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Decision 99-12-023 December 2, 1999

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.	R.95-04-043 (FILED APRIL 26, 1995)
ORDER INSTITUTING INVESTIGATION ON THE COMMISSION'S OWN MOTION INTO COMPETITION FOR LOCAL EXCHANGE SERVICE.	I.95-04-044 (FILED APRIL 26, 1995)

ORDER ADDING ORDERING PARAGRAPH TO DECISION (D.) 99-09-067 AND DENYING REHEARING.

I. SUMMARY

This decision denies the rehearing of D.99-09-067, which suspended the 424 overlay in the 310 area code and instituted measures to conserve existing numbers. We have carefully considered all of the arguments presented by both the California Cable Television Association Joint Applicants and the Cellular Carriers Association of California Joint Applicants, and are of the opinion that good cause for rehearing does not exist. However, on our own motion, we add an ordering paragraph that was inadvertently omitted from D.99-09-067. We further deny the request for oral argument on the grounds that it does not meet the requirements of Rule 86.3 of the Commission's Rules of Practice and Procedure.

II. BACKGROUND

D.98-05-021, issued on May 7, 1998, approved California's first area code overlay plan to relieve number exhaustion in the 310 Numbering Plan Area (NPA). In accordance with federal rules governing the use of overlays, mandatory 1+10 digit dialing was scheduled to begin on April 17, 1999. The 424 overlay was to be implemented effective July 17, 1999.

On June 9, 1999, Assemblyman Knox and other parties, filed a petition to modify D.98-05-021 by requesting a halt to the opening of the new 424 area code overlay. On June 11, 1999, the assigned commissioner and administrative law judge issued a ruling which granted the petitioners' motion for an order shortening time and set two dates for replies to the petition. The due date for responding to the issue of temporarily suspending the implementation of the 424 NPA overlay to allow the Commission time to act on the merits of the petition before implementation of the overlay was June 18, 1999. Parties were given until June 25, 1999 to reply to the full merits of the petition.

The following parties responded to the issue of temporarily suspending the implementation of the 424 area code overlay: Pacific Bell, the Cellular Carriers Association of California (CCAC), joint filing by MediaOne Telecommunications of California, Inc. (MediaOne), ICG Telecom Group, Inc., Nextlink of California, Inc., AT&T Communications of California, Inc., (AT&T), and the California Cable Television Association (CCTA). Joint Comments were also filed by GTE California, Inc., Paging Network of Los Angeles, The Telephone Connection of Los Angeles, Inc., Air Touch Cellular, MGC Communications, and Mobilmedia Communications/Mobilecom, Paging Network. Comments were also filed separately by MCI WorldCom and by the Commission's Office of Ratepayer Advocates (ORA).

On June 24, 1999, the Commission adopted D.99-09-061, granting a temporary suspension of the activation of the 424 area code in order to provide the Commission sufficient time to address the full merits of the petition. The

temporary suspension did not rescind the 1+10 digit dialing requirement. Responses addressing the full merits of the petition were filed on June 25, 1999. The City of Los Angeles and the County of Los Angeles also filed comments. In D.99-11-033, the Commission issued an order clarifying a finding and otherwise denying the rehearing of D.99-06-091.

On September 15, 1999, the Federal Communications Commission (FCC) delegated additional authority to this Commission to implement conservation measures to extend the life of NXX codes until the implementation of relief.[1] This order was in response to a Petition filed on April 23, 1999 by this Commission seeking authority to order mandatory number pooling trials; to order efficient number use practices within NXX codes; to hear and address individual carrier requests seeking assignment of NXX codes outside of the lottery process; to order carriers to return to code administrator unused NXX codes; and to order the return of unused and underutilized NXX codes to the pooling administrator. On the same day, the Commission filed a Petition for Waiver to Implement a Technology-Specific or Service Specific Area Code. The petition requested authority to establish a technology-specific or service-specific overlay. [2]

On September 16, 1999, the Commission issued D.99-09-067 (hereinafter, the Decision), granting the petition to suspend the 424 overlay and re-instituting permissive1+10-digit dialing. The Decision also ordered innovative, aggressive, and forward-looking number conservation measures designed to slow the rate of number exhaust in the 310 NPA.

Two joint rehearing applications of D.99-09-067 were filed by numerous parties on October 20, 1999. The first joint rehearing application was filed by the California Cable Television Association (CCTA), MediaOne, and Nextlink alleging that the Commission erred by unlawfully substituting code

[1] *See 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).)

[2] The FCC has not yet acted on the petition.

conservation measures for area code relief in the 310 NPA; by denying customers the ability to obtain service from the carriers of their choice; and by unduly disfavoring new market entrants.

The second joint application was filed by the Cellular Carriers Association of California (CCAC), Air Touch Cellular Communications, Inc. (dba Air Touch Cellular), AT&T Communications of California, Inc., Pacific Bell Wireless, and Sprint Communications LP, and Sprint Spectrum, LP (dba Sprint PCS). These joint applicants request oral argument and reserve the right to federal review. The CCAC Joint Applicants claim that the Commission's authority over area code relief does not include authority to delay area code relief, and the finding (Finding of Fact No. 3) that relief of the 310 area code can be forestalled or eliminated constitutes an abuse of discretion. They contend that the continued suspension of the 310/424 overlay and order implementing number conservation measures which exclude non-LNP capable carriers exceeds the Commission's delegated authority over area code relief because it unlawfully discriminates against wireless and other non-LNP capable carriers. The discrimination argument was also applied to the decision's statement of intent to implement a wireless-only overlay as a means to prolong the life of the 310 NPA. Finally, the CCAC Joint Applicants allege that the Commission violated Public Utilities (PU) Code §1708 in amending D.98-05-021 without an opportunity to be heard, and it contravenes §253 of the Telecommunications Act of 1996 by - reducing the monthly allotment from six to two.

On November 4, 1999, The Utility Reform Network (TURN) and the Office of Ratepayer Advocates (ORA) filed a joint response to the applications for rehearing. TURN and ORA roundly rejected most, if not all, of the arguments set forth by the rehearing applicants. They asserted that the decision does not violate the requirement that the Commission implement area code relief when necessary; that there is no evidence that D.99-09-067 has precluded customers from receiving services from the telecommunications providers of their choice;

and that the decision does not unduly disfavor new market entrants or wireless service providers. Additionally, they argue that D.99-09-067 does not constitute an abuse of discretion, nor does it violate PU Code §1708.

The City of Los Angeles also filed an Opposition to the applications for rehearing of D.99-09-067 on November 4, 1999. It argued that the Commission has independent jurisdiction to act and that it correctly exercised the authority granted to it by the FCC. Also, the City of Los Angeles disagreed that Finding of Fact No. 3 is an abuse of discretion, or that D.99-09-067 discriminates against wireless or other non-LNP carriers. Finally, the City asserted that D.99-09-067 does not contravene Section 253 of the Telecommunications Act of 1996.

