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Decision 00-01-026 January 6, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

ORDER GRANTING LIMITED REHEARING OF DECISION 99-10-022, MODIFYING THE DECISION, AND DENYING REHEARING AS MODIFIED

I. SUMMARY

This decision grants a limited rehearing to modify Conclusion of Law No. 2 so that it accurately conforms to the Commission's intent as stated on page 16 of D.99-10-022, and to add a conclusion of law which acknowledges that pursuant to the FCC's *Order Delegating Additional Authority*, we conclude that the conservation measures ordered in D.99-10-022 should prolong the lives of NXX codes in the 818 NPA. In addition, we correct typographical errors on page 6 and in Ordering Paragraph No. 6. The rehearing of D.99-10-022 is denied in all other respects.

II. BACKGROUND

On October 7, 1999, the Commission adopted D.99-10-022, which orders the implementation of several conservation measures for the 818 NPA.[1] The back-up plan of a geographic split was adopted, however, the setting of an implementation schedule for the 818 NPA split was deferred until a determination is made that number conservation measures will fail to prevent code exhaustion.

On November 8, 1999, CCAC filed an application for rehearing of D.99-10-022, challenging the decision on the grounds that the Commission acted outside of the jurisdiction granted to it by the FCC by delaying area code relief. They argue further that the decision that consideration of relief of the 818 NPA can be deferred until after the implementation of number conservation measures and utilization studies is not supported by the evidence and therefore constitutes an abuse of discretion. CCAC contends that this deferral of consideration of relief in the 818 NPA unduly discriminates against wireless and other non-LNP capable carriers. Finally, CCAC objects to the decision's assertions supporting exploring the implementation of a wireless-specific overlay on the grounds that it is not supported by the evidence, improperly pre-judges the issue, and unduly discriminates against wireless carriers.

On November 23, 1999, the Office of Ratepayer Advocates (ORA) filed a response to CCAC's application for rehearing, urging the Commission to deny rehearing because CCAC's claims are without merit. ORA asserts that the decision's deferral of an implementation date for the 818 back-up relief plan does not violate the FCC's Order, nor has the Commission abused its discretion by concluding that such implementation can be deferred. ORA argues that the Commission has not discriminated against wireless or other non-LNP capable carriers in D.99-10-022, nor has it prejudged the issue of technology-specific or service-specific overlays. The City of Los Angeles also filed an Opposition to

[1] The 818 NPA serves part of the San Fernando Valley in southern California.

CCAC's rehearing application rejecting CCAC's claims that the Commission has exceeded its authority by allegedly delaying area code relief, or abused its discretion by deferring consideration of the implementation of the area code split in the 818 NPA. Los Angeles likewise objects to CCAC's contention that the decision discriminates against wireless and other non-LNP capable carriers.

III. DISCUSSION

Once again, CCAC challenges an area code decision on numerous grounds, including the charge that the Commission has exceeded its authority. We have carefully reviewed CCAC's allegations and find them essentially lacking in merit. CCAC also requests oral argument in an attempt to make the case orally that it has been unable to accomplish in numerous pleadings in this proceeding. In this decision, we dispose of CCAC's request for oral argument, and then take each substantive allegation in turn.

REQUEST FOR ORAL ARGUMENT

CCAC requests oral argument on the grounds that D.99-10-022 presents legal issues of exceptional controversy and public importance, and that it specifically represents a marked change in Commission policy regarding area code relief and a perceived resistance to mandatory 1+10 digit dialing which must accompany area code relief in the form of overlays. (CCAC Rhg. at 3.) These are not the criteria by which requests for oral argument are evaluated. The Commission's Rules of Practice and Procedure provide that oral argument may be granted if an application for rehearing or a response to the application demonstrates that oral argument will materially assist the Commission in resolving the application, and the application or response raises issues of major significance for the Commission.[2] The rules are designed to assist the Commission in

[2] Rule 86.3 lists certain criteria which are not exclusive, but are intended to assist the Commission in choosing which applications for rehearing are suitable for oral argument. The rule notes that the Commission has complete discretion to determine the appropriateness for oral argument in any particular matter. (Commission's Rules of Practice and Procedures (Rule 86.3 (Cal.Code Regs., tit. 20.).)

choosing which rehearing applications are suitable for oral argument. The Commission has complete discretion to determine whether oral argument is appropriate in any given matter.

