

**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)	
_____)	

SPRINT REPLY COMMENTS

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Summary

Based upon comments filed by LECs, Sprint is concerned that NANC may be unable to reach consensus regarding reduction of the current intermodal porting intervals. Sprint again suggests steps the Commission should take to facilitate discussion and resolution of the porting interval issue. Sprint asks the Commission to make clear to NANC that, absent consensus, NANC should submit the alternatives considered by the Issues Management Group (IMG) so the Commission can evaluate whether to reduce the current four day intermodal porting interval and, if so, how to reduce the interval.

Most LECs now concede that the two-way intermodal porting that they originally argued was “impossible” is, in fact possible, confirming the position that Sprint had originally pro- pounded – namely, that it is technically feasible for LECs to serve wireless customers in a mis- match situation by using their FX services. Moreover, LECs, including the rural LECs, now generally agree with Sprint that government regulation of the port-in process is unnecessary be- cause competition and market forces provide carriers with adequate incentive to make the port-in process customer friendly and cost effective. All carriers, including LECs, have a strong eco- nomic incentive to acquire new customers, even though some may decide not to compete for new wireless customers in a mismatch situation. It is best to leave the daily business decisions of whether and how to acquire new customers to each individual competitor.

This docket cannot be used to change existing number assignment rules. NANC rejected BellSouth’s proposals in this regard in its 1998 *First Wireless Wireline Integration Report*. The Commission has already instituted number conservation policies that have improved number utilization and delayed NPA exhaust. Now is not the time for the Commission to permit new wasteful number assignment requirements.

Likewise, this number portability docket is not the appropriate proceeding to change ex- isting interconnection rules affirmed on appeal. RLECs continue to rehash interconnection- related arguments that are disconnected from number portability and, in essence, seek untimely reconsideration of the *Intermodal Order*. Moreover, RLECs threaten to convert calls to numbers that have been ported to wireless carriers into toll calls, despite the Commission’s recognition that local calls to telephone numbers before they are ported necessarily will remain local calls after a number is ported. The Commission should declare that such discriminatory, anti- competitive proposals are unlawful and will not be tolerated.

Finally, NTCA’s claim that this proceeding is “procedurally flawed” under the Regula- tory Flexibility Act (“RFA”) is without merit. To begin with, the RFA does not apply to incum- bent RLECs because they are not “small entities” under the Act. Even if the RFA did apply, the Commission’s Initial Regulatory Flexibility Analysis is compliant with the RFA, and any possi- ble problems can be cured when the Commission adopts its Final Regulatory Flexibility Analy- sis.

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SPRINT REPLY COMMENTS

Sprint Corporation, on behalf of its local, long distance and wireless divisions (“Sprint”), submits this reply to the comments filed in response to the Further Notice of Proposed Rulemaking that the Commission commenced on November 10, 2003 (“*Intermodal Porting NPRM*”).¹

I. INTRODUCTION

It is important that the Commission distinguish between “port-out” and “port-in” activities in considering the issues it identified in the *NPRM*. Government regulation of limited aspects of the port-out process may be appropriate to ensure customers do not face unreasonable obstacles in leaving their current service provider. On the other hand, there is no reason for the government to regulate port-in activities. Service providers have a strong economic incentive to acquire customers and to find the means to make the port-in process as customer friendly and as cost effective as possible. Indeed, not only is port-in regulation unnecessary, but Commission rules could also have the unintended – and undesirable effect – of limiting the options available to service providers and, as a result, limiting the options available to customers.

¹ See *Telephone Number Portability – CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, *Further Notice of Proposed Rulemaking*, FCC 03-284, ¶¶ 41-51 (Nov. 10, 2003), summarized in 68 Fed. Reg. 68831 (Dec. 10, 2003)(“*Intermodal Porting NPRM*”). See also *Comment Extension Order*, CC Docket No. 95-116, DA 03-4059 (Dec. 22, 2003).

Some service providers (principally rural incumbents) use their comments to rehash arguments they made in the past (*e.g.*, the public interest is served by restricting and reducing the port-out options available to their customers). The Commission rejected this “reduce customer choice” position in its *Intermodal Porting Order*, and it should continue to resist the rural LEC arguments that repeat their prior arguments – that residents of rural areas should have fewer port-out choices than what is technically feasible, or fewer porting choices than those available to customers in suburban and urban areas.

On the other hand, Sprint encourages the Commission not to impose new requirements on the port-in process – whether the regulations govern the circumstances that carriers must accept port-in requests or the methods carriers use in porting in a new customer. Service providers have a natural incentive to make the port-in process as customer friendly as possible. Commission intervention into the port-in process could needlessly add costs to carriers (and, therefore, to customers) and could potentially reduce the options available to customers. As Chairman Powell has observed, the “Government should protect consumers, but should not exercise choices or intervene where the market will correct for bad business offerings or practices.”²

II. THE COMMISSION’S REFERRAL TO NANC OF THE PORTING INTERVAL ISSUE MAY NOT BE PRODUCTIVE WITHOUT ADDITIONAL COMMISSION GUIDANCE

The Commission, noting that consumers would benefit by shorter porting intervals, has asked whether it should “reduce the current wireline four business day porting interval for intermodal porting.”³ The Commission referred this matter to NANC even though, when NANC

² Michael K. Powell, *Consumer Policy in Competitive Markets*, Remarks before the Federal Communications Bar Association (June 21, 2001).

