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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

In the Matter of )  
 )  
Petition of the Illinois Commerce Commission )  
for Temporary Waiver of 47 C.F.R. Section )  
52.19(c)(3)(ii) )

CC Docket No. 96-987  
File No. NSD-L-99-65

COMMENTS OF WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by its attorneys, hereby respectfully opposes the Petition for Expedited Temporary Waiver of 47 C.F.R. Section 52.19(c)(3)(ii) ("Petition") submitted by the Illinois Commerce Commission ("ICC") on August 10, 1999.<sup>1</sup>

Section 52.19(c)(3)(ii) of the Commission's rules provides that, when an area code overlay is used by a state to provide area code relief, ten-digit dialing is required for all calls placed within the area code. In its Petition the ICC has requested an "expedited temporary waiver" of the ten-digit dialing requirement for the 847, 312, 773, 630, and 708 NPAs in the Chicago metropolitan area until the last of four newly assigned area code overlays is activated in the area. The ICC states that the five area codes at issue are projected to exhaust within an 18-month period, beginning in the fourth quarter of 1999. The ICC generally argues that, because all five of these area codes will exhaust within such a short timeframe, a temporary waiver of the mandatory ten-digit dialing rule will minimize disruption and consumer confusion that allegedly will result from implementing ten-digit dialing in "piecemeal fashion," one area code at a time.

<sup>1</sup> Pursuant to Public Notice, DA 99-1631, released on August 16, 1999, interested parties may file comments on the Petition by September 16, 1999. These Comments therefore are timely filed.

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The Commission must deny the ICC's request. As WinStar will discuss below, the ICC has failed to meet its considerable burden of demonstrating that good cause exists to justify waiver of the rule. Indeed, several of the arguments the ICC offers as justification for its waiver request actually highlight the inappropriateness of a waiver under the circumstances presented here. In addition, grant of this request, and continuing grant of other, similar requests, would contravene the Commission's stated goals in its ongoing Numbering Resource Proceeding and hinder the establishment of an efficient and effective national numbering resource optimization scheme.

**I. THE ICC HAS FAILED TO DEMONSTRATE THAT THERE IS "GOOD CAUSE" FOR THE COMMISSION TO WAIVE THE MANDATORY TEN-DIGIT DIALING REQUIREMENTS OF SECTION 52.19.**

Pursuant to Section 1.3 of the Commission's rules, the agency may grant a waiver of a provision of those rules only upon a showing of "good cause."<sup>2</sup> The Commission has explained that, as construed by the United States Court of Appeals for the District of Columbia Circuit, Section 1.3 "allows the Commission to grant a waiver if special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest."<sup>3</sup> Petitioners "generally face a 'high hurdle' to show that a waiver is justified."<sup>4</sup>

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<sup>2</sup> 47 C.F.R. § 1.3.

<sup>3</sup> New York Department of Public Service Petition for Expedited Waiver of 47 C.F.R. Section 52.19(c)(3)(ii), 13 FCC Rcd 13491, 13493 (1998) ("*NY DPS Waiver Order*"), citing *Northeast Cellular Tel. Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); see also *Pennsylvania Public Utility Commission Petition for Expedited Waiver of 47 C.F.R. Section 52.19 for Area Code 412 Relief*, 12 FCC Rcd 3783, 3791 (1987) (*Pennsylvania PUC Waiver Order*) (same).

<sup>4</sup> *Public Utility Commission of Texas Petition for Expedited Waiver of 47 C.F.R. Section 52.19(c)(3)(ii) for Area Code Relief*, 13 FCC Rcd 21798, 21801 (1998) ("*Texas PUC Waiver Order*"); *Pennsylvania PUC Waiver Order* at 3791.

The ICC has argued that its waiver request is warranted because implementation of mandatory ten- (or eleven-) digit dialing in each of the four overlay areas as they are activated will: (1) create dialing inequities between customers in neighboring Chicago metropolitan areas; (2) create ten- or eleven-digit dialing “islands” and prevent the ICC from implementing uniform dialing in the Chicago area; (3) exacerbate disruption and customer confusion; and (4) deny the ICC and carriers additional time to develop and administer a comprehensive education program informing customers of the impending area code overlays and the corresponding need to dial ten or eleven digits throughout the Chicago metropolitan area.<sup>5</sup> Accordingly, the ICC argues, a “temporary” waiver of the rule until the last of the four newly assigned overlay area codes is activated is necessary. With these assertions the ICC has failed to satisfy its burden of demonstrating that a waiver is justified.

