
**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Numbering Resource Optimization) CC Docket No. 99-200
)
Implementation of the Local Competition) CC Docket No. 96-98
Provisions of the Telecommunications Act of)
1996)
)
Telephone Number Portability) CC Docket No. 95-116

To: The Commission

**PETITION FOR RECONSIDERATION
OF CINGULAR WIRELESS LLC**

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PETITION FOR RECONSIDERATION

Pursuant to Section 405 of the Communications Act and Section 1.429 of the Commission’s rules,¹ Cingular Wireless LLC (“Cingular”), on behalf of its subsidiaries and affiliates,² hereby requests reconsideration of the Commission’s decision in the *Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200* (“*Third Report and Order*”) to lift the ban on technology-specific overlays (“TSOs”) for Commercial Mobile Radio Service (“CMRS”) carriers.³ By establishing only loose guidelines that fail to guard definitively against potentially discriminatory TSO plans, the Commission has violated its statutory obligation to ensure that numbers are made available “on an equitable

¹ See 47 U.S.C. § 405; 47 C.F.R. § 1.429.

² Throughout this filing, the term Cingular is used to refer to Cingular, its predecessors-in-interest, subsidiaries, and affiliates.

³ Number Resource Optimization, CC Docket No. 99-200, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Telephone Number Portability, CC Docket No. 95-116, *Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200*, FCC 01-362, ¶¶ 67-94 (rel. Oct. 12, 2001), codified at 47 C.F.R. §§ 52.19(c)(4). In this petition, Cingular will follow the Commission’s convention of referring to TSOs and service-specific overlays (“SSOs”) collectively as “SOs.” *Third Report & Order* at ¶ 67 n.173.

basis.” In addition, the Commission has not justified its reversal of the TSO ban with respect to CMRS carriers. Therefore, its decision in this regard is arbitrary and capricious.

DISCUSSION

I. WITHOUT MANDATORY RESTRICTIONS TO GUARD AGAINST THE DISCRIMINATORY EFFECTS OF TSOS, REVERSING THE BAN VIOLATES THE REQUIREMENT THAT NUMBERS BE MADE AVAILABLE “ON AN EQUITABLE BASIS”

The Commission is obligated by statute to ensure that numbers are available to carriers “on an equitable basis,”⁴ and has acknowledged that TSOs are unjust, unreasonable, and discriminatory.⁵ In the *Third Report & Order*, however, the Commission’s only concession to its obligation to ensure the equitable availability of numbers was the “criteria” it adopted to guide its “case-by-case” consideration of state TSO proposals.⁶ The Commission has indicated that it will “favor” state TSO proposals that comply with its guidelines and “disfavor” those that do not, but these guidelines are precatory rather than mandatory.⁷ In light of the statutory requirement that carriers have equitable access to numbering resources, only mandatory criteria for TSOs will satisfy section 251(e)(1)’s requirements.

The potential discriminatory effects of TSOs have been discussed thoroughly in this proceeding. Cingular need not repeat those arguments here in their entirety, but incorporates the record in this proceeding by reference. Briefly stated, the Commission has found that TSOs are unjust, unreasonable, and discriminatory to the extent that they exclude a group of carriers from receiving numbers in a given area code, segregate those carriers in a separate area code, and

⁴ 47 U.S.C. § 251(e)(1).

⁵ *Ameritech Order*, 10 FCC Rcd. 4596, 4608-12 (1995).

⁶ See *Third Report & Order* at ¶¶ 73-94.

⁷ See, e.g., *Third Report & Order* at ¶¶ 82, 84, 90, 92, 94.

require “take-backs” of existing numbers.⁸ With the exception of some state commissions, every commenter in this proceeding has agreed with the Commission’s earlier holding that TSOs have the potential for enormous discriminatory effects.⁹

Nevertheless, Cingular and other wireless carriers proposed to accept TSOs under certain conditions as a transition to an all services overlay in pooling areas where they were not yet pooling capable. This proposal would function to *expedite* the availability of numbering resources while *minimizing* the potential discriminatory and anticompetitive impact on carriers initially subject to the TSO, consistent with Section 251(e)(1).¹⁰ The guidelines adopted in the *Third Report & Order* are only statements of policy, not mandatory requirements. Thus, they are insufficient to ensure these critical objectives can be achieved.

The precatory nature of the guidelines is particularly problematic in this instance, where their enforcement depends on the Commission’s willingness to deny state requests for delegated authority to implement numbering measures. Over the last few years, the Commission has demonstrated flexibility in granting states’ delegated authority over numbering issues whether or not the state proposals met the Commission’s criteria for such delegation. For example, in the *First Report & Order* in this docket, the Commission established criteria for states seeking delegated authority to implement thousands-block number pooling trials.¹¹ Since that time, a large number of state commissions have sought delegated authority to implement number

⁸ *Ameritech Order*, 10 FCC Rcd. at 4608-12. See also *Local Competition Second Report & Order*, 11 FCC Rcd. 19392, 19518 ¶ 285 (1996).

