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MAIL DATE

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Decision 99-04-073

April 22, 1999

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

ORIGINAL

Order Instituting Investigation On The
Commission's Own Motion Into
Competition for Local Exchange
Service.

1.95-04-044

**ORDER DENYING REHEARING
AND MODIFYING DECISION 98-11-065**

SUMMARY

Pacific Bell has filed an application for the rehearing of Decision (D.) 98-11-065 in which the Commission approved an overlay relief plan to avoid fully depleting available customer numbers in the 408 numbering plan area (NPA), commonly referred to as the area code region. As part of the plan, the Commission also required that the incumbent local exchange carriers (ILECs) in the region, Pacific Bell and GTE California, Inc. (GTE), assign the remaining 408 NPA numbers to customers from their NXX codes which have already been more than 25% utilized before assigning numbers from a NXX code with 25% or less

utilization (the "25% utilization rule). The NXX code is the second set of three digits following the area code in a telephone number.¹

Pacific Bell's rehearing application contests the 25% utilization rule on the grounds that: 1) the FCC has precluded the Commission's authority to regulate number assignments; 2) the restriction on number assignments unduly disfavors the ILECs; 3) the restriction denies the ILECs equal protection of the law; and 4) D.98-11-065 does not contain sufficient findings to support applying the 25% utilization rule to the ILECs, but not to the CLCs. (Application, pp.1-2.)

The Office of Ratepayer Advocates (ORA) and the California Cable Television Association (CCTA) filed separate responses in opposition to the rehearing application. GTE filed a response in support of the application.

After careful review of the issues raised, the Commission concludes that Pacific Bell has not substantiated legal error in D 98-11-065. Rehearing, therefore, is denied.

However, since the issuance of D.98-11-065, and the filing of the rehearing application by Pacific Bell, the Commission has issued decisions ordering overlay plans for the 714 and 909 NPAs, D.99-03-058 and D.99-03-059 respectively. In these decisions, the Commission found that it would be appropriate to conduct an inquiry on a generic basis regarding measures to protect undue "contamination" of existing 1,000-number blocks within each NXX code, pending the implementation of number pooling.² The Administrative Law Judge assigned to the above-captioned proceedings thus issued a ruling on April 1, 1999

¹ There are ten 1,000-number blocks, a total of 10,000 possible number assignments, for each NXX code, and a maximum 792 NXX codes within the 408 NPA. The 25% utilization rule applies to the entire NXX code, not to individual 1,000-number blocks.

² "Contamination" refers to the fragmentation of the sequential numbers constituting each 1,000-number block.

requesting comments from parties on the question of establishing a statewide policy on number conservation in connection with NPA overlay plans.

In light of these intervening events, the Commission finds it reasonable to rescind, pursuant to Cal. Pub. Util. Code Section 1708, the 25% utilization rule as ordered in D.98-11-065. A number utilization rule pertaining to the 408 NPA will be reconsidered as part of the generic inquiry.

DISCUSSION

The overlay plan we approved in D.98-11-065 makes available a new NPA for assignment to customers in the same geographic area as the 408 NPA. As part of the plan, the Commission incorporated the 25% utilization rule to promote the efficient use of numbers still remaining in the 408 NPA. The objective of efficient number use is to preserve uncontaminated sequences of numbers for possible inclusion in a number pooling program. The intent of number pooling, in turn, is to assure that an ILEC which holds the predominant number of NXX codes within a long-established NPA does not retain an unfair competitive advantage over competing carriers newly entering the local telecommunications market with an overlay NPA. A competitive advantage derives from customer preference for a telephone number associated with the old, or established NPA, rather than with the new overlay NPA. Recognizing this preference, the FCC, in fact, has stated that one of the conditions to be attached to a new area code overlay order is the allocation of at least one NXX code from the established NPA to every telecommunications carrier competing in the area (In the Matters of Implementation of Local Competition Provisions of the Telecommunications Act of 1996, Second Report and Order, FCC Docket No. 96-98, et al, FCC 96-333, 11 FCC Rcd 19392, at para. 286 and n.613. (August 8, 1996).)

