

43. Parties opposing grandfathering three-digit CICs and five-digit CACs object to the discrimination that would assertedly result from perpetuating dialing disparity.¹⁴⁴ Sprint, for example, claims that "any proposal which permanently institutionalizes such disparity must be rejected as being contrary to the public interest."¹⁴⁵ Sprint also asserts that VarTec does not provide adequate support for its claim that, in a seven-digit CAC environment, VarTec would be unable to compete for 1+ traffic and to re-educate its customers about the longer CACs.¹⁴⁶ In addition, Sprint, asserting that "it is well established that NANP codes are a public resource, and that use of such codes do [sic] not confer ownership," urges that we reject VarTec's Fifth Amendment claim.¹⁴⁷ AT&T asserts that complete conversion across-the-board would "put all carriers at parity by not requiring disparate dialing patterns."¹⁴⁸

44. In response to arguments that co-existence of five and seven-digit CACs would harm competition, VarTec states that, to the contrary, co-existence would increase competition by eliminating the possibility that the customers of five-digit CAC holders will revert to using their primary IXC because of confusion over the CAC change.¹⁴⁹ In response to US WEST's assertion that VarTec should have been aware of the need to expand to four-digit CICs, VarTec argues that because not all LEC switches are technically capable of handling four-digit CICs (an assertion VarTec argues the record supports), and because use of four-digit CICs was not mandatory and was subject to a Commission-proposed six-year transition, it has continued to promote its three-digit CICs.¹⁵⁰ VarTec rejects Sprint's opposition to its Fifth Amendment taking argument. VarTec contends that Sprint's reliance on statements in Commission Orders and industry guidelines that NANP codes are a public resource are insufficient, and that Sprint provides no statutory authority to support the assertion.¹⁵¹ VarTec argues that "CACs are analogous to western water rights which belong to no one, but may be acquired by reason of investment of time and money in application of the resource's productive use."¹⁵²

45. US WEST argues that grandfathering five-digit CACs would "preclude an orderly transition to the use of five-digit CICs, if such a transition ultimately becomes

¹⁴⁴ Sprint Comments at 3-4; AT&T Comments at 4-5; US WEST Comments at 8.

¹⁴⁵ Sprint Reply Comments at 4.

¹⁴⁶ Sprint Comments at 3-4.

¹⁴⁷ Id. at 4, citing NANP Order at para. 4.

¹⁴⁸ AT&T Comments at 5.

¹⁴⁹ VarTec Reply Comments at 3-4.

¹⁵⁰ Id. at 7-8.

¹⁵¹ Id. at 9.

¹⁵² Id.

necessary" instead of leading to an increase in the number of CICs in the long run as VarTec contends.¹⁵³ US WEST suggests that, if expansion to five-digit CICs becomes necessary, the expansion could be accomplished by "opening up the third digit '1' to utilize the numbers 2 through 9" which would "provide far more CICs than grandfathering the existing three-digit CICs, which would preclude the use of the third digit for expansion purposes."¹⁵⁴ US WEST contends that expansion from four to five-digit CICs is "far more reasonable and nondiscriminatory" than grandfathering three-digit CICs as a means of making more CICs available in the long run.¹⁵⁵

46. Both Telco and VarTec, in their reply comments, outline possible ways of allowing further CIC expansion, if necessary. In response to US WEST's concern that grandfathering three-digit CICs will preclude an orderly transition to five-digit CICs, Telco suggests a "sequential grandfathering" scheme:

for present purposes, the Commission can order carriers to assign four-digit CICs in the "1" sequence only after the other sequences -2XXX, 3XXX, etc.- have been used. Once those codes have been assigned, the Commission can reevaluate, based on competitive circumstances and CIC code demand at that time, whether a transition to five-digit CICs is necessary and whether three- and four-digit CIC assignments should be grandfathered. If four-digit CICs are exhausted at such unprecedented rates that the dial-around market is still developing when four-digit codes are used up, the Commission would still have the option of grandfathering four-digit CICs, using the unassigned "1" sequence to properly route CACs, thus allowing a smooth transition to five-digit CICs.¹⁵⁶

Telco argues that sequential grandfathering "eliminates the need for customer re-education, maintains the service status quo for customers, and stabilizes expectations for new entrants regarding the risks and investment for entry."¹⁵⁷ According to Telco, the number of CICs available with grandfathering would be "virtually the same" as under the Commission's current scheme, with only 100 fewer CICs made available with grandfathering.¹⁵⁸ VarTec disputes US WEST's assertion that VarTec's grandfathering plan would preclude future expansion to five-digit CICs, arguing that the plan, which would increase the number of available CACs from 970 to 10,900, would make unlikely the need to expand to five-digit CICs; VarTec further contends that, even if such an expansion did become necessary, its

¹⁵³ US WEST Opposition at 10.

¹⁵⁴ Id. at 7-8. We assume that US WEST is referring to the third digit in the prefix ("101") for all seven-digit CACs.

¹⁵⁵ Id. at 8.

¹⁵⁶ Telco Reply Comments at 8-9.

¹⁵⁷ Id. at n.11.

¹⁵⁸ Id.

grandfathering plan could be modified to accommodate the change and make available an additional 100,000 CICs.¹⁵⁹

3. Discussion

47. We affirm our decision in the CICs Second Report and Order to deny requests that we grandfather three-digit CICs and five-digit CACs in use when the transition ends. For the reasons described below, we affirm our conclusion in the CICs Second Report and Order that grandfathering would make it impossible to assign four-digit Feature Group D CICs outside the 5XXX and 6XXX range, a result we find to be contrary to the public interest. We also find that, even if this impossibility did not exist, grandfathering could lead to significant anticompetitive results that would be counter to the public interest. We reject VarTec's arguments that the CICs Second Report and Order: (1) incorrectly fails to grandfather five-digit CACs; (2) is arbitrary and capricious in violation of the APA; (3) violates the Fifth Amendment by taking VarTec's property; (4) violates the First Amendment by restricting VarTec's commercial speech rights; and (5) violates section 257 of the Communications Act, as amended, and the Regulatory Flexibility Act by imposing barriers to market entry for small businesses.

48. VarTec's Grandfathering Plan. VarTec erroneously contends that grandfathering would work because three-digit CICs beginning with "5" and "6" can continue to co-exist with four-digit CICs beginning with "5" and "6" in the future as they do today. We acknowledge that three-digit CICs beginning with "5" and "6" are currently in use, and that four-digit CICs beginning with the same numbers also are in use, with no conflicts. This situation can continue as long as we do not allow four-digit CICs beginning with a digit other than five or six to be assigned. As emphasized throughout the CICs Second Report and Order, and this Order on Reconsideration, however, continuing CIC demand will compel us to permit the use of four-digit CICs outside the 5XXX and 6XXX range. During the transition, we must continue to ban the use of such codes because if four-digit CICs outside the 5XXX and 6XXX range are assigned while three-digit CICs are still in use, a code conflict would cause the misrouting of calls made using the four-digit CICs and associated seven-digit CACs.¹⁶⁰ Therefore, if we grandfathered three-digit CICs under the existing expansion plan,

¹⁵⁹ VarTec Reply Comments at 2-3. VarTec suggests that if further expansion became necessary, three-digit CICs starting with "2" could be eliminated (with the new CAC format being 102XXXXX). *Id.*

¹⁶⁰ Because Bellcore realized that a permissive dialing period (during which both three-digit and four-digit Feature Group D CICs would be in use) would be necessary, it refrained from issuing three-digit CICs with either a "15" or a "16" as the first two digits. Bellcore anticipated that in order to introduce four-digit CICs in the seven-digit CAC format while three-digit CICs and the five-digit CAC format are still in use, the four-digit CICs would need to begin with different numbers than the first two numbers of any three digit CIC. Because it had not assigned any three digit CICs beginning with a "15" or a "16," Bellcore was able to assign four-digit CICs that utilize the seven-digit CAC format that begin with "5" and "6" (CICs in the 5XXX and 6XXX range). Assigning only this limited number of four-digit CICs during the transition is necessary to avoid a code conflict in which calls would be misrouted. Switches that are programmed only to receive three-digit CICs are able to read only the first three digits received. If three-digit and four-digit CICs beginning with the same number were transmitted to such switches, calls made using four-digit CICs would be misrouted because the last digit would not be read.

assignment of those additional four-digit CICs would not be possible, which would not only hamper new entrants' ability to compete but also waste a scarce numbering resource. As discussed below, the alternatives proposed by VarTec in its plan would make an orderly transition to five-digit CICs difficult, at best.

