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Before the

**FEDERAL COMMUNICATIONS COMMISSION**

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

**CC Docket No. 92-237**

**APPLICATION FOR REVIEW**

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**Dated: August 8, 1997**

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**APPLICATION FOR REVIEW**

VarTec Telecom, Inc. ("VarTec"), pursuant to Section 1.115 of the Commission's Rules, hereby applies to the Commission for review of the decision made by the Deputy Chief, Common Carrier Bureau, as contained in the Order adopted and released July 18, 1997<sup>1</sup> in the above-captioned proceeding.

**I. INTRODUCTION**

On May 19, 1997, VarTec filed an emergency motion for stay of implementation of the CICs Second Report and Order<sup>2</sup>. On July 18, 1997, the Deputy Chief, Common Carrier Bureau, pursuant to her delegated authority, denied VarTec's emergency motion on the ground that VarTec had failed to demonstrate that it will suffer irreparable harm absent the requested stay.<sup>3</sup> The Deputy Chief did not reach any of the other required elements for a motion for stay. By this application, VarTec requests review and reversal of this denial of its emergency motion for stay.

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<sup>1</sup> Order, CC Docket No. 92-237 (rel. July 18, 1997) (hereinafter "Order").

<sup>2</sup> 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).

<sup>3</sup> Order at ¶¶ 12-17.

## **II. QUESTION PRESENTED FOR REVIEW**

Whether the Deputy Chief, Common Carrier Bureau, made erroneous findings of fact and erroneously applied the law in finding that VarTec made an inadequate showing that it would suffer irreparable harm if its motion for stay is not granted.

Specifically, VarTec respectfully asserts that in making her findings of fact, the Deputy Chief failed to take fully into account the irreparable harm that VarTec will suffer to its goodwill and reputation, or the fact that VarTec will suffer irreparable harm as a result of the loss of its Constitutional rights, unless the CICs Second Report and Order is stayed. Furthermore, in arriving at her conclusion of law that VarTec failed to show irreparable harm, the Deputy Chief ignored applicable legal precedents which recognize irreparable harm under the circumstances presented by VarTec.

In addition to being contrary to common law precedent on the issue of irreparable harm, the Order violates the Administrative Procedures Act for the reasons that it is: 1) arbitrary and capricious and constitutes an abuse of the Deputy Chief's discretion pursuant to the authority delegated to her by the Commission;<sup>4</sup> 2) contrary to VarTec's rights under the First and Fifth Amendment to the Constitution to the extent it fails to recognize VarTec's rights thereunder;<sup>5</sup> and 3) unwarranted by the facts in the record.<sup>6</sup>

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<sup>4</sup> 5 U.S.C. § 706(2)(A).

<sup>5</sup> 5 U.S.C. § 706(2)(B).

<sup>6</sup> 5 U.S.C. § 706(2)(F).

### **III. FACTORS WARRANTING COMMISSION CONSIDERATION OF THE QUESTION PRESENTED**

The Deputy Chief's ruling is in conflict with applicable case precedents, as well as the Administrative Procedure Act, thereby warranting Commission review pursuant to Section 1.115(b)(2)(I) of the Commission's Rules. The Deputy Chief has also made erroneous findings as to important and material issues of fact, warranting consideration pursuant to Section 1.115(b)(2)(iv) of the Rules. In support of these contentions, VarTec states as follows.

The Deputy Chief held that VarTec failed to demonstrate that the alleged harm is "both certain and great; . . . actual and not theoretical," as required by Wisconsin Gas Co. v. FERC, 758 F.2d 669 (D.C. Cir. 1985).<sup>7</sup> She further held that VarTec failed to establish that the proposed forced transition from five-digit CACs to seven-digit CACs will cause harm to VarTec "that is certain."<sup>8</sup> Finally, the Deputy Chief concluded that VarTec "provide[d] no evidence to support its allegation that its reputation would be tarnished", citing Wisconsin Gas for the proposition that "[b]are allegations of what is likely to occur are of no value" because the important issue is "whether the harm will in fact occur."<sup>9</sup>

VarTec respectfully submits that it did in fact provide adequate substantiation for its claim that irreparable harm will occur absent a stay. It has gone well beyond showing that the alleged harm is "merely feared as liable to occur at some indefinite time," a showing held by the court in

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<sup>7</sup> Order at ¶ 13.

<sup>8</sup> Order at ¶ 14.

<sup>9</sup> Order at ¶ 15.

