

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of)	
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
USTA, CenturyTel, Inc., and CenturyTel of)	
Colorado Joint Petition for Stay)	

**OPPOSITION TO STAY OF THE
CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION**

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Pursuant to section 1.45 of the Commission’s rules, 47 C.F.R. § 1.45(d), the Cellular Telecommunications & Internet Association (“CTIA”),¹ hereby submits its Opposition to the Joint Petition for Stay Pending Judicial Review filed by the United States Telecom Association (“USTA”), CenturyTel, Inc., and CenturyTel of Colorado, Inc. (collectively, “petitioners”).

I. SUMMARY AND INTRODUCTION

For over five years, Local Exchange Carriers (“LECs”) have attempted to unilaterally limit their local number portability (“LNP”) obligations with wireless carriers (“intermodal LNP”). Before industry working groups and the Commission, they have argued that intermodal LNP with wireless carriers should be limited, as wireline-wireline LNP is limited, to the LECs’

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

historic rate center boundaries. In negotiations with wireless carriers, they have attempted to unilaterally impose this constraint.

The details of the LECs' effort were first brought to the Commission in 1998, to which the Commission responded by seeking public comment on the disagreement between the wireline and wireless industries. In 2003, with the LECs continuing to insist that the wireline boundary for LNP was applicable to intermodal LNP, the Commission again sought comment on this issue in response to two petitions filed by CTIA.

After hearing from all interested parties over several rounds of comments, the Commission issued the *Intermodal Porting Order* which is the subject of the Petitioners' stay request. Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 03-284 (rel. Nov. 10, 2003) ("*Intermodal Porting Order*"). The order is an entirely permissible action on the part of the Commission. It is consistent with the original intent of the mandate, and conforms with all of the procedural requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706, and relevant judicial precedent.

Now, in the fifty-ninth minute of the eleventh hour, petitioners have come to the FCC asking it to stay a requirement that has existed since 1996. This untimely request for reconsideration cannot serve as a basis for staying the intermodal LNP requirement. Nor should it serve as a basis for delaying the public interest benefits from opening the local exchange monopoly to competition.

II. BACKGROUND

A. Intermodal LNP

Under section 251 of the Communications Act of 1934, as amended, 47 U.S.C. § 251(b)(2), all LECs have the obligation to provide LNP, to the extent it is technically feasible,

and in accordance with requirements established by the FCC. *Id.* In 1996, the Commission adopted the *LNP First Report and Order* which promulgated the LEC and wireless requirements for LNP. Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996) (“*LNP First Report and Order*”). Among the requirements was the obligation of LECs to “provide number portability to all telecommunications carriers, and thus to CMRS providers as well as wireline service providers.” *Id.* ¶ 152. This wireline-wireless LNP, or “intermodal LNP,” has been a fundamental part of the LNP requirements ever since.

Central to the Commission’s determination was the belief that wireless carriers would eventually offer services comparable to local exchange companies’ and compete in the local exchange marketplace. *See id.* ¶ 160. The FCC indicated that “development of CMRS is one of several potential sources of competition that we have identified to bring market forces to bear on the existing LECs.” *Id.* (quoting Southwestern Bell Mobile Systems, Inc., 11 FCC Rcd at 3386, ¶ 20 (1995)). Importantly, the Commission explained that “service provider [LNP] will encourage CMRS-wireline competition, creating incentives for carriers to reduce prices for telecommunications services and to invest in innovative technologies, and enhanc[e] flexibility for users of telecommunications services.” *Id.* This goal has continued to influence the Commission’s decisions involving the details of intermodal LNP.

In 1997, the Commission again pronounced that intermodal LNP “is in the public interest because [wireless carriers] are expected to compete in the local exchange market, and number portability will enhance competition among wireless service providers, as well as between wireless service providers and wireline service providers.” Telephone Number Portability, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236, ¶ 135 (1997). *See*

Telephone Number Portability, Third Report and Order, 13 FCC Rcd 11701, ¶ 18 (1998). The Commission has further explained that “the ability to carry a telephone number from one service provider, whether they be wireline or wireless, to another provider is an important element in the transition of [wireless] services from a complementary telecommunications service to a competitive equivalent to wireline services.” Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Second Report, 12 FCC Rcd 11266 at 11326 (1997). Most recently, in the July 2002 order extending the wireless LNP implementation deadline to November 24, 2003, the FCC recounted its decision that the “implementation of LNP... would enhance competition between [wireless] carriers as well as promote competition between wireless and wireline carriers.” Verizon Wireless’s Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, Memorandum Opinion and Order, 17 FCC Rcd 14972, ¶ 2 (2002).

