact**

1. MediaOne filed a motion for a Commission order granting it a one-time exemption from the NXX code lottery and authorizing MediaOne an up-front allocation of NXX codes in each of several requested NPAs in order to begin offering local service in its territory.
2. MediaOne requires the requested codes set forth in its motion in order to offer local exchange service ubiquitously within its cable franchise areas in the greater Los Angeles service territory.
3. The Commission's adopted lottery process has not provided MediaOne with sufficient codes to offer ubiquitous service.
4. The granting of MediaOne's motion to be assigned NXX codes ahead of all other carriers would undermine the principle of nondiscriminatory allocation of codes.
5. Other similarly situated carriers which might seek the same sort of relief sought by MediaOne could be disadvantaged.
6. The lottery, as presently structured, may not yield a distribution of codes that is the most conducive to promoting competition.

### **Conclusions of Law**

1. The motion of MediaOne should be denied.

2. The concerns raised by MediaOne should be addressed on a generic basis by setting as a high priority the reform of existing lottery procedure, as well as consideration of further code conservation measures.

3. Parties should be provided with notice as required by § 1708 of the PU Code that D.96-09-087, the decision that set forth the lottery process, may be modified after future proceedings.

4. In considering revised lottery procedures, particular attention should be given to ways of increasing the availability of NXX codes for new entrants poised to begin offering service that are unable to obtain requisite codes through the random draw of the lottery.

5. Since the motion of MediaOne is denied, the arguments raised by Pacific concerning lack of Commission jurisdiction are rendered moot.

6. MediaOne's motion for leave to file the Pierce Declaration under seal should be granted.

### **O R D E R**

#### **IT IS ORDERED that:**

1. The motion of MediaOne Telecommunications of California, Inc. (MediaOne) is denied.

2. The assigned Administrative Law Judge shall set as a high priority the review of existing NXX lottery procedures with the intent of promoting opportunities for new entrants to obtain needed codes and the development of more aggressive code conservation measures. Although we find no "corruption" in the lottery process, as alleged by CCTA, the assigned ALJ shall investigate whether an ILEC should be eligible to apply in the "initial" category when a new rate center is opened. The assigned ALJ shall also consider whether residential facilities-based carriers should have priority in the lottery.

3. Notice is hereby given under Section 1708 of the Public Utilities Code that the NXX code lottery process adopted in Decision 96-09-087 may be modified after the proceedings describe in Ordering Paragraph 2 take place.

4. The Declaration of James Pierce in Support of Emergency Motion, which Declaration was submitted under seal as an attachment to MediaOne's motion for leave to file under seal, shall remain under seal for a period of two years from the date of this protective order, and during that period shall not be made accessible or disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the assigned Commissioner, the assigned Administrative Law Judge (ALJ), or the ALJ then designated as Law and Motion Judge. If MediaOne believes that further protection of information in the Declaration is needed after two years, it may file a motion stating the justification for further withholding the information from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than 30 days before the expiration of this protective order.

This order is effective today.

Dated July 23, 1998, at San Francisco, California.

RICHARD A. BILAS  
President  
P. GREGORY CONLON  
JESSIE J. KNIGHT, JR.  
HENRY M. DUQUE  
JOSIAH L. NEEPER  
Commissioners