

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

In the Matter of)
)
Telephone Number Portability) **CC Docket No. 95-116**
)
CTIA Petitions for Declaratory Ruling on)
Wireline-Wireless Porting Issues)

EMERGENCY JOINT PETITION FOR PARTIAL STAY AND CLARIFICATION

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TABLE OF CONTENTS

	Page
<u>INTRODUCTION AND SUMMARY</u>	2
<u>I. THE COMPLIANCE DEADLINES ESTABLISHED BY THE <i>ORDER</i> ARE NOT CONSISTENT WITH THE OPERATIONS AND CHARACTERISTICS OF THE 2 PERCENT CARRIERS.</u>	5
<u>A. UNLIKE THE LARGER LECs THAT ARE THE PREDOMINANT SERVICE PROVIDERS IN THE TOP 100 MSAs, THE 2 PERCENT CARRIERS HAVE NOT BEEN REQUIRED UNDER THE COMMISSION’S EXISTING RULES TO DEPLOY NUMBER PORTING CAPABILITY.</u>	6
<u>B. GOOD CAUSE EXISTS TO STAY THE EFFECTIVENESS OF THE <i>ORDER</i> ON THE 2 PERCENT CARRIERS PENDING RECONSIDERATION AND CLARIFICATION OF ADDITIONAL ASPECTS OF THE COMPLIANCE DEADLINES ESTABLISHED IN THE <i>ORDER</i>.</u>	10
<u>II. THE TECHNICAL REQUIREMENTS OF THE <i>ORDER</i> REGARDING THE RATING AND ROUTING OF CALLS TO PORTED NUMBERS ARE NOT FACTUALLY CONSISTENT WITH THE OPERATIONS AND CHARACTERISTICS OF THE 2 PERCENT CARRIERS.</u>	12
<u>A. IT IS TECHNICALLY INFEASIBLE FOR THE 2 PERCENT CARRIERS TO COMPLY FULLY WITH THE REQUIREMENTS OF THE <i>ORDER</i> WITH RESPECT TO ROUTING AND RATING OF CALLS TO PORTED NUMBERS.</u>	12
<u>B. THE <i>ORDER</i> DISREGARDS THE FACTUAL REALITIES REGARDING THE NETWORKS AND OPERATIONS OF THE 2 PERCENT CARRIERS; THE <i>ORDER</i> DISREGARDS THE CONSUMER CONFUSION AND DISSATISFACTION THAT WILL RESULT IN THE ABSENCE OF A GRANT OF THE REQUESTED STAY.</u>	15
<u>III. THE COMMISSION SHOULD STAY THE EFFECTIVENESS OF THE <i>ORDER</i> ON THE 2 PERCENT CARRIERS UNTIL A MYRIAD OF ISSUES AFFECTING THOSE CARRIERS AND THEIR CUSTOMERS ARE ADDRESSED AND RESOLVED.</u>	19
<u>IV. CONCLUSION</u>	21

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Pursuant to Sections 1.41, 1.43 and 1.106(n) of the Commission's Rules,¹ the Independent Telephone and Telecommunications Alliance (ITTA), the National Telecommunications Cooperative Association (NTCA), and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) seek a partial stay of the Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, Telephone Number Portability, CC Docket No. 95-116, FCC 03-284 (released November 10, 2003) (the “*Order*”). ITTA, OPASTCO, and NTCA collectively represent the vast majority of rural, small and mid-sized incumbent local exchange carriers (ILECs). Individual Association members each serve less than two percent of the Nation’s subscriber lines (hereafter the 2 Percent Carriers). (The ITTA, NTCA and OPASTCO are collectively referred to herein as “Petitioners.”)

¹ 47 C.F.R. §§ 1.41, 1.43 and 1.106(n).

This request for Stay is submitted by each petitioner on behalf of its respective member Local Exchange Carriers (“LECs”), each of which is a LEC that serves fewer than 2 percent of the Nation’s subscriber lines.² Petitioners respectfully submit that, with respect to the 2 Percent Carriers, good cause exists to Stay the effectiveness of the Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, CC Docket No. 95-116, FCC 03-284 (released November 10, 2003) (the “*Order*”).

INTRODUCTION AND SUMMARY

The Request for Stay of the *Order* with Respect to the 2 Percent Carriers is Consistent with the Established Criteria for Grant of a Stay Request and the Commission’s Commitment to Consideration of Rural Carriers and Rural Customer Concerns. The Petitioners emphasize to the Commission that the intent of this request is not to stop or impede the evolution of either competition or local number portability (LNP). The purpose of this request is to ensure, consistent with the explicit Congressional intent set forth in the Act, that the provision³ of wireline-to-wireless LNP in the areas served by the 2 Percent Carriers is implemented in a manner that: 1) is technically feasible; 2) is not unduly economically burdensome; 3) does not result in a significant adverse impact on users of telecommunications service generally; and 4) is