Accordingly, since 1996, intermodal LNP has been an essential element of promoting one of the principal goals of the Telecommunications Act of 1996: opening the monopoly local exchange market to competition. There have never been any regulatory limitations on the LECs’ obligation to port with wireless carriers. The limitations now being sought by the wireline industry run counter to the very purpose of the intermodal requirement: to promote competition in a market that had little or none.

B. The Rate Center Issue

Notwithstanding the fact that the FCC has adopted no limit to the LECs’ obligation to port numbers with wireless carriers, many LECs seek to constrain the ability of consumers to port their wireline numbers to wireless carriers. Relying upon a decision in 1997 to limit *wireline* local number portability to the historic rate center boundaries of incumbent LECs, many

LECs argue that intermodal LNP is only required where wireless carriers maintain a “presence,” either through interconnection with the LEC or by registering telephone numbers, in the same wireline rate center that the customer’s number is associated with on the wireline network.² This, despite the fact that when the Commission adopted the wireline rate center boundary for wireline LNP it made clear that the rate center constraint did not apply to intermodal LNP. *See Telephone Number Portability, Second Report and Order*, 12 FCC Rcd 12281, ¶¶ 88-92 (1997).

The competitive and consumer consequences of the LEC position are very large, since there is wireline-wireless “rate center” overlap (in contrast to local service overlap) on average in only one of eight rate centers across the country. In other words, wireless carriers typically serve the same service area as a LEC by establishing a presence in one rate center where a LEC on average will have eight rate centers.³ Because the overwhelming majority of wireline customers will be located in a rate center where the wireless carrier of their choice has not established a presence (*i.e.* in seven out of every eight rate centers, on average), the LECs’ view of their number portability obligations would artificially deprive the great majority of wireline customers the opportunity to port their number to a wireless carrier.

² A “rate center” is a geographic area that utilizes a common geographical point of reference (rendered at latitudinal and longitudinal coordinates). Rate centers have historically been utilized by LECs to measure the distance of calls and calculate the rates for toll charges to their customers. North American Numbering Council Local Number Portability Administration Working Group Report on Wireless Wireline Integration, May 8, 1998, CC Docket No. 95-116, at 31, § 1.1 (filed May 18, 1998).

³ This network architecture is the most technically and cost-effective means of providing wireless service. Note that the wireless carrier has a “presence” in the LEC rate center because it provides service to customers in the area covered by the LEC rate center; what the wireless carrier may lack are the facilities the LECs claim must be associated with their wireline switch – facilities that are not required to provide service to wireless customers within the LEC rate center area.

In 1998, the North American Numbering Council (“NANC”), a federal advisory committee established by the FCC pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2 §§ 1-15, informed the Commission of the LEC efforts to constrain intermodal LNP. It provided a detailed report of the dispute between the LEC and wireless industries and explained that the two industries were unable to reach consensus as to whether intermodal LNP could be restricted to the wireline rate center boundary under the Commission’s rules. North American Numbering Council Local Number Portability Administration Working Group Report on Wireless Wireline Integration, May 8, 1998, CC Docket No. 95-116, at § 3.1 (filed May 18, 1998). It referred to this as the rate center disparity issue. The Commission released a Public Notice seeking comment on the NANC report. *See* Common Carrier Bureau Seeks Comment on North American Numbering Council Recommendation Concerning Local Number Portability Administration Wireline and Wireless Integration, CC Docket No. 95-116, *Public Notice*, 13 FCC Rcd 17342 (1998).

In response, several of USTA’s members filed comments with the Commission which addressed the rate center issue. SBC Communications specifically requested “guidance” from the Commission, but never suggested that a separate notice and comment rulemaking was required:

[T]he Commission needs to give the industry *guidance* as to whether this disparity in porting is acceptable. A clear *indication* from the Commission is needed to avoid any claim that treating a wireline provider differently than a wireless provider in the ability to port violates any Commission rule. In short, the Commission should *state* whether complete parity under this scenario is a requirement and if not, *state* that the presence of such a disparity is not the basis of any claim of discriminatory treatment.

Telephone Number Portability, SBC Communications, Inc. Comments at 4 (filed Aug. 10, 1998) (emphasis added).

