

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

In the Matter of )  
 )  
Telephone Number Portability ) CC Docket No. 95-116

**REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION™**

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CTIA – The Wireless Association™ (“CTIA”)<sup>1</sup> hereby submits its reply comments in response to the Commission’s Initial Regulatory Flexibility Analysis in the Telephone Number Portability proceeding.<sup>2</sup>

**I. INTRODUCTION AND SUMMARY**

The record now before the Commission in this proceeding makes clear that the economic impact of the *Intermodal Order*<sup>3</sup> on small entities was thoroughly considered by the Commission when it adopted the order. Nothing in the comments filed in the instant proceeding raise concerns that would require additional consideration under the Regulatory Flexibility Act

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<sup>1</sup> CTIA – The Wireless Association™ (formerly known as the Cellular Telecommunications & Internet Association) is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

<sup>2</sup> See *Federal Communications Commission Seeks Comment on Initial Regulatory Flexibility Analysis in Telephone Number Portability Proceeding, Public Notice*, 20 FCC Rcd 8616 (2005) (“Notice”).

<sup>3</sup> *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) (“*Intermodal Order*”).

(“RFA”).<sup>4</sup> Accordingly, all that is now required of the Commission on remand is to follow the procedural steps of the RFA.

The record also makes clear that the vast majority of commenters consider the significant economic impact of the *Intermodal Order* to lie not within the terms of the order itself but with the FCC’s policies regarding the rating and routing of local traffic. The Commission already has determined, however, that consideration of this issue is inappropriate in the LNP context and either has been resolved by the Commission in other proceedings, or is being undertaken elsewhere. The RFA does not require the Commission to alter this conclusion.

As the comments filed by and on behalf of the rural ILECs make clear, their actual concerns are not with the requirements imposed on all carriers by the *Intermodal Order*, but rather 1) the rural ILECs generally do not wish to comply with their statutory obligation to engage in number portability with other telecommunications carriers, including wireless carriers; and 2) the rural ILECs have not been, and apparently have no intention of, complying with the Commission’s long-settled interconnection policies involving the exchange of traffic between ILECs and CMRS providers. The time has long passed, however, for the ILECs to object to either of these obligations, nor is the Commission free to ignore the statutory requirements Congress set forth in section 251 of the Communications Act of 1934, as amended (“Act”).

Finally, the comments make clear one other fact: hundreds of rural ILECs already have implemented the necessary capabilities for intermodal LNP. Significantly, these carriers have deployed the capabilities required to support intermodal LNP without incurring the type of “significant” economic impact to their operations or customers alleged by many of the rural ILEC commenters.

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<sup>4</sup> 5 U.S.C. §§ 601-612.

## II. THE COMMISSION'S REVIEW SHOULD NOT EXCEED THE REQUIREMENTS OF THE RFA.

The majority of comments filed in response to the initial regulatory flexibility analysis fundamentally misconstrue the purpose of this proceeding. The court's remand was limited. The Court of Appeals stayed enforcement of the *Intermodal Order* with respect to small entities only until such time as the Commission completed the procedural inquiry required by the RFA. While many commenters contend that the RFA commands the Commission to adopt new measures to minimize the "significant economic impact"<sup>5</sup> of the *Intermodal Order* on small entities or that it requires the Commission to conduct a cost-benefit analysis, the RFA requires no such thing.<sup>6</sup> It requires, instead, that the Commission describe the steps it has taken to minimize the significant economic impact of this requirement "consistent with the stated objectives of" the Act.<sup>7</sup> "Congress has emphasized that the RFA should not be construed to undermine other legislatively mandated goals."<sup>8</sup> In other words, the RFA does not require the Commission to take any action, nor does it permit the Commission to take steps, even steps that would minimize the significant economic impact of the *Intermodal Order's* regulations, if they would not be consistent with the stated objectives of the Act.

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<sup>5</sup> *Id.* § 604(a)(5).

<sup>6</sup> Some courts have questioned whether the RFA was ever intended to provide a basis to challenge the substantive content of rules. *See Little Bay Lobster Co. v. Evans*, Civil No. 007-M, 2002 U.S. Dist. LEXIS 8978 at \*88 (D. N.H. May 16, 2002) (stating that it is "not apparent ... that Congress intended the RFA to serve as a basis for challenges to the substantive content, as opposed to the administrative dimension, of agency regulations."); *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5<sup>th</sup> Cir. 2000) (explaining that the "RFA is a procedural rather than substantive mandate, to be sure ...").