First, the ICC has entirely mischaracterized the effect on consumers in the Chicago area of implementation of ten-digit dialing as required by Section 52.19(c)(3)(ii). As the ICC notes, there currently are five different area codes in the Chicago metropolitan area. Accordingly, it already is necessary for Chicago consumers to use ten or eleven digits to reach other consumers in the metropolitan area, and has been for some time: effectively, ten-digit dialing has been introduced in the area and is functioning smoothly. Thus, to use the ICC’s example, although it is true that, when the first NPA (630) exhausts, consumers in the 630 and newly assigned overlay area code will be required to dial ten or eleven digits for *all* calls, it also is true that they now are required to use ten digits for *many* calls within the metropolitan area, while using seven digits for

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<sup>5</sup> Petition at 2.

other calls – potentially more confusing than using ten or eleven digits for all calls, all of the time.

Further, while consumers in the remaining four area codes still will be able to dial only seven digits to reach other consumers within the same area code, they, like consumers in the 630 code, probably dial numbers in the other Chicago area NPAs – and hence use ten or eleven digits – on a regular basis. For these callers, too, the only changes they will experience in their dialing habits when the first overlay is activated and mandatory ten-digit dialing is given effect will be which first three digits of a ten digit number they dial. On an ongoing basis, as additional overlays are activated, consumers within those overlay areas should experience no more inconvenience than consumers in the 630 region. Given these circumstances, WinStar finds it difficult to understand how implementation, over an 18-month period, of mandatory ten-digit dialing throughout the Chicago metropolitan area will result in any more “dialing inequalities” or “10- or 11- digit dialing ‘islands’” than already exist as a result of the five area codes currently in place. In fact, there will be no new “special circumstance” that could justify a waiver of the rule.

In addition, “permissive” eleven-digit dialing already exists in all Ameritech switches in the Chicago area, and in virtually all of Ameritech’s competitors’ switches. Hence it is possible for Chicago customers to dial all their calls using eleven digits today, with no impact on the rating or routing of their calls. Training customers in the new procedures now, rather than 18 months from now, would facilitate a smoother transition to ten-digit dialing when it comes.

For similar reasons, WinStar is not persuaded – and neither should the Commission be – that establishment of mandatory ten-digit dialing pursuant to the timeframe established by the rule would exacerbate service disruption and consumer confusion. As the Commission has recognized, the implementation of area code relief necessarily “is initially confusing not only to

customers in the affected area but also those who call them from outside that area.”<sup>6</sup> And, consumers in the Chicago area may experience this confusion, to a certain extent, regardless of the timing of ten-digit dialing implementation in the different overlay areas. However, to the extent that Chicago-area consumers already dial ten digits or more for many calls, as discussed above, they should adjust reasonably well and quickly to dialing more than seven digits for *all* calls.<sup>7</sup> Indeed, there should be less confusion among consumers in the Chicago area than, say, among those in New York, given the existing proliferation of area codes in the Chicago region.<sup>8</sup>

Even if Chicago consumers do experience some confusion, however, the Commission has found that because consumer confusion arising from area code relief efforts “is a nationwide issue, affecting people throughout this country any time area code relief is necessary,” this argument, without more, fails to demonstrate the “special circumstances” necessary to justify a waiver.<sup>9</sup> In addition, while additional time to develop and administer an education program might certainly be useful to the ICC in developing its consumer education program, such additional time would virtually *always* be useful to combat the consumer confusion that the Commission has determined *always* will result from area code conservation measures.<sup>10</sup> Ultimately, the Commission itself already effectively has dismissed the consumer confusion argument as a basis for grant of a waiver of the ten-digit dialing requirement, concluding that “if

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<sup>6</sup> *Pennsylvania PUC Waiver Order* at 3795.

<sup>7</sup> WinStar notes that, in addition, many consumers memorize and dial carrier access and billing codes, as well as voicemail passwords and other numbering sequences, on a regular basis – resulting in many consumers routinely dialing far more than ten digits per call.

<sup>8</sup> For this reason, in part, the Commission’s decision to grant the New York DPS waiver petition is of far less precedential value in this context than the ICC appears to believe.

<sup>9</sup> *Pennsylvania PUC Waiver Order* at 3795.

