

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: January 24, 2001) (Decided: September 11, 2001)

Docket No. 99-4205

PEOPLE OF THE STATE OF NEW YORK & PUBLIC SERVICE
COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

MCI WORLDCOM, INC., BELL ATLANTIC, AIRTOUCH
PAGING, US WEST, INC., NEW YORK STATE CONSUMER
PROTECTION BOARD, AT&T CORPORATION, THE CITY
OF NEW YORK, MISSOURI PUBLIC SERVICE COMMISSION
& CONSUMER FEDERATION OF AMERICA,
Intervenors.

BEFORE: PARKER, SACK, and KATZMANN, Circuit Judges.

The People of the State of New York and the Public Service Commission of the State of New York petition this Court for review of two orders of the Federal Communications Commission, dated August 8, 1996 and October 21, 1999. The first order requires all consumers in areas implementing overlay area codes to use 10-digit dialing for local calls and the second denies a waiver to New York, which would exempt New York City from the 10-digit dialing requirement.

PETITION DENIED.

CARL F. PATKA, Assistant Counsel to the Public Service Commission of the State of New York, Albany, New York (Lawrence G. Malone, General Counsel to the Public Service Commission of the State of New York, of counsel), for Petitioner.

PAMELA L. SMITH, Federal Communications Commission, Washington, District of Columbia (Christopher J. Wright, General Counsel, John E. Ingle, Deputy Associate General Counsel, Federal Communications Commission, Washington, D.C., Joel I. Klein, Assistant Attorney General, Catherine G. O'Sullivan, Nancy C. Garrison, United States Department of Justice, Washington, D.C., of counsel), for Respondent.

JAMES F. WARDEN, JR., New York State Consumer Protection Board, Albany, New York, for Intervenor New York State Consumer Protection Board.

JAMES H. BOLIN, JR., AT&T Corporation, Basking Ridge, New Jersey (Mark C. Rosenblum, Roy E. Hoffinger, AT&T Corporation, Basking Ridge, New Jersey, David W. Carpenter, Peter D. Keisler, James P. Young, Sidley & Austin, Washington, District of Columbia, of counsel), for Intervenor AT & T Corporation, MCI WorldCom, Inc., and US West, Inc.

Edward F.X. Hart, of counsel to the Corporation Counsel of the City of New York, New York, New York (Michael D. Hess, Corporation Counsel of the City of New York, Leonard Koerner, Bruce Regal, of counsel), for Intervenor City of New York.

Mark N. Cooper, Ph.D., pro se, Consumer Federation of America, Silver Springs, Maryland, for Intervenor Consumer Federation of America.

William D. Smith, Bell Atlantic, New York, New York, for Intervenor Bell Atlantic.

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Carl W. Northrop, Paul, Hastings, Janofsky & Walker, Washington, District of Columbia, for Intervenor Airtouch Paging.

Philip V. Permut, Kelley Drye & Warren, Washington, District of Columbia, for Intervenor Paging Network, Inc.

Marc Poston, Missouri Public Service Commission, Jefferson City, Missouri, for Intervenor Missouri Public Service Commission.

PARKER, Circuit Judge:

While we hail improvements in technology, we often mourn the resulting loss of simplicity in our lives. So too with the increase in communications options. Because of the addition of fax machines, modems, cellular telephones and pagers to the traditional landline telephone, we are forced to overcome an ongoing shortage of telephone numbers. This shortage has necessitated the addition of area codes to many populous areas, including New York City, an addition causing anxiety for many.¹

¹ Indeed, the apprehension about the addition of new area codes (and the concomitant addition of numbers required to dial a local call) has reached such levels that the controversy has found its way into popular culture. In a November 2000 episode of the television series, "The Simpsons," Springfield, the local town, "was riven culturally and politically by the introduction of a second area code. Homer Simpson became mayor of New Springfield on a campaign promise to build a wall between the two towns." Simon Romero, Now You Need an Area Code Just to Call Your Neighbors, N.Y. Times, May 7, 2001, at A1 ("Romero, Now You Need An Area Code"); see also Seinfeld: The Maid (NBC television broadcast, Apr. 30, 1998) (depicting the character Elaine receiving a "646" phone number and experiencing social ostracization as a result).

1 In the controversy before us, New York State and the New
2 York Public Service Commission (collectively, the "NYPSC" or "New
3 York") challenge the authority of the Federal Communications
4 Commission ("FCC" or "the Commission") to promulgate a rule, 47
5 C.F.R. § 52.19 (2000), delegating to States the authority to
6 choose which type of area code relief to implement, and requiring
7 mandatory ten-digit dialing for all local calls in areas
8 implementing overlay area code relief, promulgated in
9 Implementation of the Local Competition Provisions of the
10 Telecommunications Act of 1996, 11 F.C.C.R. 19,392 (August 8,
11 1996) ("Second Order"). Additionally, the NYPSC challenges the
12 FCC's refusal to grant a waiver from this rule for New York City.
13 See Implementation of the Local Competition Provisions of the
14 Telecomm. Act of 1996, 18 Communications Reg. (P&F) 333, 1999 WL
15 961570 (October 21, 1999) ("Third Order") (denying New York's
16 renewed petition for expedited waiver of 47 C.F.R. §
17 52.19(c)(3)(ii)). Because we conclude that the FCC was within
18 its power to promulgate the challenged rule, and that the FCC
19 acted within its discretion in denying the waiver for New York
20 City, we affirm the FCC's decisions and deny the NYPSC's

petition.²

I. BACKGROUND

A. The North American Numbering Plan

The North American Numbering Plan ("NANP") is the basic numbering scheme that permits telecommunications service within the United States and its territories, Canada, Bermuda and many Caribbean nations. See 47 C.F.R. § 52.5(c); see also Admin. of the N. Am. Numbering Plan, 11 F.C.C.R. 2588, ¶ 3 (July 13, 1995) ("NANP R&O"). Under the NANP, telephone numbers are ten digits in length: the first three digits are called the numbering plan area ("NPA" or "area") code, the second three are called the central office code, or prefix, and the final four digits are the individual line numbers. See id. ¶¶ 8-9. The NANP was developed by AT&T and Bell Laboratories in the 1940s in order to standardize telephone dialing and to ensure the development of an integrated nationwide telephone network. See id., ¶ 8. The result was the current system of dialing seven digits within an area and three-digit area codes. At the time of the NANP's

² There are several intervenors in this action. Intervening and filing briefs in support of the NYPSC's petition for review are the New York State Consumer Protection Board ("CPB"), the City of New York ("NYC"), and Consumer Federation of America ("CFA"). Intervening and filing a brief in support of the FCC's position are AT&T Corp., MCI Worldcom, Inc., and US West, Inc. (collectively, "the industry intervenors").