Wisconsin Gas to be insufficient for purposes of obtaining a stay.<sup>10</sup>

As noted in its motion, VarTec markets its services through tens of millions of direct mail pieces sent to potential customers every year. Some customers respond to VarTec's marketing efforts by utilizing VarTec's five-digit CAC to "dial around" their presubscribed carriers. VarTec does not communicate directly with those customers for billing purposes or for any other reason, and it does not compile any record of the names or addresses of its customers in the ordinary course of business. Instead, the standard billing and collection process is handled through arrangements between VarTec and local exchange carriers ("LECs"), which collect charges for VarTec.

As the Commission is aware, the LECs are not required to provide any type of intercept message after the January 1, 1998 transition to seven-digit CACs. Therefore, all customers who dial VarTec's five-digit CACs after January 1, 1998 will fail to receive service, and will have no way of knowing why they can no longer obtain access to VarTec's dial-around service, or how they can redial to continue to use that service.<sup>11</sup> Unlike the situation where callers receive an error message when attempting to dial the disconnected number of a friend or business, they will not be able to call the local information operator to learn how to obtain access to VarTec's services. Unless the customer somehow remembers VarTec's name from the direct mail marketing material (see attachments to Emergency Motion to Stay) that the customer has long since discarded, and remembers that VarTec is located in Lancaster, Texas, that customer will have no way of tracking

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<sup>10</sup> Wisconsin Gas, 758 F.2d at 674.

<sup>11</sup> The fact that all current three-digit CICs would be converted to four-digit CICs through the addition of the number "0" at the front of the CIC does not in any way alleviate this problem.

down the company whose services it had used in the period leading up to January 1, 1998. As can be seen from the marketing materials, VarTec's name is not prominently featured. Instead, VarTec's five-digit CAC and the name of the advertised calling plan (e.g., DimeLine®) are most prominently featured. Neither of these identifiers, which are far more likely to be recalled by customers than the company's name, allow the customers a means for tracking down VarTec when they are unable to get through after January 1, 1998. For all practical purposes, those customers will have no idea what happened to VarTec's services.

Although VarTec can make best efforts to educate those customers prior to the January 1, 1998 transition through direct mail marketing efforts, it is inevitable that VarTec will not be able to alert all of its customers to the change. First, because of VarTec's billing and collection arrangements with the LECs, VarTec does not have a ready source of data to rely upon to contact its customers. Instead, it must attempt to match the phone numbers of its customers (the only information provided to VarTec by the LECs) with addresses in order to contact those users by mail. Even to the extent VarTec is able to locate some of its customers through that process, the nature of direct mail marketing is such that significant portions of people who receive such advertising in the mail either discard it without reading it, or give it a quick scan. Customers who are already using VarTec's services, because they previously received and read the marketing material and decided to use VarTec's CACs, have even less incentive to read VarTec's materials than non-users because they already know how to use VarTec's dial-around services. Those customers are most likely to routinely discard VarTec's mailings without even opening them, because they are already using VarTec's services and will see no need to read another promotional piece touting VarTec's services. VarTec will lose a significant portion of these customers. The customers will dial the VarTec CAC

they have committed to memory, and upon receiving no connection, will obviously believe something is wrong with VarTec's services: either VarTec has ceased to exist, or its services are undependable.

Of course it is literally impossible for VarTec to prove "with certainty" how many of its customers VarTec will lose. Nor is it possible for VarTec to present evidence that this harm has occurred in the past under these circumstances (one of the preferred showings under some of the authorities relied upon by the Deputy Chief), because the Commission's action in eliminating providers' CACs is without precedent. The impact of the Commission's ruling cannot be measured in the marketplace until after January 1, 1998. VarTec's claim that it will suffer harm after January 1, 1998, however, is based on much more than "theory", "speculation" or "fear" of some uncertain harm that will occur at some indefinite point in the future. Based on the facts presented by VarTec regarding its methods of operation (described above and in its motion for stay), and the manner in which the January 1, 1998 transition will be accomplished (without any intercept message), it is an undeniable fact that a substantial portion of VarTec's customers will be unable to get their calls through on VarTec's dial-around services after January 1, 1998 and they won't know why this is the case or how they can correct the problem. It is a matter of simple logic, therefore, to conclude that the harm to VarTec's goodwill and reputation beginning on January 1, 1998, unless a stay is granted, will be "both certain and great".<sup>12</sup> The law does not require that the extent of harm be quantified in order to establish irreparable harm. It is only required that the fact that such harm will occur be demonstrated.

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<sup>12</sup> Wisconsin Gas, 758 F.2d at 674.