Obtaining guidance on this issue was also important to the wireless industry. In January 2003, on behalf of its wireless members, CTIA filed a petition for declaratory ruling requesting the FCC clarify that wireline carriers have an obligation to port their customers' telephone numbers to a wireless carrier whose service area overlaps the wireline carrier's rate center, regardless of whether the wireless carrier has established a "physical" presence, as opposed to service presence, in the customer's particular rate center. In response, the FCC issued a Public Notice, published in the Federal Register, which sought comment on the rate center issue. *See Petition for Declaratory Ruling that Wireline Carriers Must Provide Portability to Wireless Carriers Operating Within Their Service Area*, 68 Fed. Reg. 7323 (Feb. 13, 2003). The Petitioners, along with many of USTA's members, filed comments addressing this issue.

Having failed to receive guidance, CTIA filed another petition seeking clarification of the rate center issue, as well as other LNP implementation issues. Again, the FCC issued a Public Notice, published in the Federal Register, seeking comment on these issues. *See Petition for Declaratory Ruling on Local Number Portability Implementation Issues*, 68 Fed. Reg. 34,547 (June 10, 2003). In response, Petitioner, USTA, argued for Commission action, not further rulemakings:

USTA agrees with the basic thrust of [the CTIA] Petition that a number of significant, pending number portability issues must be resolved by the FCC before wireless number portability is implemented. A failure on the part of the FCC to do so will result in substantial customer confusion, carrier disputes that will draw on FCC and/or state public service commission resources, and the wasting of significant . . . resources as unresolved issues are resolved over time through less efficient means.

Telephone Number Portability, USTA Comments at 3 (filed June 13, 2003) (emphasis added).

In response, the FCC released the *Intermodal Porting Order* which provided the necessary, and requested for, guidance. The *Intermodal Porting Order* is a declaration

that LECs cannot engage in the unilateral interpretation of their own regulatory obligations. It is a “clarification [of] wireline carriers’ *existing* obligation to port to wireless carriers.” *Intermodal Porting Order* at ¶ 26. While Petitioners and their members may have seen ambiguity in their regulatory duties in light of the wireline rules to port within a rate center, the *Intermodal Porting Order* affirms that the Commission “has never established limits with respect to wireline carriers’ obligation to port to wireless carriers.” *Id.*

Having had several opportunities to comment on the Commission’s intermodal LNP obligations, and having received all of the guidance they have requested (if not the answers they would have preferred), the LECs now come before the Commission to argue that they did not have proper notice of a perceived rule change, and that the Commission’s actions are therefore violative of the APA.

III. DISCUSSION

To obtain a stay of the *Intermodal Porting Order*, petitioners bear the heavy burden of demonstrating (1) a strong likelihood of success on the merits of their claims; (2) irreparable harm absent relief; (3) the balance of the equities is in their favor, meaning that a stay must not simply shift the burden to other interested parties; and (4) the public interest favors a stay.

Virginia Petroleum Jobbers Ass’n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Petitioners cannot satisfy any of these factors.

A. PETITIONERS HAVE NOT DEMONSTRATED A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR CLAIMS.

Petitioners argue that the *Intermodal Porting Order* constitutes a new “rule” that could only be promulgated after notice and comment rulemaking. This argument mischaracterizes the *Intermodal Porting Order*, ignores the administrative record, and misstates the law. Because the

Intermodal Porting Order merely clarified carrier porting obligations and did not change any existing rules, and because petitioners -- and all LECs for that matter -- had ample notice and opportunity to comment on the rate center issue addressed in that *Order*, the FCC possessed the discretion to provide LNP guidance “without issuing a new NPRM and engaging in a new round of notice and comment.” *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003).

1. The *Intermodal Porting Order* Does Not Constitute A New Rule.

Petitioners assert that the *Intermodal Porting Order* constitutes a new rule because it allegedly altered prior porting rules in three fundamental ways. All three of petitioners’ arguments lack merit and should be rejected.