Consistent with the FCC's view on the competitive value of numbers associated with the established area code, the Commission incorporated the 25%

utilization rule for the 408 NPA in conjunction with ordering the overlay plan. The rule is essentially one of preserving sequential numbers from an established NPA and is designed to coordinate with future number pooling and the potential for an equitable redistribution of preferred area code numbers. We are not persuaded, furthermore, by Pacific Bell's claim that our NXX utilization order "runs afoul" of FCC rules. (Application, p.4.) In support of this claim, Pacific Bell refers to the FCC declining to delegate to states the task of allocating and assigning NXX codes to ILECs or CLCs. (Application, p.3.) The 25% utilization rule, however, does not allocate numbers or assign numbers to carriers, and does not pool or redistribute numbers. Our decision, moreover, reflects the California Legislature's broad delegation of regulatory authority and the specific mandate that the Commission ensure fairness in a competitive telecommunications market. (See, e.g., Cal. Pub.Util.Code §§ 701, 709 and 709.5, 728, 729.)

With respect to Pacific Bell's jurisdictional challenge, therefore, we find no conflict with federal regulations, rules, or policies.

Pacific Bell's second claim states that our 25% utilization rule is unfair to ILECs and "could distort competition and give an unjustified competitive advantage to those carriers who are unencumbered by the assignment restrictions." (Application, p. 6.) Pacific Bell unfortunately does not specifically describe how it is competitively disadvantaged by having to assign numbers to customers in an efficient manner. In its January, 19, 1999 report filed with the Commission's Telecommunications Division, of which we take official notice for this proceeding, Pacific Bell indicates it holds 305 NXX codes in the 408 NPA. Pacific Bell has not explained how the 25% utilization rule unlawfully denies "...flexibility of number choices to their customers" in the context of the 305 NXX codes it has available. (Application, p. 6.)

We note, furthermore, that the information Pacific Bell offered in its Application on this subject is not persuasive. Pacific Bell claims that the data

supplied shows it is in a disfavored position because CLCs and wireless carriers, as a group, have received 90% of new NXX codes in the 408 NPA, whereas the ILECs (Pacific Bell and GTE) have received only 10% of the newly assigned NXX codes. Pacific Bell does not offer here a meaningful or accurate comparison. Our view focuses on the NXX codes and numbers which each ILEC and each CLC has available to attract, retain, and serve customers in a telecommunications market. Pacific Bell does not persuade us, therefore, that it is in a disfavored position by referring to the total NXX codes of all the CLCs combined the 408 NPA. The fair, competitive market aimed for is not between two groups, ILECs and CLCs, but among the individual telecommunications carriers.

Similarly without merit is Pacific Bell's related third claim, that our utilization order denies it equal protection under the law. As Pacific Bell recognizes, to prevail on an equal protection claim, it must establish that it has not been treated equally with respect to others similarly situated. (People v. Pottorff, 47 Cal. App.4th 1709 (1996), review denied (first prerequisite to meritorious claim under equal protection clause is showing that state has adopted a classification that affects two or more similarly situated groups in an unequal manner). See also, In re Evans, 49 Cal. App. 4th 1263 (1996); Ameri-Medical Corp v. WCAB, 42 Cal. App. 4th 1260 (1996).)³

Pacific Bell has not explained how it can be considered similarly situated with the CLCs. The same can be said, we note, with respect to GTE within its smaller 408 NPA service territory. Instead, Pacific Bell misplaces reliance on the data referred to above which shows only the combined NXX codes of the CLCs as a group. That data does not reflect the competitive positions of each of the CLCs individually, and thus fails to demonstrate that Pacific Bell is

³ The federal approach to evaluating an equal protection claim is similar to that of California (Duffy v. Cal. State Personnel Bd., 232 Cal. App. 3d 1 (1991), review denied; California Gillnetters Assoc. v. Dept. of Fish and Game, 39 Cal. App. 4th 1145 (1995), review denied

similarly situated with any of its individual competitors. As a result, the prerequisite for a meritorious equal protection claim has not been met.