We are aware that the topic of area codes is controversial and a matter of significant public interest. However, the overarching consideration by which a request for oral argument should be evaluated is whether oral argument will materially assist the Commission in resolving the rehearing applications. The parties have thoroughly briefed the legal issues, and there is no compelling reason why the issues cannot be resolved on the basis of the parties' written filings. Moreover, CCAC's assertion that the Commission has exceeded its authority is a legal question, for which oral argument is not required. To the extent that the Commission conforms its policy to accommodate newly-acquired authority over numbering administration, any perceived change in Commission policy that flows therefrom is legally justified. We therefore deny CCAC's request for oral argument.

A. The Commission Acted Within Its Authority in Instituting Various Conservation Measures in D.99-10-022.

CCAC claims that the Commission has exceeded the authority granted it by the FCC in purportedly "indefinitely" delaying relief of the 818 area code. (CCAC Rhg. at 11-13.) We disagree. CCAC goes on to concede that the FCC has delegated authority to the Commission to experiment with means to defer the need for area code relief, but then asserts that the FCC has not authorized California to delay needed area code relief. (CCAC Rhg. at 12.) The fact is that the Commission has not delayed relief in any situation where area code relief is required under FCC regulations.

The Commission acknowledges that the 818 NPA is in jeopardy, as are the majority of NPAs in California. However, the 818 NPA has enough time before exhaust to implement number conservation measures intended to make area

code relief unnecessary in the near future. Telecommunications carriers as well as CCAC have been clamoring for relief in California to the point where the Commission has implemented 12 new area codes in a period of only three years.[3] This Commission has not hesitated to provide relief when the time has come for it to do so. The Commission will provide timely relief when appropriate in this instance, as well. The Commission's actions, as memorialized in D.99-10-022, do not exceed, but are well within, the authority duly delegated to the Commission, pursuant to the *FCC's Order Delegating Additional Authority.*[4]

CCAC is quick to charge the Commission with violating the requirements of §251(e)(1) of the Telecommunications Act and §52.9(a) of the Code of Federal Regulations, as if the mere incantation of these provisions is sufficient to make its case.[5] It is not. Section 251(e)(1) of the Telecommunications Act of 1996 provides that the FCC shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States, and nothing shall preclude the FCC from delegating to state commissions any or all portions of such jurisdiction. Rule §52.9 provides that state commissions must ensure that numbers are made available on an equitable basis, that numbering resources are made available on an efficient and timely basis, and the state's policies may not unduly favor or disfavor any industry segment or groups of consumers, or favor one telecommunications technology over another.[6] It is not enough to cite these regulations and conclude, without proof, that relief is untimely, that the Commission is unduly favoring or

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[3] The Commission has not been shy about providing area code relief, as evidenced by the virtual doubling of the number of area codes from 13 to 25 in just three years. (*Reply Comments of the California Public Utilities Commission and of the People of the State of California in the Matter of Numbering Resource Optimization*, CC Docket No. 99-200; RM No. 9528, NSD File No. L-99-17, NSD File No. L-99-36, p. 4.)

[4] *In the Matter of California Public Utilities Commission Petition for Delegation of Additional Authority Pertaining to Area Code Relief and NXX Code Conservation Measures* (FCC 99-248; CC Docket No. 96-98; NSD File No. L 98-136 (rel. 9/15/99).)

[5] *See* CCAC Rhg., p. 12.

[6] 47 CFR 52.9.

disfavoring any industry segment or group of consumers over another, or favoring one telecommunications technology over another, as CCAC attempts to do.

We note that unlike the joint rehearing application of the California Cable Television Association *et al.* in D.99-09-067, CCAC does not allege in this rehearing that customers have been denied their choice of carrier. CCAC simply notes in passing that "[u]nder no circumstances are customers to be denied service from the carrier of their choice because of an inadequacy of numbering resources."[7] The Commission is committed to preventing this from happening, but must also balance the public interest in ensuring that new area codes are necessary against the stated industry demand for more numbers.

At the heart of CCAC's jurisdictional argument is its claim that the Commission is unlawfully substituting code conservation measures for area code relief in the 818 NPA. We rejected this argument in D.99-12-023, and we do so now. As we stated in that decision, we are not confusing conservation with relief.[8] The 818 NPA has not reached the point where relief is required. There are 139 NXX codes still available in the 818 NPA. The lottery currently distributes 4 NXX codes per month in the 818 NPA. Forty-five (45) NXX codes have been reserved for number pooling. In addition, the projected exhaust date has been adjusted. When D.99-10-022 was issued, the projected exhaust date was early 2001. We now estimate an exhaust date of November, 2001 or later.