2 See, Section 251(f)(2) of the Communications Act of 1934, as amended (the “Act”).

3 Petitioners are aware that the Commission has issued an Order in this proceeding dated November 20, 2003, in which the Commission denies a Joint petition for Stay filed by the United States Telecom Association and CenturyTel of Colorado, Inc. (the “Joint Petition”). Petitioners will not herein repeat the arguments that the Commission has addressed in the Order denying the Joint Petition except to the extent that the record and the public domain demonstrate the existence of facts limited to the concerns of the 2 percent carriers that have not previously been addressed. The Petitioners and their individual members reserve all rights with respect to seeking relief from a court of competent jurisdiction regarding any and all issues associated with the Order including those matters addressed by the Commission in its November 20, 2003 denial of the Joint Petition.

consistent with the public interest, convenience and necessity.⁴

The recognition of the distinction of the characteristics and concerns regarding the 2 Percent Carriers and their customers from the larger ILECs was first statutorily codified in the Telecommunications Act of 1996. The Commission, however, has a long history of policymaking both prior to and subsequent to 1996 that reflects the recognition of these distinctions. In fact, the consideration of these characteristics and distinctions has formed the basis for the Commission's thoughtful adoption of policy affecting rural subscribers and their rural incumbent providers.⁵

The *Order*, in contrast to the rigorous consideration of the distinct characteristics and concerns of the 2 Percent Carriers and their customers afforded by the Commission in other policy decisions, does not address and resolve rural deployment concerns. The Petitioners respectfully submit that the Commission's review of information on the record in this proceeding and otherwise in the public domain demonstrates that good cause exists to Stay the effectiveness of the *Order* with respect to the 2 Percent Carriers.

The Petitioners and other parties will undoubtedly seek formal reconsideration and clarification of the issues and concerns raised herein. When the Commission addresses the specific issues and concerns of the 2 Percent Carriers, Petitioners expect that the Commission will, consistent with its tradition of consideration and concern for issues affecting rural consumers and their service providers, modify the requirements for wireline-to-wireless LNP established in the *Order* with respect to the application of those requirements to the 2 Percent Carriers.

4 See, Section 251(f)(2) of the Act. The referenced criteria are those that are considered by a State Commission, pursuant to the Act, when determining whether a Section 251(b) or (c) interconnection requirement should be suspended or modified in the service areas of a 2 Percent Carrier.

5 See, e.g., *Rural Task Force Order*, 16 FCC Rcd 11244 (rel. May 23, 2001).

As demonstrated below, irreparable harm will result in the absence of the requested Stay. Two Percent Carriers will be subjected to technically infeasible compliance deadlines and resulting enforcement actions.⁶ They will also be required to invest limited resources in otherwise unnecessary efforts to comply with technical aspects of the *Order* that disregard the operational realities of the interconnection arrangements that wireless carriers have generally established with the networks of the 2 Percent Carriers. Moreover, in the absence of a Stay of the application of the *Order* to the 2 Percent Carriers, the opportunity contemplated by Congress for the State Commissions to exercise their rights and judgment in determining whether the deployment of number portability is in the public interest in the service areas of the 2 Percent Carriers could be adversely affected.⁷ Although wireless carriers may protest that the Stay will harm their competitive efforts, any such asserted harm is not irreparable. The Petitioners respectfully submit that the interests of all parties will be better served by ensuring that the deployment of number portability in the rural areas of the nation is achieved in a thoughtful manner that does not harm consumers or disregard the very real operational and network issues that must be addressed prior to any number being ported accurately.⁸

6 *See, Order* at n.76.

7 *See, Sec. 251(f)(2) of the Act.* In this regard, the Petitioners are concerned that the Commission may have inadvertently signaled an attempt to preempt the rights of State Commissions. In the context of its determination that interconnection agreements are not necessary for intermodal porting, the Commission states: “We also do not believe that the state regulatory oversight mechanism provided by Section 251 is necessary to protect consumers in this limited instance.” *Order* at para. 36. Apart from the fact that the Commission made no effort to substantiate how such a conclusory assertion meets the standards for forbearance set forth in Section 10 of the Act, the Commission cannot forbear from a function expressly delegated by Congress to State Commissions to exercise. Pending action on forthcoming petitions for reconsideration and clarification to establish that the Commission has not preempted the rights of the State Commissions pursuant to Section 251, Stay of the effectiveness of the *Order* with respect to the 2 Percent Carriers is warranted.

8 As described herein, in general wireless carriers do not have direct connectivity to the networks of the 2 Percent Carriers. Calls from wireline carriers to a point of interconnection with a wireless carrier

True consumer benefit from LNP can be achieved only if the porting process will actually work in such a manner to meet consumer expectations. The implementation and network challenges associated with LNP in rural markets is real and must be addressed. Accordingly, grant of the Stay requested by the Petitioners on behalf of the 2 Percent Carriers will serve the overall and balanced consideration of the public interest.⁹

I. The Compliance Deadlines Established by the *Order* are not Consistent with the Operations and Characteristics of the 2 Percent Carriers.

