

**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)

**REPLY COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION
ON THE
INITIAL REGULATORY FLEXIBILITY ANALYSIS**

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SUMMARY AND INTRODUCTION

The Regulatory Flexibility Act (RFA)¹ requires the Commission to explain in writing the effects of its decisions on small companies, which include hundreds of small, rural telephone companies. The Commission must also identify alternatives that would reduce the burdens on these small companies while largely achieving the Commission's objectives, and explain in writing why those alternatives were not adopted. Several parties commenting on the Commission's Initial Regulatory Flexibility Analysis (IRFA)² in this proceeding argue that these RFA obligations are only procedural, and should not affect the outcome of this proceeding.³ The RFA requirements are not mere formalities, however, and the United States Telecom Association ("USTelecom")⁴ asserts that there ultimately must be a substantive impact if the Commission does in fact fulfill the RFA requirements in this proceeding. Should the Commission attempt to avoid its FRFA obligation, however, as some parties appear to recommend, the Commission will once again be violating the RFA and risking a second consecutive appellate court reversal of the *Intermodal Portability Order*.⁵

The Commission's Final Regulatory Flexibility Analysis (FRFA) must go substantially beyond the IRFA. This proceeding is before the Commission on remand because the

¹ 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).

² Federal Communications Commission, "Federal Communications Commission Seeks Comment on Initial Regulatory Flexibility Analysis in Telephone Number Portability Proceeding," *Telephone Number Portability*, CC Docket No. 95-116, 20 FCC Rcd 8616 (Press Release April 22, 2005).

³ *E.g.*, Comments of CTIA—The Wireless Association, at 2

⁴ 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.

⁵ *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 23,697 (2003).

Commission's original decision was reversed by the United States Court of Appeals for the District of Columbia Circuit in *United States Telecom Association v. Federal Communications Commission*.⁶ In brief, the D.C. Circuit determined that the Commission substantively changed its rules by requiring *location* number portability for the first time and, therefore, that the Commission was required to comply with the RFA, which it had failed to do.

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."⁷ The Commission did not follow this principle in the *Intermodal Portability Order*, where it applied the same intermodal portability obligation to all LECs, including small LECs that face little if any demand for such portability.

One might hope that the Commission would recognize its failing after the D.C. Circuit remanded the *Intermodal Portability Order* with instructions to fulfill its obligations under the RFA. Instead, the Commission's IRFA is severely deficient in several respects. The Commission simply fails to recognize that the *Intermodal Portability Order* required some small carriers to implement number portability for the first time, and that the costs of implementation substantially outweighed the meager benefits of intermodal portability in those areas. Most importantly, the Commission simply fails to consider how it could have minimized the burdens imposed by the *Intermodal Portability Order* while retaining virtually all of the benefits it identified in that order by limiting the application of the new obligation where number portability was not otherwise required.

⁶ *United States Telecom Assn. and CenturyTel, Inc. v. the Federal Communication Comm'n*, 400 F.3d 29 (D.C. Cir. 2005).

⁷ RFA § 2(b), 5 U.S.C. § 601 note (Congressional Findings and Declaration of Purpose).

As the Commission performs the analysis required by the RFA, it will become clear that the intermodal number portability obligation does not need to be applied to small LECs that would not otherwise have to implement number portability. This obligation has imposed significant costs in return for precious few benefits—in many cases not even a single number has yet to be ported. Obviously, therefore, requiring intermodal number portability in rural areas that would not otherwise have it is far from important to the Commission's overall objectives as the capability is seldom used. While the Commission could conceivably comply with the procedural requirements of the RFA just by including this conclusion in its FRFA, there clearly would be significant administrative law problems with leaving the intermodal portability obligation in place where experience show it will be seldom used.

The record on this point is incontrovertible, so the Commission should conclude that the costs of its new intermodal portability requirement outweigh the benefits in areas served by many small companies. The Commission also should conclude that it could have adopted a less burdensome alternative to its decision in the *Intermodal Portability Order* to require all LECs, including small and rural ones, to implement intermodal number portability upon request even if they would not otherwise be required to implement local number portability. This less burdensome alternative likely could be defined as a rural exemption mirroring the section 251(f)(1) exemption or as a limitation on the intermodal portability obligation that excludes circumstances where number portability would not otherwise be required. Once the Commission makes these determinations that inevitably flow from the incontrovertible facts, it would be arbitrary and capricious for the Commission not to modify the *Intermodal Portability Order* to account for its findings. Accordingly, the Commission should initiate appropriate proceedings to modify the new rule articulated in the *Intermodal Portability Order* so as to

minimize the burden on small companies while retaining virtually all of the benefits the Commission sought.