⁹ See, e.g., Cingular comments on *Second Report & Order* at 5-11; Cingular reply comments on *Second Report & Order* at 4-12.

¹⁰ See ex parte letter from Judith St. Ledger-Roty and Todd D. Daubert on behalf of Joint Wireless Commenters (“JWC”) to Magalie Roman Salas, FCC, dated November 15, 2000, CC Docket No. 99-200 (“JWC ex parte”); Cingular comments on *Second Report & Order* at 6-7.

¹¹ *Numbering Resource Optimization First Report & Order*, 15 FCC Rcd. 7574, 7652-53 ¶¶ 169-70 (2000).

pooling, frequently in area codes that did not meet the Commission's criteria.¹² In virtually every instance, however, the Commission has granted the requested authority, finding "special circumstances" justified deviation from the guidelines.¹³

In light of this history of flexible treatment of state numbering delegation petitions by the Commission, Cingular is understandably skeptical of the effectiveness of non-binding guidelines to guard against discriminatory TSOs. The Commission could just as easily find that, on balance, a given TSO proposal should be granted, even though it contains clearly discriminatory provisions. The *Third Report & Order's* non-binding guidelines should be replaced with binding requirements for TSO proposals for CMRS carriers.

The Commission is well aware of the requirements that are necessary to protect CMRS carriers from the potential inequities in TSOs. These requirements were first laid out in the JWC ex parte;¹⁴ Cingular supported them in its comments in this proceeding;¹⁵ and the Commission generally acknowledged them in crafting the non-binding guidelines in the *Third Report & Order*.¹⁶ Most crucially, the Commission must ensure that the TSO is transitional in nature, limited to non-pooling carriers, and does not segregate CMRS carriers in a different area code beyond the implementation of pooling; CMRS customers are not forced to give back their numbers for use by landline and other carriers in the "old" area code; that states may not restrict access to numbers through rationing after the TSO has been implemented; and that the ten-digit

¹² See, e.g., *Numbering Resource Optimization, Petitions of the Arizona Corporation Commission, et al., for Delegated Authority to Implement Number Conservation Measures*, 15 FCC Rcd. 23371 (2000); *Numbering Resource Optimization, Connecticut Department of Public Utility Control et al. Expedited Petition for Additional Authority*, 16 FCC Rcd. 15842 (2001).

¹³ See *id.*

¹⁴ JWC ex parte, *supra* note 10.

¹⁵ See, e.g., Cingular comments on *Second Report & Order* at 5-11; Cingular reply comments on *Second Report & Order* at 4-12.

¹⁶ *Third Report & Order* at ¶ 74.

dialing requirement is not waived beyond the transition to an all services overlay.¹⁷ The Commission has a statutory obligation to ensure that numbers are made available to carriers on an “equitable basis.” That obligation has not been fulfilled. Mandatory, bright-line requirements are required to ensure that this mandate is fulfilled. Thus, the Commission should reconsider its decision to lift the ban on TSOs for CMRS carriers absent such requirements. Because of the imminence of CMRS carriers’ participation in number pooling, however, it would be difficult to implement a properly structured overlay before the justification for it (CMRS carriers’ inability to participate in pooling) disappears. If these restrictions cannot be established, the Commission should reinstate the ban on TSOs for CMRS providers altogether.

II. THE COMMISSION’S DECISION TO LIFT THE BAN ON TSOs IS ARBITRARY AND CAPRICIOUS

In the *Third Report & Order*, the Commission reversed its earlier decisions that TSOs “would be unreasonably discriminatory and would unduly inhibit competition” and “specifically prohibiting all service-specific or technology-specific area code overlays.”¹⁸ Agencies are permitted to reverse their views on a topic, but they must provide a reasoned, rational explanation for the change of policy.¹⁹ The Commission’s rationale for reversing the ban on TSOs for CMRS carriers does not meet this standard.

¹⁷ In addition, if the Commission adopts mandatory requirements and retains the possibility of the implementation of SOs, it should clarify the requirements with respect to thousands-block pooling. The *Third Report & Order* states that “pooling must be implemented in the SOs if it covers an area in which pooling is taking place,” ¶ 94, and yet the Commission holds open the possibility that SOs could be implemented specifically for non-pooling carriers, ¶ 69.

¹⁸ *Second Local Competition Order*, 11 FCC Rcd. at 19518 ¶ 285.

¹⁹ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983); *WorldCom, Inc. v. FCC*, 238 F.3d 440, 460 (D.C. Cir. 2001); *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996).

