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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| | ) | |
| Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers | ) | CC Docket No. 95-185 |
| | ) | |
| Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas | ) | NSD File No. 96-8 |
| | ) | |
| Administration of the North American Numbering Plan | ) | CC Docket No. 92-237 |
| | ) | |
| Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois | ) | IAD File No. 94-102 |

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**MFS COMMUNICATIONS COMPANY, INC.**
**PETITION FOR PARTIAL RECONSIDERATION**
**OF SECOND REPORT AND ORDER**

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Dated: October 7, 1996

## Table of Contents

Summary . . . . . ii

I. INTRODUCTION AND OVERVIEW . . . . . 2

II. AREA CODE OVERLAYS SHOULD NOT BE PERMITTED UNTIL PERMANENT NUMBER PORTABILITY HAS BEEN IMPLEMENTED . . . . . 2

A. The Anticompetitive Effect of Overlays is Well-Established . . . . . 3

B. The Conditions Imposed by the Commission Are Inadequate Safeguards Against the Anticompetitive Effects of Overlays . . . . . 6

III. THE COMMISSION SHOULD ADOPT ADDITIONAL REQUIREMENTS FOR "ACCESS TO DIRECTORY LISTING" . . . . . 10

IV. CONCLUSION . . . . . 14

## Summary

While MFS strongly supports the Commission's comprehensive, forward-looking, pro-competitive implementation of Section 251 of the Communications Act, it seeks reconsideration and/or clarification of the Commission's order in two narrow, but critical areas.

First, MFS recommends that the Commission prohibit area code overlays until permanent number portability has been implemented. The anticompetitive impacts of overlays are well-documented. In spite of the safeguards adopted by the Commission (mandatory 10-digit dialing and the availability to new entrants of at least one NXX code in the old NPA), allowing overlays without permanent number portability will inevitably result in anticompetitive consequences. For business customers, for example, being assigned a number from an overlay NPA creates a risk that callers will think that they must make a long distance call to reach a business that is, in fact, a local business. This risk creates an anticompetitive distortion by disincenting customers from using competitive local exchange carriers when using such carriers requires a new telephone number from the overlay NPA.

At a minimum, the Commission should clarify that its safeguards are mandatory, minimum conditions required when overlays are necessary. At least one state commission (Pennsylvania) has recently ordered an overlay without 10-digit dialing in contravention to the Commission's 10-digit dialing requirement. MFS also suggests that when overlays are necessary that new entrants be assigned all remaining NPA-NXX pairs in the old area code to minimize the anticompetitive consequences of an overlay.

Second, MFS believes that the Commission's interpretation of "access to directory listing" is erroneous. MFS believes that access to directory listing should be interpreted to create a duty for an incumbent carriers to incorporate a listing supplied by its competitor with the same level of accuracy, in the same manner, and in the same time frame as the incumbent would list its own customer's information.

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**MFS COMMUNICATIONS COMPANY, INC.**
**PETITION FOR PARTIAL RECONSIDERATION**
**OF SECOND REPORT AND ORDER**

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, hereby petitions the Commission for partial reconsideration of the *Second Report and Order and Memorandum Opinion and Order* (the "*2nd R&O*"), FCC 96-333, released in the above-captioned proceedings on August 8, 1996.[1/]

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[1/] Unless otherwise indicated, citations below in the form "para. ___" are to paragraphs of the *2nd R&O*.

## I. INTRODUCTION AND OVERVIEW

As it stated in its Petition for Partial Reconsideration and Clarification of the First Report and Order in this proceeding (filed Sept. 30, 1996), MFS applauds and strongly supports this Commission's comprehensive, forward-looking, and most importantly pro-competitive approach to implementation of Section 251 of the Communications Act. MFS similarly supports the overall policy approach embodied in the *2nd R&O*, as well as most of its specific provisions.

The purpose of this Petition is to seek reconsideration of the Commission's decisions on two particular issues where the *2nd R&O* failed to go far enough to implement the intent of Congress. The two issues are area code overlays, and provision of directory listing services by incumbent LECs. As explained in the following sections, the Commission should revisit these topics on reconsideration and adopt additional requirements to assure that the provisions of Section 251 are implemented fully.