III. DISCUSSION

Both Joint Applicants raise many arguments for the rehearing of D.99-09-067, however, none of them rise to the level of reversible error, as the ensuing discussion will demonstrate. Some of the arguments overlap or are variations on the same theme. We note that D.99-09-067 referenced our plan to order a temporary reduction in the monthly lottery from six to two, however, this provision was not replicated in the order. Therefore, *sua sponte*, we add this ordering paragraph to the order.[3] As a preliminary matter, we address the CCAC Joint Applicants' request for oral argument.

REQUEST FOR ORAL ARGUMENT

The CCAC Joint Applicants request oral argument on the grounds that D.99-09-067 changes existing Commission precedent and is likely to have significant precedential impact; that it presents legal issues of exceptional controversy and public importance; and it raises questions of first impression

[3] The CCAC Joint Applicants argue that the reduction is a barrier to entry, without noting its omission from the ordering paragraphs.

concerning the authority of the Commission to delay area code relief. (CCAC Rhg at 3.) 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.[4] The rules are designed to assist the Commission in 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.

The CCAC Joint Applicants raise issues regarding the jurisdiction of the Commission over number administration. They do so despite the FCC's order of September 15, 1999 which equipped the Commission with broad numbering authority. By virtue of the authority conditionally vested in the Commission by the FCC's *Order Delegating Additional Authority* to the California Commission, the Commission is empowered to use its expanded numbering authority to get control of the numbering crisis in California. To the extent that California, by operation of law, used authority never before enjoyed by the Commission, the question of first impression is an inevitable by-product. 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 persuasive reason why the issues cannot be resolved on the basis of the parties' written filings. We therefore deny the CCAC Joint Applicant's request for oral argument.

[4] 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.).)

A. The Commission Does Not Exceed its Authority by Substituting Code Conservation for Area Code Relief in the 310 NPA.

Each of the Joint Applicants challenging D.99-09-067 attempts to make the case that the Commission, by not immediately implementing the 424 overlay in the 310 NPA, has somehow exceeded its authority and is confusing conservation with relief. They are wrong. The Commission's actions, as memorialized in D.99-09-067, are well with the authority duly delegated to the Commission, pursuant to the *FCC's Order Delegating Additional Authority* , and does not substitute conservation for relief.

Integral to their claim that the Commission has committed legal error is the CCTA Joint Applicants' charge that the Commission unlawfully substituted code conservation measures for area code relief in the 310 NPA. This allegation is without merit. We agree with ORA and TURN that the Joint Applicants have not demonstrated that area code relief is necessary at this time for the 310 NPA:

> The record in this proceeding does not include sufficient NXX code utilization data to justify implementation of area code relief and no party has provided evidence to demonstrate that customers do not have the ability to select the carrier of their choice because of an alleged shortage of numbering resources. D.99-09-067 creates a process to collect that data. Moreover, numbering resources in the 310 NPA are currently available through the NXX code lottery and via local number portability. By implementing a mandatory number pooling trial, D.99-090-067 will likely actually increase the availability of numbering resources in the 310 NPA. [5]

The Commission appreciates the distinction between conservation and relief, and is making every effort to provide relief, *when the appropriate time comes*. In the interim, the Commission is moving forward by seeking comment

[5] ORA & TURN Rehearing Response at 2-3 (emphasis in original).

on a back up relief plan for the 310 NPA. Commission efforts enumerated in D.99-09-067 make it clear that the Commission is in compliance with the FCC order by "tak[ing] 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."[6]

B. D.99-09-067's Finding of Fact No. 3 Is Not An Abuse of Discretion.

The CCAC Joint Applicants assert that the Commission committed an abuse of discretion in violation of PU Code §1757 by formulating Finding of Fact (FOF) No. 3, which provides that "[t]he need for an area code overlay or split may be forestalled or eliminated as a result of changes in technology and pursuant to the authority the FCC granted the Commission to implement number conservation measures." On the contrary, the Commission acted clearly within the ambit of PU Code §1757(a)(1) in arriving at FOF No. 3.[7] The Commission neither exceeded its constitutional or statutory authority, nor its FCC-delegated authority in arriving at FOF No. 3.

The CCAC Joint Applicants claim lack of record support, and assert that D.98-05-021 is final. They leap also to the conclusion that relief is required now. (CCAC Rhg. at 19) First, there is ample support in the record to sustain FOF No. 3 as a finding of fact. Second, the CCAC Joint Applicants are fully aware that the Commission may at any time, upon notice and opportunity to be heard, modify its decisions *sua sponte*, pursuant to PU Code §1708, or it may do so pursuant to rehearing applications. Finally, the conservation measures ordered by D.99-09-067 should obviate the need for immediate relief. We expect that many numbers will be freed up as a result of the conservation measures we propose in the Decision, and there should not be an immediate need for relief.

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[6] *Order Delegating Additional Authority*, *supra* at ¶15.

[7] 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.

However, as previously noted, in the event that relief is needed, the Commission is formulating a back up relief plan for the 310 NPA.[8]

As legal authority in support of their argument, the CCAC Joint Applicants point to *California Hotel & Motel Association v. Industrial Welfare Commission*, 25 Cal.3d 200 (1979). The CCAC Joint Applicants are forced to admit that "[s]ince Section 1094.5 is really not a state 'enabling statute' we must look to the FCC orders that delegated authority to the Commission." (CCAC Rhg at 19.) Indeed, an honest look forces the conclusion that the Commission is in full compliance with the FCC orders.

Applying *California Hotel*, we demonstrate that Finding of Fact No. 3 still passes legal muster. The court in *California* Hotel stated as follows:

> "A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute."[9]

The rational connection between the factors and the choice made in the case before us could not be more clear. In D.99-09-067, the Commission was persuaded for good cause to suspend the 424 overlay in the 310 NPA. After becoming better informed and more sensitized to public reaction against overlays in the 310 NPA, the Commission, consistent with its authority, acted reasonably in responding to public interest rather than pursuing a rigid course of action in the face of ever-changing technology, events and the recently promulgated FCC orders.

Armed with interim authority from the FCC to address the numbering crisis in California, the Commission would be derelict in its duty to

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[8] ALJ Ruling Soliciting Comments on a Back Up Relief Plan (October 4, 1999).

[9] *California Hotel* at 212.

California consumers and carriers if it did not use the tools at its disposal in order to achieve more efficient number allocation in California The record in this proceeding fully establishes imminent number depletion in the 310 NPA.[10] Because of rapid number depletion and the proliferation of area codes in California, the FCC, in recognition of California's unique situation, delegated authority to California to implement thousands block number pooling trials, to reclaim unused or underutilized NXX codes, to order efficient number use practices, such as fill rates and sequential numbering, and to continue its use of the lottery.[11] We expect these conservation measures, or some combination thereof, to make more numbers available, thereby forestalling or obviating the need for immediate relief.