First, the *Intermodal Porting Order* does not mandate location portability. In the LNP *First Report & Order*, the FCC declined to adopt a location portability requirement. Petitioners claim that the FCC has reversed this decision and imposed location portability because there is no guarantee that a customer who has ported a wireline number to a wireless carrier will stay in the same location. In other words, according to petitioners, intermodal porting is the same as location portability, which the FCC declined to adopt in the *LNP First Report and Order*. This argument is a red herring for two reasons. In the *Intermodal Porting Order*, the FCC considered this very question and concluded that intermodal porting without respect to the wireline rate center was not location portability. *Intermodal Porting Order* at ¶ 28. As the Commission explained, intermodal porting will not impact call rating (i.e., the charge imposed for the call). The FCC clarified that a wireline carrier must port to a wireless carrier whose coverage area overlaps the wireline rate center, provided that the two carriers maintain the ported number’s original rate center designation. *Intermodal Porting Order* at ¶¶ 22, 28. Because the ported number will remain rated in its original rate center -- that is, the number will not change

locations -- the rating of calls by LECs (and thus the price paid by subscribers for placing the call) to that number will not change even if the customer is mobile.

Petitioners cannot -- and do not -- dispute the fact that intermodal porting will not change call rating. Rather, they focus on the fact that wireless consumers may themselves change locations. This possibility exists any time intermodal porting occurs, as mobility is an inherent characteristic of wireless communications. Thus, petitioners' objection to location portability is really a disguised attack on the intermodal porting requirement itself. This attack is untimely. If petitioners wanted to challenge intermodal porting, they could and should have sought reconsideration of the *First Report & Order* in 1996. *See* 47 U.S.C. § 405. Because petitioners failed to do so, their location portability argument should be summarily rejected.

Even if the FCC considers petitioners' argument, the *LNP First Report & Order* confirms that location portability and intermodal porting are not the same thing. In that Order, the FCC rejected location portability and, at the same time, imposed a broad intermodal porting requirement on wireless and wireline carriers. When it embraced intermodal porting in the *LNP First Report & Order*, the FCC was well aware that customers might move from location to location, taking their ported numbers with them as they moved. Thus, in mandating intermodal LNP, the FCC has already determined that customer movement, standing alone, does not equal location portability. To equate the two now, and to render intermodal LNP a nullity as a result, would contravene basic canons of interpretation which counsel against reading two provisions in such a way as to allow one to negate the other. *See* Norman J. Singer, *Statutes and Statutory Construction* § 46:05 (6th ed. 2000) (it is a "cardinal rule that the general purpose, intent or purport of the whole act shall control, and that all parts be interpreted as subsidiary and harmonious to its manifest object, and if the language is susceptible of two constructions, one

which will carry out and the other defeat such manifest object, it should receive the former construction”) (citations omitted).

Second, petitioners argue that the FCC changed the process for resolving LNP implementation issues. This argument fails as a matter of law. Notice and comment rulemaking is required when an agency adopts “substantive” changes to prior regulations. *Sprint*, 315 F.3d at 374. Procedural changes do not necessitate the same formalities.

Furthermore, petitioners’ argument that a procedural change has occurred is incorrect. In the LNP *Second Report & Order*, the FCC directed NANC to work with carriers to achieve industry consensus on porting issues and to make recommendations to the Commission regarding the technical and operational standards necessary for the efficient implementation of LNP. *LNP Second Report & Order* ¶ 92. As required by the Federal Advisory Committee Act, *see supra* at 4, however, the FCC made clear that it retained ultimate decisionmaking authority on number portability matters. *LNP Second Report and Order* at ¶ 129. Thus, the FCC further directed NANC to submit disputed issues to the Commission for review and final disposition. *Id.* at 130. The FCC has adhered to this process in this instance. On several occasions, NANC attempted to resolve the rate center issue, to no avail. Unable to achieve industry-wide agreement, NANC escalated the rate center issue to the FCC for resolution. In resolving the rate center issue in the *Intermodal Porting Order*, the FCC simply fulfilled its statutory duty consistent with the process set forth in the *Second Report & Order*.

Contrary to petitioners’ suggestion, the FCC was not obliged to issue a notice of proposed rulemaking to “take the process out of the NANC’s hands.” *Joint Pet.* at 8. Under the Federal Advisory Committee Act, the FCC always retained final decisionmaking authority. As such, resolution of the rate center question was never in the NANC’s “hands” to begin with.