<sup>7</sup> 5 U.S.C. § 604(a)(5).

<sup>8</sup> *A.M.L. Int'l, Inc. v. Daley*, 107 F. Supp. 2d 90, 105, No. Civ. A. 00-10241-EFH (D.Ma 2000).

The stated objectives of the number portability provisions of section 251 are to promote competition in all local exchanges. There is no doubt that the provisions apply to all local exchange carriers, regardless of size or location. Yet numerous commenters ask the Commission to impermissibly exempt them from the statutory requirements of the Act pursuant to the RFA.<sup>9</sup> Neither the procedural requirements of the RFA, nor the provisions of section 251, authorize such a result. To the contrary, the RFA makes clear that the Commission cannot act contrary to the stated objectives of the Act in the name of the RFA.

Commenters like USTA and NTCA/OPASTCO also misapprehend the requirements of the RFA when they demand a cost-benefit analysis, apparently without regard to section 251's mandate.<sup>10</sup> The RFA, however, imposes a procedural requirement that "commands an agency to give explicit consideration to less onerous options" in creating its rules.<sup>11</sup> It does not "require

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<sup>9</sup> See, e.g., SBA Comments at 8; South Dakota Telecommunications Association Comments at 6.

<sup>10</sup> See USTA Comments *passim*; NTCA/OPASTCO Comments at 10 ("Were the Commission to conduct a rational cost-benefit analysis, it would find that the costs of imposing the existing intermodal LNP requirement on two percent carriers far outweigh the perceived benefits that consumers in these areas derive from the availability of the service.").

<sup>11</sup> *A.M.L. Int'l*, 107 F. Supp. 2d at 105. See also *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agriculture*, No. 05-35264, 2005 U.S. App. LEXIS 17360, \*55 (9th Cir. Aug. 17, 2005) (citing to *United States Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001)) (explaining that the "RFA imposes no substantive requirements on an agency; rather, its requirements are 'purely procedural' in nature"); *Env'tl. Defense Ctr., Inc. v. United States EPA*, 344 F.3d 832, 879 (9th Cir. 2003) (analogizing the RFA processes to the notice and comment rulemaking process in the APA and explaining that the "analyses required by the RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit."); *Association of American Physicians & Surgeons, Inc. v. United States Dept. of Health and Human Servs.*, 224 F. Supp. 2d 1115, 1128 (S.D. Tex. 2002) (explaining that the "RFA is a procedural rather than substantive agency mandate").

economic analysis, but only requires that the agency... describe the steps it took to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes.”<sup>12</sup> To be sure

[t]his provision does not require that an agency adopt a rule establishing differing compliance standards, exemptions, or any other alternative to the proposed rule. It requires that an agency, having identified and analyzed significant alternative proposals, describe those it considered and explained its rejection of any which... would have been substantially less burdensome on the specified entities.<sup>13</sup>

Although NTCA/OPASTCO assert that the Commission’s determination in the *Intermodal Order* “was bereft of any cost-benefit analysis,”<sup>14</sup> the Fifth Circuit explained in the appeal of the FCC’s universal service order that, “[n]owhere does [the RFA] require... *cost-benefit analysis or economic modeling*.”<sup>15</sup> The Small Business Administration agrees. Its publication, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, concludes that “[i]t is now well-established that the RFA does not require an economic analysis, per se” and that “[n]either cost-benefit analysis nor economic modeling is specifically required.”<sup>16</sup>

Finally, the Commission is not required to address every possible alternative in its final regulatory flexibility analysis. Indeed, the statute does not require the FCC to even analyze

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<sup>12</sup> *Ashley County Med. Ctr. v. Thompson*, 205 F. Supp. 2d 1026, 1067 (E.D. Ark. 2002) (citing *Alenco*, 201 F.3d at 624-25).

<sup>13</sup> *Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 114 (1997) (citing to 126 Cong. Rec. S21,459-60 (daily ed. Aug. 7, 1980)).

<sup>14</sup> NTCA/OPASTCO Comments at 17.

<sup>15</sup> *Alenco*, 201 F.3d at 625 (emphasis added).