In conclusion, the Commission's actions are lawful, and not arbitrary or capricious. There is indeed a rational connection between the looming crisis in the 310 NPA, the actions undertaken by the Commission, and the purposes of the FCC Order which delegated authority to the Commission to use a multi-faceted approach to get the numbering situation in California under control.

C. The Joint Applicants Present No Evidence That Customers Have Been Denied their Choice of Carriers.

Another allegation devoid of substantiation is the CCTA Joint Applicants' claim that the Commission erred by denying customers the ability to obtain service from the carriers of their choice. (CCTA Rhg at 7-9.) We are mindful of the FCC's mandate that "[u]nder no circumstances should *consumers* be precluded from receiving telecommunications services of their choice from

[10] D.99-09-067, *mimeo*, at 16 estimates that based on current status of the NXX code lottery for the 310 NPA, all NXX codes are likely to be exhausted within about 8 months from the August 18, 1999 lottery.

[11] *Order Delegating Additional Authority*, supra at ¶ 6. The FCC noted that the area code situation in California is critical and unique in terms of the speed with which number exhaust occurs in this state. Therefore the FCC granted "significant additional authority" to the California Commission in light of this extreme situation.

providers of their choice for want of numbering resources."[12] (FCC Order at ¶9; emphasis added.) For all of the rehearing applicants' loud proclamations that customers are being denied telecommunications providers of their choice, there is no direct evidence in the record that any consumer has been unable to obtain service from carriers of their choice. TURN and ORA are in agreement.[13] The City of Los Angeles, the area from which such complaints would have emanated, observes that:

> It is noteworthy that the vocal consumer interests in this proceeding, as well as other proceedings dealing with area code exhaust, are not complaining to the Commission that they are denied access to competing telecommunications providers (as applicants assert in this case). Rather, the consumer interests are complaining about the real problem with area code exhaust. Namely, area code splits and overlays with 1+10 digit dialing are unnecessary, costly, and a nuisance and they threaten public safety.[14]

While we appreciate the carriers' concerns about consumers, their contentions amount to little more than speculation about what could happen in the future. MediaOne and Nextlink have proclaimed an alleged lack of customer choice; however, no evidence has been presented to support their claims. ORA and TURN are in agreement that "MediaOne has offered no documentary evidence to confirm that customers have been unable to select MediaOne because of the unavailability of numbering resources."[15] Similarly, Nextlink purports to have agreements to provide business in rate centers in which it has numbers only for the 424 overlay, but provided no evidence of the agreements or of customer inability to obtain telecommunications services. Moreover, like ORA and TURN,

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[12] *Id.* at para. 9; emphasis added.

[13] *Response of ORA and TURN to Joint Applications for Rehearing of Decision 99-09-067*, pp. 3-4.

[14] *City of Los Angeles' Opposition to Applications for Rehearing of Decision 99-09-067*, page 9.

[15] *See Response of ORA and TURN to Joint Applications for Rehearing of Decision 99-09-067*, p. 4.

we are not aware of any rate center in the 310 NPA that would be served only by the 424 overlay, as all 16 rate centers are served by NXX codes in the 310 NPA.

D. Implicit in the Selection of the 310 NPA for Number Pooling Is the Determination that It Is Suitable for Number Pooling.

The CCAC Joint Applicants' allegation that D.99-09-067 orders mandatory number pooling without making any determination that the 310 NPA is suitable for number pooling is erroneous. (CCAC Rhg App., pp. 23-25.) As an integral part of its decision-making process, the Commission implicitly decided that the 310 NPA was a good candidate for number pooling. It defies reasonableness and common sense to suggest that the Commission would purposely select a bad candidate for its first pooling trial. To state that the 310 NPA is the best candidate for pooling is to state the obvious. No finding is necessary.

Moreover, we fail to see the "mandate" that the CCAC Joint Applicants claim is in this excerpt from the FCC's Order:

> We *suggest* to the California 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 Optimization Notice*. [footnote omitted] (CCAC Rhg App. at 24, citing FCC Order, ¶21; emphasis added.)

The operative words are "suggest" and "consider." It is a given that the Commission would select the best candidates for pooling.

The FCC could have mandated that the Commission adhere to its suggestions to the letter since Section 251(e)(1) of the Telecommunications Act of 1996 gives the FCC plenary authority over numbering administration, and the authority to delegate to state commissions any or all of its jurisdiction. However, rather than mandate or attempt to micromanage the Commission, the FCC leaves to the California Commission the responsibility for ascertaining which are the best candidates for pooling. How that is accomplished is left to the Commission. By

way of example, the FCC encouraged the California Commission to consider number pooling in areas where multiple, LNP-capable carriers exist. Another suggestion was that we consider consolidating rate centers prior to implementing pooling. These suggestions have been, or are being, considered for the 310 NPA. Rather than diverging from the FCC's suggestions, the Commission has made diligent efforts to comport with them as closely as possible, including using the best candidates for pooling trials.

It is further noted that D.99-09-067 ordered, for the first time, the Telecommunications Division to administer a code utilization study in the 310 NPA. The fact that D.99-09-067 ordered this for the first time is not legal error. The Commission could hardly have ordered such a study prior to the grant of additional authority from the FCC in the September 15th Order. The California Legislature later enacted the Consumer Area Code Relief Act of 1999 which also authorizes number utilization studies.[16] The Commission recognizes that we are dealing with a dynamic, evolving area of numbering administration and there may be more "firsts" to come, as the Commission strives to serve the public interest.

E. D.99-09-067 Does Not Discriminate Against Wireless or Other Non-LNP-Capable Carriers.

The CCAC Joint Applicants argue that the suspension of the 310/424 overlay and the order implementing number conservation measures discriminate against wireless or non-LNP capable carriers. (CCAC Rhg. at 26-29.) They assert further that wireless carriers will be disproportionately impacted when and if number pooling is implemented in the 310 NPA because of the increased rationing of the NXX codes, combined with the fact that non-LNP capable carriers are not required to participate in number pooling. (CCAC Rhg. at 27-29.) These statements are alarmist, and devoid of reason or proof. The Commission is fully aware that federal rules require that numbering resources

[16] AB 406, formerly AB 818, passed into law on 10/10/99, authorizes number utilization studies, and other code conservation measures that would promote the efficient allocation of telephone numbers.

must be available for those carriers that do not have LNP technology available to participate in number pooling.[17] The 310 Preservation Plan bears that in mind.

