

The Commonwealth of Massachusetts
Department of Telecommunications & Energy

D.T.E. NO. 98-38 :
INVESTIGATION BY THE DEPARTMENT : OPPOSITION OF SNET
OF TELECOMMUNICATIONS & ENERGY : CELLULAR, INC. TO
ON ITS OWN MOTION TO DETERMINE : MOTION FOR AN
WHETHER MEASURES SHOULD BE : EMERGENCY RULING
IMPLEMENTED TO CONSERVE : TO PRESERVE NUMBER
EXCHANGE CODES WITHIN EASTERN : CONSERVATION OPTION
MASSACHUSETTS :

SNET Cellular, Inc. (“SNET”) opposes the Attorney General of the Commonwealth of Massachusetts’ (the “Attorney General”) Motion for an Emergency Ruling to Preserve Number Conservation Option (the “Motion”) dated June 1, 1998 and distributed to those intervenors present at the Lockheed Martin Technical Session in this proceeding on the afternoon of June 1, 1998. SNET has no objection to the concept of “virtual pooling” of telephone numbers as generally described by Lockheed Martin at the technical session¹ in connection with the jeopardy declarations in the 508, 617, 781 and 987 NPAs. SNET objects to the Attorney General’s Motion, however, on the grounds that (1) the relief sought by the Attorney General’s Motion is beyond the scope of the Department of Telecommunications and Energy’s (the “Department”) jurisdiction, in that it seeks an order regulating the administration of telephone numbering, (2) even if the Department had legal authority to issue such an order, there has been no factual demonstration by competent evidence that there is a sufficient “emergency” to justify the adoption of emergency rules ordering “virtual pooling,” effective retroactively to June 1, 1998, and (3) the proposed order with respect to “virtual pooling”

¹ SNET reserves the right to submit comments to the Department on or before June 15, 1998 with respect to specific problems SNET might have concerning details of the proposal.

contains inherent ambiguity that cannot be corrected without factual development concerning how the various telecommunications service providers “utilize” telephone numbers in providing telecommunications services.

THE DEPARTMENT LACKS AUTHORITY TO ENGAGE IN NUMBERING MATTERS OTHER THAN AREA CODE RELIEF

Pursuant to Section 251(e)(1) of the Telecommunications Act of 1996 (the “Telcom Act”)(47 U.S.C. § 251(e)(1)) the Federal Communications Commission (the “FCC”) is vested with exclusive jurisdiction over the administration of telephone numbers in the United States. That section of the Telcom Act provides further, however, that the FCC may delegate “all or any part” of such jurisdiction to state commissions such as the Department. The FCC has delegated to the various state commissions only the authority to “resolve matters involving the introduction of new area codes within their states.” (47 C.F.R. § 52.19(a)). The FCC specifically and explicitly declined to delegate to the state commissions authority with respect to the administration of central office codes (“NXX codes”) (*Second Report and Order on Interconnection*, 11 FCC Rcd 19392, 19531-19533 (1996); 47 C.F.R. § 52.15).

The plenary authority given to the FCC by Congress preempts the Department’s authority with respect to numbering administration. The proposed “virtual pooling” order, whether or not couched in terms of attempting to provide relief from the imminent exhaust of NXX codes in the 508, 617, 781, and 987 area codes, seeks a mandatory rule with respect to how telecommunications service providers will be assigned NXX codes within existing area codes. The order proposed in the

Attorney General's Motion is nothing other than plain and simple NXX code numbering administration.

THE DEPARTMENT HAS BEEN PRESENTED WITH NO EVIDENCE ON WHICH TO BASE A FINDING THAT "IMMEDIATE ADOPTION OF A REGULATION IS NECESSARY FOR THE PUBLIC HEALTH, SAFETY OR GENERAL WELFARE, AND THAT OBSERVANCE OF REQUIREMENTS OF NOTICE AND PUBLIC HEARING WOULD BE CONTRARY TO THE PUBLIC INTEREST."

The Attorney General's Motion requests that the Department "expeditiously" impose what the Motion describes as an "interim requirement on the users of existing and recipients of new central office (NXX) codes in the 617, 508, 781 and 978 Numbering Plan Areas...." The Attorney General's "interim requirement" is nothing more or less than a rule of general applicability with respect to users of NXX codes, that is, it is a regulation within the meaning of Department's regulations (220 CMR § 2.01) and M.G.L. c. 30A, § 1(5). Section 2.05(4) of the Department's regulations (220 CMR §2.05(4)) provides that the Department may dispense with notice and a public hearing prior to the adoption of a regulation only upon a finding "that the adoption of a regulation is necessary for the public health, safety or general welfare, and that observance of requirements of notice and a public hearing would be contrary to the public interest." Such a finding by the Department based upon the current state of the record in this proceeding would be arbitrary and capricious.

