

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Telephone Number Portability) CC Docket No. 95-116
Initial Regulatory Flexibility)
Analysis)

MOTION FOR STAY PENDING JUDICIAL REVIEW

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INTRODUCTION

Pursuant to 47 C.F.R. §§ 1.41 and 1.43, the National Telecommunications Cooperative Association (“NTCA”) requests that the Commission stay the effectiveness of its *Order on Remand* in *In the Matter of Telephone Number Portability, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking*, FCC Docket Nos. WC 07-243, 07-244, 04-36, CC 95-116 (FCC 07-188) released November 8, 2007 (“*Order on Remand*”).¹ The *Order on Remand* voids a United States Court of Appeals for the District of Columbia stay entered in *United States Telecom Association v. FCC*, 400 F. 3d 29 (D.C. Cir. 2005) (*United States Telecom*). Unless a stay is entered by the Commission small wireline carriers will be required to provide local number portability (LNP) to wireless carriers effective on March 24, 2008.

NTCA’s request is limited to a stay only insofar as it applies to small wireline carriers that are considered “small entities” under the Regulatory Flexibility Act

¹ NTCA requests that the Commission rule on this Motion no later than Wednesday, February 27, 2008. In the event that the Commission does not grant the Motion by that date, NTCA intends to file an Emergency Motion for Stay Pending Judicial Review before the United States Court of Appeals for the District of Columbia Circuit.

("RFA").² The stay would maintain the *status quo* established by the judicial stay entered by the United States Court of Appeals for the District of Columbia Circuit in *United States Telecom Ass'n*.

NTCA has filed a petition for review of the *Order on Remand* in the United States Court of Appeals for the District of Columbia Circuit. That proceeding has been docketed as Case No. 08-1071.

SUMMARY

Enforcement of the *Intermodal Order* against carriers that are small entities under the RFA was stayed by the United States Court of Appeals for the District of Columbia Circuit Commission in *United States Telecom Ass'n* until the Commission prepares and publishes a Final Regulatory Flexibility Analysis ("FRFA").

The Commission should grant this stay because NTCA will prevail on the merits in its appeal. The Commission has published a FRFA but the analysis does not comply with the decision in *United States Telecom Ass'n*. In that decision the court concluded that the Commission issued a new legislative rule when it promulgated the *Intermodal Portability Order* ("*Intermodal Order*") requiring location portability for the first time.³ The FRFA prepared by the Commission continues to treat the *Intermodal Order* as a prior obligation that is not subject to serious consideration under the RFA. The Commission has merely reiterated conclusions based on its assumption that the *Intermodal Order* imposes no new obligations on small carriers. It has failed to acknowledge the significant economic burdens imposed on small ILECs as a result of the

² 5 U.S.C. §§ 601 to 612.

³ *United States Telecom Ass'n*, 400 F. 3d, 36.

new location portability rule promulgated in the *Intermodal Order*. The Commission also failed to consider significant alternatives offered by the NTCA, the Office of Advocacy of the Small Business Administration (“Office of Advocacy”) and other parties commenting on the effect of the new rule on small ILECs protected by the RFA.

The FRFA does not meet the governing “reasonable good faith” standard that applies under the RFA. As a result, the Commission’s *Order on Remand* is arbitrary, capricious, an abuse of discretion and not consistent with law. The small wireline carriers that qualify as “small entities” under the RFA have made a substantial showing that the FRFA does not comply with the RFA and they are likely to prevail on the merits of their appeal of the Commission’s *Order on Remand*.

A balance of the equities favors the award of a stay pending appeal. NTCA members that are small wireline carriers will be irreparably harmed unless enforcement of the *Intermodal Order* against them is stayed while the Court of Appeals reviews the *Order on Remand*. No monetary damages can compensate the small wireline carriers for loss of their procedural right to have the Commission consider the significant additional economic burdens imposed by the *Intermodal Order*. The loss of this procedural right during the pendency of the appeal cannot be retroactively compensated by a later Commission proceeding in which the Commission gives proper application to the RFA. The Commission is required to consider public comment and promulgate a proper FRFA at the time it promulgates a new rule, not after the rule goes into effect. Having failed to perform this duty in proper fashion, the Commission should stay the new rule as it applies to small entities until it complies with the RFA.