49. Even, assuming arguendo, it were technically feasible for the Commission to grandfather three-digit CICs and five-digit CACs in use when the transition ends, and still make available for assignment four-digit Feature Group D CICs outside the 5XXX and 6XXX range, we would still decline to do so. We agree with parties arguing that a competitive disparity would result if customers of some carriers could access their services by dialing five-digit CACs, while customers of other carriers would be forced to dial seven-digit codes. Indeed, this disparity was a significant factor in our decision in the CICs Second Report and Order to end the transition on January 1, 1998, and remains a significant reason for our decision on reconsideration to extend the transition only for a short period. Customers who wish to use more than one dial-around service may be confused by the presence of CACs of varying lengths. Moreover, under VarTec's plan, entities assigned three-digit CICs beginning with a "1" would need to relinquish those codes.¹⁶¹ VarTec fails to explain adequately how the harm to those carriers is justified under its grandfathering plan. In addition, we note that the industry already has incurred great expense to accommodate the current expansion plan's permissive dialing period (which allows concurrent use of both three and four-digit CICs).

50. In response to concerns that its grandfathering plan would not allow an orderly transition to five-digit CICs, VarTec proposed a "simple adaptation" of its grandfathering plan.¹⁶² Under VarTec's modified proposal, all three digit CICs starting with "1" would be removed from use so that a switch would not confuse 101XX with 101XXXX. VarTec further claims that if subsequent expansion becomes necessary, three digit CICs starting with the number "2" could be removed from use, so that use of the number "2" would signal that a five digit CIC is about to be dialed (i.e., 102XXXXX).¹⁶³ VarTec fails to provide evidence on the record that this suggested modification to its grandfathering plan would achieve an orderly transition. Similarly, the record is insufficient to support Telco's assertion that its suggested "sequential grandfathering" modification (which appears to be the same as VarTec's modified plan) will permit an orderly transition to five-digit CICs. To the contrary, the proposals suggested by VarTec and Telco will result in the reassignment of three-digit CICs beginning with "1" as the first digit (of which there are at least 70)¹⁶⁴ and will perpetuate dialing disparity between the holders of three-digit and four-digit CICs. In addition, neither party offers any evidence regarding the software and hardware modifications that would be needed to allow switching equipment to accommodate, simultaneously, the three-digit CIC/five-digit

¹⁶¹ According to Bellcore data, there are currently 61 entities assigned such CICs. See Bellcore NANP Administration Memo 92, July 1, 1997.

¹⁶² VarTec Reply Comments at 2-3.

¹⁶³ Id. at 2.

¹⁶⁴ VarTec Petition at 4.

CAC format, the four-digit CIC/seven-digit CAC format, and the five-digit CIC/seven-digit CAC format, nor did either party present evidence regarding the costs of such modifications.

51. VarTec's argument that grandfathering five-digit CACs would be consistent with the notion of "first-come, first served," as sanctioned by the Commission in other contexts is misplaced.¹⁶⁵ VarTec cites the N11 First Report and Order and FNPRM, in which the Commission stated that when a LEC assigns N11 codes, "it must do so in a reasonable, non-discriminatory manner, such as on a first-come, first-served basis,"¹⁶⁶ and to the Commission's pole attachment rules in the Interconnection First Report and Order, in which the Commission found that parties with preexisting attachments may benefit incidentally from newly modified facilities without bearing the costs of the modifications.¹⁶⁷ The reasoning underlying these decisions does not and should not apply to a CIC expansion plan for the benefit of the entire industry. Regarding N11 codes, although the Commission stated that first-come, first-served would be a reasonable, nondiscriminatory manner for assigning N11 codes for local use, the Commission acknowledged that "widely distributed industry numbering documents consistently and unambiguously state that an N11 code assignment is not a permanent assignment and is subject to termination on short notice."¹⁶⁸ In the pole attachment context, the first-come, first-serve principle is not applicable at all. In that context the Commission requires nondiscriminatory treatment of attaching parties by utilities, while recognizing that in some instances there may be incidental beneficiaries when modifications to the attachments on a pole are made.

52. In the CICs Second Report and Order, the Commission concluded that the existence of CACs of varying lengths during the transition did not violate section 201(b)'s prohibition against unreasonable practices¹⁶⁹ or section 202(a)'s prohibition against unreasonable discrimination.¹⁷⁰ In its petition, VarTec interpreted the CICs Second Report and Order to mean that the Commission had found that "the disparity between dialing a five-digit CAC and a seven-digit CAC is not unreasonable under the Act, and that converting all five-digit CACs to seven digits 'would be contrary to the public interest.'"¹⁷¹ We reject

¹⁶⁵ See para. 39, *supra*.

¹⁶⁶ See N11 First Report and Order and FNPRM at para. 21, and n.73, citing Letter from Robert L. Pettit, FCC General Counsel, to David J. Markey, Vice President, BellSouth, dated May 4, 1992. See also N11 First Report and Order and FNPRM at para. 7, cited in VarTec Comments at 7-9 and n.18.

¹⁶⁷ See n.132, *supra*.

¹⁶⁸ See N11 First Report and Order and FNPRM at para. 64 and n.216, citing Bell Communications Research, BOC Notes on the LEC Networks -- 1994 (Issue 2), April 1994 (Network Notes), "Numbering Plan and Dialing Procedures" at 3-8.

¹⁶⁹ 47 U.S.C. § 201(b).

¹⁷⁰ 47 U.S.C. § 202(a); see CICs Second Report and Order at para. 32.

¹⁷¹ VarTec Petition at 5, quoting CICs Second Report and Order at para. 32.

VarTec's interpretation. In the CICs Second Report and Order we did not state that converting all five-digit CACs to seven-digit CACs would be contrary to the public interest. Rather, after discussing the ways in which a flash-cut conversion would be detrimental to various entities,¹⁷² we stated that "a flash-cut conversion to four-digit CICs . . . would be contrary to the public interest."¹⁷³ In other words, the Commission expressed concern not about the propriety of moving from five to seven-digit CACs, but about the potentially significant disruption that could result from a "flash-cut" conversion to seven-digit CACs. For this reason, we instituted a transition process for the phase-in of four-digit CICs. Our determination that the resulting variation in CAC lengths during the transition do not violate Sections 202(a) and 201(b) was limited to the transition period.

53. Arbitrary and Capricious Arguments. VarTec also asserts erroneously that its grandfathering proposal would make more CICs and CACs available in the long run, that the CICs Second Report and Order fails to accomplish the Commission's objectives in the CICs NPRM of ensuring that an adequate number of CICs is available, and that, as a result, our decision is arbitrary and capricious, in violation of the APA.¹⁷⁴ To the contrary, we find that VarTec's plan would result in the same number of assignable Feature Group D CICs as the current expansion plan, but with significantly greater disruption and cost to industry and the public.

