

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Franklin Telephone Company, Inc.)	
Petition for Waiver of Section 52.23(c))	
of the Commission's Rules)	
_____)	

SPRINT OPPOSITION TO FRANKLIN PETITION FOR WAIVER

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Summary

FCC Rule 52.23(c) requires an incumbent LEC such as Franklin to provide LNP within six months of a *bona fide* request. Sprint PCS submitted such a request to Franklin on May 16, 2003, asking that Franklin provide LNP beginning on November 24, 2003.

Franklin waited four months before seeking a waiver of Rule 52.23(c). It seeks a waiver of this rule on the ground that providing LNP “is technically infeasible.” According to Franklin, its largest switch vendor would require “less than six months” to install needed upgrades.

Had Franklin ordered needed upgrades shortly after receiving Sprint PCS’ *bona fide* request, it would have likely been able to have provided LNP within the six-month period specified in Rule 52.23(c). Thus, it appears that the real reason Franklin seeks a waiver of Rule 52.23(c) is not because of technical infeasibility, but because Franklin has decided that it does not want to comply with the Commission’s LNP rules by ordering needed network upgrades on a timely basis.

Franklin further asserts that the costs it would incur to comply with the LNP rules would be “uneconomically burdensome” because needed LNP upgrades will cost \$66,500. However, such an expenditure is the equivalent of \$7.39 per customer (because Franklin serves 9,000 access lines). Even if the costs exceed Franklin’s estimates, LNP implementation should have no financial impact on the company given the Commission’s cost recovery program for LNP.

Franklin’s apparent argument – that it should not have to comply with FCC rules because it does not want to – does not constitute “good cause” justifying entry of a rule waiver. The Commission should direct North Center to order immediately the upgrades it needs to comply with the LNP statute and implementing rules.

Finally, Sprint encourages the Commission to allow rural ILECs to recover their LNP implementation costs over a period shorter than five years. In other contexts, the Commission has allowed rural ILECs to recover their costs over a faster amortization period than large ILECs, and it should consider similar relief in the context of LNP surcharges.

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Sprint Corporation, on behalf of its wireless division, Sprint Spectrum L.P., d/b/a Sprint PCS (“Sprint”), opposes the Petition for Waiver that Franklin Telephone Company, Inc. (“Franklin”) submitted on September 24, 2003.¹

Franklin’s waiver request is unprecedented. While the Commission has granted targeted waivers of its rule requiring LNP implementation within six months of a request, in all such cases, a waiver was granted because of circumstances beyond the LEC’s control (*e.g.*, vendor could not complete upgrades within the time specified, problems were encountered with installed LNP upgrades, intercarrier testing could not be completed). Here, by contrast, Franklin seeks a rule waiver for reasons entirely within its control *and* after making *no effort* to come into compliance with the rule. As discussed below, the reason why Franklin is unable to comply with the LNP rules is because it has refused to order, and continues to refuse to order, needed LNP network upgrades.

¹ See *Public Notice*, Wireline Competition Bureau Seeks Comment on the Requests for Waiver or Temporary Extension of the Requirement to Provide Local Number Portability to CMRS Providers, CC Docket No. 95-116, DA 03-3014 (Oct. 2, 2003). See also Franklin Telephone Cooperative, Inc. Petition for Waiver of Section 52.23(c) of the Commission’s Rules, CC Docket 95-116 (Sept. 24, 2003)(“Franklin Petition”).

An incumbent LEC's refusal to purchase upgrades needed to comply with FCC rules is not grounds for a rule waiver – especially where as here, the Commission has already developed a cost recovery program so that Franklin can recover its LNP costs.

I. INTRODUCTION/BACKGROUND FACTS

Franklin, an incumbent LEC that provides services in Mississippi,² has been aware for years that it would be required to provide LNP to wireless carriers such as Sprint PCS if they become LNP capable. As the Commission declared in its *First LNP Order*, “LECs are obligated under the statute to provide number portability to customers seeking to switch to CMRS carriers.”³ In the same *Order*, the Commission also adopted what was later re-codified as Rule 52.23(c), which provides:

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.⁴

Sprint submitted to Franklin a LNP *bona fide* request on May 16, 2003.⁵ Sprint asked that Franklin provide LNP in three of its switches that provide services in three of its ten rate centers: Artesia-Crawford, Eddiceton and Meadville.⁶ Sprint asked Franklin to provide LNP at these switches beginning on November 24, 2003.

The facts demonstrate that Franklin could have timely honored Sprint's *bona fide* request:

² See Franklin Exhibit 1 at 1.

³ *First LNP Order*, 11 FCC Rcd 8352, 8357 ¶ 8 (1996).

⁴ *Id.* at 8479, Rule 52.3(c). See also *Local Competition Order*, 11 FCC Rcd 15499, 19588 (1996)(re-codifying Rule 52.3(c) as Rule 52.23(c)). Given the clarity of this rule, there is no basis to Franklin's assertion that its LNP obligations “are unclear” or “uncertain.” Petition at 1 and 10.

⁵ See Franklin Petition, Attachment.

⁶ See *id.*

Based on discussions with Siemens, Franklin was told that it would cost \$34,000 to upgrade the software for the Siemens switch with a six-month delivery date. . . Nortel estimates that the upgrade of the switches could be accomplished in less than six months.⁷

Thus, had it placed its LNP upgrade order shortly after receiving Sprint's request, Franklin could have timely provided LNP (or come very close to meeting the six-month deadline).