In Wisconsin Gas, heavily relied upon by the Deputy Chief, the court noted that the petitioners requesting the stay in that case did not provide any evidence that any of the petitioners' customers would refuse to deal with the petitioners as a result of the agency order that was the subject of the request for a stay.<sup>13</sup> The stay was denied due to the petitioners' failure to present evidence that such an outcome was anything more than "hypothetical."<sup>14</sup> That is hardly the case here. VarTec need not show that some of its customers will refuse to do business with VarTec, because it demonstrated why many of them will not be able to do business with VarTec.

The Deputy Chief commits further error by placing such great reliance on cases which have held that economic loss alone does not constitute irreparable harm. Those cases are limited to circumstances where the economic loss could be readily recovered, either through the litigation process or otherwise (e.g., through readjustment of the complaining party's rates by the agency in order to recoup the lost revenues).<sup>15</sup> If the CICs Second Report and Order is overturned by the courts after the transition goes into effect on January 1, 1998, however, VarTec will not be able to bring a claim anywhere for recovery of its lost revenues, nor will the FCC be able to take any action that would allow VarTec to recoup its losses, since it does not have any means for "readjusting" the marketplace to make VarTec whole for its losses. The FCC will not be able to turn back the clock and require customers to make calls that they were unable to place with VarTec's five-digit CAC, or require those customers to pay VarTec for services it was unable to render due to the elimination

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<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> Id. at 674-5; see also Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958).

of the five-digit CAC.

Similarly, the Deputy Chief has no basis for concluding that any “revenues and customers lost to competition [by VarTec] . . . can be regained through competition”.<sup>16</sup> VarTec will never be able to fully recover its lost customers. It will have to return to the marketplace and start from scratch at tremendous cost, with a new marketing campaign built around its new seven-digit CACs, to rebuild the goodwill and reputation that it has established over the past several years in the five-digit CACs that VarTec currently owns. It will never be able to win back many customers who will perceive VarTec’s services as being unreliable after they are unable to get through after January 1, 1998, especially compared to the presubscribed service that they can use simply by picking up their phones and dialing out direct. VarTec has invested considerable effort and expense, over several years, to convince customers to alter their long established calling habits by dialing around the carrier they had previously used as a matter of routine. VarTec will now have to try to regain the trust of the customers who become frustrated and disappointed with VarTec’s service when they are unable to place their calls using the five-digit CACs they have come to associate with VarTec.

For these reasons, VarTec can never be made whole for the economic harm that it will suffer absent the requested stay. Unrecoverable economic loss such as this does meet the requirement of irreparable harm, contrary to the Deputy Chief’s conclusion.<sup>17</sup>

The Deputy Chief also errs in her analysis of VarTec’s claims concerning the loss of

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<sup>16</sup> Order at ¶ 13.

<sup>17</sup> Iowa Utilities Board v. FCC, 109 F.3d 418, 426 (8th Cir. 1997).

goodwill and damage to its business reputation that VarTec will suffer absent the requested stay.<sup>18</sup> Focussing on the fact that the number "0" will be added to VarTec's current three-digit CICs, the Deputy Chief concludes that there is little likelihood of consumer confusion as between VarTec and its competitors, and thus, "any claims of customer confusion between VarTec and a competitor would at best be difficult to substantiate."<sup>19</sup> VarTec's concern regarding customer confusion is not that its customers will reach a competitor by mistake. Rather, VarTec's concern is that its customers will not be able reach VarTec when they dial VarTec's current five-digit CACs. VarTec is not concerned about being confused with another provider, it is concerned about customers being confused as to whether VarTec continues to be in business, and if so, how its services can now be used.

The tarnishment of reputation and loss of goodwill that will result from this confusion will be attributable to the fact that the carefully cultivated reputation of reliability and highest quality service that VarTec has cultivated over the years will be instantly wiped out with one phone call. VarTec has struggled long and hard to overcome the image (fostered in large part by the extensive marketing campaigns of AT&T and the other major carriers) that providers of long distance service other than the "big three" are in a different "league" in terms of quality and reliability. Beginning on January 1, 1998, hundreds of thousands of VarTec customers will experience the frustration of not being able to use VarTec through its five-digit CACs, the only means they know. There could be no worse way of communicating a negative connotation to VarTec's customers concerning

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<sup>18</sup> Order at ¶¶ 15-16.

<sup>19</sup> Order at ¶ 15.

VarTec's reliability and quality than to greet them with an error message when they dial the familiar five-digit CAC, except perhaps to also leave them with no way of knowing what happened to their former carrier of choice. Consider what people would think if they picked up their phones to dial out on their presubscribed service to place a long distance call, only to get an error tone, with no message explaining what they need to do to continue making long distance calls. Those people would be upset and disappointed, to say the least. If they had a choice, many would switch long distance services. Callers using VarTec's services have the easiest possible means of acting on their displeasure with VarTec. All they have to do is not take the additional step of dialing a five-digit (or seven digit after 1) CAC.

