

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Administration of the)
North American Numbering Plan)
Carrier Identification Codes (CICs))

CC Docket No. 92-237

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ORDER

Adopted: July 18, 1997

Released: July 18, 1997

By the Deputy Chief, Common Carrier Bureau

I. INTRODUCTION

1. Carrier identification codes (CICs) are numeric codes that enable local exchange carriers (LECs) providing interexchange access services to identify access customers in order to bill and route traffic to these customers.¹ CICs facilitate competition by enabling callers to use the services of any number of telecommunications service providers both by presubscription and by dialing a carrier's seven-digit access code, or CAC ("101XXXX"), for which the last four digits ("XXXX") are that carrier's unique four-digit Feature Group D CIC.²

2. On April 11, 1997, in the CICs Second Report and Order,³ the Commission

¹ Most access providers are incumbent local exchange carriers (ILECs) that provide access customers with circuits that interconnect to the local carrier's public switched telephone network. Commission rules require that "interstate access services should be made available on a non-discriminatory basis and, as far as possible, without distinction between end user and IC [interexchange carrier] customers." Petition of First Data Resources, Inc., Regarding the Availability of Feature Group B Access Service to End Users, Memorandum Opinion and Order, 1986 WL 291786, (rel. May 28, 1986) at para. 13. Typical access customers include interexchange carriers, wireless carriers, competitive access providers, and large corporate users.

² With three-digit Feature Group D CICs, the CAC is five digits ("10XXX"), with the last three digits ("XXX") representing the chosen carrier's assigned CIC.

³ Administration of the North American Numbering Plan, Carrier Identification Codes (CICs), Second Report and Order, CC Docket No. 92-237, FCC 97-125 (rel. Apr. 11, 1997), recon. pending (CICs Second Report and Order).

approved an industry plan⁴ to expand Feature Group D CICs from three to four digits, in anticipation of all the three digit codes being assigned, stating that it was a reasonable way to ensure that future demand for CICs could be met.⁵ The industry agreed a transition, or permissive dialing period, for the expansion from three to four-digit CICs, and a corresponding transition from five to seven-digit CACs was needed, but were unable to agree on the length of a transition.⁶ In the CICs NPRM, the Commission proposed a six-year period.⁷ In the CICs Second Report and Order, the Commission decided that the transition will end on January 1, 1998. The Commission's decision was intended to advance the pro-competitive objectives of the Communications Act of 1934 (the Act) as amended by the Telecommunications Act of 1996 (1996 Act).⁸

3. On May 19, 1997, VarTec Telecom, Inc. (VarTec) filed an emergency motion for stay of implementation of the CICs Second Report and Order.⁹ On May 27, 1997, US WEST, Inc. (US WEST) filed comments opposing VarTec's motion.¹⁰ On May 29, 1997, Thrifty Call, Inc. (TCI), filed a motion in support of VarTec's motion for stay.¹¹ For the reasons stated below, we find that VarTec has failed to justify grant of a stay, and,

⁴ In 1988, the Industry Carriers Compatibility Forum began to develop a two-part plan to convert and expand three-digit CICs (both Feature Groups B and D) to four digits. The second part of the plan, originally scheduled to occur in the third quarter of 1993, contemplated expansion of three-digit Feature Group D CICs to four digits and eventual elimination of the 10XXX CAC format. See Letter of October 13, 1989, from G.J. Handler, Vice President, Network Planning, Bellcore, to Richard M. Firestone, Chief, Common Carrier Bureau, Federal Communications Commission at p. 2 (Handler Letter). In 1994 the planned time for the expansion of Feature Group D CICs was the first quarter of 1995. See Administration of the North American Numbering Plan, Notice of Proposed Rulemaking, CC Docket No. 92-237, 9 FCC Rcd 2068, 2076 (1994) (CICs NPRM).

⁵ See CICs Second Report and Order at para. 28.

⁶ See Handler letter at p.2.

⁷ See CICs NPRM at 2076-2077.

⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); See Joint Explanatory Statement of the Committee of the Conference (H.R. Rep. No. 458, 104th Cong., 2d Sess.) at 113.

⁹ Emergency Motion for Stay of VarTec Telecom, Inc., CC Docket No. 92-237, May 19, 1997 (VarTec Motion). Also on May 19, 1997, VarTec, the Competitive Telecommunications Association, and Telco Communications Group, Inc., each filed petitions for reconsideration of the CICs Second Report and Order. The reconsideration petitions will be addressed in an upcoming order. VarTec's reconsideration petition generally restates the arguments advanced in its motion for stay.

