STATE OF MAINE
PUBLIC UTILITIES COMMISSION

February 23, 2000

EXAMINER'S REPORT

PUBLIC UTILITIES COMMISSION
Investigation into Use of Central Office Codes (NXXs) by New England Fiber Communications, LLC d/b/a Brooks Fiber

Docket No. 98-758

NEW ENGLAND FIBER COMM d/b/a BROOKS FIBER
Proposed Tariff Revision To Introduce Regional Exchange (RX) Service

Docket No. 99-593

NOTE: This Report contains the recommendation of the Hearing Examiner and is in draft order format. Parties may file responses or exceptions to this Report on or before Tuesday, March 7, 2000. It is expected that the Commission will consider this report at its deliberative session on March 13, 2000.

I. SUMMARY OF DECISION

We address two cases in this Order. In the investigation case (Docket No. 98-758), we direct the North American Numbering Plan Administrator (NANPA) to reclaim the codes acquired by New England Fiber Communications d/b/a Brooks Fiber (Brooks) that it is using for an unauthorized interexchange service and not for facilities-based local exchange service. In a related matter, in Docket No. 99-593, we find that Brooks' proposed "regional exchange (RX)" service is unjust and unreasonable and we disapprove that filing by Brooks.

We also will require Bell Atlantic-Maine (BA-ME) to offer the special retail service for internet service providers (ISPs) that it proposed in response to our last order in the investigation case. In addition, we require Bell Atlantic to provide the same service on a

wholesale basis, both for resale with a wholesale discount and broken down into components of switching, transport and "common line."

II. BACKGROUND

In our Order issued on June 22, 1999 in the investigation case, we made factual findings and "factual and legal conclusions," all of which we had proposed in prior orders. Those included findings that the service provided by Brooks was interexchange rather than local and that the 54 NXX codes Brooks had acquired outside its Portland area exchange were not being used to provide local service. We also requested comments about a proposal set forth in the Order for a special retail service to be offered by ILECs to internet service providers (ISPs). The proposed service would be interexchange, but would provide a substantial discount from existing retail toll rates. Because it would be an interexchange rate, it also would provide a more appropriate level of revenue to the ILECs than Bell Atlantic was receiving for the "local" traffic under the interconnection agreement between BA and Brooks.

III. NXX CODES

In the Notice of this proceeding, we raised questions about the resolution of this case with regard to Brooks' use of the 54 NXX codes assigned to areas outside its Portland area exchange that Brooks has claimed are being used for local service. We have made findings and factual legal conclusions about the use of those codes, but we have not addressed the issue of the disposition of those codes in any detail since the initial Notice.

In the June 22 Order we found that Brooks was not providing local exchange service in those locations of the state that are outside of its Portland area exchange, and that it was not using the central office (NXX) codes it had acquired from the North American Numbering Plan Administrator (NANPA) for the purpose of providing local exchange service. We found that Brooks has no local switching facilities or loops deployed in any of the locations outside its Portland area exchange to which the 54 codes are nominally assigned. Brooks was instead using the NXX codes for the purpose of providing an interexchange service that it characterized as "FX-like." We found, therefore, that Brooks has no need for NXX codes, that their use by Brooks could lead to the exhaustion of NXX codes in the 207 area code, and that Brooks' use of them was an unreasonable act or practice by Brooks under 35-A M.R.S.A. § 1306.

The Federal Communications Commission (FCC) has delegated "significant additional authority" to this Commission to "take steps to make number utilization more efficient" and authorized the Commission to utilize "tools that may prolong the life of the existing area code." *In the Matter of Maine Public Utilities Commission, Petition for Additional Delegated Authority to Implement Number Conservation Measures*, CC Docket No. 96-98, Order (Sept. 28, 1999) *(*FCC *Delegation Order)*, ¶¶ 5, 8. The FCC stated:

> The CO Code Assignment Guidelines provide that carriers shall activate NXXs within six months of the "initially published effective date." We are, however, concerned that enforcement of the guidelines has been lax. Reclaiming NXX codes that are not in use may serve to prolong the life of an area code, because these codes are added to the total inventory of assignable NXX codes in the area code. Therefore, we grant authority to the Maine Commission to investigate whether codeholders have activated NXXs assigned to them within the time frames specified in the CO Code Assignment Guidelines, and to direct the NANPA to reclaim NXXs that the Maine Commission determines have not been activated in a