54. As a preliminary matter, VarTec does not define "long run" in its petition. We assume that by "long run" VarTec means until all five-digit CICs are assigned.¹⁷⁵ Under VarTec's plan, a caller using a five-digit CAC could not complete his call when a five-digit CIC/seven-digit CAC format is introduced.¹⁷⁶ With five-digit CICs and seven-digit CACs, the switching equipment must be programmed to receive the five-digit CIC, preceded by the digits "10." After that programming change occurs, the same switching equipment will be unable to process the three-digit CICs also preceded by the digits "10." If a five-digit CAC using a three-digit CIC is dialed, the switching equipment will assume that the call has been abandoned, and disconnect the call because the switch did not receive the final two digits of the seven-digit CAC. Because at the time of introduction of five-digit CICs, three-digit CICs must cease to be used, we reject VarTec's argument that its grandfathering plan will make more CICs available in the "long run." The industry plan and VarTec's plan would make the same number of CICs available.

¹⁷² See CICs Second Report and Order at n.118, referring to discussion at para. 30.

¹⁷³ Id. at para. 32.

¹⁷⁴ VarTec Petition at 9-10.

¹⁷⁵ A seven-digit CAC can support CICs up to only five digits in length. See ICCF Committee No. 16 Conference, San Antonio, TX, March 1-2, 1989 (presentation on Carrier Identification Codes by Magdeline Bogdan, Bellcore, p. 8).

¹⁷⁶ Call completion occurs when the telephone numbers dialed by the consumer are "translated" (recognized and processed), resulting in the caller reaching the called party. In the CICs context, this means that the CAC is "translated" to connect the caller with the carrier.

55. In addition, because with VarTec's plan three-digit CIC holders would need to replace their three-digit CICs and five-digit CACs with five-digit CICs and seven-digit CACs immediately upon assignment of the first five-digit CIC with no transition possible, we agree with US WEST that grandfathering would "preclude an orderly transition to the use of five-digit CICs, if such a transition ultimately becomes necessary."¹⁷⁷ Under the current plan which calls for all CICs to have the same number of digits, callers will not need to change dialing patterns even after five-digit CICs are introduced, because CACs could continue to be seven digits long. For a carrier assigned a four-digit CIC, end users could continue to dial the exact same seven-digit CACs because the third digit of a seven-digit CAC would become the first digit of a carrier's new five-digit CIC. For example, the four-digit CIC "0698" (a four-digit CIC converted from the three-digit CIC "698"), would become the five-digit CIC "10698," but the CAC would remain the same before and after the conversion to five-digit CICs: "1010698."¹⁷⁸

56. Fifth Amendment Arguments. In support of its argument that the Commission has violated the Fifth Amendment in deciding to eliminate five-digit CACs, VarTec argues that the Commission has "taken," without just compensation, VarTec's property interests in its: (1) goodwill; (2) service marks; and (3) entitlement to engage in its trade and business using CACs. The Bureau rejected these arguments when it denied VarTec's emergency motion for stay of implementation of the CICs Second Report and Order. We too reject these arguments.¹⁷⁹ Although the focus of the CICs Stay Order was to address whether VarTec had shown that it would be irreparably harmed absent a stay of the CICs Second Report and Order, the reasoning upon which the Bureau based its decision to deny the stay is applicable here.

57. First, we find that VarTec has not demonstrated that the CICs Second Report and Order caused a loss of its goodwill. All three-digit CICs that currently are the suffixes of five-digit CACs will not be eliminated. Instead, they will become, by the addition of a preceding "0," four-digit CICs, that are the suffixes of seven-digit CACs.¹⁸⁰ Thus, any seven-digit CAC that might easily be confused with a five-digit CAC (i.e., 10636 and 1010636) would both correspond to the same carrier, in this example, VarTec. For this reason, we find that customer confusion between VarTec and a competitor, and the tarnishing of VarTec's reputation, is unlikely.¹⁸¹ Moreover, VarTec may act to preserve its customer base, by, for

¹⁷⁷ See supra paras. 45 and n.153, quoting US WEST Opposition at 10. VarTec contends that eventual expansion to five-digit CICs will likely be unnecessary. The Commission addresses issues related to CIC use and assignment in the CICs FNPRM issued on October 9.

¹⁷⁸ See also US WEST Comments at 7-8 (suggesting "opening up the third digit '1' to use the numbers 2 through 9").

¹⁷⁹ In its comments supporting reconsideration, CGI and CommuniGroup repeat the arguments VarTec makes in its petition for reconsideration.

¹⁸⁰ See CICs Stay Order at para. 14, and n.37, citing CICs Second Report and Order at n.2.

¹⁸¹ See CICs Stay Order at paras. 14-15.

example, educating its customers about the need to, and how to, dial the expanded CAC format.¹⁸²

58. Second, we find that VarTec's service mark argument fails. While we agree with VarTec that trademarks and service marks are property rights, we find that because CICs and CACs are telephone numbers and, therefore, a public resource, there can be no private ownership of them. We specifically reject VarTec's assertion that there is a lack of legal authority to support the propositions that NANP codes are a public resource, and that use of such codes does not confer ownership.¹⁸³

59. The 1996 Act amendments to the Communications Act confer upon the Commission "exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States," and direct the Commission to ensure that numbers are available on an equitable basis.¹⁸⁴ On several occasions, including occasions preceding the enactment of the 1996 Act, the Commission has determined that "[telephone] numbers are a public resource, and are not the property of the carriers."¹⁸⁵ Other public switched network routing information, such as CACs, also are part of that public resource, and do not become the property of carriers or their customers.¹⁸⁶ In the recent N11 First Report and Order and FNPRM, for example, we noted that N11 codes are essential public resources that serve important national and state goals.¹⁸⁷ Moreover, in the CICs Stay Order, where the Bureau rejected VarTec's request for a stay of the transition from three-digit to four-digit CICs, the Bureau stated that:

¹⁸² See id. and nn.38-39.

¹⁸³ We note that CGI and CommuniGroup, in their comments, stated that the two companies "own" the following CACs: CGI, numbers 10778, 10975, and 10998, and CommuniGroup, numbers 10268 and 10885. CGI and CommuniGroup Comments at n.2.

¹⁸⁴ 47 U.S.C. § 251(e)(1).

¹⁸⁵ See N11 First Report and Order and Further NPRM at para. 71; 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, Memorandum Opinion and Order, 59 Rad. Reg. 2d 1275, 1284 (1986); 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 Radio Common Carrier Service, Appendix B Commission Policy Statement, 59 Rad. Reg. 2d (P&F) 1275, 1284 (1986).

¹⁸⁶ "Numbers are the means by which businesses and customers gain access to, and reap the benefits of, the public switched telephone network. These benefits cannot be fully realized, however, unless numbering resources of the NANP are administered in a fair and efficient manner that makes them available to all parties desiring to provide telecommunications services." See Administration of the North American Numbering Plan, Report and Order, CC Docket No. 92-237, 11 FCC Rcd 2588 (1995).

¹⁸⁷ N11 First Report and Order and FNPRM at para. 71.

carriers do not 'own' codes or numbers . . . rather, they use them for the efficient operation of the public switched telephone network. Telephone numbers, including CICs and CACS, are a national public resource. Thus, VarTec's arguments premised on ownership of its CICs and CACS, including the Fifth Amendment argument, are unfounded.¹⁸⁸

We note that Bellcore, as current administrator of the NANP,¹⁸⁹ has also characterized numbers as a public resource and has specifically rejected the concept that the assignment of a number implies ownership by either the assignor or assignee.¹⁹⁰ The CIC Assignment Guidelines expressly state that "[a]ssignment of a CIC to an entity in no way implies or infers ownership of the public resource by the entity."¹⁹¹ VarTec cites no case law to support its position that ownership of CACS is similar to that of western water rights (with acquisition resulting "by reason of investment of time and money in application of the resource to productive use") and we, therefore, find that argument unpersuasive.

