

Decision 99-11-033

November 4, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking On The Commission Own Motion Into Competition For Local Exchange Service.	Rulemaking 95-04-043 (FILED APRIL 26, 1995)
Order Instituting Investigation On The Commission Own Motion Into Competition For Local Exchange Service.	Investigation 95-04-044 (FILED APRIL 26, 1995)

**ORDER CLARIFYING FINDING OF FACT NO. 6 AND DENYING
REHEARING OF DECISION 99-06-091, AS MODIFIED**

I. SUMMARY

In this decision, we deny the rehearing of D.99-06-091, an interim opinion that approved a temporary suspension of the implementation of the new 424 area code overlay in response to a Petition to Modify filed by Assemblyman Wally Knox and other petitioners. The temporary suspension prohibits the assignment of numbers in the 424 area code to customers, pending the Commission's consideration of the remaining issues raised in the Petition. We also affirm continuation of the lottery in the 310 area code.

II. BACKGROUND

On June 9, 1999, petitioners seeking to stop the opening of the new 424 area code overlay in the 310 NPA filed a Petition to Modify Decision (D.) 98-05-021, which ordered the overlay and required all customers in the area to dial 11 ("1+10 digit-dialing") digits for all local, as well as out-of-area calls. The overlay

was scheduled for July 17, 1999. The Petition also sought an end to mandatory 1+10-digit dialing for the 310 area code pursuant to D.98-05-021, and an order shortening the time for responses to the Petition on the grounds that expedited Commission action was needed prior to the opening of the new area code, in order to prevent irreparable harm.

A joint commissioner's and administrative law judge's ruling granting the motion shortening time was issued on June 11, 1999. The joint ruling called for two rounds of replies. Interested parties were to reply to the issue of temporarily suspending the implementation of the 424 area code overlay by June 18, 1999. Parties were given until June 25, 1999 to reply to the full merits of the Petition.

The parties responding to the issue of temporarily suspending the implementation of the 424 area code were Pacific Bell, the Cellular Carriers Association of California, jointly MediaOne Telecommunications of California, Inc., ICG Telecom Group, Inc., Nextlink of California, Inc., AT&T Communications of California, Inc., and the California Cable Television Association (Joint Commentators), MCI WorldCom, and the Commission's Office of Ratepayer Advocates (ORA).

On June 24, 1999, the Commission adopted D.99-06-091 ("the Decision"), which decided solely the issue of the temporary suspension of the 424 area code overlay. The Decision ordered the temporary suspension until further order of the Commission in order to preserve its options for deciding the Petition on its merits. However, mandatory 1+10-digit dialing was not rescinded. D.99-06-091 also ordered the continued rationing of central office codes in order to prolong the period prior to number exhaust. Pursuant to PU Code §311(g), the 30-day period for public comment was waived.

A joint application for the rehearing of D.99-06-091 was timely filed on July 26, 1999. The petitioning parties are the Cellular Carriers' Association of California (CCAC) and AT&T Communications of California, Inc. (AT&T). The

petitioners allege that the Commission lacks the authority to indefinitely delay area code relief of the 310 NPA and simultaneously continue the lottery, and to waive the 30-day public notice and comment period for D.99-06-091. The Commission is also charged with acting arbitrarily and capriciously in finding that the continuation of the 310 central office code lottery will provide sufficient numbering resources to allow the Commission time to consider the Petition on the merits, and in delaying the 424 area code overlay based on speculation, events and actions which may never occur.

III. DISCUSSION

Four specifications of error are alleged in this Joint Rehearing Application filed by the Cellular Carriers Association and AT&T. We have reviewed each and every allegation and deny rehearing because legal error was not demonstrated. D.99-06-091 addresses the limited issue of the temporary suspension of the 424 area code overlay in the 310 NPA. The Commission ruled on the merits of the Petition in a later decision.¹ Accordingly, this rehearing decision addresses only issues relating to the temporary suspension of the 424 area code overlay.

A. **The Commission Has the Authority to Temporarily Suspend the 424 Area Code Overlay and to Continue Rationing Central Office Codes.**

The Joint Applicants argue that the Commission does not have the authority to "indefinitely" delay relief, and simultaneously continue rationing central office codes in the 310 NPA. They claim that by suspending the 424 overlay, the Commission has violated 47 C.F.R. §52.19 in that "it has failed to ensure that area code relief has occur [sic] promptly and through and [sic] orderly process." (Rhg. App. at 9.) This contention is without foundation and erroneous. FCC Rule 47 C.F.R. §52.19 provides that state commissions may perform any and

¹ The Commission took up the merits of the Petition in D.99-09-067, which was issued on September 16, 1999.

all functions related to the initiation and development of area code relief plans, so long as they are consistent with FCC guidelines. Those guidelines include providing area code relief on an equitable and timely basis.² We agree that state commissions are obligated to make numbering resources available on an equitable and timely basis to carriers, and the Commission is committed to that endeavor. California has hewn to FCC guidelines and will continue to make a concerted effort on all fronts in order to bring timely area code relief.