Several intervenors entered appearances but failed to file briefs. These intervenors are Airtouch Paging, Bell Atlantic, Paging Network, Inc., and the Missouri Public Service Commission.

1 development, the number of digits required to place a call varied
2 with the size of the community. To ease the transition to seven-
3 digit local numbers, the central office codes (the first three
4 digits of a local call) were the first three letters of a word
5 followed by the individual line number. As the numbers were
6 quickly exhausted using this method, this system was replaced by
7 the "2-5 system" which employed two letters and five numbers--
8 e.g., "PEnnsylvania 6-5000." Eventually, this system too had to
9 be replaced, this time by an "all-number" seven-digit dialing
10 system for local calls. As with the current ten-digit dialing
11 controversy, seven-digit dialing, imposed in the early 1960's,
12 met with opposition, and groups such as the "Anti-Digit Dialing
13 League" and the "Committee of Ten Million to Oppose All-Number
14 Calling" sprouted. See Romero, Now You Need an Area Code.

15 For over 40 years, AT&T administered this plan (the NANP),
16 but ceased its administration in 1984 at divestiture. See NANP
17 R&O, ¶ 10. Currently, the NANP is administered by NeuStar,
18 Inc., a private company based in Washington. See Romero, Now You
19 Need an Area Code.

20 B. Area Code Relief

21 Area code relief is the process by which central office
22 codes are made available when there are few or no unassigned
23 central office codes remaining in an existing area code and,
24 often, a new area code is introduced. See Third Order, ¶ 5 n.32.

1 A new area code is assigned when almost all of the central office
2 codes within an area code are consumed.

3 There are three methods to implement area code relief. See
4 47 C.F.R. § 52.19 (2000). The first, a geographic area code
5 split, occurs when there is a central office code shortage in one
6 area and that area is then split into two or more geographic
7 parts. See id. § 52.19(c)(1). The second, a boundary
8 realignment, "occurs when the boundary lines between two adjacent
9 area codes are shifted to allow the transfer of some central
10 office codes from an area code for which central office codes
11 remain unassigned to an area code for which few or no central
12 office codes are left for assignment." Id. § 52.19(c)(2). The
13 third method, an area code overlay, "occurs when a new area code
14 is introduced to serve the same geographic area as an existing
15 area code." Id. § 52.19(c)(3). The NYPSC's choice to implement
16 the third method, an area code overlay, for the City of New York,
17 has sparked the current controversy.

18 C. The Telecommunications Act of 1996

19 In 1996, Congress enacted the Telecommunications Act of
20 1996, ("the Act" or "the 1996 Act"), which amended the
21 Communications Act of 1934, 47 U.S.C. § 151 et seq. See
22 Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56
23 (1996). The 1996 Act is "an [a]ct to promote competition and
24 reduce regulation in order to secure lower prices and higher

1 quality services for American telecommunications consumers and
2 encourage the rapid deployment of new telecommunications
3 technologies." Id. The Act "fundamentally restructures local
4 telephone markets. States may no longer enforce laws that impede
5 competition, and incumbent [local exchange carriers or "LECs"]
6 are subject to a host of duties intended to facilitate market
7 entry." AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371 (1999).
8 "Most important, Congress ended the States' longstanding practice
9 of granting and maintaining local exchange monopolies." Id. at
10 405 (Thomas, J., concurring in part, dissenting in part); see
11 also 47 U.S.C. § 253(a) (2001). To achieve the goal of opening
12 the local telephone markets to competition, Congress enacted
13 section 251 of the Act, entitled "Interconnection," which imposes
14 several obligations on incumbent LECs to allow access to their
15 networks by competitors. 47 U.S.C. § 251 (2001). This section
16 includes a provision entitled "Numbering Administration," which
17 is the subject of this appeal. This subsection provides, in
18 relevant part:

19 The Commission shall create or designate one or more
20 impartial entities to administer telecommunications
21 numbering and to make such numbers available on an
22 equitable basis. The Commission shall have exclusive
23 jurisdiction over those portions of the North American
24 Numbering Plan that pertain to the United States.
25 Nothing in this paragraph shall preclude the Commission
26 from delegating to State commissions or other entities
27 all or any portion of such jurisdiction.

28 47 U.S.C. § 251(e)(1) (2001).

D. The FCC's Orders and Actions Taken by New York

In August 1996, the FCC promulgated rules to implement the provisions of § 251, including § 251(e). See Implementation of the Local Competition Provisions of the Telecomm. Act of 1996, 11 F.C.C.R. 19,392 (August 8, 1996) ("Second Order").³ The FCC, under § 251(e)(1), delegated to the states a portion of its "exclusive jurisdiction" over the NANP, and "authorize[d] the states to resolve matters involving the implementation of new area codes." Id. ¶ 272. The FCC reasoned that "[s]tate commissions are uniquely positioned to understand local conditions and what effect new area codes will have on those conditions." Id. The FCC prohibited any service-specific or technology-specific overlay area codes, but refused to, as some parties suggested, prohibit overlay area codes altogether. See id. ¶ 281-82. Additionally, the FCC repeated its previously-established policy objectives that "numbering administration should: (1) seek to facilitate entry into the communications marketplace by making numbering resources available on an efficient and timely basis; (2) not unduly favor or disadvantage any particular industry segment or group of consumers; and (3) not unduly favor one technology over another." Id. ¶ 281.

³ Some of these rules, which are not at issue here, were the subject of a prior petition for review, which was ultimately decided by the United States Supreme Court in AT&T Corporation v. Iowa Utilities Board, 525 U.S. 366 (1999). This case is discussed infra.

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The FCC noted the benefits of adopting area code overlays as a method of implementing area code relief. See id. ¶ 283. One such benefit includes ease of implementation because overlays do not require existing customers to change their telephone numbers. See id. Additionally, the FCC observed that overlays avoid the absurd result that sometimes occur with geographic splits, that an area code would not even cover a single neighborhood in some metropolitan areas. See id. The FCC, believing that State commissions were best suited to determine what type of relief would be desirable given "local circumstances," delegated to them the task of determining which method to implement. Id.

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However, the FCC also imposed two conditions on the use of overlay area codes. See id. ¶ 286. The FCC required overlay plans to include "availability to every existing telecommunications carrier . . . authorized to provide telephone exchange service, exchange access, or paging service in the affected area code 90 days before the introduction of a new overlay area code, of at least one NXX [central office code] in the existing area code, to be assigned during the 90-day period preceding the introduction of the overlay." Id.; accord 47 C.F.R. § 52.19(c)(3)(i) (2000). This requirement serves to reduce the potentially anti-competitive effect of area code overlays by "reduc[ing] the problems competitors face in giving their customers numbers drawn from only the new 'undesirable' area

1 codes while the incumbent carriers continue to assign numbers in
2 the 'desirable' old area codes to their own customers." Second
3 Order, ¶ 288.

