

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
ASAP Paging, Inc.)
Petition for Preemption of)
Public Utility Commission of Texas)
Concerning Retail Rating of Local Calls)
to CMRS Carriers)

WC Docket 04-6

Proceeding on Termination of)
Certain Proceedings as Dormant)

CG Docket 17-22

OPPOSITION TO DISMISSAL

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The Consumer and Governmental Affairs Bureau issued a Public Notice on January 13, 2017 (DA 17-60) seeking “Comment on Termination of Certain Proceedings as Dormant” (*“Sixth Dormant Proceedings Termination Notice”*) and listed the proceedings deemed eligible for dismissal in Attachment A. The Comment Cycle was established in a subsequent Public Notice, *Consumer and Governmental Affairs Bureau Announces Comment and Reply Comment Dates for Proceeding on Termination of Certain Proceedings as Dormant*, DA 17-150 (Feb. 8, 2017). This Opposition filed by counsel of record for the Petitioner is timely filed.

Attachment A, Item 272 on page 33 proposes to dismiss Docket 04-6, *In the Matter of ASAP Paging, Inc. Petition for Preemption of Public Utility Commission of Texas Concerning Retail Rating of Local Calls to CMRS Carriers* as “dormant.” The case cannot be dismissed in 2017 any more than was the case in 2014, when the same proposal was made in the *Third Dormant Proceedings Termination Notice*.¹

The Dormant Proceedings Termination process is controlled by *Amendment of Certain of the Commission’s Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1603-1604, ¶¶23-24 (2011) (*“Procedure Order”*). This proceeding does not meet the criteria for dismissal in the *Procedure Order*. There is a request for relief that is pending, action is still required, and the petitioner has not consented.²

¹ Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Termination of Certain Proceedings as Dormant, DA 14-897, 29 FCC Rcd 7664 (rel. Jun. 2014) (*“Third Dormant Proceedings Termination Notice”*); proceeding retained, *In the Matter of Termination of Certain Proceedings as Dormant*, Order, CG Docket No. 14-97 Order, DA 14-1329, ¶¶1, 6, 29 FCC Rcd 11017, 11019 (rel. Sept. 2014) (*“Third Dormant Proceedings Termination Order”*).

² See ¶23: “Proceedings that are candidates for termination might include dockets in which no further action is required or contemplated and dockets in which no pleadings or other documents have been filed for several years. On the other hand, proceedings in which petitions addressing the merits are pending – for example, proceedings containing timely filed petitions for reconsideration that have not been addressed – should not be terminated under the authority delegated here unless the parties consent.” (emphasis added).

This matter was noticed, and comments were filed. There were many *ex parte* filings. In all there have been 34 submissions (including those by Commission Bureaus). The request for relief in this case remains pending. The matter was fully briefed. There are no truly disputed facts. Nothing more needs to be said by anyone other than the Commission. The matter has lain fallow only because the FCC has not performed its duties. All that remains is for this Commission to do its job and ***decide the merits***.

While it is true there have been no substantive filings since late 2008, the controversy over retail rating of local calls to CMRS carriers is still a live issue. The Commission so recognized in February, 2011. *See, In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Inter-carrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4773, ¶¶678, note 1076 (2011). Nothing has changed since that time, because the ILECs are still engaging in the same practices.

Despite the relative quiet in this matter since 2008, the issues have also been discussed by commentators and the Commission but never resolved in the long-running “Inter-carrier Compensation” line of cases and other proceedings. The Final Regulatory Flexibility Analysis (FRFA) in a wireline-wireless porting decision also deferred the same issue, and expressly cited to the *ASAP* proceeding, among other similar cases.³ The D.C. Circuit heard a challenge to the rule, and held that the Commission had promulgated a legislative rule, and thus a FRFA was

³ *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization*, 22 FCC Rcd 19531, 19605-19606, ¶¶4 and note 9 (2007).

required.⁴ The original rule was stayed pending the FRFA and ultimately went into effect. The Commission found in the original rulemaking that “*nothing in its rules requires a wireless carrier to have a physical point of interconnection or numbering resources in the rate center where the number is assigned.*”⁵ When the rural carriers sought review of the RFA, the D.C. Circuit denied relief, based on part on the Commission’s representation that it was addressing – and was going to resolve – “rating and routing” issues in “other proceedings” because those questions were not unique to porting.⁶ The ASAP proceeding was expressly listed as one of those “other proceedings,” along with the general intercarrier compensation rulemaking. The Commission’s brief to the D.C. Circuit in the RFA appeal specifically referred to paragraph 4 of the RFA on page 13. Paragraph 4 contained footnote 9 – which cites to the ASAP petition, among others. The FCC told the D.C. Circuit it was going to decide ASAP’s case and that is one of the reasons the court denied relief.