Third, petitioners argue that the *Intermodal Porting Order* “represents a radical departure from the nondiscrimination and competitive neutrality standards that the Commission has embraced in its prior number portability orders.” *Joint Pet.* at 9. The FCC’s LNP mandate is indeed about promoting competition in the monopoly local exchange market on fair and non-discriminatory terms. However, the FCC has never mandated complete parity. Nor would it. Wireline and wireless technologies each possess unique characteristics that appeal to customers differently. Differentiation, either between the nature or quality of the service, may seem unusual to petitioners, but it is an essential element of a competitive market. Ignoring those different characteristics, and treating wireless carriers as if they were bound by the same limitations as wireline carriers, would deprive consumers of the very competitive benefits that LNP was intended to generate. This result would be illogical and was appropriately rejected by the FCC when it clarified that a wireline carrier must port to a wireless carrier whose service area overlaps the wireline rate center.

Equally as important, the competitive obstacles that wireline carriers may face are not attributable to the *Intermodal Porting Order* or any other FCC requirements. Rather, “[t]o the extent that wireline carriers may have fewer opportunities to win customers through porting, this disparity results from the wireline network architecture and state regulatory requirements.” *Intermodal Porting Order* at ¶ 27. Staying the *Intermodal Porting Order* will not resolve either of these issues.

2. The *Intermodal Porting Order* Represents A Proper Exercise Of The FCC’s Adjudicatory Authority.

The APA gives the FCC a menu of options for issuing guidance to the telecommunications industry. One of these options is the initiation of formal notice and comment rulemaking, in which the FCC releases a “[g]eneral notice of proposed rule making ...

in the Federal Register” and gives “interested persons an opportunity to participate... through submission of written data, views, or arguments.” 5 U.S.C. § 553(b)-(c). Notice and comment rulemaking is required when the FCC seeks to change a prior regulation, but is not obligatory under other circumstances, such as when the agency merely intends to clarify the meaning of its rules. *Sprint*, 315 F.3d at 373-74.

When the FCC is not changing prior rules, it has the discretion to proceed either through rulemaking or adjudication. Specifically, as it did here, the FCC can issue a declaratory order “to terminate a controversy or remove uncertainty” about an existing rule. 5 U.S.C. § 554(e). A declaratory order can be issued “on motion” by a regulated party or on the Commission’s “own motion.” 47 C.F.R. § 1.2. The choice of which device to use -- rulemaking or adjudication -- lies exclusively with the FCC. *N.Y. State Comm’n on Cable Television v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984). “This is true regardless of whether the decision may affect agency policy and have general prospective application.” *Id.* As long as the FCC develops a record that contains “both sufficient quantity and diversity of information upon which to decide the questions presented,” its decision to proceed by adjudication in lieu of rulemaking is unassailable. *Id.*

Here, the FCC properly exercised its discretion to clarify the scope of carrier porting obligations through adjudication rather than rulemaking. In the *Intermodal Porting Order*, the FCC merely “provide[d] guidance to the industry on... [LNP] issues relating to porting between wireless and wireline carriers.” *Intermodal Porting Order* at ¶ 1. It did not create new rules requiring intermodal porting. This broad requirement was adopted six years ago in the *LNP First Report and Order*. In the *Intermodal Porting Order*, the FCC simply reaffirmed carriers’ broad porting obligations. The Commission “clarif[ied] that nothing in [its] rules limits porting

between wireline and wireless carriers to require the wireless carrier to have a physical point of interconnection or numbering resources in the rate center where the number is assigned.” *Id.* In addition, the Commission “clarif[ied] that wireline carriers may not require wireless carriers to enter into interconnection agreements as a precondition to porting between the carriers.” *Id.* In other words, the Commission only clarified and elucidated existing orders.

This was a proper exercise of the FCC’s discretionary authority, particularly because the Commission gave all interested parties -- petitioners included -- notice of the issues and an opportunity to be heard. Petitioners argue that notice and comment rulemaking was necessary because the FCC did not have a full record upon which to resolve questions concerning the scope of carrier porting obligations. Petitioners also argue that they lacked adequate notice that the FCC was considering whether the intermodal porting obligation extended outside the wireline rate center. Both of these contentions are inconsistent with the facts. The issues were fully aired before the Commission, which had the benefit of comments from petitioners as well as countless other parties, LECs and wireless carriers included. The FCC released notice of CTIA’s January Petition in the Federal Register on Thursday, February 13, 2003, requesting comment.⁴ Twenty-five parties including petitioners submitted comments; sixteen parties, including USTA, submitted reply comments. The FCC published notice of receipt of CTIA’s May Petition in the Federal Register on Tuesday, June 10, 2003, again inviting comment.⁵ Thirty-one parties including USTA filed comments; twenty parties again including USTA filed reply comments. Petitioners aggressively advocated for their interests before the FCC through multiple written submissions and *ex parte* meetings addressing the rate center issue in response to CTIA’s

⁴ 68 Fed. Reg. 7323 (Feb. 13, 2003).