Franklin did not, however, order necessary upgrades upon receiving Sprint's *bona fide* request. Instead, it waited four months – or until the “last day for such a request pursuant to the Commission's rules”⁸ – before filing its waiver request on September 24, 2003. Moreover, it appears that Franklin still has not ordered the needed LNP upgrades, having decided to delay placing its order until the Commission acts on its waiver request.⁹ Franklin objects to having to spend money to become compliant with FCC rules because the LNP upgrades it needs would cost the equivalent of \$7.39 for each of its access lines.¹⁰ Franklin characterizes its decision not to order the upgrades needed to comply with the LNP rule as “prudent.”¹¹

FCC Rule 52.23(e) specifies that to secure relief from providing LNP within six months of a request, the petitioner “must demonstrate through substantial, credible evidence the basis for its contention that it is unable to comply with the deployment schedule.”¹² The only reason why Franklin is unable to begin providing LNP on November 24, 2003 is because, upon receiving

⁷ Franklin Exhibit 1 at 1.

⁸ Franklin Petition at 1-2.

⁹ Franklin states that it “plans to complete deployment in the affected switches within one year following the clarification of its [LNP] obligations.” *Id.* at 14. Given that Nortel told Franklin that LNP upgrades could be installed in “less than six months,” Exhibit 1 at 1, it is apparent that Franklin intends to defer placing its order until after the FCC renders a decision on the instant waiver request.

¹⁰ Franklin states that it serves 9,000 access lines and that the LNP upgrades would cost \$66,500 – or \$7.39 per access line. *See* Franklin Petition at 3 and Exhibit 1 at 1.

¹¹ Franklin Petition at 14.

¹² 47 C.F.R. § 52.31(e).

Sprint's request, it decided not to comply with the rule by ordering needed network upgrades. The fact that Franklin decided unilaterally not to take the steps necessary to comply with the LNP rule is not grounds for a waiver.

II. FRANKLIN HAS NOT DEMONSTRATED ITS ENTITLEMENT TO A RULE WAIVER

A waiver applicant, the Commission has noted, "faces a high hurdle even at the starting gate."¹³ A waiver *may* be appropriate "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."¹⁴ Additionally, the applicant "must clearly demonstrate" that the general rule is "not in the public interest when applied to its particular case and that granting the waiver will not undermine the public policy served by the rule."¹⁵ Of course, "[t]he very essence of waiver is the assumed validity of the general rule."¹⁶ Sprint demonstrates below that the Franklin Petition does not begin to meet this rigorous standard for a rule waiver.

¹³ See *U S WEST Communications*, 7 FCC Rcd 4043, 4044 ¶ 6 (1992), quoting *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972). See also *Riverphone*, 3 FCC Rcd 4690, 4692 ¶ 13 (1988) ("A heavy burden traditionally has been placed upon one seeking a waiver to demonstrate that his arguments are substantially different from those which have been carefully considered at the Rule Making proceedings.").

¹⁴ *Phase II LNP Extension Order*, 13 FCC Rcd 9564, 9567-68 ¶ 16 (1998) (emphasis added), citing *Northeast Cellular v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), and *WAIT Radio*, 418 F.2d at 1157.

¹⁵ *U S WEST*, 12 FCC Rcd 8343, 8346 ¶ 10 (1997); *Bell Atlantic*, 12 FCC Rcd 10196, 10198 ¶ 5 (1996).

¹⁶ *WAIT Radio*, 418 F.2d at 1158. See also *Southwestern Bell*, 12 FCC Rcd 10231, 10239 ¶ 13 (1997); *U S WEST*, 7 FCC Rcd 4043, 4044 ¶ 6 (1992). Courts have recognized that the FCC "has broad discretion to deny waivers." *A/B Financial v. FCC*, No. 95-1027, 1995 U.S. App. LEXIS 37378, at *5 (D.C. Cir., Dec. 26 1995). See also *Orange Park Florida TV v. FCC*, 811 F.2d 664, 669 (D.C. Cir. 1987). Courts will reverse a waiver denial only if the FCC's reasons are "so insubstantial as to render that denial an abuse of discretion." *Melcher v. FCC*, 134 F.3d 1143, 1163 (D.C. Cir. 1998).

A. FRANKLIN HAS NOT SHOWN GOOD CAUSE JUSTIFYING ITS REQUESTED WAIVER

Commission rules specify that a rule waiver may be granted upon a showing of “good cause.”¹⁷ The Commission has prescribed in Rule 52.23(e) the particular showing that a LEC must make to obtain an extension of the LNP deadlines:

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 52.¹⁸

As the Commission has stated in denying an extension of the LNP deadlines, “we will not alter the basic premises [of the] Commission’s LNP schedule simply to make LNP implementation more convenient for a particular carrier.”¹⁹

Franklin seeks a “temporary extension” of the Rule 52.23 requirement that it provide LNP within six months of a *bona fide* request because, it asserts, providing LNP within six months “is technically infeasible”:

[T]o require the Company to implement number portability by the WLNP Deadline would impose a requirement that is technically infeasible. As attested to in Exhibit 1, the Company estimates that it will take a minimum of six months from the initial order date to install and test the required hardware and software upgrades.²⁰

But, LNP would have been technically feasible and Franklin could have likely met the six-month implementation deadline had it ordered necessary upgrades shortly after receiving Sprint’s *bona fide* request. To confirm, the **only** reason Franklin is unable to provide LNP and to comply with

¹⁷ 47 C.F.R. § 1.3. Franklin’s reliance on Rule 1.925 (*see* Petition at 5 n.12) is misplaced. Rule 1.925 applies to certain radio licensees, not to local exchange carriers like Franklin.

¹⁸ 47 C.F.R. § 52.23(e).

¹⁹ *Phase II LNP Extension Order*, 13 FCC Rcd 9564, 9575 ¶ 40 (1998).

²⁰ Franklin Petition at 1,4, 8, 9 and 14.. *See also id.* at Exhibit 1 at 1 (“Nortel estimated that the upgrade of the switches could be accomplished in less than six months.”).

the Commission's LNP rules is because Franklin has refused to purchase needed upgrades. In the end, Franklin seeks a waiver because it does not want to comply with the LNP rules.

