

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Numbering Resource Optimization</b>	)	<b>CC Docket No. 99-200</b>
	)	
<b>Telephone Number Portability</b>	)	<b>CC Docket No. 95-116</b>
	)	
<b>Petition of E.N.M.R. Telephone Cooperative for Clarification, or in the Alternative, Limited Waiver and Extension of its Porting and Pooling Obligations</b>	)	
	)	

To: The Commission

**PETITION OF E.N.M.R. TELEPHONE COOPERATIVE  
FOR CLARIFICATION, OR IN THE ALTERNATIVE, LIMITED WAIVER AND  
EXTENSION**

E.N.M.R. Telephone Cooperative (“ENMR”), by its attorneys, and pursuant to Sections 1.3 and 52.23 of the rules and regulations of the Federal Communications Commission (“FCC” or “Commission”), requests clarification of the intermodal porting and pooling obligations, or in the alternative and to the extent necessary, a limited waiver and extension of its obligations established by the Commission in its November 10, 2003 *Intermodal Order*.<sup>1</sup> Specifically, ENMR requests that the Commission clarify that its porting and pooling obligations are those of a carrier providing service outside of the top 100 Metropolitan Statistical Areas (“MSAs”), or in the alternative and to the extent necessary, that the Commission waive and extend ENMR’s

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<sup>1</sup> *In re Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in CC Docket No. 95-116; FCC 03-284 (November 10, 2003) (“*Intermodal Order*”).

compliance deadline for implementing Local Number Portability (“LNP”) in Torrance County until the later of May 24, 2004, or six months after receiving a request to port.<sup>2</sup>

## I. BACKGROUND

On November 10, 2003, the Commission issued its *Intermodal Order* that, *inter alia*, required wireline carriers located in the top 100 MSAs to be capable by November 24, 2003 of porting numbers to wireless carriers that do not have a point of interconnection or numbering resources in the rate center where the customer’s wireline number is provisioned. Wireline carriers serving areas outside of the top 100 MSAs were given until May 24, 2004 to achieve such capability.<sup>3</sup>

ENMR is a rural telephone company as defined by the Communications Act of 1934, as amended (“the Act”).<sup>4</sup> ENMR provides local exchange service and intraLATA toll service to approximately 12,747 access lines in the Southeastern portions of New Mexico and a very small portion of Western Texas. In addition, ENMR provides exchange access service to interexchange carriers (“IXCs”). All of these services are provided pursuant to tariffs. Specifically, ENMR serves portions of Colfax, Curry, De Baca, Guadalupe, Harding, Lincoln, Quay, San Miguel, Socorro, Torrance, and Union counties in New Mexico and the Western edge of Deaf Smith and Parmer counties in Texas. With the exception of a small portion of Torrance County, where ENMR serves 264 landline customers, of which 159 are residential customers and 105 are business customers, none of ENMR’s telephone service area falls inside of the top 100 MSAs. According to the most recent U.S. Census Bureau data, 6,024 households are located in

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<sup>2</sup> See *Intermodal Order* ¶ 29. See also, 47 C.F.R. § 52.23.

<sup>3</sup> *Intermodal Order* ¶ 29.

<sup>4</sup> 47 U.S.C. §153(37).

Torrance County.<sup>5</sup> ENMR, therefore, serves less than 2.6% of the households in Torrance County.

In the FCC's *First R&O*, the FCC required all local exchange carriers operating within the "top 100" MSAs to offer long-term service provider portability beginning on October 1, 1997 and concluding on December 31, 1998, according to the FCC's deployment schedule.<sup>6</sup> At that time, the FCC listed the Albuquerque, NM MSA within the top 100 MSAs in its deployment schedule. The U.S. Census Bureau and the Office of Management and Budget ("OMB") defined the Albuquerque MSA as including only Bernalillo, Sandoval, and Valencia Counties.<sup>7</sup> At that time, the U.S. Census Bureau did not include Torrance County in the Albuquerque MSA. In 2001, when the Commission updated the list of the top 100 MSAs in the *NRO III*, Torrance County was still not included in the Albuquerque MSA.<sup>8</sup> Since it released its *NRO III*, the FCC has not issued an updated list of the top 100 MSAs, and the counties included therein. Accordingly, ENMR has always understood its porting and pooling obligations to be those of a carrier that provides service outside the "top 100" MSAs.