> timely manner. We also extend this reclamation authority to instances where, contrary to the CO Code Assignment Guidelines and Maine's rules, a carrier obtaining NXX codes has not been certified as a provider of local exchange service or has not established facilities within the certified time frame. This authority necessarily implies that the Maine Commission may request proof from all carriers that NXX codes have been "placed in service" according to the CO Code Assignment Guidelines as well as proof of certification in the specified service area and proof that facilities have been established within the specified time frame. We further direct the NANPA to abide by the Maine Commission's determination to reclaim an NXX code if the Maine Commission is satisfied that the codeholder has not activated the code within the time specified by the CO Code Assignment Guidelines or has obtained numbering resources without being certified to provide local exchange service.

FCC Delegation Order at ¶ 19 (footnotes omitted).

The NANPA Central Office Assignment Guidelines (*Guidelines*) state that NXX codes "are assigned to entities for use at a Switching Entity or Point of Interconnection they own or control." *Guidelines* § 3.1 and 4.1. They "are to be assigned only to identify initial *destination addresses* in the public switched network." *Guidelines* § 3.1. "Assignment of the initial code(s) will be to the extent required to *terminate* PSTN [public switched telephone network] traffic as authorized or permitted by the appropriate regulatory or governmental authorities ... ." *Guidelines* § 4.1. These guidelines strongly imply that NXX codes may only be used to provide facilities-based local exchange service. IXCs generally do not terminate traffic at end-user locations. Except where they use special access (which does not require switching or NXX codes), IXCs hand over their interexchange traffic to a facilities-based local exchange carrier (e.g., at a tandem switch). The LEC then carries the call to a local switch and local loop, and then to the called customer. The FCC *Delegation Order* is consistent with the view that codes are to be used for facilities-based local exchange service, as it allows the

Commission to reclaim a code where a carrier is not certified as a provider of local exchange service or if the carrier fails to establish facilities within the required time period. *Delegation Order* at ¶ 19. NANPA CO Code Assignment Guidelines require carriers to "activate" codes within six months of the "initially published effective date." CO Code Assignment Guidelines at § 6.3.3. Brooks has not established facilities for local exchange (or any other kind of) service in the 54 non-Portland areas within the six month period required by the NANPA Guidelines. The failure to establish facilities is by itself ground for reclaiming NXX codes. *Delegation Order* at ¶19.

As noted above, we have found that Brooks is not using the codes for local exchange service, both under this Commission's definitions of local exchange and interexchange services and under the definitions of the interconnection agreement between Brooks and Bell Atlantic. In support of our conclusion that Brooks is not providing local exchange service, we found that it has not deployed any facilities (loops or switching) in the areas outside its Portland area exchange to which the 54 NXX codes are assigned.

Brooks might argue that the Guidelines do not necessarily anticipate termination only by local exchange carriers, and that Brooks needs the 54 Maine codes for the routing of its FX-like traffic, even if the Commission has characterized that traffic as interexchange. Even if Brooks were correct, we note first that Brooks is not authorized under 35-A M.R.S.A. § 2102 to provide interexchange service of any type, although that defect is curable. Notwithstanding its lack of authority to provide interexchange service, Brooks, in Docket No. 99-593, has filed proposed terms, conditions and rates

for it to provide "Regional Exchange (RX) service."[1] We disapprove the filing because Brooks is not authorized to provide interexchange service, but more importantly because we find the proposed service is not just and reasonable.