60. VarTec's reliance on American Express Travel Related Services Co. v. Accuweather, Inc.¹⁹² to support the proposition that it has service mark rights in its CACS is equally misplaced. According to VarTec, the court there "recogniz[ed] service mark rights in a particular telephone number promoted in the sale of the telephone number's owner's services."¹⁹³ The court, in American Express, however, did not base its decision on the ownership of numbers as a protected property interest. Instead, the court's holding was based on the parties' contract and principles of contract law.¹⁹⁴ We do not interpret American Express to hold that numbers, even those extensively advertised by a carrier, are necessarily owned by the entities assigned them, and therefore eligible for service mark or other protection. Further, we note that, in the promotional materials attached to its petition, VarTec does not appear to claim service mark interests in any of its CICs or CACS. Rather, VarTec's

¹⁸⁸ CICs Stay Order at para. 16 and nn.40-42.

¹⁸⁹ In an Order released October 9, 1997, the Commission named Lockheed Martin as the new NANP administrator to replace Bellcore. See Administration of the North American Numbering Plan, Third Report and Order, CC Docket No. 92-237; Toll Free Service Access Codes, Third Report and Order, CC Docket No. 95-155, FCC No. 97-372 (rel. Oct. 9, 1997). Bellcore will continue as the NANP administrator until its functions are transferred to Lockheed Martin. See Administration of the North American Numbering Plan, Report and Order, CC Docket No. 92-237, 11 FCC Rcd 2588 (1995) at para. 108.

¹⁹⁰ See Personal Communications Services N00 NXX Code Assignment Guidelines, para. 2.10 (April 8, 1995 Revision).

¹⁹¹ CIC Assignment Guidelines, September 1996 at section 1.2.

¹⁹² 849 F. Supp. 233, 240 (S.D.N.Y. 1994), aff'd sub nom., 105 F.3d 863 (2d Cir. 1997) (American Express).

¹⁹³ See VarTec Petition at n.33.

¹⁹⁴ See American Express, 849 F. Supp. at 240.

materials only place service mark notifications adjacent to phrases that clearly identify its services, such as "10 Talk" and "Choice Communications." Moreover, VarTec has not provided any documentary evidence, for example, a customer survey, to support VarTec's claim that its customers identify VarTec by its CAC. That type of evidence is commonly used to establish ownership and use of a name sufficient for trademark or service mark protection.

61. Third, we disagree with VarTec's assertion that the Commission's Second Report and Order interferes with VarTec's entitlement to engage in its trade and business using CACs. After full conversion to four-digit CICs and seven-digit CACs, VarTec can still conduct its business, but it will be required to do so on an equal footing with other carriers. We find this result to be in the public interest. As noted above, VarTec may take various actions to preserve its relationship with its customers, such as educating its customers about the need to, and how to, dial the expanded CAC format. Such actions should enable VarTec to continue its dial-around business without disruption or loss of business.

62. Even if we assume, for purposes of argument, that VarTec could have acquired an interest in its CACs, warranting Fifth Amendment protection, VarTec still has failed to demonstrate a takings under applicable Supreme Court decisions.¹⁹⁵ Under those decisions, the determination of whether a Fifth Amendment violation has occurred requires a balancing of competing interests and depends largely on the particular circumstances of the case.¹⁹⁶ In examining those facts, the Court has considered several factors, including the character of the governmental action and its economic impact on the claimant.¹⁹⁷ In looking at the nature of the governmental action, the Court has recognized that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."¹⁹⁸ Moreover, a taking is more likely to be found if the government has acquired for its own use a resource to permit or facilitate public functions.¹⁹⁹ The extent to which a governmental action has interfered with distinct investment-backed expectations is particularly relevant in examining the economic impact of the regulation on the claimant.²⁰⁰

63. In the present case, the governmental action cannot be characterized as a physical invasion of VarTec's property. Instead, it is more appropriately described as an

¹⁹⁵ See, e.g., Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1982).

¹⁹⁶ Id. at 124, citing United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1952).

¹⁹⁷ Penn Central Transp. Co., 438 U.S. at 124, citing United States v. Causby, 328 U.S. 256 (1946); Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

¹⁹⁸ Penn Central Transp. Co., 438 U.S. at 124, citing United States v. Causby, 328 U.S. 256.

¹⁹⁹ Penn Central Transp. Co., 438 U.S. at 124, citing United States v. Causby, 328 U.S. 256.

²⁰⁰ Penn Central Transp. Co., 438 U.S. at 124, citing Goldblatt v. Hempstead, 369 U.S. at 594.

adjustment to the benefits and burdens of economic life to promote the public good. Although the adjustment to expand all three-digit CIC holders' CICs to four digits may cause some inconvenience or burden to those CIC holders in the short-term, the adjustment is necessary to allow all carriers to compete on an equal basis. Moreover, the government will not acquire VarTec's CAC for its own use. Indeed, the Commission has not taken VarTec's CAC at all. To the contrary, the CICs Second Report and Order simply furthers implementation of industry's CIC expansion plan by establishing an end to the transition from three to four-digit CICs. As part of that plan, all three-digit CICs, including VarTec's, will be expanded to four-digit CICs, and five-digit CACs will be expanded to seven-digit CACs.

64. We also reject VarTec's argument that the CICs Second Report and Order interferes with its "reasonable investment-backed expectation" in its CACs.²⁰¹ VarTec's claim that it spent significant resources promoting its five-digit CACs because "until the institution of this proceeding VarTec had no reason to suspect that the Commission would attempt to take away VarTec's CACs" is unfounded.²⁰² As noted above, the Commission, in the CICs Second Report and Order, did not "take away" VarTec's, or any other three-digit CIC holder's, CICs or CACs. Reassignment of three-digit CICs is not a part of the expansion plan.²⁰³ Instead, to ensure an orderly transition to four-digit CICs and the nondiscriminatory treatment of all CIC holders, a "0" will precede CIC holders' current three-digit CICs to form four-digit CICs and current five-digit CACs will become the suffixes of seven-digit CACs. For example, one of VarTec's three-digit CICs, "636," will now become the four-digit CIC, "0636."

65. We also find that VarTec's claims that it had no knowledge of the plan to expand from three to four-digit CICs prior to the institution of this proceeding are not credible.²⁰⁴ The industry began working on the expansion of three to four-digit CICs in 1987. Moreover, it published the plan for expansion from three to four-digit CICs, and corresponding five to seven-digit CACs, in April 1991, prior not only to the Commission's issuance of the CICs NPRM, but also to the National Association of Regulatory Utility Commissioners' Petition for Notice of Inquiry in September 1991.²⁰⁵ The plan to expand to four-digit CICS was generally available within the industry and we believe that members of the industry were aware of it well before the release of the CICs NPRM. For these same reasons, we also are not persuaded by VarTec's claim that the CICs Second Report and Order interferes with VarTec's reasonable investor-backed expectations. A governmental action

²⁰¹ VarTec Petition at 13.

²⁰² See id.

²⁰³ See CICs Stay Order at para. 14.

²⁰⁴ We note that at least one of VarTec's CICs, "636," was assigned in September 1994, after the institution of this proceeding.

²⁰⁵ See ICCF Expansion Plan, April 1991, cited in n.2, supra.

readjusting rights and burdens is not unlawful solely because it "upsets otherwise settled expectations" even if new duties or liabilities are imposed.²⁰⁶

66. VarTec also has not demonstrated that the Commission's action in the CICs Second Report and Order causes it economic harm of the magnitude necessary to establish a Fifth Amendment takings under Commission precedent.²⁰⁷ To establish a takings claim under the Fifth Amendment, for example, common carriers challenging rates prescribed by the Commission must show that the rates paid by ratepayers would "jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital."²⁰⁸ The claimants also must demonstrate that the government-prescribed rates fail to compensate investors for the risks associated with their investments.²⁰⁹ Aside from bald assertions of financial harm, VarTec does not make a showing of harm necessary to support a takings claim under the Fifth Amendment.