It bears repeating that the ASAP proceeding is a petition for preemption of a state commission order that required ASAP (a CMRS provider) to have a physical presence in the rate center where the number is assigned as a condition for local retail rating (no toll charges) when an ILEC customer calls a CMRS customer using a number associated with the local calling area. The Texas PUC order on its face conflicts with the FCC’s ruling that “*nothing ... requires a wireless carrier to have a physical point of interconnection or numbering resources in the rate center where the number is assigned.*”⁷

⁴ *United States Telecom Ass’n v. FCC*, 400 F.3d 29, 43 (D.C. Cir. 2005).

⁵ *Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697, 23698, ¶1 (2003) (“*Intermodal Number Portability Order*”).

⁶ *Nat’l Tel. Coop. Ass’n v. FCC*, 563 F.3d 536, 541-542 (D.C. Cir. 2009); *see also Cent. Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 215-216 (D.C. Cir. 2005).

⁷ *Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697, 23698, ¶1 (2003) (“*Intermodal Number Portability Order*”).

Another case involved a requested modification to a LATA boundary to “accommodate” extended local calling service in Texas. A wireless provider objected because of the very problem in issue in ASAP’s petition – that the Texas Commission allows ILECs to impose toll charges on their own customers when they call a wireless provider’s number associated with the same local calling area, even though the ILEC does not impose toll charges when its customers call other ILECs’ customers for the same type call. The Competition Policy Division held:

... we do not believe that this is the appropriate proceeding to address complex issues raised by Fitch regarding the impact of ELCS on interconnecting carriers. We note that these issues have been raised in other Commission proceedings. Accordingly, we decline to address these issues in this item and defer our consideration, without prejudice, to more appropriate proceedings. Our decision to rely on the Texas Commission’s community of interest findings with respect to wireline subscribers in these exchanges is not intended to endorse any decisions made by the Texas Commission with respect to wireless subscribers.⁸

The Bureau allowed the LATA boundary modification to occur. The ILECs were able to continue violating federal law pending a determination *in the ASAP case* that the Texas PUC had illegally validated their actions, and the state commission action must be preempted. The Bureau effectively promised a determination would be made *in the ASAP case*. Dismissal will break that promise, and allow the problem to continue for another ten years if not longer.


The Commission also owes the courts a response. There is a pending complaint case in federal court, and it has been stayed for many years in deference to the FCC’s primary jurisdiction. *See ASAP Paging Inc. v. CenturyTel of San Marcos Inc.*, 137 F. App’x 694, 697 (5th Cir. 2005); *ASAP Paging, Inc. v. Centurytel of San Marcos, Inc. et al*, No. A 04 CA 181 SS, Western District of Texas, Austin Division. The District Court entered an Order Administratively Closing Case on December 3, 2008, but that was purely done for statistical reporting purposes

⁸ *In the Matter of Request for Limited Modification of LATA Boundaries to Provide ELCS Between the Jackson Exchange and the Tyler Exchange*, Memorandum Opinion and Order, WC Docket No. 04-77, DA 04-1726, 19 FCC Rcd 10719, 10721-10722, ¶8 and note 23 (Competition Policy Bureau, 2004) (notes omitted, but the proceeding mentioned in note 23 was *the ASAP case*).

and the status is legally the same as the stays routinely entered by federal courts pending resolution of a primary jurisdiction “referral.” When the FCC disposes this matter the federal court case can and will be resumed.

The FCC has consistently promised it would answer the question. It said so in Commission orders and in representations to the courts. It has yet to deliver on that promise, instead choosing to do nothing, apparently intending to duck the question by waiting for several years and then every so often trying to dismiss based on the proposition that the Commission’s failure to fulfill its duties and promises means it is “dormant.” The issue, however, is not dormant and cannot be dismissed under the *Procedure Order*. A request for relief remains pending, the Petitioner has not consented to dismissal, and the problem still exists. This matter cannot and should not be dismissed.

Respectfully Submitted,



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