<sup>16</sup> Small Business Administration Office of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 76 (May 2003) available at <http://www.sba.gov/advo/laws/rfaguide.pdf> (“SBA Guidelines”).

every possibility that it considered; the Commission is permitted to narrow its focus to only the “significant ones.”<sup>17</sup> The Commission’s “obligation is simply to make a reasonable good faith effort to address comments and alternatives.”<sup>18</sup>

As a substantive matter, the Commission has largely already undertaken the good faith effort required under the RFA in the *Intermodal Order*. The Commission recognized the stated objectives of the Communications Act to promote competition, and considered the economic impact associated with implementing the requirements of the *Intermodal Order*. It also took steps to minimize that impact. The final regulatory flexibility analysis requested by the D.C. Circuit should largely describe the efforts the Commission has already undertaken to consider and to minimize the economic burden to small entities arising from the statutory duty that requires all LECs to engage in intermodal porting.

### **III. THE ECONOMIC IMPACT DESCRIBED IN THE COMMENTS ARE LARGELY UNRELATED TO THE DECISION REACHED IN THE INTERMODAL ORDER.**

Several commenters take issue with the depth of the Commission’s initial regulatory flexibility analysis. SBA, for instance, contends that the Commission has not provided any specific cost estimates.<sup>19</sup> Yet SBA’s own guidelines make clear that an agency “can satisfy the requirements of an economic impact analysis by providing either a quantifiable or numerical description of the effects of a proposed rule or alternative to the proposed rule, or more general descriptive statements if quantification is not practicable or practical.”<sup>20</sup>

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<sup>17</sup> *A.M.L. Int’l*, 107 F. Supp. 2d at 105.

<sup>18</sup> *Little Bay Lobster Co., Inc. v. Evans*, 352 F.3d 462, 471 (1<sup>st</sup> Cir. 2003).

<sup>19</sup> *See* SBA Comments at 3-4.

<sup>20</sup> SBA Guidelines at 77.

The record is replete with widely varying cost estimates which make it impossible or impractical for the Commission to reach a specific cost estimate. The South Dakota Telecommunications Association, for instance, contends that the “costs estimated by the LECs [in South Dakota] ranged from approximately \$0.20 to \$30.00 per line per month, with most LECs experiencing a per line increase in the cost of LNP of more than \$1.00 per month solely related to transport.”<sup>21</sup> The Montana Independent Telecommunications Systems contends that “the average LNP customer surcharge would range from \$0.43/month to more than \$13/month.”<sup>22</sup> Data submitted to the Iowa Utilities Board estimated charges between from \$0.18 to \$12.72 per line per month.<sup>23</sup> In this environment, it would be impossible for the Commission to accurately estimate a numerical cost arising from the *Intermodal Order*.

The reason for the large discrepancy in estimates seems to result because most of the commenters have decided to include in their estimates the cost of transporting traffic to numbers ported to CMRS providers.<sup>24</sup> For instance, the Montana Small Rural Independents estimates that the monthly charge for intermodal LNP will be \$13.48 per line.<sup>25</sup> The estimate is based on a non-recurring, one-time charge of \$72,220 (total) to implement intermodal LNP, and estimated recurring monthly charges of \$52,731. Of this \$52,731, however, \$50,625 a month is attributed

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<sup>21</sup> South Dakota Telecommunications Association at 4.

<sup>22</sup> Montana Independent Telecommunications Systems (“MITS”) Comments at 10.

<sup>23</sup> Iowa Utilities Board Comments, *Final Decision and Order* at 9.

<sup>24</sup> See, e.g., Montana Small Rural Independents (“MSRI”) Comments at 10 (admitting that it is difficult to know the costs of LNP implementation in advance because “the cost to transport ported numbers outside of the exchange when no local point of interconnection exists with wireless carriers” is unknown).

<sup>25</sup> *Id.* at Exhibit 1.

to transport costs.<sup>26</sup> In other words, a full 96% of the estimated recurring charges are transport related.