The Commission has granted waivers of the requirement to provide LNP within six months of a request where a LEC's ability to comply with Rule 52.23 was due to circumstances *beyond* its control.²¹ However, Sprint is not aware of any order where the Commission granted a waiver of the Rule 52.23 because of circumstances *within* the LEC's control *and* where, as here, the subject carrier has made *no effort* towards compliance. And Sprint is not aware of any Commission order that has granted a rule waiver because the waiver applicant has simply decided not to comply with a rule. Clearly, Franklin has not demonstrated "good cause" for entry of the request waiver.

Any Commission delays in rejecting Franklin's waiver request will only reward Franklin for its recalcitrance – because a delayed FCC order will simply delay the date that Franklin finally places the orders for needed LNP upgrades. This is not a situation where a carrier cannot meet a regulatory deadline after making a good faith effort; *this is rather a situation where an incumbent carrier has made no effort at compliance* and has instead used the waiver procedure as a means to further delay meeting its legal obligations.

²¹ See, e.g., *OGC Telecomm Waiver Order*, 13 FCC Rcd 20839 (1998)(Two month extension granted because of vendor delays); *Roseville Telephone Waiver Order*, 13 FCC Rcd 17826 (1998)(19-day extension granted to complete intercarrier testing and to align implementation with the RBOC); *Nextlink Telephone Waiver Order*, 13 FCC Rcd 13485 (1998)(Two month extension granted to complete intercarrier testing and to align implementation with the RBOC); *Rio Virgin Telephone Waiver Order*, 13 FCC Rcd 12250 (1998)(Four month extension granted because of vendor delays in replacing a switch); *Southwestern Bell Waiver Order*, 13 FCC Rcd 9578 (1998)(One month extension granted because recently discovered problems in upgrades to network equipment); *AT&T Waiver Order*, 13 FCC Rcd 9564 (1998)(Three-week extension granted because of a change in NPAC administrator and equipment).

**B. BECOMING LNP CAPABLE IS NOT UNDULY ECONOMICALLY BURDENSOME,
AS FRANKLIN ASSERTS**

Franklin asserts that the costs it would incur in order to comply with the LNP rules would entail “a significant expense” and be “unduly economically burdensome.”²² This argument is not credible on its face given that Franklin does not seek a permanent exemption from Rule 52.23(c), but only a “temporary extension” of this Rule.²³ The issue raised by Franklin’s request for a “temporary extension” is limited to the question whether it should be required to incur its compliance costs in 2003 (in order to comply with Rule 52.23(c)) or instead incur this same expense in 2004.²⁴ On this timing issue, Franklin has not presented in its petition any evidence (*e.g.*, it would be cheaper to deploy LNP in 2004 rather than in 2003).

In addition, Franklin’s assertion that LNP implementation would constitute a “significant expense” is belied by the facts Franklin has submitted in the record. Franklin states that necessary LNP upgrades will cost \$66,500.²⁵ It further states it serves a total of 9,600 access lines.²⁶ Thus, the needed LNP upgrades would cost the equivalent of \$7.39 per access line.²⁷

²² See Franklin Petition at 2, 3, 4, 5, 6, 8 and 14.

²³ Franklin Petition at 1, 9 and 14.

²⁴ Because Franklin seeks only a “temporary extension” of Rule 52.23(c), there is no basis for its claim that grant of its waiver request would “avoid the potential waste of resources or . . . diminish the waste that would occur.” Franklin Petition at 9. Given the costs Franklin incurred to prepare its waiver request and will incur to defend it, Franklin will likely spend more ratepayer money by deferring its provision of LNP, as compared to providing LNP timely.

²⁵ See Franklin Exhibit 1 at 1. According to Franklin, Siemens will charge \$34,000 to install the upgrades on a Siemens switch and four remotes, and Nortel will charge a total of \$32,500 to install the upgrades on the seven Nortel switches. See *ibid.*

²⁶ See Franklin Petition at 3.

²⁷ Sprint acknowledges that Franklin may incur other LNP-related expenses, although Franklin does not identify in its petition these other expenses. The important point is that, regardless of Franklin’s total LNP implementation costs, the FCC has already developed a cost recovery mechanism so Franklin can recover these costs.

The Commission has held that incumbent LECs like Franklin can recover their LNP costs via a monthly federal surcharge.²⁸ Given this LNP cost recovery program, Franklin should be able to recover all of its LNP implementation expenses, and the company's implementation of LNP should thus have no financial impact on the company.

The Commission has held that a waiver applicant is not entitled to a rule waiver where compliance costs would be \$4.19 per customer.²⁹ Here, Franklin stated compliance costs will be \$7.39 per customer. A compliance cost of \$7.39 per customer cannot reasonably be characterized as "unduly economically burdensome." Indeed, given the federal LNP cost recovery program that the Commission has developed for incumbent LECs, the provision of LNP should have no economic effect on Franklin or its investors.

C. MOST OF FRANKLIN'S ARGUMENTS ARE LEGALLY IRRELEVANT

Franklin advances several arguments in its Petition as to why it thinks LNP is a bad idea.

Among other things, it asserts:

- Wireless service "at best" is "a complementary service" rather than "a competitive alternative" to Franklin's services.³⁰
- There is "no indication that any of [its] subscribers have an interest in substituting their wireline phone."³¹
- "[M]ost of [Franklin's] customers will receive no benefit from the provision of intermodal portability."³²
- "[A]ll of the subscribers of the Company would be adversely impacted by an increase in rates in order to accommodate the request of the CMRS provider."³³

²⁸ See 47 C.F.R. § 52.33; *Third LNP Order*, 13 FCC Rcd 11701, 11773-80 ¶¶ 135-49 (1998), *aff'd Third LNP Reconsideration Order*, 17 FCC Rcd 2578 (2002).