Finally, Pacific Bell argues that the Commission has not made sufficient findings, as required by Cal. Pub. Util. Code §1705, to provide a rational basis for applying the utilization restriction to the ILECs, but not to the CLCs. Quite to the contrary, D.98-11-065 sets forth the pertinent findings and rationale regarding the potential for Pacific Bell's competitive advantage when the NPA overlay plan is implemented. Findings of Fact Nos. 34-37 state that the new NPA overlay may likely be considered less desirable than the original 408 NPA (a finding consistent with that of the FCC), and that the ILECs possess the majority of the NXX codes within the preferred 408 NPA. In addition, Conclusion of Law No. 17 states that the Commission should place a high priority on promoting the efficient utilization of NXX codes so that the CLCs are not competitively disadvantaged by limited access to numbering resources after the overlay is established. We also specifically tied our ruling to the number pooling measures being taken at the direction of the FCC through the North American Numbering Council, and California's need to prepare for number pooling. (D.98-11-065, slip op., at 23, 25.) Our decision provides, therefore, both in the discussion portion and in the enumerated findings and conclusions of law, a clear rationale for adopting a measure designed to preclude anticompetitive results from the ordering of a new NPA overlay when the dominant ILECs still have a warehouse of NXX codes associated with the preferred 408 NPA. Our conservation measure directly reflects the facts of the case, as well as state and federal telecommunications policies.

We conclude, therefore, that Pacific Bell has not demonstrated legal error in our decision with respect to FCC orders, equal protection violations, or the expression of the Commission's rationale supporting the number utilization order. Accordingly, rehearing is denied.

However, subsequent to the issuance of D.98-11-065 a few months ago, our consideration of NPA number relief plans has rapidly proceeded, and we have ordered an overlay relief plan for the 714 and 909 NPAs. In doing so, we recognized that the need for number conservation was a common and complex element in deciding on an overlay rather than a geographic split to prevent number exhaustion. The Commission determined, therefore, that in order to assure a statewide design and imposition of a number utilization rule, it would be preferable to consider the matter on a generic basis, and to do so immediately.

Accordingly, by direction of the Commission in D.99-03-058 and D.99-03-059, the assigned ALJ issued a ruling on April 1, 1999 soliciting comments from parties to the above-captioned proceedings "concerning the kind of NXX code reporting requirements and other measures which may be appropriate to protect existing 1,000-number blocks from undue 'contamination' pending the implementation of number pooling." The ALJ ruling expressly notes that the comments should be based on a statewide consideration of the issue, not on any single NPA.

Under these circumstances, the Commission finds it reasonable to rescind the 25% utilization rule ordered in D.98-11-065 for Pacific Bell and GTE as part of the 408 NPA overlay relief plan. This rescission will facilitate the Commission's application of the results of the Commission's generic inquiry, which is already underway, to regions where NPA overlays have already been ordered, as well as to future NPA overlay plans.

IT IS THEREFORE ORDERED that:

1. The application for rehearing of D.98-11-065 is denied for failure to substantiate legal error.

2. The following sections of D.98-11-065 are rescinded on the Commission's own motion:

a) At page 24, the paragraph beginning with "Further, as an interim measure until further procedures have been developed in California for 1,00-block pooling..." and ending with "...a high priority on the expedited implementation of number pooling in the 408 NPA."

b) Conclusion of Law No. 19, and

c) Ordering Paragraph 17.

3. The overlay relief plan adopted in D.98-11-065 for the 408 NPA may be further modified by subsequent order of the Commission.

This decision is effective today.

Dated April 22, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners