

DT 03-099

PREXAR, LLC

Cessation of Service by Prexar, LLC

Order Granting Authority to Cease Providing Service and Waiver of
Certain Rules Regarding Cessation and Notice Requirements

O R D E R N O. 24,204

September 5, 2003

I. BACKGROUND

Prexar LLC ("Prexar") received its authority to operate as a competitive local exchange carrier (CLEC) in Docket DT 00-281 by Order No. 23,769, 86 NH PUC 576, August 31, 2001. This proceeding involves a petition by Prexar for a waiver of certain New Hampshire Public Utilities Commission (Commission) rules in connection with its cessation of service by Prexar as a CLEC.

On April 16, 2003, Prexar notified the Commission of a transaction by which United Systems Access Telecom, Inc. (USA Telecom), an authorized New Hampshire CLEC, would acquire substantially all of the assets of Prexar including its customer base and corporate name. Pursuant to RSA 374:22-o, the transaction does not require approval by the Commission. The notice petitioned the Commission for a waiver of Puc 1304.03 (d) and 1304.03(g) or (i) regarding the cessation of service or, in the alternative, for authorization to cease providing service and for authority to provide notice to customers upon closing of the asset transfer.

On May 22, 2003, Prexar filed a petition superceding its April 16 filing. The Petition included notice of a transaction under which control of all assets, tangible and intangible, including the customer base, contracts, corporate name and all domain names of Prexar, LLC would be transferred to USA Telecom. As a result of the sale, all of Prexar's assets will be transferred to USA Telecom, including the name "Prexar" and Prexar's current list of customers. The corporate entity known as Prexar, LLC will immediately cease to exist upon completion of the transaction. Prexar states its customers will receive services without interruption or diminution of service from USA Telecom. Prexar also states that the transaction will not result in any change in the existing customers' rates, terms, or conditions of service.

The Petition requests (1) leave to withdraw its Petition dated April 16, 2003, (2) approval of its cessation of operations in New Hampshire immediately upon the closing of the sale of its business to USA Telecom, pursuant to Puc 1304.03(c); and (3) waiver of the specific requirements of Puc 1304.03 (d) and 1304.03 (g) or (i), all of which require prior notice to its customers of the asset transfer to USA Telecom.

On August 21, 2003, Prexar filed a letter with the Commission, asserting that the transaction had been consummated and that notice of the transfer to USA Telecom had been sent

subsequently to customers. The letter averred that Prexar's request for a waiver of Puc 1304.03(g) and (i) was therefore moot, leaving only the request for approval of cessation of operations pursuant to Puc 1304.03(c).

We will grant Prexar's request to withdraw its April 16th filing. The relevant issues before us, therefore, are the request to cease operations and the request for waiver of the notifications to Prexar's customers regarding the transfer and the cessation of operations.

The standard for waiving our rules is contained in Puc 201.05. Pursuant to subsection (a) of that rule, a waiver shall be granted when the Commission finds that the waiver serves the public interest and will not disrupt the orderly proceeding of the Commission. Subsection (e) provides that the Commission shall waive a rule if compliance would be onerous in the circumstances and if the purpose of the rule can be satisfied by an alternative method. Finally, subsection (f) states that a rule shall be waived if the rule is inapplicable to the circumstances.

II. CESSATION OF OPERATIONS: APPROVAL AND WAIVER

Pursuant to Puc 1304.03(d), the Commission shall approve a CLEC's request to cease operations only upon finding that:

(1) all the CLEC's customers have been notified of the request to cease operations;

(2) the CLEC's customers have had 60 days in which to migrate to an alternate provider; and

(3) the customers have received refunds of any deposits made to the CLEC.

The type of notification required depends on the particular circumstances of cessation.

Prexar claims that notice of cessation is unnecessary in this case because the cessation of service is occurring as part of its transfer to another CLEC, which transfer is exempt from the requirement of prior Commission approval. Prexar also argues that notice is unnecessary because the transfer is transparent to customers because service under the same terms, conditions and rates will continue under an entity operating under the same name.

Prexar further argues that the notice should not be required in the circumstances because its customer base consists entirely of Internet customers. According to Prexar, the protection of prior notice is unnecessary for Internet customers because Internet service is fully competitive, is not itself a regulated business, and, also, Internet customers have the right and ability to change service providers at any time.

Prexar claims that the 60 day period provided by Puc 1304.03(d)(2) is likewise unnecessary. Prexar states that in

this case all customers will immediately transition to USA Telecom and therefore do not need to find another carrier, let alone be provided with 60 days to do so. Nor does Puc 1304.03(d)(3) apply, according to Prexar, as it has never collected deposits from its New Hampshire customers.

Staff recommends that the Commission approve Prexar's request to cease operations and grant a waiver of the requirements of Puc 1304.03(d). Staff reasons that the requirement of prior notification of cessation of operations applies only when service will be interrupted.

We are persuaded that the notice required by 1304.03(d)(1) is unnecessary because cessation of the carrier operations is occurring as a result of a complete transfer of assets to another carrier and service itself will not cease. In this circumstance we will waive the notice requirements of 1304.03(d)(1) because the intent of the rule is satisfied by an alternative means.

