Decision **DRAFT DECISION OF ALJ PULSIFER** **(Mailed 9/25/2001)**

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.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

O P I N I O N

I. Summary

On April 27, 2001, Pacific Bell (Pacific) filed a Petition to Modify Decision (D.) 00-07-052, which establishes number conservation rules for California telecommunications carriers. Pacific argues that the Commission should modify the decision to reflect the rules subsequently adopted by the Federal Communications Commission (FCC) regarding months-to-exhaust reports, utilization thresholds, and sequential numbering assignment. By this decision, we grant Pacific's request to conform our sequential numbering rules with those of the FCC. We previously approved a change in the months to exhaust standard, making Pacific's request on that issue moot. In all other respects the Petition is denied.

II. Background

In D.00-07-052, issued in July 2000, the Commission adopted several number conservation measures for use in Numbering Plan Area (NPAs) statewide. These measures included: 1) procedures for returning unused NXX codes; 2) imminent exhaust criteria for requesting an NXX code; 3) a requirement that carriers meet a minimum fill rate before requesting new NXX codes or number blocks; 4) sequential number assignment criteria; and 5) provisions for meeting extraordinary need outside of the lottery.

In December 2000, the FCC released its Second Report and Order in the Numbering Resource Optimization (NRO) proceeding.[1] The FCC's decision addressed many of the same issues addressed in D.00-07-052. Pacific argues that, in several cases, the FCC Order established rules inconsistent with those adopted in D.00-07-052. Pacific accordingly seeks a Commission order modifying D.00-07-052 to bring its rules into conformance with FCC rules.

Responses to the motion were filed by the following parties: jointly by the Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN), who oppose the motion and by Verizon Wireless (Verizon) who supports the motion.

[1] In the Matter of NRO, CC Docket Nos. 99-200, 96-98, Second Report and Order, Order on Reconsideration in CC Docket No. 96-98, and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200, FCC 00-429 (rel. Dec. 29, 2000) ("Second Report and Order").

III. Pacific's Requested Modifications

A. Months-to-Exhaust

In D.00-07-052, the Commission adopted statewide "imminent exhaust criteria" requiring carriers to show that exhaust was imminent within three months in order to be eligible to receive additional numbering resources. The federal rules, however, apply a standard of six-months-to-exhaust, rather than three months-to-exhaust, in determining carrier eligibility for numbering resources. Pacific requests that the Commission's previously adopted rules imposing the three-months-to-exhaust criteria therefore be conformed to the FCC standard.

Discussion

Just a few days after Pacific's petition was filed, the modification sought by Pacific were accomplished by ruling issued on April 30, 2001, making the change effective on a prospective basis beginning on and after May 8, 2001 to recognize the effects of the FCC Second Report and Order on NRO. That ruling acknowledged that state commissions must conform their number pooling rules to the FCC's rules after a three-month transition period. Commission rules, therefore, were brought into conformance with the federally adopted standard of six-months-to-exhaust effective on May 8, 2001.

B. Fill Rate Requirement

D.00-07-052 requires carriers to satisfy a 75% fill rate criterion before obtaining growth NXX codes. The FCC's Second Report and Order subsequently adopted an initial 60% fill rate (or utilization threshold), which would increase by 5% annually to a maximum of 75%. Pacific concedes that the FCC allowed state commissions to continue using a utilization threshold up to 75% if they had been using that threshold pursuant to delegated authority, but argues that the

FCC did not require states to continue using a 75% utilization threshold. Pacific claims there is a drastic difference between the ways this Commission and the FCC calculate utilization, and that the impact on the industry in California could be detrimental if service providers must apply 75% utilization threshold coupled with the FCC's utilization methodology. Pacific requests, therefore, that the Commission modify the Decision to allow service providers to initially use a 60% utilization threshold instead of the current 75% threshold for obtaining growth resources.

In its First Report and Order, the FCC established six reporting categories (*i.e.*, administrative, aging, assigned, available, intermediate, and reserved) for telephone numbers. This Commission adopted a 75% fill rate in D.00-07-052 along with a methodology for calculating fill rates. The methodology adopted took the sum of the assigned, aging, administrative and reserved numbers (up to the six-month limit) and divided that sum by the total quantity of telephone numbers held in that rate center. The quotient equaled the fill rate. The FCC's methodology for measuring the fill rate, by contrast, simply divides the quantity of assigned numbers by the sum of the numbers in five FCC categories (administrative, aging, assigned, available, and reserved, but excludes intermediate numbers from the equation). Further, Pacific claims that by not including administrative, aging, intermediate, and reserved categories in calculating the fill rate, as does this Commission, the FCC's methodology would make it unreasonably difficult to immediately achieve a 75% fill rate.

Responses by Other Parties

ORA and TURN oppose the revision of the fill rate as Pacific proposes. They argue that Pacific's request to lower the utilization threshold from 75% to 60% is neither required by the FCC nor supported by evidence and that granting

the request could impair the Commission's ability to effectively manage efficient use of numbering resources and would thus jeopardize its sound public policy goals. While ORA and TURN do not object to an examination of the desirability of conforming the Commission's policies on sequential number assignment to those of the FCC, they contend Pacific has not demonstrated that such a change is needed.

A response to Pacific's motion was also filed by Verizon. Verizon limited its remarks to the issue of whether the current 75% fill rate should be reduced to 60%. Verizon joins in support of Pacific's request to reduce the fill rate to 60%. Verizon argues that a carrier that previously would have met the 75% rate by comparing the total of its assigned, administrative, aging, intermediate, and reserved numbers against the total number of held numbers, now must meet California's higher 75% rate by comparing only actual assigned numbers against total numbers held. While this would likely not be a problem for Verizon using the 60% rate recommended by the FCC, Verizon believes there will likely be situations where a 75% fill rate cannot be met even though the need for numbering resources is extreme and legitimate. Since the Commission must conform to the FCC's definition of assigned numbers, therefore, argues that it will be more difficult for carriers to meet the 75% fill rate. The Commission should initially follow the 60% federal standard to give carriers needed flexibility. Telecommunications should then make adjustments, as provided for by the FCC Second Report and Order, over time, after carriers have had the opportunity to achieve greater efficiencies.[2]

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[2] First Report and Order, ¶ 25.

Discussion

By ruling dated April 30, 2001, the previously adopted Commission formula for calculating utilization or fill rates was conformed to the FCC methodology. The FCC formula treats administrative, reserved, aging and intermediate numbers[3] as numbers that are NOT assigned. Therefore, the ALJ Ruling directed that these numbers be removed from the numerator in computing utilization rates in order to conform to the FCC method.

We decline, however, to grant Pacific's request to modify the Commission's adopted fill rate standard from 75% to 60%. The FCC Order permits state commissions to continue using a higher fill rate up to 75% even though the federal targeted rate is 60%. It is not clear that dropping the required rate to the 60% minimum will produce the proper balance between the goals of promoting efficient number utilization and ensuring that carriers have sufficient numbers to meet customer needs. We are concerned that reducing the fill rate down to 60% could unduly accelerate exhaustion of scarce numbering resources and burden customers with premature area code changes.

Pacific has not presented quantitative evidence documenting the extent to which the new utilization formula will reduce the effective fill rate compared with that computed under the formula previously adopted in D.00-07-052. Moreover, Pacific erroneously claims that the FCC includes intermediate numbers in calculating the fill rate. In fact, to the extent that intermediate numbers are not included in the denominator in calculating fill rates under the FCC formula, it would be easier for carriers to satisfy the 75% fill rate criterion

[3] Intermediate numbers are not included in the denominator in the FCC's work sheet calculation for determining fill rates.

than is presumed by Pacific. In the absence of further documentary evidence regarding the specific impacts of using the revised FCC formula on carriers' ability to obtain needed numbering resources, we decline to lower our adopted 75% fill rate standard at this time.

To the extent that carriers cannot meet the fill rate requirement to qualify for lottery participation, carriers may still continue to seek authority from the Commission to obtain NXX codes outside of the lottery. Carriers that have been able to document and demonstrate an imminent need for numbering resources outside of the lottery in the past have been able to obtain needed resources through this alternative. We have not however, observed any marked increase in requests for codes outside the lottery since the FCC formula took effect. We request our Telecommunications Division to monitor the number of requests for NXX codes outside of the lottery, and to advise the Assigned Commissioner and ALJ regarding any significant increases in the frequency or volume of such requests. To the extent that we detect that the change in the fill rate formula causes a significant increase in the frequency or volume of NXX requests outside of the lottery, we shall at that time reconsider the need to develop a further record on the need for fill rate revisions.

C. Sequential Number Assignment

D.00-07-052 also required carriers to assign numbers within California in thousand number block sequence, moving to the next block only once a 75% fill rate was attained in the prior block, except where pooling trials were in operation. Pacific argues, however, that the Commission had been delegated authority to apply sequential numbering requirements only until January 1, 2001,

and that the FCC required state commissions to conform their existing sequential number assignment requirements by January 1, 2001.[4]

In its Second Report and Order, the FCC held that all service providers must assign numbers in accordance with the sequential numbering rules the FCC established in the First Report and Order.[5] In its First Report and Order, the FCC adopted a flexible requirement that carriers first assign all available telephone numbers within an opened thousands-block before opening another thousands-block, unless the available numbers in the opened thousands-block are not sufficient to meet a customer request.[6] A carrier is not required to meet a strict utilization threshold (75% or otherwise) prior to moving to a new thousand-block, if the carrier can demonstrate: 1) a genuine request from a customer detailing the specific need for telephone numbers, and 2) the inability on the part of the carrier to meet the specific customer request for telephone numbers from the surplus of numbers within the carrier's currently activated thousands-block. Pacific argues that the Decision should be modified to include the FCC's standard.

Response of ORA and TURN

ORA and TURN do not object to a "considered discussion and examination" of the desirability of making a change, in sequential numbering rules, but do object to granting the request absent evidence in support of Pacific's proposal change to the rules. ORA and TURN are not convinced that such a change is needed, since the Commission entertains requests to obtain numbers

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[4] First Report and Order ¶ 246.

[5] Second Report and Order, P 45. First Report and Order, ¶¶ 244-245.

[6] First Report and Order, ¶ 244.

outside of the lottery process, which provides a safety valve for these situations. Additionally, a service provider could always seek authority to deviate from the sequential assignment requirements for good cause, and obtain such authority if it can demonstrate and document a need to do so. ORA and TURN express concern that granting Pacific's request would create a substantial loophole in the sequential assignment rules and the purpose for which they were promulgated, namely to ensure optimal use of scarce and valuable numbering resources. ORA and TURN therefore recommend that this request be denied. If the Commission wishes to explore the need for changing these requirements, ORA and TURN propose that comments be taken on this specific topic, accompanied by evidence in support of changes.

Discussion

The FCC rules governing sequential numbering supersede any conflicting state rules effective January 1, 2001. The FCC's NRO Order requires that state commissions conform their existing delegations of sequential numbering authority to the FCC's adopted provisions. ORA and TURN argue that the Commission should not revise its sequential numbering rules to conform to the FCC absent a further evidentiary showing by Pacific. We conclude, however, that conformance with FCC rules for sequential numbering is not subject to factual evidentiary inquiry, but is mandatory as a matter of law.

