

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

In the Matter of)	
)	
Interconnection of the Local Competition)	CC Docket No. 96-98
Provisions of the Telecommunications Act of 1996)	
)	
Citizens Utility Board Petition for Expedited)	File No. NSD-L-01-161
Permanent Waiver of 47 C.F.R. § 52.19(c)(3)(ii))	
_____)	

SPRINT PCS OPPOSITION

Sprint Spectrum L.P., d/b/a Sprint PCS (“Sprint PCS”), opposes the Citizens Utility Board (“CUB”) petition that seeks a permanent waiver of the rule requiring 10-digit dialing when an area code overlay is implemented for the 224 and 847 area codes.¹

The Commission has previously rejected all prior requests for a permanent waiver of the 10-digit dialing rule, and the CUB petition merely repeats arguments that the Commission has previously considered and rejected. In addition, the Commission may not grant the requested relief without effectively repealing the 10-digit dialing rule – a step the Commission may not take in a waiver request proceeding. In any event, it is too late to adopt the requested relief, since mandatory 10-digit dialing is scheduled to begin next week, on January 5, 2002.

¹ See *Public Notice*, “Common Carrier Bureau Seeks Comment on the Amended Citizens Utility Board Petition for Expedited Permanent Waiver of 47 C.F.R. § 52.19(c)(3)(ii),” DA 01-2874 (Dec. 13, 2001). CUB has also filed a Petition for Stay, but the FCC has not requested comment on that petition. Accordingly, Sprint PCS will not address the merits of the stay petition. However, given that CUB has not justified its waiver request, CUB clearly has not met the extraordinary showing required for entry of a stay, and Sprint PCS opposes the stay request.

I. COURTS HAVE ALREADY CONFIRMED THAT THE COMMISSION HAS AUTHORITY TO IMPOSE ITS 10-DIGIT DIALING REQUIREMENT

The Commission's authority to require 10-digit dialing as part of area code overlays has been upheld. CUB asserts that the Commission does not have the legal authority to "pre-empt state jurisdiction with regard to local calling" because Section 2(b) of the Communications Act ordinarily reserves to states matters pertaining to intrastate telecommunications.² This argument has already been rejected in federal court. Specifically, the Court of Appeals for the Second Circuit recently ruled that the Commission possessed the authority to adopt the 10-digit dialing rule, and additionally, that "the imposition of 10-digit dialing is a valid condition" on the implementation of area code overlays.³

The Commission imposed the 10-digit dialing requirement to prevent dialing disparity between customers in the incumbent area code and customers in the new overlay code and the inequality such disparities would have on competition.⁴ The Common Carrier Bureau reiterated its position earlier this week:

Mandatory 10-digit dialing prevents dialing disparity, and thus eliminates the anti-competitive effects of area code overlays.⁵

² CUB Petition at 8-10. There may be a question whether CUB has standing to raise this jurisdictional claim. If there is any "right" here, that right is held by the State, and the Illinois Commerce Commission is not a party to the petition. Nevertheless, given the Second Circuit case, the Commission need not address this standing question to deny the CUB petition.

³ *New York v. FCC*, 267 F.3d 91, 107 (2d Cir., Sept. 28, 2001).

⁴ *See Second Local Competition Order*, 11 FCC Rcd 19392, 19518-19 ¶¶ 286-89 (1996).

⁵ *Joint Petition of the New York State Public Service Commission, the New York State Consumer Protection Board and the City of New York for an Expedited Temporary Waiver of 47 C.F.R. § 52.19(c)(3)(ii)*, Docket No. 96,98, NSD File No. L-01-158, DA 01-2921 (Dec. 26, 2001). Although the Bureau granted a temporary extension of the 10-digit dialing rule, it granted an eight month extension rather than the 14 months requested.

In this regard, the Second Circuit has affirmed the legitimacy of the Commission's 10-digit dialing rule, noting that without mandatory 10-digit dialing, customers in the new overlay code would be disadvantaged *vis-à-vis* customers in the incumbent area code.⁶

In summary, federal courts have not only ruled that the Commission has the authority to adopt its 10-digit dialing rule, but have affirmed the validity of the rule.