The balance of hardships favors NTCA members that are small entities under the RFA. NTCA members will be required to incur additional costs for the benefit of their competitors if the stay is not granted but their subscribers will have to absorb these costs even though there is minimal demand for the location portability services that are the subject of the Intermodal Order. The claimed benefits to the public and interested parties from denial of the stay are theoretical. There is no record evidence that identifies with particularity the harm to competing carriers or carrier subscribers in rural areas as a result of the stay that is currently in place. On the other hand, NTCA and the small wireline carriers have shown that the small carriers will be required to make specific large expenditures in proportion to their size and that these costs will either be passed on to small carriers' customers in monthly LNP surcharges to the detriment of the carriers' ability to compete fairly. In the case of transport costs for delivering wireless traffic associated with location portability, these costs will have to be absorbed by the small carriers with no apparent end in sight to a Commission *Intercarrier Compensation* proceeding that promises to determine how the carriers will be compensated for these costs. Neither other interested parties nor the public interest will suffer from a grant of the stay. The record demonstrates that there is very little demand for wireless-to-wireline porting in rural areas and that the large costs involved with deployment of necessary facilities and with other recurring costs such as transport and query charges will fall on consumers who obtain limited or no benefits from the availability of wireless-to-wireline porting.

BACKGROUND

In the First Report and Order in *In the Matter of Telephone Number Portability*, 11 FCC Rcd 8352 (1996) (*First Order*), the Commission mandated service provider local number portability (“LNP”) but expressly declined to require location portability. Seven years later, in the *Intermodal Number Portability Order (Intermodal Order)*, 18 F.C.C. Rcd 23697 (2003), the Commission prescribed a new rule mandating location portability. The new rule was issued in response to a petition for a declaratory ruling by CTIA-the Wireless Association. NTCA, OPASTCO, the United States Telecom Association and CenturyTel, Inc. sought judicial review of the *Intermodal Order* on the ground that the Order amounted to a legislative rule which required that the Commission abide by the notice-and-comment procedures of the Administrative Procedure Act (“APA”), 5 U.S.C. §553, and prepare a FRFA as required by the Regulatory Flexibility Act, (“RFA”), 5 U.S.C. § 601 *et.seq.*

In *United States Telecom Ass’n*, the court held that the *Intermodal Order* effected a substantive change in the First Order.⁴ In the words of the court, the *Intermodal Order* “effectively requires location portability—a requirement that the First Order has foresworn”.⁵ Though the court found that the *Intermodal Order* was a legislative rule requiring adherence to the APA procedures in 5 U.S.C. §553, it concluded that any error in following the required APA procedures was harmless because the Commission had invited and received comment from the industry on the CTIA petition.⁶

³ *United States Telecom Ass’n*, 35.

⁵ See *Id.*, 36.

⁶ See *Id.*, 42.

On the RFA claim, the Court found that the Commission “utterly failed to follow the RFA when it issued the *Intermodal Order*.” It said there is no argument that the Commission’s failure was harmless because that failure made it impossible to determine whether a final regulatory flexibility analysis—which must include an explanation for the rejection of alternatives designed to minimize significant impact on small entities—would have affected the final order. The Court remanded the case to the FCC to prepare a FRFA and entered a stay, finding that a combination of a remand and a stay—two remedies available under Section 611(b) (3) (4) of the RFA—was appropriate in the circumstances. The Court’s stay of future enforcement of the order only applies to “small entities” under the RFA and it is effective until the FCC prepares and publishes a FRFA in accordance with 5 U.S.C. §604(b).