As the final ground for the Deputy Chief's rejection of VarTec's showing on irreparable harm, she asserts that VarTec does not own its CACs, and therefore cannot rely on the commonly accepted principle that interference with a person's trademark, trade name, service mark and/or constitutional rights is irreparable harm per se (a principle that is not disputed by the Deputy Chief). VarTec has explained at length the basis for its position that it possesses a property interest in its CACs, citing numerous decisions, including Supreme Court rulings, in support [see VarTec Motion for Stay at pp. 10-12; VarTec Petition for Reconsideration (attached as an exhibit to the Motion for Stay) at pp. 10-14]. In response, the Deputy Chief rejects VarTec's position by relying on dicta contained in various Commission orders, as well as statements made by a private entity (Bellcore) at various times. The Deputy Chief does not refer to a single case or statute that supports her position in this regard, or which refutes the legal position presented by VarTec on this issue. With regard to Bellcore's statements, Bellcore certainly does not have any authority to unilaterally issue proclamations of law or policy that would affect VarTec's property rights.

In short, the Deputy Chief has failed to offer any support for her legal conclusion that VarTec can claim no ownership interest in the CACs in which it has made such a heavy investment of effort and expense in order to build VarTec's business and reputation. In essence, the Deputy Chief simply says that the Commission has said in the past that no one owns CACs, and that is the final word on that issue. With all due respect, it is improper for the Deputy Chief to give such short shrift to VarTec's claims of ownership in the CACs and the intellectual property associated with those CACs. Several members of the D.C. Circuit Court of Appeals have recently recognized that ownership rights in broadcast spectrum may result from the investment of time and money in application of that resource to productive use, in much the same way that western water rights have been acquired under common law. Time Warner v. FCC, 105 F.3d 723, 727 (D.C. Cir. 1997) (per curiam, Williams dissenting from denial of rehearing in banc; Edwards, Silberman, Ginsburg, Sentelle concurring in dissent). VarTec's claims of ownership in previously unassigned CACs, based on VarTec's substantial investment and development of goodwill in those CACs, are premised in large part on the same principles.

The Deputy Chief has also failed to even address VarTec's claim of irreparable harm that will result from the infringement of VarTec's First Amendment rights of commercial speech if the stay is not granted.<sup>20</sup>

For the reasons set forth above, the Deputy Chief's Order should be reviewed by the Commission, and reversed as being contrary to the common law legal standards applicable to a party's showing of irreparable harm. Furthermore, the Order violates the Administrative Procedures

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<sup>20</sup> VarTec Motion for Emergency Stay at pp. 13-14, 16.

Act for the reasons that it is: 1) arbitrary and capricious and constitutes an abuse of the Deputy Chief's discretion pursuant to the authority delegated to her by the Commission;<sup>21</sup> 2) contrary to VarTec's rights under the First and Fifth Amendment to the Constitution to the extent it fails to recognize VarTec's rights thereunder;<sup>22</sup> and 3) unwarranted by the facts in the record.<sup>23</sup>

**IV. RESPECTS IN WHICH THE ORDER SHOULD BE CHANGED,  
AND RELIEF SOUGHT**

VarTec respectfully urges the Commission to reverse the Deputy Chief's Order and issue the stay requested by VarTec. In light of the short period of time remaining before the proposed transition, any relief short of this will have the effect of denying VarTec any meaningful opportunity to obtain the stay at the Commission. It will do VarTec no good, for example, for the Commission

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<sup>21</sup> 5 U.S.C. § 706(2)(A).

<sup>22</sup> 5 U.S.C. § 706(2)(B).

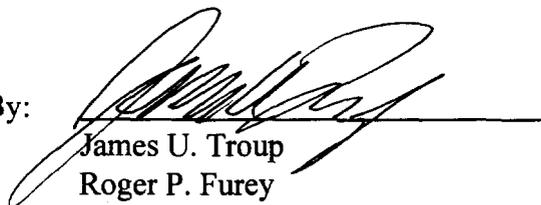
<sup>23</sup> 5 U.S.C. § 706(2)(F).

to remand this matter to the Deputy Chief for reconsideration on the issue of irreparable harm, since that process will take too long to provide VarTec with any meaningful relief. VarTec has provided the Commission with all of the information, and legal argument, that it requires in order to decide whether to grant VarTec's Emergency Motion for Stay. VarTec respectfully requests a decision on that motion, either a grant or a denial, so that VarTec can move quickly to pursue its appeals in the courts if that is necessary as the result of the Commission's decision.

Respectfully submitted,

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