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Investigation as to Whether Certain Calls are Local

Order Denying Verizon New Hampshire's Petition for Rehearing of Order Approving Agreements

O R D E R N O. 24,466

May 13, 2005

I. INTRODUCTION

This docket has a lengthy history. The proceedings pertinent at this stage begin in 2003 when the New Hampshire Public Utilities Commission (Commission) issued Order No. 24,080, found at 88 NHPUC 462 (2003) (Order for Rehearing). The Order for Rehearing granted rehearing on the limited issues of technical feasibility, time frames and cost to implement Information Access NXX[1] (IANXX), and on the appropriate treatment of existing Virtual NXX (VNXX) numbers that cannot be reassigned to the relevant point of interconnection (POI) when certain pooling circumstances exist. During the course of the rehearing process Staff and the Parties, with the exception of Verizon, negotiated two agreements to resolve the issues identified in the Order for Rehearing: the Agreement Regarding CLEC FX and Reassignment to the POI (POI Agreement) and the Agreement Regarding the Implementation of IANXX (IANXX Agreement), collectively, the Agreements. On December 30, 2004, after discovery, prefiled testimony, hearings and briefs, the Commission issued Order No. 24,419 (Order Approving Agreements).

[1] NXX refers to the first three digits of a seven digit telephone number.

Verizon New Hampshire (Verizon) filed a Petition for Rehearing of Order Approving Agreements (Petition) on January 5, 2005. Global NAPs (GNAPs) timely filed an objection to Verizon's Petition on February 4, 2005. Verizon seeks reconsideration of the Order Approving Agreements because, it claims, the Agreements fail to address and resolve the issues the Commission identified in its Order for Rehearing. In addition, Verizon claims that the Order Approving Agreements goes beyond the Commission's delegated authority. GNAPs argues that the Agreements represent a consensus of most of the Parties and that Verizon should not get another hearing on the issue of reimbursement for its alleged call transport costs. Verizon has taken many opportunities to raise this issue, says GNAPs, and to hear this matter yet again would further delay the interests of justice.

II. STANDARD FOR REHEARING

New Hampshire RSA 541:3 provides that the Commission may grant rehearing when in the Commission's opinion "good reason for the rehearing is stated in the motion." RSA 541:4 provides that a motion for rehearing must set forth grounds by which the decision is either unlawful or unreasonable. Motions for rehearing direct attention to matters "overlooked or mistakenly conceived" in the original decision and require an examination of the record already before the fact finder. *Dumais v. State Personnel Comm'n*, 118 NH 309, 312 (1975). The Commission must determine if good reason exists to consider its orders either unlawful or unreasonable, based on the record developed. *Wilton Telephone Company*, 86 NH PUC 625 (2001).

The Commission has found good reason for rehearing when rulings were made without sufficient opportunity for an affected party to comment, *Verizon New Hampshire Tariff Filing Introducing Charges for Busy Line Verification*, 86 NH PUC 266 (2001). Sufficient good reason was also found when the order was unclear as to the specific circumstances in which Rate Reduction Bond charges would apply, *Public Service Company of New Hampshire Petition of 5 Way Realty Trust*, 88 NH PUC 98 (2003). Good reason is also shown when a party demonstrates that new evidence exists that was unavailable at the original hearing. *Consumers New Hampshire Water Co., Inc*, 80 NH PUC 666 (1995), cited in *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, 87 NH PUC 334 (2002).

The Commission need not grant a request for rehearing "so that a party has a second chance to present evidence that it could have presented earlier." *LOV Water Company*, 85 NH PUC 523, 524 (2000). Further, if the arguments raised on rehearing had been fully considered during the hearings, the Commission need not grant rehearing. *Verizon New Hampshire Petition to Approve Carrier to Carrier Performance Guidelines*, 87 NH PUC 334, 339 (2002).

III. POSITIONS OF THE PARTIES

A. Verizon

Verizon requests rehearing on two grounds: 1) that the Commission lacks authority to impose either the IANXX or the CLEC FX calling arrangements; and 2) that the

Order Approving Agreements is unsupported and contrary to the evidence because the agreements fail to resolve the issues identified for rehearing.

In support of its jurisdictional arguments, Verizon states that the Commission has no authority to create a service that is exclusively interstate in nature. Verizon claims that the Federal Communications Commission (FCC) has defined the terms under which carriers provide access to information services as an interstate service, and that the Commission cannot evade this jurisdictional prohibition by the fiction that it is only defining the local calling area of an intrastate service. By the Commission's definition, only ISPs may subscribe to the proposed IANXX service and only for collecting dial-up Internet-bound traffic. Thus, according to Verizon, there is no intrastate aspect of IANXX service, only a service ("information access service") that the FCC has found to be an "end-to-end" interstate service.

