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-Wireline Porting Issues	)	

COMMENTS OF

THE UNITED STATES TELECOM ASSOCIATION

ON THE

INITIAL REGULATORY FLEXIBILITY ANALYSIS

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SUMMARY AND INTRODUCTION

The Commission's *Intermodal Portability Order*[1] placed a substantial and costly new burden on a number of small businesses, in return for virtually no benefit. Moreover, substantially all of the benefits of the rule announced in the *Intermodal Portability Order* could have been realized with a minor modification of the rule that would have not placed this new burden on the small businesses. The Commission's failure to recognize and adopt the less-burdensome alternative may be attributable to the fact that the Commission utterly failed to follow the Regulatory Flexibility Act (RFA)[2] when it issued the *Intermodal Portability Order*.[3] The D.C. Circuit has given the Commission another chance to set things right yet, based on the Commission's Initial Regulatory Flexibility Analysis (IRFA),[4] it appears that the Commission is once again failing to take seriously its obligations under the RFA.

The United States Telecom Association ("USTelecom")[5] shows in these Comments that the IRFA was inadequate, so the Commission will have to go further in its Final Regulatory Flexibility Analysis (FRFA) to avoid once again failing to comply with the RFA. In particular, the Commission must explain the extent to which the decisions in the *Intermodal Portability Order* will burden small entities, and what alternatives it considered to accomplish its objectives

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[1] *Telephone Number Portability—CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, CC Docket No. 95-116, Memorandum Opinion And Order And Further Notice Of Proposed Rulemaking, 18 FCC Rcd 23697 (2003).
[2] 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612., was amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).
[3] *United States Telecom Assn. and CenturyTel, Inc. v. the Federal Communication Comm'n*, 400 F.3d 29 (D.C. Cir. 2005).
[4] *Telephone Number Portability*, CC Docket No. 95-116, Federal Communications Commission Seeks Comment on Initial Regulatory Flexibility Analysis in Telephone Number Portability Proceeding, 20 FCC Rcd 8616 (2005).
[5] USTelecom is the nation's leading and oldest trade association representing communications service providers and suppliers for the telecom industry. USTelecom's carrier members provide a full array of voice, data, and video services across a wide range of communications platforms.

while minimizing the economic impact on small entities, and the reasons the Commission rejected those alternatives. The Commission cannot limit this analysis to issues raised in comments but, rather, must perform the analysis on its own *in addition* to addressing issues raised in comments.

When it does perform the required analysis, the Commission will find that:

1. The *Intermodal Portability Order* required, and will continue to require, some small business carriers to implement number portability for the first time.
2. The cost of petitioning for an exemption under section 251(f)(2) is high, in some cases higher even than the cost of implementing LNP.
3. The costs to a small carrier of implementing number portability are initially high (easily over $100,000 in many cases), and the annual recurring costs are large as well (upwards of $30,000 in many cases).
4. The number of actual wireline-to-wireless number ports performed by these small carriers is low, sometimes as low as zero.
5. The benefits of so few number ports are unequivocally outweighed by the implementation costs. And,
6. The Commission had no good reason to reject the obvious alternative of not requiring any new implementation of number portability where it was not already in place or would not be required because of direct interconnection, which would have fulfilled the objectives of the *Intermodal Portability Order* without imposing unnecessary burdens on small entities.

Once it fulfills these legal obligations, the Commission will realize that it should modify the rule it adopted in the *Intermodal Portability Order*. In particular, since the costs of imposing intermodal number portability on small entities that have not otherwise implemented number portability vastly exceed the benefits of such a rule, the Commission should lift the intermodal number portability requirement on small entities that are not otherwise required to implement number portability because of a request from a directly interconnected carrier.

I. THE COMMISSION MUST EVALUATE THE IMPACTS OF THE INTERMODAL PORTABILITY ORDER ON SMALL CARRIERS AND EXPLAIN ITS REASONS FOR NOT ADOPTING LESS BURDENSOME ALTERNATIVES.