The proposed service necessarily uses 54 (or more) NXX codes solely for the purpose of rating calls so that calls from various locations throughout the State that terminate in Portland will be rated as local (non-toll). While it is legitimate for a carrier to provide toll-free interexchange calling, there are reasonable alternatives to the service proposed by Brooks that do not needlessly use scarce NXX codes. One of those is the 800-like service discussed below in this Order, which would require the use of no more than one code per carrier. Under the present circumstances, where we are attempting to avoid the need for a second area code in Maine, Brooks' use of 54 codes solely for the rating of interexchange traffic is unreasonable, and we therefore disapprove the proposed terms, conditions and rates in Docket No. 99-593. Brooks is, of course, presently providing the very service it has proposed in the tariff filing, but without authority. We will require Brooks to terminate the present unauthorized service on the date that the NANPA reclaims the NXX codes assigned to Brooks outside the Brooks Portland area exchange.

The NANPA Guidelines § 4.1.4. require that an applicant for an NXX code "must be licensed or certified to operate in the area, if required, and must demonstrate that all applicable regulatory authority required to provide the service for which the central office code is required has been obtained." Brooks has not obtained our approval for the

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[1] This filing (Docket No. 99-593) was suspended pursuant to 35-A M.R.S.A. § 310(2) for investigation by the Commission on September 24, 1999 and again on December 24, 1999.

regional exchange service proposed in its filing (and that it is providing without authority), and we will not grant it at this time.

In its most recent comments, Brooks appears to argue that it, rather than the Commission's rules or Bell Atlantic, should be allowed to determine what are local calls and calling areas and what are interexchange calls. Brooks argues that competitive LECs in a competitive marketplace should not be bound by the definitions used by incumbent local exchanged carriers (ILECs). The argument must plainly fail in the context of wholesale interconnection arrangements with other carriers, particularly where one carrier uses the facilities of another carrier to carry or terminate its traffic. For that purpose it is necessary to have uniform rules established by the Commission or by agreements between interconnecting carriers. Otherwise a carrier could unilaterally declare that traffic is either local or interexchange, depending on which characterization was to its financial advantage. The interconnection agreement between Brooks and Bell Atlantic does provide definitions of local and interexchange traffic; these definitions apply to the traffic of both Brooks and Bell Atlantic. They are identical to the Commission's definitions in Chapter 280. Under those definitions, we concluded that the traffic that originated from areas outside Brooks Portland area exchange, and that terminated in Portland, is interexchange. Bell Atlantic and the other ILECs gather that traffic using their loops and local switches in the various locations outside Brooks' Portland area exchange, and they carry it over interoffice transport facilities to Brooks' only switch, located in Portland. Because the traffic is interexchange, it is subject to the access charge provisions of the Brooks-BA interconnection agreement (for

interexchange traffic) rather than the reciprocal compensation provisions (for local traffic).

In the context of local exchange carriers' retail service and rate structures Brooks' argument has at least superficial appeal. Brooks may well be free to define a call from Augusta to Portland by one of its customers as "local" and to charge its customers accordingly, subject to the ruling that such a call is considered interexchange for wholesale purposes and requires the payment of access charges, as discussed above. Brooks is not free, however, to redefine as local calls those that Bell Atlantic customers make from Augusta (or anywhere else outside of the BA-ME Portland calling area) to Portland. As we found in the June 22 Order, the customers making calls from outside Brooks' Portland area exchange are not Brooks' customers. Brooks has no local exchange customers outside its Portland area exchange. Brooks' local exchange customers are located entirely in its Portland area exchange. Brooks provides those customers (at least the internet service provider (ISP) customers) with a service it describes as "FX-like." FX (foreign exchange) service in effect brings the local exchange service, specifically the dial tone, of a distant ("foreign") exchange to another exchange. Thus, for example, a customer located in Portland who subscribes to FX service for Augusta will be provided with an Augusta telephone number and may make calls as if the customer were located in Augusta. Calls to locations within the basic service calling area (BSCA) for Augusta will be toll-free. If the customer's Augusta telephone number is published, callers located in the Augusta BSCA may dial that number and be connected, toll-free, to the customer in Portland. However, the customer must pay for the cost of the transport facilities (ordinarily dedicated) between

Portland and Augusta. Those costs are often substantial. Customers subscribe to FX to avoid paying toll charges, and to allow others to call them without toll charges,[2] but they must have substantial toll-calling volume between the two locations to justify the cost of the dedicated transport facilities.