4 Also, most important to this petition for review, the FCC
5 ruled that it would permit "all-services overlay plans only when"
6 these plans include "mandatory 10-digit local dialing by all
7 customers between and within area codes in the area covered by
8 the new code." Id. ¶ 286; see also 47 C.F.R. 52.19(c)(3)(ii)
9 (2001). Regarding this condition, the FCC reasoned that 10-digit
10 dialing would

11 ensure that competition will not be deterred in overlay
12 area codes as a result of dialing disparity. Local
13 dialing disparity would occur absent mandatory 10-digit
14 dialing, because all existing telephone users would
15 remain in the old area code and dial 7-digits to call
16 others with numbers in that area code, while new users
17 with the overlay code would have to dial 10-digits to
18 reach any customers in the old code. When a new
19 overlay code is first assigned, there could be nearly 8
20 million numbers assigned in the old code, with just a
21 few thousand customers using the new overlay code. If
22 most telephone calls would be to customers in the
23 original area code, but only those in the new code must
24 dial ten-digits, there would exist a dialing disparity,
25 which would increase customer confusion. Customers
26 would find it less attractive to switch carriers
27 because competing exchange service providers, most of
28 which will be new entrants to the market, would have to
29 assign their customers numbers in the new overlay area
30 code, which would require those customers to dial 10-
31 digits much more often than the incumbent's customers,
32 and would require people calling the competing exchange
33 service provider's customer to dial 10-digits when they
34 would only have to dial 7-digits for most of their
35 other calls. Requiring 10-digit dialing for all local
36 calls avoids the potentially anti-competitive effect of
37 all-services area code overlays.

1 Second Order, ¶ 287. The FCC also noted that incumbent LECs have
2 an advantage over new entrants in that they can "warehouse"
3 central office codes in the old area code, and also get old area
4 code numbers returned to them when customers move or cease
5 service. Id. ¶ 289.

6 While the FCC delegated to the State commissions authority
7 to determine area code relief methods, and also to "perform
8 functions associated with initiating and planning area code
9 relief, as distinct from adopting final area code relief plans,"
10 id. ¶ 318, it declined to delegate the task of overall number
11 allocation, id. ¶ 320-21. The FCC reasoned that a "nationwide,
12 uniform system of numbering . . . is essential to efficient
13 delivery of telecommunications services in the United States."
14 Id. ¶ 320.

15 Additionally, the FCC explicitly recognized the role of the
16 State commissions prior to the 1996 Act: "We conclude that the
17 states may continue to implement or change local dialing patterns
18 subject to any future decisions by the Commission regarding
19 whether to require uniform nationwide dialing patterns." Id. ¶
20 315 (emphasis added). Prior to the rule's promulgation, states
21 were responsible for determining the number of digits to be
22 dialed for intra-area code toll calls and for inter-area code
23 local calls. See id. ¶ 316. The FCC reasoned that this power
24 was best left to the states "subject to . . . the Commission's

1 requirement in this Order of 10-digit dialing for all calls
2 within and between NPAs in any area where an area code overlay
3 has been implemented" because "States are in the best position at
4 this time to determine dialing patterns because of their
5 familiarity with local circumstances and customs regarding
6 telephone usage." Id. ¶ 317.

7 Therefore, the FCC promulgated the following rule regarding
8 area code relief:

9 (a) State commissions may resolve matters involving the
10 introduction of new area codes within their states.
11 Such matters may include, but are not limited to:
12 Directing whether area code relief will take the form
13 of a geographic split, an overlay area code, or a
14 boundary realignment; establishing new area code
15 boundaries; establishing necessary dates for the
16 implementation of area code relief plans; and directing
17 public education efforts regarding area code changes.
18

19 (c) New area codes may be introduced through the use
20 of: . . . (3) [a]n area code overlay, which occurs when
21 a new area code is introduced to serve the same
22 geographic area as an existing area code, subject to
23 the following conditions: . . . (ii) No area code
24 overlay may be implemented unless there exists, at the
25 time of implementation, mandatory ten-digit dialing for
26 every telephone call within and between all area codes
27 in the geographic area covered by the overlay area
28 code.

29 47 C.F.R. § 52.19 (2000).

30 New York filed a petition for reconsideration of the
31 mandatory 10-digit local dialing rule on October 7, 1996, arguing
32 that the FCC lacked authority to promulgate the 10-digit dialing
33 rule and that the imposition of this rule would impose extreme

1 costs to consumers and to the telephone networks.

2 While the petition for reconsideration was pending, the
3 NYPSC, on December 10, 1997, issued an order concluding it would
4 implement an overlay area code to relieve the impending central
5 office code shortages within the 212, 917, and 718 area codes of
6 New York City. Although the NYPSC recognized possible problems
7 with the FCC's 10-digit dialing requirement, the NYPSC determined
8 that an overlay was preferable to a geographic split. To obviate
9 competitive concerns, the NYPSC mandated local number
10 portability, which would allow customers changing telephone
11 service providers to keep their area code and phone number, and
12 number pooling, which assigns telephone numbers in small blocks
13 to both incumbent LECs and competitive LECs.

14 On January 9, 1998, following its decision to implement
15 overlay area codes and faced with the FCC's inaction on the
16 earlier reconsideration petition, New York filed a Supplemental
17 Petition for Reconsideration. In the supplemental petition, the
18 NYPSC argued that 10-digit dialing was not necessary to promote
19 competition in New York City and, again, that the FCC lacked
20 jurisdiction to impose the 10-digit dialing requirement.

21 On that same day, the NYPSC petitioned for an expedited
22 waiver of 47 C.F.R. § 52.19(c)(3)(ii). The waiver petition
23 pressed arguments similar to the earlier petitions, outlined the
24 inconveniences imposed by the 10-digit dialing requirement, and

1 urged that the requirement was unnecessary to promote competition
2 in New York. On July 20, 1998, the FCC's Common Carrier Bureau
3 denied a permanent waiver of the 10-digit dialing rule, but sua
4 sponte granted a temporary waiver, allowing the NYPSC to
5 implement area code overlay in New York City without 10-digit
6 dialing until April 1, 1999. See N.Y. Dep't of Pub. Serv., 13
7 F.C.C.R. 13,491, ¶ 19 (July 20, 1998) (petition for expedited
8 waiver of 47 C.F.R. § 52.19(c)(3)(ii)) ("Waiver Order"). Shortly
9 thereafter, New York implemented area code overlay in New York
10 City, and retained 7-digit dialing for local calls within the
11 same area code. On August 14, 1998, the NYPSC sought expedited
12 review by the FCC of the Common Carrier Bureau's denial of a
13 permanent waiver.