The Commission did not perform a FRFA in the *Intermodal Portability Order*. In *USTelecom v. FCC*,[6] the United States Court of Appeals for the District of Columbia remanded the *Intermodal Order* to the Commission with instructions to prepare conduct an analysis of the effect of the *Intermodal Portability Order* on small entities, as required under section 553 of the RFA.[7] The Commission has released the IRFA and seeks comments to prepare its FRFA.[8]

The Regulatory Flexibility Act fundamentally shifts to the Commission the burden of analyzing and minimizing the impacts of its rules on small entities. The goal of Congress in creating the RFA was to require regulatory agencies to consider alternatives that achieve statutory purposes while ensuring that small businesses are not disproportionately burdened in implementing new regulations that may promise relatively little benefit in their areas. In the words of Congress, the RFA embodies a "principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rules and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses . . . subject to regulation."[9] The Commission is required to include in its FRFA:

> (1) a succinct statement of the need for, and objectives of, the rule;
>
> (2) a summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

[6] 400 F.3d 29.
[7] 5 U.S.C. § 604.
[8] IRFA, 20 FCC Rcd 8616.
[9] RFA § 2(b), 5 U.S.C. § 601 note (Congressional Findings and Declaration of Purpose).

> (3) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;
>
> (4) a description of the projected reporting, recordkeeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
>
> (5) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.[10]

Notably, the requirement that the Commission address issues raised in the comments is separate and distinct from the requirement that the Commission describe how it has minimized the significant economic impact on small entities[11] and the reasons it rejected less burdensome alternatives. The same separation is required in the IRFA—the Commission must explain the impact of the proposed rule on small entities so that they may more easily and effectively provide input given their more limited resources, *and* the Commission must describe any significant and less burdensome alternatives to the proposed rule. In practice, therefore, the RFA shifts to the Commission the burden of recognizing and addressing small entity concerns. This is demonstrated by the fact that the Commission would be required to perform the analysis even if it received no comments addressing small entity concerns.

II. THE IRFA IS DEFICIENT IN SEVERAL RESPECTS

The IRFA released by the Commission on April 22, 2005 is severely deficient in several respects. In it, the Commission fails to recognize that the *Intermodal Portability Order* required

[10] 5 USC § 604(a)
[11] An analysis of the economic impact itself is necessary in order to describe the steps taken to minimize that impact.

some small carriers to implement number portability for the first time. The Commission also fails to recognize that those costs substantially outweighed the meager benefits of intermodal portability in those areas. Finally, the IRFA analysis of steps taken to minimize the burden on small entities is inadequate. In particular, the Commission utterly fails to explain that, as an alternative, it could have slightly modified its ruling to provide virtually all of the same public interest benefits without burdening small carriers with unnecessary number portability implementation costs.

A. The Commission Fails To Recognize that the Intermodal Portability Order Required Some Small Carriers To Implement Number Portability for the First Time.

The requirements of the *Intermodal Portability Order* should easily have been seen at the time as likely to have a serious impact on some small rural carriers. The Commission writes in the IRFA that intermodal number portability would have the following impacts: (1) by making porting more widely available, the requirement may increase the number of ports, which may necessitate additional personnel, updated porting procedures, or upgraded software; (2) porting beyond a carrier's boundaries may cause small rural carriers to incur transport costs when delivering calls to ported numbers served by distant switches, and (3) porting to wireless carriers may give them an economic advantage over small wireline carriers.[12]

The Commission fails to recognize in the IRFA, however, that the *Intermodal Portability Order* required some small carriers implement number portability for the first time. This is an obligation the Commission could not easily have missed. Before the Commission issued its decision, the industry understood its number portability obligations as being geographically congruent with its interconnection obligations. Accordingly, where there was no

[12] IRFA, ¶ 10.

interconnection, there was no number portability, which is the logical consequence of the fact that the Telecommunications Act number portability requirement is designed to facilitate local competition.