<sup>10</sup> In this regard, WinStar would note that the ICC has been aware of the need for overlay relief, and corresponding consumer education measures, at least since spring of 1998.

ten-digit dialing were adopted as part of a national numbering optimization policy, customer confusion resulting from inconsistencies in dialing patterns from one area to another would be eliminated.”<sup>11</sup> WinStar submits that it would be far more efficient and effective to begin the transition to nationwide ten-digit dialing sooner rather than later; waiver requests such as this only serve to perpetuate and promote disruption and confusion.

Finally, the ICC has entirely failed to recognize the potentially devastating anticompetitive effects the waiver will have on competitive carriers, particularly smaller carriers and carriers just entering the marketplace. The FCC repeatedly has recognized that, in an overlay situation without mandatory ten-digit dialing, customers may find it undesirable to switch from an incumbent to a competitive carrier because the competitive carriers would have to assign their customers numbers in the new overlay area code. The effect of this, of course, is that those customers would be required to dial ten digits more often than the incumbent’s customers, and, correspondingly, consumers calling the competitive providers’ customers would be required to dial ten digits for those customers when they would only have to dial seven digits to reach the incumbent’s customers.<sup>12</sup>

This local dialing disparity, which results in competitive advantages for incumbents over competitors, expressly contravenes the Commission’s self-imposed mandate to ensure that

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<sup>11</sup> *In the Matter of Numbering Resource Optimization, Connecticut Department of Public Utility Control Petition for Rulemaking to Amend the Commission’s Rule Prohibiting Technology-Specific or Service-Specific Area Code Overlays, Massachusetts Department of Telecommunications and Energy Petition for Waiver to Implement a Technology-Specific Overlay in the 508, 617, 781, and 978 Area Codes, California Public Utilities Commission and the People of the State of California Petition for Waiver to Implement a Technology-Specific or Service-Specific Area Code*, CC Docket No. 99-200, RM No. 9258, NSD File No. L-99-17, NSD File No. L-99-36 (rel. June 6, 1999) (“*Numbering NPRM*”), ¶ 124.

<sup>12</sup> *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 19392, 19518-19 (1996) (“*Local Competition Second R&O*”).

“telecommunications communications numbers are made available on an equitable basis,”<sup>13</sup> and that its numbering policies do not “unduly favor or disfavor any particular telecommunications industry segment.”<sup>14</sup> Moreover, and perhaps more importantly, the procompetitive safety provisions of Section 52.9(a) also prevent the adoption, by the FCC or by the states, of measures that unduly favor or disfavor any particular group of telecommunications *consumers*.<sup>15</sup> Grant of the waiver request, as discussed above, not only would have anticompetitive effects on competitive carriers, but also, correspondingly, would disparately impact their customers as compared with customers of the incumbent. WinStar submits that the FCC must be guided by the mandates of Section 52.9(a), and consider the potential anticompetitive effects of the waiver as compared to the dubious benefits cited in the Petition when reaching its decision regarding the Petition.

In short, the ICC’s stated justifications for its waiver request fall far short of satisfying the demanding requirements of Section 1.5, and, further, fail to recognize and address the resulting serious anticompetitive effects on both competitive carriers and consumers alike. For these reasons, and, on a broader level, as discussed below, because grant of the waiver request and others like it would undermine the Commission’s ongoing efforts to craft an effective and efficient national numbering resource optimization framework, the Petition must be denied.

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<sup>13</sup> 47 C.F.R. § 52.9(a).

<sup>14</sup> 47 C.F.R. § 52.9(a)(2).

<sup>15</sup> 47 C.F.R. § 52.9(a)(2).

**II. GRANT OF THE WAIVER REQUEST WOULD BE INCONSISTENT WITH, AND DISSERVE, THE COMMISSION'S GOAL OF CREATING EFFICIENT AND EFFECTIVE NATIONAL STANDARDS FOR NUMBERING RESOURCE OPTIMIZATION.**

Although WinStar recognizes the importance – and the value – of permitting the states a certain limited degree of authority to fashion area code relief schemes, that are tailored to local needs, WinStar urges the FCC not to lose sight of the fact that “the 1996 Act assigned to the Commission the responsibility for implementing a *national* numbering policy.”<sup>16</sup> The Commission is well aware that “a nationwide, uniform system of numbering is essential to the efficient delivery of telecommunications services in the United States.” Specifically, with regard to area code relief, the Commission has balanced the interests of the various states with its own preeminent statutory mandate by authorizing the states to adopt all-service overlays only under certain conditions – one of which is mandatory ten-digit local dialing by all customers between and within area codes in the overlay.<sup>17</sup> The Commission has found that this restriction on overlays is essential in order to ensure that competitive providers throughout the United States – and especially small entities – do not “suffer competitive disadvantages.”<sup>18</sup>