³ *Intermodal Porting NPRM* at ¶¶ 49.

considered this very issue in the past, it was “not able to reach consensus on reducing the porting interval.”⁴

Nine LEC comments addressed the subject of reducing the intermodal porting interval. All but one LEC (Sprint) opposed any reduction to their current four-day business interval.⁵ This reluctance to change the *status quo* may be understandable given available evidence that 99 percent of all intermodal port requests to date involve customers leaving a LEC for a wireless carrier (rather than a LEC acquiring a former wireless customer).⁶ Customers would benefit from a shorter porting interval, but the position taken by most LECs suggests they have little economic incentive to make it easier for their customers to leave to a competitive carrier.

NANC utilizes consensus procedures, and a resistance to any change by most LECs would almost certainly preclude NANC (and its new Issue Management Group⁷) from developing consensus recommendations. It may be idealistic to think that NANC could ever develop consensus on a subject that has the potential to result in sizable customer shifts among different industry segments. Sprint is concerned, however, that the announced LEC resistance to any change in the *status quo* may effectively preclude a meaningful discussion within IMG and NANC of realistic options to improve porting intervals for the benefit of customers.

Sprint urged the Commission in its comments to take three steps in the hope of facilitating a meaningful dialogue within the NANC IMG:

⁴ *Id.* at ¶ 46.

⁵ The following seven incumbent LEC commenters opposed any reduction to the current LEC interval: BellSouth, Qwest, SBC, South Dakota Telecommunications Association; Texas Statewide Cooperative, USTA, and Verizon. The one CLEC commenter, AT&T, stated that LECs should be “encouraged but not required” to reduce their porting interval. AT&T Comments at 10.

⁶ See Sprint Comments at 11; Verizon Comments at 1 and 9.

⁷ See CTIA Comments at 4; Sprint Comments at 5-6.

- The Commission should promptly resolve the remaining legal challenges to LEC-wireless port-out process so all carriers move on and focus their energies on making number portability work for the benefit of customers;
- The Commission should make clear that customers deserve a rapid and error free porting interval and that NANC's mission is to investigate ways of improving current port provisioning processes – and not to continue the debate whether current intervals should be reduced; and
- The Commission should assure all carriers, incumbent LECs in particular, that they will be able to recover their (proven) upgrade costs to meet any interval ultimately adopted.⁸

The Commission should also make clear to NANC that, if consensus cannot be achieved on any one porting reduction alternative, NANC should then submit to the Commission the alternatives that the Issues Management Group considered, so the Commission can evaluate whether to reduce the intermodal porting interval and, if so, how best to reduce the interval. The Commission should assure all industry members that it will promptly seek public comment on any recommendation or alternatives that NANC presents, so that parties who do not agree with any part of the NANC presentation will have the opportunity to be heard before the Commission.

Sprint respectfully submits that the comments submitted by most LECs objecting to any reduction of the current LEC porting interval make Commission guidance in this area even more important.

III. THERE IS CONSENSUS THAT THE COMMISSION NEED NOT INTERVENE TO FACILITATE THE LEC PORT-IN PROCESS

The comments demonstrate the following: (a) it is technically feasible for LECs to port-in a wireless number in a mismatch situation (and as a result, the alleged competitive disparity issue does not exist); and (b) the Commission should not regulate “port-in” activities because market forces give carriers strong incentives to gain additional customers.

⁸ See Sprint Comments at 6–9.

A. SOME LECs NOW CONCEDE THAT IT IS TECHNICALLY FEASIBLE FOR THEM TO PORT-IN A WIRELESS NUMBER – EVEN IN A “MISMATCH” SITUATION

In response to the CTIA declaratory ruling petitions, some LECs began arguing that the intermodal number portability which wireless carriers were seeking would result in a competitive inequality because it was supposedly “impossible” for LECs to port-in wireless customers whose physical location and number were associated with different rate centers – the so-called “mismatch” situation.⁹ In response, Sprint demonstrated that these factual allegations lacked merit because LECs could use their foreign exchange (“FX”) services to port-in these wireless customers.¹⁰ The Commission in its *Intermodal Porting Order* did not address the merits of the technical feasibility/mismatch issue, but it refused to limit the port-out opportunities of LEC customers:

The fact that there may be technical obstacles that could prevent some other types of porting does not justify denying wireline customers the benefit of being able to port their wireline numbers to wireless carriers. . . . The focus of the porting rules is on promoting competition, rather than protecting individual competitors.¹¹

In its *Intermodal Porting NPRM*, the Commission specifically asked LECs to identify the “technical impediments associated with requiring wireless-to-wireline LNP when the location of the wireline facilities serving the customer requesting the port is not in the same rate center where the wireless number is assigned.”¹²

⁹ See SBC Ex Parte Letter, CC Docket No. 95-116 (Aug. 29, 2003). See also Qwest Ex Parte Letter, CC Docket No. 95-116 (Sept. 17, 2003)(Wireless carriers supposedly “preclude” LECs from serving this category of wireless customers.”).