ORA and TURN fail to explain how we can deny Pacific's request that we conform to FCC rules without discretionary authority to continue to apply sequential numbering rules that differ from FCC rules. Since our delegated authority to apply different sequential numbering rules has been superseded by the FCC order, we must conform to the FCC's sequential numbering rules as a matter of law irrespective of arguments that further evidentiary analysis must be

conducted first to study the matter. Accordingly, we shall grant Pacific's request to conform to the FCC's sequential numbering rules. We provide the appropriate conforming language in Ordering Paragraph 1 below.

IV. Comments on Draft Decision

The draft decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____ and reply comments were filed on _____.

Findings of Fact

1. In D.00-07-052, the Commission adopted various number conservation measures, including fill rates standards, in accordance with delegated authority from the FCC.

2. The FCC Second Report and Order on NRO, FCC Docket CC 99-200, released December 29, 2000, (NRO Order) required state commissions to conform state-mandated number pooling rules to the FCC's rules after a transition period.

3. By Ruling dated April 30, 2001, the Commission revised its rules to reflect FCC rules (1) requiring carriers to satisfy a six-months-(rather than three-months) -to-exhaust criterion to obtain numbering resources, and (2) calculating the fill rate formula as prescribed by the FCC.

4. The FCC NRO Order permits state commissions to continue using previously existing fill rates up to 75% even though the federal targeted fill rate is 60%.

5. In its First Report and Order, the FCC established six reporting categories (*i.e.*, administrative, aging, assigned available, intermediate, and reserved) for telephone numbers.

6. The FCC's methodology for measuring the fill rate, simply divides the quantity of assigned numbers by the sum of the numbers in five FCC categories (administrative, aging, assigned, available, and reserve, but excludes intermediate numbers from the equation).

7. Pacific erroneously claims that the FCC includes intermediate numbers in calculating the fill rate.

8. To the extent that PG&E presumes that intermediate numbers are included in the FCC formula, PG&E's claims about satisfying a 75% fill rate are overstated.

9. Pacific has not provided sufficient documentation to warrant a reduction in the 75% fill rate requirement to 60% in view of the potential adverse effects on number conservation.

10. The FCC NRO requires that state commissions conform to FCC rules regarding the application of sequential numbering requirements.

Conclusions of Law

1. The Commission is required as a matter of law to conform its number conservation rules to those adopted by the FCC, except where the FCC has provided discretion for states to continue employing different standards, such as fill rate levels.

2. To the extent that the Commission has already revised its months-to-exhaust standards and fill rate utilization formula to conform to FCC rules pursuant to a ruling issued on April 30, 2001, Pacific's petition regarding those issues is moot.

3. Pacific's Petition for Modification should be denied to the extent it seeks to modify the Commission's adopted fill rate standard, given the Commission's discretion to continue using the 75% fill rate and absent an evidentiary showing to the contrary.

4. Pacific's Petition for Modification should be granted to the extent it seeks an order confirming Commission rules to FCC's sequential numbering rules, given the lack of discretion for the Commission to elect not to conform its rules in this area.

O R D E R

IT IS ORDERED that:

1. Pacific Bell (Pacific) Petition for Modification of Decision (D.) 00-07-052 is hereby granted, in part, as provided below. The following modifying language is adopted:

> "Carriers must first assign all available telephone numbers within an opened thousands-block before opening another thousands-block, unless the available numbers in the opened thousands-block are not sufficient to meet a customer request. A carrier is not required to meet a strict utilization threshold prior to moving to a new thousand-block, if the carrier can demonstrate: (1) a genuine request from a customer detailing the specific need for telephone numbers; (2) the inability on the part of the carrier to meet the specific customer request for telephone numbers from the surplus of numbers within the carrier's currently activated thousand-block."

2. Pacific's Petition to Modify D.00-07-052 is denied to the extent it seeks to modify the existing 75% fill rate requirement.

3. The motion of Verizon Wireless for leave to file a late response to the Petition is granted.

This order is effective today.

Dated _____, at San Francisco, California.