**A. The Cost Of Transporting A Call To A CMRS Provider Using A Ported Number Is Not The Subject Of This Proceeding.**

The weight of the rural ILEC comments rests on the claimed cost of transporting calls to CMRS providers with no “presence” (as defined by the rural ILECs, not by the Commission) in the rural ILEC’s rate center. Very little discussion is devoted to the actual costs directly associated with intermodal LNP implementation. The entire discussion of transport costs, however, is not germane to the instant proceeding – the Commission already has considered and dealt with this issue.<sup>27</sup>

The intercarrier compensation regimes that direct all LECs to assume their own costs for transporting traffic originated on their own networks is not the subject of this inquiry. That decision was reached almost a decade ago when the Commission concluded that “[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network,”<sup>28</sup> and when the Commission further declared that “traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA ... is subject to transport and termination rates under section 251(b)(5), rather than interstate or intrastate access charges.”<sup>29</sup> Whether the call is to a CMRS customer using a ported

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

<sup>27</sup> *See Intermodal Order* ¶¶ 39-40.

<sup>28</sup> 47 C.F.R. § 51.703(b).

<sup>29</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, ¶ 1043 (1996) (“*Local Competition Order*”). The South Dakota Telecommunications Association clearly misapprehends its duties under the FCC’s rules when it claims that it is under no

number or a non-ported number, the transport costs do not change. A carrier must transport *all* calls to a CMRS provider within the same MTA pursuant to the principles and rules the Commission adopted nearly a decade ago.

Presumably, the current discussion by rural ILECs of their transport costs arises as an objection to the decision in the *Intermodal Order* that a ported number maintain its original rate center designation following the port.<sup>30</sup> The effect of this requirement, which the Court of Appeals affirmed,<sup>31</sup> is 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.”<sup>32</sup> Apparently, the rural ILECs object to the obligation to rate calls to one rate center but to deliver them to another within the same MTA or LATA. However, the rural LECs’ obligation to route calls to CMRS carriers outside of the LECs’ rate centers is not an issue that arises from the *Intermodal Order*. As Sprint’s long-pending petition for declaratory ruling makes clear, wireless carriers have always efficiently used numbering resources by deploying different rating and routing points for a large segment of their telephone numbers.<sup>33</sup> Whether establishing different rating and routing points for a number is initiated by a wireless carrier when it first obtains a block of numbers, or whether it is done when a consumer ports a number to a wireless

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obligation “to transport local traffic outside of the local calling area or service area.”  
South Dakota Telecommunications Association Comments at 3.

<sup>30</sup> *Intermodal Order* ¶ 22.

<sup>31</sup> *United States Telecom Ass’n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005).

<sup>32</sup> *Intermodal Order* ¶ 28.

<sup>33</sup> *Sprint Corp. Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs*, CC Docket No. 01-92, *Public Notice*, 17 FCC Rcd 13859 (2002).

carrier, does not change the fact that this process has nothing to do with the *Intermodal Order* and everything to do with intercarrier compensation.

This, of course, is not news to the rural ILECs. In fact, NTCA raised the exact same arguments in its prior comments to the Commission and was rebuffed for being outside the scope of this proceeding.<sup>34</sup> The *Intermodal Order* makes clear that arguments about transport costs associated with different rating and routing points

are outside the scope of this order. ... [The] declaratory ruling with respect to wireline-to-wireless porting is limited to ported numbers that remain rated in their original rate centers. We make no determination, however, with respect to the routing of ported numbers, *because the requirements of our LNP rules do not vary depending on how calls to the number will be routed after the port occurs.* Moreover, as CTIA notes, the rating and routing issues raised by the rural wireline carriers have been raised in the context of non-ported numbers and are before the Commission in other proceedings. Therefore, without prejudging the outcome of any other proceeding, we decline to address these issues at this time as they relate to intermodal LNP.<sup>35</sup>

CTIA has previously urged the Commission to resolve the rating and routing matters in the other proceedings, and continues to respectfully request swift resolution. However, commenters' efforts to bootstrap those separate proceedings – which were not before the Court of Appeals – into this RFA review of the *Intermodal Order* should be rejected.

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<sup>34</sup> *Intermodal Order* ¶ 39 (“The National Exchange Carrier Association (NECA) and National Telecommunications Cooperative Association (NTCA) ... argue in their joint comments, that when wireless carriers establish a point of interconnection outside of a rural LEC’s serving area, a disproportionate burden is placed on rural LECs to transport originating calls to the interconnection points. They argue that requiring wireline carriers to port telephone numbers to out-of-service area points of interconnection could create an even bigger burden. Other carriers point out, however, that issues associated with the rating and routing of calls to ported numbers are the same as issues associated with rating and routing of calls to all wireless numbers.”) (citations omitted).

<sup>35</sup> *Id.* ¶ 40 (emphasis added) (citations omitted).