In the remainder of these Reply Comments, USTelecom responds specifically to a number of incorrect assertions raised in comments endorsing the Commission's IRFA or suggesting that the Commission need not consider burdens identified in the IRFA.

I. THE INTERMODAL PORTABILITY ORDER CREATED A NEW OBLIGATION FOR MANY SMALL CARRIERS.

A. The Commission Must Accept the D.C. Circuit's Decision that the Intermodal Portability Order Created a New Obligation.

Several parties suggest in their comments that the *Intermodal Portability Order* did not create a new obligation for any small companies.⁸ Instead, they argue that all LECs were required to implement local number portability by the terms of the Telecommunications Act of 1996, and in the words of one party, "it was the rural LEC refusal to comply with the requirements of the Act and preexisting FCC rules that required the Commission to enter the *Intermodal Portability Order*."⁹ This position is incorrect and, because it was flatly rejected by the D.C. Circuit in its review of the *Intermodal Portability Order*,¹⁰ the Commission is barred by *res judicata* from adopting it in the FRFA.

First, the statutory number portability obligation is explicitly limited to those circumstances defined by the Commission—a LEC shall provide local number portability "in accordance with requirements prescribed by the Commission."¹¹ Accordingly, there is no default number portability obligation that applies where the Commission has not expressly ordered that number portability be implemented.

⁸ CTIA Comments at 4, Sprint Nextel Comments at 2, Verizon Wireless Comments at 2.

⁹ Sprint Nextel Comments at 18.

¹⁰ 400 F.3d at 35.

¹¹ 47 U.S.C. § 251(b)(2).

The *Intermodal Portability Order* plainly created a new requirement for LECs to provide *location* number portability, which the Commission had explicitly refused to do in the *First Report and Order*. The Commission did not limit the application of intermodal number portability to circumstances where the wireless customer only uses the ported number at the same location where the number had been used for wireline telecommunications.¹² Nonetheless, the Commission argued before the D.C. Circuit that it was not extending the portability requirement to include *location* number portability as well as service provider number portability. This argument was explicitly rejected by the court, however: “In short, the *Intermodal Order* requires wireline carriers to port telephone numbers without regard to the physical location of the subscriber, the equipment, or the carrier, and thus effectively requires location portability a requirement that the *First Order* had foresworn.”¹³ Therefore, the Commission must acknowledge in its FRFA that it imposed location number portability, allowing customers to move outside the rate center (indeed, across the country) while retaining the same telephone number.

Not only did the Commission create a location portability obligation for the first time in the *Intermodal Portability Order*, but the Commission also extended the intermodal portability obligation beyond the commonly understood limitations on local number portability that the Commission adopted in the *Second Report and Order*.¹⁴

The Commission attempted to characterize its new rules as “clarifications” of existing rules, stating that the Commission, in the past, had only limited the obligation for wireline

¹² Indeed, such a limitation would have been senseless as it would have largely eliminated intermodal number portability. USTelecom is not arguing that the Commission should adopt a limitation on wireless subscribers’ ability to use ported numbers outside of their homes.

¹³ 400 F.3d at 36.

¹⁴ *Telephone Number Portability*, CC Docket No. 95-116, Second Report and Order, 12 FCC Rcd 12,281 (1997).

portability and not for intermodal portability.¹⁵ The D.C. Circuit explicitly rejected this argument as well, concluding instead “it is simply wrong to say that the *First Order* "imposed no limitations" on a wireline carrier's duty to port numbers to a wireless carrier. To the contrary, the order expressly limited that obligation by declaring that wireline carriers were not obligated to provide location portability.”¹⁶ Therefore, the law of the case has been established—the *Intermodal Portability Order* established a new number portability obligation.

B. The Intermodal Portability Obligation Caused Some Small Carrier to Implement Number Portability for the First Time.

Although there is far less demand for intermodal number portability than for wireline-wireline portability, the Commission decided in the *Intermodal Portability Order* to extend the intermodal portability obligation beyond the obligation to provide number portability to (largely wireline) local exchange competitors, even though the latter is the core functionality contemplated in the 1996 Act. Whereas wireline number portability is explicitly limited to circumstances where the requesting carrier has an interconnection agreement and/or numbering resources in the rate center,¹⁷ the Commission explicitly rejected these limitations for intermodal number portability when it adopted the *Intermodal Portability Order*.¹⁸

The fact that the intermodal portability obligation is broader than the wireline-wireline number portability obligation is what caused some small companies to implement number portability for the first time. Small, rural LECs often did not have to implement number

¹⁵ *Intermodal Portability Order*, 18 FCC Rcd at 23,698 ¶ 1.

¹⁶ 400 F.3d at 38.

¹⁷ 47 C.F.R. § 52.26(a) (incorporating North American Numbering Council Local Number Portability Selection Working Group Final Report and Recommendation to the FCC, Appendix D, at § 7.1—“In the context of LNP, a Service Provider is a facility (switched) based (The term facility based is used in this document to describe carriers who own or lease switching equipment) local telecommunications provider certified by the appropriate regulatory body or bodies.”)

¹⁸ 18 FCC Rcd at 23,707 ¶ 25.

portability prior to the *Intermodal Portability Order* because they had not received a *bona fide* request from a wireline carrier with interconnection and/or numbering resources in the relevant rate center. Indeed, many small, rural LECs faced no realistic prospect of receiving such a *bona fide* request in the foreseeable future. When the Commission created the location number portability requirement in the *Intermodal Portability Order*, however, a number of these small, rural LECs received *bona fide* requests from CMRS carriers that did not have interconnection and/or numbering resources in the relevant rate center. Therefore, these small, rural LECs were faced for the first time with the prospect of implementing number portability.

This new intermodal portability obligation is inconsistent with the broader objectives embodied in the rural exemption in section 251(f)(1).¹⁹ As mentioned above, the statute clearly requires the Commission to define the scope and circumstances for number portability.²⁰ Although Congress did not explicitly limit this obligation in rural areas as it did with the new obligations it created for incumbent local exchange carriers in section 251(c), Congress did not prevent the Commission from limiting the number portability obligation in a similar manner. In that regard, the Commission did limit the number portability obligation to circumstances where the LEC received a *bona fide* request from a carrier with interconnection and/or numbering resources in the relevant rate center, which had the effect of limiting the number portability obligation in many areas covered by the section 251(f)(1) exemption.

When the Commission described the benefits it anticipated from location number portability in the *Intermodal Portability Order*, it focused on facilitating competition between wireless and wireline services.²¹ This objective is similar to the objective of wireline-wireline

¹⁹ 47 U.S.C. § 251(f)(1).

²⁰ 47 U.S.C. § 251(b)(2).

²¹ *Intermodal Portability Order*, 18 FCC Rcd at 23,708 ¶ 27.

number portability, which the Commission limited in a manner analogous to the section 251(f)(1) exemption. The Commission should similarly be loathe to extend the obligations of rural carriers covered by the section 251(f)(1) exemption to facilitate intermodal competition beyond those that they have to facilitate wireline competition. This is not a claim for special treatment that is inconsistent with the RFA, contrary to the assertion of some parties.²² Rather, it is the wireless carriers that are seeking special treatment in the form of a broader intermodal portability obligation. The Commission should arrive at a conclusion that parallels the decision in the 1996 Act to exempt rural carriers from other obligations to facilitate competition, particularly since there are no meaningful public interest benefits from doing so.²³

II. IMPLEMENTING LOCAL NUMBER PORTABILITY FOR THE FIRST TIME HAS PROVED VERY BURDENSOME FOR SOME SMALL COMPANIES.

A. It Is Costly To Implement Local Number Portability for the First Time.

Small entities have incurred substantial costs because of the *Intermodal Portability Order*. Without performing the analysis required under the RFA, the Commission imposed on carriers having only a handful of employees and a few hundred lines the same costly intermodal porting requirements that it imposed on large telephone companies with thousands of employees and tens of thousands of lines. These small companies have limited customer bases, so 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 implementing and maintaining number portability is burdensome.

