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July 8, 2004

VIA HAND DELIVERY

Honorable Richard Collier
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c/o Sharla Dillon, Docket & Records Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

RE: Tennessee Coalition of Rural Incumbent Telephone Companies and Cooperatives Request for Suspension of Wireless to Wireless Number Portability Obligations Pursuant to Section 251(f)(2) of the Communications Act of 1994, As Amended
TRA Docket No. 03-00633

Dear Hearing Officer Collier:

Enclosed please find thirteen (13) copies of the following for filing in the above-captioned matter (1) Brief for Respondents, In the United States Court of Appeals for the District of Columbia (No 03-405), *Central Texas Telephone Cooperative, Inc., et al, v. FCC* (June 24, 2004); and (2) Opinion and Order, *In the Matter of the Application of Waldron Telephone Company for Temporary Suspension of Wireline to Wireless Number Portability Obligations Pursuant to§ 251(f)(2) of the Federal Telecommunications Act of 1996, as amended / In the Matter of the Application of Ogden Telephone Company for Temporary Suspension of Wireline to Wireless Number Portability Obligations Pursuant to§ 251(f)(2) of the Federal Telecommunications Act of 1996, as amended, MPSC,* Case No. U-13956 and Case No. 13958 (Feb 12, 2004).

As with similar previous submissions by Verizon Wireless, these documents are being filed consistent with the directions of the Hearing Officer and/or Tenn. Code Ann. § 4-5-313.

Also enclosed is an additional copy to be "File Stamped" for our records If you have any questions or require additional information, please let me know.

Very truly yours,

Melvin J. Malone

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CERTIFICATE OF SERVICE

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ORAL ARGUMENT SCHEDULED FOR NOVEMBER 18, 2004

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 03-1405

CENTRAL TEXAS TELEPHONE COOPERATIVE, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(A) PARTIES AND AMICI

All parties, intervenors and *amici* appearing in this Court are listed in the brief of Petitioner.

(B) RULING UNDER REVIEW

Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issue, CC Docket No. 95-116, 18 FCC Rcd 20971 (2003) (JA).

(C) RELATED CASES

The following cases currently before this Court involve related issues: *United States Telecom Association and Centurytel, Inc. v. FCC, et al.,* Case No. 03-1414 and consolidated case *National Telecommunications Cooperative Association and Organization for the Promotion and Advancement of Small Telecommunications Companies, et. al. v. FCC,* Case No.03-1443. *Central Texas Telephone Cooperative, Inc., et al. v. FCC & USA,* D.C. Circuit Case No. 04-1038, was dismissed by Court Order on June 3, 2004.

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GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996)
The Act	Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et al.*
CMRS	Commercial Mobile Radio Service
FCC	Federal Communications Commission ("FCC" or "Commission")
ILEC	Incumbent Local Exchange Carrier
IXC	Interexchange Carrier
LATA	Local Access and Transport Area
LEC	Local Exchange Carrier
MTA	Major Trading Area
NANC	North American Numbering Council
Order	The order under review: *Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issues,* CC Docket No. 95-116, 18 FCC Rcd 20971 (2003)
POI	Point of Interconnection
RTC	Rural Telephone Company. *See* 47 U.S.C § 152(37)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-1405

CENTRAL TEXAS TELEPHONE COOPERATIVE, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

In the order on review, the Federal Communications Commission clarified and affirmed a rule adopted by the Commission in 1996 concerning the duty of commercial mobile radio services ("CMRS") carriers to provide local number portability to other CMRS carriers. *Telephone Number Portability – Carrier Requests for Clarification of Wireless-Wireless Porting Issue,* CC Docket No. 95-116, 18 FCC Rcd 20971 (2003) (JA). The following questions are raised by the petition for review filed by the rural wireline carriers:

(1) Do the petitioners have standing to maintain their challenge given that the redressability of the petitioners' alleged injury depends on factors other than the rule clarified in the order on review?

(2) Was the petition for review timely filed?

(3) Did the Commission act reasonably and in accordance with law in clarifying the obligations of CMRS carriers' duty to provide local number portability to other CMRS carriers, as established in its earlier rule?

JURISDICTION

This Court has jurisdiction to review final orders of the FCC pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum to this brief.

COUNTERSTATEMENT

I. Statutory And Regulatory Framework For Number Portability

A. The Telecommunications Act of 1996

Number Portability is "the ability of users of telecommunications services to retain, at the same location, existing [telephone] numbers without impairment of quality, reliability or convenience when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30); *see also* 47 C.F.R. § 52.21(k) (same). Section 251(b)(2) of the Communications Act, as amended by the Telecommunications Act of 1996 (the "1996 Act"), requires all local exchange carriers ("LECs") "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2).

Congress viewed number portability as one of the minimum requirements "necessary for opening the local exchange market to competition." *See, e.g.*, S. Rep. No. 23, 104th Cong., 1st Sess. at 19-20 (1995). "[T]he ability to change service providers," the House Commerce Committee found, "is only meaningful if a customer can retain his or her local telephone number." H.R. Rep. No. 204, 104th Cong. 1st Sess. at 72 (1995); *accord Cellular Telecommunications & Internet Ass'n v. FCC*, 330 F.3d 502, 513 (D.C. Cir. 2003) ("*CTIA*")

(observing in the context of wireless-to-wireless number portability that "[t]he simple truth is that having to change phone numbers presents a barrier to switching carriers, even if not a total barrier, since consumers cannot compare and choose between various service plans and options as efficiently.").

B. The Commission's First Number Portability Order

In accordance with its congressional directive, on July 2, 1996, the Commission promulgated rules and deployment schedules for the implementation of number portability. *Telephone Number Portability*, 11 FCC Rcd 8352 (1996) (*First Portability Order*), *recon.*, 12 FCC Rcd 7236 (1997), *further recon.*, 13 FCC Rcd 21204 (1998). In that order, the Commission required both LECs and wireless carriers to provide number portability.[1] As applied to LECs, the Commission adopted, consistent with the statute, broadly applicable porting requirements: "number portability must be provided...by all LECs to all telecommunications carriers, including commercial mobile radio services (CMRS) providers." *Id.*, 11 FCC Rcd at 8355 ¶ 3; *see also id.* at 8431 ¶ 152.[2] Recognizing that section 251(b)(2) explicitly imposes the number portability requirement only on LECs, the Commission relied on other provisions of the Act to require CMRS providers to provide number portability to other wireline and wireless carriers. *Id.*, 11 FCC Rcd at 8431-32 ¶ 153 (relying on 47 U.S.C. §§ 1, 2, 4(i), and 332 to impose number portability requirements on CMRS providers).[3]

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[1] *See* 47 C.F.R. § 52.3 (1996) (describing the number portability obligations of LECs). This provision has since been recodified at 47 C.F.R. § 52.23. *See also* 47 C.F.R. § 52.11 (1996) (describing the number portability obligations of CMRS carriers). This provision has since been recodified at 47 C.F.R. § 52.31.

[2] CMRS providers are commonly known as wireless providers, and we use the terms interchangeably.

[3] *See generally*, *CTIA*, 330 F.3d at 502.

In the *First Portability Order*, the Commission specifically required CMRS providers to institute number portability among themselves.[4] The Commission reasoned that number portability should be made available among CMRS providers "to remove barriers to competition among such providers[,].... [to] stimulate the development of new services and technologies, and [to] create incentives for carriers to lower prices and costs." *Id.*, 11 FCC Rcd at 8435 ¶158. The transfer of a telephone number from one wireless carrier to another (referred to herein as "wireless-to-wireless porting" or simply "wireless porting") is the subject of the order on review in this case.[5]

In the *First Portability Order*, the Commission distinguished between "service provider portability," *i.e.*, "the ability of end users to retain the same telephone numbers as they change from one service provider to another," and "location portability," which it described as "the ability of users of telecommunications services to retain existing telecommunications numbers ...when moving from one physical location to another."[6] The Commission in the *First Portability Order* mandated service provider portability -- the definition of which is synonymous with the statutory definition of number portability. It did not, however, require location

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[4] *First Portability Order*, 11 FCC Rcd at 8433 ¶ 155 & 8482 (former rule 47 C.F.R. § 52.11, now codified at 47 C.F.R. § 52.31).

[5] Transferring a number from a wireline carrier to a wireless carrier, or vice versa (referred to herein as "intermodal porting"), is the subject of the order on review in Case Nos. 03-1414 and 03-1443 that are currently pending before the Court.

[6] *First Portability Order*, 11 FCC Rcd at 8443 ¶¶ 172, 174. We note that, in this context, we use the term "port" to mean the transfer of a telephone number from one carrier's switch to another carrier's switch, which enables a customer to retain his or her number when transferring from one local service provider to another. *Telephone Number Portability*, 12 FCC Rcd 12281, 12287 n.28 (1997) ("*Second Portability Order*").

portability. *Id.*, 11 FCC Rcd at 8447 ¶ 181.[7] The Commission largely affirmed the *First Portability Order* on reconsideration.[8]

C. Subsequent Number Portability Proceedings

In an effort to address technical issues raised by the implementation of number portability, the Commission turned to a federal advisory committee called the North American Numbering Council (NANC), which was composed of representatives of a broad range of telecommunications interests. The agency had earlier created NANC to develop consensus in the industry on technical issues relating to the administration of the country's telephone numbers and to make recommendations to the FCC based on that consensus. *See First Portability Order*, 11 FCC Rcd at 8401 ¶ 93.

On May 1, 1997, the NANC submitted to the FCC a series of recommendations pertaining to the transfer of a telephone number from one wireline carrier to another ("wireline-to-wireline porting").[9] In August 1997, after soliciting public comment on the *NANC Working Group Report*, the Commission largely adopted recommendations from the NANC for the implementation of wireline-to-wireline portability.[10] Under the guidelines developed by the NANC, if a state elected to impose a separate location portability requirement between LECs,

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[7] The Commission required that any long-term number portability method be able to accommodate location portability in the future. *See First Portability Order*, 11 FCC Rcd at 8383 ¶ 58.

[8] *See First Portability Reconsideration Order*, 12 FCC Rcd 7236 (1997).

[9] *See Local Number Portability Administration Selection Working Group Report* (Apr. 25, 1997) ("*NANC Working Group Report*").

[10] *See Second Portability Order*, 12 FCC Rcd 12281; *see also* 47 C.F.R. § 52.26(a) (codifying by reference *NANC Working Group Report*).

such a requirement would have to be limited to carriers with a local presence in the same rate center to accommodate wireline carriers' concerns about the proper rating and routing of calls.[11]

The *Second Portability Order* did not address issues associated with wireless or intermodal porting.[12] Nor did it place any limits on the requirement of such porting; instead, it asked the NANC to develop a consensus recommendation on various outstanding matters, including "how to account for differences between service area boundaries of wireline versus wireless services."[13] The NANC reported to the Commission in May 1998 that its members were not able to reach consensus on technical issues surrounding intermodal porting and that it would not make a recommendation on the topic.[14]

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[11] *See Local Number Portability Selection Working Group Final Report and Recommendation to the* FCC, Appendix D, § 7.3, at 6 (rel. April 25, 1997). The report addressed the question of geographic limitations on wireline carriers' obligation to provide *location* portability if required by a state commission. It did not address geographic limitations with respect to wireline carriers' obligation to provider *service provider* portability.

[12] The Commission concluded that it was "reasonable for the NANC to defer making recommendations at this time with respect to the implementation of local number portability by CMRS providers" in light of the Commission's decision to delay the implementation date of wireless portability. *Second Portability Order*, 12 FCC Rcd at 12333 ¶ 90.

[13] *See Second Portability Order*, 12 FCC Rcd at 12333-34 ¶ 91.

