

**New York State Department of Taxation and Finance
Office of Counsel
Advisory Opinion Unit**

TSB-A-11(25)S
Sales Tax
October 11, 2011

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S051128A

The Department of Taxation and Finance received a Petition for Advisory Opinion from Petitioner, [REDACTED]. The issue raised by Petitioner is whether the “shared costs” it is required to allocate to telecommunication carriers pursuant to 47 CFR part 52.32 for management and maintenance of the regional databases relating to the provision of telephone number porting (“shared costs”) are subject to sales and use tax. We conclude that they are not.

Facts

Petitioner submitted the following facts as the basis for this Advisory Opinion.

Pursuant to the Telecommunications Act of 1996, telecommunications providers, particularly local exchange carriers and cellular carriers (collectively, “carriers”) are required to provide number portability. Prior to this federal mandate, all telephone numbers were associated with a particular geographic area (identified by area code), a specific switch operated by a specific telephone company within that geographic area (the 3-digit area code plus the next three digits of the telephone number), and a particular line serving the customer's location (the last four digits of the telephone number). Therefore, if a customer were to change telephone service providers, the new local service provider would be required to assign the customer a new ten-digit telephone number for the new switch and line, even if the location where a customer receives telephone service did not change. Under the current law, customers are able to switch to a new local service provider without having to change their telephone number. Number portability permits consumers to select a local telephone provider based on service, quality, and price, rather than on the desire to keep a particular telephone number.

As the federal agency responsible for implementing this federal law, the Federal Communications Commission (“FCC”), mandated the establishment of at least one Local Number Portability (LNP) Administrator to facilitate the porting of customers’ local telephone numbers between telecommunications providers. The FCC delegated direct management of the LNP Administrator to seven regional limited liability companies (each corresponding to the former Bell Telephone company local telephone regions). The LLCs were established by the several carriers operating in the portability regions to fulfill their obligations for number

portability, subject to the oversight of the North American Numbering Council (NANC), and ultimately subject to the plenary authority of the FCC.¹

Petitioner serves as the LNP Administrator under regional contracts (the “Master Agreements”) with the North American Portability Management LLC (NAPM LLC), the successor in interest to these regional limited liability companies, to act as the administrator responsible for operating the regional Number Portability Administration Centers (NPACs). It is the Master Agreements that set forth, on behalf of all customers of the LNP Administrator, all pricing and charges for NPAC services offered by the LNP Administrator.² The NAPM LLC is a member-run limited liability company recognized by the FCC as having the authority to enter into Master Agreements with a contractor (i.e., Petitioner) for the administration and operation of the regional NPACs. All carriers operating in a given region are afforded access to that region’s NPAC database, regardless of the particular carrier’s membership in the NAPM LLC, upon execution of a regional agreement (the “User Agreement”) with the LNP Administrator (i.e., Petitioner). A customer executing such a User Agreement is known as an NPAC “User.” The regional Master Agreements require that the Petitioner, as the LNP Administrator, extend to each User the same terms and conditions in such User’s User Agreement as other Users; i.e., they are not negotiable. This requirement is a contractual manifestation of the “neutrality” obligations that the FCC imposed on the LNP Administrator. Pricing for all NPAC-related services offered by the LNP Administrator is set forth in the regional Master Agreements with the NAPM LLC, and are automatically incorporated by reference into all User Agreements.

A “whereas” clause in the Master Agreements explains that the Master Agreements grew out of a Request for Proposals that sought “a Number Portability Administration Center/Service Management System (“NPAC/SMS”) service vendor to provide a turnkey database solution to local number portability.” The Master Agreements describe as follows the services Petitioner is to provide:

- (i) adapt the *NPAC/SMS* Software to meet Customer's requirements and test the *NPAC/SMS* Software according to the terms and conditions of this Agreement, for implementation * * *;
- (ii) provide all facilities, equipment, Software, personnel and materials necessary to manage, maintain and operate the *NPAC/SMS* Data Centers; and
- (iii) provide Services to Users according to the terms and conditions of this Agreement and the *NPAC/SMS* User Agreement, including from time to time, providing Additional Services upon the execution of Statements of Work by both Parties

Article 12 of the Master Agreements provides that Petitioner must provide a disaster recovery system to ensure continuous availability of the *NPAC/SMS* services. The User agreements specify further that Petitioner is to provide the *NPAC/SMS* services at specified levels and to report thereon periodically to NAPM LLC; provide training; provide a hotline service for Users;

¹ The NANC is a federal advisory committee that was created to advise the FCC on numbering issues and to make recommendations that foster efficient and impartial number administration. Under Orders issued by the FCC, the NANC exercises oversight over LNP.