As in its joint rehearing application challenging D-99-09-067, CCAC relies on *California Hotel & Motel Association v. Industrial Welfare Commission*, 25 Cal.3d 200 (1979) in an attempt to prove that the Commission acted outside its FCC-delegated authority. Its attempt was not successful then, and it fails now.

[7] CCAC Rhg., p. 12; emphasis in original.

[8] D.99-12-023, *mimeo*, at 7.

In D.99-12-023, the decision on rehearing of D.99-09-067, the Commission determined that its actions in the 310 NPA comport with the requirements enunciated in *California Hotel.* In *California Hotel*, the court saw its duty as ensuring that an agency has adequately considered all the relevant factors and has demonstrated a rational connection between those factors, the choice made and the purpose of the enabling statute.[9] Since we were not dealing with a state enabling statute in D.99-09-067, we agreed that we must look to the FCC Orders that delegated authority to the Commission. In so doing, we concluded that the rational connection between the factors and the choice made was very clear.

Similarly, in this case, the rational connection between the relevant factors, the choices made in D.99-10-022, and the FCC's *Order Delegating Additional Authority* is just as clear. The Decision correctly recognizes that the 818 NPA is in jeopardy, as are most of California's NPAs. In order to slow down code exhaust, the Commission is availing itself of legitimate tools to get the situation under control, pursuant to the FCC's *Order Delegating Additional Authority.* To avoid rushing to provide relief where it is not warranted, the Commission is reasonably providing an opportunity for the conservation measures and other tools for efficient number management to work.[10]

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[9] *California Hotel* at 212.

[10] The Commission is instituting a number of conservation measures designed to extend the life of the 818 NPA, such as: establishing voluntary 1,000-block number pooling; ordering preparations to begin mandatory 1,000-block number pooling, directing the NANPA to determine whether any NXX codes assigned in the 818 NPA have not been activated in the time frame provided by the industry guidelines, and if not, directing the NANPA to seek return of those NXX codes; requiring the implementation of efficient number management practices, such as fill rates and sequential numbering; exploring other feasible means of promoting more efficient number usage; and ordering carriers to provide utilization information required to implement the return of unused numbers and the efficient allocation of numbers. (D.99-10-022, *mimeo* at pp. 5-6.)

B. Conclusion of Law No. 2 Is Not An Abuse of Discretion.

CCAC asserts that the Commission committed an abuse of discretion in violation of PU Code §1757 by formulating Conclusion of Law No. 2, which states:[11]

> "The Commission should defer further consideration of a split until after the implementation of number conservation measures ordered herein and the assessment of the effects of those measures on the availability of numbering resources in the 818 NPA."

As a preliminary matter, we conform Conclusion of Law No. 2 to mirror the Commission's intent, as stated on page 16 of D.99-10-022. We make it clear on page 16 that "[w]e defer adopting a contingency implementation schedule for the 818 relief plans if and when we are sure the split is required." The facts demonstrate that the Commission, despite deferring the implementation schedule at the time D.99-10-022 was adopted, is moving forward in its preparations for developing a contingency back-up plan. In D.99-10-022, the Commission is simply deferring the implementation of the 818 NPA back-up relief plan at the time of D.99-10-022, not the preparations for developing a contingency schedule at the appropriate time. The Commission's back-up preparations for the relief plan in the 818 NPA meet the requirements of the FCC's Order which "require that in any NPA which is in jeopardy in which the California Commission implements a pooling trial, the California Commission *must take all necessary steps to prepare an NPA relief plan* that it may adopt in the event that numbering resources in the NPA at issue are in imminent danger of being exhausted."[12]

Therefore, the Commission's preparations go forward, notwithstanding the temporary deferral in setting a contingent implementation

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[11] PU Code §1757(a)(1) provides in pertinent part that review by the court shall not extend further than to determine, on the basis of the entire record whether the commission acted without, or in excess of, its powers or jurisdiction.

[12] *Order Delegating Additional Authority, supra* at 15; emphasis added.

schedule. D.99-10-022 directs the Administrative Law Judge (ALJ) to solicit comment on the amount of preparation time needed to implement the back-up relief plan for the 818 NPA, and the need for a trigger mechanism. On November 15, 1999, ALJ Pulsifer issued a ruling which requests comment on these issues. Thus, the Commission is taking appropriate precautionary steps to provide sufficient time to begin implementing the back-up plan, if or when it becomes necessary.

