

STATE OF MICHIGAN
COURT OF APPEALS

OAKLAND COUNTY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,
VERIZON WIRELESS, AT&T WIRELESS PCS,
LLC, and WORLDCOM,

Appellees.

UNPUBLISHED

November 16, 2001

No. 234244

Public Service Commission

PSC No. 00-012721

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Oakland County appeals as of right from the April 17, 2001, opinion and order of the Michigan Public Service Commission (MPSC) that ordered the implementation of an all-services overlay relief plan for area code 248, which serves Oakland County. We affirm.

In May 1999, the North American Numbering Plan (NANP) Administrator, currently designated by the Federal Communications Commission (FCC) as NeuStar, Inc., determined that the 248 area code was “in jeopardy” because the available NXX codes (the three numbers that follow an area code) could be exhausted by the first quarter of 2000. NeuStar and members of the telephone industry met to discuss long-term relief alternatives for the 248 area code.

In June 2000, NeuStar filed a petition with the FCC seeking area code relief and presenting five alternatives: a geographic split,¹ an all-services distributed overlay² of the 248

¹ A geographic split means that the geographic area served by an area code is split into two or more smaller geographic areas, each with a separate area code. Thus, when a geographic split occurs, some consumers are assigned a new telephone number.

² An all-services distributed overlay means that a new area code is introduced to serve the same geographic area as an existing area code. Thus, when there is an overlay, the boundary lines for the geographic area served by the area code do not change, but consumers who wish to add a telephone line or other telecommunications service may be assigned a different area code for that service. The FCC currently does not permit technology-specific overlays, e.g., application of the new overlay area code only to wireless services. 47 CFR § 52.19(c)(3)(i). Also, as currently mandated by the FCC, area code relief in the form of an overlay means the imposition of

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area code, two all-services overlay plans that would cover more than one area code, and a new area code that would apply only to wireless customers. NeuStar recommended adoption of an all-services overlay relief plan for the 248 area code. At the time the FCC petition was filed, the MPSC did not have any statutory authority to address area code relief. However, in July 2000, the Michigan Legislature amended the Michigan Telecommunications Act, MCL 484.2101 *et seq.*, to grant such authority to the MPSC. 2000 PA 295.³ In light of this new statutory authority, the FCC forwarded NeuStar's petition to the MSPC for review.

A public hearing was held regarding the 248 area code relief plan, and the public was invited to file written comments and responses to those comments. In its public and written comments, the telephone industry as a whole strongly supported an overlay. Oakland County appeared at the public hearing and made a presentation on behalf of its residents, and also submitted written comments opposing as unnecessary any 248 area code relief. Oakland County conducted research that purported to demonstrate that phone numbers were being allocated inefficiently in the 248 area code. In particular, the county found that there were enough numbers in the 248 area code to provide each county resident with at least six phone numbers. The county further noted that most of its residents had been subjected to area code relief twice since 1993, that a request for area code relief was submitted in 2000 and that, without number pooling, it appeared likely that relief would again be necessary in 2004.

Number pooling is a conservation effort that maximizes number usage and reduces the likelihood of new area codes being necessary. Historically, telephone companies have held 10,000 number blocks⁴ for distribution as necessary; however, this has led to inefficient use by stranding large blocks of numbers. To alleviate this problem, the industry has begun to use thousands-block number pooling in which service providers are assigned numbers in blocks of 1,000 numbers, not the 10,000 blocks of numbers used in the old allocation method. While the FCC has delegated authority to some states to conduct thousands-block number pooling trials, introduction of a nationwide plan for such pooling faces substantial technical obstacles.

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“mandatory ten-digit dialing [area code plus seven digit number] for every telephone call within and between all area codes in the geographic area covered by the overlay area code.” 47 CFR § 52.19(c)(3)(ii).

³ As amended, MCL 484.2303 provides in pertinent part:

(4) The commission has the authority to approve or deny a proposed addition, elimination, or modification of an area code in this state. The commission shall give public notice and shall conduct a public hearing in the affected geographic area before an addition, elimination, or modification of an area code is made in this state.

(5) To the extent that it is technically and economically feasible, the commission shall issue orders requiring the modification of all area code boundaries in this state to insure that they conform to county lines.