On October 23, 2003, however, counsel for ENMR discovered that as of June 6, 2003, the Office of Management and Budget ("OMB") now includes Torrance County, New Mexico in the Albuquerque, New Mexico MSA ("Albuquerque MSA").<sup>9</sup> Prior to June 6, 2003, MSAs were defined as of June 30, 1999, and as noted above, OMB did not include Torrance County in the

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<sup>5</sup> See, <http://quickfacts.census.gov/qfd/states/35000.html>.

<sup>6</sup> See *Telephone Number Portability*, First Report and Order, 11 FCC Rcd 8352 (1996) ("*First R&O*") (subsequent history omitted).

<sup>7</sup> See OMB Bulletin No. 99-04.

<sup>8</sup> See *Numbering Resource Optimization*, Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, 17 FCC Rcd 252 (2001) ("*NRO III*") App. D.

<sup>9</sup> See OMB Bulletin No. 03-04.

Albuquerque MSA.<sup>10</sup> Counsel notified ENMR of this discovery on October 25, 2003. Because ENMR provides service in Tarrant County, ENMR could be considered to be providing service within one of the “top 100” MSAs and absent clarification or waiver of the FCC’s rules, is subject to the FCC’s deadline for wireline carriers within the top 100 MSAs to immediately implement LNP.<sup>11</sup>

Western Wireless Corporation (“Western Wireless”) previously brought this MSA-definition issue before the Commission in a petition requesting clarification of the porting and pooling obligations applicable to cellular carriers.<sup>12</sup> In its petition, Western Wireless requested that the Commission clarify that cellular carriers licensed to provide service in RSAs or small MSAs are by definition not subject to the number porting and pooling obligations applicable to carriers providing service in the “top 100” MSAs. The Cellular Telecommunications & Internet Association (“CTIA”) also requested clarification of the MSA-definition issue in its May 13, 2003 *Implementation Petition*.<sup>13</sup> Although this clarification request was in reference to a wireless carrier’s porting obligations, the shifting MSA boundary issue is also relevant to local exchange carriers (“LECs”) and remains unresolved.

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<sup>10</sup> See OMB Bulletin No. 99-04.

<sup>11</sup> See *Intermodal Order*.

<sup>12</sup> See Supplement to Petition for Waiver And Petition for Clarification of Western Wireless Corporation filed March 3, 2003 (“*Western Wireless Petition*”). See also, *The Commission Seeks Comment on the Petition of Western Wireless for Waiver of the Commission’s Number Pooling Requirements*, DA 03-860 (March 24, 2003) (“*Public Notice*”). At the time that the FCC sought comment on the *Western Wireless Petition*, OMB had not yet redefined the Albuquerque MSA to include Tarrant County, and accordingly, ENMR was clearly outside the top 100 MSAs. In addition, the Commission had not yet issued the *Intermodal Order*, and accordingly, ENMR did not believe that it was obligated to port numbers to carriers that had not established local interconnection arrangements with ENMR.

<sup>13</sup> Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association filed May 13, 2003 in CC Docket No. 95-116 (“*Implementation Petition*”).

To date, the Commission has yet to act on the *Western Wireless Petition*, the *CTIA Implementation Petition*, or the individual requests of carriers that may be affected by periodic shifts in MSA boundaries. Although the Commission clarified that the largest 100 MSAs includes MSAs listed in either the original or subsequent lists of top 100 MSAs,<sup>14</sup> the Commission has yet to address the specific treatment of shifts in MSA boundaries and the impact that such shifts have on the obligations of carriers operating in predominately rural counties that have subsequently been included in a top 100 MSA.

While ENMR does not believe it is suddenly required to meet the obligations of a wireline carrier within a top 100 MSA, out of an abundance of caution, ENMR requests that the Commission confirm this position. Alternatively and to the extent necessary, ENMR requests that the Commission waive and extend ENMR's porting and pooling compliance deadlines to make them consistent throughout its service area as a carrier providing service outside of the top 100 MSAs.

## **II. ARGUMENT**

### **A. The Commission Should Clarify That ENMR's Obligations Are Those of a Carrier Providing Service Outside of the Top 100 MSAs**

The FCC should clarify that ENMR's porting obligations are those of a carrier providing service outside the top 100 MSAs. Torrance County has never been included in any FCC-released update to the top 100 MSAs, and should not be considered within the top 100 MSAs for the purposes of pooling and porting. In the *NRO III*, the FCC determined that carriers would have an additional six months to implement LNP upon the release of an updated list of the top

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<sup>14</sup> See *Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability*, Fourth Report and Order in CC Docket No. 99-200 and CC Docket No. 95-116, and Further Notice of Proposed Rulemaking in CC Docket No. 99-200, FCC 03-126 ¶ 20 (June 18, 2003) ("*NRO IV*").

