

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

In the Matter of:

E-mail Address Portability

RM No. 11391

**EX PARTE REPLY COMMENTS OF
THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL**

The comments filed in this docket are striking. As the Information Technology Industry Council (ITI) – and practically every other commenter – argued, the Commission should deny the Petition for Rulemaking recently submitted to the Commission.¹

Nearly all commenters (including those that rarely see eye-to-eye) agree that, despite its title, the Petition doesn't really seek "e-mail address portability."² It instead seeks a rule requiring the forwarding of e-mails to users' new addresses upon termination of service.³ As AT&T observes, "the Commission should be mindful of the specific

¹ *E-mail Address Portability*, Petition for Rulemaking, RM-11391 (filed July 20, 2007) ("Petition"). ITI represents the nation's leading information technology companies, including computer hardware and software, Internet services, and wireline and wireless networking companies. 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>.

² Petition at 1.

³ 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.'").

relief that [Petitioner] is seeking and, of equal importance, the relief [she] is *not* seeking.”⁴

Nearly all commenters also agree that the Commission’s jurisdiction to require e-mail forwarding is, at best, questionable. They uniformly cite the “hands-off approach toward the Internet and Internet-based information services” mandated by the Communications Act and maintained by the Commission for nearly four decades.⁵ They note that the Communications Act is silent about e-mail and e-mail addresses.⁶ They agree the e-mail is, at most, an unregulated “information service,” subject to a “pro-competitive, deregulatory regime” and *not* subject to Title II regulation.⁷ And – perhaps most importantly – they confirm that the Commission cannot legitimately assert “ancillary” jurisdiction over e-mail forwarding. The Commission’s ancillary jurisdiction under Title I covers “communication[s] by wire or radio,”⁸ and is limited to that “necessary” to the implementation of specific statutory directives.⁹ As Time Warner points out, an e-mail forwarding mandate “would not entail ‘the process of radio or wire

⁴ AT&T Comments at 2-3 (“Rather than e-mail portability, Mortenson is seeking what could better be described as an e-mail ‘forwarding’ obligation.”); ITAA Comments at 2 (“[T]here is no justification for imposition of an ‘email forwarding’ requirement in ISPs.”); Internet Commerce Coalition Comments at 2 (referring to e-mail forwarding); Time Warner Comments at 2 (noting that the Petition calls “[f]or rules that would force service providers to ‘port’ (or forward)” email); US IPA Comments at 1 (describing the Petition as explaining its proposed rules as a “mechanism that would ‘automatically forward[]’ all messages sent to one e-mail address to a different e-mail address”).

⁵ AT&T Comments at 3.

⁶ Time Warner Comments at 8 (“In fact, the Commission has never purported to regulate the provision of e-mail at all.”).

⁷ ICC Comments at 2.

⁸ 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 in 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).

⁹ *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

transmission itself.”¹⁰ And such a mandate “can in no way be considered ‘reasonably ancillary’ to any provision of the Act.”¹¹ Nor is e-mail in any way “analogous” to services subject to plenary jurisdiction (as is asserted to be the case for VoIP services).¹²

Nearly all commenters also agree that e-mail provision constitutes a highly competitive market in which government intervention is both unnecessary and inappropriate. Several cite to Commission pronouncements that “the best decision government ever made with respect to the Internet was the decision that the FCC made 15 years ago NOT to impose regulation on it.”¹³ Others note how the vibrantly competitive email market provides consumers with a number of e-mail forwarding options. Verizon, for example, discusses True Switch, “a company that provides email forwarding service and transfers stored data from one active e-mail account to another e-mail account,” as well as similar services offered by websites and universities.¹⁴ Time Warner discusses Google’s Gmail service, Pobox, and Bigfoot, which of which offer versions of e-mail portability.¹⁵ As does AT&T.¹⁶ In short, Petitioner had – and still has – any number of options open to her short of government intervention.¹⁷

¹⁰ Time Warner Comments at 10, *citing American Library Ass’n. v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

¹¹ *Id.*

¹² ITTA Comments at 4; ICC Comments at 3; Verizon Comments at 3.

¹³ Verizon Comments at 2 (quoting former Chairman William Kennard); *see also* AT&T Comments at 4 (quoting Jason Oxman, FCC Office of Plans and Policy, *The FCC and the Unregulation of the Internet*, Working Paper No. 31 at 24 (July 1999)).

¹⁴ *Id.* at 5.

¹⁵ Time Warner Comments at 4.

¹⁶ AT&T Comments at 6 (citing services offered by True Switch, Forward America, Primemail and Pobox).

¹⁷ *See, e.g.*, Verizon Comments at 1 (noting that “the market already addresses many of Ms. Mortenson’s concerns”).

Indeed, several commenters point out that undue government intervention could cause real harm in this competitive market. Time Warner argues that an e-mail forwarding obligation “would add significant cost and complexity to e-mail delivery and risk diminishing the range of service options that now exists,” and adds that “[r]outing e-mails from one provider to another . . . would lead to complex and ultimately inefficient message routing.”¹⁸ It also cites the additional litigation risk associated with a forwarding mandate – both if e-mails were not forwarded within certain timeframes and if undesired e-mails *were* forwarded against the consumer’s wishes.¹⁹ Others focus on technical limitations. Verizon, for example, notes that, while e-mail forwarding on a small scale is “manageable, albeit inefficient,” “a mandating requiring *all* ISPs to forward emails for *all* former customers . . . would make email forwarding unmanageable.”²⁰ Commenters plainly fear the unintended consequences of an e-mail forwarding mandate, and they are right to do so.

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Of the more than twenty comments filed in this proceeding, ITI has found only *two* with anything positive to say about the Petition.²¹ In light of the overwhelming weight of the record evidence, ITI again urges the Commission to deny the Petition.

¹⁸ Time Warner Comments at 6. Time Warner adds: “These burdens on service providers and their networks – and the corresponding detriment caused to consumers – would be magnified depending on the specific contours of the forwarding obligation.”

¹⁹ *Id.* at 7.

²⁰ Verizon Comments at 6.

²¹ See Comments of Allan Hoving (an individual AOL Customer who argues that e-mail should be portable in the same way that mobile telephone numbers are portable); Comments of David Allen (an ISP provider who supports an e-mail forwarding requirement as long as an ISP could charge for that service).

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