The fact that some small carriers would be required to implement number portability for the first time was made clear in Comments[13] and Reply Comments filed in response to the Petition for Declaratory Ruling filed by the Cellular Telecommunications and Internet Association (CTIA) on January 23, 2003. It was expressed even more clearly in Emergency Joint Petition for Partial Stay and Clarification filed by the Independent Telephone and Telecommunications Alliance (ITTA), National Telecommunications Cooperative Association (NTCA), and Organization for the Promotion and Advancement of Small Telephone Companies (OPASTCO) on November 21, 2003. Therefore, it is surprising, and a source of considerable concern, that the Commission failed to include this most significant impact on some small companies in its IRFA.

USTelecom takes this opportunity to explain clearly how the Commission extended the number portability requirement in the *Intermodal Portability Order* to small carriers that had not yet been required, and were not likely to be required, to implement number portability. Prior to the *Interim Portability Order*, a local exchange carrier (LEC) was required to implement number portability in a switch only after receiving a *bona fide* request from a local exchange competitor. In practice, therefore, number portability implementation was limited in areas served by small incumbent LECs (ILECs) because the rural exemption in section 251(f)(1)[14] specifically protected these small ILECs from the costs of facilitating competition absent an affirmative

[13] *E.g.*, Comments of the Organization for the Promotion and Advancement of Small Telephone Companies (OPASTCO), at 5 (filed Feb. 26, 2003).
[14] 47 U.S.C. § 251(f)(1).

determination by the state commission that competition from the requesting carrier was in the public interest.

As a general matter, therefore, many small carriers had not implemented number portability before the *Intermodal Portability Order*, and they were unlikely to be required to do so anytime soon.[15] Some of these small ILECs, however, serve areas that are also served by commercial mobile radio service (CMRS) carriers without direct interconnection arrangements with the small ILECs. Accordingly, the Commission's decision to require intermodal number portability in the absence of interconnection triggered CMRS carrier requests for porting from small ILECs that had not yet implemented number portability.

The Commission did not even address this scenario in the *Intermodal Portability Order*, yet that decision plainly applied even in those areas where wireline number portability was not already implemented. The Commission reasoned that intermodal portability is desirable generally because it facilitates competition between wireless and wireline services.[16] This part of the order appears, however, to assume implicitly that all covered LECs were providing number portability in all relevant end offices, and that its order only added CMRS carriers to the list of number portability recipients. The Commission did not make a separate finding that the benefits outweighed the costs of incremental intermodal competition in rural areas where number portability was not yet available (which would amount to only a handful of lines at best).

Moreover, the Commission imposed its new number portability requirement in areas covered by the section 251(f)(1) rural exemption, which reflects Congressional intent to place the burden of overcoming the infrastructure cost of competition on the carrier seeking to compete.

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[15] These small carriers would, of course, implement number portability when competing directly with another provider that was directly interconnected or sharing a presence in the rate center.
[16] *Intermodal Portability Order*, 20 FCC Rcd, at 86__ ¶ 27.

The Commission imposed intermodal number portability, however, without making any of the determinations that are statutorily required to lift the section 251(f)(1) exemption. In effect, therefore, the Commission chose in the *Intermodal Portability Order* to depart from the precedent established by the Telecommunications Act of 1996.

B. The Costs of Intermodal Portability Have Substantially Outweighed the Benefits in Some Areas.

In the FRFA that the Commission will conduct after receiving these and other Comments and Reply Comments, the Commission must explain the costs of implementing number portability for small carriers. It must also explain the benefits of such implementation in the areas served by small carriers implementing number portability for the first time in order to determine whether other alternatives could have achieved substantially the same overall public interest benefits in other areas without imposing the implementation burden on the small carriers.