In sum, rather than deferring further consideration of a split, the Commission is actually deferring the implementation schedule for the 818 NPA back-up plan, and Conclusion of Law No. 2 should be modified accordingly.

We now turn to CCAC's claims of error. CCAC contends that Conclusion of Law No. 2 constitutes abuse of discretion because the decision lacks any findings or conclusions that number conservation measures will prolong the life of the 818 NPA beyond the anticipated exhaust date of early 2001, and CCAC argues, such findings and conclusions are required to support the determination that area code relief can be deferred while the Commission pursues various number conservation measures. (CCAC Rhg. At 14.) We both agree and disagree with CCAC. We agree with CCAC that "it would be impossible to make such a finding at this time." (CCAC Rhg. At 15.) Since findings are based on facts, and the number conservation measures have not had an opportunity to be fully implemented, the Commission cannot make findings of fact pertaining to events that have not yet occurred. Furthermore, between now and the anticipated exhaust date for the 818 NPA of November 2001, the Commission has an opportunity to monitor the situation, give the conservation measures a chance to work, and modify its actions accordingly, if conditions warrant. However, we acted to defer implementation of area code relief because we fully expect code conservation measures to prolong the life of existing NPAs.

We disagree that specific findings are required before the Commission can determine that area code relief can be deferred while various

conservation measures are explored. One need only review the FCC's *Additional Authority Order* to conclude that conservation measures are capable of prolonging the lives of NXX codes. The FCC recognized such when it noted that it is "giving the California Commission tools that may prolong the lives of existing area codes." (*Id.* at ¶9.) The FCC acknowledges that such measures may in fact prolong the lives of NXX codes, and indeed this was one of the motivating factors underlying the FCC's significant grant of authority to California. In addition, the FCC wanted "to empower the California Commission to take steps to make number utilization more efficient." (*Id.* at ¶6.) Therefore, based on the FCC's reasoning in the *Order Delegating Additional Authority*, the Commission may conclude that the conservation measures and other methods of efficient number management should prolong the lives of the NXX codes.

Increasing the longevity of NXX codes, in turn, should abate the necessity for imminent area code relief. This would not offend Rule §52.9 because timely relief can still be achieved. This is the situation in which we find ourselves in the 818 NPA. Factoring in the number of available NXX codes (139), along with the NXX codes reserved for pooling (45), and the lottery distribution of 4 NXX codes per month in the 818 NPA leaves sufficient time to adopt a contingency schedule to implement relief prior to code exhaustion. Under these conditions, it is reasonable to defer beginning immediate relief in order to give the various conservation measures an opportunity to work. The Commission's actions are neither arbitrary nor capricious, but are eminently reasonable under the circumstances. Thus, there is no merit to CCAC's claim that the Commission abused its authority in formulating Conclusion of Law No. 2.

C. CCAC's Assertions Regarding Mandatory Number Pooling Do Not Establish Legal Error.

As a subset of its argument that Conclusion of Law No. 2 is an abuse of discretion, CCAC asserts that number pooling has not yet been implemented in any part of California and states further that the "Commission has not even begun

to consider implementation of number pooling outside of the 310 NPA." (CCAC Rhg. at 15.) CCAC is wrong. Number pooling is scheduled to begin in the 310 NPA on March 18, 2000, and the Commission is considering number pooling in other NPAs, as well. In D.99-10-022, the Commission ordered the Administrative Law Judge (ALJ) to issue a ruling instituting a process for number pooling to be implemented in the 818 NPA, and directed the Telecommunications Division to begin designing the structure for mandatory number pooling in the 818 NPA.[13] More recently, in D.99-12-051, the Commission referenced its plans to implement number pooling, on a staggered basis, in the 408, 415, 510, 650, 714, and 909 NPAs.[14] Thus, the Commission is beyond the stage of merely considering implementing number pooling outside of the 310 NPA.

CCAC questions whether 818 is a good candidate for number pooling by citing to paragraph 21 of the FCC's *Order Delegating Additional Authority*. (CCAC Rhg. at 16.) That excerpt "suggests" to the Commission that it "consider" concentrating its thousands-block trials in those NPAs which are best candidates for pooling, based on the considerations set forth in the *Numbering Resource Optimization Notice*.[15] CCAC claims that it is implicit in this FCC "mandate" that the Commission determine whether an NPA is a good candidate before making its decision to order number pooling, not after. (CCAC Rhg. at 16.) Once again, CCAC persists in seeing a mandate where it does not exist. As noted in D.99-12-023, common sense dictates that the Commission use what it deems are the best candidates for number pooling. The FCC assumes California will select the best candidates for pooling, consistent with the *Numbering Resource Optimization Notice*.