Moreover, the FCC and the Commission are well aware of the disparity in treatment of wireless carriers, which are not required to implement local number portability until November 2002, or until the FCC releases an order establishing requirements for wireless carriers' participation in number pooling in the *Numbering Resource Optimization* docket.[18] The FCC, in fact, stated as much:

> "*We recognize that* conditioning the California Commission's authority to implement a mandatory thousands-block pooling trial on *exemption of non-LNP capable carriers from participation in the trial will create a disparity* in the way different types of service providers obtain access to numbering resources...[footnote omitted.] In order to ensure that consumers may continue to obtain service from non-LNP capable carriers of their choosing, however, we find that for the purposes of this interim delegation, it is necessary to safeguard these carriers' access to numbering resources, while they lack the technical capability to participate in pooling." (FCC Order, ¶16; emphasis added.)

However, neither the FCC, nor this Commission, is confusing *disparity* with *discrimination*. Non-LNP capable carriers are temporarily being treated differently due to technological constraints. So long as the non-LNP capable carriers have equal access to numbering resources, discrimination is not in issue. This Commission is committed to ensuring that *all* carriers enjoy equal access to numbering resources.

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[17] Petition for Declaratory Ruling and Request for Expedited Action on July 15, 1997 Order of the Pennsylvania Public Utility Commission Regarding Area Codes 412, 610, 215, and 717, *Memorandum Opinion and Order on Resonsideration, CC Docket No. 96-98, 13 FCC Red 19009, 19025,* ¶ 9 (1998) (Pennsylvania Numbering Order).

[18] 64 FR 32471, Fed. Reg., vol. 64, No. 116 (CC Docket No. 99-200; FCC 99-122).

In addition, as noted by ORA and TURN:

> Although non-LNP-capable carriers cannot draw numbers from a pool in the 310 NPA, LNP-capable carriers will have to seek available numbering resources first from the pool. Only if the pool does not possess sufficient 1,000 blocks in a particular rate center will LNP-capable carriers go to the NXX code lottery to obtain a full NXX code. [footnote omitted] Thus, wireless carriers will actually face less competition in accessing number resources via the monthly lottery...[than] they do today." (TURN & ORA at 5; emphasis in original.)

D.99-09-067 does not discriminate against non-LNP capable carriers. It requires all carriers to provide NXX code utilization data to determine the actual need for area code relief, and to determine which resources are available for use in a number pooling trial in the 310 NPA. Like the FCC, we "believe that even those carriers that cannot participate in pooling at this time will benefit from the more efficient use of numbering resources that pooling will facilitate."[19] While wireless carriers lack the technical capability to participate in pooling, they are urged to use other numbering resource optimization strategies in order to improve the efficiency of numbering resources assigned to them.

It is also claimed that D.99-09-067 lacks any plan to ensure that wireless carriers will receive access to numbering resources. (CCAC Rhg. at p. 29) This sweeping statement is not true. All of the measures proposed in D.99-09-067 are part of the Commission's comprehensive 310 Preservation Plan to ensure that wireless carriers, and all carriers, will receive access to numbering resources. Moreover, we note that D.99-09-067 is an interim decision, and therefore not the final word on what additional steps the Commission may take to ensure that all carriers have access to numbering resources. We are grateful that

[19] *FCC Order Delegating Additional Authority, supra* at ¶ 18.

the FCC's interim delegation of additional authority gives us the tools and the flexibility to more quickly accomplish efficient number allocation in California.

F. The Commission Does Not Disfavor New Market Entrants.

The claim that the Commission errs by unduly disfavoring new market entrants, as alleged by the CCTA Joint Applicants, does not bear up under scrutiny. (CCTA Rhg. at 9-10.) This argument is a variation on the discrimination theme put forth by the CCAC Joint Applicants. The Commission's actions in grappling with the area code situation in the 310 NPA are not intended to, nor do they, discriminate or favor one industry segment or group of telecommunication consumers over another. Reliance on Commissioner Duque's dissent notwithstanding, the CCTA Joint Applicants fail to carry their burden of proving that D.99-09-067 unduly disfavors new market entrants.

New LNP-capable market entrants have access to the same numbering resources already allocated to incumbents in the 310 NPA. As for non-LNP capable carriers, they cannot draw numbers from a pool in the 310 NPA. However, as noted by ORA and TURN, LNP-capable carriers will have to seek available numbering resources first from the pool. Only if the pool does not have sufficient 1,000 blocks in a specific rate center will LNP-capable carriers go to the NXX code lottery to obtain a full NXX code.[20] Thus, wireless carriers will have less competition in accessing numbering resources via the monthly lottery than they do today.

The Commission is committed to ensuring that all carriers have access to numbering resources, including those already assigned numbers in the 424 overlay area code. These carriers shall be given an opportunity to apply for a priority assignment of NXX codes from the remaining 310 NPA inventory. Additionally, a needs-based assessment shall be instituted before the NANPA issues codes to such carriers. The Commission stated its intent, by separate order,

[20] ORA and TURN Rhg. Response at 5.

to address the needs of the carriers that have already been assigned NXX codes in the 424 NPA, and is addressing an emergency petition that seeks a revision of NXX code allocation measures in the 310 NPA.[21]

We expect a number pooling trial will allow participating carriers access to more numbering resources, however, number pooling alone will not resolve the numbering crisis in the 310 NPA. In D.99-09-067, we agreed with those parties expressing the sentiment that number pooling alone in a mature NPA such as 310 is not sufficient to defer an overlay or split.[22] Therefore, the Commission has undertaken a multi-faceted approach in addressing the numbering problems in the 310 NPA. The 310 Preservation Plan consists of number pooling, a temporarily reduced allotment in the monthly NXX lottery for the 310 NPA, the return of unactivated NXX codes, institution of efficient number management practices, such as fill rates or sequential numbering, the collection of number utilization information to implement return of unused numbers, and the exploration of other feasible means of promoting more efficient number usage. This comprehensive plan is geared toward the freeing up and distribution of numbers heretofore inefficiently allocated under the historical numbering system that existed when incumbent LECs assigned the numbers in blocks of 10,000. New entrants, and all participating carriers, will be advantaged by having access to hundreds of thousands more numbers than are available today.

G. The Decision Lawfully Amends D.98-05-021, Pursuant to PU Code §1708.

The CCAC Joint Applicants' claim that the Commission commits error because PU Code §1708 "requires the Commission to conduct hearings before it amends D.99-09-067 [sic]" is erroneous. (CCAC Rhg at 29.)] Assuming they meant D.98-05-021, we disagree. In *Re Mobile Telephone Service and Wireless Communications*, we held that Section 1708 does not apply if the

[21] Decision, *mimeo* at 12.

[22] *Id.* at 17.

decision in issue does not alter or rescind a previous Commission decision. [23] Section 1708 necessitates hearings only when the Commission alters or rescinds a previous Commission decision. D.99-09-067 is an interim decision that suspends the overlay pending further order of the Commission. Any perceived difference between D.98-05-021 and D.99-09-067 is attributable to the expansion of the Commission's numbering authority pursuant to the FCC's order. That order renders the regulatory scheme in D.98-05-021 significantly different than that in D.99-09-067. Because the Commission was delegated expanded authority to address the numbering crisis, it was endowed with more options to slow down number exhaust, thus obviating the need for immediate area code relief. Any change that occurred happened by operation of law, pursuant to FCC mandate. Jurisdictional questions pertaining to the parameters of the FCC's order is a legal issue for which no hearings are required.

