

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

SEP 19 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Petition for Reconsideration Filed by Competitive)	NSD File No. L-01-143
Telecommunications Association and Personal)	
Communications Industry Association)	
)	
Numbering Resource Optimization)	CC Docket No. 99-200
)	

AT&T CORP. COMMENTS

Pursuant to the Commission's Public Notice^{1/} issued in response to Competitive Telecommunications Association and Personal Communications Industry Association's (collectively "the Petitioners") Petition for Reconsideration,^{2/} AT&T Corp ("AT&T") hereby submits these comments in support of the Petitioners' request for notice and a rulemaking proceeding in accord with the Administrative Procedure Act ("APA").^{3/} As shown below, because the Bureau's "clarification" and instructions^{4/} incorrectly adopted the requirements set forth therein, it is not necessary, nor does AT&T herein address, the merit of the Bureau's 500 and 900 reporting statistics or the breadth of the Bureau's supposed clarification as suggested by the Petitioners.^{5/}

^{1/} *Common Carrier Bureau Seeks Comment on Petition For Reconsideration Filed By Competitive Telecommunications Association and Personal Communications Industry Association*, Public Notice, DA 01-1966 (rel. August 20, 2001).

^{2/} *In the Matter of Numbering Resource Optimization*, Petition for Reconsideration (filed July 12, 2001) ("Petition").

^{3/} 5 U.S.C. § 551 *Et seq.*

^{4/} *Common Carrier Bureau Clarifies that Future Filings of Numbering Utilization and Forecast Reports Must Include Numbering Resources in the 500 and 900 NPAs*, Public Notice, DA 01-1409 (rel. June 11, 2001) ("Reporting Notice").

^{5/} Petition, pp. 2-3.

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On March 31st 2000 the Commission adopted an order^{6/} that, in part, established a reporting requirement for central office codes within geographic numbering plan areas and created FCC Form 502 to collect the data.^{7/} The Bureau, on June 11th, 2001, released its Reporting Notice, styled as a “clarification” of the Numbering Order. The Reporting Notice’s purported clarification comes fifteen months, and two full reporting cycles, after the Numbering Order.^{8/} The Petitioners demonstrate persuasively that the Reporting Notice does not simply interpret the Numbering Order but instead creates new reporting obligations and establishes penalties for non-compliance based on those new requirements. Clearly, such action requires a noticed rulemaking proceeding in accord with the APA.

Courts have made clear the exceptions to the APA are to be construed narrowly and that statute provides only for very limited exceptions where the notice and comment procedures may be foregone.^{9/} As the U.S. Court of Appeals for the D.C. Circuit noted, courts should only “reluctantly” permit agencies to dispense with notice and comment procedures.^{10/} Otherwise, the important administrative due process protections provided by Section 553 would be swallowed by its exceptions.^{11/}

^{6/} Report and Order and Further Notice of Proposed Rule Making, *Numbering Resource Optimization*, CC Docket 99-200, FCC 00-104, (rel. March 31, 2000) (“Numbering Order”).

^{7/} Petition, p.4.

^{8/} Petition, p. 9. The Petitioners also point out that 500 and 900 code usage was low during the comment period proceeding the adoption of the Numbering Order and surged during the year 2000 causing the NANPA’s concern in late 2000 and early 2001. *Id.*

^{9/} 5 U.S.C. § 553(b)(A) & (B); 47 C.F.R. § 1.412(b) & (c).

^{10/} *National Ass’n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983).

^{11/} 2A Sutherland on Statutory Construction § 47.23 (5th ed. 1992) (“The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded.”).

In this case, the ‘interpretive rule’ is the only possible exception. The Petition, plain facts and court precedent show, however, the interpretive rule is not applicable. More specifically, it is well established that an “interpretive statement” is one that does not create “new rights or duties,” but instead serves merely to publicize “an agency’s reading of a statute or a rule.”^{12/} As the U.S. Court of Appeals for the D.C. Circuit has explained:

The distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that ‘regulations,’ ‘substantive rules’ or ‘legislative rules’ are those which create law, usually complementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means.^{13/}

The Reporting Notice does not merely reflect the Bureau’s consideration of number utilization or reporting policies, or otherwise simply restate the agency’s understanding of key terms contained in the Commission’s Numbering Order. To the contrary, the Reporting Notice revised the context of understanding^{14/} and existing reporting procedures,^{15/} necessitated new instructions^{16/} and cited penalties for non-compliance.^{17/} As such, the Reporting Notice cannot be reconciled with Section 553 of the APA and applicable precedent requiring public notice and an opportunity for comment on proposed changes to the Commission’s rules before such requirements are adopted.

^{12/} *Orengo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993).

^{13/} *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952).

^{14/} Petition, pp. 5-7.

^{15/} Petition, pp. 4, 7-8.

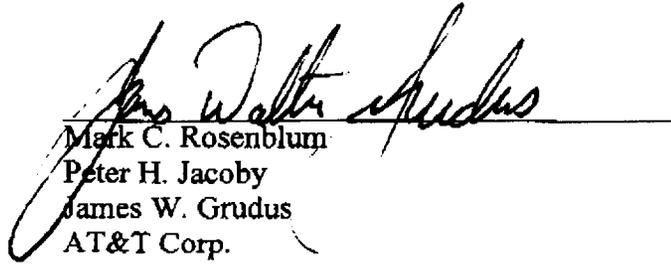
^{16/} Petition, pp. 14-15.

^{17/} Petition, p. 2.

CONCLUSION

For the foregoing reasons, the Commission should rescind the new Reporting Notice requirements and institute a properly noticed rulemaking proceeding addressing the need for utilization and forecast reporting on the 500 and 900 NPAs.

Respectfully submitted,



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