¹⁰ See, e.g., Sprint Ex Parte Letter, CC Docket No. 95-116 (Sept. 22, 2003); Sprint Ex Parte Letter, CC Docket No. 95-116 (Oct. 8, 2003).

¹¹ *Intermodal Porting Order* at ¶ 27.

¹² *Intermodal Porting NPRM* at ¶ 42.

The record comments confirm Sprint's position – namely, it is technically feasible for LECs to serve wireless customers in a mismatch situation using their FX services. For example, Verizon states that it gives such wireless customers “three options,” including a FX alternative:

[K]eeping the number and buying foreign exchange service (with the tariffed charges for that service), keeping the number and using it with a remote call forwarding arrangement to a newly assigned number at the new location, or a number change.¹³

SBC, which had earlier told the Commission that it was “impossible” for it to port-in “mismatch” wireless customers, now concedes that it “is technically feasible today to port that wireless customer's number in” and that its FX service “has been available for decades and remains available” to serve mismatch customers.¹⁴ Qwest, which had earlier told the Commission that wireless carriers “preclude” it from porting-in wireless numbers in a mismatch situation,¹⁵ ignores the subject in its comments – despite the Commission's request that LECs claiming technical infeasibility “specifically describe [the impediments], including any upgrades to switches, network facilities, or operational support systems that would be necessary”¹⁶

BellSouth asserts that FX service is “not a viable solution” to port-in a mismatch wireless customer.¹⁷ But BellSouth's objections to FX service are based not on technical infeasibility, but on the way it prices its current FX services.¹⁸ BellSouth suggests that, given its current prices, FX service is not an “appropriate solution” unless wireless carriers increase their service

¹³ Verizon Comments at 5 n.8. *See also id.* at 11 (“Verizon can do this, and, in fact, its procedures are to offer such an [FX] arrangement to any customer who want to pot in an out-of-area CMRS number.”).

¹⁴ SBC Comments at 3 and 9. According to SBC, its current FX service is an “inefficient solution.” *Id.* at 9.

¹⁵ *See, e.g.*, Qwest Ex Parte Letter, CC Docket No. 95-116 (Sept. 17, 2003).

¹⁶ *See Intermodal Porting NPRM* at ¶ 42.

¹⁷ BellSouth Comments at 20.

¹⁸ *See id.* at 16.

prices to more closely resemble BellSouth's current FX service prices.¹⁹ However, the way an individual service provider prices its service does not raise a competitive parity issue that should be a concern for government regulators.²⁰

In short, as reflected in the LEC Comments, it is technically feasible for LECs to port-in wireless customers in a mismatch situation using their existing FX services.²¹ And, if it is technically feasible for LEC's to port-in wireless customers in a mismatch situation, it necessarily follows that there can be no competitive inequality.

B. THERE IS AGREEMENT THAT PORT-IN METHODS BE GOVERNED BY MARKET FORCES RATHER THAN NEW REGULATION

The Commission has asked how it can "facilitate" the ability of LECs to port-in wireless numbers.²² Sprint demonstrated in its comments that "given the forces of competition, the Commission need not take any steps to facilitate LEC-wireless porting."²³

Other LECs addressing the subject agree with Sprint that it would be inappropriate for the Commission to regulate or facilitate the "port-in" process. For example, Verizon states that any order requiring it to redesign its exchange services to accommodate any particular port-in situation would be "extremely expensive, and its cost, which consumers would bear, would far outweigh any benefit consumers would receive."²⁴ Verizon then states:

¹⁹ See *id.* at 15-16.

²⁰ See *Intermodal Porting Order* at ¶ 27 ("The focus of the porting rules is on promoting competition, rather than protecting individual competitors.).

²¹ Although some rural LECs continue to assert that wireless-to-LEC porting is "impossible" (NTCA Comments at 2), these advocates make no effort to explain why such porting supposedly is "impossible" – despite the FCC's explicit request for supporting explanations. See *Intermodal Porting NPRM* at ¶ 42.

²² See *Intermodal Porting NPRM* at ¶ 42.

²³ Sprint Comments at 13.

²⁴ Verizon Comments at 3.