Moreover, it was the rural ILECs and their representatives that requested ported numbers continue to be rated to their original rate centers. They alleged in their comments that technical problems and customer disarray would be engendered if a number assigned to one rate center was rated to the different rate center of the porting-in carrier. OPASTCO asserted that “customers calling the ported number may find that the call is suddenly subject to toll charges, which were not imposed prior to porting. Customers would be subject to undue confusion and frustration by these unexplained alterations.”<sup>36</sup> They also proclaimed that “rate center databases would be contaminated” and that a “new rate center may be located within a differing local access transport area... or state boundaries, adding to the confusion and obscuring what intercarrier compensation regime and jurisdictional rules should apply.”<sup>37</sup> CenturyTel further argued that not maintaining the original rate center would create a public safety hazard that could result in the “incorrect routing of 911 calls.”<sup>38</sup>

Based on these comments, the Commission determined that “[t]o ensure that permitting porting beyond wireline rate center boundaries does not cause customer confusion with respect to charges for calls, ... ported numbers must remain rated to their original rate center [even though] the routing will change when a number is ported.”<sup>39</sup> It strains all credulity for these

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<sup>36</sup> *Telephone Number Portability*, CC Docket No. 95-116, *Comments of OPASTCO on CTIA Petition for Declaratory Ruling that Wireline Carriers Must Provide Portability to Wireless Carriers Operating Within Their Service Areas* at 2 (filed Feb. 26, 2003).

<sup>37</sup> *Id.* at 3.

<sup>38</sup> *Telephone Number Portability*, CC Docket No. 95-116, *Opposition of CenturyTel, Inc. to the Petition for Declaratory Ruling of the Cellular Telecommunications and Internet Association*, at 5 (filed Feb. 26, 2003).

<sup>39</sup> *Intermodal Order* ¶ 39.

carriers to come back to the Commission now and object to the very thing they originally requested – porting without impairment to the number’s existing rate center designation.

**B. The Record Data Shows That LNP-Related Costs Are Not Significant.**

While the RFA does not define what is a “significant economic cost,” the Iowa Utilities Board has determined that “when the projected surcharges for LNP implementation, as submitted by the petitioners, is equal to or less than \$1, the surcharge represents an adverse impact on users or an economic burden on the company that is sufficient to justify, *at most*, a six-month suspension” of the intermodal LNP obligations.<sup>40</sup> It also specifically rejected claims that intermodal LNP costs for rural ILECs must be lower than the costs for the RBOC.<sup>41</sup> Under its own standard, the Iowa Utilities Board found that 87 of the 147 companies that petitioned for extensions were entitled to nothing more than a six-month extension of the intermodal LNP requirements.<sup>42</sup>

The record before the Commission is largely bereft of intermodal LNP-specific cost data. However, a few commenters submitted LNP cost data on a recurring and non-recurring basis (and separate from their transport costs) that provides some insights into the cost of implementing LNP as ordered by the *Intermodal Order*. Assuming the data is accurate, it confirms that the cost of intermodal LNP does not impose a significant economic impact on small entities. For instance, the Missouri Small Telephone Company Group, (“MoSTG”) explained that the non-recurring implementation costs associated with intermodal LNP were

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<sup>40</sup> Iowa Utilities Board Comments, *Final Decision and Order* at 12-13 (emphasis added).

<sup>41</sup> *Id.* at 9.

<sup>42</sup> *Id.* at 12.

\$1,000,000 (compared to \$72,220 for the Montana Small Rural Independents).<sup>43</sup> When divided by the 88,500 lines MoSTG’s members serve, and divided by the five years during which carriers are permitted to recover these non-recurring charges,<sup>44</sup> the charge amounts to \$0.19 per line, per month. The MoSTG also estimates that the recurring costs associated with intermodal LNP are \$0.30 per month, per line.<sup>45</sup> Similarly, the Montana Small Rural Independents estimate the recurring charges for LNP implementation, minus transport charges, to be only \$2106 per month, across its entire network (and more than half of the \$2106 falls into the catch-all category of “maintenance”).<sup>46</sup>

Assuming the MoSTG data to be correct, it would seem that the significant economic impact of which the rural ILECs complain amounts to less than \$0.50 per line, per month.<sup>47</sup>

With implementation costs in this range, the Commission should consider whether a final

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<sup>43</sup> MoSTG Comments at 2.