We will waive the requirement of Puc 1304.03(d)(2), the 60 day period allowing for migration, for similar reasoning. In Order No. 24,040 in DT 02-006, we dealt with a carrier that gave prior notice to its customers but not 60 days prior notice. We construed the purpose of the prior notice rule as to insure continuous service. In this situation, service will be provided without interruption, it will not cease and therefore prior

notice is unnecessary.

We will also waive the requirement of Puc 1304.03(d)(3) to refund any and all deposits. Prexar collected no deposits and therefore the rule is inapplicable to these circumstances. We will grant waiver of these provisions pursuant to 201.05(a) and (f).

III. WAIVER OF NOTICE OF TRANSFER OF ASSETS

When a CLEC transfers its franchise or system, Puc 1304.03(f) applies, requiring notice to any affected customer. The type of notice depends upon the circumstances surrounding the transfer, as detailed in Puc 1304.03(h). The fact that the transfer itself does not require Commission approval, pursuant to RSA 374:22-o, does not exempt a carrier from providing notice in compliance with our rules. Nor does the fact that the transfer has already occurred and that notice of some sort has been made exempt a carrier from complying with our rules. Prexar's notice to customers of the transfer, made after the fact, must be evaluated in light of the rules.

In support of its request for a waiver of Puc 1304.3(f), Prexar puts forth some of the same arguments made above. The transfer will be transparent to customers because service will continue under the same terms, conditions and rates and will be provided by an entity operating using the same name. Prexar also argues that the notice should not be required in the

circumstances because its customer base consists entirely of Internet customers. According to Prexar, the protection of prior notice is unnecessary for Internet customers because Internet service is fully competitive, is not itself a regulated business, and, also, Internet customers have the right and ability to change service providers at any time.

Staff concurs with Prexar's argument that requiring the CLEC to notify its customers that they shall be afforded an opportunity to change carriers without charge, is inapplicable because Internet customers have that right at any time. Staff, however, recommends that customers be notified of the identity of the new carrier providing service, in recognition of the customers' right to that information. Staff therefore recommends applying Puc 1304.03(i), giving each affected customer a 14 day opportunity to choose another CLEC without charge and providing the name, address and telephone number of the CLEC that will provide service if the customer does not choose another CLEC by the end of the 14-day period.

We find that Puc 1304.03(i) is not applicable. Puc 1304.03(i) applies when the five circumstances detailed in 1304.03(h) exist. The first circumstance listed is that the existing CLEC will continue to exist, serving its customers under the same name. Here, Prexar does not exist after the transfer. Even though USA Telecom will provide service under that name, it

is not the same company. Therefore, Puc 1304.03(i) is not the appropriate notice requirement.

We agree with Staff that notice to customers is required pursuant to Puc 1304.03(f). Customer notification requirements as set out in Puc 1304.03(f) protect customers against slamming, which is prohibited under RSA 374:28-a. Slamming is defined in RSA 374:28-a, I as any practice that changes a customer's telecommunications service carrier or provider without the customer's knowledge or consent.

As a CLEC, Prexar is a telecommunications carrier and this transaction transfers Prexar's customers to USA Telecom without the customer's knowledge or consent. Prexar's customers are now being served by a different company and were not provided the prior notice required by Puc 1304.03(f). The fact that the different company is using the Prexar name is an added confusing element for its customers. Thus we believe it is necessary for the affected customers to be provided precise information about the identity of their carrier. We are unpersuaded that the customers' status as Internet customers dispenses with the need to provide them with notice of the transfer to USA Telecom. Prexar customers are receiving service from a CLEC and therefore are entitled to all of the protections afforded CLEC customers.

We find that Prexar's failure to provide prior notice of the transfer arguably was a technical violation of Puc

1304.03(f) and RSA 374:28-a. Under the facts of this case, Prexar provided notice to its customers during the pendency of this proceeding and it appears that customers were not harmed as a result of the slamming. Therefore, we decline to pursue penalties for Prexar's conduct in this matter.

Prexar's original petition requested permission to provide notice at the time of transfer and we would most likely have approved that action as an adequate alternative to Puc 1304.03(f), pursuant to Puc 201.05. In similar circumstances, carriers should be guided by the principle that notice of a transfer must occur prior to the transfer or, if approved by the Commission, contemporaneous with the transfer.

Based upon the foregoing, it is hereby

ORDERED, that Prexar's request for approval of its cessation of operations is granted; and it is

FURTHER ORDERED, that Prexar's request for waiver of the requirements of Puc 1304.03(d) is granted; and it is

FURTHER ORDERED, that Prexar's request for waiver of the notification requirement of Puc 1304.03 (g) or (i) is denied.

By order of the Public Utilities Commission of New
Hampshire this fifth day of September, 2003.

Thomas B. Getz
Chairman

Susan S. Geiger
Commissioner

Nancy Brockway
Commissioner

Attested by:

Debra A. Howland
Executive Director & Secretary