[14] *See Local Number Portability Administration Working Group Report on Wireless Wireline Integration*, May 8, 1998, CC Docket No. 95-116, at §3.1 (filed May 18, 1998) ("*Report on Wireless Wireline Integration*"). On further reconsideration of the *First Portability Order*, the Commission acknowledged concerns raised by a commenter that requiring service provider portability in a wireless environment without imposing explicit geographic restrictions on such porting could "theoretically" result in *de facto* location portability. In response to this comment, the Commission expressed its concern that "limiting number portability in a wireless environment to those carriers already serving the NPA of the ported wireless number may thwart the pro-competitive goals of the Act." *Telephone Number Portability*, 13 FCC Rcd 21204, 21232 ¶ 61 (1998). Noting that further analysis of this issue was needed, the Commission deferred consideration of the issue and took no action to limit the geographic scope of wireless porting. *Id.*

Although the Commission had originally ordered CMRS carriers to implement number portability by June 30, 1999, *First Portability Order*, 11 FCC Rcd 8355 ¶ 4, the Commission subsequently found that carriers needed additional time "to develop and deploy the technology that will allow viable implementation of service provider portability." *Forbearance From CMRS Number Portability Obligations*, 14 FCC Rcd 3092, 3104-3105 ¶ 25 (1999) ("*Temporary Forbearance Order*"). Thus, as a practical matter, there could be no porting of numbers by CMRS carriers until they implemented the necessary technology. *Id.*; *see also* 47 C.F.R. § 52.31. During this period of temporary regulatory forbearance, NANC issued several reports but did not adopt or recommend technical standards governing wireless-to-wireless or intermodal portability.

In July 2002, the Commission established a firm deadline of November 24, 2003, for wireless portability and intermodal portability within the 100 largest localities. *Verizon Wireless' Petition for Partial Forbearance*, 17 FCC Rcd 14972 14985-86 ¶ 31 (2002) ("*Forbearance Denial Order*"), *aff'd, CTIA*, 330 F.3d 502. CMRS carriers outside of the largest 100 localities were required to allow end users to port their numbers by the later of May 24, 2004, or six months after receiving a porting request. *Id.* Thus, by these deadlines, carriers had to be capable of allowing end users to port their telephone numbers if another carrier had made a request for portability. The 2002 *Forbearance Denial Order*, like the 1999 *Temporary Forbearance Order*, addressed the *timing* of wireless number portability. But neither of those orders addressed the scope of the portability obligation established in 1996.

In the *Forbearance Denial Order*, the Commission also reaffirmed its policy rationale for wireless number portability. *Id.*, 17 FCC Rcd 14972. In denying a request by wireless carriers for permanent forbearance of the wireless portability requirement, the Commission explained

that wireless number portability would enhance competition, reduce prices – especially as customers came to view their wireless phones as possible substitutes for their wireline phones – and promote the public interest. *See generally id.*, 17 FCC Rcd at 14977-14981, ¶¶ 14-22.[15] This Court upheld that determination over the objections of wireless carriers, holding that the Commission reasonably had concluded that application of the wireless number portability requirement was "necessary for the protection of consumers."[16] The Court explained that "[t]he simple truth is that having to change phone numbers presents a barrier to switching carriers, even if not a total barrier, since consumers cannot compare and choose between various service plans and options as efficiently." *CTIA*, 330 F.3d at 513 (internal citation omitted).

II. LEC-CMRS Interconnection

A. Physical Point of Interconnection

Under section 251(a) of the Act, a telecommunications carrier, including a CMRS provider, may interconnect with an incumbent LEC either directly or indirectly. 47 U.S.C. § 251(a)(1). In the *Local Competition First Report and Order*, the Commission made clear that such carriers "should be permitted to provide interconnection pursuant to section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices." 11 FCC Rcd 15499, 15991 ¶ 997 (1996) (subsequent history omitted). The Commission has interpreted

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[15] Section 10(a) of the 1996 Act directs the Commission to forbear from applying any provision of the Act or agency rule if the Commission determines (1) that enforcement of the requirement is not necessary to ensure that rates are just, reasonable, and non-discriminatory, (2) that the regulation is not needed to protect consumers, and (3) that forbearance is consistent with the public interest. 47 U.S.C. § 160(a). In making that public interest determination, Congress directed the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. 47 U.S.C. § 160(b).

[16] *CTIA*, 330 F.3d at 509; *see also* 47 U.S.C. § 160(a)(2).

these provisions to give telecommunications carriers, including CMRS providers, the option to interconnect at a single point of interconnection ("POI") in each LATA.[17] In rural areas, CMRS carriers typically interconnect indirectly with smaller LECs through the tandem switch of one of the regional Bell Operating Companies ("RBOCs").[18]

B. Intercarrier Compensation Procedures

The Act and the Commission's rules provide for two separate compensation regimes when two or more carriers collaborate to complete a local or long distance call. The access charge regime governs payments that interexchange carriers ("IXCs") and CMRS carriers make to LECs to originate and terminate long-distance calls. By contrast, carrier compensation for the exchange of local traffic is determined according to the Commission's reciprocal compensation procedures under section 251 of the Act.[19] In the *Local Competition First Report and Order*, the Commission determined that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area ("MTA")[20] is subject to reciprocal compensation

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[17] A local access and transport area ("LATA") is a geographical area within which a Bell Operating Company ("BOC") may offer local or long distance telecommunications services. 47 U.S.C. §§ 271, 153(3).

[18] A tandem switch is an intermediate switch between an originating telephone call location and the final destination of the call. Its function is to sort traffic coming in over common trunk groups and then to send it on to other local switches. Rural LECs have noted that they may realize "efficiencies" in using indirect interconnection (*via* RBOC tandem switches) "instead of building a direct connection" to competing providers. National Telecommunications Cooperative Association *Ex Parte*, CC Docket No. 01-92 (March 10, 2004), *attaching* NTCA report, "Bill and Keep: Is It Right for Rural America," at 41 (March 2004).

[19] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 ¶ 6 (2001) ("*Intercarrier Compensation NPRM*").

[20] MTAs are geographic areas within which CMRS providers are licensed to provide service. The Commission has established the MTA as the local calling area for CMRS providers for purposes of intercarrier compensation. *Local Competition First Report and Order*, 11 FCC Rcd at 16014 ¶ 1036.

obligations under section 251(b)(5), rather than interstate or intrastate access charges. *Local Competition First Report and Order*, 11 FCC Rcd at 16014 ¶ 1036. Thus, section 51.701(b)(2) of the Commission's rules defines telecommunications traffic exchanged between a LEC and a CMRS provider that is subject to reciprocal compensation as traffic "that, at the beginning of the call, originates and terminates within the same Major Trading Area." *See* 47 C.F.R. § 51.701(b)(2). For traffic that is subject to reciprocal compensation, the Commission's rules provide that a terminating carrier may recover from the originating carrier the cost of certain facilities and transport costs from an "interconnection point" to the called party. *See* 47 C.F.R. §§ 51.701(a), (c).

Section 51.703(b) of the Commission's rules states that a LEC may not assess charges on any other telecommunications carrier, including a CMRS provider, for telecommunications traffic that originates on the LEC's network. *See* 47 C.F.R. § 51.703(b). The Commission has construed this provision to mean that an incumbent LEC must bear the cost of delivering traffic (including the facilities over which the traffic is carried) that it originates to the POI selected by a competing telecommunications carrier.[21] At least two federal appellate courts have held that this rule applies even in cases where an incumbent LEC delivers calls to a POI located outside of its customer's local calling area.[22]

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(21) *See TSR Wireless v. U S West Communications*, 15 FCC Rcd 11166, 11181 ¶ 34 (2000), *aff'd sub nom., Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

(22) *See Southwestern Bell Tel. Co. v. Public Utilities Comm'n of Texas*, 348 F.3d 482, 486-87 (5th Cir. 2003); *MCImetro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, 878-79 (4th Cir. 2003); *see also Atlas Tel. v. Corp. Comm'n of Oklahoma*, 309 F. Supp. 2d 1313 (W.D. Okla. 2004).

C. Rating Calls as Local or Toll

Under standard industry practice, calls are determined to be local or toll (long distance) by comparing the NPA-NXX codes[23] of the calling and called parties.[24] Thus, carriers generally compare the NPA/NXX prefixes of the calling and called parties' telephone numbers to determine both the retail rating of a call (that is, the charge imposed on the calling party) as well as the appropriate intercarrier compensation that is due. Every 10-digit telephone number is assigned to a particular rate center. A rate center is a geographic point (defined as a specific longitude and latitude) designated by a LEC and state regulators that is used to determine whether a call that originates on the LEC's network is a local call or a toll call.

All telephone numbers assigned to a particular rate center are presumed for rate-making purposes to be located at that geographic point. In addition, each rate center has a local calling area that consists of the set of other rate centers that are local to it, and two or more rate centers may have identical local calling areas. As a general matter, a call is rated local if the called number is assigned to a rate center within the local calling area of the originating rate center.

CMRS local service areas tend to be larger than wireline carriers' rate centers. Because wireline service is fixed to a specific location, a subscriber's telephone number is generally limited to use within the rate center within which it is assigned.[25] By contrast, wireless service is mobile and not fixed to a specific location. Accordingly, although a wireless subscriber's

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[23] The ten digit code assigned to telephone numbers is NPA-NXX-XXXX, with "NPA" representing the area code, "NXX" representing the middle three digits that identify the central office switch of the local service provider, and "XXXX" representing the individual subscriber.

[24] *See Starpower Communications v. Verizon South*, 18 FCC Rcd 23625, 23633 ¶ 17 (2003).

[25] *Working Group Report on Wireless Wireline Integration*, at 7.

number is associated with a specific geographic rate center, the number is not limited to use within that rate center. *Id.*

III. The Instant Proceeding

A. CTIA Petitions for Declaratory Ruling

As the implementation deadline for wireless and intermodal portability approached, disputes arose among carriers as a result of conflicting interpretations of the Commission's number portability rules. In particular, certain wireline carriers and rural wireless carriers announced their intention to construe narrowly their obligation to port numbers to CMRS carriers, taking the position that they need not port to CMRS carriers that do not have a presence in the rate center from which the ported number originated or direct interconnection with the customer's original carrier.[26] These pronouncements concerning the proper construction of the Commission's rules led the Cellular Telecommunications & Internet Association ("CTIA"), a trade group that represents CMRS carriers, to seek guidance from the Commission to resolve these disputes. In January and May of 2003, CTIA filed with the Commission petitions for declaratory ruling seeking guidance on a number of issues relating to the implementation of wireless and intermodal number portability.[27]

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[26] *See, e.g., Ex Parte* Presentation of the Rural Wireless Working Group Regarding Rural Wireless Number Portability Guidelines, Section 1.3 (filed Aug. 25, 2003) (JA).

[27] Petitions for Declaratory Ruling of the Cellular Telecommunications & Internet Association, CC Docket No. 95-116 (filed Jan. 23, 2003 and May 13, 2003) ("CTIA Petitions") (JA). Although two separate CTIA petitions, along with other petitions, were filed with the Commission seeking clarification of the Commission's number portability rules, it is primarily the May 2003 CTIA petition that is relevant here. The January 2003 CTIA petition primarily raised issues relating to intermodal portability.

The Commission issued public notices inviting comment on the issues raised in the CTIA Petitions.[28] The public notices were published in the Federal Register on February 13, 2003 (68 Fed. Reg. 7323) and June 10, 2003 (68 Fed. Reg. 34547) respectively.