⁴ Each NXX prefix represents 10,000 individual telephone numbers.

On April 17, 2001, the MPSC issued an opinion and order approving implementation of an all-services overlay relief plan for the 248 area code, citing the following six reasons:

First, . . . customers within the 248 area code have already had their area code changed twice, once from 313 to 810 during 1993 and again from 810 to 248 during 1997. Requiring these customers to endure yet another geographic split, and thus forcing them to change their respective telephone numbers for the third time in eight years, should be avoided if at all possible.

Second, the previous geographic splits in this region have resulted in a very compact area code. Thus, as NeuStar correctly pointed out in the petition, the region covered by the 248 area code has already been divided into the smallest practical area without dividing communities of interest.

Third, research indicates that overlays have become much more accepted throughout the country over the last few years. As of February 2001, nearly 75% of the pending area code relief plans approved by state commissions have been in the form of overlays. This is due to the fact that overlays are generally faster to implement than geographic splits and serve to make future area code relief efforts much less disruptive.

Fourth, overlays can accentuate the benefits derived from various numbering resource optimization programs. As correctly noted by Verizon Wireless, numbers that are ultimately freed-up through either NXX code reclamation or thousands-block number pooling can be utilized throughout the 248 area code. Thus, keeping the region covered by the 248 area code as large as possible should reduce the number of stranded NXX codes. Moreover, it increases the opportunity for customers who are assigned numbers in the new overlaid area code to switch back to a subsequently freed-up 248 number, should they so desire. If a geographic split is implemented, however, customers who have had their area code changed will no longer have access to any 248 numbers that reclamation and pooling efforts ultimately make available for use.

Fifth, the alternative recommended by NeuStar and the industry is expected to provide the longest-term relief to all customers currently located within the 248 area code. Specifically, the best estimate available at this time indicates that by adopting an overlay that adheres to the current boundaries of the 248 area code, further NXX code exhaustion should be avoided for seven years.

Sixth, the Commission further finds that, as pointed out by Ameritech Michigan and Verizon, it is [sic] neither technically nor economically feasible to split or otherwise reconfigure the 248 area code precisely along county lines. Therefore, the alternative recommended in the petition complies with Section 303(5) of the [Michigan Telecommunications] Act. To conform to county lines, providers along the boundary would have to reconstruct their networks and reconfigure their exchange boundaries. The required changes would likely be too expensive and time-consuming, as well as disruptive to customers, to justify their adoption in this instance.

The MPSC further noted that it was “keenly aware of the inconvenience and confusion that area code relief can entail,” and that it would “continue to aggressively exercise the legislative authority it was granted . . . to minimize the need for, as well as the adverse consequences arising from, future area code relief.” In particular, the MPSC noted that it had filed a petition in January 2001 with the FCC for authorization to implement thousands-block number pooling, and that, assuming the FCC granted the petition, it would “work as expeditiously as possible to select a pooling administrator and implement the program.”⁵ Oakland County appealed.

A party challenging an order of the MPSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.25; MCL 462.26(8); *In re MCI Telecommunications Complaint*, 460 Mich 396, 426-427; 596 NW2d 164 (1999); *In re Complaint of Bierman Against Centurytel of Mich, Inc*, 245 Mich App 351, 361; 627 NW2d 632 (2001). To prove unlawfulness, the appellant must show “that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment.” *In re MCI, supra* at 427 (citation omitted). Further, “[t]he hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or ‘zone’ of reasonableness within which the PSC [Public Service Commission] may operate.” *Id.* When the MPSC engages in fact-finding, such findings must be supported by competent, material, and substantial evidence on the whole record. *Attorney General v Public Service Comm*, 206 Mich App 290, 295-296; 520 NW2d 636 (1994).