14 In March 1999, the NYPSC sought from this Court a writ of
15 mandamus to compel the FCC to rule on its petitions for
16 reconsideration and its waiver request. On March 26, 1999, this
17 Court ordered a stay of enforcement in New York of the 10-digit
18 dialing requirement until 1 year following the earlier of either
19 the FCC's ruling on New York's petition for reconsideration and
20 waiver or a panel of this Court's ruling on New York's Petition
21 for a Writ of Mandamus. New York v. FCC, No. 99-3015 (2d Cir.
22 March 26, 1999).

23 On October 21, 1999, the FCC denied the NYPSC's request for
24 reconsideration and waiver of the 10-digit dialing requirement,

1 and reaffirmed its rule that overlay area code plans must include
2 10-digit dialing for all local calls between and within area
3 codes in areas served by an overlay. See Third Order, ¶ 35.

4 The FCC reiterated that

5 in an overlay situation, competing exchange service
6 providers, most of which would be new entrants to the
7 market, would have to assign to their customers numbers
8 in the new area code while incumbent LECs would be able
9 to assign to their customers numbers in the old area
10 code. Thus, competitive LECs' customers in the new
11 overlay code would have to dial 10 digits much more
12 often than the incumbent LECs' customers in the old
13 area code, thereby making it less attractive for
14 customers to switch to competitive LECs.

15
16 Id.

17 The FCC rejected the NYPSC's argument regarding its
18 authority to condition use of overlay area codes on 10-digit
19 dialing and instead concluded that the 1996 Act "met the Supreme
20 Court's standard for preemption of an activity traditionally
21 regulated by the states." Id. ¶ 36. The FCC relied on language
22 in 47 U.S.C. § 251(e), which stated that the Commission was to
23 have "exclusive jurisdiction over those portions of the North
24 American Numbering Plan that pertain to the United States," and
25 concluded that this language gave the FCC the additional
26 authority required to overcome any jurisdictional limitation set
27 forth in the Communications Act. Id. (discussing 47 U.S.C. §
28 152(b)). The FCC emphasized that, although it had delegated
29 authority to the State commissions to implement area code
30 relief, it "retain[ed] authority to set policy with respect to

1 all facets of numbering administration in the United States."

2 Id. ¶ 38.

3 The FCC also rejected the NYPSC's argument that widespread
4 customer confusion would result from 10-digit local calling
5 because customer confusion quickly dissipates. See id. ¶ 39.
6 The FCC likewise rejected arguments regarding increased costs
7 involved with 10-digit dialing. See id. Regarding the NYPSC's
8 arguments that LNP reduces the competitive disparity without
9 need for 10-digit dialing, the FCC stated that portability does
10 not sufficiently alleviate the dialing disparity between the old
11 area code and the new area code because new customers' numbers,
12 as well as new lines for existing customers, would still be
13 assigned from the overlay. See id. ¶ 40.

14 On November 26, 1999, following publication in the Federal
15 Register of the FCC's order denying reconsideration and the
16 waiver, the NYPSC filed, with its Petition for Review to this
17 Court, an application to extend the stay for 10 months after
18 this Court decides the Petition for Review. The application for
19 a stay was granted by this Court on January 18, 2000,
20 conditioned on NYPSC's implementation or continuation of number
21 portability, number pooling, and a non-discriminatory number
22 assignment system in area code overlay regions. Therefore, as
23 the situation now stands, New York City has adopted overlay area
24 codes, although it has not implemented mandatory 10-digit

1 dialing.

2 II. DISCUSSION

3 We have "exclusive jurisdiction to enjoin, set aside,
 4 suspend (in whole or in part), or to determine the validity of
 5 . . . all final orders of the Federal Communications Commission
 6 made reviewable by section 402(a) of title 47." 28 U.S.C. §
 7 2342 (2001). The NYPSC's petition for review was timely filed
 8 within thirty days of the public notice of the Third Order in
 9 the Federal Register.⁴ See 47 U.S.C. §§ 402(c), 405; 47 C.F.R. §
 10 1.4(b)(1).

11 A. The FCC's Authority to Promulgate the 10-digit Dialing
12 Rule

13 The FCC based its assertion of jurisdiction to mandate 10-
 14 digit local call dialing in overlay regions (thereby regulating
 15 local dialing patterns) on § 251(e) of the Telecommunications
 16 Act of 1996, which provides that
 17

18 [t]he Commission shall create or designate one or more
 19 impartial entities to administer telecommunications
 20 numbering and to make such numbers available on an
 21 equitable basis. The Commission shall have exclusive
 22 jurisdiction over those portions of the North American
 23 Numbering Plan that pertain to the United States.
 24 Nothing in this paragraph shall preclude the
 25 Commission from delegating to State commissions or
 26 other entities all or any portion of such
 27 jurisdiction.

28 47 U.S.C. § 251(e) (2001). Section 201(b), a 1938 amendment to

29 ⁴ The Third Order was published in the Federal Register at
 30 64 Fed. Reg. 62,983 on November 18, 1999.

1 the Communications Act of 1934, confers rule-making authority on
2 the FCC: "The Commission may prescribe such rules and
3 regulations as may be necessary in the public interest to carry
4 out the provisions of this chapter." 47 U.S.C. § 201(b). The
5 1996 Act left this section intact and the Supreme Court, in
6 AT&T, 525 U.S. at 378, held that this rulemaking authority
7 encompassed the 1996 Act's provisions. Also left intact by the
8 1996 Act, however, was section 152(b), which contains
9 "[e]xceptions to Federal Communications Commission
10 jurisdiction." 47 U.S.C. § 152(b) (2001). The relevant portion
11 of this section provides that "nothing in this chapter shall be
12 construed to apply or to give the Commission jurisdiction with
13 respect to . . . charges, classifications, practices, services,
14 facilities, or regulations for or in connection with intrastate
15 communication service by wire or radio of any carrier[.]" Id. §
16 152(b)(1). The interplay between § 152(b) and § 251(e) is at
17 the heart of the NYPSC's challenge to the FCC's assertion of
18 jurisdiction.

19 The NYPSC principally argues that the FCC's 10-digit
20 dialing rule violates § 152(b)'s prohibition against FCC
21 jurisdiction with respect to "charges, classification,
22 practices, services, facilities, or regulations for or in
23 connection with intrastate communication service" because
24 Congress did not clearly mandate that the state's "traditional

1 powers" over local dialing be preempted. On the other hand, the
2 FCC and the industry intervenors contend that § 152(b) has no
3 application where Congress has expressly given the FCC
4 jurisdiction over intrastate matters, as it has with § 251(e)'s
5 grant of exclusive jurisdiction over the NANP.