Small ILECs have incurred substantial costs because of the *Intermodal Portability Order* yet, because but they have limited customer bases, they do not have the same ability as larger companies to absorb and distribute new operating costs. Smaller carriers typically serve rural areas rather than densely populated urban centers served by the large ILECs, and, therefore, have fewer customers per switch. For these small ILECs, the initial cost of implementation as well as the cost of transporting calls to ported numbers is a burden. Moreover, the additional number portability capabilities required by the Commission have seldom been used, generating sparse public interest benefits.

For example, CC Communications, in Fallon, Nevada first had to implement number portability because of the *Interim Portability Order*. CC Communications states that it incurred over $70,000 in initial, non-recurring implementation costs, and that it incurs about $30,000 annually in recurring costs for deploying number portability. CC Communications, which has

about 13,000 access lines, stated to USTelecom that it has ported fewer than 5 numbers (0.0385%). Therefore, CC Communications currently has incurred more than *$14,000* initial costs and *$6,000* annually recurring costs for each number ported.

D&E Communications in Ephrata, Pennsylvania has over 100,000 lines, and it incurred over $250,000 in initial expense, and over $50,000 in annual recurring costs for number portability because of the *Interim Portability Order*. D&E Communications has ported fewer than 50 numbers (0.05% of its 100,000 lines), which comes to over *$5,000* in initial costs and *$1,000* in annual recurring costs for every single number ported.

Other examples are available from public filings. For example, the Consolidated Telephone Company, which serves about 6000 lines in Nebraska, estimated that it would incur non-recurring initial costs of $327,000, and annual recurring costs of $75,000.[17] Other estimates surely are available from applications for waivers filed by small carriers with state commissions, of which the Commission takes note in its IRFA.[18] In addition to obtaining specific filed information about number portability costs and usage flowing directly from the intermodal portability requirement, the Commission could also look at representative NECA tariff filings, which include worksheets for carriers to calculate the cost recovery for implementing local number portability.[19]

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[17] *Application of Consolidated Telephone Co*. Nebraska Public Service Commission, No. C-3111 (February 14, 2004).

[18] IRFA ¶ 15. The fact that these carriers may have obtained waivers pursuant to section 251(f)(2) hardly mitigates the harm done to them by the *Intermodal Portability Order*. Pursuing regulatory and legal relief is intrinsically costly, particularly when it includes significant attorneys fees, as do most formal proceedings. These costs were incurred solely because the Commission chose not to follow the statutory precedent of placing the burden on the carrier seeking to compete in rural areas—the section 251(f)(1) exception.

[19] National Exchange Carrier Association, *Tariffs Filed with the Federal Communications Commission on Behalf of Individual Companies*, Transmittal Numbers 869, 956, 996, 1003, 1012, 1019, 1025, 1027, 1034, 1038, 1041, 1046, 1051, 1055, 1059, 1063, 1069, 1070, and 1073.

The obligation to port calls in areas that had not yet implemented number portability has not brought, and likely will not bring any significant benefit, to the vast majority of rural subscribers unwilling to give up wireline service. In addition to the two examples above, discussions with various USTelecom members that were first required to implement local number portability by the *Intermodal Portability Order* have revealed that a surprising number of carriers have yet to port a *single* number, and none of those with which USTelecom has conferred have ported as many as 100 numbers within a company. The Commission can, and should, develop a record on the extent to which intermodal number portability will occur in areas where number portability would not otherwise be implemented.

Based on the few examples provided in these Comments, it is clear that companies first implementing number portability because of the *Intermodal Portability Order* generally are receiving few requests for number porting. Accordingly, the Commission must conclude that there will be little benefit from the new implementation of number portability solely to facilitate intermodal competition. The Commission's one-size-fits-all approach in the *Intermodal Portability Order* has imposed substantial costs. From the examples above, it appears that even if other small companies have lower implementation costs, or greater quantities of numbers ported inter-modally, those small companies likely are incurring initial costs of $1000s per number ported and recurring costs of $100s per number ported, which clearly exceeds any benefit from the new implementation of number portability to facilitate intermodal competition in the rural area. It is difficult indeed to see how these expenditures served the public interest, much less reflected an effort by the Commission to minimize the impact of its decision on small entities as required by the RFA.