100 MSAs.<sup>15</sup> The June 6, 2003 redefinition of MSAs should not accelerate ENMR's compliance deadline without adequate notice.<sup>16</sup> The Commission, however, has never provided notice of a change in MSA boundaries for the purpose of FCC-regulations, and ENMR has reasonably relied on the FCC and OMB definition of MSAs prior to June 6, 2003. Therefore, ENMR believes that its service area does not fall within a top 100 MSA for purposes of porting and pooling.

Alternatively, and to the extent necessary, ENMR requests a waiver and extension of its porting and pooling obligations.

**B. Good Cause Exists for an Extension of ENMR's Compliance Deadlines Because the June 2003-Redefinition of MSA Boundaries is an Extraordinary Circumstance Beyond ENMR's Control and It Would be Impossible for ENMR to Implement LNP by November 24, 2003**

Pursuant to Rule Section 1.3, the Commission may waive a rule for good cause shown. Pursuant to the FCC's *Intermodal Order*, carriers inside the 100 largest MSAs, or outside the 100 largest MSAs after a transition period, may file petitions for waiver of their obligation to port numbers to wireless carriers, if they can provide substantial, credible evidence that there are special circumstances that warrant departure from existing rules.<sup>17</sup> In addition, pursuant to Rule Section 52.23, a carrier may request an extension of its LNP implementation deadline by demonstrating that extraordinary circumstances beyond its control prevent it from being able to comply with the deadline.<sup>18</sup> Specifically, the carrier must: (1) demonstrate why it is unable to meet the deadline, (2) explain what steps it has taken to comply, (3) identify particular switches,

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<sup>15</sup> See *NRO III* ¶ 127.

<sup>16</sup> See Petition of Advantage Cellular Systems, Inc. for Clarification, or in the Alternative, Limited Waiver and Extension, filed September 25, 2003 in CC Docket Nos. 95-116 and 99-200.

<sup>17</sup> See *Intermodal Order* ¶ 30; See also, 47 C.F.R. § 1.3.

<sup>18</sup> *First R&O* ¶ 85 (1996).

(4) provide a time when deployment will be complete in the switch(es), and (5) propose milestones for compliance.<sup>19</sup>

Good cause exists for a waiver and extension of ENMR's deadline because the June 6, 2003 redefinition of MSAs is an extraordinary circumstance beyond ENMR's control, and of which ENMR learned only on October 25, 2003.<sup>20</sup> At the time that ENMR received requests to port, Torrance County was not included within the Albuquerque MSA.<sup>21</sup> The intervening OMB redefinition of the Albuquerque MSA was clearly beyond ENMR's control.

The Commission has never provided ENMR with notice of any change in the FCC's definition of MSAs, much less of the June 6, 2003 redefinition of MSAs.<sup>22</sup> Accordingly, ENMR has reasonably relied on the FCC's unambiguous definition of the top 100 MSAs in planning for the implementation of LNP.<sup>23</sup>

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<sup>19</sup> See 47 C.F.R. § 52.23(e).

<sup>20</sup> ENMR did not seek a waiver on October 25<sup>th</sup> because the FCC had not yet issued the *Intermodal Order* and ENMR did not believe it was obligated to port to carriers with no local interconnection. Immediately upon release of the *Intermodal Order*, ENMR moved with all reasonable diligence and alacrity in filing this petition. Accordingly, to the extent necessary, ENMR requests a waiver of the sixty-day advanced filing requirement contained in section 52.23(e) of the Commission's rules.

<sup>21</sup> Although ENMR disputes the validity of the requests, for the limited purpose of this Petition, ENMR will assume that the requests were *bona fide*.

<sup>22</sup> In *NRO III*, the Commission noted that the 100 largest MSAs had changed in several respects from the list identified in the 1990 U.S. Census. See *NRO III* ¶126. In footnote 312, the Commission specifically enumerated the changes in the ordering of "top 100" list. *Id.* note 312. The Commission, however, never recognized or noted any change in the boundaries of any of the MSAs. To ENMR's knowledge, the Commission has yet to notify carriers of the June 6, 2003 redefinition of MSAs or to address the impact on carriers that, due exclusively to OMB boundary changes, serve individual counties that were never considered to be part of a top 100 MSA but are now considered by OMB to be part of a top 100 MSA.