With multiple wireline and wireless carriers in every market, the Commission should let the marketplace work and not issue new mandates and regulations. . . . If there really is a market for these arrangements, it will become apparent without regulatory intervention. If there isn't, then regulators should not require carriers and their customers to bear the costs of preparing for it.²⁵

Other LECs agree with Sprint and Verizon. SBC states that the answer for port-in activities is "deregulation, not more regulation."²⁶ According to Qwest, the *Intermodal Porting Order* puts "significant pressure on wireline carriers to address the rate center 'problem'" – that is, respond to competition – and that regulation of the port-in process is therefore unnecessary:

The most sage approach then is for the Commission to allow wireline carriers to seek rate design and rate center changes (with any attendant expansion of local calling areas) at the state level, where appropriate. The Commission should wait in the wings, acting only in those cases where it has received a particular request to become involved in a particular matter.²⁷

Rural LECs likewise agree that new port-in rules are inappropriate. For example, the Oklahoma Rural Companies ask the Commission to "reject any proposals requiring an ILEC to match a wireless carriers local calling scope or placing the burden on the ILEC to seek rate design changes at state commissions."²⁸ The South Dakota Telecommunications Association states that carriers should "compete for customers based on the relative merits of their service offerings":

Wireline carriers should make the determination to re-design their rates and seek rate center changes based on their own circumstances. * * * The Companies emphasize that they object to a Commission requirement that carriers subsidize the service of certain customers to encourage porting, which is distinct from providing regulatory flexibility to allow carriers to respond to competitive pressures.²⁹

²⁵ Verizon Comments at 11-12.

²⁶ SBC Comments at 7.

²⁷ Qwest Comments at 3-4.

²⁸ Oklahoma Rural Telephone Companies Comments at 3.

²⁹ South Dakota Telecommunications Association Comments at 3-4 (emphasis in original).

As noted, all carriers have a strong economic incentive to acquire new customers. Some LECs may decide not to compete for wireless customers in a mismatch situation. Others may decide to compete for such customers, but may choose different means to accommodate port-in requests. As Sprint noted in its comments,³⁰ these kinds of business decisions are best made by each competitor, and government regulation of the port-in process could have the undesirable effect of reducing customer options or increasing service prices (because of the costs of any new regulations).³¹

C. THIS NUMBER PORTABILITY DOCKET IS NOT THE APPROPRIATE PROCEEDING TO CHANGE EXISTING NUMBER ASSIGNMENT RULES

BellSouth acknowledges there are several steps it could take to “eliminate or reduce” its competitive parity concerns (*e.g.*, consolidate some of its rate centers or restructure its FX service prices).³² However, rather than make its own business decisions regarding the most effective way to respond to competition, BellSouth instead wants the Commission to impose new rules on others (*i.e.*, wireless carriers) that would take away options currently enjoyed by customers (*e.g.*, begin restricting the inbound calling areas that wireless customers can select). Specifically, BellSouth asks the Commission to “require wireless carriers to assign a number to a customer from NXXs that match the physical location of the customer,” which in turn, would

³⁰ See Sprint Comments at 12-14.

³¹ Sprint certainly agrees with those commenters taking the position that the FCC should not adopt any port-in “solution” that would negatively impact 911 service. See, *e.g.*, NENA Comments. However, the limitations that certain parties recite (CAMA trunks can handle 911 calls from only four NPAs, *see, e.g.*, BellSouth at 8-10) is not an issue. If a wireless number is within the local calling scope of a rate center, it is extremely unlikely that the wireless number will be from an NPA not already loaded in the LEC selective router. Even if such a situation could be found, however, wireless carriers are already providing ten digit call back numbers to PSAPs. BellSouth provides no explanation why it cannot provide the same service to PSAPs that wireless carriers now routinely provide.

³² See BellSouth Comments at 15-16 and 20.

require wireless carriers to obtain numbers rated to “each rate center to which it offers service.”³³ BellSouth makes this proposal even though, it says, the arrangement would mitigate only “some of the competitive disparity facing wireline carriers.”³⁴

NANC previously considered – and rejected – this very proposal in its 1998 *First Wireless Wireline Integration Report*, as BellSouth notes.³⁵ NANC rejected this approach for two reasons. First, it recognized that there is “no technical need from a routing or rating perspective within the wireless service provider’s network for this restriction.”³⁶ Second, because this arrangement would require wireless carriers to obtain telephone numbers they do not need, it would result in the wasteful assignment of numbers that “would have a significant impact on NPA exhaust.”³⁷

BellSouth says, not to worry, “NPA exhaust is no longer an imminent concern.”³⁸ Sprint agrees that the number crisis is over, largely due to the number conservation policies that the Commission has adopted. However, after making real progress in improving number utilization

³³ BellSouth Comments at 13 and 20.

³⁴ *Id.* at 15 (emphasis added).

³⁵ See BellSouth Comments at 13. BellSouth neglects to advise the FCC that not only was its current proposal rejected by NANC, but it was also rejected by the LEC members of the LNPA-WG (*including BellSouth*). See Wireline Position Paper, § II.D.2, at 41 (“This alternative was discarded because of the impact on NPA exhaust and the fact that there is no technical need from a routing or rating perspective within the wireless service provider’s network for this restriction.”). BellSouth’s further suggestion that it was NANC that determined LECs faced “significant competitive disadvantage” from the mismatch situation (Comments at 12-13), is inconsistent with the facts. The sentence BellSouth quotes was made not by NANC, but by the LEC members of the LNPA-WG. See Wireline Position Paper, § J, at 43.

³⁶ NANC, *First Wireless Wireline Integration Report*, Appendix A, § I.B, at 38.

³⁷ *Id.* at § I.A.

³⁸ BellSouth Comments at 13. BellSouth suggests there is an additional reason to adopt its “new regulation/reduce customer option” approach: wireless carriers (like its affiliate, Cingular) “purposely” and “intentionally limit a subscriber’s ability to port to a wireline customer.” *Id.* at 14 and 15. This unsupported assertion is without any basis in fact. As NANC has recognized, wireless carriers assign numbers based on “customer desires” and to “meet the competitive needs of the markets.” *First Wireless Wireline Integration Report*, at §§ 2.2, 2.3, at 33. Indeed, one of the easiest ways for a wireless carrier to lose a customer is to assign an inbound calling area that the customer does not want.

and in delaying NPA exhaust, now is not the time for the Commission to introduce new number assignment requirements that would decrease number utilization and again accelerate NPA exhaust.³⁹ And BellSouth's "require wireless carriers to obtain numbers in each rate center" proposal is particularly dubious when, according to BellSouth, this arrangement would at best address only "some" of BellSouth's competitive parity concerns.⁴⁰

D. THIS NUMBER PORTABILITY DOCKET IS NOT THE APPROPRIATE PROCEEDING TO CHANGE EXISTING INTERCONNECTION RULES AFFIRMED ON APPEAL

Most rural LECs ("RLECs") use their comments to urge the Commission to reconsider its *Intermodal Porting Order* by restricting the porting options available to their customers to those few situations where a wireless carrier interconnects directly with a RLEC.⁴¹ There are a number of flaws with this RLEC position:

³⁹ As Sprint has previously documented, adoption of BellSouth's proposal would require its PCS division alone to obtain more than nine million numbers – or more numbers than contained in a single NPA – that it does not currently need. *See* Sprint Comments at 15 n.30. Sprint serves approximately 10 percent of the entire wireless market. Adoption of BellSouth's proposal would thus have an enormous negative effect on premature NPA exhaust.

⁴⁰ *See* BellSouth Comments at 15.

⁴¹ *See, e.g.,* Texas Statewide Telephone Cooperative Comments at 2 (FCC should "revise its wireless-to-wireline porting order and limit porting to situations where the wireless and wireline rate centers match."); Oklahoma Rural Telephone Companies Comments at 4-5 ("CMRS providers choosing to compete for local service and port local telephone numbers for such purpose should be required to interconnect with an incumbent LEC's network.") (emphasis in original). In addition, NTCA asks the FCC to stay the effective date of its *Intermodal Porting Order*, and USTA effectively seeks the same relief (in asking that LEC-wireless porting be postponed until the FCC "resolves all issues associated with intercarrier compensation in the *Developing A Unified Intercarrier Compensation Regime* proceeding"). USTA Comments at 4; NTCA Comments at 4. However, both the FCC and the courts have already rejected all stay requests, and these two commenters do not raise any issue not already considered – and rejected. *See, e.g., Intermodal Porting Stay Denial Order*, CC Docket No. 95-116, FCC 03-298 (Nov. 20, 2003), *aff'd* USTA v. FCC, No. 03-1414, *Order Denying Stay* (D.C. Cir., Dec. 4, 2003); *Central Texas Telephone Coop. v. FCC*, No. 03-1405, *Order Denying Stay* (D.C. Cir., Nov. 21, 2003). *See also* USTA v. FCC, No. 03-1414, *Order Denying Expedited Appeal* (D.C. Cir., Jan. 23, 2004); *LNP Two Percent Waiver Order*, CC Docket No. 95-116, FCC 04-12 (Jan. 16, 2004) (FCC grants a six-month waiver to some but not all RLECs and implicitly rejects NTCA's request for a more expansive and longer relief).

- This request for reconsideration is untimely, as the time to file reconsideration petitions of the *Intermodal Porting Order* has long passed;⁴²
- The Commission did not ask in its *Further NPRM* whether it should reconsider its rulings in the *Intermodal Porting Order*, and any re-evaluation of the *Order* would require publication of a new notice of proposed rulemaking;⁴³
- The subject of intercarrier interconnection has nothing to do with number portability, because interconnection options do not change whether or not number portability is available; in other words, direct vs. indirect interconnection has nothing to do with the technical feasibility of number portability;⁴⁴
- Existing interconnection rules permit wireless carriers to interconnect indirectly with RLECs, so the Commission would therefore be required to change these rules before it could grant the relief the RLECs seek;⁴⁵
- The Commission has already commenced a rulemaking to consider changes to current interconnection and intercarrier compensation rules;⁴⁶
- Direct interconnection would needlessly increase the cost of wireless service;⁴⁷
- Direct interconnection would reduce the options available to RLECs in the routing of their own traffic;⁴⁸

⁴² Section 405(a) of the Communications Act specifies that “a petition for reconsideration *must* be filed within thirty days from the date upon which public notice is given of the order.” 47 U.S.C. § 405(a)(emphasis added). The last date for filing reconsideration petitions of the *Intermodal Porting Order* was December 10, 2003, and no one timely submitted such a petition.