As relevant here, CTIA's May 13th petition sought guidance as to whether CMRS carriers are required to enter into interconnection agreements as a precondition to porting numbers. May 13th Petition at 16-23 (JA). In response, certain rural CMRS carriers took the position that a rural CMRS carrier has no obligation to port numbers to a second CMRS carrier unless the second carrier has a local point of presence, local numbering resources, and direct interconnection with the porting out carrier in the rate center with which the telephone number is associated.[29] In a subsequent *ex parte* submission, CTIA urged the Commission to address this issue in the context of wireless-to-wireless portability.[30] Finally, CTIA urged the Commission to resolve a petition for declaratory ruling ("the Sprint Petition") that was pending before the Commission to the extent that the petition raised, with respect to non-ported numbers, the same rating and routing issues that commenters had raised in the Commission's number portability proceeding.[31]

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[28] Petition for Declaratory Ruling that Wireline Carriers Must Provide Portability to Wireless Carriers Operating Within Their Service Areas, CC Docket No. 95-116, Public Notice (rel. Jan. 27, 2003); Petition for Declaratory Ruling on Local Number Portability Implementation Issues, CC Docket No. 95-116, Public Notice (rel. May 22, 2003). Approximately 100 comments and *ex parte* letters were filed in response to the CTIA Petitions.

[29] *Ex Parte* Presentation of the Rural Wireless Working Group Regarding Rural Wireless Number Portability Guidelines, Section 1.3 (filed Aug. 25, 2003) (JA).

[30] Letter from Diane Cornell, CTIA, to Marlene H. Dortch, Secretary, FCC (filed Aug. 26, 2003) (JA).

[31] May 2003 CTIA Petition, at 25 (JA), *citing Sprint Petition for Declaratory Ruling Regarding ILECs' Obligation to Load Numbering Resources and to Honor Routing and Rating Points Designated by Interconnecting Carriers*, CC Docket No. 01-92 (filed May 9, 2002).

B. The *Order* on Review

On October 7, 2003, in response to CTIA's petition for declaratory ruling and other requests for clarification, the Commission issued the *Order* on review providing guidance on matters relating to the wireless-to-wireless number portability requirement established in the *First Number Portability Order*. The Commission in the *Order* rejected the argument that number portability is not required unless the requesting carrier has local numbering resources, and local interconnection with the porting out carrier in the rate center with which the ported number is associated. *Order* ¶ 21 (JA). The Commission pointed out that its rules require all wireless carriers, by the implementation deadline, to provide a long term database method for number portability in switches to permit number portability upon another carrier's request. *Id.*, *citing* 47 C.F.R. § 52.31 (JA). The Commission found that nothing in its rules exempts wireless carriers from porting numbers in cases where the requesting carrier does not have numbering resources and/or a direct interconnection in the rate center associated with the number to be ported. *Order* ¶ 21 (JA). While permitting carriers "the flexibility to negotiate porting agreements that meet their particular needs," the Commission clarified that "no carrier may unilaterally refuse to port with another carrier because that carrier will not enter into an interconnection agreement." *Id.*, 18 FCC Rcd at 20977-78, 20979 ¶¶ 21, 24 (JA - ,). In the absence of an agreement, the Commission stated that "carriers must port numbers upon request, with no conditions." *Id.*, ¶ 24 (JA).

The Commission found that limiting wireless-to-wireless porting on the basis of wireline rate centers would undermine the competitive benefits that flow from the availability of number portability. The Commission explained that it had "established number portability requirements for wireless carriers to spur increased competition, thereby creating incentives for wireless

carriers to offer lower prices and higher quality service." *Order* ¶ 22 (JA). The Commission pointed out that the practical effect of limiting wireless-to-wireless porting on the basis of wireline rate centers would be to limit the ability of some users to port their telephone numbers from one wireless service provider to another. The Commission found no justification for thus constraining the competitive alternatives available to wireless customers. Because wireless service is spectrum-based, the Commission pointed out that wireless carriers do not use or depend upon wireline rate center boundaries to provide service. *Id.*

The Commission also declined to limit wireless number portability on the basis of concerns that the transport of calls to ported numbers may involve additional transport costs for certain carriers in certain circumstances. *Order* ¶ 23 (JA). The Commission pointed out that the requirements of the wireless number portability rules do not vary depending upon how calls to the number will be rated and routed after the port occurs. The Commission also noted that it was addressing the rating and routing concerns raised by the commenters in other proceedings that are pending before the Commission. *Id.*

On November 14, 2003, the petitioners filed with the Court an emergency motion for partial stay of the *Order*, which was denied November 21, 2003. *See Central Texas Tel. Coop. v. FCC*, Order, No. 03-1405 (Nov. 21, 2003) ("Petitioners have not demonstrated the irreparable injury requisite for the issuance of a stay pending review.").

IV. Related Proceedings

On November 10, 2003, the Commission issued an order in response to CTIA's January 2003 petition, providing guidance on number portability issues relating to intermodal porting. *Telephone Number* Portability, Mem. Op. and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697 (2003) (*"Intermodal Order"*). As noted above, the *Intermodal*

Order is the subject of the petition for review that was filed with the Court in *USTA v. FCC*, No. 03-1414 (D.C. Cir.). The RTCs belatedly filed with the Court their own petition for review of the *Intermodal Order*, which was dismissed.[32] On December 4, 2004, the Court denied a motion to stay that order, as well.[33]

V. Subsequent Developments

In the wake of the Court's decision in *CTIA*, as well as its denial of the stay motion in this case, wireless-to-wireless portability took effect on a phased-in basis in November 2003 and May 2004. As of May 2004, the Commission's staff reported that approximately two million consumers have availed themselves of the opportunity to port their number when switching wireless carriers.[34]

SUMMARY OF ARGUMENT

The petitioners in this case are rural telephone companies ("RTC"). The RTCs contend that the *Order* indirectly affects them adversely because they may be required to route calls to ported wireless telephone numbers beyond their wireline rate centers and, in doing so, may be unable to obtain reimbursement from the wireless carrier receiving the ported number for the cost of delivering those calls. Because the *Order* applies solely to the porting of numbers between wireless carriers when customers change wireless service providers, the petitioners, as

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[32] *See Central Texas Tel. Coop. v. FCC*, Order, No. 04-1038 (Feb. 3, 2004) (ordering petitioners to show cause why petition for review should not be dismissed for lack of jurisdiction); *Central Texas Tel. Coop. v. FCC*, Order, No. 04-1038 (April 22, 2004) (denying motion to dismiss without prejudice "[b]ecause this court may not extend the time to file a petition for review"); *Central Texas Tel. Coop. v. FCC*, No. 04-1038 (June 3, 2004) (granting voluntary motion to dismiss).

[33] *See United States Telecom Ass'n v. FCC*, Order, No. 03-1414 (Dec. 4, 2003).

[34] *FCC Reports on Status of Local Number Portability*, Public Notice (rel. May 13, 2004) (JA).

rural LECs, do not have standing to maintain their challenge. In addition, because the obligation they describe is a product of the Commission's long-standing interconnection rules, and not of the *Order*, the RTCs' alleged injury would not be redressed by a decision of the Court in their favor. And because the RTCs have not substantiated their claim that they will incur costs beyond those that they normally incur in delivering other locally-rated traffic, they have not demonstrated that their alleged injury is concrete as opposed to hypothetical and, in any event, that it is a consequence of the order on review.

The original wireless portability requirement was broadly applicable and, by its terms, not subject to exception or qualification. Despite their claims to the contrary, it is this underlying obligation to which the RTCs object and not to the Commission's order clarifying the requirement. However, the time for direct review of the underlying rule expired years ago. Moreover, inasmuch as the RTCs contest their obligation under the Commission's interconnection rules to deliver calls to points outside of their rate centers (whether to ported or non-ported numbers), the time for direct review of those rules likewise has passed. Thus, the Court should dismiss the petition for review because the petitioners have failed to establish their standing to challenge the order and because the petition for review is time-barred.

If the Court reaches the merits, it should deny the petition. The RTCs claim that the Commission unlawfully established or created a new a rule without notice and comment, but the record shows that the Commission simply *clarified* a longstanding rule, an action as to which the APA does not require notice and comment. Although the RTCs claim that the *Order* expanded substantive wireless portability obligations for CMRS carriers and imposed newly created burdens on the RTCs, Pet. Br. at 16, this claim is wrong. The *Order* is consistent with, and

merely clarified the pre-existing duty to provide wireless number portability. As such, no additional procedure was required.

Nor have the petitioners established that the 1996 rule as clarified is not reasonable. The Commission determined that limiting wireless-to-wireless porting on the bases proposed by the rural carriers would significantly impact wireless customers' ability to port their telephone numbers to other CMRS providers and would undermine the competitive benefits that flow from the availability of number portability. *Order* ¶ 22 (JA).

The RTCs' claim that the *Order* "prohibits" LECs from requiring the porting-in carrier to "negotiate the terms of interconnection" is without merit. Pet. Br. at 43. The Commission held only that the absence of an interconnection agreement between two CMRS carriers does not provide a legitimate basis for a CMRS carrier to refuse to port to another CMRS carrier. This holding was consistent with the Act and reasonable. *Order* ¶ 21 (JA).

Finally, the Commission properly declined to limit wireless number portability on the basis of concerns that the delivery of calls to ported numbers may involve additional transport costs for certain carriers in certain circumstances. *Order* ¶ 23 (JA). The Commission deferred consideration of the rating and routing concerns raised by commenters so as to permit them to be addressed upon an appropriate administrative record in the broader context of the Commission's pending intercarrier compensation rulemaking proceeding. *Id.* The RTCs' construction of the scope of the wireless porting requirement is incompatible with the wireless porting rule, as established in 1996, and, if credited, potentially would deny some consumers the ability to change wireless service providers in rural areas. The Commission properly rejected such a narrow interpretation of its rule.

STANDARD OF REVIEW

To prevail on review, the RTCs must show that the *Order* is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Under this "highly deferential" standard, the court presumes the validity of agency action. *E.g., Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000). The court must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment. *E.g., Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

The Court's review of an agency's interpretation of its own regulations is "particularly deferential." *Davis v. Latschar*, 202 F.3d at 365.[35] The Court must "give 'controlling weight' to the Commission's interpretation of its own regulations 'unless it is plainly erroneous or inconsistent with the regulation.'"[36] Deference to the expert agency's interpretation "is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotations omitted.). Finally, an agency's determination that "its order is interpretive" and thus not subject to APA requirements for the adoption of a new legislative rule "'in itself is entitled to a significant degree of credence.'" *See, e.g., Viacom Int'l v. FCC*, 672 F.2d 1034, 1042 (2nd Cir. 1982) (quoting *British Caledonian Airways v. CAB*, 584 F.2d 982, 992 (D.C. Cir. 1978)).

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[35] *See also Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996), *quoting National Medical Enterprises v. Shalala*, 43 F.3d 691, 697 (D.C. Cir. 1995).

[36] *Biltmore Forest Broadcasting FM, Inc. v. FCC*, 321 F.3d 155, 160 (D.C. Cir.), *cert. denied*, 124 S.Ct. 463 (2003), *quoting High Plains Wireless L.P. v. FCC*, 276 F.3d 599, 607 (2002); *see also Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064, 1069 (D.C. Cir. 2004).

ARGUMENT

I. THE COURT SHOULD DISMISS THE PETITION FOR REVIEW BECAUSE THE PETITIONERS LACK STANDING AND BECAUSE THEIR CLAIMS ARE NOT PROPERLY BEFORE THE COURT.

A. The Petitioners Lack Standing Because They Have Failed to Establish Injury.

The Court must consider as a threshold matter whether the petitioners have standing. In order to establish standing, a petitioner must demonstrate that it has suffered a concrete injury that was caused by the action complained of and would be redressed by a decision in its favor. The injury must be actual or imminent and may not be speculative.[37] The petitioners have failed to make that showing, and the Court should therefore dismiss the petition.