6 The United States Supreme Court, in Louisiana Public
7 Service Commission v. Federal Communications Commission, 476
8 U.S. 355, 368-69 (1986), framed a similar issue as one of
9 preemption. Federal preemption of state law can occur in
10 several different ways: first, Congress may explicitly provide
11 for preemption; second, Congress's intent to preempt state law
12 may be inferred where the federal regulation in a particular
13 area "left no room for supplementary state regulation;" third,
14 state law is nullified to the extent that it actually conflicts
15 with federal law. Hillsborough County, Fla. v. Automated Med.
16 Labs., Inc., 471 U.S. 707, 713 (1985) (citations and internal
17 quotation marks omitted). "Where . . . the field that Congress
18 is said to have pre-empted has been traditionally occupied by
19 the States we start with the assumption that the historic police
20 powers of the States were not to be superseded by the Federal
21 Act unless that was the clear and manifest purpose of Congress."

1 Id. at 715 (internal quotation marks and citations omitted).⁵

2 Prior to the 1996 Act, Congress articulated no such "clear
3 and manifest purpose" in the area of intrastate telephone
4 communication; in fact, § 152(b) provided strong evidence
5 against preemption. In Louisiana Public Service Commission, 476
6 U.S. at 377, the Supreme Court held that, in order to "override
7 the command of § 152(b) that 'nothing in this chapter shall be
8 construed to apply or to give the Commission jurisdiction' over
9 intrastate service," another provision of the statute must
10 supply unambiguous or straightforward language allowing the FCC
11 to act in intrastate matters. Effectuating a federal policy
12 consistent with the Act is not enough to sustain the FCC's
13 authority to act in intrastate matters. See id. The Supreme
14 Court's holding in Louisiana Public Service Commission thus
15 limited the FCC's ability to assert so-called "ancillary
16 jurisdiction" in intrastate areas where the Act does not
17 specifically grant FCC authority. See AT&T, 525 U.S. at 381
18 (citing La. Pub. Serv. Comm'n, 476 U.S. at 370, 374).

19 ⁵ We assume, for purposes of this analysis, that "numbering
20 administration" is a task traditionally performed by states,
21 although we note that this proposition is far from clear.
22 Historically, as described supra, many numbering administration
23 tasks were performed first by AT&T, then by the incumbent LECs.
24 The limited role of the State commission was to approve plans
25 developed by the LECs and the NANP Administrator. However,
26 because the FCC conceded that the State commissions played at
27 least some role with respect to local dialing, we assume for this
28 discussion that this area has been "traditionally occupied" by
29 the states. See Second Order, at ¶ 315-17.

1 The 1996 Act significantly altered the regulatory
2 landscape. There can be no question "whether the Federal
3 Government has taken the regulation of local telecommunications
4 competition away from the States . . . [because] it
5 unquestionably has." AT&T, 525 U.S. at 378 n.6. In AT&T, the
6 Supreme Court noted that, after the passage of the
7 Telecommunications Act of 1996, "§ 152(b) may have less
8 practical effect . . . because Congress, by extending the
9 Communications Act into local competition, has removed a
10 significant area from the States' exclusive control." 525 U.S.
11 at 381 n.8. In interpreting § 152(b)'s phrase, "nothing in this
12 chapter shall be construed to apply or to give the Commission
13 jurisdiction," the Supreme Court stated that

14 even though "Commission jurisdiction" always follows
15 where the Act "applies," Commission jurisdiction (so-
16 called "ancillary" jurisdiction) could exist even
17 where the Act does not "apply." The term "apply"
18 limits the substantive reach of the statute (and the
19 concomitant scope of primary jurisdiction), and the
20 phrase "or give the Commission jurisdiction" limits,
21 in addition, the FCC's ancillary jurisdiction.

22 AT&T, 525 U.S. at 380. Thus, "[i]nsofar as Congress has
23 remained silent, . . . § 152(b) continues to function. The
24 Commission could not, for example, regulate any aspect of
25 intrastate communication not governed by the 1996 Act on the
26 theory that it had an ancillary effect on matters within the
27 Commission's primary jurisdiction." Id. at 381 n.8.

1 Congress has not remained silent with respect to numbering
2 administration. Section 251(e) explicitly grants the FCC
3 "exclusive jurisdiction" over the North American Numbering Plan
4 and its administration. 47 U.S.C. § 251(e). This explicit
5 grant of authority provides the requisite "unambiguous and
6 straightforward" evidence of Congress's intent to "override the
7 command of § 152(b) that 'nothing in this chapter shall be
8 construed to apply or to give the Commission jurisdiction' over
9 intrastate service." La. Pub. Serv. Comm'n, 476 U.S. at 377.
10 Additionally, as AT&T recognized, the 1996 Act specifically
11 injected the FCC into the area of local competition, see AT&T,
12 525 U.S. at 378 n.6. Section 251(e) falls within this expansion
13 of the FCC's jurisdiction; indeed, § 251 is included within the
14 part of the 1996 Act entitled, "Development of Competitive
15 Markets." Telecommunications Act, 110 Stat. at 61. We
16 therefore conclude that § 251(e) grants the FCC authority to act
17 with respect to those areas of intrastate service encompassed by
18 the terms "North American Numbering Plan" and "numbering
19 administration."

20 Congress does not conclusively set forth in § 251, however,
21 what either term encompasses. Our next task, therefore, is to
22 determine if these terms, as used by Congress in § 251, provide
23 authority to the FCC to dictate the number of digits dialed by
24 consumers making local calls.

1 The Supreme Court recently set forth the framework for
2 analyzing an administrative agency's assertion of jurisdiction
3 to regulate. See EDA v. Brown & Williamson Tobacco Corp., 529
4 U.S. 120, 132 (2000). "Because this case involves [the FCC's]
5 construction of a statute that it administers, our analysis is
6 governed by Chevron U.S.A. Inc. v. Natural Resources Defense
7 Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694
8 (1984)." Id. The first inquiry under Chevron is "whether
9 Congress has directly spoken to the precise question at issue."
10 Id. (quoting Chevron, 467 U.S. at 842). If Congress has
11 explicitly resolved the issue, we must "give effect to the
12 unambiguously expressed intent of Congress." Id. (quoting
13 Chevron, 467 U.S. at 843). On the other hand, if Congress is
14 silent or ambiguous on the specific issue, we must defer to the
15 agency's reasonable interpretation of the statute it
16 administers. Id.