C. The IRFA Includes an Inadequate Analysis of Steps Taken To Minimize the Burden on Small Entities

The Commission's IRFA discusses three alternatives to the decision in the *Intermodal Portability Order* that it states could have minimized the burden on small carriers: (1) limiting intermodal porting to instances where there is a physical point of interconnection, (2) delaying implementation for small carriers, and (3) relying on small carriers to obtain relief from state commissions pursuant to section 251(f)(2).[20] None of these three are meaningfully considered and, indeed, the third is not an option at all but, rather, a failed justification for not mitigating the burden on small entities.

Limiting porting to instances where there is a physical point of interconnection. The Commission states in the IRFA that it considered limiting intermodal portability to instances where there is a physical point of interconnection, but that the incremental cost of requiring intermodal portability more broadly was outweighed by the benefits of intermodal portability to most wireline customers.[21] The Commission also wrote that the "concerns [about burdens imposed by the order] were outside the scope of the number portability rulemaking and noted that the rating and routing issues . . . were before the Commission in other proceedings." In both cases, the Commission misses the point. The relevant comparison is between the additional costs of number portability where not required before and the benefits to customers *in those areas*. Second, this analysis cannot be deferred to another rulemaking as it is directly caused by the decision in the *Intermodal Portability Order*.

[20] IRFA ¶¶ 13-15.
[21] IRFA ¶ 13.

Delaying implementation. The second alternative mentioned in the IRFA is the six-month implementation delay granted to small carriers.[22] This not an alternative in any meaningful sense as the same rule applies as if the delay were not granted. In any case, it conferred little benefit (equal to six months interest on the initial investment, and six fewer months of recurring costs), particularly as compared with the meager benefits created by extending the requirement to small carriers that would not otherwise implement number portability.

Relying on petitions for relief. The final alternative discussed in the IRFA is for small rural carriers to petition state public utility commissions for relief pursuant to section 251(f)(2).[23] The Commission noted that many small carriers have sought such relief, and that a large number have been granted temporary or permanent relief. Once again, this is not an alternative to the Commission's decision as it merely points to a right the small carriers already had.[24] In any event, it is a very costly alternative; in many cases probably more costly than the requirement imposed by the Commission. Petitions are time-consuming proceedings, often requiring expensive legal representation. Moreover, relief is far from certain, so small carrier often will incur in addition to those legal costs, the same implementation costs it would have incurred had it not filed the petition.

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[22] IRFA ¶ 14.
[23] IRFA ¶ 15.
[24] As described above, forcing small carriers to seek relief under the section 251(f)(2) exemption, under which they bear the burden of proof, actually puts them in a worse position than they were before the *Intermodal Portability Order*. Prior to the order, these small carriers did not have to bear the cost of implementing number portability (and other measures) as long as no request was granted pursuant to the section 251(f)(1) exemption, which places the burden of proof on the competitor seeking to force the small company to invest in competition-facilitating infrastructure.

The IRFA Does Not Consider an Obvious Alternative that Accomplishes the Same Objective Without Imposing as Much Burden on Small Carriers. As described above, parties raised the argument that the Commission should not require any new implementation of number portability to provide intermodal number portability where it would not have been required otherwise. Even if this alternative were not fairly raised, the Commission should have anticipated this alternative. Indeed, if the Commission had fulfilled its obligation under the RFA to consider the impact of its decision on small carriers, it would have had to recognize that it could limit its decision so as to avoid requiring intermodal number portability where number portability would not otherwise be required.

III. THE COMMISSION MUST EXPLAIN IN THE FRFA, THE IMPACT OF ITS ORDER ON SMALL CARRIERS, AND EVALUATE ALTERNATIVES THAT SUBSTANTIALLY FULFILL ITS OBJECTIVES.