The only evidence on the record of this proceeding concerning the preferred timing for the implementation of "virtual pooling" is the testimony of Mr. Deak at the June 1, 1998 technical meeting on Lockheed Martin's proposal. *Transcript*, pp. 42-45. Mr. Deak indicated that he had assumed it would take ninety days to implement "virtual pooling" but that the sooner it is implemented, the better. He explained that the sooner "virtual pooling" is implemented, the more

thousands blocks of telephone numbers can be preserved for use when actual pooling can be implemented by the industry. There is nothing more about the issue in the record. There is no exploration about how many more thousands blocks might be lost by delay or whether or not it would be worth waiting some period of time in order to make the proposal clearer or to determine if specific types of uses of telephone numbers by specific types of service providers might require modifications to the proposal. In fact, when one of the parties attempted to question Mr. Deak along these lines, he was summarily prevented from doing so by the Hearing Officer. *Transcript*, pp. 93-98. The record reflects that the proponent of the “virtual pooling” proposal made the proposal assuming its implementation in ninety days and that he believes it would be better if it were implemented sooner. There is nothing in the record to justify foregoing public hearings in order to implement the proposal sooner.

THE PROPOSED ORDER WITH RESPECT TO “VIRTUAL POOLING” CONTAINS INHERENT AMBIGUITY THAT CANNOT BE CORRECTED WITHOUT FACTUAL DEVELOPMENT CONCERNING HOW VARIOUS TELECOMMUNICATIONS SERVICE PROVIDERS “UTILIZE” TELEPHONE NUMBERS IN PROVIDING TELECOMMUNICATIONS SERVICES

As was abundantly clear from Mr. Deak’s testimony in numerous instances, for example *Transcript*, p. 99, the “virtual pooling” proposal by both Lockheed Martin and the Attorney General contains ambiguities that Mr. Deak assumed would be “cleared up” at some point prior to implementation. If the Department were to grant the Attorney General’s Motion and adopt as an emergency regulation the proposal as currently written, no party could be assured that the obviously flawed proposal would or could be applied fairly to all types of service providers. The only logical solution is to clarify the ambiguities now, prior to implementation. The only way to resolve the

ambiguities in a regulatory setting is to take evidence on how to do so.

THE DEPARTMENT SHOULD CONVENE AN INDUSTRY MEETING IN CONNECTION WITH AREA CODE RELIEF TO SUGGEST THE IMPLEMENTATION OF VOLUNTARY “VIRTUAL POOLING”

As mentioned at the outset, SNET has no objection to the concept of “virtual pooling” of telephone numbers as generally described by Lockheed Martin in the technical session. SNET would voluntarily participate in a “virtual pooling” program adopted by the industry as a means to conserve telephone numbers until a legally adopted national pooling plan is approved and the technology for it is available to the industry. SNET would support convening the various industry participants in eastern Massachusetts as soon as possible at the Department’s request and under the aegis of the numbering administrator to attempt to agree to a voluntary “virtual pooling” plan.

THE ATTORNEY GENERAL’S MOTION SHOULD BE DENIED BECAUSE THE DEPARTMENT’S EFFORTS SHOULD BE CONCENTRATED ON TRADITIONAL AREA CODE RELIEF RATHER THAN ON ADOPTION AND ENFORCEMENT OF PLANS THAT DO NOT HAVE A REASONABLE LIKELIHOOD OF ASSURING AN ADEQUATE SUPPLY OF TELEPHONE NUMBERS FOR THE RESIDENTS OF EASTERN MASSACHUSETTS

SNET continues to be concerned that the Department’s efforts to adopt NXX code conservation measures while delaying the initiation of processes to put in place traditional area code relief, if necessary, will have the inevitable result of eastern Massachusetts reaching NXX code exhaust before area code relief can be implemented. Even if full thousands block pooling is able to be implemented prior to the exhaust date, and “virtual pooling” has been successful in preserving thousands blocks of numbers for use in pooling, there is no evidence how long such pooling will be

able to delay exhaust at that point. Any information about demand that the “virtual pooling administrator” collects during the “virtual pooling” program will be suspect and will necessarily not include the forecasts of new competitors. In addition, it is by no means clear that the wireless industry will be able to participate in pooling as soon as the wireline providers. There is every reason to believe that wireless participation in local number portability, a prerequisite for pooling, will be delayed far beyond the time it is available for the wireline providers. SNET believes that without traditional area code relief in the 508 NPA, it will be unable to get telephone numbers with which to serve its customers. The Department’s failure to focus on area code relief will inevitably put SNET, a wireless provider, at a competitive disadvantage.

CONCLUSION

For the reasons set forth above, the Department should deny the Attorney General’s Motion.

Respectfully submitted this 8th day of June, 1998.

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