WinStar submits that continuing grant of waivers of Section 52.19 on a state-by-state basis would undermine the procompetitive objectives underlying the ten-digit requirement, and, on a broader level, certainly also would impede the Commission's efforts to slow the rate of number exhaust in the United States and to prolong the life of the North American Numbering

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<sup>16</sup> See *Petition for Declaratory Ruling and Request for Expedited Action on the July 15, 1997 Order of the Pennsylvania Public Utility Commission Regarding Area Codes 412, 610, 214, and 717; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 13 FCC Rcd 19009, 19023 (1998).

<sup>17</sup> 47 C.F.R. § 52.19(c)(3)(ii).

<sup>18</sup> *Local Competition Second R&O* at 19518.

Plan. The ten-digit dialing requirement is a small but crucial component of these efforts. As noted, mandatory ten-digit dialing is necessary to ensure that overlay area code relief does not have an anticompetitive impact on competitive providers. In addition, the Commission has concluded that mandatory ten-digit dialing serves as an effective numbering resource measure by freeing additional numbering resources for use, through the reclamation of protected codes and, potentially, by permitting the use of either “0” or “1” as the first digit of a ten-digit telephone number.<sup>19</sup> Too many waivers of Section 52.19 – even temporary waivers, which may be extended, for various reasons, indefinitely – will negate the value of ten-digit dialing as an optimization resource. Significantly, the FCC has recognized that the discretion it may exercise to waive a rule “does not contemplate that [the] agency must or should tolerate *evisceration* of a rule [– such as the ten-digit dialing requirement –] by waivers.”<sup>20</sup>

Indeed, WinStar submits that the Commission should be particularly unwilling to forgo the value of this important measure now, during the pendency of its Numbering Resource Optimization proceeding. In that regard, WinStar urges the Commission to keep in mind certain of the goals the agency set for itself in that proceeding, in order to “best. . . create national standards for numbering resource optimization”: (1) to “ensure sufficient access to numbering resources for all service providers that need them to enter into or compete in telecommunications markets”; (2) to “impose the least societal cost possible, in a competitively neutral manner, while obtaining the highest benefit”; and (3) to “ensure that no class of carrier or consumer is unduly favored or disfavored” by the agency’s optimization efforts.<sup>21</sup> As discussed, grant of this waiver

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<sup>19</sup> *Numbering NPRM*, ¶ 123.

<sup>20</sup> *Texas PUC Waiver Order* at 21801, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (emphasis added); *Pennsylvania PUC Waiver Order* at 3791 (same).

<sup>21</sup> *Numbering NPRM*, ¶ 6.

request would provide competitors with access to numbering resources, but in a manner insufficient to permit them to compete on a competitively neutral basis with incumbents – and thereby unduly disfavor the class of competitive carriers and their customers as a result of its efforts.

### CONCLUSION

WinStar does not intend to belittle the concerns of the ICC, and, indeed, applauds the ICC's ongoing efforts to resolve the numbering crisis in Illinois. However, as discussed above, individual state remedies must not interfere with – or, worse, hinder – the Commission's national policy goals and the establishment of a national numbering scheme. WinStar is concerned that continuing grant of waivers such as that requested by the ICC will have precisely that effect. Accordingly, for the foregoing reasons, the Commission should deny the Petition for Expedited Temporary Waiver of 47 C.F.R. Section 52.19(c)(3)(ii).

Respectfully submitted,

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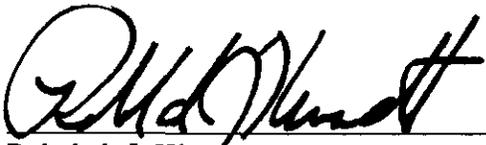
September 16, 1999

Its Attorneys

**CERTIFICATE OF SERVICE**

I, Rebekah J. Kinnett, hereby certify that on this 16th day of September, 1999 two copies of the foregoing Comments of WinStar Communications, Inc. were served by hand on the following:

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