## II. AREA CODE OVERLAYS SHOULD NOT BE PERMITTED UNTIL PERMANENT NUMBER PORTABILITY HAS BEEN IMPLEMENTED

The Commission's policy on area code overlays, as adopted in the *2nd R&O*, does not go far enough to combat potential anticompetitive conduct by ILECs. MFS urges the Commission to adopt even stronger policies regarding Numbering Plan Area ("NPA" or "area code") relief. Specifically, the Commission should determine that overlay plans for relief of NPA exhaust may not be implemented until states implement permanent service provider number portability.

### A. The Anticompetitive Effect of Overlays is Well-Established

Overlays are harmful to competition, consumers, and plainly not in the public interest, which has been recognized by both by Congress and this Commission. These problems have been recognized, as well, by many state public utility commissions which have, with rare exception, determined that geographic splits rather than overlays are the preferred relief for NPA exhaust.[2]

As a new entrant in local exchange markets throughout the country, MFS' primary concerns about overlay plans for relief of NPA exhaust is that they are anticompetitive. In an overlay plan, subscribers who convert from an ILEC to a new entrant typically receive a telephone number in the new overlay area code. Without mandatory 10-digit dialing, calls to or from the new area code created in an overlay would require 10-digit dialing whereas calls within the old area code would be 7-digit dialed. Obviously, as the Commission recognized,[3] assignments of numbers from the overlay NPA are less attractive to consumers. For business customers, for example, who must advertise their telephone numbers, being assigned a number in an overlay NPA creates the risk that their customers will not dial the overlay NPA because they think the number is a toll call rather than a local call. Such business customers would be reluctant to change local service providers if it meant changing their telephone number to an overlay NPA.

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[2] Maryland is the only state which has ordered an overlay for wireline carriers. Maryland's decision is premised, however, mistakenly on the availability of permanent service provider number portability by the time of the NPA relief. *In the matter of the inquiry into the merits of alternative plans for new telephone area codes in Maryland*, 1995 Md. PSC Lexis 254 (1995).

[3] Para. 288 n.614. The number inventory includes not only many unused numbers but also those that become available as a result of customer churn. These factors may mean that an incumbent might not be required to issues "new" numbers for a significant period after the new entrant is required to do so.

Overlays that result in a disproportionate share of numbers from the overlay NPA assigned to new entrants while incumbent carriers retain the advantages of the existing number inventory distorts the market and raise a barrier to entry. Without permanent service provider local number portability, consumers would be reluctant to switch providers if they were assigned a number in the overlay NPA. Thus, overlays would restrict customer mobility, and create a barrier to entry by artificially limiting the ability of new entrants to attract customers.

The Commission has declared that using geographic splits to address NPA exhaust is presumptively consistent with its numbering guidelines, and that states have traditionally preferred geographic splits.[4] More fundamentally, as discussed below, overlays fail to satisfy the "procompetitive" mandate unambiguously expressed in the 1996 Act and Commission policy. The anticompetitive burdens created by overlays are especially great during the transition to a competitive market in telecommunications.[5] Consequently, competitive considerations are paramount in choosing NPA relief plans, especially during the current rapid growth in telecommunications markets, and the obligation of states, under applicable federal mandates, to foster development of robust competition in these markets by NPA relief plans.[6]

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[4] Para. 273. On the other hand, to be lawful an overlay must comply with certain specific Commission guidelines. Para. 286.

[5] *See, e.g.*, *Airtouch Communications, Inc. v. Pacific Bell, Inc.*, Decision 95-08-052, 1995 WL 540588, at *21 through 22 (Cal. PUC 1995). Other State commissions have reached the same conclusion.

[6] *See, e.g.*, paras. 261, 272, 274, 281 (discussing Congressional and Commission policies and guidelines governing telecommunications numbering administration, in general, and NPA relief in particular).

The competitive harms of overlays ultimately injures consumers. An overlay is likely to result in both short and long term costs to consumers in the form of higher prices, as well as lower quality and output for telecommunications services. In the short term, many consumers (particularly businesses) will be obliged to bear tangible cost, such as those associated with telephone system management, as well as hidden costs in the form of lost business. The Commission and the vast majority of state public utility commissions have determined that such results would render overlay plans anticompetitive and unacceptable for implementation.[7] In light of the explicit recognition by Congress, the Commission, and most state public utility commissions that overlays pose serious anticompetitive risks, overlays plainly do not represent "the *competitively neutral* alternative" as certain ILECs attempt to claim.