⁵ 68 Fed. Reg. 34,547-548 (June 10, 2003).

petitions. *See, e.g.*, Letter from Mary J. Sisak, Attorney for CenturyTel, Inc., to Marlene H. Dortch, Sec'y, FCC (filed May 15, 2003) (stating that CTIA's position on the rate center issue would "create a disparity in number portability and could force changes in ILEC local calling areas and/or rating of calls"); *Telephone Number Portability; Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association*, CC Docket No. 95-116, USTA Comments at 1, 5-8 (filed Feb. 26, 2003) (discussing how portability requirements should be confined to existing rate centers). It is untenable and disingenuous for petitioners to argue that they lacked notice of the rate center issue and were somehow deprived of an opportunity to be heard on that issue.

Because the FCC gave adequate notice of CTIA's petitions, and issued its LNP guidance after compiling an exhaustive record, there is simply no reason in law or fact to stay the *Intermodal Porting Order*. *See N.Y. State Comm'n*, 749 F.2d at 815 (holding that the FCC's declaratory ruling preempting local regulation was proper because interested parties had adequate notice and opportunity to comment and the issues were ripe for resolution). The FCC already has heard, addressed, and rejected wireline carriers' arguments against porting with wireless carriers. The FCC also has read numerous *ex parte* filings and comments specifically relating to CTIA's petitions. The FCC was provided "with both sufficient quantity and diversity of information upon which to decide the questions presented" in those petitions. *Id.* Under such circumstances, there is "no advantage to be gained... by requiring the Commission to proceed by the formalities of rulemaking rather than through adjudication." *Chisolm v. FCC*, 538 F.2d 349, 365 (D.C. Cir. 1976). The rate center issue has been fully aired before the Commission and, as a result, it is "difficult to see how requiring the Commission to go through the motions of notice and comment rulemaking at this point would in any way improve the quality of the information

available to the Commission or change its decision.” *Id.* Thus, staying the *Intermodal Porting Order* would simply delay the consumer benefits of LNP while “the Commission accomplished the same objective under a different label.” *Id.* Neither the APA, nor judicial precedent, requires the FCC to engage in the “empty formality” of redundant rulemaking. *Id.*; *see also Sprint*, 315 F.3d at 373 (“the APA does not simply erect arbitrary hoops through which federal agencies must jump without reason”).⁶

3. Alternatively, The *Intermodal Porting Order* Is An Interpretative Rule That Is Exempt From The APA’s Notice And Comment Requirements.

In addition to providing guidance through declaratory rulings, the FCC is also empowered to resolve uncertainty by issuing interpretative rules, which are exempt from the APA’s notice and comment requirements. *See* 5 U.S.C. § 553(b)(3)(A). “A rule is interpretative if it is promulgated by an agency having authority to issue substantive rules and if it attempts to clarify an existing rule but does not change existing law, policy, or practice.” *United States v. Yuzary*, 55 F.3d 47, 51-52 (2d Cir. 1995) (internal quotation omitted). “[I]t is the proper function of interpretative rules to clarify ambiguities.” *Id.*

In determining whether an agency statement is interpretative -- and exempt from notice and comment -- or substantive -- and subject to the notice and comment requirement -- the following factors are relevant:

⁶ Tellingly, petitioners fail to identify a single new argument or bit of evidence that they would proffer to the FCC if rulemaking proceedings were commenced. Indeed, rather than show that a rulemaking would expand the record, and thereby improve the FCC’s decisionmaking, petitioners simply argue that they are not obliged to come forward with new arguments or considerations. This argument is untenable. At a minimum, petitioners must show -- or at least suggest -- how a stay and new rulemaking proceedings would enhance the FCC’s ability to resolve the rate center issue.

(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule.