<sup>23</sup> The FCC's recently released Consumer Fact Sheet for Wireless Local Number Portability depicts a map of the MSAs where wireless LNP will be available starting November 24, 2003. This map, however, does not show Torrance County as being included in the Albuquerque MSA.

In its *Intermodal Order*, the FCC stated:

[For] wireline carriers operating in areas outside of the 100 largest MSAs, we hereby waive, until May 24, 2004, the requirement that these carriers port numbers to wireless carriers that do not have a point of interconnection or numbering resources in the rate center where the customer's wireline number is provisioned.<sup>24</sup>

In establishing the November 24 intermodal portability deadline in its *Intermodal Order*, the FCC expressly noted that “many wireline carriers outside the top 100 MSAs may require some additional time to prepare for implementation of intermodal portability” and recognized the need for a “transition period [to] help ensure a smooth transition for carriers operating outside of the 100 largest MSAs and provide them with sufficient time to make necessary modifications to their systems.”<sup>25</sup> Thus, the Commission waived the intermodal portability deadline until May 24, 2004 for wireline carriers located outside of the top 100 MSAs.<sup>26</sup>

In the present case, the overwhelming majority (approximately 98%) of ENMR's telephone service area and customers fall outside of the top 100 MSAs. That a miniscule fraction of ENMR's total customer base happen to be located in a county that formerly was considered to be outside of a top 100 MSA and is now within a top 100 MSA, does not alter the fact that ENMR needs exactly the same transition period to provide intermodal portability as it would have needed had it not served those 264 Torrance County customers.

In many different contexts the Commission has granted waivers of its rules or applied different rules in cases where either the number of people affected by the rule or the impact of variance from the rule was shown to be *de minimis*. For example, *de minimis* waivers have been

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<sup>24</sup> *Intermodal Order* ¶ 29.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

granted in the context of the Commission's dialing parity rules,<sup>27</sup> tariff and access charge rules,<sup>28</sup> jurisdictional separations rules,<sup>29</sup> affiliate transactions rules,<sup>30</sup> cellular service area rules,<sup>31</sup> PCS build out rules,<sup>32</sup> CMRS spectrum cap rules,<sup>33</sup> short spacing rules,<sup>34</sup> duopoly and cross-ownership rules,<sup>35</sup> anti-trafficking rules,<sup>36</sup> signal carriage and blackout rules,<sup>37</sup> and program access rules.<sup>38</sup>

In the present case these *de minimis* standards are satisfied. Not only do the Torrance County customers represent a miniscule fraction of ENMR's customer base of 12,747, they also

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<sup>27</sup> See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Petition of U S WEST Communications, Inc. for Waiver of Dialing Parity Dates Established in March 23, 1999 Dialing Parity Order*, 1999 FCC LEXIS 4863 (October 1, 1999).

<sup>28</sup> See *CenturyTel of Northwest Arkansas, LLC and Century Tel of Central Arkansas, LLC*, 15 FCC Rcd 25437 (2000).

<sup>29</sup> See *GTE Midwest Incorporated*, 9 FCC Rcd 7789 (1994); *GTE Southwest Incorporated*, 9 FCC Rcd 7785 (1994); *United Utilities, Inc.*, 9 FCC Rcd 7793 (1994); *Telephone Utilities of Washington, Inc.*, 7 FCC Rcd 3007 (1992).

<sup>30</sup> See *US West, Inc.*, 15 FCC Rcd 4400 (2000).

<sup>31</sup> See *Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules*, Second Report and Order, 7 FCC Rcd 2449 (1992).

<sup>32</sup> See *Monet Mobile Networks, Inc.*, 17 FCC Rcd 18381 (2002); *Minnesota PCS Limited Partnership*, 17 FCC Rcd 16371 (2002).

<sup>33</sup> See *Cingular Wireless LLC*, 24 CR 874 (2001).

<sup>34</sup> See *Rural Initiatives For Shelter And Education; American Indian Broadcast Group, Inc.* 8 FCC Rcd 2472, (1993); *Baltimore Radio Show, Inc.*, 5 FCC Rcd 3712 (1990).

<sup>35</sup> See *Iowa State University Broadcasting Corporation*, 9 FCC Rcd 481 (1993); *Hubbard Broadcasting, Inc.*, 2 FCC Rcd 7374 (1987); *Acadian Television Corp.*, 51 RR2d 743 (1982); *KSOO-TV Inc.*, 43 FCC2d 879 (1973); *Meridian Broadcasting Partnership*, 8 FCC Rcd 8399 (1993).