Indeed, recognizing the important potential anticompetitive impacts of overlays on new firms entering the telecommunications market, the Commission imposed strict conditions on the adoption of any overlay plan, including: (1) mandatory 10-digit local dialing by all customers between and within NPAs in the area covered by the new codes, and (2) the availability to all existing telecommunications carriers of at least one NXX code in the existing NPA for new entrants. These conditions, however, do not go far enough, as discussed below.

It is significant that the Commission, in declining to make permanent number portability a condition for the implementation of overlays, stopped just short of prohibiting overlays altogether. Although it recognized that permanent number portability "will reduce the anticompetitive impact of overlays," the Commission nevertheless did not wish to deny the

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[7] *See, e.g., Airtouch*, 1995 WL 540588, at *11.

overlay option, where necessary, to states facing "imminent [number] exhaust."[8] The Commission plainly did not intend overlays to be the solution of choice. Overlays are useful only in very specific situations such as when the geographic area involved is too small for a split. Such an area would usually be very densely populated with no logical geographic split line. As discussed below, overlays also will be less objectionable when permanent local number portability is implemented and when new entrants have access to numbers in the old area code.

### B. The Conditions Imposed by the Commission Are Inadequate Safeguards Against the Anticompetitive Effects of Overlays

MFS believes that the conditions the Commission imposed on overlays in the *2nd R&O* are inadequate to effectively address the serious anticompetitive distortions caused by overlays. As such, these conditions standing alone are insufficient to establish the lawfulness of an overlay under federal law.

Specifically, in the *2nd R&O*, the Commission found that mandatory 10-digit dialing was necessary to address the anticompetitive impact of dialing disparities. However, MFS believes that the anticompetitive aspects of overlays are not adequately addressed by mandatory 10-digit dialing. There would still be a disparity in the perceived value of the old versus the new NPA. Callers may still believe that calls to an overlay area code are long distance calls, and business customers will be reluctant to change local service providers if it means adopting an overlay NPA and creating confusion in the minds of callers/customers. Permanent service provider

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[8] Para. 290.

number portability where consumers can retain their area code and 7-digit number is essential to effectively mitigate the important anticompetitive aspects of an overlay.

While mandatory 10-digit dialing is not adequate to prevent the anticompetitive distortions of an overlay, the Commission should clarify that mandatory 10-digit dialing is required in instances where geographic overlays are unavoidable. For example, in a recent order, the Pennsylvania Commission required a geographic overlay, but explicitly refused to require 10-digit dialing.[9] The Commission should clarify that 10-digit dialing is mandatory for overlays.

The Commission explicitly recognized that permanent number portability will reduce the anticompetitive impact of overlays by allowing customers to keep their telephone numbers when they switch carriers.[10] However, inasmuch as the Commission has ordered states to implement interim number portability until permanent number permanent number portability is deployed, the *2nd R&O* stopped short of prohibiting overlays outright. The Pennsylvania Commission's recent overlay order, described above, is evidence that at least one state commission is inclined to adopt overlays and ignore the Commission's 10-digit dialing requirement.

Interim number portability is wholly inadequate, however, to address the anticompetitive effects of an overlay. Furthermore, interim portability entails significant additional costs, makes inefficient use of scarce numbering resources, and cannot be used in all

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9/ In the Matter of Petition for NPA Relief Coordinator to Resolve 412 Area Code Relief Issues, Pennsylvania Public Utilities Commission, Order P-00961027 (Sept. 12, 1996).

10/ Para. 290.

customer situations. Indeed, the Commission, itself, had previously found that "[permanent] number portability is essential to ensure meaningful competition in the provision of local exchange services," and that current feasible means of providing interim portability could impair "the quality, reliability, and convenience of telecommunications services" offered by new entrants into local markets.[11] As noted by the Commission in its Number Portability Order, several state commissions have reached similar conclusions.

The Commission's additional requirement that at least one NXX code in the existing NPA area be available to new entrants does nothing to mitigate the important anticompetitive effects on carriers who must compete with incumbents who have disproportionately higher access to NXX codes in the old NPA. Moreover, in practice, this condition does not provide a meaningful opportunity for new entrants competitively to provide services in what the Commission itself calls the "desirable" old area code.[12] The *2nd R&O* fails to recognize that one NXX is required for each "rate center," not merely for each NPA.[13] Said differently, unless the Commission reserves an NXX for new entrants in every rate center, merely reserving one NXX in an NPA effectively requires significant modifications or even abandonment of existing rate centers so that the NXX assigned to new entrants can be used

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11/ First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability,* Commission 96-286, CC Docket No. 95-116, para. 27, 28 (released July 2, 1996) ("*Number Portability Order*").