[13] Ordering Paragraph 6 should state that number pooling is ordered in the 818 NPA. This typographical error is corrected in this rehearing.

[14] *See* D.99-12-051, Ordering Paragraph No. 2

[15] See *Notice of Proposed Rulemaking*, CC Docket No. 99-200, FCC 99-122 (rel. June 2, 1999).

CCAC suggests that the 818 NPA is not a good candidate for pooling on the grounds that number pooling is more effective in new NPAs where there will be more whole NXX blocks available for non-LNP capable carriers. (CCAC, p. 17.) ORA disagrees with CCAC:

> "Contrary to CCAC's assertion, the FCC did not restrict the Commission to implementing number pooling in a new NPA with the full 792 NXX codes available as opposed to an NPA with 135 NXX codes. No law, or regulation exists to prevent the Commission from implementing a mandatory number pooling trial in a mature NPA." (ORA's Response to CCAC's Rhg., p. 4.)

We agree with these sentiments. The Commission recognizes that number pooling alone in a mature NPA such as 818 is not sufficient to defer an overlay or split, and so stated on page 8 of D.99-10-022. That is why the Commission is concurrently requiring carriers to return unused or underutilized assigned NXX codes, and is instituting other efficient allocation measures. Ultimately, CCAC was forced to concede that the FCC acknowledges that number pooling may be effective where few NXX codes remain for assignment. (CCAC Rhg. at 17.) The objective of number pooling is to extend the life of the NPA. By that standard and based on the numbers provided to the Commission, we are confident that number pooling will prove useful in the 818 NPA. In any event, we have made provision for implementation of a relief back-up plan, should number pooling and related measures prove insufficient to significantly defer code exhaust.

CCAC states that D.99-10-022 was adopted before the Commission requested raw data from carriers regarding their utilization in the 818 NPA. (CCAC Rhg. at17.) CCAC appears to suggest that the Commission has somehow acted outside the boundaries of an imagined or pre-ordained sequence of events. We remind CCAC that early on, the carriers had ample opportunity to provide the

Commission with raw utilization data and demand which they could have provided under seal, if they so desired, but they preferred to divulge public data only. The Commission intends to get the data that it needs in due course and has already set the wheels in motion. Utilization studies will be done on an NPA-by-NPA basis. We have currently ordered such a study for the 310 NPA. Since the 818 NPA is not projected to exhaust until November of 2001, the Commission has more leeway in which to act.

D. Exploration of Service-Specific Overlays Is Not Discriminatory.

The final argument set forth by CCAC attacks dicta, which CCAC concedes is not part of the decision in D.99-10-022.[16] As we noted in D.99-12-023, legally, the Commission need not go any further to dispose of this claim since it is already acknowledged that it is not part of the Commission's "decision." However, the claim that the Commission has prejudged an issue should be addressed.

It is no secret that the Commission has petitioned the FCC for authority to establish a technology-specific or service-specific overlay.[17] In that petition, we indicated that our request was not intended to prejudge whether the Commission would order a technology-specific or service-specific area code. Our purpose was to maximize the options available to gain control of the ongoing numbering crisis in California.[18] We also stated: "The CPUC may ultimately decide that implementing such an area code is technically infeasible or simply will not contribute significantly to easing pressure on the numbering system."[19] We

[16] *See* CCAC's Rehearing Application at 22, which states: "CCAC is well aware that dicta contained in Commission decisions which is not supported by any findings of fact, conclusions of law or ordering paragraphs, cannot be considered the 'decision' of the Commission."

[17] *Petition of the CPUC for Waiver to Implement A Technology-Specific or Service-Specific Area Code* (April 23, 1999).

[18] *Id.* at 1, 7.

[19] *Id.* at 7.

have not changed our position, and are not prejudging how the FCC will resolve our technology-specific petition.

In D.99-10-022, we are considering our options and not foreclosing any option that could expedite the efficient allocation of numbers in the 818 NPA. As we stated in D.99-12-023, we reserve the right to exercise whatever authority the FCC delegates to this Commission in order to relieve the numbering crisis in California. We would be within our rights to explore this option if the FCC grants the authority.