17 The NYPSC contends that Congress's failure to state
18 explicitly that number administration includes regulation of
19 local dialing patterns compels the conclusion that the FCC's
20 authority does not reach local call dialing. Accordingly, the
21 NYPSC asserts, the FCC's interpretation of its authority under
22 the Act is entitled to no deference, because of what the NYPSC
23 characterizes as the Telecommunications Act's clear limits on
24 the FCC's jurisdiction. Because § 251(e) grants the FCC no

1 authority over local call dialing, the NYPSC's argument goes, we
2 must give effect to § 152(b)'s plain reservation to the states
3 of jurisdiction over intrastate matters.

4 Although the NYPSC correctly points out that § 251(e) does
5 not explicitly mention "local dialing patterns" as within the
6 scope of FCC's "exclusive jurisdiction" over the North American
7 Numbering Plan, this absence by no means makes the statute
8 itself or Congress's intent clear. As the Supreme Court in AT&T
9 noted, the 1996 Act is "not a model of clarity. It is in many
10 important respects a model of ambiguity or indeed even self-
11 contradiction." AT&T, 525 U.S. at 397. What constitutes
12 "numbering administration" or is encompassed by the NANP under §
13 251(e), given the FCC's "exclusive jurisdiction" and its
14 authority to "delegat[e] to State commissions . . . all or any
15 portion of such jurisdiction" is far from clear. The Supreme
16 Court in AT&T, applying Chevron deference to the FCC's
17 interpretation of several other subsections of § 251, recognized
18 that "Congress is well aware that the ambiguities it chooses to
19 produce in a statute will be resolved by the implementing
20 agency. We can only enforce the clear limits that the 1996 Act
21 contains" Id. (emphasis added). We therefore will
22 uphold the FCC's interpretation of "numbering administration"

1 and "North American Numbering Plan" so long as it is reasonable.

2 The FCC and the industry intervenors urge that
3 establishment of local dialing patterns and a uniform telephone
4 numbering system are included in the term "numbering
5 administration," as the term is used in § 251. We agree with
6 the FCC and the industry intervenors that such an interpretation
7 is reasonable. Including local dialing patterns within the
8 scope of the "North American Numbering Plan" is eminently
9 logical. The FCC points out:

10 The numbering system necessarily requires a degree of
11 uniformity in telephone numbers, including the number
12 of digits to be assigned as area codes (3), central
13 office codes (3), and individual subscriber codes (4).
14

15 That the number of digits dialed is a function of
16 numbering administration is demonstrated by New York's
17 own request that the Commission "formally investigate"
18 the "feasibility of eight digit telephone numbers,"
19 because such a dialing pattern would "increase the
20 supply of numbers 10-fold."

21 Respondent's Br. at 23, 25 (quoting the NYFSC's Petition for
22 Reconsideration). Because it is reasonable to interpret
23 "numbering administration" as including all dialing patterns,
24 local and interstate, we conclude that the FCC's rule should be

1 upheld as a permissible construction of § 251(e).⁶

2 The FCC points out that, even prior to the 1996 Act's grant
3 of "exclusive jurisdiction" over the NANP, it had a role in
4 assuring that "numbering resources of the NANP [we]re
5 administered in a fair and efficient manner that ma[de] them
6 available to all parties desiring to provide telecommunications
7 services." NANP R&O, ¶ 4. Thus, the FCC had instituted "broad
8 policy objectives" that provided:

9 Administration of the plan must seek to facilitate
10 entry into the communications marketplace by making
11 numbering resources available on an efficient, timely
12 basis to communications services providers.

13 Administration of the NANP should not unduly favor
14 or disadvantage any particular industry segment or
15 group of consumers. . . .

16 Administration of the NANP and the dialing plan
17 should give consumers easy access to the public
18 switched telephone network.

19 NANP R&O ¶ 15 (reiterating a prior order which rejected a
20 proposal that would discriminate against wireless technologies
21 by assigning new NPAs for them, see Proposed 708 Relief Plan and
22 630 Numbering Plan Area Code by Ameritech-Illinois, 10 F.C.C.R.

23 ⁶ NYC's argument that City of Dallas, Texas v. FCC, 165 F.3d
24 341, 347-48 (5th Cir. 1999) provides support for its position
25 that the FCC had no authority to promulgate this regulation is
26 without merit. City of Dallas is readily distinguishable,
27 because the court concluded that the statute's "plain meaning"
28 prevented the FCC from enacting the cable regulations at issue
29 there. Because Chevron deference applies here (since no such
30 statutory "plain meaning" exists to prevent deference to the
31 reasonable interpretation of the FCC) as to the scope of the
32 FCC's exclusive jurisdiction, NYC's argument that City of Dallas
33 prevents preemption in this case is unavailing.

1 4,596 (January 23, 1995) ("Ameritech Order"). In the Ameritech
2 Order, the FCC described its jurisdiction over the NANP prior to
3 the 1996 Act, and found that "it is a practical and economic
4 impossibility to separate NPAs for local use from NPAs for
5 interstate use. Not only are NPAs scarce resources, but also,
6 it would be technologically impossible to have separate NPAs for
7 interstate and intrastate telephone calls." Ameritech Order, ¶
8 14. We believe that the FCC's interpretation of § 251,
9 especially when viewed along with its prior interpretations
10 regarding the NANP -- which preceded Congress's grant of
11 exclusive jurisdiction over the NANP to the FCC -- is
12 permissible and reasonable.⁷

⁷ The industry intervenors press another argument regarding the FCC's jurisdiction based on the first sentence of § 251(e), which provides, "The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbering available on an equitable basis." 47 U.S.C. § 251(e)(1) (2001) (emphasis added). First, they point out that because the statutory definition of "telecommunications" in 47 U.S.C. § 153(43) does not distinguish between intra- and interstate communications, jurisdiction over "numbering" must include both inter- and intrastate calls. See id. § 153(43) (defining "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received"). Second, they argue that the FCC's responsibility to ensure numbers are available on an "equitable basis" supports its exercise of jurisdiction over local dialing. Without mandatory 10-digit dialing, it is argued, numbers from the new area code are less valuable than numbers from the old area code, placing the carrier with more old numbers (the incumbent LECs) at an advantage over new carriers, an inequitable result. Although this argument is appealing, we need not reach it because we conclude that the
(continued...)

1 The NYPSC's argument to the contrary is unavailing. The
2 NYPSC contends that the FCC's "exclusive jurisdiction" does not
3 extend to local dialing patterns, because they are separate from
4 the NANP, which only includes ensuring an adequate supply of
5 telephone numbers.⁷ The NYPSC cites to the Eighth Circuit's
6 decision in California v. FCC, 124 F.3d 934, 943 (8th Cir.
7 1997), rev'd in part on other grounds by AT&T, 525 U.S. 366
8 (1999), as support for its argument that the NANP does not
9 encompass local dialing patterns.⁸ In California, however, the
10 Eighth Circuit merely stated that "[n]umbering administration

⁷(...continued)

FCC's jurisdiction is properly based on its "exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States." Id. § 251(e)(1).