As an initial matter, because the *Order* on review applies solely to the porting of numbers between wireless carriers when customers change wireless service providers, *see Order* ¶ 2 (JA), it is unclear how the petitioners, as rural LECs, have standing to maintain their challenge. Although petitioners Kaplan Telephone Cooperative, Inc. and Leaco Rural Telephone Cooperative, Inc. note in passing that they provide both wireline and wireless services (Pet. Br. at 2), they make no substantive argument independently of the remaining two LEC petitioners.[38] Thus, all of the petitioners contend that the *Order* indirectly affects them adversely because they may be required (in their capacity as LECs) to transport calls to ported wireless telephone numbers beyond their wireline rate centers and, in doing so, may be unable to obtain

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[37] *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc). The standing requirement also is reflected in statutory provisions limiting review of agency action to "aggrieved" persons. *See, e.g.*, 28 U.S.C. § 2344; 5 U.S.C. § 702; 47 U.S.C. § 402(a).

[38] Although the wireless industry at one time vigorously resisted implementation of wireless number portability, *see CTIA, supra*, that no longer is the case. The only petitioners in this litigation challenge the *Order* in their capacity as wireline LECs.

reimbursement from the wireless carrier receiving the ported number for the cost of transporting those calls. This can happen when the receiving wireless carrier has no local presence in the wireline carrier's rate center. Pet. Br. at 1-2. But the obligation they describe is a product of the Commission's long-standing interconnection rules (*i.e.*, the obligation to deliver traffic for termination), and not of the order on review. Moreover, these obligations are identical to those imposed on wireless and wireline carriers with respect to the exchange of calls to both ported and non-ported numbers.[39] Thus, it is unclear how the RTCs' alleged injury was caused by the *Order* or would be redressed by a decision of the Court in their favor.

This Court examined the redressability of a petitioner's alleged injury in *Fulani v. Brady*, 935 F.2d 1324, 1331 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992). In that case, the Court determined that the petitioner's claimed injury resulted not from the agency actions challenged by the petitioner, but instead was "due to other intervening causal factors." Because the redressability of petitioner's injury "depends on those factors as well," the Court held that the alleged injury did not bear "sufficient traceability to the agency's actions" and that the requested relief would not redress the alleged injury sufficiently to warrant standing. *Id.* In this case, because the redressability of the alleged injury depends on Commission regulations that are unrelated to the subject matter of the order on review, the RTCs have not established that the requested relief would redress the alleged injury. Therefore, they lack standing to challenge the *Order*.

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[39] Thus, under the Commission's pre-existing rules, a rural LEC would be required to deliver calls that originate on its network to a non-ported number of a CMRS carrier's customer where the CMRS carrier has telephone numbers assigned to the rural LEC's rate center but no local presence in the rate center or direct interconnection with the rural LEC.

Finally, the RTCs describe hypothetical situations, including wireless-to-wireless ports from Washington, D.C. to San Francisco (Pet. Br. at 21 n.53), and from Boston to Oregon (Pet. Br. at 36-37), to support their claim that the *Order* could subject a LEC (although presumably not a rural LEC given the urban locations identified in the hypotheticals) to virtually unlimited transport costs. Given that the RTCs would be required, at most, to transport calls to consumers within the MTA boundary of the requesting CMRS provider, it is not surprising that they do not claim to have been asked to transport such a call.[40] In addition, the RTCs claim that they are "adversely affected" due to the "significant cost" of transporting calls to ported numbers outside of their rate centers. Pet. Br. at 2. They do not allege, however, that wireless-to-wireless porting of the type of which they complain has in fact occurred within their service areas or that, even if it has, that they will incur costs beyond those that they normally incur in transporting other locally-rated traffic. Because the claimed injury is entirely hypothetical rather than concrete and, in any event, is not a consequence of the order on review, the petitioners have failed to establish their standing to challenge the *Order* and the Court should dismiss the petition for review.

On this basis, the Court similarly could find that the petition is not ripe for review. *See, e.g., Qwest v. FCC*, 240 F.3d 886 (10th Cir. 2001) (dismissing on ripeness grounds petition for review). In the *Qwest* case, Qwest had challenged Commission orders governing cost recovery of interim wireline number portability but had not demonstrated to the court that it had actually

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[40] Regarding traffic that is exchanged between a LEC and a CMRS provider, the Commission's reciprocal compensation requirements apply only with respect to such traffic "that, at the beginning of the call, originates and terminates within the same Major Trading Area." *See* 47 C.F.R. § 51.701(b)(2). Thus, the boundaries of the CMRS provider's MTA should represent the furthest point to which a carrier's transport obligations would extend. And, as a matter of common sense, it is nonsensical to suggest that a CMRS carrier would serve a Washington, D.C. rate center using a switch in San Francisco given that the CMRS carrier must be able to serve the original rate center from which the ported number originated.

ported any numbers. The court found no hardship to Qwest in delaying judicial review and noted that the court would benefit from further factual development in a concrete setting. The court held that, if a state in the future imposed a cost recovery scheme under the Commission's rules that Qwest thought was unlawful, it could seek a Commission declaratory ruling, and then seek judicial review of any adverse Commission decision. *Id.*, 240 F.3d at 893-95.[41]

B. The Petition For Review Is Untimely.

A petition for judicial review to challenge a final order of the Commission must be filed within 60 days after its entry. *See* 28 U.S.C. § 2344.[42] As discussed more fully below, the order on review clarified CMRS carriers' duty, as established in the *First Portability Order* in 1996, to implement wireless-to-wireless number portability. The original wireless portability requirement was broadly applicable and, by its terms, not subject to exception or qualification. Despite their claims to the contrary, it is this underlying requirement to which the RTCs object and not to the Commission's *Order* clarifying the requirement. Pet. Br. at 3 ("This controversy is a challenge not to number portability itself, but rather the manner in which the FCC has sought to implement it."). The time for direct review of the underlying rule expired years ago, however. Moreover, to the extent that the RTCs contest their obligations under the Commission's interconnection and intercarrier compensation rules to deliver locally-rated calls outside of their rate centers (whether

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[41] In section V., *infra*, we demonstrate that the RTCs' claims regarding particular rating and routing issues likewise are not ripe for review given that the Commission determined to defer consideration of those issues and to address them in a broader context in its pending intercarrier compensation rulemaking proceeding.

[42] *See also CTIA*, 330 F.3d at 508-09 (dismissing petition challenging Commission's authority to require wireless number portability because rules in question were promulgated in July 1996 and petition for review was not filed until August 2002); *PanAmSat v. FCC*, ___ F.3d __, 2004 WL 1243132 (June 8, 2004) (dismissing untimely petition for review).

to ported or non-ported numbers), the time for direct review of those rules likewise has expired. Because the petition for review is untimely, the Court should dismiss it. 28 U.S.C. § 2344 (petition for review must be filed within 60 days). *See generally ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 285-86 (1987).

There are limited exceptions that permit parties to file late challenges to rules: "1) following enforcement of the disputed regulation; and (2) following an agency's rejection of a petition to amend or rescind the disputed regulation." *CTIA,* 330 F.3d at 508. However, neither of these exceptions is applicable here. Nor can Petitioners argue that they did not have reasonable notice of the rule's content. *See Edison Electric Institute v. ICC*, 969 F.2d 1221, 1229 (D.C. Cir. 1992) (noting that courts have allowed a late appeal of an agency rule when the agency's promulgating action did not reasonably put aggrieved parties on notice of the rule's content). As noted above, the petitioners challenge the lack of an exception to a porting obligation that facially contains none.

C. The Petitioners' Claims With Respect To The *Intermodal Order* Are Not Properly Before The Court.

The RTCs repeatedly claim that the Commission erred in holding that a ported number must keep its original rate center designation following the port of that number. But the source of that holding is not the order on review in this case but is, instead, the subsequent *Intermodal Order*. *See, e.g.*, Pet. Br. at 30, 39. As such, this claim of error is not properly before the Court in this case. To the extent that the RTCs seek to challenge this or other aspects of the Commission's *Intermodal Order*,[43] they may attempt to do so only in their limited role as

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[43] For example, the RTCs claim that the *Order*, "in conjunction with the companion *Intermodal Order*," unlawfully expanded the porting obligations of CMRS carriers. Pet. Br. at 4. They further claim that the two orders impose "identical call routing obligations" and, as such, neither order "can be considered in isolation." *Id.*

intervenors in the separate litigation challenging that order.[44] They may not, however, obtain review here of their arguments against that order.[45]

II. BECAUSE THE *ORDER* IS FULLY CONSISTENT WITH THE *FIRST PORTABILITY ORDER*, NO ADDITIONAL PROCEDURE WAS REQUIRED.

A. Overview

The RTCs construe the original number portability rule to impose rather narrow, qualified obligations in the context of wireless-to-wireless portability. From this starting point, they argue that the *Order* expanded substantive portability obligations for wireless carriers and imposed newly created burdens on them. This premise permeates their brief and infuses most of their arguments. But that premise is wrong, and consequently their various arguments are wrong. The *Order* is consistent with, and merely clarified, the pre-existing duty to provide wireless number portability.

B. The *Order* Is Consistent With Commission Precedent.

In the *First Portability Order*, issued in 1996, the Commission established the requirement that numbers be portable among CMRS carriers. 11 FCC Rcd at 8433 ¶ 155; *see*

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[44] The petitioners failed to file a timely petition for review of the *Intermodial Order*. See *Central Texas Tel. Coop. v. FCC*, Order, No. 04-1038 (Feb. 3, 2004) (ordering petitioners to show cause why petition for review should not be dismissed for lack of jurisdiction); *Central Texas Tel. Coop. v. FCC*, Order, No. 04-1038 (April 22, 2004) (denying motion to dismiss without prejudice "[b]ecause this court may not extend the time to file a petition for review"); *Central Texas Tel. Coop. v. FCC*, Order, No. 04-1038 (June 3, 2004) (granting voluntary motion to dismiss).

[45] Notwithstanding their failure to properly invoke this Court's jurisdiction to review the *Intermodal Order*, petitioners refer to that order no fewer than two dozen times in their brief. *See, e.g.*, Pet. Br. at 4, 12, 13, 14, 15, 19, 21 n.53, 22, 24, 26, 30, 36, 37, 39 n.100, 40. This fact provides evidence that petitioners' real grievance lies not with the *Order* on review but instead with statements in the *Intermodal Order* clarifying the intermodal portability obligation established in 1996.

also 47 C.F.R. § 52.11 (1996) (providing that "all cellular, broadband PCS, and covered SMR providers must provide a long-term database method for number portability") (currently codified at 47 C.F.R. § 52.31). The Commission expressed no limitations on that rule. In the order on review, the Commission declared that, under the terms of the previously established rule, CMRS carriers must port numbers to other CMRS carriers whether or not the requesting carrier has telephone numbers assigned to it that are associated with the rate center of the ported number, and whether or not the two carriers have a direct interconnection. The RTCs' fundamental claim is that the *Order* amounts to a new substantive rule that represents an unexplained departure from Commission precedent. This contention is wrong because the *Order* amounts only to a clarification of the underlying requirement of wireless-to-wireless portability, which has been codified in the Commission's rules since 1996.

In particular, the RTCs contend that the *Order* "effected a substantive change in law by (1) requiring location portability and by (2) shifting and expanding the transport and interconnection obligations of rural carriers" without issuing a new notice of proposed rulemaking. Pet. Br. at 16. We address each of those arguments below.

(1) The Commission Did Not Require Location Portability.

The RTCs argue that the *Order* newly requires location portability without providing an explanation for this alleged departure from precedent insofar as the Commission explicitly declined to require location portability in the *First Portability Order*. Pet. Br. at 19-22. The Commission did not require location portability in its *Order*, and the RTCs appear to confuse location portability with the mobility that is the very nature of wireless communications services.

"Service provider portability" is defined as the ability of end users to retain their existing telephone numbers "at the same location ...when switching from one telecommunications carrier to another." 47 U.S.C. § 153(30); 47 C.F.R. §§ 52.21(l), (q). That is all that the Commission required of CMRS carriers in its *Order* clarifying the 1996 rule.[46]

"Location portability," by contrast, is defined as the ability of end users to retain their existing telephone numbers "when moving from one physical location to another." 47 C.F.R. § 52.21(j). In other words, with location portability, the port occurs at the time the customer moves from one geographic location to another.[47] Location portability does not require a port from one carrier to another. At issue here is the port of a number from one carrier to another when the customer remains "at the same location" where he received service from his former carrier. This is service provider portability, not location portability.

In support of their peculiar construction of location portability, the RTCs assert that "the relevant location is not the physical location of the customer but the location of the serving switch or the POI." Pet. Br. at 20. In essence, they argue that location portability occurs when the customer's new carrier has a switch that is in a different location from the porting carrier's switch. Pet. Br. at 21-22. But this contention is incompatible with the plain language of both the statutory and rule definitions of number portability, which make clear that the "same location" requirement applies to the location of the customer, not of a switch or a POI. If a customer's

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[46] Indeed, in the *First Portability Order*, the Commission determined that wireless-to-wireless portability constituted service provider portability, *not* location portability. 11 FCC Rcd at 8447 ¶ 181.

[47] The Commission has described "location portability" as the ability of "customers to port their numbers when moving from one geographic location to another." *Forbearance From CMRS Number Portability Obligations*, 14 FCC Rcd at 3097.

desired new carrier provides service "at the same location" in which the customer currently receives service, then porting would be permitted under these circumstances.

It is clear from the *First Portability Order* that location portability refers to disassociating a telephone number from the rate center at which it originated, which would occur if a wireline subscriber moved his residence and wished to take his wireline number with him. *See, e.g., First Portability Order*, 11 FCC Rcd at 8443 ¶ 174 (explaining that, under a regime that requires service provider portability, but not location portability, "subscribers must change their telephone numbers when they move outside the area served by their current central office"). A wireless telephone number, by contrast, remains assigned to the same rate center from which it originated (and the wireless carrier must provide service within that rate center) notwithstanding the mobility of the wireless service customer. *See Intermodal Order* ¶ 28. Under the established definitions, if the number does not leave the rate center, it has not been subject to location porting. It makes no difference that the end user is mobile and is capable of moving about and taking the wireless handset with him – that is the very nature of wireless phones.[48]

In the *Order*, the Commission refused to construe the number portability requirement in the manner suggested here by the RTCs. Rather, the Commission clarified that a CMRS carrier may not refuse to port to another CMRS carrier on the basis of the location of the requesting carrier's switch. *Order* ¶ 2 (JA). This clarification was both sensible and consistent with Commission precedent in this area. As a practical matter, it would make no sense to condition wireless number portability on the basis of the physical location of the serving switch. That is

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[48] As noted above, the Commission consistently has found switching among wireless service providers to involve only service provider portability, notwithstanding the mobile nature of wireless service. *First Portability Order*, 11 FCC Rcd at 8443 ¶ 172.

because switch location has limited relevance to the geographic area in which wireless services are provided since CMRS carriers are capable of serving large geographic areas with a single switch. Moreover, it is common sense that a customer would not seek to switch his number to a CMRS carrier that is not providing service at the location where the customer currently receives service from another provider. By refusing to confine the wireless number portability requirement according to the particular location of the requesting carrier's switch, the Commission acted consistently with Commission precedent, which similarly imposed no geographic restriction on wireless porting. Both then and now, the Commission has recognized that imposing such conditions would deprive consumers of the ability to port their numbers and thereby jeopardize the pro-competitive purposes of the number portability requirement.

(2) The *Order* Did Not Expand Porting Obligations for Wireless Carriers or Alter Long-Standing Interconnection and Intercarrier Compensation Rules.

In response to CTIA's May 2003 Petition, the Commission confirmed CMRS carriers' obligation to port telephone numbers upon request by another CMRS carrier "with no conditions." *Order* ¶ 2 (JA). This obligation was clearly within the scope of the pre-existing wireless portability requirement, which similarly imposed no limitations on wireless porting.[49]

Nevertheless, the RTCs mischaracterize the *Order* as adopting fundamental changes to the wireless porting rules. As we demonstrate below, these arguments are contrary to the Act and the Commission's rules, and provide no legitimate basis on which to challenge the *Order*.

As an initial matter, the RTCs contend that the *Order* newly requires CMRS providers to port numbers to other CMRS providers "without geographic limitation on the location of the

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[49] *First Portability Order*, 11 FCC Rcd at 8355 ¶ 3; 47 C.F.R. § 52.31.

porting-in carrier's Mobile Switching Center ("MSC") or Point of Interconnection ("POI")." Pet. Br. at 3. In doing so, according to the RTCs, the *Order* expanded the porting obligations of CMRS providers "beyond the limitations previously adopted" in the *First Portability Order*. Pet. Br. at 28. The RTCs reason by implication that, because the Commission limited wireline-to-wireline portability previously to the boundaries of wireline rate centers, "it would only be logical to conclude" that the wireless porting requirement would be so limited. Pet. Br. at 26.

The petitioners' suggestion that the *Order* must have amended the earlier rule because it is different from the rule governing wireline porting ignores the fact that wireless porting and wireline porting present entirely different technical considerations. In 1997, the Commission had adopted some NANC recommendations limiting wireline porting in light of technical constraints that are specific to the architecture of wireline networks.[50] In the *Order*, the Commission saw "no reason to impose such limitations" on wireless porting because "wireless carriers do not utilize or depend on the wireline rate center structure to provide service." *Order* ¶ 22 (JA).

In any event, as a practical matter the RTCs' claim that there is "no geographic limitation" on wireless porting is wrong. Pet. Br. at 3, 25. Regarding traffic that is exchanged between a LEC and a CMRS provider, the Commission's reciprocal compensation requirements apply only with respect to such traffic "that, at the beginning of the call, originates and terminates within the same Major Trading Area." *See* 47 C.F.R. § 51.701(b)(2). Thus, the boundaries of the CMRS provider's MTA should represent the furthest point to which a carrier's transport obligations would extend. And, as a practical matter, it makes no sense to suggest that a CMRS carrier would serve a Washington, D.C. rate center using a switch in San Francisco

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[50] *Telephone Number Portability*, 12 FCC Rcd 12281, 12313-28 (1997).

given that the CMRS carrier must be able to serve the original rate center from which the ported number originated.

The RTCs next claim that, under the *Order*, CMRS carriers are "*no longer required* to have a presence within Petitioners' telephone service areas or interconnection arrangements pursuant to which such calls may be properly routed." Pet. Br. at 1-2 (emphasis added). Contrary to this statement, CMRS carriers have never been required to have a "presence" (or POI) within every wireline local service area. Under the Act and the Commission's orders, CMRS carriers have a right to interconnect *indirectly* with other carriers, *see* 47 U.S.C. § 251(a)(1); *First Portability Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121.

Nor is there any basis to the RTCs' claim that CMRS carriers in the past have been required to enter into interconnection agreements solely for the purpose of porting numbers. Section 252 of the Act sets forth the process by which a competing provider may request and obtain interconnection from an incumbent LEC according to agreements fashioned through negotiations between the two carriers. 47 U.S.C. § 252. Such agreements are voluntary and the proposition that the Commission previously has required carriers in such circumstances to enter into interconnection agreements is simply wrong. In fact, most carriers that interconnect indirectly today do so without an interconnection agreement (often because the traffic flows between two carriers are not large enough to justify the cost of negotiating and implementing a contract).

The RTCs also argue that, due to the "significant cost" of transporting its customers' calls to ported numbers and the "inability to require compensation from the wireless carriers who benefit from such transport" the RTCs are "adversely affected" by the *Order*. Pet. Br. at 2; *see also* Pet. Br. at 28 (the Order "dramatically increased the cost and burden on RTCs to deliver

traffic"). Contrary to these assertions, nothing in the *Order* altered rural LECs' pre-existing obligations to deliver calls to wireless customers, or changed pre-existing intercarrier compensation requirements.[51]

Finally, the RTCs claim that the *Order* has "eliminated the Petitioners' (and state commissions') ability to determine Petitioners' own local calling areas and to establish the rates that they charge end users." Pet. Br. at 24; see also *id.*, at 39. Neither statement is accurate. State utility commissions remain responsible for determining LECs' local calling areas and the rates charged for local wireline service. In this regard, the *Order* states only that the wireless portability requirements "do not vary depending on how calls to the number will be rated and routed after the port occurs." *Order* ¶ 23 (JA). This ruling, which is critical if consumers are to realize the benefits of number portability, does not impinge upon local rate-making authority in any way.[52]

C. Because The *Order* Only Clarified A Pre-Existing Obligation, No Additional Procedure Was Required.

(1) The Administrative Procedure Act ("APA").

The APA requires an agency to publish in the Federal Register a "[g]eneral notice of proposed rulemaking" when the agency is proposing to make new legislative-type rules. 5 U.S.C. § 553(b). But the Act exempts "interpretive rules" from the scope of the notice requirement. 5 U.S.C. § 553(b)(3)(A). Thus, an agency can "declare its understanding of what a [regulation] requires" without providing notice and comment. *Fertilizer Institute v. EPA*, 935

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[51] *See, e.g.*, 47 C.F.R. § 51.703(b) (a LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network).

[52] Despite the RTCs' allegation that the *Order* tramples on state authority, no state commission challenges the *Order* on this (or any other) basis. Indeed, the National Association of Regulatory Utility Commissioners ("NARUC") has intervened in support of the Commission.

F.2d 1303, 1308 (D.C. Cir. 1991); *see also* 5 U.S.C. § 554(e) (agency may issue declaratory ruling to remove uncertainty); 47 C.F.R. § 1.2 (Commission may issue declaratory rulings). A rule is interpretive, and thus not subject to the notice requirement, if it "confirm[s] a regulatory requirement, or maintain[s] a consistent agency policy." *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992). The legislative versus interpretive status of an agency's rule turns on "the prior existence or non-existence of legal duties and rights." *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993).

Consistent with their premise that the *Order* adopted a substantively new rule, the RTCs claim that it was, therefore, procedurally improper insofar as it was adopted without following the notice and comment requirements governing informal rulemaking under the APA and in alleged violation of the Regulatory Flexibility Act ("RFA"). Pet. Br. at 16-28, 45-48. These arguments are without merit.

As previously noted, the Commission's number portability rules in 1996 imposed a wireless-to-wireless porting obligation on all CMRS providers without limitation. The Commission did not specify any circumstances under which a CMRS carrier would *not* have to comply with the wireless portability requirement. Although the Commission referred several matters to the NANC pertaining to wireless and intermodal portability, the NANC was unable to reach a consensus. *See Intermodal Order* ¶ 11. Nevertheless, as the implementation deadline approached, certain rural CMRS carriers contended that they had no duty to port numbers to another CMRS carrier unless the carrier requesting the port has a local point of presence and numbering resources within the rate center as well as a direct interconnection with the porting out CMRS carrier within that rate center. *Ex Parte* Presentation of the Rural Wireless Working

Group Regarding Rural Wireless Number Portability Guidelines, Section 1.3 (filed Aug. 25, 2003) (JA). In response, CTIA urged the Commission to clarify these issues in the context of the wireless-to-wireless portability requirement. *Ex Parte* Letter from Diane Cornell, CTIA, to Marlene H. Dortch, Secretary, FCC (filed Aug. 26, 2003) (JA). In essence, these rural wireless carriers read the Commission's (unqualified) rule narrowly, and unilaterally limited the scope of portability that they would provide to requesting CMRS carriers. It was this unilateral action by rural wireless carriers – and the resulting controversy it ignited among industry participants – that made clarification of the pre-existing rule necessary and appropriate.