The *Order* requires wireline carriers operating within the top 100 Metropolitan Statistical Areas (MSAs) to support wireline-to-wireless porting by November 24, 2003.¹⁰ The language of the *Order* suggests that the Commission's intent may have been to provide the 2 Percent Carriers with a "transition period" to "help ensure a smooth transition" in the deployment of number portability in their service areas:

(F)or 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. We find that this transition period will 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.¹¹

beyond the wireline carrier's network are transported generally by interexchange carriers or intraLATA toll carriers that charge for their interexchange services. These wireline to wireless calls are not "local exchange service." See Section III, *infra*.

9 The Petitioners' request is, accordingly, consistent with the criteria for Stay: 1) Petitioners are likely to prevail on the merits; 2) irreparable harm will result in the absence of Stay; and 3) consideration of the effect on other parties in contrast to the overall public interest warrants grant of the Stay. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also, *Washington Metropolitan Transit Commission v. Holiday Tours, Ind.*, 559 F.2d 841 (D.C. Cir. 1977).

10 *Order* at para. 29.

11 *Id.* Moreover, Commissioner Adelstein, in supporting the Commission's waiver of LNP obligations for carriers operating outside of the top 100 MSAs until May 24, 2004, indicated that this decision was made because of "certain limitations on the ability of the nation's smallest LECs to technically provide LNP." Commissioner Martin also noted that small and rural carriers require this additional time in order to overcome the burdens associated with LNP deployment. See, *Id.*, Separate

Unfortunately, the realization of the intent expressed by the Commission to provide a transition cannot be achieved in the absence of the requested Stay because of the operational factual realities and network characteristics of the 2 Percent Carriers that are not addressed and resolved by the *Order*.

A. Unlike the Larger LECs that are the predominant service providers in the top 100 MSAs, the 2 Percent Carriers have not been required under the Commission’s existing rules to deploy number porting capability.

When the Commission released the *Order* on November 10, 2003 establishing the compliance deadline for wireline-to-wireless portability in the top 100 MSAs for November 24, 2003 (two weeks after the issuance of the *Order*), it clearly did not consider that many 2 Percent Carriers serve small portions of the access lines in the top 100 MSAs.¹² Given the language cited above reflecting the Commission’s intent to provide a “transition period” for carriers operating outside of the top 100 MSAs, it is likely that the Commission may have assumed that the carriers providing service in the top 100 MSAs have already deployed the hardware and software necessary to support number porting. With the development of competitive local exchange carrier (CLEC) competition in urban areas, the Commission may have expected that *bona fide* requests and the resulting deployment of number portability in the switches of the large carriers that predominantly serve these markets has already taken place.¹³ Under these

Statements of Commissioners Jonathan S. Adelstein and Commissioner Kevin J. Martin.

12 In those instances where 2 Percent Carriers serve portions of the top 100 MSAs, their service is generally provided in the more rural areas of those MSAs contiguous to the greater portion of the Carrier’s operations in rural market areas. The access lines served in the top 100 MSAs by a 2 Percent Carrier generally represents a relatively small percentage of that carrier’s total operations.

13 Under the Commission’s existing rules, service provider portability at the same location has been available upon request since December 31, 1998. 47 CFR § 52.23.

circumstances, and setting aside all of the other aspects of the *Order* that subject it to challenge, we take no position whether it may be unreasonable, arbitrary or capricious to provide only two weeks notice of the requirement to support intermodal wireline-to-wireless LNP.

These circumstances, however, are not the circumstances applicable to the 2 Percent Carriers. In general, the service areas served by the 2 Percent Carriers (with operations both inside and outside of the top 100 MSAs) have not been subjected to requests for number portability from CLECs. Accordingly, and consistent with the Commission's Rules and Regulations, the 2 Percent Carriers have not generally deployed the hardware and software in their switches to support number portability in their operations whether inside or outside of the top 100 MSAs except where they may have received BFR's from wireline carriers or CLECs within the rate center. For these carriers, it is technically infeasible to support wireline-to-wireless number portability in accordance with the *Order* by November 24, 2003. With respect to the 2 Percent Carriers, Stay of the effectiveness of the *Order* is necessary to avoid a clearly arbitrary result. So, contrary to the Commission's assertions, rural LECs have not necessarily had years to prepare for LNP in their markets.

A two-week notice is an unquestionably inadequate period within which to deploy wireline-to-wireless number porting capability in switches that have not previously been upgraded to support portability. The Commission's rules provide for a six-month period to deploy hardware or switch changes from the time of receipt of a legitimate request for portability.¹⁴

14 47 CFR § 52.23.