⁴³ See, e.g., *Sprint v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

⁴⁴ Indeed, the FCC ruled six years ago, and reaffirmed in its *Intermodal Porting Order*, that competitive carriers can interconnect with ILECs “either directly or indirectly.” See *First Porting Reconsideration Order*, 12 FCC Rcd 7236, 7305 ¶ 121 (1997).

⁴⁵ FCC rules specify that a LEC is required to provide the type of interconnection that a wireless carrier requests (e.g., Type 2A indirect vs. Type 2B direct interconnection). See 47 C.F.R. § 20.11(a). The FCC has consistently interpreted this rule as permitting the wireless carrier, not the LEC, to determine the most efficient form of interconnection. See, e.g., *Bowles v. United Telephone*, 12 FCC Rcd 9840, 9849 ¶ 15 (1997); *Third Radio Common Carrier Order*, 4 FCC Rcd 2369, 2376 ¶ 47 (1989).

⁴⁶ See *Unified Intercarrier Compensation Regime NPRM*, CC Docket No. 01-92, 16 FCC Rcd 9610 (2001).

⁴⁷ Wireless carriers interconnect indirectly with most RLECs because they do not have sufficient traffic volumes to justify a direct (Type 2B) interconnection, and therefore, it is generally more economical to use the transit services offered by the LATA tandem switch owners.

⁴⁸ With a direct interconnection, RLECs would lose the opportunity to determine how to route most efficiently their customers’ traffic to wireless carrier networks (because they would instead route all their traffic over the direct (Type 2B) trunk group. For the same reason that wireless carriers generally do not find it cost effective to use direct connection, RLECs would also likely find that direct interconnection is a more costly alternative than indirect interconnection.

- RLECs are responsible for their own transport costs whether a wireless carrier uses direct or indirect interconnection;⁴⁹
- The RLEC proposal would create enormous customer confusion, because the availability of porting would depend on whether a wireless carrier uses direct or indirect interconnection – a technical detail that RLEC customers would have no way of ascertaining for themselves.

The Commission has recognized that local calls to telephone numbers before they are ported necessarily will remain local calls after a number is ported.⁵⁰ Nevertheless, some RLECs threaten to convert calls to numbers that have been ported to wireless carriers into toll calls.⁵¹ In effect, these RLECs seek to penalize their own customers because some of their other customers have chosen to leave the RLEC for a competitor's services. So as to ensure that no consumer is harmed by this RLEC threat while complaints are being litigated, the Commission should declare that such discriminatory, anti-competitive proposals are unlawful and will not be tolerated.

⁴⁹ Direct interconnection does not, as RLECs like to believe, relieve them from paying for the costs of transporting their own customers' traffic to the terminating carrier. See NTCA Comments at 4. Under FCC rules affirmed on appeal, RLECs are required to pay the cost of transporting their own customer's traffic from their originating end office switch to "to the terminating carrier's end office switch that directly serves the called party." 47 C.F.R. § 51.701(c). See, e.g., *Mountain Communications v. FCC*, No. 02-1255 (D.C. Cir., Jan. 16, 2004)(FCC order permitting LEC to charge the wireless carrier for transport is vacated); *MCImetro v. BellSouth*, No. 03-1238 (4th Cir., Dec. 18, 2003)(PUC order permitting LEC to charge terminating carrier for transport is vacated because of the FCC's "existing" and "unambiguous" interconnection rules).

⁵⁰ See *Intermodal Porting Order* at ¶ 28. See also *Mountain Communications v. FCC*, No. 02-1255, Slip op. at 3 (D.C. Cir. Jan. 16, 2004)("Qwest determines whether a customer's call is a toll call by comparing the number of the call with the number of the person being called."); *Starpower v. Verizon*, File No. EB-00-MD-19, (Nov. 7, 2003); BellSouth Comments at 7 ("Today, local and toll calls are rated based upon the 'To' NPA/NXX and 'From' NPA/NXX."); Verizon Comments at 5 ("Carrier billing systems determine the end points of a call – and, therefore, how a call is to be billed – based on the NXXs of the calling and called telephone numbers.").