We therefore conclude that PU Code 1708 does not apply, and there is no merit to the allegation that D.99-09-067 violates the hearing requirement. The California Supreme Court has stated that "[An administrative hearing] consists of any confrontation, oral or otherwise between an affected individual and an agency decision-maker sufficient to allow [an] individual to present his case in a meaningful manner. [Citation omitted.]"[24] The CCAC Joint Applicants have had ample opportunity to be heard. They acknowledge that they were given the opportunity to file comments and replies on the Petition, as well as on the draft decision and the alternate decision.[25] They complied by filing extensive comments. No statutory hearing rights applicable to D.99-09-067 were violated.

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[23] *See* 59 CPUC 2d 91, 97.

[24] *James T. Lewis v. Sup Ct. of San Bernardino County (Green),* 19 Cal.4th 1232, 1247 (1999).

[25] CCAC Rhg. at 29.

H. The Decision Is Not A Breach of Section 253 of the Telecommunications Act of 1996.

The CCAC Joint Applicants complain that the Commission's lottery reduction of the monthly allotment from six to two is a barrier to entry for new carriers, and thus a violation of Section 253 of the Telecommunications Act of 1996. (CCAC Rhg at 30.) This argument has no basis in fact. California has the authority to impose competitively neutral requirements to safeguard the rights of consumers, per Section 253(b) of the Telecom Act. Consumers have the right not to be subjected to the inefficient allocation of numbers that has resulted in the rapid proliferation of area codes, and the near chaos that has ensued from an outdated distribution system that has not kept up with regulatory law or changing technology. The 310 Preservation Plan is about sparing consumers from that unfortunate result. An element of that Plan is the temporary reduction of the monthly allotment of NXX codes which will be withheld from the lottery for use in the number pooling trial. This action is competitively neutral and does not favor one carrier over another.

Furthermore, the reduction is a temporary one which should, in conjunction with other conservation measures, extend the life of the 310 NPA. We agree with the City of Los Angeles that "[r]educing on a temporary basis the monthly allotment of NXX Codes from six to two, may make it a little difficult for a short period of time for some carriers to assemble their desired inventory of numbers. *But it will not preclude them from doing business nor denying consumers their choice of competing service providers.*" (City of Los Angeles Opposition, p. 8; emphasis added.) This is so despite the claims by MediaOne that it is unable to offer residential facilities-based local exchange service in Los Angeles. As noted by ORA and TURN, "MediaOne has offered no documentary evidence to confirm that customers have been unable to select MediaOne because of the unavailability of numbering resources. MediaOne is LNP capable and

could port telephone numbers for customers it seeks to serve from both Pacific Bell and GTE California, Inc."[26] Similarly, no direct evidence was presented by Nextlink that customers were denied their choice of carriers.

I. The Decision's Reference to A Wireless-Only Overlay Neither Prejudges Nor Discriminates Against Wireless Carriers.

The CCAC Joint Applicants overreach by attacking dicta which they concede is not part of the Decision.[27] 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 merits a response.

D.99-09-067 does acknowledge an open fact, and that is that the Commission has petitioned the FCC for authority to establish a technology-specific or service-specific overlay.[28] 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. We stated further that "California is making this request so that we can maximize the options available to gain control of the ongoing number crisis we face."[29] 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.[30] We stand by both of these statements, and are not prejudging how the technology-specific request will be resolved. In D.99-09-067, we are considering our options and not foreclosing any option that could expedite

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[26] ORA and TURN Response to Rehearing,p. 4.

[27] *See* CCAC's Joint Rehearing Application at 33 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."

[28] *Petition of the CPUC For Waiver To Implement A Technology-Specific or Service-Specific Area Code (April 23, 199).*

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

[30] *Id.* at 7.

the efficient allocation of numbers in the 310 NPA. We reserve the right to exercise whatever authority the FCC sees fit to delegate to this Commission in order to relieve the numbering crisis in California.

Similarly, the allegation that the wireless-overlay is patently discriminatory is without merit. To make a discrimination charge against the Commission on the basis of authority which has not yet been granted is premature, speculative, and unproven. The FCC is not in the practice of giving its blessings to California, or any other state, to engage in discriminatory activities. Furthermore, it is not for us to speculate at this time how the FCC will rule. In addition, CCAC's contention that a wireless-only overlay will do nothing to alleviate the need for area code relief in the 310 NPA while stating that "there are several reasons why a wireless-only overlay will not solve California's area code problems, " without supplying those reasons, is not enough to meet their burden of proof.[31]

IV. CONCLUSION

We have reviewed each and every allegation of legal error in these rehearing applications and are of the opinion that legal error has not been demonstrated. Therefore, the rehearing of D.99-09-067 is denied. However, on our own motion, we add an ordering paragraph concerning the temporary reduction of the monthly lottery allotment because it was inadvertently omitted in the ordering paragraphs in D.99-09-067.

Therefore, **IT IS ORDERED that:**

1. The following is added as Ordering Paragraph No. 12:

   We order the monthly allotment of NXX codes assigned from the lottery to be reduced temporarily from 6 to 2 NXX codes per month, effective on the September 22, 1999 lottery session.

[31] *See* CCAC Rhg at 32-33.

2. The following is re-numbered and becomes Ordering Paragraph No. 13:

> The Petition to Modify D.99-05-021 is granted to the extent set forth herein.

3. Oral argument is denied.

4. The Joint Application for the rehearing of D.99-09-067 by the California Cable Television Association, MediaOne, and Nextlink is denied.

5. The Joint Application for the rehearing of D.99-09-067 by the Cellular Carriers Association of California, Air Touch Cellular Communications, Inc. (dba Air Touch Cellular), AT&T Communications of California, Inc., Pacific Bell Wireless, and Sprint Communications LP and Sprint Spectrum LP (dba Sprint PCS) is denied.

This order is effective today.

Dated December 2, 1999, at San Francisco, California.

RICHARD A. BILAS
President
JOEL Z. HYATT
CARL W. WOOD
Commissioners

I will file a written dissent.

/s/ HENRY M. DUQUE
Commissioner

I will file a written dissent.

/s/ JOSIAH L. NEEPER
Commissioner

Commissioner Henry M. Duque, dissenting:

My analysis of the facts, the record before us, applicable law, relevant federal regulation, and the issues raised in the applications for rehearing compel my dissent. My dissent will present its analysis following the format of the majority's decision to demonstrate that both D.99-09-067 and today's order of the majority commit legal error.