Moreover, with the November 2003 *Order* denying the Joint Petition filed by the United States Telecom Association (USTA and CenturyTel, Inc.), the Commission appears to indicate that, absent a *bona fide* request from a wireless carrier, LNP deployment is not expected. Prior to November 10, 2003, and the release of the Commission's *Order*, no person or entity could maintain with certainty that a request for intermodal portability, as described in the *Order*, could possibly be *bona fide*. In fact, the subject matter of the CTIA's request for declaratory ruling necessarily implied the very presence of uncertainty regarding the legitimacy of this new type of intermodal portability.¹⁵ Good reason existed for the CTIA's uncertainty. The intermodal portability that the wireless carriers seek does not require the customer to utilize the ported number "at the same location" where the number was previously used prior to porting.¹⁶

Without reaching all of the legal challenges which the *Order* will undoubtedly encounter, the Commission can address and grant this request for Stay based on the facts before it. The CTIA submitted its initial declaratory ruling request on January 23, 2003.

¹⁵ See, joint comments filed by NTCA and NECA, and comments filed by OPASTCO on Feb. 26, 2003 in response to, Comments Sought on CTIA Petition for Declaratory Ruling That Wireline Carriers Must Provide Portability to Wireless Carriers Operating Within Their Service Areas, CC Docket No. 95-116, 18 FCC Rcd 832 (2003) and also OPASTCO comments filed June 13, 2003 in response to, Comment Sought on CTIA Petition for Declaratory Ruling on Local Number Portability Implementation Issues, CC Docket No. 95-116, CC Docket No. 95-116, DA 03-1753 (rel. May 22, 2003), and also NTCA reply comments filed June 24, 2003 in response to Comment Sought on CTIA Petition for Declaratory Ruling on Local Number Portability Implementation Issues, CC Docket No. 95-116, DA 03-1753 (rel. May 22, 2003).

¹⁶ See, Section 3(30) of the Act which defines number portability in the context of use of the number "at the same location," not the same *service area*, not the same *CMRS license area*, not within the same *LATA*, and *not rated to the same rate center* - but "**at the same location.**" As previously noted, the Petitioners reserve their rights with respect to seeking relief from a court of competent jurisdiction regarding any and all issues associated with the *Order* including the issue of whether the *Order* exceeds the Commission's authority. At the end of the day, the Commission cannot escape the fact that the requirement to provide number portability is established in Section 251 of the Act and number portability is defined by Section 3 (30) of the Act. The *Order* clearly requires number portability beyond the scope of the Commission's authority. The disregard of the statutory limitations and subsequent requirement of investment by the 2 Percent Carriers, the consequent additional cost burden on the consumers they serve, and the likely anticipated competitive loss (compounded by the existing restrictions on wireless-to-wireline porting) will cause irreparable harm and disservice to the overall public interest. Good cause exists to grant the requested Stay.

The Commission's guidance was not provided until November 10, 2003. During the intervening period, there was no basis for any LEC to act to support the type of intermodal LNP requested by the wireless carriers.

Clearly, pending the issuance of the Commission's guidance regarding the issues raised by the CTIA, it would have been irresponsible for any LEC to incur significant investments in software upgrades or new switches to accommodate the intermodal portability requests, investments which may or may not have been consistent with the Commission's ultimate decisions but which would have unavoidably imposed additional cost burdens on consumers. In fact, the Commission itself in announcing the issuance of the *Order* stated in its November 12, 2003 Daily Digest, "FCC CLEARS WAY FOR LOCAL NUMBER PORTABILITY BETWEEN WIRELINE AND WIRELESS CARRIERS." The existence of uncertainty, confusion and the need for clarification was well known and understood by all parties and by the Commission. Under these circumstances, the 2 Percent Carriers should not be subjected to a two-week notice period to deploy a service that the Commission's own rules provide a six-month notice period prior to provisioning. The Petitioners submit that the requested Stay should be granted. To put the intermodal portability deadline in perspective, the wireless industry required at least 18-24 months to prepare for intermodal probability. It is neither reasonable nor practicable to subject the Petitioners to the November 24, 2003 compliance deadline.¹⁷

¹⁷ Petitioners recognize and anticipate that carriers may seek waiver of this requirement as noted in the *Order* at para. 30. The public interest will be further served by grant of the requested Stay which will obviate the necessity of the Commission's devotion of resources to the processing of the large number of anticipated waiver requests.

B. Good Cause Exists to Stay the Effectiveness of the *Order* on the 2 Percent Carriers Pending Reconsideration and Clarification of Additional Aspects of the Compliance Deadlines Established in the Order.

The concerns of the Petitioners and the 2 Percent Carriers with the compliance deadlines set forth in the *Order* are not limited to those instances where a 2 Percent Carrier serves a portion of a top 100 MSA. The language of paragraph 29 of the *Order* unfortunately lends itself to ambiguity and resulting controversies. For example, although the *Order* requires wireline carriers to support wireline-to-wireless LNP in the top 100 MSAs by November 24, 2003, the compliance deadline does not address a situation common to many 2 Percent Carriers that serve a small portion of a top 100 MSA utilizing a switch that is located outside of that MSA. Although the Commission's rules provide that LNP is requested on a switch specific basis,¹⁸ the language establishing the compliance deadlines is not clear. Is a 2 Percent Carrier required to support LNP in the small portion of a top 100 MSA regardless of where its switch is located, or only if its switch is in a top 100 MSA?¹⁹

18 47 CFR § 52.23.