²⁹ See *Brunson Communications Waiver Denial Order*, 16 FCC Rcd 21499 (2001).

³⁰ Franklin Petition at 7.

³¹ *Id.* at 8.

³² *Id.* at 9.

³³ *Ibid.*

- It is “difficult to justify” the costs of LNP implementation when “few, if any, public benefits . . . may be gained by attempting to implement the capability to port numbers to the CMRS provider.”³⁴

These Franklin arguments are legally irrelevant to the relief it seeks. Franklin does not seek a permanent exemption from LNP requirements; it rather seeks only a “temporary extension” of the date by which it must begin providing LNP.³⁵ Yet, these Franklin arguments attack the very LNP statutory requirement, not the timing of making LNP available – the only issue that is relevant to request for a “temporary extension.” These Franklin arguments are also irrelevant because “[t]he very essence of waiver is the assumed validity of the general rule.”³⁶

D. FRANKLIN HAS NOT DEMONSTRATED HOW GRANT OF A WAIVER WOULD BETTER PROMOTE THE PUBLIC INTEREST

Both the Commission and appellate courts have held that to be eligible to receive a rule waiver, the applicant “must clearly demonstrate” that “special circumstances warrant a deviation from the general rule *and* such deviation will serve the public interest.”³⁷

Waiver is appropriate if special circumstances warrant a deviation from the general rules, and *such deviation would better serve the public interest than strict adherence to the general rule.*³⁸

While Franklin asserts that grant of a waiver would promote the public interest,³⁹ it has not submitted facts or “substantial credible evidence” that grant of the request waiver would “better serve the public interest” and better serve the interests of Franklin customers.⁴⁰

³⁴ *Id.* at 6.

³⁵ *See id.* at 1, 8 and 14.

³⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

³⁷ *Phase II LNP Extension Order*, 13 FCC Rcd 9564, 9567-68 ¶ 16 (1998)(emphasis added), *citing Northeast Cellular v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), and *WAIT Radio*, 418 F.2d at 1157; *U S WEST*, 12 FCC Rcd 8343, 8346 ¶ 10 (1997); *Bell Atlantic*, 12 FCC Rcd 10196, 10198 ¶ 5 (1996).

³⁸ *National Rural Telecommunications Cooperative*, DA 03-2627, at ¶ 11 (Aug. 12, 2003), *citing Northeast Cellular v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)(emphasis added).

The provision of LNP by incumbent LECs is a critical component of the competitive regime that Congress sought to foster in the 1996 Act. Congress, the Commission has observed, has “recognized that the inability of customers to retain their telephone numbers when changing local service providers hampers the development of local competition”:

Section 251(b)(2) removes a significant barrier to competition by ensuring that consumers can change carriers without forfeiting their existing telephone numbers.⁴¹

This past summer, the Commission reaffirmed that LNP remains “an important tool for enhancing competition, promoting numbering resource optimization, and giving consumers greater choices.”⁴²

Franklin, in seeking a “temporary extension” of the LNP deadlines, does not allege that its customers will benefit by a delay in the availability of new options, including the opportunity to port their number to wireless services. Franklin does not even allege that there are offsetting benefits by such a delay.⁴³ In short, Franklin does not provide any facts to support its argument that grant of a deferral would better promote the public interest than complying with the LNP rules.

³⁹ See Franklin Petition at 2, 6, 8 and 9.

⁴⁰ See 47 C.F.R. ¶ 52.23(e).

⁴¹ *Third LNP Order*, 13 FCC Rcd 11701, 11702-04 ¶¶ 3-4 (1998).

⁴² *Fourth LNP Order*, CC Docket No. 95-116, FCC 03-126, at ¶ 9 (June 18, 2003).

⁴³ Franklin does not present any facts in support of its assertion that delaying the availability of LNP will “diminish the waste that would occur.” Petition at 9. Again, given the costs of preparing and prosecuting its waiver request, Franklin may expend more total expenses by deferring LNP implementation than the costs it would have incurred by timely implementing the capability.

**E. THE PUBLIC INTEREST WOULD BE HARMED BY GRANT OF FRANKLIN'S REQUEST
BECAUSE OF THE RESULTING WASTE OF SCARCE NUMBERING RESOURCES**

The public interest would be harmed by grant of Franklin's request because such action would promote telephone number inefficiencies by relieving Franklin from participating in thousands block pooling and by requiring new entrant competitors to therefore obtain additional NXX blocks rather than using the vast quantities of numbers that Franklin possesses but does not use.

Franklin serves a total of 9,000 access lines,⁴⁴ but holds a total of 100,000 telephone numbers.⁴⁵ Franklin's number utilization rate is thus less than nine percent (9%).⁴⁶ It is apparent that Franklin possesses large quantities of numbering resources – over 90,000 telephone numbers – that it does not use and will likely never use. If Franklin participated in number pooling, new entrant carriers would be able to use these unused numbers assigned to Franklin, rather than obtaining yet additional scarce numbering resources (in the form of 10,000 block NXX codes).

If, however, Franklin is relieved of its statutory obligation to provide number portability, it will then also be relieved of having to participate in number pooling. The Commission recently adopted a plan which “exempt[s] rural telephone companies . . . that have not received a request to provide LNP from the pooling requirement”:

⁴⁴ Franklin Petition at 3.

⁴⁵ According to Neustar's records, Franklin holds one NXX code in the 662 NPA (272) and nine NXX codes in the 601 NPA (277, 384, 532, 535, 598, 639, 694, 945 and 964).