A. The Commission Exceeds its Authority by Substituting Code Conservation for Area Code Relief in the 310 NPA.

Each of the joint applicants argues that the Commission has substituted conservation for area code relief in the 310 NPA. The order of the majority asserts that the Commission "appreciates the distinction between conservation and relief." This assertion, however, has no basis in fact or in the record. As noted in my dissent on D.99-09-067:

> "The record of this proceeding makes it clear that the 310 is currently exhausted. There are currently 51 unassigned codes in the 310 area code, each holding 10,000 numbers. This decision sets aside 16 codes for a number pooling trial. Thus, there remain 35 codes available to meet numbering needs. In July alone, 77 applications for codes in the 310 went unmet. In addition, carriers have already received 81 codes in the 424 overlay area code. With the majority's decision, these 81 codes will remain unmet. Thus, there is an immediate need for 156 NXX codes in the area served by the 310 area code. Following today's action, we have available only 35 codes, which will be distributed through a parsimonious auction, and a promise that at some time in the future, 160,000 more numbers will be available in a numbering pool."

Analysis of the facts and record of this proceeding make it reasonable to conclude that the Commission has substituted rationing and conservation for needed code relief.

Ironically, today's order of majority does correct one omission in the underlying decision – it adds an ordering paragraph to ensure that the monthly auction of NXX codes is reduced from 6 to 2 per month. The availability of only 2 NXX codes per month to meet a pent-up demand for 156 prefixes shows the draconian nature of the measures adopted in D.99-06-067. Thus, the majority's order not only fails to correct the legal errors of D.99-06-067, but joins it in committing legal error.

i. Analysis of the reasoning of the majority concerning the substitution of conservation for needed relief – an introduction.

The above facts alone demonstrate that the conclusion reached in the majority's order – that the Commission has not substituted conservation for needed number relief – is wrong. Nevertheless, a direct analysis of the arguments offered in today's order shows that the conclusions of D.99-06-067 and today's order result not just from a faulty weighing of facts, but also from fallacious reasoning. Today's order of the majority offers two lines of argument to conclude that the Commission does not substitute code conservation for area code relief in the 310 NPA. First, the order finds that there is no evidence to demonstrate that customer choice of carrier is abridged by the Commission's

action. Second, that order argues that the Commission is "making every effort to provide relief, *when the appropriate time comes*." We consider each argument in turn.

ii. The claim that there is no evidence that customers have been denied their choice of carrier because of a lack of numbers is incorrect.

The claim that there is no evidence that customers have been denied their choice of carrier because of a lack of numbers is difficult to understand. The record of the proceeding, cited by the joint rehearing application filed by the California Cable Television Association, MediaOne, and NEXTLINK (CCTA Joint Application), shows that customers have been denied choice by the decision to rescind the overlay. The CCTA Joint Application notes:

> "For example, MediaOne, relying on the Commission's May 1998 decision that promised area code relief, planned to serve residential customers throughout the 310 NPA region. Due to the suspension of the 424 overlay, MediaOne has tens of thousands of market-ready homes that cannot choose MediaOne as their local exchange provider because MediaOne does not have NXX codes available for the rate centers serving those homes. Similarly, NEXTLINK, in reliance on the Commission's previous order to implement area code relief, obtained codes from the 424 overlay and entered into agreements to provide business services to customers in rate centers served only by telephone numbers in the 424 code. Because of the lack of NXX codes, NEXTLINK cannot honor these contracts." (CCTA Joint Application, pp. 8-9).

To conclude that there is no evidence that the actions of the Commission have denied customers choice is incorrect.

iii. If, for the sake of argument, one concludes that there is no evidence in this proceeding, then the Commission's exercise of delegated power remains arbitrary.

Since this proceeding was based entirely on written comments, in a legalistic reading of the word "evidence," one can argue that there is no evidence in this proceeding. Even in this case, the Commission's exercise of delegated power remains illegal.

First, if there are no findings that a customer's choice is not restricted by the rationing plan, then the factual predicate for the exercise of the delegated power by the Commission remains unmet. The FCC clearly states: "Under no circumstances should customers be precluded from receiving telecommunications services of their choice from providers of their choice for a want of numbering resources." (FCC 99-248, paragraph 9). Thus, the exercise of discretion in the face of the claims that customer choice is abridged, without any findings of fact, constitutes a legal error.

Second, if the written filings in which MediaOne and NEXTLINK state that the Commission's actions restrict customer choice do not constitute "evidence," then these carriers have had no real opportunity to present evidence on this matter.

This result arises from a consideration of the timing of events leading to the adoption of D.99-09-067. The FCC's order stating the conditions for the exercise of delegated power was released the day before the Commission adopted D.99-09-067.

Upon reading the FCC's Order, the avoidance of restrictions on customer choice made information on this matter critical to the lawful exercise of the delegated power. For this reason, I made a motion to delay consideration of this matter to permit a full analysis of this matter. The majority, however, rejected this motion by a vote of 3-2 on September 16, 1999 immediately prior to its adoption of D.99-09-067. As a consequence, there was no opportunity for parties to provide material directly relevant to the Commission's exercise of its delegated power. This failure to provide such an opportunity to present evidence is another of the arbitrary actions of this Commission endemic to D.99-09-067.

In summary, even if for the sake of argument one concedes that the ample filings stating consumer impact do not constitute evidence, the Commission's actions remain defective. First, the fact that the Commission failed to examine allegations of customer impact and reach findings makes the exercise of the delegated discretion arbitrary. Second, the Commission failed to provide affected parties an opportunity to present evidence on this matter. For both these reasons, the Commission's exercise of delegated authority constitutes an arbitrary, capricious, and unlawful action.

iv. It is appropriate to provide number relief now, and the Commission is ignoring the only available and timely alternative.

The assertion in today's order of the majority that the Commission is "making every effort to provide relief, *when the appropriate time comes*" is more of an excuse than an argument. It does not demonstrate that the Commission "appreciates the distinction between conservation and relief." First, the majority's order provides no discussion of the current shortages of NXX codes in the 310 area code cited above. If this is not the "appropriate time" to provide relief, then when is it the appropriate time? There are no hints either in D.99-09-067 or this order as to when the time would be "appropriate." Further, the Commission is clearly not making "every effort" to provide relief, for both D.99-09-067 and this order reject the most effective and timely alternate, the reinstitution of the 424 overlay.

In conclusion, the record in this proceeding on the shortage of numbers in the 310 area code and its impact on customers make the Commission's exercise of the delegated authority to order mandatory pooling an arbitrary and capricious action. Neither the analysis of D.99-09-067 nor the reasoning in today's majority decision supports the conclusion that the Commission has not substituted conservation for needed code relief. Indeed, as noted above, the record of the proceeding demonstrates the opposite – that the Commission has substituted conservation for needed code relief. These actions of this Commission to substitute rationing for needed code relief constitute legal error for they contravene a key condition for the exercise of authority delegated by the FCC. (FCC 99-248, paragraphs 9 and 22).