19 The ambiguities regarding the application of the compliance deadlines established by the *Order* are further exacerbated by questions regarding the determination of what constitutes the "top 100 MSAs" for purposes of the *Order*. The Commission must address the ramifications of the revised definitions of MSAs by the Census Bureau which were effective June 6, 2003. Petitioners understand that the Commission treats an MSA that was once in the top 100 MSAs as a "top 100 MSA" notwithstanding that it may no longer be included in the top 100 MSAs. The petitioners are unaware, however, of how the Commission treats a specific county that was once associated with a top 100 MSA, but is no longer associated with that MSA. Similarly, the Petitioners are aware of circumstances where 2 Percent rural carriers are associated with newly established non-top 100 MSAs which were once incorporated into another MSA in the top-100 MSAs.

Equally troubling and a likely source of otherwise unnecessary disputes between parties is the following language from the Commission's Order:

(F)or 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.²⁰(Underscoring added).

This is the same language cited in Section A above which the Petitioners believe the Commission adopted to provide the 2 Percent Carriers with a transition period. The underscored language, however, raises unanswered questions and concerns. Even if a 2 Percent Carrier provides no service in a top 100 MSA, the underscored words will likely be used by a wireless carrier to request immediate intermodal portability on the basis of an assertion that the wireless carrier has "a point of interconnection or numbering resources in the rate center where the customer's wireline number is provisioned."

Because of this ambiguity in the cited language, the apparent objective to provide the 2 Percent Carriers with a transition period is not achieved. Moreover, the words "point of interconnection or numbering resources in the rate center" raise additional ambiguities and uncertainties, as the Commission is aware. Issues exist within pending proceedings at the Commission with respect to what constitutes a "point of interconnection" when a wireless carrier elects to utilize indirect interconnection to the network of a 2 Percent Carrier. Similarly, questions regarding what legitimately constitutes a numbering resource in a rate center are also pending.²¹ As a result of the

²⁰ *Order* at para. 29.

²¹ Within the context of the Commission's consideration of intercarrier compensation issues there are numerous pending matters addressing various aspects of wireline/wireless interconnection including the treatment of so-called "transit traffic," obligations regarding the routing and rating of traffic and the utilization of rate centers, and the use of "phantom NXXs." In this regard, the *Order* references the Sprint petition for Declaratory Ruling. *Order* at n.75.

lack of clarity and certainty with respect to these matters, otherwise unnecessary controversies and disputes will undoubtedly arise in the context of a request to a 2 Percent Carrier for portability. The obvious need for clarification and reconsideration of these matters further substantiates the good cause that exists to grant the requested Stay.²²

II. The Technical requirements of the *Order* Regarding the Rating and Routing of Calls to Ported Numbers are not Factually Consistent with the Operations and Characteristics of the 2 Percent Carriers.

A. It is Technically Infeasible for the 2 Percent Carriers to Comply Fully with the Requirements of the *Order* With Respect to Routing and Rating of Calls to Ported Numbers.

As discussed above, the service and operational characteristics of the 2 Percent Carriers are distinct from the larger carriers that predominantly serve the top 100 MSAs. Unlike the larger carriers, the 2 Percent Carriers have generally not received requests from CLECs for LNP and, consequently, their switches are not technically capable of supporting intermodal portability to customers residing inside or outside of the top 100 MSAs. Distinctions between the 2 Percent Carriers and the larger carriers also exist with respect to the network arrangements (or lack thereof) in place with wireless carriers. These distinctions render it technically infeasible for 2 Percent carriers to comply generally with the rating and routing requirements established by the *Order*.

²² The Petitioners have also been concerned that the broad language utilized in the *Order* at para. 29 may be interpreted to require the 2 Percent Carriers to deploy intermodal porting capability by either November 24, 2003 or May 24, 2004 irrespective of whether or not they have received BFR for portability from a carrier. As noted above, the November 20, 2003 decision denying the Joint Petition, states that “carriers do not need to deploy LNP until receiving a request from another carrier to do so.” The Petitioners believe that it is imperative that this interpretation of relevant statutes be confirmed, so that small and rural LECs have a reasonable degree of certainty with regards to their LNP-associated obligations.

Specifically, the *Order* requires that “calls to the ported number will continue to be rated in the same fashion as they were prior to the port. As to the routing of calls to ported numbers, it should be no different than if the wireless carrier had assigned the customer a new number rated to that rate center.”²³ The quote reflects an apparent assumption that the Commission has made that somehow a wireless carrier may have a right to “associate” a number with a rate center and thereby automatically ensure that calls to that number will be treated by an originating LEC as a “local exchange service” call.²⁴ While the Commission’s assumption may or may not be correct in the areas served by larger carriers that have deployed network facilities throughout a Local Access Transport Area (LATA) or region, this assumption is most definitely not correct with respect to 2 Percent Carriers.