Brooks is correct that FX service has attributes of local service, because it brings local service to a remote location, but the primary purpose of FX is as a toll substitute, and we reaffirm our prior finding that FX is an interexchange service.

Brooks' "FX-like" service uses the interoffice trunking of another carrier rather than dedicated facilities provided by Brooks. Brooks created the FX-like service by the expedient of acquiring a group of NXXs from the NANPA and assigning various geographic locations to them that are outside of its Portland area exchange, even though it had no customers in those locations and all of its local exchange service customers were located in the Portland area exchange. As a result, calls to the numbers assigned to locations outside the Portland area exchange, which in reality were calls to Brooks customers located in the Portland area exchange, were rated as if they were calls to the assigned locations, e.g., Augusta. If a call to a Brooks number assigned to Augusta originated within the Augusta BSCA, it was rated as a "local" call. Such a call would be routed from a Bell Atlantic customer over a local loop owned by

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[2] Customers occasionally subscribe to FX service for an exchange that is within the BSCA of the home exchange. Nevertheless, even that FX service would be for the purpose of avoiding toll charges. For example, a Portland customer might subscribe to FX service for Freeport, which is within the Portland BSCA. Freeport's BSCA includes Brunswick, but Portland's does not. Accordingly, the Portland customer, using the Freeport number, may call toll-free to locations, including Brunswick, that are within the Freeport BSCA; and persons in Brunswick may call toll-free to the customer in Portland by dialing the Freeport number.

Bell Atlantic, through a local switch owned by Bell Atlantic, over trunking owned by Bell Atlantic to Bell Atlantic's access tandem in Portland, then to Brooks' switch in Portland, and finally to a Brooks ISP customer, also located in Portland.

The record makes clear that Brooks' "FX-like" service is being used by ISPs for the purpose of allowing their customers to call them from locations all over the state without paying toll charges. Thus, it has exactly the same purpose as "traditional" FX service: it is a substitute for interexchange toll service. We therefore reaffirm our finding that Brooks' "FX-like" service is an interexchange rather than a local exchange service.

Even if the Brooks service were local, or if it were irrelevant to whether it is local or interexchange, Brooks has no loops, switches or any other facilities in (or that provide local service to) any of the areas to which the non-Portland NXXs are assigned. Brooks therefore is not providing *facilities-based* local exchange (or other) service in those areas. For that reason alone, as provided in the *Delegation Order*, we have the authority to order the NANPA to reclaim the NXXs.

The question that remains is the procedure that we must use to order NANPA to reclaim Brooks' non-Portland area exchange NXX code. The FCC stated:

> We note that the CO Code Assignment Guidelines dictate substantial procedural hurdles prior to reclamation of an unused NXX, in part to afford the codeholder an opportunity to explain circumstances that may have led to a delay in code activation... . We clarify that the Maine Commission need not follow the reclamation procedures set forth in the CO Code Assignment Guidelines relating to referring the issue to the Industry Numbering Committee (INC) as long as the Maine Commission accords the codeholders an opportunity to explain extenuating circumstances, if any, behind the unactivated NXX codes.

FCC Delegation Order at ¶ 20 (footnote omitted).

Brooks has had an ample opportunity in this proceeding to contest the findings we have made, and our existing findings amply support an order to the NANPA to reclaim the unused Brooks codes. Accordingly, by this Order, we will order the NANPA to reclaim all of the codes assigned to Brooks except those that it uses for its Portland area exchange. We do not, however, wish to disrupt service to current ISP subscribers. We therefore will delay the effective date of reclamation until 45 days after Bell Atlantic and other ILECs establish the services and rates described in Part IV, so that ISPs (and carriers on a wholesale basis) will have had a reasonable opportunity to subscribe to those services.

IV. RATES FOR ISPS AND CARRIERS SERVING ISPS

In the June 22 Order, we proposed that Bell Atlantic provide a special retail rate for ISPs that would provide a substantial discount from existing retail toll rates. It would also provide Bell Atlantic and the other ILECs with a more appropriate level of revenue than the amounts BA-ME has "received" as "local" reciprical compensation (which actually are payments by BA to Brooks) under Brooks' interpretation of the interconnection agreement between Brooks and Bell Atlantic.