B. D.99-09-067's Finding of Fact 3 Is An Abuse of Discretion.

Today's majority order errs in concluding that D.99-09-067's Finding of Fact 3 is not an abuse of discretion. D.99-09-067's Finding of Fact 3 states:

> 3. The need for an area code overlay or split may be forestalled or eliminated as a result of changes in technology and pursuant to the

> authority granted the Commission to implement number conservation measures. (D.99-09-067, p. 23)

Today's order provides three lines of reasoning to support the finding. The first and third lines of reasoning are essentially the same – they are an assertion that there is record support for the finding. The second line of reasoning points out that this in an interim decision.

i. Today's order cites no evidence to support Finding of Fact 3.

Today's order simply asserts, with no citation to the record of the proceeding, that:

> "We expect that many numbers will be freed up as a result of the conservation measures we propose in the Decision [D.99-09-067], and there should not be an immediate need for relief." (D.99-09-067, p. 15)

Moreover, D.99-09-067 itself contains no citation to the record supporting this finding. The only discussion that I can find in D.99-09-067 is the following statement:

> "If we hope to provide timely relief for the residents in the 310 NPA without opening a new area code, we must rely on mandatory pooling."

Clearly, this "hope" provides no evidentiary or record support for Finding of Fact 3.

In addition, today's order also points out that the mandated return of unused numbers for use in the pooling trial will provide more numbers. Unfortunately, there is no evidence in the record concerning how many numbers will become available, and whether the newly available numbers may prove reasonably adequate to meet the demand. Thus, the truistic argument that the ordered return of numbers and this new technology will free up numbers does not provide adequate support for Finding of Fact 3.

ii. Today's order of the majority and D.99-09-067 ignores record evidence that mandatory pooling will not forestall or eliminate the immediate need for relief in the 310 area code.

On a certain level, Finding of Fact 3 is so weak that it is a truism – indeed, number exhaustion "may be forestalled or eliminated" sometime and somewhere through number pooling and conservation measures like those ordered in D.99-09-067. The issue at hand is not whether pooling may, but whether it does enable us to meet the numbering needs at this time in the 310 area code. Only in that circumstance would the Commission meet the requirements for the lawful exercise of delegated power set out by the FCC. (See FCC 99-289, paragraphs 9 and 22).

Concerning this issue, the joint application of the Cellular Carriers Association of California, AirTouch Cellular Communications, Inc., AT&T Communications of California, Inc., Pacific Bell Wireless, and Sprint Communications LP, and Sprint Spectrum, LP (CCAC Joint Application) makes clear on pages 19 through 25 that the record indicates that 310 is too far depleted and the implementation of mandatory pooling is too far off to provide timely relief for the numbering crisis in 310. Neither today's order of the majority or D.99-09-067 grapple with this evidence. A finding more consonant with the record of this proceeding is that mandatory pooling, although a promising conservation technology, cannot solve the numbering crisis in the 310 area code.

iii. The fact that D.99-09-067 is interim provides no support for Finding of Fact 3.

The majority order supports Finding of Fact 3 with the statement:

> "Second, the CCAC Joint Applicants are fully aware that the Commission may at any time, upon notice and opportunity to be heard, modify its decisions, *sua sponte*, pursuant to PU Code § 1798, or it may do so pursuant to rehearing applications."

Clearly, this argument is not relevant to determining whether Finding of Fact 3 has a basis in the record. It simply states one line of legal defense for D.99-09-067 that the Commission could pursue if today's order is appealed – the argument that these orders are not yet final, and are therefore not ripe for review. Although this defense strategy may prove relevant for those considering an appeal of the majority's order, it has no relevance for determining whether D.99-09-067's Finding of Fact 3 constitutes legal error.

C. The Joint Applicants Presented Evidence That Customers Have Been Denied their Choice of Carriers.

The order of the majority, in addition to its discussion of evidence in section A, provides a more fulsome discussion of the issue of evidence in section C. The discussion of section C, however, adds no new argument to that of section A. My conclusion reached above thus remains unchanged: the record contains evidence that customers have been denied their choice of carriers.

It is important to note that D.99-09-067 exercises the authority delegated by the FCC without reaching any finding on how the order affects the ability of consumers to exercise their choice of carrier. On the basis of the record in this proceeding, it cannot make a finding that it imposes no restrictions on customer choice. As stated previously, the Commission's order to impose mandatory pooling and rationing measures in the 310 area without making such a finding is itself an arbitrary and capricious exercise of the authority delegated by the FCC.

D. D.99-09-067 Discriminates Against Wireless and Other Non-LNP-Capable Carriers.

Section E in today's order of the majority argues that D.99-09-067 does not discriminate against wireless and other non-LNP-capable carriers. In this, the majority's order is mistaken. The rationing measures that limit the availability of NXX codes to 2 per month virtually preclude access of carriers without LNP capability to numbering resources. If, for example, a non-LNP carrier wishes to enter the 310 area and offer service in all 16 rate centers, the carrier will require 16 codes. An extremely lucky carrier could acquire these codes in an 8-month period. An unlucky carrier could be unable to enter at all. On the other hand, once pooling commences, LNP capable carriers should have immediate access to numbers in each rate center because of the reservation of codes for pooling purposes. In a competitive market where advantages accrue to a "first mover," this impact is not simply disparate, but it is discriminatory. This discriminatory impact that results from this first step to implement number pooling makes this exercise of the authority delegated by the FCC illegal. (FCC 99-248, paragraph 16).

Section E seeks refuge from this logic by asserting that the impacts of the Commission's conservation plan produce a permissible "disparate" impact not an

impermissible "discriminatory" impact, and that the disparate impact is temporary. The word "temporary" is not defined. It would seem from the facts of the proceeding that the unequal treatment will continue until the non-LNP-capable carriers acquire this technology or until the Commission implements an area code split that makes more NXX codes available. Under FCC rules, the acquisition of LNP capable technology by wireless carriers should occur in 2002 or when the FCC issues an order setting some other date. Thus, "temporary" may well prove to be 2 years. In any event, a reasonable exercise of delegated authority would require the Commission to make both a finding and a legal conclusion that the persistent disparate impacts are not discriminatory. Neither D.99-09-067 or today's majority order make such a finding of fact or reach such a conclusion of law.

E. D.99-09-067 Disfavors New Market Entrants.

Today's order of the majority errs when it concludes the D.99-09-067 does not disfavor new market entrants. It disfavors new entrants using both wire and wireless technologies.

