

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

In the Matter of:

RM No. 11391

E-mail Address Portability

**COMMENTS OF
THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL**

The Information Technology Industry Council (ITI) is pleased to provide comments on a Petition for Rulemaking recently submitted to the Commission.¹ ITI represents the nation's leading information technology companies, including computer hardware and software, Internet services, and wireline and wireless networking companies.²

The Petition submitted purportedly concerns "e-mail address portability," although it could more accurately be described as seeking mandatory, free e-mail forwarding. Because e-mail is among the most competitive of all markets, the case for government intervention here is exceptionally weak. And because e-mail is (at most) an "information service" that is unregulated by the Communications Act, the Commission almost certainly lacks authority to intervene. The Commission should deny the Petition.

¹ *Matter of E-mail Address Portability*, Petition for Rulemaking, RM-11391 (filed July 20, 2007) ("Petition").

² ITI is the voice of the high tech community, advocating policies that advance U.S. leadership in technology and innovation, open access to new and emerging markets, support e-commerce expansion, protect consumer choice, and enhance global competition. For more information on ITI, including a list of its members, please visit <http://www.itic.org/about.php>.

ARGUMENT

The Petition claims to seek “e-mail address portability.”³ But this is not really so, at least not as that term has been used in the telephone context. “Number portability” involves keeping one’s phone number when changing providers.⁴ The Petition, by contrast, does *not* seek a rule under which users keep their e-mail addresses when changing providers. It instead seeks a rule requiring the forwarding of e-mails to users’ new addresses upon termination of service.⁵ The proposed requirement would last for six months (and, presumably, must be offered free of charge).⁶ This proceeding, then, is about mandatory free e-mail forwarding upon termination of service, not e-mail portability.⁷

Free e-mail forwarding may or may not be a service that consumers need. But typically, decisions by participants in a competitive market not to offer a particular service – much less offer such service free of charge to consumers – do not constitute grounds for Commission intervention. To the contrary, the very heart of the

³ Petition at 1.

⁴ 47 U.S.C. § 153(30) (defining “number portability” as “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another”). See also *Telephone Number Portability*, First Report and Order, 11 FCC Rcd. 8352, ¶ 7 n.15 (1996) (defining three types of number portability: (1) service provider - the ability to retain one's number when changing service providers; (2) service - the ability to retain one's number when changing services; and (3) location - the ability to retain one's number when changing physical locations).

⁵ Petition at 4-5 (“There is no technical reason at all why an e-mail sent to ‘customer@aol.com’ could not be automatically forwarded by AOL to ‘customer’snewaddress@yahoo.com’”).

⁶ *Id.* at 1 (describing such a requirement as lasting “for at least six months”).

⁷ Requiring true e-mail portability would be even more complicated – and even more jurisdictionally questionable – than requiring e-mail forwarding. Apart from the issues raised below in these comments, true e-mail portability would have to grapple with numerous intellectual property issues (many e-mail addresses consist of trademark materials), technical issues, and Internet governance issues (it is unclear what authority, if any, the FCC might have to alter the international system for assigning domain names and IP addresses).

Telecommunications Act is Congress's directive to "promote competition and reduce regulation" in the markets under the Commission's purview.⁸

And there are few markets more competitive than that for the provision of e-mail. Practically every provider of Internet access (Comcast, Verizon, AT&T, *etc.*) offers e-mail. Dozens, if not hundreds, of other *free* e-mail services are available to consumers, including not only those offered by AOL and Yahoo!, but those offered by Google, Microsoft, Apple and others – including practically every college and university alumni association.⁹ Indeed, market entry is so easy in this sector that companies such as GoDaddy.com allow customers to set up their own e-mail service, complete with their own domain names.¹⁰ Many people thus have multiple e-mail addresses: with their employers, with their schools, with their alumni associations, with free internet-based services, and with their internet access providers. If ever there were a sector in which the competitive marketplace can be trusted to produce the optimum mix of services consumers want, at prices they are willing to pay for such services, e-mail is surely it.

More fundamentally, the Commission must carefully consider the limits on its legal authority to require e-mail providers to offer free forwarding. E-mail forwarding, unlike number portability, is addressed nowhere in the Communications Act. Indeed, E-

⁸ Telecommunications Act of 1996, Preamble, 110 Stat. 56 (1996); *see also* H. R. Conf. Rep. No. 104-458, p. 1 (1996); *Verizon Commun's., Inc. v. FCC*, 535 U.S. 467, 542 (U.S. 2002) (Breyer, J. concurring) ("The Telecommunications Act is not a rate making statute seeking better regulation. It is a deregulatory statute seeking competition.").