⁴⁶ As a point of comparison, the utilization rate for the telecommunications industry overall is 39.2 percent – and the average utilization rate for wireless carriers like Sprint PCS is 47.8 percent. See Industry Analysis and Technology Division, *Numbering Resource Utilization in the United States as of December 31, 2002*, at Table 1 (July 2003).

We therefore exempt from the pooling requirement rural telephone companies, as defined in the Communications Act of 1934, as amended (the Act), that have not received a request of provide LNP.⁴⁷

Thus, if Franklin is relieved of its LNP obligation, the over 90,000 telephone numbers that it does not use will continue to be stranded. And, if Franklin is relieved of its LNP obligation, Sprint and other carriers that begin serving customers in Franklin's exchanges using their own numbers will be required to obtain their own NXX blocks for each Franklin exchange they serve, rather than using thousands blocks from the numbers Franklin does not use. Further, if only two competitive carriers provide services in each of Franklin's ten exchanges using their own numbering resources, these two carriers would require the assignment of yet another 290,000 numbers (two NXX codes per each of Franklin exchange). The assignment of 300,000 numbers for use in Franklin's rural service area makes no sense when Franklin already does not use over 90,000 of the 100,000 numbers assigned to it.

The Commission has held that implementation of "number pooling should be as expansive as possible in order to promote efficient and effective numbering resource optimization":

Pooling is essential to extending the life of the NANP by making the assignment and use of central office codes more efficient.⁴⁸

There are over two million Mississippi residents who live in the 601 and 662 area codes where Franklin provides its telecommunications services. The interests of these residents are not served when Franklin does not use 90 percent of the numbers assigned to it. And, the interests of these residents certainly would not be served if wireless or other competitive carriers require assignment of additional unused numbers because Franklin does not support number pooling.

⁴⁷ *Fourth Numbering Resource Optimization Order*, CC Docket No. 99-200, FCC 03-126, at ¶¶ 1 and 18 (June 18, 2003).

⁴⁸ *Fourth Numbering Resource Optimization Order*, CC Docket No. 99-200, FCC 03-126, at ¶ 15 (June 18, 2003).

Sprint submits that the public interest and the interests of the residents of the 601 and 662 area codes would not be served if Franklin is relieved from participating in number pooling because the Commission has excused Franklin from having to comply with its statutory LNP obligation.

F. FRANKLIN'S MISCELLANEOUS ARGUMENTS LACK MERIT

Franklin advances several additional arguments in its petition, but these arguments lack merit, as Sprint demonstrates below.

1. Franklin's Rating and Routing Concerns Are Unfounded

Franklin asserts that it does "not know how routing, rating and recording of the end user traffic related to any number portability will be achieved" and that implementation of LNP will result in unexplained "interconnection conundrums."⁴⁹ Franklin need not be concerned because, as Sprint has explained in response to a similar concern expressed by an RBOC, the rating and routing of land-to-mobile calls are unaffected by the implementation of LNP:

Whether a number is ported or not, a LEC such as Qwest merely has to route the call to the wireless carrier – *in exactly the same way it always has* – and to rate the call by reference to originating and terminating rate center – *as it always has*.⁵⁰

Incumbent LECs like Franklin rate calls as local or toll by comparing the NPA-NXX of the calling and called parties.⁵¹ For example, Franklin has been assigned the NXX, 662-272, for its Artesia-Crawford exchange, one of the exchanges where Sprint PCS has requested LNP. If a

⁴⁹ Franklin Petition at 1 and Exhibit 1 at 1. *See also id.* at 11, where Franklin expresses concern that callers to persons with ported numbers "would not know whether they were making a call to a nearby location or to a distant location, and may not know whether the call would be subjected to toll charges." In fact, Franklin customers have been making calls to wireless customers for years, without encountering the problems that Franklin recites.

⁵⁰ Letter from Luisa L. Lancetti, Sprint Vice President, to William Maher, Chief, Wireline Competition Bureau, and John Muleta, Chief, Wireless Telecommunications Bureau, CC Docket No. 95-116, at 4 (Aug. 18, 2003)(emphasis in original).

call by a Franklin customer to another Franklin customer containing the digits, 662-272, is local today, the call will remain local if the Franklin customer being called decides to port his number to Sprint PCS (or any other wireless carrier).

Nor will there be any confusion over the routing of calls from Franklin customers to Sprint PCS. Sprint uses a Type 2A interconnection in the Jackson LATA, whereby Sprint PCS connects to BellSouth's LATA tandem switch in both Columbus and Jackson, Mississippi.⁵² Thus, Franklin can route calls to Sprint PCS customers with ported numbers over the existing trunk group that connects its network with the LATA tandem switch in Columbus or Jackson.⁵³

There is, in summary, no basis to Franklin's concern that LEC-wireless porting will cause problems in the routing and rating of land-to-mobile calls.

2. Franklin's Geographic Location Portability Arguments Are Frivolous

Congress has defined number portability as the ability of customers to "retain, at the same location, existing telecommunications numbers . . . when switching from one telecommunications carrier to another."⁵⁴ Sprint PCS, a telecommunications carrier under the Communications Act, is prepared to provide its wireless services to Franklin customers "at the same location" where they currently receive their services from Franklin. Accordingly, under Section

⁵¹ See *Virginia Arbitration Order*, 17 FCC Rcd 27039, 27181 ¶ 301 (2002).

⁵² This Type 2 LATA tandem interconnection provides a wireless carrier with indirect interconnection with all other carriers that connect to the same LATA tandem switch. The FCC has already held that carriers can use indirect interconnection in a porting environment. See *First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7305 ¶ 121 (1997)("[T]o provide number portability, carriers can interconnect either directly or indirectly as required under Section 251(a)(1).").