12/ Para. 288.

13/ A rate center is the geographic location associated with each NPA-NXX pair. It is the location used to measure distance sensitive charges for calls to and from a particular telephone number.

throughout the NPA. For example, the 303 area code covers the northern half of Colorado, an area extending more than 500 miles east to west. Assigning one NXX in that NPA to new entrants would be generally unworkable given the number of rate centers contained in that NPA. Consequently, by itself, this condition is inadequate to prevent the anticompetitive effects of overlays. While the incumbent LEC will be able to assign new numbers from its "warehouse" of NXXs in the old area code, new entrants will be limited to assigning numbers in a single rate center in the "desirable" NPA.[14] This imbalance is likely to be significant in the development of local exchange competition. Consequently, new entrants still face significant competitive disadvantages in the local market, and the development of competitive local markets would be forestalled. In either case, consumers will suffer harm which is otherwise avoidable through the use of a geographic split.

MFS suggests that the Commission require that whenever an overlay is required, new entrants should be assigned all the remaining old NPA-NXX pairs. This would reduce the anticompetitive potential arising from the assignment of numbers from the overlay NPA to new entrants. Since ILECs are not attracting customers from new entrants, it would not distort competition to require that ILECs use the new overlay NPA and reserve the remaining numbers in the old NPA for new entrants.

MFS submits that permanent portability is the only effective means of ensuring effective competition in the context of an overlay, and is technically feasible. Only by

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[14] To take just one example, there are fifty-five (55) rate centers in Bell Atlantic's territory in the 201 area code, in New Jersey. Allotting a single NXX code to a new entrant will permit that carrier to serve only one of them.

requiring permanent number portability where overlays are the chosen means of NPA relief can the Commission ensure that the local competition mandate of the 1996 Act is fully implemented in accordance with the explicit intent of Congress.[15]

## III. THE COMMISSION SHOULD ADOPT ADDITIONAL REQUIREMENTS FOR "ACCESS TO DIRECTORY LISTING"

Section 251(b)(3) of the Act requires all LECs, among other things, to permit competing providers "to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays." The Commission interpreted the portion of this subsection relating to directory listing in paras. 130-145 of the *2nd R&O*. MFS respectfully submits that the Commission's interpretation was erroneous insofar as it interpreted the statutory reference to "directory listing" as referring only to information received from a directory assistance operator, and not listings published in a printed (or electronic) directory. Contrary to the Commission's conclusion that "[t]he requirements for nondiscriminatory access to directory assistance and directory listings are intertwined," para. 135, in fact the two requirements are quite distinct although related. Access to directory *assistance* means that LECs must provide their competitors with the ability to obtain subscriber telephone numbers upon request to the same extent that they provide this ability to their own customers, as the Commission correctly determined in para. 133. Access to directory *listing*, however, means that a LEC publishing a telephone directory has a duty to incorporate a listing supplied by its

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[15] As stated by the Commission, "[n]umber portability is one of the obligations that Congress imposed on all [LECs] . . . in order to promote the pro-competitive, deregulatory markets it envisioned. *Number Portability Order* para. 2.

competitor with the same level of accuracy, in the same manner, and in the same time frame that it would list its own customer's information, contrary to the Commission's erroneous interpretation in para. 135.

The *2nd R&O* misquotes the statute repeatedly, using the phrase "directory assistance and directory *listings*" where the actual statutory language uses the singular form of the word "listing." MFS submits that this typographical error results in a change in the meaning of the statute. The phrase "access to . . . directory *listings*" suggests a duty to provide a carrier with access to a compilation of information—*i.e.*, whatever information is listed in the directory. By contrast, the phrase "access to . . . directory *listing*" suggests instead the act of listing a particular subscriber in the directory. This distinction is supported by Section 271(c)(2)(B)(viii) of the 1996 Act where, in the "competitive checklist" for Bell Operating Companies which generally recapitulates and amplifies the duties imposed under Section 251, Congress included a specific reference to "White pages directory listings," clearly requiring publication of competitors' listings in the directory and not merely making them available through directory assistance.