¹⁰ Comments of US WEST, Inc., CC Docket No. 92-237, May 27, 1997 (US WEST Opposition).

¹¹ TCI filed a motion in support of VarTec's reconsideration petition. See Motion in Support of VarTec Telecom Inc.'s Emergency Motion for Stay and Petition for Reconsideration of Thrifty Call, Inc., CC Docket No. 92-237, May 29, 1997 (TCI Motion). As noted above, reconsideration petitions will be addressed in a later Order. See n.9, *supra*.

accordingly, we deny its motion.

II. POSITION OF PARTIES

A. VarTec Motion

4. VarTec states that it is an interexchange carrier currently authorized to provide intrastate interexchange services in forty-eight states and the District of Columbia. VarTec argues that its motion meets the four criteria to justify a stay of the CICs Second Report and Order: (1) it is likely to prevail on the merits; (2) it would suffer irreparable harm if its motion was not granted; (3) others would not be harmed by the grant of a stay; and (4) a stay would serve the public interest.

5. First, VarTec makes four arguments in support of its claim that it is likely to prevail on the merits.¹² VarTec argues that the CICs Second Report and Order is arbitrary and capricious because its longterm impact will be to decrease the number of CICs available for assignment, contrary to the Commission's stated goal of "maximizing the number of CICs available for new services and technologies to support continued economic growth."¹³ Next, VarTec contends that the CICs Second Report and Order effects a taking without just compensation of VarTec's private property interests in its CACs (including its business goodwill, trademark and service mark rights, and entitlement to engage in its chosen trade and business) in violation of the Fifth Amendment.¹⁴ VarTec also argues that the Commission violated VarTec's commercial free speech rights in its trademarks, trade names, and other symbols used to communicate information about its products under the First Amendment, by rejecting, in the CICs Second Report and Order, the plan VarTec proposed to "grandfather" three-digit CICs.¹⁵ VarTec argues that its grandfathering plan is a more narrow restriction on commercial free speech than the alternative adopted by the Commission.¹⁶ Finally, VarTec argues that the Commission's actions in the CICs Second Report and Order violate the rights

¹² VarTec Motion at 10-13.

¹³ Id. at 9, quoting CICs NPRM at 2068.

¹⁴ VarTec Motion at 10-13.

¹⁵ Id. at 13-14. Under VarTec's plan, all three-digit CICs starting with a "1" would be taken out of use as of January 1, 1998 (the end of the transition under the CICs Second Report and Order) so that a switch would not confuse 101XX with 101XXXX. VarTec acknowledges that this plan would require the reassignment of three-digit CICs that have "1" as the first digit, but states that only 70 such CICs have been assigned. VarTec contends that its proposal is much easier than reassigning as many as 969 CICs as it alleges would be required under the CICs Second Report and Order. VarTec claims that software and switch reprogramming that currently allow switches to read both three and four-digit CICs beginning with a "5" or a "6" (such as 10636 --one of VarTec's CACs-- and 1016XXX) will allow for the implementation of VarTec's grandfathering plan. See VarTec Motion at 4-5.

¹⁶ VarTec Motion at 13-14.

of small businesses under section 257 of the Act¹⁷ and the Regulatory Flexibility Act¹⁸ by creating market barriers and failing to consider less burdensome alternatives (namely, its grandfathering plan).¹⁹

6. Second, VarTec argues that the Commission's action in the CICs Second Report and Order will cause it irreparable harm. VarTec's arguments on irreparable harm mirror its arguments on its ability to prevail on the merits.²⁰ For example, VarTec cites its irreparable loss of: (1) its five-digit CACs, which VarTec argues it owns; (2) its constitutional right to free speech; (3) the goodwill associated with its CACs (which, according to VarTec, will result from consumer confusion and loss of customer confidence);²¹ and (4) the service mark rights developed in its CACs. According to VarTec, these losses are caused by the Commission's decision to replace VarTec's existing five-digit CACs with "new and totally different CACs that will be assigned at random."²² VarTec also alleges trademark, trade name, and service mark infringements, and contends that these types of injuries constitute irreparable harm per se.

7. Third, VarTec contends that no others will be harmed by the grant of the stay. Indeed, VarTec asserts that other CAC owners will benefit from the grant of a stay because they will be allowed to maintain their current five-digit CACs.

8. Fourth, VarTec argues that a stay will serve the public interest because consumers will continue to enjoy the current process of accessing alternative long distance carriers and will not need to be reeducated. In the end, according to VarTec, both consumers and long distance carriers will benefit if VarTec's grandfathering plan is adopted because more CACs would be available in the longterm.