⁵¹ See, e.g., South Dakota Telecommunications Association Comments at 2 ("[C]alls to and from the ported number would be routed to a third carrier, such as an interexchange or toll carrier."); Oklahoma Rural Telephone Companies Comments at 4 (RLEC "customers must still use an interexchange carrier to complete calls to the ported number."); NTCA Comments at 4 ("Also unknown is whether the calling [RLEC] customer will receive a toll charge or whether the call will be dropped.").

IV. NTCA'S CLAIM THAT THIS PROCEEDING IS "PROCEDURALLY FLAWED" UNDER THE REGULATORY FLEXIBILITY ACT IS WITHOUT MERIT

The National Telecommunications Cooperative ("NTCA"), alone among the RLEC commenters, asserts that this proceeding is "procedurally flawed" because the Commission supposedly has not complied with the Regulatory Flexibility Act ("RFA").⁵² This argument lacks all merit.

A. THE REGULATORY FLEXIBILITY ACT DOES NOT APPLY TO INCUMBENT RLECS

NTCA's argument that the Commission's initial regulatory flexibility analysis contravenes the RFA is based on a defective premise – namely, that the Commission is required to conduct RFA analyses for RLECs.⁵³ In point of fact, Sprint submits that the RFA does not apply.

The RFA requires the Commission to prepare initial and final regulatory flexibility analyses when a proposed rule will have a "significant impact" on "small entities."⁵⁴ A small entity under the RFA is defined as a "small business concern" under the Small Business Act.⁵⁵ The Small Business Act defines a small business concern as a firm that is independently owned and operated and is "not dominant in its field of operation."⁵⁶

It is difficult to assert that incumbent RLECs are "not dominant in [their] field of operations," the local telecommunications market. Indeed, less than three weeks ago the Commission

⁵² See NTCA Comments at 1.

⁵³ NTCA's comments contain a second inaccurate assertion – namely, that the *Intermodal Porting Order* "chang[ed] the entire regulatory regime and intercarrier compensation scheme under which the rural wireline carriers operate." NTCA Comments at 2. In fact, as Sprint as previously documented, the FCC in the *Intermodal Porting Order* only applied and reaffirmed *existing* LNP and interconnection rules. This point is underscored by the fact that NTCA does not identify a single rule that the FCC supposedly changed.

⁵⁴ See 5 U.S.C. §§ 603(a), 604(a).

⁵⁵ See 5 U.S.C. § 601(3).

⁵⁶ See 15 U.S.C. § 632(a).

acknowledged that NTCA's members "are local exchange companies (LECs) that have long held monopolies in their markets" and are "incumbent monopolist telephone companies."⁵⁷ Sprint recognizes that the Small Business Administration ("SBA"), however, has taken the position that RLECs are "not dominant" in their field of operation because any dominance is not "national" in scope: "the local field is not the relevant market."⁵⁸ This position defies market realities.

In this regard, the Commission has consistently held that the relevant geographic market for local exchange and exchange access services is the local market within which the LEC provides these services – and not the nation as a whole.⁵⁹ As the Commission has explained:

We affirm that local areas constitute separate geographic markets, because people dissatisfied with their local exchange service cannot substitute a local exchange service from a different area. Consumers of local services in St. Louis, Missouri, for example, cannot substitute the local services offered by carriers in New York City.⁶⁰

Because RLECs are "dominant in their field of operations," the Commission is under no legal obligation to conduct RFA analyses for them. If the Commission is not required to conduct RFA analyses for RLECs, it necessarily follows that the Commission cannot legitimately be accused of contravening the RFA when it voluntarily conducts such an analysis.

⁵⁷ Opposition of the Federal Communications Commission to Petitioners' Emergency Motion for Expedited Review at 1 and 5, *NTCA v. FCC*, No. 03-1443 (D.C. Cir., filed Jan. 16, 2003).

⁵⁸ See SBA Reply Comments, WT Docket No. 99-217, at 4 (Sept. 10, 1999). See also *Intermodal Porting Initial Regulatory Flexibility Analysis*, 68 Fed. Reg. 68831, 68832 (Dec. 10, 2003). The SBA appears to argue that the FCC is required to use the entire nation as the appropriate geographic market for LECs because its rules define "field of operation" on "a national basis." See 15 C.F.R. § 121.102(b). However, courts have held that the SBA "neither administers nor has any policymaking role under the RFA" and that as a result, neither courts nor agencies like the FCC need to defer to the SBA's interpretation of the RFA. *American Trucking Ass'n v. EPA*, 175 F.3d 1027, (D.C. Cir. 1999).

⁵⁹ See, e.g., *GTE/Bell Atlantic*, 15 FCC Rcd 14032, 14089 ¶ 103 (2000); *Tele-Communications/AT&T*, 14 FCC Rcd 3160, 3183 ¶ 45 (1999); *Alltel*, 14 FCC Rcd 2005 (1998); *Teleport/AT&T*, 13 FCC Rcd 15236 (1998).

⁶⁰ *WorldCom/MCI*, 13 FCC Rcd 18025, 18120 ¶ 166 (1998).