⁵³ There is, therefore, no basis to Franklin's assertion that as mobile customers change their location, "LECs' service offerings, switching, and routing of originating calls to the ported numbers would need to be changed." Petition at 11-12. A LEC's obligation with a land-to-mobile call is limited to delivering the call to the wireless carrier's interconnection point in the originating LATA. The wireless carrier, not the LEC, has the responsibility to then transport the call to the wireless customer, regardless of the customer's location at the time.

251(b)(2) of the Act, Franklin is required to permit its customers to port their numbers to Sprint PCS when it becomes LNP capable.

Franklin now asserts that incumbent LECs like itself are not required to permit its customers to port *their* numbers to Sprint PCS and other mobile wireless carriers because wireless carriers have “the capability to allow the mobile subscriber to use the number outside the boundaries of the original rate center”:

Such an obligation would be considered “location” or “geographic” portability, an obligation that the FCC has already determined is not required by statute and would be contrary to the public interest.⁵⁵

In other words, according to Franklin, the Commission’s ruling in the *First LNP Order* – “LECs are obligated under the statute to provide number portability to customers seeking to switch to CMRS carriers”⁵⁶ – is legally erroneous because, Franklin says, LECs have no obligation to permit their customers to port their telephone numbers to any mobile wireless carriers.

This Franklin argument is frivolous. The Commission also need not entertain this argument because it constitutes “an untimely collateral attack on prior rulemakings.”⁵⁷ The Commission’s ruling in another waiver proceeding is equally applicable here:

We will not, in this waiver request proceeding, entertain a collateral attack on the Commission's decision. The appropriate avenue to pursue these issues further was to seek reconsideration of the Fourth Report. Dataradio did not do so, and may not do so here. Thus, to the extent Dataradio seeks to revisit the Commission's decisions in the Fourth Report in WT Docket No. 96-86, we dismiss its Pe-

⁵⁴ 47 U.S.C. § 153(30).

⁵⁵ Franklin Petition at 4. *See also id.* at 10-12.

⁵⁶ *First LNP Order*, 11 FCC Rcd 8352, 8357 ¶ 8 (1996). *See also id.* at 8443 ¶ 172 (“We regard switching among wireline service providers and broadband CMRS providers, or among broadband CMRS providers, as changing service providers” and thus falling within the definition of service provider portability.).

⁵⁷ *Minnesota PCS*, 17 FCC Rcd 126, 131 ¶ 11 (2001).

tion as moot given that the Commission has already addressed the matter and Dataradio did not submit a timely petition for reconsideration.⁵⁸

Given the Commission's unequivocal ruling that "LECs are obligated under the statute to provide number portability to customers seeking to switch to CMRS carriers," the Commission may not now reconsider this 1996 rulemaking order in this 2003 waiver proceeding.

In any event, Franklin confuses geographic location portability with the terminal mobility that is inherent with mobile wireless services.⁵⁹ Location portability, defined as the ability of customers "to retain existing telecommunications numbers . . . when moving from one physical location to another,"⁶⁰ generally does not involve any change in service providers.⁶¹ In addition, location portability, unlike service provider portability, involves the re-association, or re-rating, of a telephone number from the original rate center to another rate center. Location portability, unlike service provider portability, thus changes the way that calls to the number are rated as local or toll.

The Act requires an incumbent LEC like Franklin to permit its customers to port their numbers to "any telecommunications carrier" that provides services "at the same location" as the ILEC customer. This constitutes service provider portability under the Act, under the Commission's implementing rules, and under the industry's own interpretation of these rules.⁶²

⁵⁸ *Dataradio Corp.*, 16 FCC Rcd 21391, 21396 ¶ 12 (2001).

⁵⁹ Although a wireless handset may be physically located anywhere within a wireless network at any given time (this is inherent to mobile service), ILECs have never faced technical obstacles in routing and rating their land-to-mobile calls. The mobility associated with a wireless handset (and the number assigned to the handset) does not impact how LEC's either route or rate their land-to-mobile calls to wireless carriers, and nothing changes once LEC-wireless porting becomes available.

⁶⁰ 47 C.F.R. § 52.21(h)(i).

⁶¹ A geographic portability capability would be involved when a customer moves from one location to another, with the customer wanting to keep both his telephone number *and his service provider*.

⁶² NANC has described a situation where a "[w]ireline subscriber with telephone number 214-789-2222, located in RC [Rate Center] 7, wishes to change to wireless service while remaining at the same loca-

3. Franklin's "Challenges" to Sprint's *Bona Fide* Request Are Baseless

As noted above, Sprint submitted a *bona fide* request ("BFR") to Franklin on May 16, 2003. In response, Franklin "question[ed] whether the mailing constitute[s] a valid request for number portability."⁶³ Franklin appears to contend that it can exempt itself from its statutory LNP obligation simply by "challenging the validity of the request."⁶⁴

The BFR Sprint submitted to Franklin unquestionably is valid. The Commission has ruled that a valid BFR must contain three components:

Requesting telecommunications carriers must [1] specifically request portability, [2] identify the discrete geographic area covered by the request, and [3] provide a tentative date by which the carrier expects to utilize number portability to port prospective customers.⁶⁵

Sprint's BFR satisfied all three conditions. Sprint specifically requested LNP; it identified the discrete geographic areas covered by the request by identifying the three Franklin switches it wished be made LNP capable; and it asked Franklin to provide LNP effective November 24, 2003. In this regard, the Commission has specifically ruled that "Sprint's profile information exchange process is an example of the type of contact and technical information that would trigger an obligation to port."⁶⁶

tion." NANC has stated that in this example, "[p]orting would be permissible." NANC LNPA Working Group, Wireless – Wireline Service Provider Portability Rate Center Discussion, at 4 § 1.11 (Feb. 27, 1998).