Neither interconnection between two carriers nor the establishment of an Extended Area Service (EAS) route between two carriers occurs automatically or by regulatory fiat. Interconnection occurs within the framework of Section 251 of the Act and is initiated by a request of one carrier to another; interconnection is not a product of spontaneous generation.²⁵ Similarly, the establishment of an EAS route does not occur in

23 *Order* at para. 28.

24 The Petitioners note with concern that this apparent assumption regarding the treatment of traffic from a wireline carrier to a wireless carrier appears to prejudice issues pending before the Commission in the Sprint Petition for Declaratory Ruling.

25 In this regard, the Petitioners reiterate their concern with the Commission’s statement, “We also do not believe that the state regulatory oversight mechanism provided by Section 251 is necessary to protect consumers in this limited instance.” *Order* at para. 36. Petitioners urge the Commission to guard against any party that attempts to avoid the statutorily established framework of request, negotiation, and state Commission arbitration, if necessary. Forbearance in this instance may be a disservice to the public interest. The Commission bases its forbearance on an assumption that “number portability, by itself, does not create new obligations with regard to exchange of traffic between the carriers involved in the port.” *Order* at para. 36. The Commission should be aware that this statement is not factually sustainable in the instance of most of the 2 Percent Carriers which do not have an established relationship with wireless carriers that have elected to transport traffic to the customers of the 2 Percent Carriers via a third party carrier.

the absence of negotiation and agreement regarding the exchange of traffic between the two carriers.

Irrespective of the factual assumptions implicit in the *Order*, the fact is that if a call is ported to a wireless carrier that has no established interconnection arrangement with a 2 Percent Carrier, the “calls to the ported number” cannot be rated “in the same fashion as they were prior to the port.”²⁶ In the absence of an established interconnection arrangement with a wireless carrier, calls from wireline carriers to the network of the wireless carrier are generally carried by the originating end user’s choice of toll carrier or interexchange carrier (IXC).

Where the *Order* directs wireline carriers to route “calls to ported numbers . . . no different than if the wireless carrier had assigned the customer a new number rated to that rate center,” the routing will be to the originating wireline customer’s chosen toll or IXC in those instances where a wireless carrier has failed to establish an interconnection arrangement with the wireline carrier pursuant to Section 251 of the Act. Under these circumstances, the wireline carrier is unable to comply with the requirement of the *Order* to rate calls to the ported number “in the same fashion as they were prior to the port.” The rating is performed by the originating customer’s toll or interexchange service provider.

²⁶ In fact, the Commission should be aware that 2 Percent Carriers do not “rate” calls within a local exchange service calling scope. “Rating” is a function performed by toll or interexchange carriers.

B. The *Order* Disregards the Factual Realities Regarding the Networks and Operations of the 2 Percent Carriers; the *Order* Disregards the Consumer Confusion and Dissatisfaction that will Result in the Absence of a Grant of the Requested Stay.

Petitioners are concerned by the *Order's* disregard for the specific operational and network characteristics of the 2 Percent Carriers and of the factual realities regarding the existing exchange of traffic between the 2 Percent Carriers and wireless carriers. The Commission should be aware that each of the Petitioners and their members have met with Commission Staff in this proceeding and numerous other proceedings to set forth and explain these factual realities.²⁷ Acknowledgement and understanding of these fundamental operational realities is vital not only within this proceeding, but in each of the pending proceedings before the Commission which will impact the provision of universal service in the areas served by the 2 Percent Carriers.²⁸

In this regard, Petitioners observed with distress the following statement in the November 20, 2003, Order denying the Joint Petition filed by the USTA and CenturyTel:

Finally, with no factual backup, petitioners assert that there is no established method for routing and billing calls ported outside of the local exchange. We note that today, in the absence of wireline-to-wireless LNP, calls are routed outside of local exchanges and routed and billed correctly. We thus find that, without more explanation, the scope of the alleged

²⁷ *Ex Parte* meetings with FCC Commissioners, their advisors or bureau staff held July 31 with the Wireless Telecommunications Bureau, on September 4 with Commissioner Adelstein and his legal advisor for spectrum issues, Commissioner Copps and legal advisor Paul Margie, on September 9 with Sheryl Wilkerson, an advisor to Chairman Powell and Trey Hanbury from the Office of General Counsel, on September 17 with Barry Ohlson, legal advisor to Commissioner Adelstein, Jason Williams, special assistant to Commissioner Martin, Paul Margie, legal advisor to Commissioner Copps, Sheryl Wilkerson, legal advisor to Chairman Powell & Jennifer Manner, senior counsel to Commissioner Abernathy, on September 29 with Commissioner Martin and his legal advisor Sam Feder, on October 21 with FCC staff Bill Maher, Carol Matthey, Paul Garnett, Cheryl Callan, Eric Einhorn and Rob Tanner.