On appeal, Oakland County contends that the MPSC’s order is unreasonable. The gravamen of the county’s appeal includes a general attack against the industry’s numbering system as archaic, inefficient, and burdensome on consumers, in conjunction with a specific attack against the MPSC’s choice of an all-services overlay relief plan for area code 248, rather than a geographic split. The problem with the former argument is that the MPSC is acting within a limited sphere of regulatory authority delegated to it by the FCC, i.e., authority to implement area code relief after the NANP Administrator has deemed an area code to be in jeopardy of NXX code exhaustion. The FCC is vested with jurisdiction over the NANP and its administrator. 47 USC 251(e)(1). Thus, the MPSC simply does not have the regulatory

⁵ Oakland County submitted comments to the FCC in support of the MPSC’s petition. We take note that on August 24, 2001, the FCC issued an order conditionally granting the MPSC the authority to institute a thousands-block number pooling trial in the 248 area code. *In the Matter of Numbering Resource Optimization*, CC Docket No. 99-200, released 8/24/2001. The FCC found that the 248 area code met the three prerequisites for thousands-block number pooling: (1) the subject area code is in jeopardy, (2) it has a remaining life span of at least one year, and (3) it is in one of the largest 100 MSAs [metropolitan statistical areas]. Specifically referring to Oakland County’s research data, the FCC stated:

We believe that pooling will increase the efficient use of numbering resources in the 248, 313, 616, 734 and 810 NPAs [Numbering Plan Areas]. According to data from the Numbering Resource Utilization/Forecast Reports filed by carriers in February 2001, approximately 9,331 thousands-blocks located within a top 100 MSA in Michigan are available for pooling. [*Id.* at 12.]

authority to address and solve industry- and nation-wide issues such as stranded numbers, inefficient number pooling, and rate center consolidation.

Nonetheless, we note that the MPSC has taken action to expand its delegated authority to implement number optimization efforts in this state. In an order issued August 24, 2001, the FCC conditionally granted the MPSC the authority to institute a thousands-block number pooling trial in the 248 area code, expressly recognizing that the 248 area code was in jeopardy. Further, pursuant to a recent FCC rule amendment, 47 CFR § 52.15(i), the MPSC has established a process for reclamation of unused NXX codes in Michigan.⁶

In challenging the MPSC's specific decision to implement an all-services overlay, Oakland County asserts that area code relief is unnecessary in light of its own research, which indicated that phone numbers were being allocated inefficiently in the 248 area code. As noted by appellee, Oakland County's argument is directed to the wrong party. NeuStar, the FCC's designated NANP Administrator, not the MPSC, deemed the 248 area code to be in jeopardy of NXX code exhaustion. Indeed, the MPSC's delegated authority in these matters is limited to authorizing an area code relief plan after an area code has been determined to be in jeopardy by the NANP Administrator. Thus, appellant has not demonstrated unreasonableness in this regard.

Oakland County further argues that the MPSC's choice of an all-services overlay rather than a geographic split is without support in the record and, therefore, must be deemed unreasonable. We disagree. After meeting with industry representatives, NeuStar recommended implementation of an all-services overlay plan. Acknowledging that any relief plan would cause some confusion and inconvenience for affected consumers, the MPSC cited six reasons for adopting NeuStar's recommendation and choosing the overlay plan. Each of these findings was supported by competent, material, and substantial evidence on the whole record. *Attorney General v Public Service Comm, supra* at 295-296. Further, the mere showing of the existence of an alternative relief plan does not constitute a showing that the plan adopted by the Commission is unlawful or unreasonable. See *City of Parma v Public Utilities Comm'n of Ohio*, 86 Ohio St 3d 144, 150; 712 NE2d 724 (1999).

In sum, we conclude that the MPSC's decision to choose an all-services overlay relief plan for the 248 area code falls within the broad zone of reasonableness within which the MPSC operates, and that it is beyond the purview of the judiciary to substitute its judgment for that of the MPSC on such regulatory matters. *In re MCI, supra* at 427.

⁶ In its opinion and order, the MPSC explained:

Based on a recent amendment to its rules concerning the assignment of NXX codes, as set forth in 47 CFR § 52.15(i), the FCC provided state commissions an opportunity to investigate and determine whether service providers have activated the NXX codes assigned to them within the required time frame, and to seek the release of codes that were not activated in a timely manner. The Commission [MPSC] issued a November 2, 2000 order in Case No. U-12703, which established a process for reclaiming unused NXX codes in Michigan.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Joel P. Hoekstra

/s/ Jane E. Markey