First, the order errs in its analysis of the situation of new carriers planning entry into the area served by the 310 code. The order argues, "New LNP-capable market entrants have access to the same numbering resources already allocated to incumbents in the 310 NPA." There is no basis for this conclusion. As CCTA points out:

> "New facilities-based market entrants are also left at a significant and undue disadvantage consequent to the Decision [D.99-09-067]. With no numbering resources to draw from in certain rate areas, MediaOne and NEXTLINK are unable to establish an initial footprint upon which to firmly establish a viable telecommunications business. In contrast, their incumbent competitors have accumulated considerable numbering resources in the 310 NPA since the code was opened in 1995. Based on the LERG, Pacific Bell currently holds about 2.5 million 310 NPA telephone numbers. GTEC holds approximately 1.5 million 310 NPA telephone numbers. Even if one assumes an 80% utilization level, ILECs would still have an average of 50,000 unused numbers for each rate center within the 310 NPA. In addition, the ILECs enjoy additional numbering resources made available through the churn of consumers. New entrants have no such advantage." (CCAC, pp. 9-10).

This argument has its basis in the standard statistics of large numbers and the dynamics of customer churn – approximately twenty percent of all telephone subscribers change their service and number in a year. A routine exercise of the technical knowledge available in this administrative agency would conclude that new entrants, who lack a stock of numbers and customers, are unduly disfavored when numbers are not made available. That the majority's order remains unmoved by this argument demonstrates the arbitrary nature of the Commission's actions. Thus, D.99-09-067 fails to meet the FCC's requirement that California not "unduly favor or disfavor any industry segment." (47 C.F.R. Section 52.9).

In addition, my dissent to D.99-09-067 provided a similarly detailed analysis of the unduly adverse impacts of that decision on wireless carriers. My conclusion on this

matter remains unchanged and provides a second demonstration that the Commission's action unduly disfavors an industry segment.

In summary, today's order and D.99-09-067 unduly disfavor new wire carriers entering the markets served by the 310 area code and wireless carriers who do not have LNP capabilities. Thus, D.99-09-067 committed legal error, and today's majority order fails to correct it.

G. The Reduction in the Lottery from 6 to 2 per Month Creates a Barrier to Entry.

Today's order of the majority argues that D.99-09-067 is not a breach of Section 253 of the Telecommunications Act of 1996. It supports this conclusion with two arguments. First, the order argues that the reduction is "competitively neutral and does not favor one carrier over another." Second, the order argues that, in any event, the reduction is temporary.

The first argument fails to stand up to scrutiny. As the argument of the last section makes clear, the rationing measures, of which the reduction in the lottery from 6 to 2 is a key part, disadvantages new entrants and non-LNP-capable carriers by precluding or delaying market entry. One simply cannot enter a telecommunications market without having phone numbers. Failure to provide numbers acts as an entry barrier equivalent to a regulatory prohibition on market entry.

Moreover, since economies of scale and scope dominate this industry, efficient market entry requires a company to establish a service "footprint." (See FCC99-248, paragraph 29). Dribbling out new telephone codes at a rate of 2 per month in an area code containing 16 rate centers precludes efficient market entry.

The second argument, that this reduction is temporary, has little bearing on the issue. There is a barrier to entry now. Although a temporary restriction limits the damage to new entrants and non-LNP-capable carriers caused by this entry barrier, the barrier clearly exists.

Moreover, there is no reason to believe that this restriction will be in place of a short period. As of this date there is no back-up relief plan in place. There are no criteria selected by the Commission to indicate what would trigger implementation of the relief plan. Further, as noted above, there is little reason to expect that number pooling will meet all the pent-up demand for numbers in the 310 area.

In summary, my analysis produces the opposite conclusions: rationing produces a barrier to entry and there is no reason to expect that this barrier will be short-lived.

H. Conclusion

In a statement of its philosophy, today's order of the majority argues, "Armed with interim authority from the FCC to address the numbering crisis in California, the Commission would be derelict in its duty if it did not use the tools at its disposal in order to achieve more efficient number allocation in California." Who can disagree with this sentiment? Only those who think that the arbitrary exercise of delegated authority invites its recision by the FCC or a judicial order halting its exercise. The order of the majority and D.99-09-067 incur this very risk and are a disservice to Californians.

For the reasons stated above, I conclude that I must dissent from today's order.

/s/ HENRY M. DUQUE .

Henry M. Duque
Commissioner

Commissioner Josiah L. Neeper, Dissenting:

I dissent for the following reasons.

Decision 99-07-067, which is the subject of the rehearing application, is flawed because it confused conservation with relief for 310/424 area code contravening Federal Communications Commission's clear orders to implement timely number relief plans. The majority's decision on the rehearing application could have corrected this fundamental flaw in D.99-07-067 as alleged by the Applicants[1]. Today's order fails to set the course straight and instead continues the path towards further number crisis and inequity among telephone service providers in the 310 area code.

In exercising its newly minted interim numbering authority, the Commission adopted numerous number conservation measures including, mandatory number pooling, reclamation of unused and underutilized NXX codes, and number utilization studies. All of these efficient number management tools would be proper number conservation techniques for the 310 area code had it not reached a critical number exhaust level where a relief was necessary. The Commission did recognize that relief was needed; and it timely adopted an overlay plan for number relief and implementation dates by D.98-05-021. D.99-09-067 halted the implementation of 310/424 area code and adopted the number conservation measures finding that the proposed number conservation method will forestall or eliminate the need for an overlay in the 310 area code. The cancellation of relief plans for conservation measures led to an immediate reduction of NXX codes to telephone companies whose growing need for numbers could no longer be tempered by a rationed allotment of six NXX codes per month. Instead the monthly allotment was reduced to two numbers per month per carrier. The effect of reduced NXX code rationing was immediately destructive to all telephone service providers but quite devastating to new entrants and commercial mobile radio service (CMRS) providers (cellular, personal communications services, and paging companies.)

D.99-07-067 clearly stretched the bounds of the Commission's authority on numbering by its failure to fulfill the Commission's obligation to implement

[1] California Cable Telephone Company, Cellular Carriers Association of California, Media One, Nextilink, Air Touch Cellular, AT&T Communications of California, Inc., Pacific Bell Wireless, Sprint Communications LP, Sprint Spectrum, LP.

timely relief. Thus, D.99-06-067 violated the FCC's direction and this Commission's long standing policy against discriminatory treatment of telephone service providers.

The Commission also erred in D.99-06-067 in stating an intent to implement technology specific number relief plans by singling out CMRS providers. Here too, the Commission pushed the envelop of its authority on number administration by proposing a discriminatory policy as a relief for number exhaust which clearly will have disparate impact on a segment of the telecommunication industry contrary to the FCC's and this Commission's policy.

Today's rehearing order misses a chance to rectify these and several other errors in law that have severe and destructive effect on the emerging local competition in California.

For all these reasons, I dissent.

/s/ Josiah L. Neeper
Josiah L. Neeper
Commissioner

San Francisco, California
December 2, 1999