67. The cases relied on by VarTec are inapposite.²¹⁰ For example, VarTec cites the Lucas case²¹¹ for the proposition that the Commission has effected a per se taking of its property.²¹² In Lucas, the court concluded that a government regulation prohibiting the construction of any permanent habitable structures on the plaintiff's land effected a total destruction of the value of the plaintiff's property. The effect of the Commission's decision here, in contrast, is simply to add a "0" to VarTec's current three-digit CIC ("636" becomes "0636") and the digits "10" to VarTec's CAC ("10636" becomes "1010636"). The Commission has not confiscated VarTec's alleged property or destroyed its value. Moreover, the Commission has provided a reasonable transition within which VarTec may educate its

²⁰⁶ See Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 645-46, citing Usery v. Turner Elkhorn, 428 U.S. 1, 16 (1976). The Supreme Court in Concrete Pipe also affirmed the principle that where a particular field is subject to federal regulation, those who enter the regulated field cannot object if the "legislative scheme" is later buttressed by amendments to achieve the legislative end. Id. at 645.

²⁰⁷ See, e.g., Concrete Pipe, 508 U.S. at 645 ("[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking.").

²⁰⁸ See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 2220, 2244 (1996); see also Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, Order, CC Docket No. 89-624, 5 FCC Rcd 7507 (1990), on recon., 6 FCC Rcd 7193 (1991), aff'd sub nom. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993).

²⁰⁹ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Report and Order, First Order on Reconsideration, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 2220.

²¹⁰ VarTec Petition at 10-17.

²¹¹ Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

²¹² VarTec Petition at 14.

customers. As discussed above, the Commission also is requiring LECs to offer an intercept message that will inform callers of the change in dialing patterns and that will assist VarTec in educating its customers about the changes in CAC dialing. Thus, the facts and reasoning of the Lucas case do not apply in the present context. Other cases cited by VarTec are similarly distinguishable.

68. In sum, to determine whether government action is confiscatory, and therefore may violate the Fifth Amendment, the Court has looked at the financial impact of that action.²¹³ The end result of the CICs Second Report and Order is that all CIC holders must convert to four-digit CICs and, accordingly, must compete on an equal footing. We conclude that this end result falls far short of a Fifth Amendment takings. Thus, we reject VarTec's arguments on this point.

69. First Amendment Arguments. VarTec argues that its CACs are service marks that constitute commercial speech warranting protection under the First Amendment.²¹⁴ VarTec claims that the service marks in question, its CACs, are entitled to First Amendment protection because they serve "as indications of the origin of VarTec's services (the function of a service mark)" and "communicate useful information to consumers regarding the manner in which VarTec's services can be utilized."²¹⁵ VarTec asserts that the Commission's decision in the CICs Second Report and Order fails the Supreme Court's test that commercial speech restrictions must pass,²¹⁶ because there is no "reasonable fit" between the governmental action and the government's interest.²¹⁷ We conclude that we need not apply the Central Hudson test for three reasons. First, with respect to its CICs and CACs, VarTec does not provide, nor exercise discretion over, the content of the information contained in its particular CICs and CACs. These CICs and CACs were assigned to VarTec by a third party. The inherent technical nature and purpose of CICs and CACs requires that the content of CICs and CACs be fixed when assigned and remain fixed thereafter while the particular CICs and CACs are in use. VarTec thus did not create the original content of the CICs and CACs it uses, and any unilateral alteration by VarTec of their content would make them unusable for the purpose intended. This absence of original content creation and editing control means that the use of

²¹³ See Rules and Policies Regarding Calling Number Identification Service--Caller ID, CC Docket No. 91-281, 10 FCC Rcd 11700, 11716 (1995), Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Notice of Proposed Rulemaking, *aff'd sub nom. California v. FCC*, 75 F.3d 1350 (9th Cir. 1996), citing FPC v. Hope Natural Gas Co., 320 U.S. 591 (1994) and Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

²¹⁴ VarTec Petition at 17. According to VarTec, commercial speech is speech that proposes a commercial transaction. *Id.*, citing Board of Trustees of SUNY v. Fox, 492 U.S. 469, 473-74 (1989). VarTec also claims that trademarks, trade names and other symbols used to communicate information to consumers about an owner's products or services are forms of commercial speech. VarTec Petition at 17.

²¹⁵ VarTec Petition at 17.

²¹⁶ See *id.* at 18, citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557 (1980) (Central Hudson).

²¹⁷ VarTec Petition at 19, citing Board of Trustees, 492 U.S. at 480.

the CICs and CACs by VarTec does not constitute speech subject to First Amendment protection.²¹⁸ Second, VarTec has not demonstrated that its customers identify VarTec by its CICs and CACs in the manner necessary to establish service mark or trademark interests in its CICs and CACs. Therefore, no commercial interest exists that arguably might warrant First Amendment protection. Finally, VarTec has not cited any legal authority for the proposition that telephone numbers such as CICs and CACs constitute speech, commercial or otherwise. For the foregoing reasons we conclude that there is no commercial speech with respect to VarTec's use of its CICs and CACs; hence, there can be no First Amendment violation.

70. Even assuming, arguendo, that VarTec's CACs constituted commercial speech, the Commission's decision is a permissible restriction under the test set forth in Central Hudson.²¹⁹ Under Central Hudson, if the commercial speech is not misleading or related to unlawful activity, a restriction on that speech is lawful and does not violate the First Amendment if: (1) the government has a substantial interest to be achieved by the restriction; and (2) the limitation on the expression is designed carefully to achieve the government's goal.²²⁰ Compliance with the second element of the Central Hudson test may be measured by two criteria. First, the restriction may not provide only ineffective or remote support for the government's purpose. Instead, it must directly advance the governmental interest. Second, a "reasonable fit" must be present between the government's ends and the means chosen to accomplish those ends.²²¹ The "fit" need not be perfect; it simply must be reasonable and "in proportion to the interest served."²²²

71. Applying the Central Hudson test, we reject VarTec's argument that the CICs Second Report and Order violates the First Amendment. Although the information VarTec seeks to protect is not misleading or otherwise related to unlawful activity, the governmental interest in any restriction on that speech is substantial and the CICs Second Report and Order directly advances that interest. CICs are the essential means by which LECs provide interexchange access services. Without an adequate supply of CICs, competition in the telecommunications market will be thwarted because new entrants will be unable to gain access to LECs' networks. Thus, the government has a substantial interest in ensuring that a

²¹⁸ Cf. Turner Broadcasting Sys., Inc. v. FCC, 114 S. Ct. 2445, 2456 (1994); Implementation of the Non-accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21947 (1996).

²¹⁹ VarTec Petition at 18.

²²⁰ Central Hudson, 447 U.S. at 563.

²²¹ Board of Trustees, 492 U.S. at 479. Board of Trustees refined the Central Hudson test. Rather than requiring that the restriction on commercial speech must not be more excessive than would serve the governmental interest, under Board of Trustees, the government need only show a "reasonable fit" between the government's ends and the means chosen to accomplish those ends. See also Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1510 (1996); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 416 (1993); United States v. Edge Broadcasting Co., 509 U.S. 418, 429 (1993).

