

TALK: 512.881.1112
TALK: 713.231.2315
FAX: 512.692.2522

W. SCOTT MCCOLLOUGH
ATTORNEY AT LAW
1250 CAPITAL OF TEXAS HIGHWAY SOUTH
BUILDING TWO, SUITE 235
AUSTIN, TX 78746

Email: wsmc@smccollough.com

March 14, 2007

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Room CY -B402
Washington, D.C. 20554

RE: WC Docket 04-6;
*ASAP Paging, Inc. Petition for Preemption of Public Utility Commission
of Texas Concerning Retail Rating of Local Calls to CMRS Carriers;*
Ex Parte Letter

Dear Ms. Dortch:

Please forward this *Ex Parte* filing to the attention of the Commission.

The Commission needs to resolve this case. The matter was filed on December 22, 2003, more than three years ago. The comment cycle is complete, and other than updates relating to ASAP's state court administrative appeal of the Texas PUC decision, no other comments have been submitted. ASAP has patiently waited, but it is a small business with limited resources and the extraordinary delay in processing this matter has imposed a severe burden since CenturyTel has to date been allowed to continue its anti-competitive actions that effectively bar ASAP from providing service using its own NANPA-assigned numbering resources in a significant part of its primary service area.

CenturyTel's January 19, 2007 *ex parte* notice correctly states that the Texas Supreme Court denied ASAP's petition for review of the Texas Court of Appeals decision that in turn affirmed a state district court decision upholding the Texas PUC's decision. The state courts in Texas have now sustained the Texas PUC's decision that CMRS carriers' federally-assigned local numbers are not in fact local numbers if the ILEC chooses to not honor the CMRS carrier's rate center assignment. The state courts in Texas have decided not to reverse the PUC's ruling that it would ignore this Commission's decision in *TSR* that paging carriers perform a transport and termination function and calls to paging customers "terminate" at the customer's location. The Texas PUC instead decided that paging traffic terminates at the paging carrier's switch location, not the customer's location, for purposes of retail rating. The state courts in Texas have let the Texas PUC and the ILECs in Texas assert before this Commission that "Expanded Local Calling Service" is basic local service for purposes of securing modifications to RBOC LATA boundaries, while at the same time holding that ELCS is not basic local service for purposes of retail rating of calls originated by ILECs and addressed to competitive carriers. The state courts in Texas rejected ASAP's contention that CenturyTel's refusal to honor ASAP's rate center assignments – resulting in CenturyTel requiring its own customers to dial 1+ and pay toll when they call an ASAP number that is associated with a rate center in the same mandatory expanded local calling area as CenturyTel's San Marcos exchange – violates CenturyTel's local dialing

parity obligation to ASAP and CenturyTel's own customers under 47 C.F.R. § 51.207.¹ In Texas, the retail rating for ported numbers can be different than the retail rating that applies when the competitive carrier assigns one of its own numbers, notwithstanding the holding in ¶ 28 of the Memorandum Opinion and Order and Further Notice Of Proposed Rulemaking *In the Matter of Telephone Number Portability CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, FCC 03-284, 18 FCC Rcd 23697 (rel. Nov. 10, 2003). Finally, the state courts in Texas have allowed the Texas PUC to assert state regulatory jurisdiction over ASAP's service to Internet Service Providers, even though the law is clear, both at this Commission and in many federal court decisions, that the telecommunications service input supplied to ISPs by carriers is jurisdictionally *interstate* as a matter of law.

Each of the above-described state level holdings unequivocally and directly conflict with this Commission's prior decisions and unlawfully intrude on the FCC's exclusive jurisdiction over numbering, its rules concerning CMRS and ISP-bound traffic, its dialing parity rules and carriers' jurisdictionally interstate services. With regard to dialing parity in particular, two recent federal court decisions confirm ASAP's position. See *Rural Iowa Indep. Tel. Assoc. v. Iowa Utilities Bd.*, 2007 U.S.App. LEXIS 302 (8th Cir. 2007) ("RIITA"); *WWC License, LLC v. Boyle*, 459 F.3d 880 (8th Cir. 2006). The Eighth Circuit's opinion in *Rural Iowa Indep. Tel. Assoc. v. Iowa Utilities Bd.*, is particularly illuminating. The court was wryly critical of rural ILECs' practice of imposing toll charges for calls to wireless customers when it approved the Iowa Utilities Board's observation that ILEC customers do not much appreciate the "right" that is extended to them by the RLECs to dial 1+ and pay toll to reach their friends, local business associates or family who use CMRS services. These CMRS users are usually within the RLEC's local calling area at the time of the call.

This abuse and increasingly rampant violation of FCC rules must stop. Since the Texas courts chose to not disturb the Texas PUC decision on appeal – but did not conduct any real analysis of the federal issues – the Commission must now grant ASAP's Petition and pre-empt the decision of the Texas Public Utility Commission because that decision conflicts with and frustrates the operation of federal law.

Thank you.

Sincerely,


W. Scott McCollough
Counsel for ASAP Paging, Inc.

¹ "A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider."