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EX PARTE

October 17, 2003

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Telephone Number Portability*, CC Docket No. 95-116

Dear Ms. Dortch:

As Qwest, SBC, BellSouth and USTA have discussed in their recent *ex partes*, the wireless industry has asked the Commission to place the wireline industry at an enormous competitive disadvantage through a back-door rule change in this proceeding. Specifically, it seeks to require each wireline carrier to port its customers' telephone numbers ("TNs") to wireless carriers that do not have a numbering presence in the wireline carrier's rate center where the customer is located. In particular, this back-door rule change would explicitly favor one provider over another as the wireline carrier would be technically unable to compete for -- and port-in -- wireless customers who, although located in a wireline rate center, do not have matching TNs from that same rate center -- better known as the "**mismatch**" problem. This is not service provider portability -- this is not location portability -- this is yet another form of local number portability yet to be clearly defined and mandated by the Commission. As Qwest and other commenters have explained, that rule would make it technically infeasible for the wireline carrier to port the numbers of such customers in the other direction -- from the wireless carrier's networks onto the wireline carrier's network.

Quite apart from the technical myths of their advocacy, the wireless industry further invites the Commission to slight its procedural obligations by changing the ground rules of wireline-to-wireless number portability without first issuing a notice of proposed rulemaking, as required by the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 553(b). The Commission should decline that invitation. As discussed below, the Commission would blatantly violate the APA's notice requirements if it were to change the competitive neutrality and service provider portability premises of its existing number portability rules without first giving interested parties a genuine opportunity for comment on the competitive imbalances and immense practical difficulties that such a change would produce.

Qwest has previously shown that what the wireless parties seek in this proceeding is not a "clarification" of existing rules, as the Cellular Telecommunications & Internet Association ("CTIA") contends, but a radical and immediate restructuring of the regulatory premises that have governed location and number portability since 1996. To summarize: Existing portability

rules (i) require competitive neutrality as between providers of different services¹ and (ii) confine service provider portability, and to a limited extent location portability (where ordered by a state commission), to “rate center/rate district boundaries of the incumbent LEC due to rating/routing concerns.”² As Qwest has explained, and other parties have agreed, CTIA’s proposal for immediate wireline-to-wireless number portability would undermine those rules.

I. **Qwest’s previous *ex partes* have explained in great detail that, if wireline-to-wireless number portability were implemented immediately based on the wireless carriers’ proposals, wireless carriers would assume an immense competitive advantage over wireline carriers.**³

Because wireline carriers have operated for many years on the rate center system, they cannot feasibly port numbers from another carrier to their own networks if the other carrier has assigned the customer a TN associated with a different rate center, *i.e.*, **the “mismatch” problem**. To do so would abruptly undermine decades of established rating practices and, just as important, would produce profound network operational problems, given the integral role that NPA-NXXs currently play in the routing of TNs over particular trunk groups and the subsequent billing of these calls.

In recent Sprint *ex partes*, Sprint would make the Commission think that there are no technical impediments to any type of wireline-wireless porting. This is incorrect. Qwest, like other wireline carriers, cannot port-in TNs that are not matched to that rate center without modifying a variety of network, Operational Support Systems (“OSS”), billing, and customer confusion problems in the process. Wireline carriers cannot port numbers across rate center boundaries today. Porting-in TNs that are not matched up with the correct rate center would impact and confuse over 17 million Qwest wireline consumers, let alone confuse wireless customers who may want to port to a wireline carrier in the future but cannot due to the mismatch problem.⁴ Then, backtracking some, Sprint while then acknowledging the inherent

¹ See *Report and Order, Administration of the North American Numbering Plan*, Report and Order, 11 FCC Rcd 2588, 2595-96 ¶ 15 (1995) (“Administration of the NANP should not unduly favor or disadvantage any particular industry segment or group of consumers. Administration of the NANP should not unduly favor one technology over another. The NANP should be largely technology neutral.”).

² See Letter from Cronan O’Connell (Qwest) to Marlene H. Dortch, CC Docket No. 95-116, at 7-8 (Sept. 17, 2003) (discussing 47 C.F.R. § 52.26(a) and Report of NANC Local Number Portability Administration Selection Working Group Report, Appx. D, § 7.3 (April 25, 1997)).

³ See *id.* at 1-8.

⁴ The billing implications of an NPA-NXX split between rate centers causes calls to that NPA-NXX and calls from that NPA-NXX to be billed as local sometimes or toll sometimes depending on the rate center.

technical incapability of wireline carriers porting between rate centers or porting “mismatched” customers, throws out an alternative called “FX service” as if this service could be used as a competitively neutral and valid substitute to alleviate incumbent LEC technical infeasibility issues caused by the mismatch problem.⁵

Given Sprint’s failed attempt to propose a Private Line FX service as a valid substitute for LNP, it is clear that the Commission must address key technical issues prior to modifying the LNP rules. While we have yet to know to what extent the Commission is contemplating changing the LNP rules, Qwest would like to address, at a minimum, a few of the key technical issues in order for the Commission to clearly comprehend the steps the incumbent LECs will have to undertake to facilitate intermodal portability across rate center boundaries. In particular, an intermodal port from a wireline provider to a wireless provider will result in a telephone number no longer being associated with a fixed geographic location, *i.e.*, a physical address. If that telephone number is subsequently ported from a wireless provider back to a wireline provider, the number must go back to the rate center from which it was originally assigned. Otherwise, such a port would constitute an inappropriate location port that may, depending on the facts of the port, create: 1) customer confusion (*i.e.*, it is no longer possible for a customer to properly use the NPA-NXX of a telephone number to determine whether the call will be local or toll. For example, if location ports are allowed and the TN crosses a rate center and local calling area boundary, calls to the ported number could appear to the calling party as toll even though

⁵ In both its October 8, 2003, and its August 18, 2003 letters Sprint asserts that Qwest’s FX service enables it to serve a customer physically located in one rate center but who has a number associated with another rate center. Sprint concludes that this specialized private line transport service offering makes Qwest capable of “competing for and porting-in customers that have been assigned a telephone number from a rate center different from the rate center in which the customer physically resides.” First, FX service allows certain customers to remain in their current rate center and receive dial-tone from another rate center. This service is NOT service provider portability let alone location portability, but rather a private line extension the customer may subscribe to in order to receive calls from a local wire center where they are not physically located. To receive FX service, the requesting customer acquires a new TN in the foreign rate center. The customer DOES NOT move, or port, their existing TN to the foreign rate center. For example, a business customer in Ft. Collins, CO would like to extend its business into Denver, CO. The business customer orders a private line FX service between its existing TN in Ft. Collins and the new TN in Denver. Going forward, end users contact this business using a local Denver TN which is then transported over the private line and terminates at the customer’s business office in Ft. Collins. FX service gives the end users the “impression” that the business customer has a sales office in Denver but actually all the sales calls are forwarded to Ft. Collins. Again, this is not a regulatory equivalent substitute to local number portability (“LNP”) as this is a customer product to enhance the visibility of business customers, for the most part. On the other hand, service provider LNP is a competitively-neutral regulatory requirement. Also, FX today has a nonrecurring charge of ~\$270 in CO.

the called party may live next door to the calling party); 2) billing problems for carriers (*i.e.*, calls to the ported telephone number may appear to the billing systems as local and not billed even though toll charges should apply to a call that is routed to a rate center outside the local calling area); and 3) competitive inequities for LECs (*i.e.*, technical and regulatory obstacles prohibit LECs from porting outside the rate center whereas wireless providers do not have such limitations).

Service Provider Portability within a rate center requires both carriers to: 1) comply with industry approved porting requirements and notification intervals; and 2) update the 911 database. Qwest, along with other wireline local service providers, currently allows a customer to port his/her TN from Qwest to another local service provider as long as the TN stays within the rate center. Conversely, Qwest will port a TN from another local service provider to Qwest as long as the rate center of the TN matches the rate center of the customer's physical address. These requirements comport with the Commission's LNP rules as codified in 47 C.F.R. § 52.26.

Today, Qwest manages 793 rate centers within 27 LATAs in its 14-state region. When Qwest receives a Local Service Request for a customer that is moving to Qwest from another LEC, Qwest performs the following checks in its systems:

- Using the customer's physical address, Qwest verifies that there is a local facility available to the customer's location.
- Qwest checks the customer's current TN (that they would like to keep as they port their TN and subscribe to service from Qwest) and verify that the NPA-NXX of his/her number is within the same rate center serving area as the customer's physical address.
- If the TN and the physical address are not in the same rate center, the customer is notified that he/she must change the TN or we must reject the order.
- The TN and the customer's physical address must be within the same rate center. In the LEC's network, the customer's local loop is connected to a switch and TN, all of which is associated with a specific rate center. This information is required by the local service provider to properly route and bill calls. Automatic Message Accounting ("AMA") records created by the switch are used for billing calls. The billing systems analyze the NPA-NXX of the calling and called parties to determine whether the call is local or toll.
- If LNP is expanded beyond the rate center, this analysis would have to be expanded to account for all 10 digits of the called number (*i.e.*, NPA-NXX-XXXX). Some estimates indicate that expanding the AMA systems to analyze all 10 digits of both the calling and called numbers would require an overhaul of the existing billing systems. This is one of many reasons why the current LNP rules and processes restrict LNP to service provider portability and limit location ports to the rate center whereby the rate center of the TN matches the rate center of the customer's physical address.

If LNP was expanded beyond the rate center boundary as requested by the wireless companies, the currently well-defined rate center and local calling area boundaries managed by the various state commissions will erode. Changing rate center and local calling area boundaries would: i) require upfront planning which considers switching, trunking, and network routing changes; ii) result in enormous customer confusion as a result of TNs no longer being associated with a fixed geographic location and the resulting downstream local versus toll billing impacts; iii) impose significant costs on the general public; and iv) lead to the loss of toll revenues, a major funding source for state universal service programs. In addition, any requirement to port TNs across rate center boundaries must also consider the impact to state-ordered area code splits. Oftentimes an area code split will bisect a major metropolitan area. All of these impacts must be fully considered. For example:

- As with any standard network engineering plan, the Company would first have to determine exactly the new local calling area, yet to be defined by the Commission; determine the effect on each of the 793 rate centers and the consumer communities of interest within and between each rate center, gain approval for the plan and appropriate cost recovery from the state commissions and then begin the engineering activities listed below.
- Each local service provider within the LATA or the designated local calling area would prepare all of their switches to accommodate ported-in numbers from all of the new “local” NPA-NXXs. To accomplish this, Qwest would be required to work with switch vendors and in most cases, pay for additional functionality to be added to or made workable within switches to add capacity for the appropriate number of NPA-NXXs. If done on a national scale, there would be major scheduling and deployment issues for all carriers and vendors.
- With the expansion of the local calling area to the LATA level, **local** call volumes will increase where the calls were once **toll**, thereby stimulating call volumes. This call stimulation would require increasing the size and amount of physical trunk routes between switches and/or access tandems. Also, such a change would require local service providers to reconfigure their access and local tandems to accommodate the change in local and toll traffic.
- New routing solutions would need to be translated into each switch. Each switch would need these new translations to route calls over the correct trunk groups within the expanded local calling area. This work must be completed in every switch within the LATA/NPA for all of the NPA-NXXs in service within the LATA/NPA.
- Today, because the switch only examines the NPA-NXX (the first six digits of the TN) to route the call, it needs to know information about all of the NXXs in all of the switches in order to do call set up and completion for the entire LATA. Qwest’s switches are programmed to know all of the NPA-NXXs for the local calling area. This number will increase significantly.

- Operational Support Systems, including billing systems, will require major rework/modifications. *Today, each NPA-NXX has one and only one rate center for toll rating and billing which is based on the originating and terminating NPA-NXXs associated with a particular call.* The billing systems perform this activity. Any change to the current rate center model would require significant changes to the local service providers' billing systems. The local service providers' provisioning systems would also need to be modified.

Therefore, the Commission, through a Further Notice of Proposed Rulemaking ("FNPRM") along with the industry and state regulatory bodies, collectively, should resolve these technical issues, including addressing the revenue implications as traffic is redefined from toll to local and providing the local service providers a means of recovering their costs for implementing such changes, prior to revising any of the current LNP rules. Failing to fully address these issues will cause consumer frustration and significant systems and network implications.

Many industry players seem to think that the incumbent LECs are grossly exaggerating the complex nature of this restructure, were it ever to occur. However, the incumbent LECs have already grappled with rate center consolidation. For example, Qwest, at the direction of the Colorado Public Utilities Commission, consolidated 45 Denver-based rate centers to 16. Even though the requirements were known in advance, the Denver rate center consolidation required 18 months of upfront planning and engineering and took two years to complete. While the local switches that serve the Denver local calling area had sufficient capacity to accommodate the "fringe" geographic areas that were added to the rate centers without generic upgrades, this may not always be the case. Nonetheless, the Denver consolidation required that additional trunk side ports be added to the switching equipment, as well as trunking changes. This effort required trunk side port additions, trunking changes, local network planning and engineering work, switch translations, and resolving call blockage problems.

In contrast, "[b]ecause wireless service is spectrum-based and mobile in nature, wireless carriers do not utilize or depend on the wireline rate center structure to provide service: wireless licensing and service areas are typically much larger than wireline rate center boundaries, and wireless carriers typically charge their subscribers based on minutes of use rather than location or distance."⁶ As a result, wireless carriers face no impediments similar to those faced by wireline carriers in porting TNs unassociated with the rate center in which the customer is located, *i.e.* the mismatch problem. **Wireless carriers hope to exploit this competitive imbalance** by 1) permitting customers they have won from wireline carriers to keep their ported TNs even when they switch locations and move outside the rate centers associated with those TNs; and 2) preventing wireline carriers from winning wireless customers due to the fact that the rate center

⁶ *In the Matter of Telephone Number Portability -- Carrier Requests for Clarification of Wireless-Wireless Porting Issues, Memorandum Opinion and Order*, CC Docket No. 95-116, FCC 03-237 at ¶ 22 (rel. Oct. 7, 2003).

of the wireless customer's TN does not match the rate center of the customer's physical address. As a practical matter, this precludes wireline carriers from winning back customers as well as marketing to mismatched customers. Wireless carriers face no similar disadvantage.

Wireline carriers cannot instantly remedy this competitive imbalance unless and until, as a first step, they persuade state commissions to address current rate center boundaries in conjunction with the Commission, through a *FNPRM*. Even then, wireline carriers like Qwest, which has 793 rate centers in its territory, will need to meet the costly and time-consuming technical challenges involved in reprogramming their central office switches to accommodate the change. Neither step in this process could be completed overnight, given the immense practical significance of existing rate centers for both pricing and operational purposes. In the interim, wireline carriers would be unable to compete with wireless carriers on anything resembling a level playing field.

II. The Commission has not issued, and has not even formally sought, guidance from interested parties either on the extent of this competitive imbalance or on the concrete steps that wireline carriers and the states must take to accommodate the striking regulatory changes that CTIA has proposed.

In the *Second Report and Order*, the Commission at least acknowledged the problem by directing the North American Numbering Council ("NANC") to address "how to account for differences between service area boundaries for wireline versus wireless services" for number portability purposes.⁷ But neither the NANC nor the Commission has ever settled on a plan for resolving that concern, although the NANC has noted several possible options.⁸ And the Commission is not now free simply to implement immediate intermodal number portability without seeking formal comment on the issue.

For their part, the wireless proponents of those changes have tried to sweep the issue under the rug in the hope of a quick win. For example, T-Mobile asks the Commission to ignore the wireline carriers' concern for competitive fairness on the self-serving theory that customers would never have any interest in migrating from a wireless service to a wireline one in the first place.⁹ The Commission has no factual or legal basis for agreeing with that remarkable proposition, let alone for making it a self-fulfilling prophecy by handing wireless carriers an enormous regulatory advantage over their wireline rivals. And CTIA claims (in a footnote to its

⁷ *In the Matter of Telephone Number Portability, Second Report and Order*, 12 FCC Rcd 12281, 12333-34 ¶ 91 (1997).

⁸ *See generally* Letter from Herschel L. Abbott, Jr., BellSouth, to Chairman Michael K. Powell, CC Docket No. 95-116, at 3 (Oct. 14, 2003).

⁹ Letter from Thomas Sugrue and Todd Daubert, T-Mobile, to William Maher and John Muleta, CC Docket No. 95-116, at 3 n.7 (Aug. 25, 2003).

original petition) that it is not *formally* seeking “location portability,”¹⁰ but that is exactly what its proposal for immediate wireline-to-wireless number portability is designed to achieve if not going beyond that definition, as Sprint’s recent advocacy makes clear.¹¹ Further, Sprint, in its latest *ex parte*, stated that the “LNP regime that Congress adopted was inherently competitively unequal. After all it was Congress that decided LECs, but not wireless carriers, would be required to provide LNP. Thus, under the regime Congress established, LECs are required to permit customers to port their numbers to wireless carriers, but wireless carriers had no obligation to reciprocate.”¹² Such an interpretation of the 1996 Act is I would say at a minimum beyond strange.

Sprint then suggests that the Commission has somehow addressed these issues by assuring competitive LECs and wireless carriers that they are free to establish only one physical point of presence in a LATA.¹³ On two levels, however, this is no answer at all. First, this controversy is not about what rules carriers must follow to obtain interconnection; it is about what rules they must follow to ensure competitive neutrality in the implementation of *number portability*. The same flaw undermines Sprint’s reliance on the Commission’s other interconnection-related rules. Second, Qwest is not asking the Commission to condition wireline-to-wireless number portability on the establishment of a *physical presence* in each rate

¹⁰ Petition of CTIA for Declaratory Ruling, CC Docket No. 95-116, at 3 n.5 (Jan. 23, 2003).

¹¹ See Letter of Luisa L. Lancetti, Sprint, to John Rogovin, William Maher, and John Muleta, CC Docket No. 95-116, at 5 (Oct. 8, 2003) (“Physical addresses have always been irrelevant for mobile wireless services[.]”). Sprint claims that what it seeks should not be characterized as “location portability,” because that concept involves “permit[ting] a customer to keep his number *and existing service provider* when moving from one ‘physical address’ to another.” *Id.* (emphasis in original). But the mischaracterization is Sprint’s alone, for what it wants is actually a *combination* of both service provider portability *and* location portability. The former concept is defined only as “the ability of users of telecommunications services to retain, *at the same location*, existing telecommunications numbers . . . when switching from one telecommunications carrier to another.” 47 C.F.R. § 52.21(p) (emphasis added). Here (for example) Sprint and other wireless carriers have every intention of allowing whatever customers they win from Qwest to move across rate center boundaries while keeping their original Qwest numbers, thereby disabling Qwest from porting those numbers back onto its network as part of a win-back campaign. Further, with the mismatch of TNs and physical addresses with regard to rate centers, this is yet another large base of wireless customers that Qwest has no ability to compete for until, as discussed in detail in this and many past *ex partes*, it is addressed in a *FNPRM* dealing with the state regulatory, technical, operational and billing issues.

¹² See Letter of Luisa Lancetti, Sprint, to John Rogovin, William Maher and John Muleta, CC Docket No. 95-116, at 2-3 (Oct. 8, 2003).

¹³ *Id.*

center in any event. Instead, wireless carriers could alleviate concerns about competitive neutrality by obtaining numbers identified with each rate center from which it seeks to port numbers. CLECs and cable companies have complied with this obligation; wireless carriers provide no reason why their platform should receive special treatment.

Section 251(b)(2) of the Communications Act of 1934, as amended by the 1996 Act, directs each LEC “to provide, to the extent technically feasible, number portability in accordance with **requirements prescribed by the Commission**.”¹⁴ The 1996 Act defines “number portability” as 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” (emphasis added).¹⁵ The 1996 Act defines the term “telecommunications carrier” as “any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226).”¹⁶ The term “telecommunications service” is defined by the 1996 Act as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”¹⁷

In the Commission’s initial *Further Notice of Proposed Rulemaking* (“Notice”), the Commission defined three types of number portability: (1) service provider -- the ability to retain one’s numbers when changing service providers; (2) service -- the ability to retain one’s number when changing services; and (3) location -- the ability to retain one’s number when changing physical locations.¹⁸ In the *First Report and Order*, the Commission modified its proposed definition of number portability to conform to the statutory definition of number portability and noted that the statutory definition of this term “is synonymous with the *Notice*’s definition of ‘service provider portability.’”¹⁹ The Commission went on to state:

The ability of end-users to retain their telephone numbers when changing service providers gives customers flexibility in quality, price, and variety of telecommunications services they can choose to purchase. Number portability **promotes competition** between **telecommunications service providers** by,

¹⁴ 47 U.S.C. § 251(b)(2). Emphasis added.

¹⁵ 47 U.S.C. § 153(30).

¹⁶ 47 U.S.C. § 153(44).

¹⁷ 47 U.S.C. § 153(46).

¹⁸ CC Docket No. 95-116, 10 FCC Rcd. at 12355-56.

¹⁹ *In the Matter of Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 8352, 8366-67 ¶ 27.

among other things, allowing customers to respond to price and service changes without changing their telephone numbers. **The resulting competition will benefit ALL users of telecommunications services.** Indeed, **competition** should foster lower local telephone prices and, consequently, stimulate demand for **telecommunications services** and increase economic growth.”²⁰

Furthermore, when discussing number portability by wireless providers, the Commission stated that it possesses independent authority under sections 1, 2, 4(i) and 332 of the Act to require wireless providers to provide portability as the Commission deems appropriate. Specifically, the Commission stated: “Ensuring that the portability of telephone numbers within the United States is handled **efficiently** and **fairly** is within [the Commission’s] jurisdiction under [the Act].” The Commission also recognized that:

“the public interest is served by requiring the provision of number portability by [wireless providers] because number portability will **promote competition** between providers of **local telephone services** and thereby **promote competition** between **providers of interstate access services.**”²¹

In fact, the Commission’s *First Report and Order* is showered with statements that illustrate the Commission’s pro-competition objectives. Of note:

“We require cellular, broadband PCS, and covered [SMR] providers, . . . which are the CMRS providers that are expected to **compete in the local exchange market**, to offer number portability. This mandate is in the public interest because it will **promote competition** among cellular, broadband PCS, and covered SMR carriers, as well as **among CMRS providers AND wireline providers.**”²²

“Removing barriers, such as the requirement of changing telephone numbers when changing providers, will likely stimulate the development of new services and technologies, and create incentives for carriers to lower prices and costs.”²³

“We believe, for the reasons stated above, that service provider portability will **encourage [wireless-wireline] competition**, creating incentives for carriers to reduce prices for telecommunications services and to invest in innovative technologies, and enhancing flexibility for users of telecommunications services.”²⁴

²⁰ *Id.* at 8368 ¶ 30 (emphasis added).

²¹ *Id.* at 8431-32 ¶ 153 (emphasis added).

²² *Id.* at 8433 ¶ 155 (emphasis added).

²³ *Id.* at 8435 ¶ 158.

²⁴ *Id.* at 8436-37 ¶ 160 (emphasis added).

Surprisingly, Sprint's position in its October 8, 2003 *ex parte* ignores the Commission's repeated statements in this proceeding which clearly capture the Commission's intent to adopt LNP policies that promote broad competition amongst all service providers. The Commission should resist Sprint's strained attempt to turn the Commission's current LNP objectives on their head when it states that "the LNP regime Congress adopted was inherently competitively unequal" and offers this premise as justification for the Commission to off-handedly dismiss the wireline industry's legitimate competitive and technical intermodal portability concerns.

Qwest does not dispute that LECs are statutorily obligated to provide number portability in accordance with the requirements prescribed by the Commission. While not explicitly ordered by statute, the Commission exercised its jurisdictional authority in requiring wireless providers to adhere to the same definition of number portability as wireline providers.²⁵ In short, the number portability requirements apply equally to both wireline and wireless providers. If the Commission is serious about providing users of telecommunications services meaningful choice when changing service providers in accordance with the Commission's LNP rules, then the Commission must insist on LNP policies which are **bi-directionally fair and efficient** for all providers of telecommunications services, not just the wireless industry.

III. Wireless carriers have argued that the Commission may resolve this proceeding without complying with the notice-and-comment requirements of section 553(b), reasoning that an agency is free to do through a declaratory ruling whatever it could do through a rulemaking proceeding.

That is wrong -- as Sprint well knows, because it successfully litigated the issue against the Commission during the past year. As the D.C. Circuit held, at Sprint's behest, section 553(b) of the APA specifies a critical "distinction between rulemaking and a clarification of an existing rule. Whereas a clarification may be embodied in an interpretive rule that is exempt from notice and comment requirements, new rules that work substantive changes in prior regulations are subject to the APA's procedures."²⁶ Here, as discussed, CTIA's petition would work a sea of

²⁵ 47 C.F.R. § 52.31(a).

²⁶ *Sprint Corp. v. FCC*, 315 F.3d 369, 374-75 (D.C. Cir. 2003) (citing 5 U.S.C. § 553(b)(3)(A) and *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993)); see also *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992). Moreover, Sprint's reliance on *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir. 1976), is entirely misplaced. Among other distinctions, that case addresses whether an agency can "revers[e] by adjudication" a statutory interpretation that "was also established by adjudication." *Id.* at 365. Here, CTIA has urged the Commission to "reverse by adjudication" a legislative rule that was adopted through notice-and-comment rulemaking, is codified in the Code of Federal Regulations, and is binding on the industry as a whole, and not just individual parties. This is precisely the sort of procedural end-run that the APA is designed to prevent.

change in existing number portability rules and would fly in the face of several decades of rate center assumptions.

In addition, the Commission cannot avoid its APA obligations through the simple expedient of issuing one or two perfunctory two-page requests for public comment on a private party's request for a procedurally inappropriate declaratory ruling, as it did here in response to CTIA's twin petitions. The Commission must instead provide meaningful notice of its *own* intention to alter existing rules, indicate the policy direction it wishes to follow, identify the legal and practical implications of the proposed change, and seek comment on how to mitigate any concerns raised by that change. The D.C. Circuit has repeatedly "rejected bootstrap arguments predicating notice on public comments alone. Ultimately, notice is the agency's duty because comments by members of the public would not in themselves constitute adequate notice. Under the standards of the APA, notice necessarily must come -- if at all -- from the [a]gency."²⁷ And because "general notice that a new standard will be adopted affords the parties scant opportunity for comment[,] . . . [t]he agency's obligation is more demanding -- it must 'describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making.'"²⁸

The Commission has not yet taken these critical steps here, and the public is completely in the dark as to the Commission's plans (if any) for neutralizing the problems discussed above. Until it complies with its procedural obligations by affording the public a genuine opportunity to comment on a proposed course of action, it cannot lawfully order wireline-to-wireless number portability in those cases whereby either carrier is competitively disadvantaged. Therefore, for wireline to wireless service provider portability to meet the **public interest, competitive neutrality and technological neutrality** requires the Commission to:

1. Reaffirm service provider portability is within the rate center and the rate center of the customer's TN matches the rate center of the customer's physical address.
 - Any modifications to the definition require a *FNPRM*.
2. Reaffirm service provider portability requires that the customer does not change his/her physical location.

²⁷ See, e.g., *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (internal quotations omitted); *accord Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) ("The fact that some commenters actually submitted comments suggesting the [course the agency ultimately took] is of little significance. Commenting parties cannot be expected to monitor all other comments submitted to an agency."); see also *Sprint*, 315 F.3d at 376.

²⁸ *Horsehead Resource Dev't Co.*, 16 F.3d at 1268 (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)).

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3. Reaffirm all carriers, regardless of technology, should have equal opportunity to market to -- and compete for -- the entire customer base within a rate center. If the Commission implements intermodal LNP between the wireline carriers and the wireless carriers on November 24, 2003, Qwest will be ready to port between wireline and wireless carriers within the rate center in the instances where the customer, at the same location, ports a number between carriers and where the customer's TN matches the rate center of the customer's physical address. This instance will allow all providers to have an equal opportunity to market to the entire customer base within the rate center.
4. Reaffirm customer moves outside a rate center require a TN change.
 - o Any modifications to the definition require a *FNPRM*.
5. Affirm the Commission's commitment to reasonable transition and implementation periods when rule changes fundamentally impact a carrier's network, systems, and business processes.
6. Initiate a *FNPRM* to address the fundamental LNP problems within the rate center including "mismatches"; and begin to ask the appropriate questions and establish a record to determine the long-term LNP scope between all types of providers and technologies (*see* attached draft of recommended questions for the *FNPRM*).

Sincerely yours,

Gary Lytle

Ms. Marlene Dortch

Oct. 17, 2003

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ATTACHMENT 1

PROPOSED LNP ISSUES TO BE ADDRESSED IN A COMMISSION-INITIATED FURTHER NOTICE OF PROPOSED RULEMAKING

- Presence within a rate center/portability area for wireline and wireless carriers
 - What constitutes “presence” within a rate center/portability area?
 - The October 2000 Phase II NANC Report on LNP identified potential ways to resolve the rate center issue. What are the pros and cons of the following NANC suggestions:
 1. Requiring assignment of NXXs to wireless service providers (“WSPs”) on a rate center basis and requiring assignment of TNs to wireless customers based on their billing (or physical) location.
 2. Aligning local service areas between wireline and wireless carriers.
 3. Requiring both categories of carriers to adopt the same rating methods.
 4. Deferring wireless LNP until state commissions order location portability beyond the rate center, NPA boundary, state and LATA.
 5. Limiting intermodal portability to fixed location/non-roaming wireless services where the WSP has agreed to adopt wireline numbering assignment and portability rules.
 6. Do not require intermodal portability.
 - What are the potential impacts of each of these alternatives to current number assignment rules and guidelines? Would modifications to industry guidelines be required?
 - With respect to the first option, what additional steps would need to be taken to assure that wireline service providers could compete for the “embedded” wireless customer base?
 - What costs would adoption of either the second or third option impose upon wireline service providers? Upon wireless service providers? Upon state regulators?
 - What advantages and disadvantages would accompany adoption of the fourth option? With respect to option four, what additional steps would be required to maintain competitive parity between the RBOCs and other carriers if location portability were extended beyond LATA boundaries?
 - What impact would extension of location portability beyond rate center boundaries have upon state ratemaking assumptions, universal service support, and seven-digit dialing policies?

- Demand for expansion of the current rate center boundary
 - Is requiring LNP beyond the rate center in the public interest?
 - What is the anticipated customer demand for TN ports outside a rate center?

- Assuming expansion of the current rate center boundary for LNP is found to be in the public interest, what is the appropriate scope of the new boundary?
 - Is the current rate center boundary the appropriate boundary?
 - If not, what should the boundary be (*e.g.*, local calling area, NPA, LATA, MSA including all rate center boundaries in MSA and correcting for local calling area disparities)?
 - What are the impacts of changing the current rate center boundaries?
 - What are the regulatory constraints to changing a rate center boundary?
 - What are the technical impacts (*e.g.*, switching, trunking and network routing, billing and other OSSs) that need to be considered?
 - What is the impact to end-user customers? Could such changes produce customer confusion?
 - What is the impact to the local calling areas established by state public utility commissions?
 - What is the impact to carriers' toll revenues? What steps could be taken to mitigate the adverse impact to carrier's toll revenues?
 - Would such changes stimulate different customer calling habits? What are the potential impacts to carriers' networks as a result of these changes?
 - Could expansion of the rate center boundary force customers into local ten-digit dialing? (FYI, Commission refused to adopt nationwide mandatory ten-digit dialing in the *NRO Second Report and Order*).
 - Is it better, as the Commission concluded in the First Report and Order in CC Docket 95-116, to continue to leave this decision to the states?

- Technical issues caused by portability outside the rate center.
 - What is the impact to Network, OSS and Service Delivery processes?
 - Network: Switching, trunking, forecasting, 911, NPAC database issues? Other?
 - OSS: Ordering, provisioning, and billing? Loss of toll revenues? Other?
 - Service Delivery: What is the impact to business office processes? What changes would have to be made to accommodate ports outside the rate center?
 - Is there a possibility for service disruptions to the customer?
 - Would modifications to the industry guidelines be necessary? Should NANC or some other industry group (*i.e.*, INC) be charged with reviewing this issue prior to adoption of substantive rules by the Commission?
 - Should there be additional technical trials to "test" the feasibility of porting outside the rate center prior to adoption of substantive rules by the Commission?
 - Should the Commission request that NANC prepare a recommendation/analysis to flag all technical issues prior to adoption of substantive rules by the Commission?

- Cost Recovery
 - Rate regulated carriers must be allowed to recover additional costs incurred for implementing additional LNP functionality as a result of changes to the Commission's rules and industry guidelines. Through what mechanism would ILECs be permitted to recover the costs of implementing? Through a surcharge on end users' rates?

- Number Administration
 - Carriers (including ILECs, CLECs, Independents, and CMRS) currently manage their numbering inventories on a rate center level. In addition, industry thousands-block number pools are managed on a rate center level. What would be the impact to number administration if portability is expanded beyond the rate center?

- Porting Intervals
 - Are existing process flows codified in the Commission's rules sufficient for intermodal porting. If not, how should changes to those flows be altered, and by whom? What steps would wireline carriers need to accommodate such changes, and at what cost? If the intervals within which intermodal ports must be completed are shortened, must these shortened intervals, as a matter of law, apply to wireline-to-wireline ports as well? Should they apply as a matter of policy?

- Type One Porting Issues
 - Are existing process flows governing wireline-to-wireline porting sufficient to address porting requests to or from a CMRS provider that has Type 1 interconnection to an ILEC? Are existing LSR process flows sufficient to address a request to port to or from a CMRS provider with Type 1 interconnection to an ILEC's switch? If the carrier requesting the port is a CMRS provider with Type 1 interconnection, should this carrier or the ILEC to which it is interconnected file the LSR requesting the port? If the customer moving to the CMRS provider is currently the customer of another CMRS provider with Type 1 interconnection to an ILEC, should the requesting CMRS provider, or its ILEC, be required to send an LSR to both the customer's current CMRS provider and the ILEC to which that provider is connected?

- Are there additional issues which the Commission should be aware of and consider?