² Membership in the NAPM LLC is open to all carriers, but only nine (9) carriers currently enjoy membership.

maintain safety and physical security at the NPAC/SMS Data Centers and to report events of Unauthorized Access; consult with a User about the number and type of data circuits required by User to connect to the NPAC/SMS given the configuration of User's system; and test the User's system.

Petitioner's role in the number porting process is as follows. The porting carrier (i.e., the carrier causing the porting of a telephone number) assigns at least one unique ten-digit Location Routing Number (LRN) to each telecommunications switch for each Local Access Transport Area (LATA) served by that switch.³ This number serves as a telecommunications network address of the switch. The first six digits of the LRN identify the location of the switch while the remaining four digits serve to make the LRN look like a telephone number for inter-switch signaling purposes, thus permitting transport of calls to ported numbers through even non-LNP capable intermediate switches.

When a customer changes carriers, the porting carrier transmits to the applicable NPAC the LRN of the switch to which the customer's telephone number is to be ported. The porting carrier matches the customer's telephone number with the LRN in a record update transmitted to the NPAC. This new LRN assignment for the customer's telephone number is then transmitted from the NPAC to Local Service Management Systems (LSMSs). An LSMS is a database operated by or on behalf of a carrier, which is configured to receive broadcasts from the NPAC for the purpose of provisioning the carrier's own systems. These LSMSs in turn update the carriers' call-routing and other databases for purposes of routing, rating, or billing of calls, or the performance of network maintenance. In this way, the carriers' various telecommunications network elements (e.g., service control points, service switch points, and service transfer points) are updated so as to be able to identify that a telephone number has been ported and to allow calls to that ported number to be routed to the appropriate switch. No real-time query to the NPACs is launched as the porting information is resident in the carriers' own database after the update is sent by the regional NPAC to the carriers in the region.

Both the Users reporting and verifying the porting of a customer's telephone number from one carrier to another, and those receiving the ported number data that Petitioner disseminates, are each individually responsible for obtaining and maintaining their own links (telecommunications lines, cables, Internet lines, etc.), equipment and compatible software in connecting with Petitioner's out-of-state interface location.

LSMSs are owned primarily by the telecommunications carriers, but in some instances are owned by service bureaus or, in rare cases, may be owned by a provider of telecommunications-related services (PTRS), such as a government 911 authority. Each carrier in each region would have at least one LSMS for that region (directly owned or a contracted service bureau), but since there are many carriers in each region, there are multiple LSMSs

³ A LATA is a geographical area based on community of interest, developed at FCC direction in 1983. The LATA boundary delineates the area in which a telephone call can be delivered by a local telephone company. At the time of its inception, the limit applied to the Bell Operating companies and to certain other major independent telephone companies.

associated with each region. Some carriers may have more than one LSMS in a particular region. Some of the smaller carriers use contracted service bureaus, as do many of the government 911 authorities.

Although service bureaus and PTRSs may own an LSMS, they are not responsible for paying the allocable costs of Petitioner. Service bureaus and PTRSs may be subject to other direct charges based on certain activities but would not be subject to paying any portion of the allocable costs.⁴ Only the carriers pay the allocable costs and those costs are shared based on each carrier's respective share of end-user revenues. Therefore, there is not a direct relationship between the ownership of LSMSs and the requirement to pay Petitioner's allocated costs.

The FCC is required by federal law to ensure that telecommunications carriers contribute to the costs of the NPAC in a competitively neutral manner (47 USC § 251[e][2]). The FCC has set forth a specific method for allocating the shared costs of providing long-term number portability attributable to that regional database to the all telecommunications carriers providing telecommunications service in area served by that regional database (47 CFR § 52.32). These "shared costs" or "allocable charges" are allocated to each carrier in each region in proportion to that carrier's end-user revenues (defined by the FCC for this purpose as intrastate, interstate, and international end-user telecommunications revenues) attributable to that region. Under this allocation method, which is known as the "Allocation Model," a carrier's percentage share of NPAC fees and charges is unrelated to the number of porting transactions that may have been caused by that carrier.⁵ Until 2008, the aggregate amount of allocable charges for NPAC service was calculated based directly on the volume of billable porting transactions; i.e., the charges equaled the product of the number of NPAC transactions and a fixed price per NPAC transaction. However, effective January 1, 2009, the aggregate amount of allocable charges for NPAC service in a calendar year equals a predetermined fixed fee, an amount that is determined through negotiations between Petitioner and, on behalf of all carriers sharing costs under the Allocation Model, NAPM LLC. The billing of these charges to carriers in accordance with the FCC-mandated Allocation Model has, however, remained unchanged.