We proposed this rate for two reasons, both related to our findings that the ISP traffic "carried" by Brooks (from its switch to its ISP customers, but by Bell Atlantic from locations outside the Portland calling area to Brooks' Portland switch) was interexchange rather than local in nature, and that the traffic is actually carried by Bell Atlantic's and other ILECs' transport facilities. First, we wish to ensure that internet subscribers are able to continue to subscribe to the internet at reasonable rates,

consistent with the Legislature's mandate of "affordable" internet access in 35-A M.R.S.A. § 7101(4), even though the traffic at issue in this case is interexchange rather than local. Second, we intend that the rate fairly compensate Bell Atlantic and other ILECs that are presently carrying this interexchange traffic. We proposed that the service would be toll-free to end-users, much like an 800 service, and that it would use a single three-digit number as the prefix to seven-digit numbers assigned to various ISPs, thereby avoiding the need to use any NXX codes within the 207 area code.

Bell Atlantic, in its comments proposed a rate essentially identical to that proposed by the Commission, except for price. BA proposed a rate it viewed to be "affordable" rather than one based on long run marginal cost, a pricing standard mentioned in the Commission's Order. No party objected to BA's proposed pricing. As under the Commission's proposal, Bell Atlantic would use numbers that would be toll-free to end-user customers. Each ISP could be assigned one (or more) 7-digit number within the "500" prefix. There would be no need to use any NXX codes within the 207 area code.

Comments filed by Brooks claimed that the proposed Bell Atlantic-ILEC retail rate would not allow Brooks to "compete." Brooks did not state the reason for this claim, beyond a statement that the proposed rate includes a "discriminatory rate structure that will make this service uneconomical for CLECs to provide." Nothing precludes Brooks from offering a similar retail service using its own facilities and ILEC access services or through total resale.[3]

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[3]Brooks presently does not have authority to provide interexchange service, and would have to remedy that omission in order to provide a similar service itself.

As proposed in the Commission's Order the retail rate would be available at a wholesale discount so that other carriers would be able to resell it. Brooks might be concerned, however, that the wholesale discount would not be sufficiently large for it to be able to offer a similar retail service on a resale basis. Implicit in any wholesale rate costs for full service, including switching. However, Brooks (and some other carriers) own their own switching, which they would not use if they purchased Bell Atlantic's wholesale service, but which still has ongoing capital costs.

This problem could be remedied by requiring the ILECs to provide an additional rate for wholesale customers (IXCs) that would equal the wholesale rate described above, but be broken down into separate components of switching, transport and a remaining "common line" amount, similar to the current structure for access rates. In that way a carrier providing service to an ISP for interexchange traffic could use its own switching, purchase only transport and the common line component from Bell Atlantic or other ILECs, and avoid the ILEC switching charge.

Brooks also complains, as it reads the Commission's proposal, that it would not be permitted to collect anything for terminating traffic that originates on another carrier's network. Brooks is correct that the proposal indicated that Brooks could not collect reciprocal compensation because of the finding that the traffic was interexchange, not local, and the BA-Brooks interconnection agreement does not require the payment of reciprocal compensation for interexchange traffic. Brooks, if it becomes an IXE, and other IXCs are not precluded, however, from establishing retail interexchange services of their own.

We therefore will order Bell Atlantic to provide the services and rates described above.

V. CONCLUSION

We reaffirm our findings in prior orders that Brooks' use of the 54 NXX Codes outside its Portland area exchange is for interexchange purposes, not local, and that Brooks is not providing facilities-based local exchange service or any other facilities-based service in those exchanges. The "Fx-like" service that Brooks is currently offering without authority is unreasonable and will not be approved. Accordingly, Brooks has no legitimate need for the 54 codes, and, as authorized by the FCC *Delegation Order*, we order the NANPA to reclaim them 45 days after our approval of the services and rates described below.

Within 30 days following this Order Bell Atlantic shall file rates, terms and conditions for the retail, wholesale combined, and wholesale components services described in Part IV above.

Dated: February 23, 2000

Submitted by,

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Peter G. Ballou
Hearing Examiner