⁸ The CPB further argues that local dialing is a "practice" under 47 U.S.C. § 152(b), not subject to FCC authority under § 251(e). We reject this argument as we have already concluded that § 251(e) provides an explicit grant of jurisdiction to the FCC, not controlled by § 152(b).

⁹ The NYPSC also argues that § 251(e) should be read in conjunction with § 271, which includes a checklist for Bell operating companies (BOCs) to meet before they are allowed entry into the long-distance market. See 47 U.S.C. § 271. Section 271(c)(2)(B)(ix) states that BOCs must provide, "[u]ntil the date by which telecommunications numbering administration guidelines, plan or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers." Id. The NYPSC argues that, when read together, "numbering administration" means the allocation of telephone numbers, not local dialing patterns. Although the NYPSC correctly describes what § 271 provides, it fails to explain why § 271 is relevant to the determination at issue here, or why § 271's reference to numbering administration necessarily excludes dialing patterns.

1 involves the coordination and distribution of all telephone
2 numbers in the United States." Id. California never actually
3 addressed the FCC's power pursuant to § 251(e), because the
4 petitioners' challenge to the FCC's rule, promulgated pursuant
5 to § 251(e)(2), was not ripe. See id.

6 NYPSC's reliance on an industry document, BOCs Notes on the
7 LEC Networks is likewise misplaced. BOCs Notes on the LEC
8 Networks - 1994, contained in Petitioner's Ex. 1. First, the
9 NYPSC makes much of the fact that the section on the NANP is
10 entitled "Numbering Plan and Dialing Procedures," contending
11 that the numbering plan is distinct and separate from dialing
12 procedures. Additionally, the NYPSC points to the BOCs Notes'
13 definition of dialing procedures as the "use of certain digits
14 or special characters as prefixes or appendices to the number
15 address defined by the NANP or its equivalent elsewhere in the
16 world." Id. § 3.8 (emphasis in original). This definition
17 alone, culled from an industry document, does not render
18 unreasonable the FCC's conclusion that dialing patterns are part
19 of the NANP, as that term is used in the statute. As Chevron
20 dictates, we must defer to an agency interpretation so long as
21 that interpretation is based on a permissible construction of
22 the statute. See Chevron, 467 U.S. at 843. Given the strong
23 pro-competitive purpose of and significant increase in the FCC's
24 authority pursuant to the 1996 Act, it is not unreasonable to

1 conclude that Congress's use of the term "North American
2 Numbering Plan" encompasses more than the BOCs' use of that
3 term.

4 Additionally, the principal purpose of the 10-digit dialing
5 rule, as repeatedly stated by the FCC, is to ensure competition
6 in the local telecommunications markets. As we noted earlier,
7 the 1996 Act itself indicates that it is an "act to promote
8 competition." Telecommunications Act, 110 Stat. at 56.
9 Additionally, the Supreme Court concluded that the 1996 Act
10 "unquestionably" grants the FCC authority to regulate local
11 telecommunications markets. AT&T, 525 U.S. at 378 n.6. These
12 statements bolster the FCC's view of its authority to impose the
13 10-digit dialing requirement, a pro-competitive regulation. For
14 this additional reason, the FCC's assertion of jurisdiction over
15 local dialing patterns is reasonable.

16 In short, the NYPSC's arguments do not convince us that the
17 FCC's interpretation of "numbering administration" and the
18 "North American Numbering Plan" is impermissible under the 1996
19 Act. Because the FCC's interpretation is reasonable, we defer,
20 as we must, to the FCC's assertion of jurisdiction under §
21 251(e) to promulgate a rule pertaining to local dialing
22 patterns.

23 B. The FCC's Promulgation of the 10-digit Dialing Rule

24 Having concluded that the FCC possessed jurisdiction to

1 promulgate rules pursuant to § 251 generally with respect to
2 local dialing patterns, we would normally now turn to the
3 question of whether the specific rule passes muster.

4 However, the petitioner in this case, the NYPSC, argues
5 only that the FCC rule is invalid as exceeding its authority.
6 The City of New York, as an intervenor, argues that the FCC's
7 rule is an unreasonable exercise of the FCC's rule-making
8 authority. The FCC submits that NYC's argument need not be
9 addressed because it was not raised by the party to this case,
10 the NYPSC. Although we believe that the FCC's argument is
11 correct, see La. Pub. Serv. Comm'n v. FERC, 174 F.3d 218, 224
12 n.5 (D.C. Cir. 1999) ("An intervening party may join issue only
13 on a matter that has been brought before the court by another
14 party."), we can easily dispose of this argument on the merits.

15 Contrary to the City of New York's argument, the FCC's
16 rulemaking was not arbitrary and capricious. The 10-digit
17 dialing rule was based on the FCC's determination that to allow
18 seven digit local dialing would have anti-competitive effects by
19 favoring the incumbent LECs. See Second Order, ¶¶ 287, 289.
20 After reviewing the submitted comments, the FCC reasonably
21 concluded that without 10-digit dialing

22 [c]ustomers would find it less attractive to switch
23 carriers because competing exchange service providers,
24 most of which will be new entrants to the market,
25 would have to assign their customers numbers in the
26 new overlay area code, which would require those
27 customers to dial 10-digits much more often than the

1 incumbent's customers, and would require people
2 calling the competing exchange service provider's
3 customer to dial 10-digits when they would only have
4 to dial 7-digits for most of their other calls.

5 Id. ¶ 287.

6 In its third order, the FCC considered and rejected the
7 NYPSC's arguments that long-term local number portability will
8 eradicate the anti-competitive effects of an overlay area code,
9 finding that the dialing disparity between new area code
10 customers and old area code customers still exists because
11 incumbent LECs have access to a larger pool of old area code
12 numbers. See Third Order, ¶¶ 40, 41. That the public would be
13 initially inconvenienced by adjusting to dialing 10-digits for
14 all local calls was likewise considered by the FCC, but it
15 concluded that such customer confusion quickly dissipates. See
16 id. ¶ 39.

17 The NYPSC, in its brief, concedes that "[t]he NANP defines
18 telephone numbers as ten-digits long, reserves certain numbers
19 for special purposes, and provides for the assignment of new
20 area codes to ensure that enough ten-digit numbers are available
21 for assignment to customers." The NYPSC itself therefore
22 impliedly recognizes that the FCC has "exclusive jurisdiction"
23 over the assignment of new area codes. The only reason that the
24 NYPSC has any authority to implement overlay area codes in New
25 York City is because the FCC exercised its authority under §
26 251(e) to delegate to State commissions the power to implement

1 area code relief. We believe that the imposition of 10-digit
2 dialing is a valid condition on this delegation, which allowed
3 New York to implement area code overlay in the first place. The
4 industry intervenors point out that the FCC was not required to
5 delegate this authority, and could, in fact, have assigned
6 particular methods of area code relief to the States under §
7 251(e) or prohibited area code overlays altogether. This
8 "greater power includes the lesser power" argument lends further
9 support to the conclusion that the FCC's promulgation of 47
10 C.F.R. § 52.19 was a reasonable exercise of the FCC's authority
11 under § 251(e).