<sup>36</sup> See *SLT Cable T.V., Inc.* 10 FCC Rcd 8598 (1995).

<sup>37</sup> See *Buckeye Cablevision, Inc.*, 8 FCC Rcd 7944 (1993); *Capitol Cablevision Corporation*, 71 FCC 2d 281 (1979); *Village CATV, Inc.*, 39 FCC 2d 288 (1973); *Continental Cablevision of Lansing, Inc.*, 57 FCC 2d 86 (1975); *Orangeburg Cable TV, Inc.*, 50 RR 2d 538 (1981); *Putnam All Channel Cable Vision, Inc.*, 70 FCC 2d 695 (1978); *Eastern Connecticut Cable Television, Inc.*, 51 FCC 2d 921 (1975); *Missouri Valley Communications, Inc.*, 58 FCC 1101 (1976); *Harbor-Vue Cable TV, Inc.*, 42 FCC 2d 1067 (1973); *Diversified Communications Investors, Inc.*, 37 FCC 2d 981 (1972).

<sup>38</sup> See *Petition of Walt Disney Company for Waiver of Program Access Rules*, 9 FCC Rcd 4007 (1994).

represent a very small fraction of the 6,024 households that are located in Torrance County and of the 281,052 households that are presently located in the Albuquerque, MN MSA.<sup>39</sup> Granting the relief sought by ENMR would have a negligible impact on the Commission's stated policy of promoting intermodal competition and would provide ENMR with the same transition period that the Commission granted to similarly situated rural carriers. ENMR, therefore, requests that the Commission rule that ENMR's intermodal porting obligations are those of a carrier providing service outside of the top 100 MSAs. Alternatively, and to the extent necessary, ENMR requests a limited waiver and extension of its intermodal porting obligations until May 24, 2004.

As noted above, were ENMR required to immediately implement LNP, ENMR would not have sufficient notice from the release of the *Intermodal Order*, and it would be impossible for ENMR to implement LNP immediately. This grossly accelerated deployment would derail ENMR's network planning and would force ENMR to divert resources in an inefficient manner. This result would not serve the public interest. Such a grossly accelerated deployment also would be inconsistent with the Commission's determination to allow carriers at least nine months notice prior to a requirement to implement LNP.<sup>40</sup>

More importantly, if the Commission were to determine that ENMR does not fall within a *de minimis* exception, ENMR will not have a legal way to route calls to wireless carriers that do not have a point of interconnection within the various rate centers where ENMR's local numbers are provisioned. Under New Mexico law, ENMR is prohibited from transporting local traffic beyond its certificated service area.<sup>41</sup> Furthermore, ENMR's existing exchange access

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<sup>39</sup> See, <http://quickfacts.census.gov/qfd/states>.

<sup>40</sup> See *First R&O* ¶ 85.

<sup>41</sup> See generally, New Mexico Public Utilities Commission Rule § 17.11.5.7 (defining what is required and allowed of certificated carriers). 17 NMAC 13.5.

tariff and intrastate toll tariff do not permit ENMR to place local traffic on these trunks.<sup>42</sup> In sum, even if ENMR could be technically ready to port by November 24, it could not do so because it is illegal for ENMR to unilaterally send local traffic over existing trunks that are governed by tariffs that only permit toll traffic to be carried on such trunks.

As demonstrated herein, because of the unusual facts in this case, requiring ENMR to implement LNP on the schedule established for carriers operating in the top 100 urban markets would be inequitable, unduly burdensome and contrary to the public interest. The June OMB redefinition of MSAs was a circumstance clearly beyond ENMR's control, and it will be impossible for ENMR to implement LNP immediately. Good cause therefore exists for the Commission to grant a limited waiver and extension of ENMR's deadline for implementing number porting and pooling to make those requirements consistent with the requirements applicable to other carriers providing service outside of the top 100 MSAs.

### **III. CONCLUSION**

For the reasons discussed above, ENMR respectfully requests that the Commission clarify that ENMR's porting and pooling obligations are those of a carrier providing service outside of the top 100 MSAs. In the alternative, and to the extent necessary, ENMR respectfully requests that the Commission waive and extend ENMR's compliance deadlines and allow ENMR to implement LNP as a carrier providing service outside the "top 100" MSAs.

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<sup>42</sup> See *National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5*. This tariff can be viewed at <http://www.neca.org/media/tariff5.pdf>; and See generally, *ENMR Telephone Cooperative, Inc. Intrastate Access Service Tariff, State of New Mexico*.