The Commission based its reversal of policy in the *Third Report & Order* on a finding that “circumstances have changed” since the ban was imposed.²⁰ The Commission found that “carriers in 1996 were not faced with the exigent numbering shortages that exist today,” and suggested that a re-examination of the ban on TSOs was justified by “changes in the use of numbering resources,” suggesting that numbering resources are being used more rapidly than before.²¹

To the extent that an increase in the pace of number usage could justify a re-examination of the Commission’s policy regarding TSOs, such an explanation makes little sense now that the pace of number usage has slowed substantially. According to data from the North American Numbering Plan Administrator (“NANPA”), numbering resource assignment was lower for every month in calendar year 2001 than 2000 except one, and had slowed to an overall rate of only 73% of that in 2000.²² And the assignment figures do not account for the significant number of CO codes – literally hundreds – that were reclaimed in 2001 pursuant to the Commission’s new procedures implemented in this proceeding.²³ Net of reclamation, the effective rate of assignment was even lower than the assignment figures suggest taken alone. Given the precipitous drop in the rate of number assignments in the past year, the Commission cannot justify a new policy on TSOs.

With respect to the rise of number shortages in the time since the ban was imposed, the Commission notes that “earlier concerns raised over the potential discriminatory effects of SOs

²⁰ *Third Report & Order* at ¶ 72.

²¹ *Third Report & Order* at ¶¶ 73-74. In addition, the Commission cited to the rise of “new telecommunications services that do not necessarily need numbering resources from a particular geographic area” as a justification for SSOs. *Id.* Because Cingular’s challenge to the *Third Report & Order* is focused on the treatment of CMRS carriers (whose use of numbers is geographically based) in TSOs, this aspect of the *Third Report & Order* is not discussed herein.

²² Central office code assignment figures from www.nanpa.com.

have been tempered by carriers' concerns over the availability of numbering resources in certain areas, *particularly where state commissions have postponed needed area code relief.*" The Commission found that a significant benefit of reversing the ban on TSOs was the possibility of "mak[ing] available additional resources to certain service providers that would otherwise be subject to rationing or other limitations on access to numbering resources."²⁴

While the rise of numbering shortages caused by state commissions' failure to implement timely area code relief, and the Commission's failure to enforce its own requirements that they do so,²⁵ may be new circumstances since the ban was imposed in 1995, they hardly constitute a reasoned basis for a change in policy.

In essence, in lifting the ban on TSOs the Commission adopted a new analysis of the issue based on weighing the discriminatory effects of TSOs against other potential "benefits." Under this new analysis, the Commission found that it could "no longer fully embrace the notion that placing certain technologies and services in a separate overlay is necessarily *unreasonably* discriminatory."²⁶ Thus, the Commission found that "the benefits of making more numbering resources available through SOs may, in some circumstances, outweigh their potential discriminatory effect."²⁷

The Commission's statutory obligation, however, is to ensure that numbering resources are made available to all carriers on an "equitable basis" – not a "reasonably" equitable basis, or as equitable a basis as possible taking account of other factors. Thus, the Commission's decision in the *Third Report & Order* to "balance" the need for an equitable numbering policy against

²³ *Id.*

²⁴ *Third Report & Order* at ¶ 77.

²⁵ *First Report & Order*, 15 FCC Rcd. at 7583 ¶ 9.

²⁶ *Id.* (emphasis in original).

²⁷ *Third Report & Order* at ¶ 72.

other factors is itself statutorily unsound and cannot form the basis for reversal of its earlier conclusions.

Moreover, the “benefits” that the Commission proposes to weigh against TSOs’ potential discriminatory effects are themselves problematic. The Commission states that TSOs may “prolong the life of the underlying code by placing certain technologies and service providers in a separate area code, thereby easing the cost and inconvenience of frequent area code relief.”²⁸ Similarly, the Commission finds that “SOs may also benefit consumers by facilitating the preservation of geographic identity *for wireline customers* in a particular area.”²⁹ Both of these benefits, however, only inure to wireline carriers (or whatever other carriers are allowed to remain in the underlying code); meanwhile, the carriers relegated to the TSO – and their customers – must endure the cost and inconvenience of area code relief, and forego geographic identity of their numbers. Simply stated, the Commission has observed that TSOs’ discriminatory effects on some carriers inure to the benefit of others. This is hardly a reason – new or otherwise – to permit them.

Just as the Commission found in 1995, TSOs are unjust, unreasonable, and discriminatory. The Commission has offered no reasonable justification to reverse that decision. Accordingly, lifting the ban on TSOs was arbitrary and capricious and must be reconsidered.

²⁸ *Third Report & Order* at ¶ 77.

²⁹ *Id.* (emphasis added).

CONCLUSION

For the foregoing reasons, the Commission must reconsider its reversal of the ban on TSOs adopted in the *Third Report and Order*. TSOs can only be implemented consistent with section 251(e)(1) subject to *mandatory* restrictions to mitigate their inequitable effects.

Respectfully submitted,

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