II. CUB HAS NOT MET ITS HEAVY BURDEN OF DEMONSTRATING ITS ENTITLEMENT TO A WAIVER OF THE 10-DIGIT DIALING REQUIREMENT

Based on all prior precedent, CUB has not justified a need for a waiver of the 10-digit dialing rule. A waiver applicant, the Commission has noted, "faces a high hurdle even at the starting gate".⁷

A heavy burden traditionally has been placed upon one seeking a waiver to demonstrate that his arguments are substantially different from those which have been carefully considered at the Rule Making proceedings.⁸

A waiver *may* be appropriate *if* "[1] special circumstances warrant a deviation from the general rule *and* [2] such deviation will serve the public interest."⁹ In addition, the applicant "must clearly demonstrate that the general rule is not in the public interest when applied to its particular case and that granting the waiver will not undermine the public policy served by the rule."¹⁰

⁶ See *New York v. FCC*, 267 F.3d at 106-08.

⁷ See *U S WEST Communications Petition for Waiver of Part 69 of the Commission's Rules*, 7 FCC Rcd 4043, 4044 ¶ 6 (1992) quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁸ *Applications for Authority to Construct and Operate an Automated Maritime Telecomm. System filed by Riverphone, Inc.*, 3 FCC Rcd 4690, 4692 ¶ 13 (1988) ("Riverphone").

⁹ *Texas NPA Relief Plan Waiver Order*, 13 FCC Rcd 21798, 21801 ¶ 6 (1998) (emphasis added), citing *Northeast Cellular v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio*, 418 F.2d at 1157.

¹⁰ *U S WEST Petition for Waiver of the Tariff Review Plan Rules*, 12 FCC Rcd 8343, 8346 ¶ 10 (1997); *Bell Atlantic Telephone Company Petition for Waiver of Part 69.112(b) and (c) of the Commission's Rules*, 12 FCC Rcd 10196, 10198 ¶ 5 (1996) ("Bell Atlantic").

CUB has not identified any special circumstances justifying a permanent waiver of the 10-digit dialing rule. CUB claims that the reasons the Commission articulated for adopting the rule in the first place are “faulty” and based on “inaccurate” premises.¹¹ These arguments might have been appropriate for Commission consideration had CUB filed a properly supported rule-making petition asking the Commission to modify the 10-digit dialing rule. These arguments are not appropriate, however, in a waiver proceeding where “[t]he very essence of waiver is the assumed validity of the general rule.”¹² CUB attacks the legitimacy of the 10-digit dialing rule itself, and it simply repeats the same arguments that the Commission carefully considered in adopting the rule.

It is axiomatic that the Commission “must not eviscerate a rule by a waiver.”¹³ In addition, the Commission may grant a waiver only if it is based on “articulated, reasonable standards that are predictable, workable, and not susceptible to discriminatory application.”¹⁴

The agency must . . . articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.¹⁵

Granting CUB’s requested waiver would have the practical effect of eviscerating the 10-digit dialing rule because CUB has offered no reason that would not also apply to any other area code

¹¹ See CUB Petition at 8 and 10.

¹² *WAIT Radio*, 418 F.2d at 1158. See also *Southwestern Bell Telephone Company Tariff FCC No. 73*, 12 FCC Rcd 10231, 10239 ¶ 13 (1997); *US WEST*, 7 FCC Rcd 4043, 4044 ¶ 6 (1992). Courts have recognized that the FCC “has broad discretion to deny waivers.” *A/B Financial v. FCC*, 1995 U.S. App. LEXIS 37378, at 5 (D.C. Cir. 1995).

¹³ See *Riverphone*, 3 FCC Rcd 4690, 4692 ¶ 12 (1988). See generally *WAIT Radio*, 418 F.2d at 1159 (Waiver procedure “emphatically does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.”).

¹⁴ *Request of WirelessCo, L.P. for Limited Waiver of Section 24.204 of the Commission’s Rules*, 10 FCC Rcd 11111, 11114 ¶ 17 (1995).