Pursuant to an order of the FCC (Matter of Telephone Number Portability, Third Report and Order CC Docket 95116, RM 8535, FCC 98-8 [the "Cost Recovery Order"]), Petitioner invoices the allocable charges to the carriers on a monthly basis, based on the amount set forth in its Master Agreements. The invoice rate (>100%) is adjusted annually based on collection history. In the event that the invoice rate results in over- or under-collections of the total allocable charges, the under- or over- collections balance plus interest will be applied as a credit or debit on an annual basis. This means that if a particular carrier cannot pay its share of the allocable charges, for example, as a result of insolvency, then Petitioner is entitled to recover the

⁴ In this context, direct charges include fees for dedicated ports or VPN access to the NPAC network, support, ad hoc reporting, dedicated technical support, log-on ID, mechanized interface to the NPAC, and testing support. As suggested by its name, an Ad Hoc Report is a custom report requested by a User of an NPAC using a then-current snapshot of the NPAC database and presents information about any combination of data elements then-present.

⁵ Alternatively, if a carrier does not have any end-user revenues attributable to a region in which it provides telecommunications service, it must pay \$100 per year per region.

shortfall by allocating that shortfall amount to the remaining carriers as a debit on the next annual true-up related to the Revenue Recovery Cost.

The term of the Master Agreements is five to seven years depending on which option is chosen by Petitioner (“Initial Period”). NAPM LLC can extend the contract for an additional five-year period and can also terminate the contract prior to the Initial Period expiring, depending on whether certain trigger events occur, such as Petitioner filing for bankruptcy. If the contract is not extended, the Master Agreements require Petitioner to grant a five-year, non-exclusive license to NAPM LLC to use and modify the *NPAC/SMS* Software and to sublicense the *NPAC/SMS* Software to any contractor providing services similar to *NPAC/SMS* to the Users. Petitioner will be authorized to charge a royalty fee at a specified rate. The User Agreements provide that the data supplied by the Users to the LNP Administrator remain the property of the User furnishing the data.

Analysis

Tax Law § 1105(c)(1) imposes sales and use tax on receipts from the service of furnishing information by printed, mimeographed or multigraphed matter, or by duplicating written or printed matter in any other manner. “Sale” is defined as “Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume (including, with respect to computer software, merely the right to reproduce), conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration” (Tax Law § 1101[b][5]).

Petitioner, as LNP Administrator, is providing a host of services under the Master and User Agreements, in addition to providing each carrier with number porting information. First, it was required to devise and construct the NPAC/SMS systems, which involved designing the system, developing software, integrating the proper hardware, and procuring a physical site at which to operate the system. It then has to operate the system, which involves collecting the numbering information, providing security at the physical facilities, assisting the carriers in their effort to establish telecommunication connections with the NPAC/SMS systems; providing User training; providing a Hotline; and maintaining a Disaster Recovery center for the systems. Finally, it must issue reports to NAPM LLC regarding the levels of service provided. In short, as the Master Agreement states, Petitioner is to provide a “turnkey” solution to the problem of long-term number portability, which appears to be a more extensive service than merely providing phone number information. Moreover, the payments by the carriers cannot be said to be for any one aspect of this service; rather, the carriers are mandated by law to pay for the costs of providing number portability in general (47 USC § 251[e][2]).

In TSB-A-09(49)S, the Department held that the service of operating, managing and maintaining a waste water or water treatment facility is not one of the taxable services enumerated in Tax Law section 1105(c). Similarly, here, Petitioner appears to be providing the service of operating and managing the NPAC/SMS systems, which entails duties well beyond providing information. Consistent with this characterization of Petitioner’s service, Petitioner

does not own the information it is conveying and must grant a sublicense to use the software it has developed to perform NPAC/SMS services to NAPM LLC if the contract terminates and NAPM LLC chooses not to renew it.

In sum, in light of all the circumstances here, the shared costs Petitioner allocates to the telecommunication carriers under 47 CFR part 52.32 are not payments for a taxable service.

DATED: October 11, 2011

/S/

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NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.