The allegation by CCAC that the wireless-overlay is patently discriminatory is baseless. CCAC makes a discrimination charge against the Commission on the basis of authority which has not yet been granted. We need not respond to a premature allegation that amounts to little more than speculation. Moreover, we will not speculate at this time on how the FCC will rule. Finally, CCAC states that "there are several reasons why a wireless-only overlay will not solve California's area code problems, " but does not supply the reasons.[20] Therefore, the Commission need not give much weight to this unsupported allegation.

IV. CONCLUSION

We grant limited rehearing to modify Conclusion of Law No. 2 so that it more clearly reflects the Commission's intent with regard to deferring the contingent implementation of the 818 area code relief back-up plan, and to add a conclusion of law which acknowledges that pursuant to the FCC's Order, the Commission may conclude that conservation measures authorized in that Order should prolong the lives of NXX codes. Typographical errors are also corrected. We deny rehearing in all other respects.

[20] *See* CCAC Rhg. at 22.

Therefore, **IT IS ORDERED that:**

1. Oral argument is denied.

2. Conclusion of Law No. 2 is modified to read:

   The Commission should defer beginning the 818 back-up relief plan, at least until the number conservation measures ordered herein are implemented and the effects of those measures on the remaining life of numbering resources in the 818 NPA are assessed.

3. We add the following as Conclusion of Law No. 4:

   Pursuant to the FCC's Order Delegating Additional Authority which concludes that conservation measures may prolong the lives of NXX codes, the Commission reasonably concludes that these measures, as ordered in D.99-10-022, should prolong the lives of NXX codes.

4. Page 6, the next to the last paragraph should be modified to read:

   Accordingly, we direct our Telecommunications Division ("TD") to begin designing the structure for mandatory number pooling in the 818 NPA. TD shall contract for services to design, implement, and evaluate an NXX code utilization study for the 818 NPA.

5. OP 6 should be modified to read:

   The Telecommunications Division shall develop a plan for the design and implementation of a mandatory number-pooling program, and procedures for the return of underutilized NXX codes in the 818 NPA. The TD shall take all other necessary steps to implement number conservation measures set forth herein.

6. The rehearing of D.99-10-022 is denied in all other respects.

This order is effective today.

DATED January 6, 2000, at San Francisco, California.

RICHARD A. BILAS
President
CARL W. WOOD
LORETTA M. LYNCH
Commissioners

I will file a written dissent.

/s/ HENRY M. DUQUE
Commissioner

I dissented.

/s/ JOSIAH L. NEEPER
Commissioner

Commissioner Henry M. Duque, dissenting:

Today's decision of the majority echoes the arguments contained in Decision 99-12-023, and consequently contains the same legal flaws. These legal flaws once again compel my dissent.

The Federal Communications Commission's (FCC) delegation to California of the authority to mandate number conservation requires that "Under no circumstances should customers be precluded from receiving telecommunications services of their choice from providers of their choice for a want of number resources." (FCC 99-248, paragraph 9). Nevertheless, today's decision of the majority exercises this delegated power without making any findings that the situation in the 818 area code meets this factual predicate.[1] Thus, the majority's exercise of authority delegated by the FCC fails to comport with the terms of the delegation, and is therefore contaminated by legal error.

The FCC's delegation to California of the authority also requires that California not substitute code conservation for needed code relief. (FCC 99-248, paragraphs 9 and 22). Although D.99-10-022 does adopt an area code split as a back-up plan, neither it or today's order of the majority set forth the criteria that would trigger implementation of the back-up relief plan. Thus, this Commission has failed to demonstrate that it will implement code relief in a timely matter to avoid code exhaustion. This omission indicates that today's order of the majority, like D.99-12-023, also substitutes code conservation for needed code relief. Once again, California fails to meet a condition necessary for the lawful exercise of the delegated authority.

For these reasons, I must respectfully dissent.

/s/ HENRY M. DUQUE

Henry M. Duque
Commissioner

January 6, 2000

San Francisco

[1] Unlike the 310 area code, the current availability of NXX prefixes in the 818 suggests that it may prove possible to make such a determination in this case. Nevertheless, D.99-10-022 failed to make such a finding. Moreover, D.99-10-022 failed to develop a record that enables this Commission to make such a finding. Thus today's order of the majority cannot make such a finding to correct this legal error.