Next, Verizon claims that both the IANXX Agreement and the POI Agreement contravene the FCC's plenary and exclusive numbering authority. Verizon restates the arguments made in its brief, contending that the POI Agreement is in direct conflict with the plenary and exclusive authority of the FCC over numbering pursuant to the Telecommunications Act of 1996, stating that the POI Agreement provides criteria for reassignment of telephone numbers, establishes terms and conditions for pooling and porting numbers, and directs CLECs to relinquish numbering resources. Verizon states that each clause unlawfully places limits on the administration of telephone numbers beyond the numbering authority of the Commission. Further, in developing specifications for IANXX numbering procedures, Verizon claims that the

IANXX Agreement inappropriately expands the Commission's numbering authority, is inconsistent with existing telephone numbering procedures, and places intrastate limits on the administration of telephone numbers.

In arguing that the Agreements fail to address the issues preserved for rehearing, Verizon argues that the Agreements fail to account for the costs Verizon will incur to implement IANXX and CLEC FX service. Again restating the arguments raised in its brief, Verizon claims that the IANXX Agreement fails to account for the costs Verizon will incur to implement IANXX, specifically the cost of transporting IANXX calls statewide beyond the caller's local calling area to the terminating CLEC's POI. Verizon contends that if the IANXX Agreement is adopted, Verizon will be forced to bear its competitors' transport costs, creating an unfair competitive advantage for CLECs in the marketplace. Verizon asserts that the failure of the IANXX Agreement to address Verizon's recurring transport costs discriminates against Verizon and fails to foster efficient economic competition.

For CLEC FX, Verizon claims that under the POI Agreement CLECs offer their end users an unduly subsidized interexchange calling service; incur none of Verizon's interexchange transport costs; pocket the retail revenues from their end user; and inappropriately bill Verizon reciprocal compensation charges on traffic that is plainly interexchange in nature.

Verizon claims that it is not technically feasible for carriers to implement or enforce the IANXX Agreement. Here Verizon argues that the Commission dismissed its argument on this topic with the erroneous conclusion that "VoIP service requires a broadband

connection whereas IANXX, by definition, is solely a dial-up service." Verizon's witness testified that with existing computer software, widely available for download to all Internet users, end users can make voice telephone calls using their personal computer over any dial-up Internet connection, which Verizon claims is proof that VoIP is not only a broadband service. The broadband-based VoIP service referenced by the Commission eliminates the use of the computer (by substituting a modem that connects to any phone) but according to Verizon's witness, Mr. Nestor established that VoIP service for voice traffic is enabled today for any end user with a personal computer and a dial-up connection. Because the Commission cannot enforce the prohibition against VoIP applications over IANXX, Verizon argues, the Commission should not have approved the IANXX Agreement.

Verizon claims that the timeframe for implementing the IANXX Agreement conflicts with the competitive and technological changes in the marketplace. In a restatement of its brief on this topic, Verizon claims that IANXX will be outdated by the time it is implemented in the marketplace.

Finally, Verizon claims that the Commission's "local nexus" criteria for CLEC FX eligibility are flawed. Verizon asserts that allowing CLEC-FX expressly condones CLEC actions that: displace significant amounts of ILECs' toll and/or access revenues; allow CLECs to use the ILEC network for free; and exploit reciprocal compensation from the ILEC. With the Commission's encouragement, CLECs will continue to offer virtual numbers to their customers to place and receive calls from Verizon's customers. The only way the Commission can prevent

such abusive behavior is to reaffirm that the physical end points of the call define the proper rating of all non ISP-bound traffic for purposes of intercarrier compensation. Unless the Commission draws the line brightly, Verizon asserts CLECs will continue to search for means to evade the tariffed compensation ILECs receive for interexchange traffic and further erode the traditional support interexchange service provides to keeping basic exchange service affordable in New Hampshire.

B. GNAPs

In its comments regarding Verizon's Petition, GNAPs asserts that the arguments made in the Petition have been raised many times in the course of this docket. GNAPs states that Verizon has raised no new arguments nor have any changes in federal law occurred that should be reinterpreted by this Commission.

On the issue of transport cost, GNAPs argues that there are substantial legal and policy grounds for not imposing access or other call transport charges on IANXX or CLEC FX traffic. The other issues raised by Verizon, according to GNAPs, should have been raised earlier. Verizon's concerns about VoIP are inappropriate to this forum, given that the definitions and handling of VoIP calls are being defined by the FCC.