American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993). An affirmative answer to any of these questions means that the statement is substantive and, thus, subject to the APA's formal rulemaking strictures. *Id.*

In this instance, it is clear that the FCC issued an interpretative rather than substantive rule. First, there was an adequate legislative basis for enforcing wireline-wireless porting requirements. The FCC promulgated broad porting requirements in the *LNP First Report and Order*, requiring wireline carriers to port with wireless carriers. Failure to comply with this mandate would be a failure to obey the law as it existed before the *Intermodal Porting Order* was issued. Second, the *Intermodal Porting Order's* Ordering Clauses do not contain any direction to amend or make additions to the Code of Federal Regulations. Thus, the contents of the *Intermodal Porting Order* are not "substantive" or "legislative" under the second prong of the test. *Cf. Sprint*, 315 F.3d at 373. Third, the FCC did not explicitly invoke its legislative authority here. In fact, the Commission strongly indicated its intention not to do so. The FCC repeatedly stated that it was "clarifying" or interpreting existing obligations of wireline carriers to port with wireless carriers. It was not implementing a "new rule" and not acting in its legislative capacity. Hence, the *Intermodal Porting Order* is "interpretative" under the third prong of the test. Fourth, the *Intermodal Porting Order* did not amend an existing rule. The Commission merely clarified carriers' existing obligations under the *LNP First Report and Order*. As the FCC thoroughly explained, 47 U.S.C. § 251(b)(2) and the *LNP First Report and*

Order impose a broad mandate requiring wireline carriers to port to wireless carriers when technically feasible. Unlike it did for intramodal porting between wireline carriers, the FCC has never limited or changed this broad intermodal requirement. Rather, the *Intermodal Porting Order* merely provided needed guidance to the wireline and wireless industries to assist them in achieving implementation of LNP by the November 24, 2003 deadline where the wireline industry was attempting to unilaterally limit its porting obligations. As such, it is clear that the *Intermodal Porting Order* was interpretative and not subject to notice and comment.

4. *Sprint* Is Distinguishable From The Present Case.

Petitioners rely extensively on the D.C. Circuit's recent *Sprint* decision. That reliance is wholly misplaced. As an initial matter, nothing in *Sprint* affects the ability of the Commission to clarify its rules or provide guidance where necessary. *Id.* at 373 (“agencies possess the authority in some instances to clarify or set aside existing rules without issuing a new NPRM and engaging in a new round of notice and comment.”). *Sprint* does not overturn the basic principles of administrative law, summarized above, which have for decades permitted agencies to clarify and interpret their own rules.

Moreover, the principles set forth in *Sprint* are largely fact specific -- facts which are distinguishable from the present situation. As explained by the court, in the orders underlying the *Sprint* decision, the Commission modified and revised its rules by shifting certain compensation burdens from one class of carriers to another, while not publishing a notice of proposed rulemaking published in the Federal Register. As the court explained, the Commission “largely jettisoned the approach adopted” in an earlier order. *Id.* at 373. Not only was it facially clear that the Commission had changed the requirements, the Commission itself acknowledged that it had “modified” and “revised” its rules, and it amended the Code of Federal Regulations accordingly. *Id.* at 373, 377.

Contrary to the Petitioners' suggestions, *Sprint* merely reaffirms well-settled precedent that an agency may not change its rules without sufficient notice and comment, but it may issue a "clarification ... embodied in an interpretive rule that is exempt from notice and comment." *Id.* at 374.

The only similarity between the *Sprint* case and the present case is that the Commission did not issue a notice of proposed rulemaking. It did not have to, and nothing in *Sprint* changes that. The *Intermodal Porting Order* does not repudiate a previous rule, nor is it irreconcilable with one. *Cf. id.* at 374. Petitioners cannot point to a rule change or a shift in regulatory burdens. Unlike *Sprint*, the Commission never claimed to be modifying or revising a rule; to the contrary the *Intermodal Porting Order* makes clear that it is merely clarifying carriers' long-standing obligation to engage in intermodal LNP without constraint. In fact, *Sprint* stands for the proposition that the Commission could not have ruled otherwise. Had the Commission decided to limit intermodal portability to the LECs' rate center boundaries, and constrain the ability of most consumers to engage in intermodal LNP where they had not previously been constrained, it would have amounted to an impermissible change in the LNP rules. It would have completely shifted the cost-benefit analysis which, with full intermodal porting may have supported requiring wireless carriers to spend hundreds of millions of dollars, completely fails if most consumers are locked-in to their wireline carrier as a result of a regulatory, not technological constraint. *See* 47 U.S.C. 251(b) (requiring LECs to engage in number portability to the extent technically feasible).