²⁸ As the Commission is aware, it is this basic concern for the welfare of customers in the rural areas generally served by the 2 Percent Carriers that lead Congress to statutorily identify and provide distinct treatment for the 2 Percent Carriers with respect to the determination of interconnection requirements pursuant to Section 251 of the Act.

problem and its potential effect on consumers is unclear.²⁹

To those committed to investment in telecommunications infrastructure throughout rural America, the tone and content of the quoted statement is chilling. With deference and respect, the Petitioners will endeavor to summarize the “factual backup” and explanation of the problem and its potential effect on consumers.

Contrary to the Commission’s apparent factual misunderstanding, the 2 Percent Carriers do not provision local exchange services that involve transport responsibility or network functions beyond their own networks within their respective service areas. This fact is in stark contrast to the networks of the Regional Bell Operating Companies (RBOCs). It is particularly disheartening to the Petitioners that the *Order* acknowledges the limitations of the RBOCs “to route calls outside of LATA boundaries,”³⁰ but fails to acknowledge and recognize that the 2 Percent Carriers are physically and technically limited to transport traffic within their exchange boundaries and to points of interconnections at their boundaries.

Unlike the RBOCs that transport traffic throughout a LATA over their established network facilities, the interconnection obligations and technical capabilities of the 2 Percent Carriers are limited to their local exchange networks which are geographically limited by the bounds of their incumbent service territory. Telecommunications services provided to end users which involve transport responsibility to interconnection with the networks of other carriers at points beyond a 2 Percent Carrier’s service area network are provided by toll or IXCs, and not by the 2 Percent Carrier.

²⁹ In the Matter of Telephone Number Portability, CC Docket No. 95-116, Order released November 20, 2003 at para. 9.

³⁰ *Order* at n.75.

The toll carrier or IXC chosen by the end user customer is responsible for the transport and network functions for the transmission of the calls destined to points beyond the network of the 2 Percent Carrier. The toll carrier or IXC “carries” the call to its destination for termination to the called party, generally utilizing the switched interconnection and termination services of the carrier serving the customer on the other end of the call. Accordingly, calls that are originated by customers of 2 Percent Carriers and destined to network interconnection points beyond the network of the 2 Percent Carrier are both “routed” and “rated” by the customer’s chosen toll carrier or IXC which, in fact, is the service provider for such calls. The functional involvement of the 2 Percent Carrier with respect to such calls is limited to the provision of interexchange access services on an equal basis to IXCs that compete to provide interexchange services to the end user.

In the absence of a factually and legally sound determination of these specific network issues, there is no basis to establish a method for routing and billing calls ported outside of the local exchange “in the same fashion as they were prior to the port.” The Commission states, as quoted above, “that today, in the absence of wireline-to-wireless LNP, calls are routed outside of local exchanges and routed and billed correctly.” The statement is true, but in the instance of calls from customers of 2 Percent Carriers to wireless carriers that have failed to establish interconnection with the 2 Percent Carrier, the Commission must recognize the fact that the calls are “routed and billed correctly” by the originating customer’s toll carrier or IXC which charges the originating end user customer for the interexchange service.

The Petitioners are concerned that the *Order’s* disregard for the operational realities set forth above leads the Commission also to disregard the potential effect of the

Order on consumers. As described above, a 2 Percent Carrier does not have the technical ability to transport a call beyond its network boundary. When a number is ported under these circumstances to a wireless carrier, the 2 Percent Carriers are concerned that their end users originating a call to such a number will continue to dial the number as a “local exchange service call.” The call will travel from the end user to the switch of the 2 Percent Carrier. The switch will perform a database dip and determine that the destination number is now assigned to a wireless carrier. The switch will look for a trunk to switch the call to, but it will find no trunk because the wireless carrier has not established interconnection. In all likelihood, the customer will either: 1) receive a message that the call cannot be completed as dialed, or 2) the call will be completed as dialed, but will be routed through the originating customer’s presubscribed IXC, who will in-turn bill said customer the associated toll charges for transport of the call to the terminating wireless carrier.

As noted by the *Order*, though perhaps not fully understood, “the routing of calls to ported numbers ... should be no different than if the wireless carrier had assigned the customer a new number rated to that rate center.” In the described circumstances, and irrespective of the wireless carrier’s unilateral assignment of a “rate center,” when the wireless carrier has not established interconnection, the only technical means for the call to move from the originating end user to the wireless network is over the interexchange facilities of the originating customer’s long distance provider.

This is the set of circumstances that 2 Percent Carriers have presented to the Commission underscoring their concern for their subscribers. Because these issues have not been addressed, the wireline-to-wireless porting of numbers in the 2 Percent Carrier service areas will either lead to non-completed calls or to toll charges for calls that had

historically been treated as local, and inevitably lead to general customer confusion and dissatisfaction. Because these issues remain unaddressed, the industry, state and federal regulators, and consumers will be subjected to undue burdens while they struggle with the consequences of the implementation of the *Order* in the absence of the requested Stay.