Verizon's concerns about abuse of CLEC FX and IANXX are misplaced as well, GNAPs avers, as the penalty of decertification is far more punitive than mere fines, and acts as an equalizer: some carriers may be able to afford higher absolute fines than others, but no carrier can afford decertification. As to the implementation timeframe, GNAPs takes issue with

Verizon's argument that dial-up services are irrelevant given today's broadband technology. Indeed, GNAPs claims, the most effective way to provide ubiquitous Internet access to casual users is through dial-up access. For this reason alone, implementation of IANXX is long overdue, says GNAPs. GNAPs asks that the Commission reject Verizon's request for a rehearing and move forward to implement the Agreements.

IV. COMMISSION ANALYSIS

Verizon seeks rehearing of our approval of the POI and IANXX Agreements. We begin by noting that Verizon is requesting rehearing of an issue that we already agreed to rehear once. In Order No. 24,218 (October 17, 2003), we allowed rehearing with new discovery and testimony, followed by initial and reply briefs, specifically in response to the requests of Parties, including Verizon, that we consider the cost and other aspects of IANXX.

Verizon asserts it is not technically feasible for carriers to implement or enforce the IANXX settlement because an end user could take advantage of software that would enable a person using a dial-up connection to enable VoIP, even though IANXX as defined by the Commission's prior orders is only for Internet Service Provider (ISP) bound data traffic. The argument, first presented in Verizon's testimony on the implementation of IANXX, is not persuasive. The Commission is not inserting itself into the regulation of VoIP, which the FCC clearly intends to reserve to itself. (*See* WC Dkt No. 03-211 Memo Opinion and Order released November 12, 2004.) To the contrary, we have created IANXX as a means for New Hampshire end users to access their Internet service providers ISPs using dial-up connections that

specifically do not involve VoIP technology. Further, we required carriers and their customers to take steps to ensure that it is not used for purposes other than those for which it was conceived. While we cannot guarantee that end users will not concoct workarounds, we believe that IANXX will continue to benefit dial-up Internet users, and meets our stated goal of not disrupting the existing state-wide access CLECs and ISPs are currently providing to their customers using VNXX.

Verizon asserts that the time frame does not reflect the technological and competitive changes in the marketplace. These arguments were made previously and found not to be persuasive in the Order Approving Agreements. We will not revisit them here.

Verizon argues that both Agreements contravene the numbering authority of the FCC, another claim it made for the first time in its post hearing brief. We found otherwise in the Order Accepting Agreements and will not rehear this issue.

Verizon asserts the Commission's "local nexus " criteria for CLEC FX are flawed in that they allow CLECs to displace Verizon's traditional toll and/or access revenue, allow the CLECs to use Verizon's network for free, and exploit reciprocal compensation arrangements. None of these issues are new and have been dealt with in the original VNXX order and Order Approving Agreements.

Finally, Verizon asserts that the Agreements and the Commission's orders fail to account for the costs Verizon will incur to implement IANXX and CLEC FX. Verizon's cost arguments have been reiterated repeatedly throughout this docket and have been addressed by

the Commission in each of its orders. While Verizon asserts that the Commission did not consider its implementation costs (which would be the one-time costs contemplated by the Commission in its Order on Rehearing addressing the implementation of IANXX) Verizon's argument here, and throughout this docket, is about compensation for transport, not implementation. In its initial arguments in this docket, Verizon asserted that it should receive terminating access, that is, compensation for terminating long distance calls to another carrier's network, for VNXX calls. Verizon argued persuasively that the Commission should prohibit VNXX. The Commission agreed, eliminating the general use of VNXX, and instead creating IANXX, to preserve the current availability of statewide dial-up access to ISPs already provided by CLECs, and CLEC FX, which requires CLECs to make a commitment to a local presence. The Commission found that, for IANXX, compensation for transport would be governed by the FCC, which had then recently developed an intercarrier compensation scheme specifically for ISP-bound calls.

In its request for reconsideration of the Commission's VNXX Order, Verizon argued that terminating access should apply to IANXX calls. Again the Commission found, in its Clarifying Order, that calls to IANXX from a 603 NXX would be rated as local, and that no reciprocal compensation or access charges would apply. The Commission reiterated this position in its Order on Motions for Rehearing with the Commission stating that IANXX calls would not incur access charges.

Verizon now asserts that the Agreements fail to address an issue preserved for

rehearing, arguing that its request for access charges for IANXX, denied by the Commission three times, are implementation costs that must be addressed here. However, having raised no new evidence or arguments on this issue, there is no cause for rehearing regarding Verizon's transport costs.

Verizon has raised no new evidence or arguments that warrant rehearing. The Petition for Rehearing of Order Approving Agreements, therefore, will be denied.

Based upon the foregoing, it is hereby

ORDERED, that Verizon's Petition for Rehearing of Order Approving Agreements is DENIED.

By order of the Public Utilities Commission of New Hampshire this thirteenth day of May, 2005.

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Thomas B. Getz	Graham J. Morrison
Chairman	Commissioner

Attested by:

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Debra A. Howland
Executive Director and Secretary