²²² Board of Trustees, 492 U.S. at 479, citing In re R.M.J., 455 U.S. 191, 203 (1982).

sufficient supply of CICs is available for the continued growth of the telecommunications market. Industry has long recognized the need for an adequate supply of CICs and began to plan for the expansion to four-digit CICs prior to the Commission's decision in the CICs Second Report and Order.²²³

72. The CICs Second Report and Order directly advances the government's interest in maintaining an adequate supply of CICs. That order continues the implementation of the expansion plan developed by industry in 1991,²²⁴ instituted because industry recognized that expansion from three-digit CICs to four-digit CICs was necessary to ensure an adequate supply of CICs.²²⁵ Thus, the Commission's decision in the CICs Second Report and Order, continuing the implementation of industry's expansion plan, is "carefully calculated" to avoid market disruption or burdening speech as it ensures that all market participants receive equitable treatment as the market expands.

73. We reject VarTec's contention that its grandfathering plan "better achieves" the government's interest than a nondiscriminatory expansion to four-digit CICs.²²⁶ As discussed above, we find that VarTec's grandfathering plan would not result in a greater number of available CICs than the current industry expansion plan.²²⁷ To the contrary, if the Commission grandfathered three-digit CICs under the existing expansion plan, assignment of four-digit CICs outside the 5XXX and 6XXX range would not be possible.²²⁸ Furthermore, VarTec admits that its plan would require a complete change in the CICs, and consequently in the CACs, of the holders of 70 CICs and a random reassignment of a CIC to those entities.²²⁹ VarTec fails to justify the discriminatory treatment its plan would inflict upon those CIC holders. The industry plan, on the other hand, treats all CIC holders equally.²³⁰ Finally, and most importantly, we find that VarTec's grandfathering plan would create long term, significant discrimination in dialing patterns. Whereas the current plan to expand all three-digit CICs to four digits requires the customers of all carriers to dial a seven-digit CAC to reach their service provider, under VarTec's plan, the customers of carriers with three-digit

²²³ See ICCF Expansion Plan, April 1991, cited in n.2, supra.

²²⁴ See id.

²²⁵ Id. (stating that when the supply of 3-digit FG D CICs is exhausted, FG D CICs will be expanded to four digits).

²²⁶ VarTec Petition at 19.

²²⁷ See paras. 53-54, supra.

²²⁸ The NANP Administrator will be free to assign CICs outside of the 5XXX and 6XXX range when the transition from three to four-digit CICs ends on June 30, 1998.

²²⁹ VarTec Petition at 4.

²³⁰ The expansion plan provides that all three-digit CICs will be converted to four digits by the addition of a preceding "0."

CICs could reach their service providers by dialing only five digits. This aspect of VarTec's grandfathering plan would create a significant competitive imbalance at odds with the underlying procompetitive policies of the Communications Act.

74. The other cases cited by VarTec in support of its claim that the CICs Second Report and Order violates its First Amendment rights²³¹ are clearly distinguishable from the instant case. Each of the cited cases involved a ban on particular forms of commercial speech.²³² A ban is not involved here. Rather, the CICs Second Report and Order reasonably alters the manner in which VarTec and its customers will communicate in order to enter into a transaction at the same point of purchase as before, by requiring the dialing of a seven-digit CAC, rather than the dialing of a five-digit one. VarTec is therefore not prohibited from transacting business or otherwise communicating with its customers; the intrusion on its commercial speech rights, if any, is minimal.

75. In sum, we conclude that an important governmental interest is served by the Commission's determination, consistent with industry's plan, that all three-digit CICs should be expanded to four digits, to ensure an adequate supply of CICs and vigorous competition in the telecommunications market. The CICs Second Report and Order directly advances that interest by implementing the expansion plan in, what the Commission believes, is the most reasonable and nondiscriminatory way. The means chosen by industry and affirmed by the Commission in the CICs Second Report and Order, an across-the-board conversion from three to four-digit CICs, is a "reasonable fit" with the objective of ensuring that the pool of available CICs is sufficient to meet the demand for CICs and to accommodate new entrants. Thus, we find that the First Amendment is not violated by any alleged restriction to VarTec's "commercial speech."

76. Section 257 and Regulatory Flexibility Arguments. VarTec's argument that the CICs Second Report and Order violates section 257 of the Communications Act,²³³ as amended, and the Regulatory Flexibility Act²³⁴ is unfounded. We stated in the CICs Second Report and Order that the transition to the use of only four digit CICs will "[s]erve the goal of section 257 . . . by reducing barriers to entry of new small carriers and perhaps other small

²³¹ VarTec Petition at 19, citing City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 1510 n.13 (1993); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1593 (1995); Hornell Brewing Co., v. Brady, 819 F. Supp. 1227, 1239 (E.D.N.Y. 1993).

²³² See, e.g., City of Cincinnati, 507 U.S. 410 (banning the distribution of "commercial handbills" on public property); Rubin, 115 S. Ct. 1585 (banning beer bottle labels from displaying alcoholic content); Hornell Brewing, 819 F. Supp. 1227 (banning the use of the name "Crazy Horse" on alcoholic beverages).

²³³ 47 U.S.C. § __, et seq.

²³⁴ 5 U.S.C. § 601, et seq.

entities."²³⁵ The directive to eliminate "barriers to entry" does not mean that we must give preference to small carriers. In the CICs Second Report and Order, we were careful to treat all carriers the same, whether large, small, incumbent provider, or new market entrant. When the conversion to four-digit CICs is completed, more CICs will be available to new market entrants, many of whom will be smaller carriers.²³⁶ Thus, contrary to VarTec's claims, we conclude that the actions taken in the CICs Second Report and Order and today eliminate market entry barriers and advance the procompetitive purposes of the Act.

IV. ORDER ON APPLICATION FOR REVIEW

A. Position of Parties

1. VarTec Application

77. In its application for review of a Common Carrier Bureau decision denying its request for a stay of the CICs Second Report and Order, VarTec argues that the Bureau erred in determining that VarTec would not suffer irreparable harm absent a stay.²³⁷ VarTec argues that, contrary to the Bureau's determination, VarTec demonstrated that certain harm would occur.²³⁸ VarTec claims that, because of its billing and collection arrangements with LECs, VarTec is unable to identify its customers in order to communicate directly with them about change in CAC dialing, and must instead rely on mass marketing techniques. This arrangement, according to VarTec, makes it impossible for the company properly to educate its customers about the important change in dialing.²³⁹ VarTec asserts that the inability to alert each of its customers about the change in dialing, compounded by the fact that the LECs are not required to provide intercept messages after January 1, 1998, will cause VarTec to lose a significant portion of these customers.²⁴⁰ In addition, VarTec argues that: (1) the Bureau erred in its application of legal precedent to determine that VarTec will be able to recover economic loss alleged as a result of the CICs Second Report and Order²⁴¹ and that VarTec does not "own" its CACs;²⁴² (2) the Bureau failed to address VarTec's claim of

²³⁵ See CICs Second Report and Order at n.110, citing 47 U.S.C. § 257. The Commission issued a Notice of Inquiry in May 1996 to begin implementing Section 257. See In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Notice of Inquiry, GN Docket No. 96-113, 11 FCC Rcd 6280 (1996).

²³⁶ See CICs Second Report and Order, Final Regulatory Flexibility Analysis, at Appendix A, para. 2.

²³⁷ See VarTec Application at 2.

²³⁸ Id. at 3.

²³⁹ Id. at 4-6.

²⁴⁰ Id. at 5-6.

²⁴¹ Id. at 7-8.