¹⁵ *Northeast Cellular*, 987 F.2d at 1166.

overlay. If the Commission were to grant this waiver, it would have no principled basis to deny the same relief to any other waiver applicant.

On two occasions in the past, the Commission has been asked to grant a permanent waiver of the 10-digit dialing rule. The Commission denied both requests.¹⁶ Given this precedent, and given the fact that CUB has raised no arguments that the Commission has not already considered and rejected, the Commission must as a matter of law deny CUB's petition for a permanent waiver of the 10-digit dialing rule.¹⁷

III. CUB'S CLAIM OF CUSTOMER HARM IS UNSUPPORTED AND REBUTTED BY ALL AVAILABLE EVIDENCE

Mandatory 10-digit dialing in the 224 and 847 area codes is scheduled to begin next week, on January 5, 2002. CUB asserts that this development will impose a "significant burden" on residents of these two area codes.¹⁸

All services overlays and 10-digit dialing have been implemented in numerous metropolitan areas, including Atlanta, Boston, Dallas, Houston, Miami and Philadelphia. There is no evidence that residents in these areas had difficulty adjusting to the new environment. To the contrary, the Colorado Public Utilities Commission has advised that "weeks after implementa-

¹⁶ See *New York Petition for a Permanent Waiver of the 10-Digit Dialing Rule*, 13 FCC Rcd 13491 (1998); *Pennsylvania Petition for a Permanent Waiver of the 10-Digit Dialing Rule*, 12 FCC Rcd 3783 (1997).

¹⁷ While the FCC ordinarily has the flexibility to change its position on issues, courts have held it "elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent." *Channel 41 v. FCC*, 79 F.3d 1187, 1191 (D.C. Cir. 1996). See also *Wisconsin Valley Improvements v. FERC*, 236 F.3d 738, 747 (D.C. Cir. 2001); *AT&T v. FCC*, 236 F.3d 729 (D.C. Cir. 2001); *AT&T v. FCC*, 974 F.2d 1351 (D.C. Cir. 1992).

¹⁸ See CUB Petition at 8.

tion” of an all-services overlay and 10-digit dialing in the Denver metropolitan area, it “received only three phone calls from customers complaining or having problems”:

Adapting to ten digit dialing in Colorado has gone more smoothly than anyone could have predicted.¹⁹

CUB presents no evidence suggesting that residents of the 224 and 847 area codes will be less adept in adjusting to 10-digit dialing than residents in other metropolitan areas where 10-digit dialing has become the norm.

The consumer education campaign for 10-digit dialing in the 224 and 847 area codes has already begun, and mandatory 10-digit dialing will begin in eight days, on January 5, 2002. Even if CUB had demonstrated that residents of these two area codes would face a “burden” different than that faced by residents of other all-services overlays (and it has not), the simple fact is that it is too late in the day to stop the “burden” that CUB seeks to remove.

¹⁹ Colorado Public Utilities Commission Comments, Docket No. 99-200, at 12 (July 29, 1999).

IV. CONCLUSION

For the foregoing reasons, Sprint PCS respectfully requests that the Commission deny the rule waiver sought by the Citizens Utility Board.

Respectfully submitted,

SPRINT SPECTRUM L.P., D/B/A SPRINT PCS

A handwritten signature in black ink, appearing to read 'Luisa L. Lancetti', written over a horizontal line. The signature is stylized with loops and a long horizontal stroke extending to the right.

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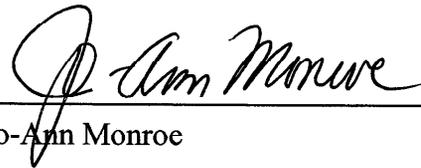
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December 27, 2001

CERTIFICATE OF SERVICE

I, Jo-Ann Monroe, do hereby certify that on this 27th day of December 2001, a copy of the foregoing "Sprint PCS Opposition" was served by U.S. first-class mail, postage prepaid to the following:

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A handwritten signature in cursive script, reading "Jo Ann Monroe", is written over a horizontal line.

Jo-Ann Monroe