<sup>44</sup> See 47 C.F.R. § 52.33(a).

<sup>45</sup> MoSTG Comments at 3 (\$27,000 per month, divided by 88,500 access lines served by its members); see also The Nebraska Rural Independent Companies Comments at 4 (estimating the non-recurring implementation costs at \$2,796,556. When divided by the 92,055 access lines and the five year recovery period, the cost for recovery is approximately \$.50 per month, per line.).

<sup>46</sup> MSRI Comments at Exhibit 1.

<sup>47</sup> These implementation costs are comparable to the charges the Commission has approved for other ILECs. See *Citizens Telecommunications Companies, Order*, 19 FCC Rcd 8128 (2004) (noting that Citizens had been charging its end-users \$0.41 per month for local number portability recovery); *Telephone Number Portability; Sprint Local Telephone Companies Petition for Waiver*, CC Docket No. 95-116, *Order*, 19 FCC Rcd 23962 (2004) (noting that Sprint’s intermodal LNP tariff permitted recovery of \$0.47 per month from end users). Since the Commission’s rules permit ILECs to recover the carrier-specific costs directly related to providing number portability, 47 C.F.R. §52.33(a), this provides persuasive evidence that the rural ILECs can implement intermodal LNP without incurring significant economic impact to their operations or customers.

regulatory flexibility analysis is even warranted. Instead, the Commission can proceed under section 605 of the RFA, which permits the agency to entirely avoid the analysis required under section 604 if the Chairman certifies that the *Intermodal Order* will not have a significant economic impact on a substantial number of small of entities.<sup>48</sup> At less than \$0.50 per line, per month, such a certification seems eminently reasonable.

#### **IV. THE COMMISSION SHOULD NOT USE THIS RFA INQUIRY TO REWRITE ITS LNP OR INTERCONNECTION RULES.**

In addition to including extraneous transport costs which are outside the scope of the *Intermodal Order*, the rural ILEC commenters and their supporters generally propose two alternatives that are outside the scope of the RFA. Specifically, they request that the Commission 1) exempt rural ILECs from intermodal porting requirements; and/or 2) require wireless carriers to pay for the transport costs for traffic that originates on the rural ILEC networks. Alternatively, some commenters argue the Commission should reconsider its decision in the *Intermodal Order* and require wireless carriers to establish a point of presence in every rate center in which a consumer wants to port its number. These alternatives do not serve the public interest, nor are they permissible in this inquiry. Essentially, the commenters are seeking untimely reconsideration of the *Intermodal Order*, the *First LNP Order*,<sup>49</sup> and the Commission's *Local Competition Order* adopted in 1996. Accordingly, they should be rejected.

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<sup>48</sup> 5 U.S.C. § 605(b).

<sup>49</sup> *Telephone Number Portability*, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352 (1996) (“*First LNP Order*”).

**A. The Commission should not reconsider the fundamental conclusion of the *Intermodal Order*.**

This RFA inquiry is not a proceeding for reconsideration of the *Intermodal Order*. The time for such review has long passed.<sup>50</sup> Yet the SBA makes clear (and the overall comments reflect) that reconsideration of the *Intermodal Order* is exactly what the rural ILECs are seeking.<sup>51</sup> It notes that “limiting number portability to instances where there is a point of physical interconnection is the *primary alternative requested by small rural carriers ...*”<sup>52</sup> The Commission, however, rejected this alternative in the *Intermodal Order*, finding unequivocally that

under the Act and the Commission’s rules, wireline carriers must port numbers to other telecommunications carriers, to the extent that it is technically feasible to do so, in accordance with regulations prescribed by the Commission. There is no persuasive evidence in the record indicating that there are significant technical difficulties that would prevent a wireline carrier from porting a number to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number. Accordingly, the plain text of the Act and the Commission’s rules, requiring LECs to provide number portability applies. In fact, several LECs acknowledge that there is no technical obstacle to porting wireline numbers to wireless carriers whose point of interconnection is outside of the rate center of the ported numbers.<sup>53</sup>

The Commission has considered and rejected the request to require a CMRS point-of-presence in every rural ILEC’s rate center. Changing that requirement now would violate foundational principles regarding notice and comment rulemaking. Because the RFA inquiry is

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<sup>50</sup> See 47 C.F.R. §1.429(d) (requiring petitions for reconsideration be filed 30 days from public notice of the underlying order). Indeed, the Court of Appeals has affirmed the *Intermodal Order*, limiting the scope of the remand to the instant RFA analysis.