²⁴² Id. at 10-11.

irreparable harm that would result from First Amendment violations; and (3) the CICs Stay Order violates the APA as being arbitrary and capricious, an abuse of discretion pursuant to delegated authority, contrary to the Fifth and First Amendments, and unwarranted by the record.²⁴³

2. US WEST Opposition

78. In its opposition to VarTec's application for review, US WEST claims that the Bureau was correct in denying VarTec's motion for stay. US WEST asserts that granting VarTec's motion would cause others substantial harm by way of competitive disparity. US WEST also claims that VarTec raised no new matters in its motion.²⁴⁴ US WEST also disputes VarTec's claimed inability to educate its customers properly.²⁴⁵ US WEST asserts that the industry had been aware for some time prior to issuance of the CICs Second Report and Order that education about expanded CICs and CACs would be necessary, and that VarTec, therefore, should have been taking steps to educate its customers.²⁴⁶ US WEST also suggests ways in which VarTec effectively can use mass marketing techniques to alert customers to the dialing changes resulting from the expansion from three to four-digit CICs and from five to seven-digit CACs (including inserting a conspicuous message in its mailings to customers and using other types of mass market communications vehicles such as radio and television).²⁴⁷ In response to VarTec's argument that its problems are particularly acute because LECs are not required to provide intercept messages, US WEST asserts that it currently provides an intercept message when an access code is misdialed or is not active in its region, a practice which it plans to continue after the transition.²⁴⁸ US WEST also contends that such a message will likely be provided by most LECs, alleviating any harm that VarTec might otherwise suffer.²⁴⁹

²⁴³ Id. at 11-12, citing 5 U.S.C. §§ 706(2)(A),(B)(F).

²⁴⁴ US West Application Opposition at 2.

²⁴⁵ Id. at 3-7.

²⁴⁶ Id. at 5-7.

²⁴⁷ Id. at 5.

²⁴⁸ US WEST asserts that, in most US WEST switches, the intercept message states: "We're sorry, your call cannot be completed with the access code you dialed. Please check the code and dial again, or call your long distance carrier for assistance." US WEST September 16, 1997 Ex Parte Filing at 1. In some US WEST switches, the intercept message states: "We're sorry, your call cannot be completed as dialed. Please check the number and dial again." Id.

²⁴⁹ Id. at 7. US WEST notes also that it has brought before the Alliance for Telecommunications Industry Solutions' Network Interconnection Interoperability Forum (NIIF) the subject of a standardized intercept message. US WEST states that the issue is on the agenda for the forum's October 1997 meeting. Id. The proposed standardized wording before the NIIF is "We're sorry, your call cannot be completed with the access code you dialed. Please check the code and dial again, or call your long distance carrier for assistance." Id. at 2, attaching NIIF Issue Identification Form, 3 Digit CIC Announcement, August 21, 1997.

B. Discussion

79. For the reasons discussed below, we find that the Bureau did not err in denying VarTec's motion for stay of implementation of the CICS Second Report and Order. In its application for review, VarTec relies heavily on the absence of a requirement that LECs provide intercept messages after the transition to demonstrate that, contrary to the Bureau's finding, VarTec would be harmed absent a stay. VarTec, in its motion for stay, did not rely on the need for an intercept message to make its showing of irreparable harm. Commission procedural rules regarding applications for review require that the application rely on questions of fact or law upon which the designated authority has been afforded an opportunity pass.²⁵⁰ VarTec's application fails to comply with this requirement. This failure alone would warrant denial of the application. Because the intercept message issue was raised in petitions for reconsideration, which we are addressing concurrently with VarTec's application for review, we will, nonetheless, consider VarTec's application for review, and, specifically, the issue of intercept messages.

80. In the Order on Reconsideration, we conclude that LECs must offer an intercept message, explaining that a dialing pattern change has occurred, and instructing the caller to contact its IXC for further information.²⁵¹ In addition, US WEST's opposition makes it apparent that local exchange carriers are aware of the importance of intercept messages to a smooth transition to four-digit CICs and seven-digit CACs. We find that the Commission's requirement that LECs provide intercept messages will significantly reduce any harm that VarTec may arguably suffer as a result of CIC expansion.

81. We agree with the Bureau, notwithstanding the intercept issue, that VarTec's claim of irreparable harm must fail because the economic harm VarTec claims it will suffer is speculative. As the Bureau stated, "VarTec may take actions to preserve its customers, such as educating them about the need to, and how to, dial the expanded CAC format."²⁵² While we acknowledge that VarTec's mass mailings may not reach all of VarTec's customers because billing and collection from those customers is handled by LECs,²⁵³ we agree with US WEST that VarTec can still adequately educate its customers, for example, by inserting a conspicuous message in its mass mailings. Existing dial-around customers that VarTec may be unable to contact directly, and who, according to VarTec, may ignore mass mailings even if they receive them,²⁵⁴ will be more likely to notice mass mailings if they include a conspicuous message. Inclusion in mass mailings of a conspicuous message about the change in VarTec's CAC will increase the likelihood that VarTec's existing customers will be alerted

²⁵⁰ 47 C.F.R. § 1.115 (c).

²⁵¹ See para. 26, *supra*.

²⁵² See CICs Stay Order at para. 15.

²⁵³ See VarTec Application at 5.

²⁵⁴ See *id.*

to this important change. We also note that VarTec still may be able to contact some of its customers directly, by matching the phone numbers of its customers with their addresses (provided by the LECs). In this way, VarTec will be able to provide direct mailings to its customers to inform them of the change in reaching VarTec through its CACs.

82. We disagree with VarTec that the Bureau erred in rejecting VarTec's Fifth Amendment and First Amendment claims. VarTec presented both of these issues in its Petition for Reconsideration and we rejected both arguments.²⁵⁵ Thus, for the reasons stated in the Order on Reconsideration, we also reject VarTec's arguments here.

V. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

A. Background

83. In the Independent Telephone Company Equal Access Report and Order,²⁵⁶ the Commission recognized differences between independent telephone companies other than GTE on the one hand, and GTE and the Bell Operating Companies (BOCs) on the other, primarily in the types of switching equipment they used, the markets they served, and the financial resources available to most non-GTE independent telephone companies. This led the Commission to set an equal access implementation schedule for non-GTE independent telephone companies that differed from those set for the BOCs in the Modified Final Judgment and for GTE in the Consent Decree.²⁵⁷ For non-GTE independent telephone company end offices equipped with SPC switches, the Commission required that equal access implementation must occur within three years of a reasonable request for equal access,²⁵⁸ with the possibility of a waiver, if the company seeking the waiver could demonstrate that upgrading its switch was infeasible, except at costs that clearly outweigh potential benefits to users of telecommunications services.²⁵⁹ For companies not receiving a request for equal access, the Commission required that implementation occur as soon as practicable, according to a schedule and a degree of implementation that reflected the capital constraints of the operating company and the market and other business conditions of the area served by the end office.²⁶⁰ The Commission did not impose a conversion schedule on end offices equipped

²⁵⁵ For a discussion of VarTec's Fifth Amendment arguments, see paras. 56-68, supra. For a discussion of VarTec's First Amendment arguments, see paras. 69-75, supra.

²⁵⁶ See In the Matter of MTS and WATS Market Structure Phase III, Report and Order, CC Docket No. 78-72, 100 F.C.C.2d 860 (1985) (Independent Telephone Company Equal Access Order).

²⁵⁷ Id. at paras. 47-50.

²⁵⁸ Id. at para. 48.

²⁵⁹ Id. at para. 50.