²² *E.g.*, Sprint Nextel Comments, at 18.

²³ Indeed, the Commission could not remove the presumption against burdening rural local exchange carriers for section 251(c) obligations without making the necessary findings for section 10 forbearance, 47 U.S.C. § 160, which would be hard at best in this case given the lack of demand for intermodal number portability.

USTelecom has looked at one estimate of the average cost incurred by a small LEC to implement local number portability for the first time, which comes from representative National Exchange Carrier Association tariff filings.²⁴ Those tariffs include worksheets for charges that recover the costs of implementing local number portability incurred by a number of small, rural carriers. Based on the LNP Exhibits in the NECA tariff, NECA participants appear to average \$324,264 in LNP implementation costs, and \$61,938 in annually recurring LNP administration costs. Since the size of NECA carriers varies significantly (although they generally serve small, rural exchanges), it may make more sense to look at LNP costs per line, which are \$17.66 for implementation and five years of annual recurring costs, excluding any transport costs. Those NECA participants that have fewer lines have higher per-line costs on average (as high as \$105.19 per line for Bergen Telephone Company). Clearly, therefore, it is burdensome for a small company to implement number portability.

B. The Intermodal Number Portability Burden Is Not Meaningfully Mitigated By Allowing the Small Company To Increase Its Rates or Petition for a Waiver.

Several parties assert that any burden imposed on small companies by the *Intermodal Portability Order* is mitigated by the small companies' abilities to raise their prices (or apply regulatory surcharges) and/or their ability to seek waivers (or forbearance) from the rules.²⁵ Both of these assertions are mere tautologies that offer no mitigation within the meaning of the RFA. They are also small comfort to small carriers as they merely substitute a different burden for the one imposed by *Intermodal Portability Order*.

²⁴ 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.

²⁵ CTIA Comments at 10-12; Sprint Nextel Comments at 10-14, Verizon Wireless Comments at 3.

The option to raise rates or apply a surcharge is not mitigation within the meaning of the RFA. The assertion that a small carrier is not burdened by a new requirement that to implement number portability because it can charge higher rates is a tautology, and it would be arbitrary and capricious for the Commission to adopt such reasoning. Small companies generally have the opportunity to raise their prices to cover the costs of virtually any burden, whether great or small. If cost recovery were mitigation, therefore, than there could be no regulatory burdens under the RFA, which obviously makes no sense at all. Moreover, when a small carrier raises its rates or applies a surcharge in a competitive market, it necessarily suffers a loss of customers or, at a minimum, goodwill (which will, over time, result in customer loss). Therefore, cost recovery through price increases cannot serve as mitigation under the RFA.

The ability to seek a waiver cannot serve as mitigation under the RFA. Small companies must incur considerable expenses when petitioning for waivers, regulatory exemptions (such as the ones available through section 251(f)(2) of the Act), or forbearance. Generally, they will have to hire attorneys and devote significant management resources to the process. The ability to incur a substantial burden in order to remove a burden imposed by regulation, however, cannot meaningfully qualify as mitigation under the RFA of the original burden because it simply offers the small company the unsatisfying choice of which burden to accept. Moreover, it offers nothing that is not already available to all companies, large and small, which can always petition for waivers of rules (including forbearance under section 10). The RFA reflects a different Congressional intent altogether—the purpose of the RFA is to require the Commission and other federal agencies to assess and minimize the burdens they impose on small companies so that those small companies do not have to incur the burden of seeking remedies, such as waivers, for unnecessarily burdensome rules.

III. CUSTOMERS HAVE NOT BENEFITED FROM THE COMMISSION'S DECISION TO REQUIRE INTERMODAL NUMBER PORTABILITY WHERE NUMBER PORTABILITY WAS NOT OTHERWISE REQUIRED.

A. Intermodal Portability Is Rarely Used Where Local Number Portability Would Not Have Been Implemented but for the Intermodal Portability Order.