<sup>51</sup> See NTCA/OPASTCO Comments at 18 (“the Commission should require wireless carriers to ... establish POIs within the service areas of two percent carriers.”).

<sup>52</sup> SBA Comments at 7 (emphasis added).

<sup>53</sup> *Intermodal Order* ¶ 23 (citations omitted).

only procedural in nature, one could not reasonably expect the Commission to alter the fundamental determination of the *Intermodal Order* in this inquiry. Such a decision could only be made through formal notice and comment rulemaking, in compliance with the Administrative Procedure Act.<sup>54</sup>

Moreover, requiring CMRS providers to establish a point-of-presence in every rate center will do nothing to reduce the small carriers' LNP-related costs, but it will dramatically raise their rivals' costs. SBA makes clear that the rural ILECs would like the Commission to require a point-of-presence because it "would eliminate transport costs, which may remove the majority of the recurring economic impact."<sup>55</sup> As explained above, however, transport costs are not the subject of this proceeding. Whether a CMRS customer is using a number ported from the rural ILEC or a number obtained by the wireless carrier from the NANPA, the rural ILECs are obligated to bear the costs of transporting that traffic to CMRS providers within the same MTA or LATA. Requiring a point-of-presence in every rural ILEC's rate center would, however, dramatically increase the cost of providing competitive service in these areas, either increasing the price of wireless service to customers in rural markets, or discouraging CMRS carriers from providing service in the very areas the Commission has recognized can benefit the most from wireless service. The result, therefore, would be in direct contravention of the pro-competitive goals of section 251.

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<sup>54</sup> See *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) ("new rules that work substantive changes in prior regulations are subject to the APA's procedures. ... if a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.") (citations omitted).

<sup>55</sup> SBA Comments at 7; see NTCA/OPASTCO Comments at 4 ("[T]he transport cost issue is to a large degree the crux of two percent carriers' concerns about how intermodal portability is being implemented.").

**B. The Commission Should Not Revisit Its Intercarrier Compensation Rules In This Proceeding.**

For similar reasons, requests to alter the Commission’s almost decade-old interconnection policies must be rejected. Some commenters contend that if the Commission is going to maintain the requirements established in the *Intermodal Order*, it should simply change its interconnection rules and require CMRS providers to assume the costs of transport.<sup>56</sup> Under the Commission’s rules, however, “[a] LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC’s network.”<sup>57</sup> There is no exception for rural carriers; there is no exception for LNP. Apparently, the rural LECs would have the Commission use the procedural requirements of the RFA to rewrite long-standing intercarrier compensation policies. As noted above, doing so is not permitted under the procedural requirements of the RFA or the APA.

The rural ILECs had their opportunity to seek reconsideration before the Commission, and judicial review in the Court of Appeals, for all of the rules they now seek to have the Commission change pursuant to the RFA. This the Commission cannot do, and their untimely petitions for reconsideration must be denied accordingly.

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<sup>56</sup> See, e.g., NTCA/OPASTCO Comments at 18 (“the Commission should ... require wireless carriers to pay for the transport and termination of traffic outside of two percent carriers’ service areas.”); MoSTG Comments at 6 (“The Commission should find that wireless carriers are financially and operationally responsible for the transport and termination of any ported wireless calls if the wireless carrier has no POI within the rural LEC’s service area.”).

<sup>57</sup> 47 C.F.R. § 51.703(b).

**C. The Commission Cannot Ignore The Express Terms Of The Communications Act.**

As an alternative to reconsideration of the *Intermodal Order* and the intercarrier compensation rules, many of the rural ILEC commenters request the Commission simply exempt them from the intermodal number portability requirements.<sup>58</sup> As an initial matter, the Commission did not order intermodal porting in the *Intermodal Order* under review. That decision was reached in 1996, and reaffirmed in 1997. It would be wholly inappropriate to use this RFA inquiry to rewrite rules that are almost ten years old and outside the scope of this review.