B. US WEST Opposition

9. US WEST opposes VarTec's emergency motion for stay and requests that we deny it. US WEST argues that it is "simply an attempt to secure an untimely reconsideration

¹⁷ 47 U.S.C. § 257.

¹⁸ 5 U.S.C. §§ 601 et seq.

¹⁹ VarTec Motion at 14-15.

²⁰ Id. at 15-17.

²¹ See id. at 17-18, and n.44, citing T.I.M.E.-DC, Inc. v. I.A.M. National Pension Fund, 597 F. Supp. 256, 264 (D.D.C. 1984); T.I.M.E.-DC, Inc. v. New York State Teamsters Conference Pension & Retirement Fund, 580 F. Supp. 621, 630 (N.D.N.Y. 1984).

²² VarTec Motion at 16.

of the Commission's decision not to grandfather 3-digit CICs" and that the motion "raises no new matters and it fails to meet the procedural requirements for a stay."²³

10. US WEST counters VarTec's contentions about its investments in marketing to its customer base by arguing that, as the Commission observed in the CICs Second Report and Order, since 1989, the industry should have been aware that it would need to replace five-digit CACs with seven-digit CACs and, since 1994, the industry has been on notice that such changes would be likely.²⁴ US WEST asserts that a stay should not be granted "to accommodate any carrier's intentional delay."²⁵ In response to VarTec's argument that a stay is warranted because the Commission has acted in violation of VarTec's property rights under the Fifth Amendment by "taking" VarTec's goodwill, service marks, and other protected property interests, US WEST asserts that VarTec lacks the alleged property interests that it claims warrant protection.²⁶ US WEST urges the Commission to proceed to full implementation of four-digit CICs, in the interest of "industry equality, dialing parity [and] public policy."²⁷

C. TCI Motion in Support

11. TCI, a long distance company operating in 16 states and offering discounted service via CAC dialing, supports VarTec's motion for stay. TCI restates VarTec's arguments that the Commission's action was arbitrary and capricious and contends that VarTec is likely to establish First and Fifth Amendment violations.²⁸ TCI also asserts that absent a stay, VarTec, and other similar carriers, will suffer irreparable harm by losing goodwill and First Amendment rights, and that adequate compensatory or other corrective relief does not exist to salvage goodwill and a customer base.²⁹ Finally, TCI asserts that a stay will not substantially harm other parties and will serve the public interest by maximizing available CICs.³⁰

²³ See US WEST Opposition at 1-2 (emphasis in original).

²⁴ See id. at 2-3, citing CICs Second Report and Order at para. 37.

²⁵ US WEST Opposition at 3.

²⁶ See id. at 6-7, and n.19-21.

²⁷ Id. at 2. In addition, US WEST contends that reassignment of four-digit CICs to previous three-digit CIC assignees is unnecessary, even without grandfathering, because three-digit CICs will be converted to four digits with the addition of a "0" before the now-assigned three digits. See id. at 4, citing, Carrier Identification Code Assignment Guidelines, INC 95-0127-006, formerly ICCF 92-0726-002, Revision September 1996 (CIC Assignment Guidelines, September 1996).

²⁸ TCI Motion at 1 and n.3.

²⁹ Id. at 1-2.

³⁰ Id. at 2.

III. DISCUSSION

12. As VarTec states, a party seeking a stay must demonstrate: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors the grant of a stay.³¹ We need not examine all four factors if we find that a party fails to meet its burden on any one of these factors.³² A showing of irreparable harm, for example, is an essential factor in any request for a stay.³³

13. To meet its burden of showing the irreparable harm, a petitioner must demonstrate that the alleged harm is "both certain and great; . . . actual and not theoretical."³⁴ The United States Court of Appeals for the District of Columbia Circuit has held that "economic loss does not, in and of itself, constitute irreparable harm."³⁵ The Court also found that "revenues and customers lost to competition which can be regained through competition are not irreparable."³⁶ We find that VarTec's unsupported allegations of irreparable harm do not satisfy these exacting standards.

14. First, VarTec has not demonstrated that a complete transition, by January 1, 1998, to four-digit CICs and seven-digit CACs, without grandfathering any three-digit CICs or five-digit CACs, will cause harm to VarTec that is certain. VarTec's argument is premised on erroneous facts. US WEST correctly notes that after the end of the transition, the Commission will not eliminate all current three-digit CICs and reassign new four-digit CICs randomly. Rather, three-digit CICs would, no later than January 1, 1998, become four-digit CICs by adding a "0" at the beginning of the three digits (0XXX).³⁷ Reassignment of three-digit CICs is not a part of the expansion plan.

³¹ See Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d 841, 843-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

³² Wisconsin Gas, 758 F.2d at 674.