In the *Order*, the Commission addressed the issues raised in CTIA's petition and in the *ex parte* letters from CTIA and the Rural Wireless Working Group. In rejecting the limitations on wireless porting proposed by the rural wireless carriers, the Commission pointed out that its rules require all CMRS carriers, by the implementation deadline, to provide wireless number portability. *Order* ¶ 21 (JA). The Commission found that nothing in its rules exempts CMRS carriers from porting numbers in cases where the requesting carrier does not have numbering resources and/or a direct interconnection in the rate center associated with the number to be ported. *Id.* Given the unqualified nature of the 1996 rule and the policy of increasing competition underlying the portability requirement, the *Order*'s ruling that CMRS carriers must port numbers among themselves without qualification only clarified and did not amend the original rule.

The RTCs' reliance on *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003), is misplaced. Pet. Br. at 18, 27. In that case, the Court ruled that the Commission had fundamentally changed a rule without notice, pursuant to a petition for clarification that requested action different from the action the agency subsequently took. Here, CTIA's petition and letter sought exactly the

clarification the Commission then rendered – a situation that the Court did not have occasion to rule upon in *Sprint*. Because the *Order* does not "work substantive changes in prior regulations," does not "repudiate" the existing rule, and is not "irreconcilable" with the existing rule, it did not amount to a new rule. *Id.*, 315 F.3d at 374. Instead, the *Order* resolved an industry controversy by confirming the breadth of the pre-existing duty that the Commission imposed on CMRS carriers years ago; it "illustrate[s] [the Commission's] original intent," which is precisely what the Court has held a clarification order may do. *Sprint*, 315 F.3d at 374; *see Intermodal Order* ¶ 26.[53]

Although additional notice and comment rulemaking procedures were not required in connection with the Commission's *Order*, the Commission nonetheless issued public notices (both of which were published in the Federal Register) seeking comment on the January and May 2003 petitions for declaratory ruling filed by CTIA. In response, the Commission compiled a record consisting of more than 100 comments, reply comments, and *ex parte* letters. Notably, the comments included those of rural LEC organizations whose arguments were nearly identical to those pressed here by the RTCs.[54] Thus, unlike in *Sprint*, the very matters at issue here were themselves subject to multiple rounds of comment and no party was deprived of any opportunity to make its views known to the agency on the precise regulatory issue at hand.

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[53] By contrast, had the Commission wished to adopt the conditions and limitations offered here by the RTCs, under the APA, it likely would have been required to commence a new rulemaking.

[54] For example, comments and/or reply comments were filed by GVNW Consulting; Independent Alliance; Missouri Independent Telephone Group; National Telecommunications Cooperative Association; Organization for the Promotion and Advancement of Small Telecommunications Companies; Rural Cellular Association; Rural Iowa Independent Telephone Association; Rural Telecommunications Group; South Dakota Telecommunications Association, and USTA.

(2) The Regulatory Flexibility Act.

In the *Order*, the Commission determined that it was not required to prepare a Regulatory Flexibility Analysis of the possible economic impact of the *Order* on small entities. *Order* ¶ 42 (JA). The RTCs counter that the Commission erred because the Regulatory Flexibility Act ("RFA") requires the agency to consider, according to the RTCs, the impact of its *Order* on the small businesses operated by the petitioners. Pet. Br. at 45-48. This argument is flawed because, as discussed above, the RTCs mistakenly assume that the *Order* imposes new portability and interconnection/intercarrier compensation obligations on CMRS carriers and rural LECs that did not exist previously. The RFA applies when the Commission engages in rulemaking. See 5 U.S.C. §§ 603, 604. Because (as demonstrated above) the agency did not engage in rulemaking, the RFA did not apply.

III. THE WIRELESS-TO-WIRELESS PORTING REQUIREMENT AS CLARIFIED IS REASONABLE.

In the *Order*, the Commission rejected proposed limitations on the wireless porting requirement, including those that would require wireless portability only to the extent that a requesting CMRS carrier has local numbering resources, and local interconnection with the porting out carrier in the rate center with which the ported number is associated. *Order* ¶ 21 (JA). The Commission pointed out that the wireless porting obligation in section 52.31 of its rules requires all wireless carriers, by the implementation deadline, to provide a long term database method for number portability in switches to permit number portability upon another carrier's request. *Id.*, *citing* 47 C.F.R. § 52.31. The Commission found that nothing in its rules exempts wireless carriers from porting numbers in cases where the requesting carrier does not have numbering resources and/or a direct interconnection in the rate center associated with the number to be ported. *Order* ¶ 21 (JA).

The Commission also found that limiting wireless-to-wireless porting on the basis of wireline rate centers would undermine the competitive benefits that flow from the availability of number portability. The Commission explained that the practical effect of limiting wireless porting on the basis of wireline rate centers would be to limit the ability of end users to port their telephone numbers from one wireless service provider to another. The Commission found no justification for thus constraining the competitive alternatives available to wireless customers. *Id.*

These clarifications were reasonable, consistent with Commission precedent, and faithful to the underlying pro-competitive purposes of the number portability statute that this Court has recognized. *See CTIA,* 330 F.3d 502.[55] The Commission properly found that limiting wireless-to-wireless porting on the bases proposed by the rural LECs would confine drastically the competitive benefits to consumers of wireless number portability. *See Order,* ¶ 22 (JA). Because CMRS providers have a direct interconnection or facilities only in approximately ten percent of wireline carriers' rate centers, the practical effect of limiting wireless portability solely to those rate centers in which CMRS carriers have a local presence would prevent wireless consumers living in approximately ninety percent of the wireline industry's rate centers from being able to change their wireless service providers.[56] Thus, if the Court were to grant the requested relief, it would frustrate the expectations of many wireless service customers who want to keep their numbers when they change to another wireless carrier.

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[55] Notably, the RTCs do not cite *CTIA* in their brief.

[56] CTIA January 2003 petition, at 18 (JA).

In addition, grant of the petition would generate massive customer confusion, since consumers who have not yet ported, would have no reliable method of knowing whether their wireless number could be ported. Wireless consumers who have ported their numbers would have no way of knowing whether and, if so, on what terms others in their local community of interest could call their number. And it would keep in place large parts of what this Court described as "a barrier to switching carriers." *CTIA*, 330 F.3d at 513.

IV. THE *ORDER* IS CONSISTENT WITH SECTIONS 251 AND 252 OF THE ACT.

While permitting carriers "the flexibility to negotiate porting agreements that meet their particular needs," the Commission clarified that "no carrier may unilaterally refuse to port with another carrier because that carrier will not enter into an interconnection agreement." *Order* ¶¶ 21, 24 (JA ,). In the absence of an agreement, the Commission stated that "carriers must port numbers upon request, with no conditions." *Id.* ¶ 24 (JA).

The RTCs assert that the "structure of the Act clearly requires that number portability be imposed and accomplished within the context of carrier interconnection agreements." Pet. Br. at 41. The RTCs further assert that the *Order* "prohibits" LECs from requiring the porting-in carrier to "negotiate the terms of interconnection." Pet. Br. at 43. These arguments are flawed on several levels. First, the *Order* applies only to wireless porting; LEC porting obligations are addressed in the *Intermodal Order*. Second, the *Order* does not "prohibit" any carrier (CMRS or LEC) from seeking commencement of interconnection negotiations, as the Commission made clear. *See Order* ¶ 21 (JA). The Commission ruled only that the absence of an interconnection agreement does not provide a legitimate basis for a CMRS carrier to refuse to port to another CMRS carrier.

Third, the procedures set forth in section 252 governing the negotiation and arbitration of interconnection agreements apply by their terms exclusively to incumbent LECs. 47 U.S.C. § 252. It is, therefore, unclear how section 252 is relevant here insofar as the order on review addressed the question of appropriate interconnection arrangements when two CMRS carriers port numbers.

Further, sections 251 and 252 of the Act are not the source of authority upon which the Commission has relied in requiring wireless number portability. Rather, CMRS carriers' porting obligations are imposed by the Commission under section 332 and other independent authority under the Act.

Finally, pointing to section 251(c)(2)(b) of the Act, which requires incumbent LECs to permit interconnection "within" their network, the RTCs claim that the *Order* "effectively negates" this provision by not requiring a CMRS carrier to have a POI that is "geographically proximate to the wireline carrier's network facilities." Pet. Br. at 44. This argument, however, ignores the fact that, under the Act, wireless carriers can choose to interconnect indirectly – that is, outside of their respective networks. *First Portability Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121 (citing 47 U.S.C. § 251(a)(1)).[57]

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[57] In the *First LNP Reconsideration Order*, 12 FCC Rcd at 7305 n.399, the Commission explained how a small rural LEC might interconnect indirectly with a competing carrier for purposes of providing number portability:

> For example, a smaller rural carrier and a competing carrier might interconnect indirectly by both establishing direct connections with a third carrier and routing calls to each other through that third carrier. The smaller rural carrier could then provide portability by performing its own database queries and then routing the call to the competing carrier through that third carrier.

V. THE PETITIONERS' CLAIMS CONCERNING RATING AND ROUTING ISSUES ARE NOT RIPE FOR REVIEW.

In the Order, the Commission also declined to limit wireless number portability on the basis of commenters' concerns that the transport of calls to ported numbers may result in additional transport costs. *Order* ¶ 23 (JA). The Commission pointed out that the requirements of the wireless portability rule "do not vary depending on how calls to the number will be rated and routed after the port occurs." *Id.* The Commission noted, however, that it was addressing the same rating and routing concerns raised by the commenters "in the context of non-ported numbers" in other proceedings that are pending before the Commission. *Id.* Thus, "without prejudging the outcome of any other proceeding," the Commission declined to address particular rating and routing concerns as they relate to wireless portability. *Id.*

While conceding that the Commission need not dispose of every issue and concern relating to wireless portability prior to its implementation (Pet. Br. at 31,33), the RTCs nevertheless contend that the *Order* is arbitrary and capricious because the Commission did not address all of the rating and routing issues raised by the RTCs. Pet. Br. at 29-38. The RTCs'conclusory assertion fails to satisfy their burden to demonstrate that the Commission abused its discretion when it deferred consideration of these issues. The Commission "has broad discretion to control the disposition of its caseload, and to defer consideration of particular issues to future proceedings" when doing so would be "conducive to the efficient dispatch of business and the ends of justice."[58] In particular, the Commission deferred consideration of particular rating and routing issues so as to permit them to be addressed in response to the Sprint petition,

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[58] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (internal citations and quotations omitted) ("Although the Commission failed to resolve [a] question pressed by the CLECs in this Order, the Commission need not address all problems in one fell swoop.").

upon an appropriate administrative record, in the broader context of the Commission's pending intercarrier compensation rulemaking.