In considering similar requests, the Iowa Utilities Board declined to exempt small carriers from intermodal LNP and granted only limited extensions after concluding that “the underlying importance of LNP to telephone competition” warranted “setting firm schedules for implementation.”<sup>59</sup> The Commission should not now grant an exemption that the Iowa Utilities Board found was not in the public interest. In fact, the FCC is not free to simply declare that rural ILECs are exempt from the statutory requirements of section 251(b) to engage in number portability with CMRS carriers.<sup>60</sup> Under the Act, every LEC “has the duty to provide, to the

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<sup>58</sup> See, e.g., SBA Comments at 8 (“A third alternative is to exempt small rural wireline carriers from the intermodal portability requirement.”); South Dakota Telecommunications Association Comments at 6 (“[T]he Commission should exempt small entity LECs from the intermodal porting requirement until the Commission issues its order concerning transport.”).

<sup>59</sup> Iowa Utilities Board Comments at 6.

<sup>60</sup> While section 10 of the Act permits the Commission to forbear from applying provisions in the Act if certain public interest conditions are met, 47 U.S.C. §160(a), this RFA inquiry does not satisfy the procedural or substantive requirements for forbearance from the section 251(b) intermodal porting rules. Section 10 contemplates forbearance only where doing so would serve the public interest and promote competitive market conditions. Doing so here would actually impede competition and run counter to

extent technically feasible, number portability” which is defined as the ability of LEC customers to retain their telephone numbers when switching from one telecommunications carrier to another.<sup>61</sup> Had Congress not intended to grant LEC consumers the right to switch their numbers to CMRS carriers, it would not have used the term “telecommunications carrier” in the definition of a provision it explicitly applied only to LECs.<sup>62</sup>

The Commission, of course, is not free to ignore the mandates of Congress – even where Congress has delegated to it authority to implement the specific requirements. Rather, as the Supreme Court made clear, the Commission’s wide latitude to implement the provisions of the Act, does not authorize the FCC to make fundamental changes to the regulatory scheme.<sup>63</sup> In *MCI*, the Court held that the Commission’s authority to “modify” the tariff filing requirements did not grant it the ability to modify the tariff filing requirements out of existence. Similarly, the Commission’s authority to prescribe the requirements for number portability does not give it the ability to prescribe those requirements out of existence for a certain category of LECs.<sup>64</sup>

Finally, there simply can be no question of technical feasibility at this point.

NTCA/OPASTCO claim that “[i]t is technically infeasible for carriers with less than two percent

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Congress’s intentions. Moreover, section 10(c) specifically requires telecommunications carriers to file a petition requesting the Commission exercise its forbearance authority. *See id.* U.S.C. §160(c).

<sup>61</sup> *Id.* §§ 251(b)(2); 153(30).

<sup>62</sup> *See* Sutherlands Stat. Interp. §46:06 (6<sup>th</sup> ed. 2000) (“[w]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.”).

<sup>63</sup> *See MCI v. AT&T*, 512 U.S. 218 (1994).

<sup>64</sup> Congress exempted rural ILECs from subsection (c) of section 251, but Congress did not exempt these carriers from the number portability requirements set forth in subsection (b). *See* 47 U.S.C. § 251(f)(1).

of the subscriber lines nationwide [] to comply with the rating and routing requirements of the Intermodal LNP Order ....”<sup>65</sup> However, their own comments show that this argument holds no merit. They explain that NTCA conducted a survey of its member companies and that 49% of the more than 350 companies that responded “were capable of providing wireline-to-wireless LNP.”<sup>66</sup> In other words, at least 170 of NTCA’s members are technically capable of providing intermodal LNP.<sup>67</sup> The record contains no information as to why it is not technically feasible for every carrier to offer its customer intermodal porting capabilities.<sup>68</sup> Absent such a finding, there is no basis to exclude any LEC from the portability requirements of section 251.

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<sup>65</sup> NTCA/OPASTCO Comments at 2. As noted in Section III A, *supra*, the Commission already has determined that arguments about transport costs associated with different rating and routing points are outside the scope of the *Intermodal Order*. See *Intermodal Order* ¶ 40.

<sup>66</sup> NTCA/OPASTCO Comments at 11.

<sup>67</sup> See The Nebraska Rural Independent Companies Comments at 3 (noting that one of its members, the Blair Telephone Company, “has implemented intermodal LNP capability in accordance with the *Intermodal Order*.”).

<sup>68</sup> As CTIA noted in its comments, rural ILECs that do not wish to provision these capabilities directly may contract with service bureaus to fulfill their obligations.