USTelecom explained in its Comments that there has been little demand for number portability in the areas served by small, mostly rural, LECs that had not needed to implement number portability prior to the *Intermodal Portability Order*.²⁶ This is not surprising as those areas are relatively sparsely populated. The National Telecommunications Cooperative Association (NTCA) described in its comments the results of a survey of its membership regarding the results of intermodal number portability. In particular, NTCA found that nearly 75% of its members (which are small, rural LECs) that “at the unilateral request of a wireless carrier, spent roughly \$100,000 to become LNP capable had, at most, a single customer who was interest in taking advantage of the service.”²⁷ Other parties’ comments further support the point, and the record does not contain any substantial evidence that intermodal portability has produced significant public interest benefits in those areas where number portability was not otherwise required but for the *Intermodal Portability Order*. These examples illustrate what should by now be apparent—intermodal number portability yields few benefits in areas where number portability would not otherwise be required.

B. Additional Examples Show the Great Disparity Between the Costs and Benefits of the Intermodal Portability Order for Many Small Companies.

USTelecom provided several concrete examples in its comments showing the extent to which the Commission’s “one-size-fits-all” application of intermodal number portability had

²⁶ USTelecom Comments at 10.

²⁷ Comments of the NTCA and the Organization for the Promotion and Advancement of Small Telecommunications Companies, at 12.

produced perverse cost-benefit disparities.²⁸ In these Reply Comments, USTelecom offers several more examples.

Sand Hill Telephone Cooperative in Jefferson, South Carolina has incurred over \$117,800 in initial expense, and over \$1,700 in annual recurring costs for number portability because of the *Interim Portability Order*. Sand Hill also has yet to port a single number, which means that Sand Hill will have incurred at least \$117,800 in initial costs and \$1,700 in future annual recurring costs in return for no public interest benefits from the implementation of number portability.

Kerman Telephone Company in Kerman, California has over 6,600 lines, and it incurred approximately \$50,000 in initial expense, and over \$4,000 in annual recurring costs for number portability because of the *Interim Portability Order*. Kerman has ported zero numbers, which means that Kerman has incurred over \$58,000 to date, and \$4,000 in future annual recurring costs in return for no public interest benefits from the implementation of number portability.

Monon Telephone Company, in Monon, Indiana first had to implement number portability because of the *Interim Portability Order*. Monon states that it incurred over \$20,217 in initial, non-recurring implementation costs, and that it incurs about \$9,021 annually in recurring costs for deploying number portability. Monon, which has about 1,600 access lines, states that it has yet to port a single number. Therefore, Monon will have incurred at least \$20,217 in initial costs and \$1,600 in future annual recurring costs in return for no public interest benefits from the implementation of number portability. To make the situation worse for Monon, it states that the fact that it has yet to port a number has delayed (and possibly prevented) its cost recovery tariff from becoming effective.

²⁸ USTelecom Comments at 8-10.

HunTel Systems, Inc. in Blair, Nebraska has over 8,700 lines, and it incurred over \$264,480 in initial expense, and over \$15,000 in annual recurring costs for number portability because of the *Interim Portability Order*. HunTel has ported 19 numbers, but *all* of those ports were from one wireless provider to another wireless provider (wireless number portability), which means that HunTel has incurred over \$13,920 in initial costs and \$789 in annual recurring costs per number ported, none of which involved HunTel local exchange lines.

There can be no possible justification under the RFA for not explaining to these companies why they have had to spend so much money for so little public interest benefit. Moreover, the Commission owes them an explanation as to why it didn't adopt a less-burdensome alternative, such as mirroring the section 251(f)(1) exemption or limiting intermodal number portability to circumstances where it was already implemented (or would otherwise be implemented). Finally, given such poor results from the application of a uniform intermodal portability policy to areas served by small rural carriers, the Commission should initiate proceedings to amend its rule by adopting a less burdensome alternative.

CONCLUSION

As the Commission performs the analysis required by the RFA, it will become clear that the intermodal number portability obligation does not need to be applied to small companies that would not otherwise have to implement number portability. The Commission should conclude that the costs of its new intermodal portability requirement outweigh the benefits in areas served by many small companies. The Commission also should conclude that it could have adopted a less burdensome alternative to its decision in the *Intermodal Portability Order* to require all LECs, including small and rural ones, to implement intermodal number portability upon request even if they would not otherwise be required to implement local number portability.

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Based on the foregoing analysis, the Commission should initiate appropriate proceedings to modify the new rule articulated in the *Intermodal Portability Order* so as to minimize the burden on small companies while retaining virtually all of the benefits of promoting competition sought by the Commission.

Respectfully submitted,

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