²⁶⁰ Id. at para. 48.

with electromechanical switches, regardless of the existence of a request, and required only that for these end offices, conversion should occur as soon as practicable.²⁶¹

B. Request for Comments

84. Our inquiries regarding the status of LEC conversion to accept four-digit CICs reveal that some independent incumbent LECs in rural and isolated areas do not provide equal access.²⁶² Some of those LECs' end offices are equipped with SPC switches, but the LECs have never received a bona fide request to provide equal access. In other instances, the LECs' end offices are not equipped with SPC switches and, therefore, the LECs are not required to convert to equal access according to a specific timetable, even if a LEC received a reasonable request for equal access.²⁶³ Thus, a requirement that all LEC end office switches be upgraded to accept four-digit CICs by January 1, 1998, may have the unintended effect of requiring those LECs that have never received a bona fide request for equal access or that are not subject to a specific timetable for providing equal access nonetheless to upgrade their end offices to offer equal access by January 1, 1998. Such a requirement would modify the Commission's equal access implementation schedule for non-GTE independent telephone companies, set by the 1985 Independent Telephone Company Equal Access Report and Order. More than twelve years have passed since the adoption of the Independent Telephone Company Equal Access Report and Order. We therefore tentatively conclude that all LEC end offices, including those LECs whose end offices are equipped with SPC switches, but have not received a bona fide request for equal access and those LECs whose end offices are equipped with non-SPC switches, should nevertheless be required to provide equal access. This requirement also would apply to LECs who may have received a waiver of the Commission's equal access rules, to the extent those waivers remain in place. We tentatively conclude that LECs with SPC switches that have not received a bona fide request for equal access should be required to upgrade their facilities to provide equal access and to accept four-digit CICs within three years of the effective date of an Order adopted in this proceeding. We further tentatively conclude that LECs whose end offices are equipped with non-SPC switches should be required to provide equal access and to convert their switches to accept four-digit CICs when they next replace their switching facilities. We seek comment on these tentative conclusions.

85. We tentatively conclude that requiring LECs whose end offices are equipped with SPC switches to upgrade their facilities to enable them to offer equal access, even if they have not received a request for equal access, and LECs whose end offices are equipped with non-SPC switches to convert their facilities to provide equal access, is not inconsistent with the Commission's general goal, expressed in the Independent Telephone Company Equal Access Report and Order, that equal access occur as soon as practicable, regardless of whether a request has been made for equal access, and regardless of the type of switch with

²⁶¹ Id. at para. 49.

²⁶² See, e.g., NTCA July 29, 1997 Filing.

²⁶³ See Independent Telephone Company Equal Access Order at para. 49.

which an end office is equipped. Moreover, the Commission stated, in the Independent Telephone Company Equal Access Report and Order, that where generic software is available, the telephone company should endeavor to make the necessary conversions in less than three years.²⁶⁴ We note that the responses to our inquiries indicate that the four-digit CIC software generally is included in equal access software packages developed since 1995.²⁶⁵ Commenters that oppose our tentative conclusion should discuss why a twelve year period of time in which to convert to provide equal access has been insufficient and should propose specific alternatives to the Commission's proposal.

C. Procedural Matters

1. Ex Parte Presentations

86. This is a permit-but-disclose notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206. Written submissions, however, will be limited as discussed below.²⁶⁶

2. Regulatory Flexibility Act

87. See Appendix B, infra for the Initial Regulatory Flexibility Analysis.

3. Comment Filing Procedures

88. General Requirements. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before December 8, 1997, and reply comments on or before January 12, 1998. To file formally in this proceeding, you must file an original and six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and 11 copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554, with a copy to Carmell Weathers of the Common Carrier Bureau, 2000 M Street, N.W., Room 221, Washington, D.C. 20554. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C. 20036. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, 1919 M Street, N.W., room 239, Washington, D.C. 20554.

²⁶⁴ Id. at para. 65.

²⁶⁵ See e.g., NECA August 1, 1997 Filing at 2.

²⁶⁶ See paras. 88-90, infra.

89. Other requirements. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with Section 1.49 and all other applicable sections of the Commissions rules.²⁶⁷ We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. Comments and reply comments also must clearly identify the specific portion of this FNPRM to which a particular comment or set of comments is responsive. If a portion of a party's comments does not fall under a particular topic listed in the outline of this FNPRM, such comments must be included in a clearly labelled section at the beginning or end of the filing.

90. Parties are also asked to submit comments and reply comments on diskette. Such diskette submissions would be in addition to and not a substitute for the formal filing requirements addressed above. Parties submitting diskettes should submit them to Carmell Weathers, Network Services Division, 2000 M Street, N.W., Room 235, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible form using MS DOS 5.0 and WordPerfect 5.1 software. The diskette should be submitted in "read only" mode. The diskette should be clearly labelled with the party's name, proceeding, type of pleading (comment or reply comments) and date of submission. The diskette should be accompanied by a cover letter.

VI. CONCLUSION

91. Our proceedings on CICs, and other numbering proceedings, emphasize that numbering resources must meet not only the needs of incumbents, but also those of new entrants in the telecommunications services market. Our decision on reconsideration to modify the transition in a limited manner, and to extend the permissive dialing period by only six months, is intended to ensure that, as soon as practicable, new market entrants have access to numbering resources on the same basis as incumbents. In the Order on Reconsideration, we have sought to: allow additional time for carriers to educate customers about the need to dial the extra digits of longer CACs; ensure that the dialing disparity between five and seven-digit CACs does not continue for a lengthy period; and end the transition before the assignment of all available four-digit CICs in the 5XXX and 6XXX range. Similarly, our Order on Application for Review is intended to ensure the orderly transition from three to four-digit CICs and to ensure the nondiscriminatory treatment of all CIC holders. Finally, our Second FNPRM, tentatively concluding that all LECs, when they next upgrade their switches, should make the upgrades necessary to provide equal access and to accept four-digit CICs, seeks to promote an efficient nationwide communications service.

²⁶⁷ See 47 C.F.R. § 1.49. We require, however, that a summary be included with all comments and reply comments. The summary may be paginated separately from the rest of the pleading (e.g., as "i, ii"). See 47 C.F.R. § 1.49.

VII. ORDERING CLAUSES

92. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 201-205, and 251(e)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, and 251(e)(1), that the Petition for Reconsideration of VarTec Telecom, Inc., is DENIED.

93. IT IS FURTHER ORDERED, that the Petitions for Reconsideration of the Competitive Telecommunications Association and Telecommunications Group, Inc., ARE GRANTED to the extent stated herein, and, in all other respects, ARE DENIED.

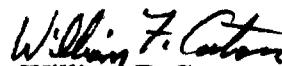
94. IT IS FURTHER ORDERED, that the Order on Reconsideration and the requirements contained herein WILL BECOME EFFECTIVE 30 days after publication of a summary in the Federal Register. The collection of information contained within is contingent upon approval by the Office of Management and Budget.

95. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), that the Application for Review filed by VarTec Telecom, Inc. is DENIED.

96. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i) and (j), 201-205, 218 and 251(e)(1) of the Communications Act as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-205, 218 and 251(e)(1), that the Second Further Notice of Proposed Rulemaking is hereby ADOPTED.

97. IT IS FURTHER ORDERED that the Commission's Office of Managing Director SHALL SEND a copy of the Second Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION


William F. Caton
Acting Secretary

APPENDIX A: LIST OF PARTIES

1. Petitions for Reconsideration of CICs Second Report and Order

a. Parties Filing Petitions for Reconsideration

The Competitive Telecommunications Association (CompTel)
Telecommunications Group, Inc. (Telco)
VarTec Telecom, Inc. (VarTec)

b. Parties Filing Comments

AT&T Corp. (AT&T)
Cable and Wireless, Inc. (CWI)
CGI and CommuniGroup
Long Distance International (LDI)
MCI Telecommunications Corporation (MCI)
Sprint Communications Company, L.P. (Sprint)
Telecommunications Resellers Association (TRA)
US WEST, Inc. (US WEST)
WorldCom, Inc. (WorldCom)

c. Parties Filing Reply Comments

CompTel
Sprint
Telco
TRA
VarTec
US WEST

2. Petition for Application for Review of CICs Second Report and Order

a. Party Filing Petition for Application for Review

VarTec Telecom, Inc.

b. Party Filing Opposition

US WEST