The Commission's interpretation of "directory listings" makes this term virtually synonymous with "directory assistance." In para. 135, the Commission states, "'nondiscriminatory access to directory listings' means that, if a competing provider offers directory assistance, any customer of that competing provider should be able to access any listed number on a nondiscriminatory basis . . . ." Although MFS agrees fully with the substance of the requirement imposed by the Commission in this sentence, this obligation would more sensibly be construed as part of the duty to provide "nondiscriminatory access to directory assistance." The Commission's interpretation essentially treats the words "directory listing" as redundant of

"directory assistance," and violates the canon of statutory construction that effect must be given, if possible, "to every clause and word of a statute."[16]

Availability of subscriber listings in published directories[17] is every bit as important as their availability through directory assistance services. Access to published directories is important for two reasons. First, customers desire a directory that is as complete as possible for their use in placing calls. Second, many customers (especially businesses) desire that their listing be published in a directory that is widely used so that others can use it to call them. LECs recognize the value of their directories to customers, and they generally provide copies of White and Yellow Pages directories to their subscribers without charge. Many LECs (although not all) now charge consumers for calls to directory assistance, so omission of a subscriber's listing from the published directory would impose added costs and inconvenience on callers who are unable to find that listing in the directory. Furthermore, incumbent LECs typically provide each local exchange service subscriber with one listing in the White Pages directory, and business subscribers with one listing in the Yellow Pages as well, at no additional charge as a bundled part of local exchange

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16/ *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). *See also, e.g., United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) (following "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect").

17/ Although directories have traditionally been published on paper in book form, recent advances in information technology permit them to be published in other forms including CD-ROM and as World Wide Web pages. The duties imposed by the statute should apply to any published compilation of directory listings in any medium.

service.[18] If competitors of the incumbent LEC were unable to provide their customers with the same offering, or could do so only by incurring excessive costs, it would make their competitive local exchange services less attractive to prospective customers due solely to the incumbent's control of the telephone directory.[19]

For these reasons, the Commission should interpret "nondiscriminatory access to . . . directory listing" as requiring every LEC that publishes a directory of telephone numbers, in any medium, to include therein listings supplied by competing providers of telephone exchange service on the same terms and conditions (including any applicable charges) as it includes listings supplied by its own subscribers. In addition, the Commission should apply these requirements to any LEC that contracts with an affiliated entity or a third party to publish a directory on its behalf.[20] Carriers should not be able to evade their duty under Section 251 to perform certain functions on a nondiscriminatory basis by arranging for other entities to perform those functions for them.

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18/ LECs generally impose charges for listings after the first one, as well as for special listings (*e.g.*, boldface) and foreign listings (*e.g.*, listing a Maryland business in a suburban Virginia directory). MFS has no objection to imposition of these charges on listings supplied by competitive LECs, as long as it is done on a nondiscriminatory basis.

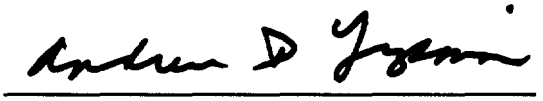
19/ Some communities have independent directories published in competition with the incumbent LEC's directory, but these directories rarely have circulation or usage even remotely comparable to that of the LEC directory. This situation may change over time as competitive telephone services become more accepted, and the Commission could revisit the issue as and when appropriate, but at least today "competition" in the directory publishing industry is essentially meaningless to prospective local exchange carriers and their customers.

20/ Of course, Section 251 does not impose any affirmative obligation on a LEC to publish a directory at all, although State laws and rules often do impose such an obligation. If a LEC causes its listings to be published in a directory, whether by choice or pursuant to State law, it has an obligation under Section 251(b)(3) to provide nondiscriminatory access to that directory regardless of whether it acts as a publisher itself or contracts that function to another entity.

## IV. CONCLUSION

For the reasons stated above, the Commission should reconsider the limited portions of the *2nd R&O* discussed herein. With respect to area code relief, the Commission should prohibit the use of overlay plans until permanent number portability has been implemented. With respect to directory listings, the Commission should require any LEC that publishes a directory (in any medium), or causes an affiliate to do so, to incorporate therein any listings supplied by a competing provider of telephone exchange service on the same basis as it incorporates listing information supplied by its own customers.

Respectfully submitted,

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Dated: October 7, 1996

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## CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October 1996, copies of the foregoing MFS COMMUNICATIONS COMPANY, INC. PETITION FOR PARTIAL RECONSIDERATION OF SECOND REPORT AND ORDER, CC Docket Nos. 96-98, 95-185, 92-237; NSD File No. 96-8; and IAD File No. 94-102, were sent via Messenger** to the parties on the attached service list.

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