We take issue with the Joint Applicants' characterization of the suspension of the 424 overlay ordered in D.99-06-091 as "indefinite." D.99-06-091 clearly states that the suspension is temporary, with the sole purpose of giving the Commission time to address the merits of the Petition for Modification:

"Just as this decision indicates the limited step we are taking with this order – preserving our options for deciding the Petition on its merits – the people of California and the telecommunications industry should not read into our action today more than that. Until we have considered the Petition on its merits and determined whether the rescission of an overlay plan and corresponding 1+10-digit dialing is reasonable and in the public interest, area code relief efforts will, of necessity, continue for this and other California area codes facing crisis."

A period of about three months from the time D.99-06-091 was issued until a decision on the merits was rendered cannot fairly be characterized as "indefinite."

The Joint Applicants acknowledge that the Commission has the authority to continue to preserve central office codes through the use of lotteries

² The FCC's general guidelines require state commissions to ensure that numbers are made available on an equitable basis; that numbering resources are made available on an efficient and timely basis; that the state's policies may not unduly favor or disfavor any industry segment or group of consumers; and the state may not unduly favor one telecommunications technology over another. (47 CFR 52.9)

prior to determining the form of overlay code relief and the implementation date for such relief, but question whether such authority extends to the situation created by D.99-06-091, where the form and implementation date for relief were set and then suspended. (Rhg. App. at 8.) Nothing in the rehearing application establishes why the Commission's authority stops short of the situation in D.99-06-091. The Commission is simply maintaining the *status quo* by continuing a lottery that was already in place, and one which the industry recommended remain in place until April 2000.³ Moreover, D.99-06-091's continuation of the lottery does not violate the authority delegated to the Commission by the FCC. On December 1, 1998, in a letter order to the California Commission, the FCC granted California temporary authority to continue to conduct its current lotteries prior to the implementation of an area code relief plan.⁴ Paragraph 38 of the FCC's Order of September 15th allows California to continue its existing code rationing plan, concluding that "extenuating and unique circumstances exist in California that justify a grant of additional authority to California to continue to conduct monthly lotteries in jeopardy area codes."⁵

B. D.99-06-091's Continuation of the Lottery in the 310 NPA, Along with Ongoing Relief Measures, Provides Sufficient Numbering Resources Pending Consideration of the Petition on the Merits.

Rehearing is also urged by the Joint Applicants on the ground that the Commission arbitrarily determined that the continuation of rationing of central office codes in the 310 NPA will provide carriers with sufficient numbering

³ D.98-05-021, *mimeo*, at page 5 notes that the industry proposed continuation of the lottery until April 2000.

⁴ Letter from Yog R. Varma to Helen Mickiewicz, dated December 1, 1998 (DA 98-2463).

⁵ In this Order, the FCC also delegated to California interim authority to institute mandatory thousands block pooling trials, to establish usage thresholds, to reclaim unused and reserved NXX codes and portions thereof, to require sequential number assignments, and to hear and address carrier claims requesting number resources outside of rationing procedures. However, the FCC declined to grant authority to implement individual telephone number pooling. (*In the Matter of California Public Utilities Commission Petition for Delegation of Additional Authority Pertaining to Area Code Relief and NXX Code Conservation Measures* (FCC 99-248; CC Docket No. 96-98; NSD File No. L 98-136 (rel. 9/15/99).)

resources. (Rhg. App. at 10.) This claim is meritless. The Joint Applicants read Finding of Fact No. 6 too narrowly.⁶ Continuation of the lottery is one way of conserving numbers in order to prolong the period before number exhaust. However, this finding is in no way intended to imply that other conservation and relief measures would not continue at the same time. Indeed, Conclusion of Law No. 4 makes it clear that such measures would continue: "This order does not in any manner affect any other area code relief planning efforts currently underway in this or any other area code in California." The Commission believes the continuation of the lottery during the suspension, in concert with relief efforts, will provide sufficient numbering resources to allow the Commission time to consider the Petition on the merits.

Moreover, Finding of Fact No. 6 reflects the industry proposal that 310 NPA code applicants participating in the lottery for NXX resources will continue to do so until April 2000.⁷ In *Re Competition for Local Exchange Service*, D.96-09-087 (68 CPUC 2d 195), the Commission determined that it may adopt rules for central office code rationing through a lottery or other means as a function of its delegated authority to initiate and plan area code relief. The FCC's letter order of December 1, 1998 leaves no doubt that when the Commission issued D.99-06-91, California could continue the lottery prior to area code relief. That authority was affirmed in the FCC's order of September 15, 1999. The Commission's intent in continuing the lottery was to continue to conserve numbers pending consideration of the Petition on the merits. D.99-06-091 is also consistent with D.96-09-087's mandate that "a lottery is to be used as a last resort after all other feasible means have failed to avert a shortage of numbers." (68 CPUC 2d 195, 207, Conclusion of Law No. 9.) Thus, Finding of Fact No. 6's

⁶ Finding of Fact No. 6 reads as follows: "Continuation of the lottery in the 310 area code will provide sufficient numbering resources to allow the Commission time to consider the Petition on the merits."