The Commission's *Intermodal Portability Order* placed a substantial and costly new burden on a number of small businesses, in return for virtually no benefit. Moreover, substantially all of the benefits of the rule announced in the *Intermodal Portability Order* could have been realized with a minor modification of the rule that would have not placed this new burden on the small businesses. The Commission's failure to recognize and adopt the less-burdensome alternative may be attributable to the fact that the Commission utterly failed to follow the RFA.

Failure to meet the requirements of the RFA has already had a serious effect on some small, rural ILECs that have had to bear costs disproportionate to any public interest benefits from the *Intermodal Portability Order*. Without performing the analysis required under the RFA, the Commission imposed on some carriers having only a handful of employees and a few thousand lines the same costly intermodal porting requirements that it imposed on large

telephone companies with thousands of employees and millions of lines. The small carriers, in turn, have had to impose the initial cost of implementation and the continuing cost of transporting calls to ported numbers on a narrow base of rural subscribers, which affects both the subscribers and the small companies' business results.

In the FRFA that the Commission adopts pursuant to court remand, it must fulfill its obligations under the RFA. In particular, the Commission must explain the extent to which the decisions in the *Intermodal Portability Order* will burden small entities, and what alternatives it considered to accomplish its objectives while minimizing the economic impact on small entities, and the reasons the Commission rejected those alternatives. The Commission cannot limit this analysis to issues raised in comments but, rather, must perform the analysis on its own *in addition* to addressing issues raised in comments.

When it wrote the *Intermodal Portability Order*, the Commission was required to take the following steps:

1. Determine whether the *Intermodal Portability Order* was likely to require some small carriers to implement number portability for the first time.
2. Estimate the costs to those small carriers of petitioning for an exemption under section 251(f)(2).
3. Estimate also the costs to a small carrier of implementing number portability, which was readily ascertainable from NECA tariffs.
4. Project the number of actual wireline-to-wireless number ports that the small carrier is likely to perform, which necessarily would have been seen to be low.
5. Determine whether the benefit of those few number ports outweighed the implementation costs. And,
6. Explain why the Commission was rejecting the obvious alternative of not requiring any new implementation of number portability where it was not already in place or would not be required because of direct interconnection, which would have fulfilled the objectives of the *Intermodal Portability Order* without imposing unnecessary burdens on small carriers.

Each of those steps was readily achievable in 2003, when the order was written, so the Commission should have taken them. Moreover, they are all easily performed today using actual data from small businesses that either had to implement LNP because of the Commission's decision in the *Intermodal Portability Order*, or had to obtain a waiver from doing so. The Commission must, therefore perform the analysis in its FRFA, and it cannot conclude that it lacks the data to do so.

The Commission must further take steps to remedy the harms that it identifies in the FRFA. In particular, the Commission has before it the alternative of limiting the intermodal portability requirement to circumstances where number portability would be otherwise required. Given that this alternative yields substantially all of the benefits of intermodal number portability without placing the heavy burden of an otherwise unneeded number portability capability on small carriers covered by the RFA, the Commission really has no alternative but to recognize that such a limitation would be in the public interest.

CONCLUSION

The IRFA prepared on remand was inadequate and the Commission must correct the infirmities in its FRFA. Under the RFA, an agency must describe significant alternatives considered in reaching the proposed approach, and show the steps it has taken to minimize the significant economic impact of its decision on small entities. In the IRFA, the Commission has not done either in a meaningful fashion. Accordingly, in the FRFA, the Commission must show now the steps it has taken to minimize the significant economic effect on small entities and describe its decision-making regarding alternatives to the *Intermodal Portability Order*. Once it fulfills these legal obligations, the Commission will realize that it should modify the rule it adopted in the *Intermodal Portability Order*. In particular, since the costs of imposing

intermodal number portability on small entities that have not otherwise implemented number portability vastly exceed the benefits of such a rule, the Commission should lift the intermodal number portability requirement on small entities that are not otherwise required to implement number.

Respectfully submitted,

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