12 In reviewing agency action,

13 [this Court] must be satisfied that the agency
14 examined the relevant data and established a rational
15 connection between the facts found and the choice
16 made. The agency's action should only be set aside
17 where it relied on factors which Congress has not
18 intended it to consider, entirely failed to consider
19 an important aspect of the problem, offered an
20 explanation for its decision that runs counter to the
21 evidence before the agency, or is so implausible that
22 it could not be ascribed to a difference in view of
23 the products of expertise.

24 Cellular Phone Taskforce v. FCC, 205 F.3d 82, 89-90 (2d Cir.

25 2000) (internal citations and quotation marks omitted). We are
26 satisfied that the FCC, in promulgating this rule, appropriately
27 assessed all relevant factors. Given the deference accorded the
28 FCC's action, the FCC's rule cannot be said to be arbitrary and
29 capricious.

C. Denial of Waiver to the NYPSC

A waiver of an FCC rule may be granted "for good cause shown." 47 C.F.R. § 1.3. "The FCC may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest." Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990). "Challenging the denial of a waiver is . . . not an easy task because an applicant for waiver bears the heavy burden on appeal to show that the Commission's reasons for declining to grant the waiver were so insubstantial as to render that denial an abuse of discretion." BellSouth Corp. v. FCC, 162 F.3d 1215, 1222 (D.C. Cir. 1999) (internal quotation marks and citations omitted).

Regarding New York's waiver petition, the FCC concluded that the Common Carrier Bureau's denial "was entirely consistent with the Act, our regulations, precedent and policy." Third Order, ¶ 45. In challenging this denial, the NYPSC first argues that the FCC erred in treating its waiver request merely as an appeal from the FCC Common Carrier Bureau's denial, and claims that it also renewed its waiver request. The NYPSC therefore argues that the FCC failed to address the merits of the waiver request and that this failure was "arbitrary and capricious" because the FCC treated its request as an attempt to overturn the 10-digit dialing rule. The FCC did address the merits of

1 the NYPSC's waiver request (albeit briefly), however, when it
2 stated that the Bureau's denial of a waiver was consistent with
3 "the Act, our regulations, precedent and policy" and thereby
4 adopted the Bureau's reasoning in denying the waiver. Third
5 Order, ¶ 45.

6 Second, as to the merits of the waiver request, the NYPSC
7 argues that 10-digit dialing is unnecessary in New York City,
8 because New York City is the "mecca of local telephone
9 competition." The NYPSC points to a December 22, 1999 finding
10 by the FCC that New York's local telephone network was open to
11 competition, such that Bell Atlantic was permitted to provide
12 long-distance service under § 271. See Application by Bell
13 Atlantic N.Y. for Authorization Under Section 271 of the
14 Communications Act to Provide In-Region, InterLATA Serv. in the
15 State of N.Y., 15 F.C.C.R. 3,953 (December 22, 1999), ¶¶ 6, 13
16 (concluding that "New York . . . has been a leader in opening
17 local markets to competition for over fifteen years" and "[t]he
18 well established pro-competitive regulatory environment in New
19 York in conjunction with recent measures to achieve section 271
20 compliance has, in general created a thriving market for
21 provision of local exchange . . . service."). Additionally, the
22 NYPSC asserts that its imposition of permanent LNP, which would
23 allow customers of the incumbent LEC to keep their number when
24 switching to another new entrant, alleviates any anti-

1 competitive concerns. Also, the NYPSC contends that its
2 requirement of non-discriminatory number assignment, under which
3 the competitive LECs' new customers are no more likely to
4 receive telephone numbers in the new overlay area codes than if
5 they remained customers of Bell Atlantic, the incumbent LEC.
6 Additionally, NYPSC argues that, although Bell Atlantic has more
7 numbers in the existing area codes, competitors have a supply of
8 unused numbers in proportion to their market share. Finally,
9 the NYPSC, joined by intervenors CFA and NYC, argues that 10-
10 digit dialing would impose needless costs and inconvenience on
11 New York City residents, chiefly in reprogramming automatic
12 dialing equipment such as modems, fax machines, fire and burglar
13 alarms.

14 The FCC considered and rejected each of these arguments.
15 We do not find the FCC's refusal to grant the requested waiver
16 an abuse of its discretion. First, even with New York's
17 advances in local telephone service competition and the NYPSC's
18 pro-competitive conditions, including the LNP, non-
19 discriminatory number assignment, and number pooling, concerns
20 about maintaining competition remain. For instance, without 10-
21 digit dialing, the dialing disparity between numbers in the old
22 and new area codes remains. Second, regarding the argument on
23 consumer inconvenience, the FCC's Common Carrier Bureau noted,
24 and we agree, that "implementation of any new area code, whether

1 through an overlay, a geographic split, or a rearrangement of
2 existing area code boundaries, is initially confusing, not only
3 to customers in the affected area, but also to those who call
4 them from outside that area." Waiver Order, ¶ 14. Finally, as
5 the FCC points out, many of the arguments asserted by the NYPSC
6 to support its waiver application were also pressed in its
7 challenge to the rule itself. These arguments fail in this
8 context for the same reasons that they failed in that context.

9 In short, the Common Carrier Bureau's decision and the
10 FCC's adoption of that order adequately considered all of NY's
11 arguments in support of its waiver application. We uphold the
12 denial of the waiver, and conclude that the FCC's reasons cannot
13 be considered "so insubstantial as to render that denial an
14 abuse of discretion." Mountain Solutions, Ltd. v. FCC, 197 F.3d
15 512, 517 (D.C. Cir. 1999) (internal quotation marks and
16 citations omitted).

17 III. CONCLUSION

18 For the foregoing reasons, we affirm the FCC's exercise of
19 jurisdiction over local dialing and its imposition of mandatory
20 10-digit dialing for those areas adopting area code overlays.
21 Although New York has long resisted this rule, New York City
22 will thus soon join the ranks of several major metropolitan
23 areas, including Boston, Philadelphia, Pittsburgh and Denver,
24 that have implemented 10-digit local call dialing apparently

1 without great incident.

2 The NYPSC's petition to review seeking an order setting
3 aside the FCC's orders is hereby DENIED.