In addition, because the RTCs' rating and routing concerns have yet to be addressed by the Commission, under the ripeness doctrine, judicial review of these claims should await final Commission action.[59]

Although the RTCs claim that they are unable to route calls to wireless customers with ported numbers, as noted above, they appear to disregard their duty under the 1996 Act "to interconnect their facilities directly or indirectly with the facilities of other carriers." 47 U.S.C. § 251(a)(1); *see also First Portability Reconsideration Order*, 12 FCC Rcd at 7305 ¶ 121. As the Commission determined in its *Intermodal Order*, if a rural LEC is capable of routing a call that its customer places to a wireless customer with a non-ported number, then the rural LEC also is capable of routing a call to a customer of the same wireless carrier who has a ported number. *Intermodal Order*, ¶ 28 (the routing of calls to ported numbers "should be no different than if the wireless carrier had assigned the customer a number rated to that rate center"). In its recent order denying a petition for administrative stay of the *Intermodal Order*, the Commission indicated that "more explanation" from the rural LECs was needed to assess their claims that the rating and routing of ported wireless numbers raises different issues than the rating and routing of non-

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[59] *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 735 (1998). The ripeness doctrine is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *See, e.g., Nat'l Park Hospitality Ass'n v. Dept. of the Interior*, 123 S. Ct. 2026, 2030 (2003), (quoting *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1963)).

ported wireless numbers. *See Telephone Number Portability*, Order, FCC 03-298, 2003 WL 22739558 ¶ 9 (2003). In that order, the commission stated that:

> [P]etitioners assert that there is no established method for routing and billing calls ported outside of the local exchange. We note that today, in the [case of non-ported numbers], calls are routed outside of local exchanges and routed and billed correctly. We thus find that, without more explanation, the scope of the alleged problem and its potential effect on consumers is unclear.

Id. Accordingly, the RTCs' arguments concerning the rating and routing of calls to ported numbers should not be considered ripe until their factual components have been ascertained by some concrete action that adversely affects the petitioners.[60]

[60] To the extent that the RTCs complain of an injury that is unrelated to the wireless number portability obligation clarified in the *Order* – as appears to be the case, since petitiners assert that they are aggrieved by an obligation to pay the additional transport costs associated with the delivery of calls outside of the local exchange, regardless of whether the call is to a number that has or has not been ported – the TRCs' complaint should be dismissed because it is not redressable in this case. See authorities cited *supra* in section I.A of the Argument. In any event, given the uncertainty attendant to petitioners' claims on the record before the Court in this case and the pending proceedings at the agency that should enable the development of an adequate record for review, this Court should dismiss petitioners' rating and routing claims as not ripe. *See, e.g., Lujan v. National Wildlife Fed.*, 497 U.S. at 891.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed. If not dismissed, it should be denied.

Respectfully submitted,

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June 24, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTRAL TEXAS Telephone Cooperative, Inc., et al.,	)	
PETITIONERS,	)	
V.	)	No. 03-1405
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	
RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13138 words.

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STATUTES AND REGULATIONS

Contents:

47 U.S.C. § 153 (30)
47 U.S.C. § 251(a) & (b)
47 U.S.C. § 252

47 C.F.R. § 1.2
47 C.F.R. § 51.701
47 C.F.R. § 52.21(j), (k), (l), & (q)
47 C.F.R. § 52.23
47 C.F.R. § 52.25
47 C.F.R. § 52.31

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Wire or Radio Communication
General Provisions

§ 153. Definitions

For the purposes of this chapter, unless the context otherwise requires--

(30) Number portability

The term "number portability" means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Common Carriers
Development of Competitive Markets

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

United States Code Annotated
Title 47. Telegraphs, Telephones, and Radiotelegraphs
Chapter 5. Wire or Radio Communication
Common Carriers
Development of Competitive Markets

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have

jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) "Incumbent local exchange carrier" defined

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A--GENERAL
PART 1--PRACTICE AND PROCEDURE
SUBPART A--GENERAL RULES OF PRACTICE AND PROCEDURE
GENERAL

Current through September 24, 2003; 68 FR 55280

§ 1.2 Declaratory rulings.

The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B--COMMON CARRIER SERVICES
PART 51--INTERCONNECTION
SUBPART H--RECIPROCAL COMPENSATION FOR TRANSPORT AND TERMINATION OF TELECOMMUNICATIONS TRAFFIC

Current through June 16, 2004; 69 FR 33774

§ 51.701 Scope of transport and termination pricing rules.

(a) The provisions of this subpart apply to reciprocal compensation for transport and termination of telecommunications traffic between LECs and other telecommunications carriers.

(b) Telecommunications traffic. For purposes of this subpart, telecommunications traffic means:

(1) Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see FCC 01-131, paragraphs 34, 36, 39, 42-43); or

(2) Telecommunications traffic exchanged between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area, as defined in § 24.202(a) of this chapter.

(c) Transport. For purposes of this subpart, transport is the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC.

(d) Termination. For purposes of this subpart, termination is the switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises.

(e) Reciprocal compensation. For purposes of this subpart, a reciprocal compensation arrangement between two carriers is one in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier.

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B--COMMON CARRIER SERVICES
PART 52--NUMBERING
SUBPART C--NUMBER PORTABILITY
Current through June 16, 2004; 69 FR 33774

§ 52.21 Definitions.

As used in this subpart:

(j) The term location portability means the ability of users of telecommunications services to retain existing telecommunications numbers without impairment of quality, reliability, or convenience when moving from one physical location to another.

(k) The term long-term database method means a database method that complies with the performance criteria set forth in § 52.3(a).

(l) The term number portability means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

(q) The term service provider portability means the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
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PART 52--NUMBERING
SUBPART C--NUMBER PORTABILITY
Current through June 16, 2004; 69 FR 33774

§ 52.23 Deployment of long-term database methods for number portability by LECs.

(a) Subject to paragraphs (b) and (c) of this section, all local exchange carriers (LECs) must provide number portability in compliance with the following performance criteria:

(1) Supports network services, features, and capabilities existing at the time number portability is implemented, including but not limited to emergency services, CLASS features, operator and directory assistance services, and intercept capabilities;

(2) Efficiently uses numbering resources;

(3) Does not require end users to change their telecommunications numbers;

(4) Does not result in unreasonable degradation in service quality or network reliability when implemented;

(5) Does not result in any degradation in service quality or network reliability when customers switch carriers;

(6) Does not result in a carrier having a proprietary interest;

(7) Is able to migrate to location and service portability; and

(8) Has no significant adverse impact outside the areas where number portability is deployed.

(b)(1) All LECs must provide a long-term database method for number portability in the 100 largest Metropolitan Statistical Areas (MSAs), as defined in § 52.21(k), in switches for which another carrier has made a specific request for the provision of number portability, subject to paragraph (b)(2) of this section.

(2) Any procedure to identify and request switches for deployment of number portability must comply with the following criteria:

(i) Any wireline carrier that is certified (or has applied for certification) to provide local exchange service in a state, or any licensed CMRS provider, must be permitted to make a request for deployment of number portability in that state;

(ii) Carriers must submit requests for deployment at least nine months before the deployment deadline for the MSA;

(iii) A LEC must make available upon request to any interested parties a list of its switches for which number portability has been requested and a list of its switches for which number portability has not been requested; and

(iv) After the deadline for deployment of number portability in an MSA in the 100 largest MSAs, according to the deployment schedule set forth in the Appendix to this part, a LEC must deploy number portability in that MSA in additional switches upon request within the following time frames:

(A) For remote switches supported by a host switch equipped for portability ("Equipped Remote Switches"), within 30 days;

(B) For switches that require software but not hardware changes to provide portability ("Hardware Capable Switches"), within 60 days;

(C) For switches that require hardware changes to provide portability ("Capable Switches Requiring Hardware"), within 180 days; and

(D) For switches not capable of portability that must be replaced ("Non- Capable Switches"), within 180 days.

(c) Beginning January 1, 1999, all LECs must make a long-term database method for number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.

(d) The Chief, Common Carrier Bureau, may waive or stay any of the dates in the implementation schedule, as the Chief determines is necessary to ensure the efficient development of number portability, for a period not to exceed 9 months (i.e., no later than September 30, 1999).

(e) In the event a LEC is unable to meet the Commission's deadlines for implementing a long-term database method for number portability, it may file with the Commission at least 60 days in advance of the deadline a petition to extend the time by which implementation in its network will be completed. A LEC seeking such relief must demonstrate through substantial, credible evidence the basis for its contention that it is unable to comply with the deployment schedule set forth in the appendix to this part 52. Such requests must set forth:

(1) The facts that demonstrate why the carrier is unable to meet the Commission's deployment schedule;

(2) A detailed explanation of the activities that the carrier has undertaken to meet the implementation schedule prior to requesting an extension of time;

(3) An identification of the particular switches for which the extension is requested;

(4) The time within which the carrier will complete deployment in the affected switches; and

(5) A proposed schedule with milestones for meeting the deployment date.

(f) The Chief, Wireline Competition Bureau, shall monitor the progress of local exchange carriers implementing number portability, and may direct such carriers to take any actions necessary to ensure compliance with the deployment schedule set forth in the appendix to this part 52.

(g) Carriers that are members of the Illinois Local Number Portability Workshop must conduct a field test of any technically feasible long-term database method for number portability in the Chicago, Illinois, area. The carriers participating in the test must jointly file with the Common Carrier Bureau a report of their findings within 30 days following completion of the test. The Chief, Common Carrier Bureau, shall monitor developments during the field test, and may adjust the field test completion deadline as necessary.

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
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SUBCHAPTER B--COMMON CARRIER SERVICES
PART 52--NUMBERING
SUBPART C--NUMBER PORTABILITY
Current through June 16, 2004; 69 FR 33774

§ 52.26 NANC Recommendations on Local Number Portability Administration.

(a) Local number portability administration shall comply with the recommendations of the North American Numbering Council (NANC) as set forth in the report to the Commission prepared by the NANC's Local Number Portability Administration Selection Working Group, dated April 25, 1997 (Working Group Report) and its appendices, which are incorporated by reference pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. Except that: Section 7.10 of Appendix D of the Working Group Report is not incorporated herein.

(b) In addition to the requirements set forth in the Working Group Report, the following requirements are established:

(1) If a telecommunications carrier transmits a telephone call to a local exchange carrier's switch that contains any ported numbers, and the telecommunications carrier has failed to perform a database query to determine if the telephone number has been ported to another local exchange carrier, the local exchange carrier may block the unqueried call only if performing the database query is likely to impair network reliability;

(2) The regional limited liability companies (LLCs), already established by telecommunications carriers in each of the original Bell Operating Company regions, shall manage and oversee the local number portability administrators, subject to review by the NANC, but only on an interim basis, until the conclusion of a rulemaking to examine the issue of local number portability administrator oversight and management and the question of whether the LLCs should continue to act in this capacity; and

(3) The NANC shall provide ongoing oversight of number portability administration, including oversight of the regional LLCs, subject to Commission review. Parties shall attempt to resolve issues regarding number portability deployment among themselves and, if necessary, under the auspices of the NANC. If any party objects to the NANC's proposed resolution, the NANC shall issue a written report summarizing the positions of the parties and the basis for the recommendation adopted by the NANC. The NANC Chair shall submit its proposed resolution of the disputed issue to the Chief of the Wireline Competition Bureau as a recommendation for Commission review. The Chief of the Wireline Competition Bureau will place the NANC's proposed resolution on public notice. Recommendations adopted by the NANC and forwarded to the Bureau may be implemented by the parties pending review

of the recommendation. Within 90 days of the conclusion of the comment cycle, the Chief of the Wireline Competition Bureau may issue an order adopting, modifying, or rejecting the recommendation. If the Chief does not act within 90 days of the conclusion of the comment cycle, the recommendation will be deemed to have been adopted by the Bureau.

(c) The Director of the Federal Register approves this incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies of the Working Group Report and its appendices can be obtained from the Commission's contract copier, International Transcription Service, Inc., 1231 20th St., N.W., Washington, D.C. 20036, and can be inspected during normal business hours at the following locations: Reference Information Center, 445 12th Street, SW., Room CY-A257, Washington, D.C. 20554 or at the Office of the Federal Register, 800 North Capitol Street, N.W., Suite 700, Washington, D.C. The Working Group Report and its appendices are also available on the Internet at http://www.fcc.gov/ccb/Nanc/.

CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B--COMMON CARRIER SERVICES
PART 52--NUMBERING
SUBPART C--NUMBER PORTABILITY
Current through June 16, 2004; 69 FR 33774

§ 52.31 Deployment of long-term database methods for number portability by CMRS providers.

(a) By November 24, 2003, all covered CMRS providers must provide a long-term database method for number portability, including the ability to support roaming, in the 100 largest MSAs, as defined in § 52.21(k), in compliance with the performance criteria set forth in section 52.23(a) of this part, in switches for which another carrier has made a specific request for the provision of number portability, subject to paragraph (a)(1) of this section. A licensee may have more than one CMRS system, but only the systems that satisfy the definition of covered CMRS are required to provide number portability.

(1) Any procedure to identify and request switches for development of number portability must comply with the following criteria:

(i) Any wireline carrier that is certified (or has applied for certification) to provide local exchange service in a state, or any licensed CMRS provider, must be permitted to make a request for deployment of number portability in that state;

(ii) Carries requesting deployment in the 100 largest MSAs by November 24, 2003 must submit requests by February 24, 2003.

(iii) A covered CMRS provider must make available upon request to any interested parties a list of its switches for which number portability has been requested and a list of its switches for which number portability has not been requested;

(iv) After November 24, 2003, a covered CMRS provider must deploy number portability in additional switches serving the 100 largest MSAs upon request within the following time frames:

(A) For remote switches supported by a host switch equipped for portability ("Equipped Remote Switches"), within 30 days;

(B) For switches that require software but not hardware changes to provide portability ("Hardware Capable Switches"), within 60 days;

(C) For switches that require hardware changes to provide portability ("Capable Switches Requiring Hardware"), within 180 days; and

(D) For switches not capable of portability that must be replaced ("Non- Capable Switches"), within 180 days.

(v) Carriers must be able to request deployment in any wireless switch that serves any area within the MSA, even if the wireless switch is outside that MSA, or outside any of the MSAs identified in the Appendix to this part.

(2) By November 24, 2002, all covered CMRS providers must be able to support roaming nationwide.

(b) By December 31, 1998, all covered CMRS providers must have the capability to obtain routing information, either by querying the appropriate database themselves or by making arrangements with other carriers that are capable of performing database queries, so that they can deliver calls from their networks to any party that has retained its number after switching from one telecommunications carrier to another.

(c) The Chief, Wireless Telecommunications Bureau, may waive or stay any of the dates in the implementation schedule, as the Chief determines is necessary to ensure the efficient development of number portability, for a period not to exceed 9 months (i.e., no later than September 30, 1999, for the deadline in paragraph (b) of this section, and no later than March 31, 2000, for the deadline in paragraph (a) of this section).

(d) In the event a carrier subject to paragraphs (a) and (b) of this section is unable to meet the Commission's deadlines for implementing a long-term number portability method, it may file with the Commission at least 60 days in advance of the deadline a petition to extend the time by which implementation in its network will be completed. A carrier seeking such relief must demonstrate through substantial, credible evidence the basis for its contention that it is unable to comply with paragraphs (a) and (b) of this section. Such requests must set forth:

(1) The facts that demonstrate why the carrier is unable to meet our deployment schedule;

(2) A detailed explanation of the activities that the carrier has undertaken to meet the implementation schedule prior to requesting an extension of time;

(3) An identification of the particular switches for which the extension is requested;

(4) The time within which the carrier will complete deployment in the affected switches; and

(5) A proposed schedule with milestones for meeting the deployment date.

(e) The Chief, Wireless Telecommunications Bureau, may establish reporting requirements in order to monitor the progress of covered CMRS providers implementing number portability, and may direct such carriers to take any actions necessary to ensure compliance with this deployment schedule.

03-1405

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTRAL TEXAS TELEPHONE COOPERATIVE, INC., et al., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.

Certificate Of Service

I, Shirley E. Farmer, hereby certify that the foregoing typewritten "Brief for Respondents" was served this 24th day of June, 2004, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

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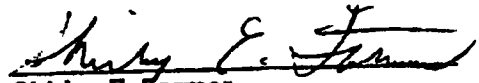

Shirley E. Farmer

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **WALDRON TELEPHONE COMPANY** for temporary suspension of wireline to wireless number portability obligations pursuant to § 251(f)(2) of the federal Telecommunications Act of 1996, as amended.	Case No. U-13956
In the matter of the application of **OGDEN TELEPHONE COMPANY** for temporary suspension of wireline to wireless number portability obligations pursuant to § 251(f)(2) of the federal Telecommunications Act of 1996, as amended.	Case No. U-13958

At the February 12, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

OPINION AND ORDER

On November 21, 2003, Waldron Telephone Company (Waldron) and on November 24, 2003, Ogden Telephone Company (Ogden), (collectively, the petitioners), filed petitions requesting that the Commission temporarily suspend their wireline-to-wireless local number portability (LNP) obligations for one year and eighteen months, respectively, pursuant to Section 251(f)(2) of the federal Telecommunications Act of 1996 (FTA), 47 USC 251(f)(2).

Federal Communications Commission (FCC) rules require that telecommunications carriers in the top 100 Metropolitan Statistical Areas provide LNP by November 24, 2003, unless a state

commission granted a suspension of the LNP requirements under Section 251(f)(2) of the FTA, which provides:

> Suspensions and modifications for rural carriers. A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—
>
> (A) is necessary—
>
> i. to avoid a significant adverse economic impact on users of telecommunications service generally;
>
> ii. to avoid imposing a requirement that is unduly economically burdensome; or
>
> iii. to avoid imposing a requirement that is technically infeasible; and
>
> (B) is consistent with the public interest, convenience, and necessity.

47 USC 251(f)(2).

Each petitioner qualifies as a "rural telephone company" as defined in 47 USC 153(37) and both are local exchange carriers with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide (Two Percent Carriers). The petitioners request a temporary suspension of their LNP obligations under Section 251(f)(2), because both (1) are replacing in the near future their current switches that are not capable of intermodal portability, and (2) say they are confused because of the many questions regarding implementation of intermodal portability that the FCC has yet to resolve.

Waldron has not received any bona fide requests from any wireless carriers to implement intermodal portability, nor has it received any requests from its own customers to port a wireline number to a wireless carrier. Further, Waldron is currently using a Nortel DMS-10 switch, which is not capable of intermodal porting.[1] However, Waldron plans to replace (within the next

[1] Waldron estimates it would cost at least $8,000 to make the DMS-10 switch capable of intermodal porting.

12 months) its DMS-10 switch with a CSX 2100 softswitch, which is capable of intermodal porting. Waldron is currently field-testing the softswitch with some of its customers. Therefore, Waldron concludes that any expenditure to upgrade the DMS-10 switch would be unduly economically burdensome and would not be well spent on a switch that it intends to replace soon.

Similarly, Ogden says that it currently uses a Siemans DCO switch, incapable of intermodal porting, which it plans to retire in a year.[2] Ogden is currently working on the engineering specifications necessary for the replacement softswitch, and projects that the process of constructing, installing, and testing the new softswitch could take as much as, if not more than, a year. Likewise, Ogden says, spending money to update a switch it is about to replace would be unduly economically burdensome.

Alternatively, both petitioners argue that their LNP obligations are technically infeasible, 47 USC 251(b)(2), and that suspension of the portability obligations would avoid a significant adverse economic impact on users of telecommunications services generally, 47 USC 251 (f)(2)(A)(i). The petitioners complain that they have a limited customer base over which to spread the implementation costs for LNP. Finally, the petitioners conclude that suspension of their portability requirements would serve the public interest, convenience, and necessity. 47 USC 251(f)(2)(A)(i).

Since the petitioners filed their requests, the FCC has issued an order[3] in which it authorized a limited waiver of the LNP requirements until May 24, 2004 for Two Percent Carriers that have not received a request for local number porting from either a wireline carrier prior to May 24, 2003, or a wireless carrier that has a point of interconnection or numbering resources in the rate center

[2] Ogden estimates it will cost approximately $25,000 to replace the DCO switch with a new, next generation switch capable of intermodal porting.

[3] See, In the matter of Telephone Number Portability, CC Docket No. 95-116 (rel'd January 16, 2004).

where the customer's wireline number is provisioned. However, the FCC was clear that Two Percent Carriers not meeting these qualifications must comply with LNP requirements. Therefore, to the extent that the petitioners are Two Percent Carriers who have not received a request for LNP prior to May 24, 2003 or requests from their own customers to port any wireline numbers to a wireless carrier, the LNP obligations are temporarily suspended until May 24, 2004.

However, the petitioners have requested that the Commission suspend their LNP obligations until November 21, 2004 or May 24, 2005. The Commission is not persuaded that it should suspend their LNP obligations beyond the FCC deadline. Neither petitioner has shown that it is technically infeasible for it to meet its portability obligations. To the contrary, they have indicated that calls can be routed through interexchange carriers. Further, neither petitioner has shown a significant adverse economic impact beyond stating that it would cost either $8,000 or $25,000 to meet its portability obligations by the deadline. Finally, neither petitioner has demonstrated that it will incur any costs that are different from, or more burdensome than, the costs of similarly situated providers of basic local exchange service. The Commission is unconvinced that the burdens will disproportionately affect the petitioners as compared with other carriers. Indeed, the petitioners have been on notice since 1996 to prepare for implementation of LNP and replacement of new switches should have been completed prior to the implementation date.

Therefore, the Commission cannot find that it is consistent with the public interest, convenience, and necessity to temporarily suspend Waldron and Ogden's LNP obligations beyond November 24, 2003 or May 24, 2004, if they qualify for the FCC's limited waiver. Any deferment of the FCC's number portability requirements beyond that time would be anti-competitive and anti-consumer. The Commission concludes that an extension of the porting deadline until November 2004 or May 2005 would not serve the public interest because it unnecessarily delays

the LNP benefits to the public. A further delay of LNP obligations would unnecessarily harm competition and consumers, whereas portability will promote competition by allowing consumers to move to carriers that would better serve their needs without having to give up their telephone numbers. Thus, the Commission finds that the public interest would be served by LNP implementation consistent with FCC requirements.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.

b. Waldron and Ogden's petitions to temporarily suspend their LNP requirements beyond the FCC deadline are not consistent with the public interest, convenience, and necessity, and should be denied.

THEREFORE, IT IS ORDERED that the petitions of Waldron Telephone Company and Ogden Telephone Company for temporary suspension of wireline to wireless local number portability obligations, pursuant to Section 251(f)(2) of the federal Telecommunications Act of 1966, are denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(SEAL)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of February 12, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chair

Commissioner

Commissioner

By its action of February 12, 2004.

Its Executive Secretary

PROOF OF SERVICE

STATE OF MICHIGAN)

Case No. U-13956

County of Ingham)

Patricia A Fronta being duly sworn, deposes and says that on February 13th 2004, A D. she served a copy of the attached Commission orders by first class mail, postage prepaid, or by inter-departmental mail, to the persons as shown on the attached service list.

Patricia Fronta

Digitally signed by Patricia Fronta
DN: cn=Patricia Fronta, o=MPSC, c=US
Date: 2004.02.20 14:49:42 -05'00'

Signature Not Verified

Patricia Fronta

Subscribed and sworn to before me
this 13th day of February 2004

Catherine H. Bowers

Digitally signed by Catherine H. Bowers
DN: cn=Catherine H. Bowers, o=Michigan Public Service Commission, ou=Regulatory Affairs Executive Secretary Section, c=US
Date: 2004.02.24 14:48:20 -05'00'

Signature Not Verified

Notary Public, Eaton County, Michigan
Acting in Ingham County
My Commission expires November 22, 2004

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