LECs now have the clarification they have sought for years; they understand that nothing in the FCC's orders directing them to participate in intermodal LNP authorizes them to unilaterally establish the rate center as the boundary for intermodal LNP.

B. PETITIONERS CANNOT DEMONSTRATE THAT THEY WILL BE IRREPARABLY HARMED ABSENT A STAY.

Petitioners have not shown -- and cannot show -- that they will be irreparably harmed absent a stay. “Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough” to satisfy the irreparable harm prong for injunctive relief. *Virginia Petroleum Jobbers*, 259 F.2d at 925. Here, petitioners’ entire irreparable harm argument is based on the fact that, if intermodal LNP goes forward, they may lose customers to wireless carriers. This argument ignores the fundamental fact that the entire LNP mandate is about promoting competition by increasing consumer choices and facilitating intermodal mobility. Consumers will not leave wireline carriers because of anything in the *Intermodal Porting Order*, but, instead, because of the vagaries of the market. Those happy with the price and service of their wireline carriers will stay, while those who are not will have the freedom to switch. This is the fundamental operation of a competitive market. Moreover, this is the result that the FCC intended and that wireline carriers have known about since 1996 when the FCC imposed the intermodal LNP mandate in the *LNP First Report and Order*. In any event, even if the loss of customers could be considered an injury here, that injury is purely economic and does not warrant extraordinary stay relief. *Id.*

C. THE BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST WEIGH HEAVILY AGAINST A STAY.

Petitioners argue that a stay is justified to prevent economic harm to them and their members, and that no harm will come to any other interested parties. In particular, they note that the wireless industry has opposed LNP in the past and that a delay of intermodal LNP could not “plausibly” harm the industry. Glaringly absent from any consideration of the equities in the Petition is the harm that further delay would cause consumers by preventing the realization of competition to local exchange monopolies.

As an initial matter, a stay would cause significant harm to the wireless industry. Although the industry has not uniformly supported the mandate, it has spent hundreds of millions of dollars investing in and preparing for LNP. See Thomas M. Lenard and Brent D. Mast, “Taxes and Regulation: The Effects of Mandates on Wireless Phone Users,” at 19 (Oct. 18, 2003), available at <http://pff.org/publications/communications/pop10.18wirelessmandates.pdf> (estimating the initial cost of wireless LNP implementation at over \$900 million and \$4.74 billion over the next ten years). If intermodal LNP is stayed or limited to the rate center boundary, the cost benefit analysis upon which the entire wireless LNP mandate rests would collapse. The wireless industry will have made all of the investment, with only half the ability to compete as the Commission had intended when it first ordered wireless LNP. In other words, a stay would simply shift the alleged burden on wireline carriers to wireless carriers and their customers. Courts have made clear that a stay should not issue if it will merely transfer the burden from one party to another: “[r]elief saving one claimant from irreparable injury, at the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents.” *Virginia Petroleum Jobbers*, 259 F.2d at 925.

Moreover, and perhaps more importantly, American consumers will be severely harmed if intermodal LNP is delayed. As explained above, intermodal LNP may be the linchpin to prying open the local exchange monopoly held by petitioners and the members of USTA. The Commission made clear many times over several years that intermodal LNP will be critical to bringing local exchange competition to consumers.

The petitioners’ suggestion that a stay would actually serve consumer interests by forestalling consumer confusion associated with LNP strains all credulity. They support their argument with completely unsubstantiated assertions. See *Joint Pet.* at 15 (“individuals most

interested in intermodal portability are also individuals who may be likely to change residences often within the same urban area. Such individuals are also likely to want to switch numbers repeatedly from wireline to wireless carriers.”). Concededly, LNP is going to cause consumer confusion. A stay of intermodal LNP, however, will not solve the problem. In fact, because of all of the attention brought to bear over the last several months on LNP and the Commission’s LNP decisions, including intermodal LNP,⁷ it is more likely that consumers will be more confused and frustrated if they cannot port their numbers on November 24, 2003.

⁷ No less than 500 articles have discussed wireless LNP just during the last 60 days, including widely read publications like the Washington Post, Wall Street Journal, New York Times, Financial Times of London, and Consumer Reports.

IV. CONCLUSION

For all of the foregoing reasons, CTIA respectfully requests that the Commission reject petitioners' stay request, deny the Petition, and enforce intermodal LNP as scheduled on November 24, 2003.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
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November 20, 2003

CERTIFICATE OF SERVICE

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