⁶³ Letter from Sylvia Sene, Kraskin, Lesse & Cosson, to Fawn Romin, Sprint PCS, at 1 (June 16, 2003) ("Kraskin Letter"), a copy of which is appended to Franklin's Petition.

⁶⁴ Franklin Petition at 4.

⁶⁵ *Fourth LNP Order*, CC Docket No. 95-116, FCC 03-126, at ¶ 10 (June 18, 2003).

⁶⁶ *Local Number Portability*, CC Docket No. 95-116, *Memorandum Opinion and Order*, FCC 03-237, at 8 n.40 (Oct. 7, 2003) ("Wireless Porting Order"). Admittedly, the FCC made this ruling in the context of porting between wireless carriers, rather than LEC-wireless porting. But, it cannot credibly be argued that a LNP request format that is valid for wireless carriers is invalid when submitted instead to landline carriers. The technology a carrier uses in the provision of its services is irrelevant to the type of information required to trigger an LNP obligation.

Franklin identified two reasons in its response to Sprint PCS' BFR for "questioning the validity" of the BFR. It contended that its provision of LNP to mobile wireless services would constitute location portability rather than service provider portability.⁶⁷ This argument is baseless, as demonstrated above.

Franklin further asserted that there is "no local interconnection in place between Sprint PCS and the LEC, demonstrating the absence of Sprint PCS' local presence and any indication of its 'plans to operate' in the area."⁶⁸ In fact, "local" interconnection between the two carriers already exists. Both Franklin and Sprint PCS are located in the Memphis-Jackson Major Trading Area ("MTA"), and the Commission's "local" interconnection/reciprocal compensation rules apply to intraMTA traffic exchanged by a LEC and wireless carrier.⁶⁹ Both Franklin and Sprint PCS connect to the BellSouth LATA tandem switch in Columbus and Jackson. Thus, the two carriers are already interconnected (*albeit* indirectly), and their customers already exchange traffic with each other. In this regard, the Commission has previously recognized that carriers can use indirect interconnection in a porting environment:

Moreover, to provide number portability, carriers can interconnect either directly *or indirectly* as required under Section 251(a)(1).⁷⁰

⁶⁷ See Kraskin Letter at 2-3.

⁶⁸ See *id.* at 2. See also Franklin Petition at 5. In its petition, Franklin additionally asserts that Sprint PCS must prove to Franklin that it provides a "viable service." *Ibid.*

⁶⁹ See 47 C.F.R. § 51.701(b)(2).

⁷⁰ *First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7305 ¶ 121 (1997)(emphasis added). The FCC has specifically recognized that under Section 251(a), wireless carriers are not required to interconnect directly with other carriers. See, e.g., *First Local Competition Order*, 11 FCC Rcd 15499, 15991 ¶ 997 (1996). It has also recognized that with Type 2 interconnection, which carriers have utilized for nearly 20 years, wireless carriers interconnect indirectly with other carriers subtending the LATA tandem switch. See, e.g., *LEC-Wireless Carrier Interconnection Policy Statement*, 59 R.R.2d 1275, 1284 (1986); *LEC-Wireless Interconnection Declaratory Ruling*, 2 FCC Rcd 2910 ¶ 4, 2913 ¶ 29 (1987). Under 47 C.F.R. § 20.11(a), LECs are required to provide the type of interconnection that a wireless carrier requests, including Type 2 interconnection. See, e.g., *Bowles v. United Telephone*, 12 FCC Rcd 9840, 9849 ¶ 15 (1997). Type 2 interconnection is thus fully consistent with the FCC's "single POI per LATA" rule. See, e.g.,

Moreover, earlier this month the Commission reaffirmed that direct interconnection is not a condition precedent to porting among wireless carriers:

[W]e conclude that carriers may not impose non-porting related restrictions on the porting out process. * * * Nothing in the rules provides that wireless carriers must port numbers only in cases where the requesting carrier has numbering resources and/or *a direct interconnection in the rate center associated with the number to be ported and wireless carriers may not demand that carriers meet these conditions before porting.*⁷¹

Although the Commission was careful to point out that its ruling was limited to porting between wireless carriers, logically, there is no reason to follow a different practice with regard to LEC-wireless porting. There is, in summary, no basis to Franklin's unsupported assertion that there is no "local" interconnection between Franklin and Sprint PCS. The fact that carriers may interconnect indirectly *via* a LATA tandem switch for the exchange of local traffic does not mean that interconnection is not "local."

Sprint's BFR satisfied the requirements that the Commission has established for BFRs, and Franklin cannot ignore valid BFRs by requiring the submitting carrier to prove to Franklin's satisfaction that it provides "viable service in the Company's service territory."⁷² Whether Sprint PCS, or any other competing carrier, provides a "viable service" is a decision properly made by customers, not by the incumbent carrier.

Unified Intercarrier Compensation NPRM, 16 FCC Rcd 9610, 9634 ¶ 72 (2001); *Virginia Arbitration Order*, 17 FCC Rcd 27039, 27064 ¶ 52 (2002).

⁷¹ *Wireless Porting Order* at ¶¶ 11 and 21 (emphasis added).

⁷² Franklin Petition at 5.

4. Franklin Cannot Relieve Itself of Its Statutory LNP Obligation Because an Interconnection Contract Has Not Been Negotiated or Arbitrated

Franklin asserts in its petition that it can ignore its statutory obligation to provide LNP because “the process of negotiating an interconnection agreement” is not completed, “a process that the CMRS provider has not sought”:

In addition to the upgrades, . . . the necessity of negotiating an interconnection agreement could not be accomplished by the WLNP Deadline.⁷³

This Franklin argument is disingenuous. In response to Sprint's *bona fide* request, Franklin stated that it “has no need or desire to negotiate an agreement that goes beyond the standards that the FCC has set forth pursuant to Section 251.”⁷⁴ Franklin thus contends that it should be able to exempt itself from its statutory LNP obligation simply by refusing to negotiate in good faith with Sprint PCS.