⁷ D.98-05-021 notes that the lottery for the 310 area code was designed to permit rationing to continue through April 2000.

continuation of the lottery is not a departure from Commission policy, and is consistent with the industry proposal for the 310 NPA.

We conclude that the Joint Applicants' complaint does not rise to the level of legal error, however, for clarity's sake, Finding of Fact No. 6 will be modified to indicate that continuation of the lottery, in conjunction with relief planning efforts, will provide sufficient numbering resources to allow the Commission time to consider the merits of the Petition to Modify.

C. The Commission Acted Reasonably in Temporarily Suspending the 424 NPA Overlay.

D.99-06-091 is challenged on the ground that the Commission acted arbitrarily and capriciously in allegedly basing the Decision on speculation, events and actions which have not yet, and may never occur. (Rhg. App. at 12.) The Joint Applicants based their claim on the statement in D.99-06-091 that "efforts are underway to secure appropriate technical and jurisdictional resources and expand our arsenal for addressing the numbering dilemma that telecommunications growth and competition has created."⁸ The Joint Applicants concluded, without naming the rulemaking or legislation, that the anticipated events are "a pending federal rulemaking and pending legislation pertaining to area code relief and number allocation." (Rhg. App. at 12; emphasis in original.) Assuming that the Joint Applicants had in mind the federal rulemaking, *Numbering Resource Optimization, Notice of Proposed Rulemaking*, CC Docket No. 99-200, FCC 99-122 (rel. June 2, 1999), it is ongoing.²

Joint Applicants also allude to alleged Commission reliance on pending legislation, without identifying it. Assuming the Joint Applicants had in mind AB 406 (Knox), it was recently signed into law as the Consumer Area Code

⁸ D.99-06-091, *mimeo* at 5.

² The FCC's September 15th order delegates additional authority to the California Commission over number allocation issues and substantially changes the landscape in providing the state with tools that it may now use to aggressively fight number exhaust and pave the way for timely relief.

Relief Act of 1999.¹⁰ The Joint Applicants have the burden of showing that the Commission relied on clearly identified legislation, however, they provide no basis in the rehearing application for concluding that the Commission relied on this, or any, legislation. The Commission is not obligated to respond to vague allegations. Therefore, pursuant to PU Code §1732 and Rule of Practice and Procedure 86.1, we accord little attention to this allegation.¹¹

D. The Commission's Waiver of the Public Review and Comment Period Is Fully Justifiable Under the Circumstances.

The Joint Applicants assert that the Commission has no authority to waive the 30-day public review and comment period before adopting D.99-06-091 because implementation of the 424 overlay is not an unforeseen emergency situation. (Rhg. App. at 13.) We acknowledge that the PU Code §311(g) ordinarily requires 30 days for public review and comment prior to the Commission voting on a decision. However, the confluence of events leading up to the imminent opening of the 424 overlay constituted an emergency which impelled the Commission to act in order to preserve its options to act on the merits of the Petition. The 424 overlay was scheduled to take effect on July 17, 1999. The Petition was filed on June 9, 1999. The Commission needed to act on the temporary suspension of the 424 area code prior to the date on which it was otherwise scheduled to become operational. The last Commission meeting date preceding the 424 overlay implementation date was July 8, 1999. Time was of the

¹⁰ AB 406, enacted into law on October 10, 1999, authorizes the Commission to use any measures that would promote the efficient allocation of telephone numbers, including the allocation of numbers in blocks smaller than 10,000, number utilization studies, the reclamation of unused or reserved NXX codes, and rate center consolidation.

¹¹ Rule 86.1 cautions applicants that vague assertions to the record or the law, without citation, may be accorded little attention.

essence, and pursuant to Rule 81(f), the Commission reasonably took action to avert the looming crisis.¹²

The purpose for providing public review and comment is providing an opportunity to be heard. The Joint Applicants were heard on the issue of the temporary suspension of the 424 overlay when they filed comments on June 18, 1999. Therefore, the Joint Applicants cannot be heard to complain that they were deprived of the opportunity to present their views on the temporary suspension. We therefore conclude that the Commission, for good cause, waived the review and comment period.

IV. CONCLUSION

We have reviewed each and every allegation in this rehearing application, and are of the opinion that legal error has not been demonstrated. Therefore, the rehearing of D.99-06-091 is denied. However, Finding of Fact No. 6 is clarified to reflect that the area code lottery is one means of providing carriers with sufficient numbering resources pending consideration of the Petition on the merits.

THEREFORE, IT IS ORDERED:

Finding of Fact No. 6 is modified to read:

1. "Continuation of the lottery in the 310 area code, along with other conservation and relief measures, will provide sufficient numbering resources to allow the Commission time to consider the Petition on the merits."

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¹² Rule 81 defines unforeseen emergency as "a matter that requires action or a decision by the Commission more quickly than would be permitted if advance publication were made on the regular meeting agenda."

2. Rehearing of D.99-06-091, as modified, is denied.

This order is effective today.

Dated November 4, 1999, at San Francisco, California.

RICHARD A. BILAS

President

HENRY M. DUQUE

JOSIAH L. NEEPER

JOEL Z. HYATT

CARL W. WOOD

Commissioners