⁹ *See* http://email.about.com/od/freeemailreviews/tp/free_email.htm (listing the "top 12" free e-mail services).

¹⁰ This, of course, is yet another reason not to grant the Petition. Surely the Commission is not going to get into the business of imposing rules on the tens of thousands of individuals who have set up what are essentially their own ISPs through services such as GoDaddy.

mail itself is mentioned only twice.¹¹ Moreover, E-mail is plainly not a “telecommunications service” subject to Title II Commission regulation.¹² To the extent e-mail is anything more than an unregulated Internet “application,”¹³ e-mail would be considered an “information service” under the Telecommunications Act.¹⁴

Nor is e-mail a legitimate subject of the Commission’s ancillary jurisdiction, as Petitioner suggests.¹⁵ The Commission’s ancillary jurisdiction is limited to that “necessary” to the implementation of specific statutory directives.¹⁶ There are no such directives governing e-mail, so the Commission cannot invoke ancillary jurisdiction to regulate here. Even if one argued that e-mail was a “communication by wire,”¹⁷ that alone would not be enough to give the Commission authority to regulate it. As the courts

¹¹ E-mail is referenced in the Communications Act in a provision governing the “E-Rate” portion of the Universal Service Fund, 47 U.S.C. § 254(l), and again in a provision governing electronic publishing by Bell Companies, 47 U.S.C. § 274(h)(2)(D). It is also referenced in Sections 1101(d)(3) and 1108 of the Internet Tax Freedom Act, P.L. 105-277, Div C, Title XI, 112 Stat. 2681-719; Nov. 28, 2001, P.L. 107-75, codified at 47 U.S.C. § 151 note, and in the Child Online Protection Act, codified at 47 U.S.C. § 231.

¹² 47 U.S.C. § 153(46); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, 11536 (1998) (rejecting claims that e-mail is a “telecommunications service.”).

¹³ The Commission probably cannot regulate pure “applications” to the extent that “applications” include end-user software. Such software does not constitute “communication by wire or radio,” the broadest possible articulation of the Commission’s authority under the Communications Act. *See* 47 U.S.C. § 151.

¹⁴ The Act defines “information service” as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications” 47 U.S.C. § 153(20).

¹⁵ Petition at 5. Section 1 of the Communications Act established the Commission “[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio,” 47 U.S.C. § 151, and section 4(i) “authorize[s] the Commission to ‘perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.’” 47 U.S.C. § 154(i).

¹⁶ *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (“*Midwest Video II*”).

¹⁷ 47 U.S.C. § 151.

have said with respect to the Commission’s jurisdiction, “Congress ‘does not . . . hide elephants in mouseholes.’”¹⁸

Petitioner’s proposed e-mail forwarding requirement is thus very different than recent Commission assertions of ancillary jurisdiction. E-mail is not a substitute for a traditionally regulated service, as the Commission has viewed interconnected Voice over Internet Protocol service.¹⁹ E-mail like instant messaging and social networking websites, is not really a substitute for any traditional mode of communication. Nor is e-mail related to any area in which the Commission possesses plenary regulatory authority. By contrast, when it required wireless number portability, the Commission cited its plenary authority over both wireless telephony *and* numbering issues.²⁰

* * *

The petitioner complains of a dispute with her e-mail provider. A number of remedies are available to the Petitioner, beginning with one she has already chosen – switching providers. There were, of course, also other (no cost) avenues available to her to ensure the forwarding of e-mail to the e-mail address provided by her new service

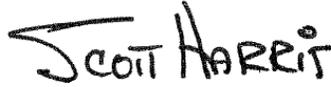
¹⁸ *Am. Library Ass'n v. FCC*, 365 U.S. App. D.C. 353 (D.C. Cir. 2005) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

¹⁹ *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 10245 ¶ 24 (2005) (E911); *Wireless E911 Location Accuracy Requirements; Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling; 911 Requirements for IP-Enabled Service Providers*, Notice of Proposed Rulemaking, 22 FCC Rcd. 10609 (2007) (Autolocation); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 14989 (2005) (CALEA); *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518 (2006) (USF Contribution); *Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927 at ¶ 5 (2007) (Privacy); *IP-Enabled Services, Notice of Proposed Rulemaking*, 19 FCC Rcd. 4863 at ¶ 72 (2004) (other consumer regulation).

²⁰ *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352, 8432 (1996).

provider. But the Petition presents no case for government regulation of e-mail. And the Commission almost certainly lacks jurisdiction to regulate e-mail in any event. The Commission should dismiss the Petition.

Respectfully Submitted,

A handwritten signature in black ink that reads "SCOTT HARRIS". The signature is written in a cursive, slightly stylized font.

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October 26, 2007