B. THE COMMISSION'S INITIAL REGULATORY FLEXIBILITY ANALYSIS COMPLIES WITH THE REGULATORY FLEXIBILITY ACT

NTCA asserts that the Commission's initial regulatory flexibility analysis is "procedurally defective" because it contains "no concrete proposals upon which small carriers can comment."⁶¹ This assertion lacks merit, even if the RFA applies to RLECs.

The Commission has asked whether the current four-day porting interval applicable to LECs (including RLECs) should be reduced, and it asked NANC to make recommendations on how the interval can be shortened and what transition period should be utilized if a shorter interval is adopted.⁶² Obviously, the Commission cannot make a more "concrete proposal" until NANC completes its work, RLEC associations are participating in this new NANC effort, and the Commission undoubtedly will seek public comment on any recommendations that NANC may make. Moreover, the Commission specifically asked LECs to identify the "technical or practical impediments" to accelerating the interval, and RLEC comments other than NTCA accepted this invitation by addressing these issues.⁶³ NTCA cannot legitimately assert that it has been deprived of sharing its views with the Commission.

The Commission also asked how it could facilitate the ability of LECs to port-in wireless telephone numbers.⁶⁴ It identified several options (*e.g.*, FX service) and asked LECs to discuss any "procedural, technical, financial, and regulatory" issues with these options and whether the Commission should consider "any alternative approaches."⁶⁵ Indeed, the Commission "empha-

⁶¹ NTCA Comments at 3.

⁶² See *Intermodal Porting NPRM* at ¶¶ 49-51.

⁶³ See, *e.g.*, South Dakota Telecommunications Association Comments at 5-8; Texas Statewide Telephone Cooperative Comments at 2-3; United States Telecom Association Comments at 5-7.

⁶⁴ See *Intermodal Porting NPRM* at ¶ 42.

⁶⁵ See *id.* at ¶ 44.

sized” that it will consider any alternatives, “particularly those relating to minimizing the effect on small businesses”:

The FNPRM reflects the Commission’s concern about the implications of its regulatory requirements on small entities. . . . These questions provide an excellent opportunity for small entity commenters and others concerned with small entity issues to describe their concerns and propose alternative approaches.⁶⁶

It is important to remember that the RFA is “a procedural rather than substantive agency mandate.”⁶⁷ Congress enacted the RFA to “encourage administrative agencies to consider the potential impact of nascent federal regulation on small businesses.”⁶⁸ The Commission in its FNPRM and its Initial Regulatory Flexibility Analysis certainly is sensitive of the needs of RLECs, and it cannot be credibly said that the Commission has “undermine[d] the intent and purpose of the Regulatory Flexibility Act.”⁶⁹ To the contrary, Sprint submits that it is unfair for NTCA to criticize the Commission for not making “concrete proposals” on behalf of RLECs, when the Commission went out of its way to ask RLECs to identify the approaches they think would best meet their needs.

C. ANY DEFECTS IN THE INITIAL REGULATORY FLEXIBILITY ANALYSIS ARE AT MOST HARMLESS IN ANY EVENT

Even if there were defects in the initial regulatory flexibility analysis (and there are not), those defects can be cured when the Commission adopts its final regulatory flexibility analysis. Thus, any defects in an initial regulatory flexibility analysis necessarily are, at best, harmless errors. In this regard, as courts have consistently ruled, the Regulatory Flexibility Act “expressly

⁶⁶ *Intermodal Porting Initial Regulatory Flexibility Analysis*, 68 Fed. Reg. at 68832-33.

⁶⁷ *Alenco Communications v. FCC*, 201 F.3d 608, 624 (5th Cir. 2000). *See also U.S. Cellular v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001).

⁶⁸ *Associated Fisheries v. Daley*, 127 F.3d 104, 111 (1st Cir. 1997).

⁶⁹ *See* NTCA Comments at 3.

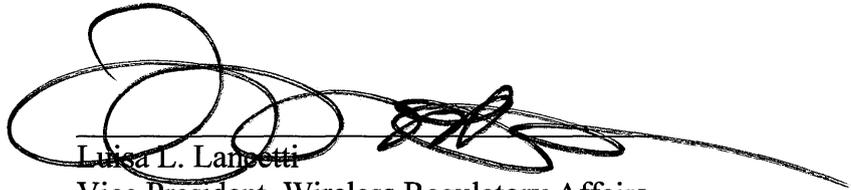
prohibits courts from considering claims of non-compliance with section 603," the initial regulatory flexibility analysis provision.⁷⁰

V. CONCLUSION

For the foregoing reasons, the Commission should take action consistent with the positions Sprint discusses above and in its comments filed on January 20, 2004.

Respectfully submitted,

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⁷⁰ See, e.g., *U.S. Cellular v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001); *Allied Local & Regional Mfrs. Caucus v. EPA*, 215 F.3d 61, 79 (D.C. Cir. 2000).