III. The Commission should Stay the Effectiveness of the *Order* on the 2 percent Carriers Until a Myriad of Issues Affecting Those Carriers and their Customers are Addressed and Resolved.

The unresolved matters regarding routing and rating of wireline calls to numbers ported to wireless carriers are not the only unresolved issues raised by the *Order* that demonstrate the existence of good cause to grant the request for Stay of the effectiveness of the *Order* with respect to the 2 Percent Carriers. The Petitioners have identified numerous additional concerns that will undoubtedly be the subject matter of petitions for reconsideration, clarification, and judicial review. For purposes of this request for Stay, the Petitioners respectfully bring one additional matter to the attention of the Commission.

The *Order* assumes Commission jurisdiction over the rates charged by the 2 percent carriers in an inequitable anti-competitive manner and without due process. The concern of the Petitioners regarding the directive in the *Order* addressing the rating of a call to a ported number reaches far beyond the operational and technical feasibility concerns addressed in Section III above. In just twenty-one words, the *Order* revamps jurisdictional regulation, preempts state regulatory authority, and establishes disparate regulatory treatment on the basis of technology in an anti-competitive and unjustly discriminatory manner. The *Order* casually states as a matter of fact that “calls

to the ported number will continue to be rated in the same fashion as they were prior to the port.”³¹ The conclusion is provided as if it is a “natural wonder.” No notice of the issue; no opportunity to comment; no discussion or analysis of the issue much less the offer of a rational basis for the conclusion.

This is the first instance known to the Petitioners in which the Commission has directed how a LEC will charge a customer for the provision of telecommunications service that the Commission apparently wants the customer to consider “local exchange service.” In those states where a 2 Percent Carrier is subject to rate regulation with respect to the provision of local exchange services, the relevant regulatory body for such determinations is the State Commission. If the Commission is asserting jurisdiction, thereby preempting the State Commission, and mandating the scope of traffic that a LEC must include in its local exchange service offering, the Petitioners respectfully suggest that any such preemption cannot be effective in the absence of appropriate statutory authority and due process.³²

In the alternative, the Commission may more likely have determined, but not offered its reasoning, that the calls from a wireline network to a number ported to a wireless carrier are “CMRS” traffic and, accordingly, not subject to state rate jurisdiction pursuant to Section 332 of the Act. The Commission, however, does not rate regulate CMRS traffic. On any call from a wireless network to a wireline network, the wireless carrier is free to charge market rates as it determines in its sole discretion. Petitioners submit that if a call between two customers of different providers is free from rate regulation when initiated on the network of one provider, it should be free from

31 *Order* at para. 28.

32 *See*, 5 U.S.C. § 553(b).

regulation when originated on the network of the other provider. Neither the direction of the call nor the characteristics of the technology serving one end of the call compared to the other provides a basis to provide less than equal protection to both carriers. Pending reconsideration, clarification, or judicial review of this matter, good cause exists to grant the Stay requested by the Petitioners in order to avoid irreparable competitive harm.³³

IV. CONCLUSION

Petitioners have demonstrated that good cause exists for the grant of a stay of the *Order*. A stay is needed to prevent unwarranted disruption and harm to the 2 Percent Carriers operating in rural areas and to their customers. The *Order* recognizes that a transition is needed for these carriers but subjects them on short notice to ill-defined, novel and conflicting obligations. The *Order* fails to ensure that wireline-to-wireless LNP can be achieved in rural areas without imposing adverse impacts on users of telecommunications services and undue economic burdens on 2 Percent Carriers. Despite the *Order's* conclusions to the contrary, the facts demonstrate that it is not technically feasible for the 2 Percent Carriers to comply with the November 24 deadline and that these carriers will be subject to potential enforcement actions unless a stay is granted

³³ Several 2 Percent Carriers report that wireless carriers have demanded that wireline calls to wireless networks must be “rated” as local calls on the basis of an assertion by the wireless carriers that “parity” dictates the result they desire. Petitioners note the irony of the unsustainable claim of “parity” by the wireless carriers. Parity would require equal regulatory treatment of both the wireline and the wireless carriers with respect to the regulation or forbearance of rate regulation of the traffic they exchange.

pending clarification and/or reconsideration of the *Order*. Consequently, petitioners request that the Commission stay the application of the *Order* with respect to the 2 Percent Carriers until it has reconsidered and clarified its application to these carriers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Emergency Joint Petition for Partial Stay And Clarification, filed on behalf of the Independent Telephone and Telecommunications Alliance, the National Telecommunications Cooperative Association, and the Organization For The Promotion And Advancement Of Small Telecommunications Companies, in CC Docket No. 95-116 was served on this 21st day of November 2003 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Rita H. Bolden
Rita H. Bolden

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