Moreover, Sprint PCS has not sought an interconnection agreement with Franklin for the simple reason that such an agreement is not necessary. The two carriers exchange traffic today without an interconnection contract; LNP does not change call rating or routing in any way; and there is, therefore, no need for an interconnection contract before LNP is activated.

Of course, Franklin can ask Sprint PCS at any time to commence interconnection negotiations.⁷⁵ But Franklin may not avoid complying with its statutory LNP obligation pending the commencement (or completion) of interconnection negotiations. Franklin's LNP obligations, both under the Act and the Commission's implementing rules, are mandatory and not contingent.

⁷³ Franklin Petition at 8 and 13.

⁷⁴ Letter from Sylvia Sene, Kraskin, Lesse & Cosson LLC, to Fawn Romig, Sprint PCS Industry Compliance, at 3 (July 16, 2003), *appended to* Franklin's Petition.

⁷⁵ The FCC has required LECs and wireless carriers to negotiate the terms and conditions of interconnection in good faith. *See, e.g., Second CMRS Order*, 9 FCC Rcd 1411, 1497 ¶ 229 (1994). A wireless carrier's refusal to negotiate with a LEC requesting interconnection negotiations would not constitute good faith.

In this regard, the Commission has already rejected the ILEC argument that their obligations under Section 251(b) and implementing rules are contingent upon the execution of an interconnection contract.⁷⁶ And, in the context of porting between wireless carriers, the Commission reaffirmed this principle of law earlier this month:

Of course, nothing would prevent carriers from entering into interconnection agreements on a voluntary basis; however, *no carrier may unilaterally refuse to port with another carrier because that carrier will not enter into an interconnection agreement.*⁷⁷

There is, in summary, no basis to Franklin's argument that it can excuse itself from its statutory obligation to provide LNP pending the negotiation or arbitration of an interconnection agreement. If an interconnection agreement is not needed before LNP, such an agreement certainly is not necessary after LNP becomes available.

III. A PROPOSAL FOR RURAL ILEC LNP COST RECOVERY

The LNP implementation costs that Franklin has identified are relatively small: \$66,500, or the equivalent of \$7.39 per access line.⁷⁸ If Franklin is required to recover this cost over the five-year period that the Commission established for its LNP cost recovery program,⁷⁹ Franklin's surcharge would approximate less than thirteen cents (\$0.13) per month.

⁷⁶ See, e.g., *TSR Wireless v. U S WEST*, 15 FCC Rcd 11166 (2000), *aff'd Qwest v. FCC*, 252 F.3d 462 (D.C. Cir. 2001).

⁷⁷ *Wireless Porting Order* at ¶ 21 (emphasis added). Logically, there is no reason to follow a different practice with regard to LEC-wireless porting – especially given the FCC's ruling in the *TSR Wireless* case (interconnection contracts are not a prerequisite to ILEC duties under Section 251(b) of the Act).

⁷⁸ Franklin Exhibit 1 at 1. Again, Sprint acknowledges that Franklin will incur LNP implementation costs in addition to switch upgrade costs, but Franklin does not identify these other costs in its petition.

⁷⁹ The FCC chose the five-year period for the end-user charge because “it will enable incumbent LECs to recover their portability costs in a timely fashion, but will also help produce reasonable charges for customers and avoid imposing those charges for an unduly long period.” *Third LNP Order*, 13 FCC Rcd 11701, 11777 ¶ 144 (1998). See also *Third LNP Reconsideration Order*, 17 FCC Rcd 2578, 2619 ¶ 83 (2002).

The LNP surcharges currently assessed by larger ILECs range from \$0.24 to \$0.53 monthly. For example, the surcharge assessed by Sprint's local telephone companies is \$0.48 monthly.

Sprint believes that rural ILECs should be allowed to impose a surcharge that is comparable in size to that assessed today by larger ILECs. The experience with large ILEC surcharges demonstrates that surcharges at these levels have not adversely affected customers in any way. Indeed, Commission data confirms that household telephone subscribership penetration rates have increased since large ILECs began imposing their LNP surcharges.⁸⁰

Sprint therefore recommends that the Commission favorably entertain rural ILEC requests to recover their LNP implementation costs over a period shorter than five years. For example, a monthly surcharge of \$0.50 would enable Franklin to recover its identified costs in 15 months. It appears that little purpose would be served by requiring Franklin to recover its costs over a five-year period.

In other contexts, the Commission has allowed rural ILECs to recover costs incurred in implementing regulatory mandates over a shorter amortization period than large ILECs. For example, the Commission permitted rural ILECs to recover their equal access conversion costs in one year (the year the costs were incurred), while the Bell Operating Companies were required to recover their conversion costs over an eight-year period.⁸¹ The Commission should favorably consider the similar relief in the context of LNP surcharges for rural ILECs.

⁸⁰ See Universal Service Monitoring Report, at 6-10, Table 6.1 (Oct. 2002).

⁸¹ See *NECA Waiver Order*, 3 FCC Rcd 6042 (1988).

IV. CONCLUSION

Franklin is unable to comply with LNP requirements because it refuses to purchase the LNP upgrades it needs. A carrier's refusal to comply with rules is not the basis for a waiver grant: the Franklin petition should be denied.

Respectfully submitted,

SPRINT CORPORATION

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October 17, 2003

Certificate of Service

I, Karin E. Gray, hereby certify that I have on this 17th day of October 2003, served via e-mail, a copy of the foregoing Sprint Opposition to Inter-Community's Waiver Request, filed this date with the Secretary, Federal Communications Commission, to the persons listed below:

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