³³ Reynolds Metals Co. v. FERC, 777 F.2d 760, 763 (D.C. Cir. 1985); Wisconsin Gas, 758 F.2d at 674.

³⁴ Wisconsin Gas, 758 F.2d at 674.

³⁵ Id.

³⁶ Central & Southern Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 309 (D.C. Cir.), cert. denied, 474 U.S. 1019 (1985). See also Washington Metropolitan Area Transit Authority 559 F.2d at 843 n.3 ("[t]he mere existence of competition is not irreparable harm").

³⁷ For example, AT&T has "288" as its three-digit CIC. This three-digit CICs will become four digits by adding a "0" before it, and "0288" would, therefore, become AT&T's four-digit CIC. See CICs Second Report and Order at n.2.

15. Second, VarTec provides no evidence to support its allegation that its reputation would be tarnished if the Commission's requirement that VarTec cease using five-digit CACs is not stayed. As the District of Columbia Circuit has noted, in evaluating a petitioner's allegations of irreparable harm, "[b]are allegations of what is likely to occur are of no value" because the critical issue is "whether the harm will in fact occur."³⁸ Because, as noted above, all three-digit CICs that currently are the suffixes of five-digit CACs would not be eliminated but would rather become the suffixes of seven-digit CACs merely by adding a "0" to now-assigned three-digit CICs, any claims of customer confusion between VarTec and a competitor would at best be difficult to substantiate.³⁹ Even if VarTec could establish with certainty a loss of goodwill caused by customer confusion, its contention that it would be irreparably harmed is speculative. VarTec may take actions to preserve customers, such as educating them about the need to, and how to, dial the expanded CAC format.

16. Finally, we reject VarTec's contention that a stay must be granted because trademark, trade name, and service mark infringements constitute irreparable harm per se, and that a monetary award would not amount to adequate compensation because of the damage to VarTec's goodwill and reputation. The flaw in this argument is that carriers do not "own" codes or numbers, as we recently emphasized in the N11 First Report and Order,⁴⁰ rather, they use them for the efficient operation of the public switched telephone network.⁴¹ Telephone numbers, including CICs and CACS, are a national public resource.⁴² Thus, VarTec's arguments premised on ownership of its CICs and CACS, including the Fifth Amendment argument, are unfounded.

³⁸ Wisconsin Gas, 758 F.2d at 674.

³⁹ Any seven-digit CACs that might easily be confused with five-digit CACs (i.e., 10288 and 1010288) would both correspond to the same carrier (in this example, AT&T).

⁴⁰ The Use of N11 Codes and Other Abbreviated Dialing Arrangements, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 92-105, FCC 97-51 (rel. Feb. 19, 1997), recon. pending, at para. 71.

⁴¹ See The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Memorandum Opinion and Order, 59 Rad. Reg. 2d 1275, 1284 (1986). We note that Bellcore, as current administrator of the NANP, also has characterized numbers as a public resource and has specifically rejected that the assignment of a number implies ownership by either the assignor or assignee. See Personal Communications Services N00 NXX Code Assignment Guidelines, Para. 2.10 (April 8, 1995 Revision).

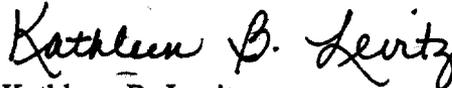
⁴² See, e.g., Administration of the North American Numbering Plan, Report and Order, CC Docket No. 92-237, 11 FCC Rcd 2588, 2591 (1995) (stating that telephone numbers are a public resource); The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, Report No. CL-379, 2 FCC Rcd 2910, 2912 (1987), recon., 4 FCC Rcd 2369 (1989) (stating that NXX codes are a national resource). See also CIC Assignment Guidelines, September 1996 at section 1.2 ("[a]ssignment of a CIC to an entity in no way implies or infers ownership of the public resource by the entity.")

17. In sum, we find that VarTec has failed to demonstrate that without the stay it requests, VarTec will suffer irreparable harm. Because VarTec has failed to demonstrate that application of the Commission's requirement in the CICs Second Report and Order that five-digit CACs be converted to seven-digit CACs as of January 1, 1998, would cause it irreparable harm, we find that VarTec has failed to demonstrate that a stay of the CICs Second Report and Order is warranted.

IV. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED THAT, pursuant to authority found in Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and authority delegated thereunder pursuant to sections 0.91, 0.204 (a)-(b) and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91, 0.204(a)-(b) and 0.291, the emergency motion for stay of implementation of the CICs Second Report and Order filed by VarTec Telecom., Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Kathleen B. Levitz

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