Following the Court’s remand, the FCC published an Initial Regulatory Flexibility Analysis (“IRFA”) and sought and received public comment on the IRFA.⁷ The FRFA, Appendix D, discusses selective portions of some of the public comments and makes conclusions that purport to conform to Sections 604 of the RFA. The Commission claims that it has prepared a FRFA as directed by the Court.⁸ It says that it has considered the potential economic impact of the intermodal porting rules on small entities. Despite these claims, a careful look at the *Order on Remand* and FRFA reveals that the Commission has not given serious consideration to the economic impact of the

⁷ *Federal Communications Commission Seeks Comment on Initial Regulatory Flexibility Analysis in Telephone Number Portability Proceeding*, CC Docket No. 95-116, Public Notice, 20 FCC Rcd 8616 (2005).

⁸ *Appendix D to In the Matter of Telephone Number Portability*, Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, FCC Docket Nos. WC 07-243, 07-244, 04-36, CC 95-116 (FCC 07-188) released November 8, 2007 (“*Order on Remand, Appendix D*”).

new requirements in the *Intermodal Order*. It has failed to give a reasonable explanation for ignoring the economic impacts and substantial burdens imposed on small wireline carriers by the first-time obligation to incur non-recurring LNP and recurring interconnection and transport costs. Instead of taking these costs and other burdens imposed by the new rule into consideration, the Commission merely reiterates its conclusion that wireline-to-wireless porting is required where the requesting wireless carrier's coverage area overlaps the geographic location in which the customer's wireline number is provisioned, provided that the porting-in carrier maintains the number's original rate center designation following the port. The commission finds no justification for excusing "small entities" from complying with this requirement. In lieu of adopting any of the significant alternatives to reduce the economic burdens imposed by its new rule, the Commission concludes that existing procedural and substantive rights accorded to small carriers under the Telecommunications Act constitute "steps that minimize the economic impact of LNP on small entities."⁹

DISCUSSION

The Commission ordinarily relies on *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F. 2d 951 (D.C. Cir. 1958) in deciding whether to issue a stay.¹⁰ This standard requires that the Commission grant a stay when petitioner has shown (1) that it is likely to prevail on the merits on appeal, 2) that it will be irreparably injured if a stay is not granted, 3) that issuance of a stay will not substantially harm other parties interested in the proceeding, and 4) that a stay is in the public interest.

⁹ See *Id.*, para.15.

¹⁰ See, e.g., *In the Matter of Cable Television Syndicated Program Exclusivity Rules*, 81 F.C.C. 2d 395, 396 (1980).

I. THERE IS A STRONG LIKELIHOOD THAT PETITIONER WILL PREVAIL ON THE MERITS

NTCA is likely to succeed on the merits of its petition for review because the Commission (1) did not properly assess the significance of the economic burdens imposed on the small carriers as a result of its new rule, and (2) failed to consider significant alternatives that would reduce the burdens on small entities while at the same time achieve the objectives of the Telecommunications Act.

A. The Commission Did Not Properly Assess The Significance Of The Economic Burdens Imposed On The Small Wireline Carriers.

1. The Commission Acted Arbitrarily In Concluding That The Non-Recurring Costs Associated With Wireline-To-Wireless Porting Do Not Impose A Significant Economic Burden On Small Wireline Carriers.

NTCA, the Office of Advocacy and other commenting parties provided evidence showing that the small carriers would have to incur substantial new implementation costs related to the *Intermodal Order*. These costs include hardware upgrades and additional software needed to make a switch capable of providing intermodal LNP. To the extent permitted by Commission rules, carriers recover these costs in a monthly federal surcharge that they are permitted to collect over five years.¹¹ The costs are substantial for small wireline carriers. The Commission chose to accept opposing parties' characterization of these costs as insignificant instead of examining the actual impact of the cost and accepting as credible small carrier data that was previously scrutinized by state public service commissions in adversarial proceedings under Section 251(f) of the Telecommunications Act.

¹¹ See *Order on Remand*, fn. 22.

NTCA and OPASTCO submitted the results of an informal survey of their membership which showed that all of the small carriers with per line monthly LNP cost resulting in a \$10.00 or greater customer surcharge serve fewer than 7,000 subscriber lines.¹² The Nebraska Rural Independent Companies (“Nebraska Companies”) submitted data showing that the monthly LNP charges for the group ranged from \$.64 to \$12.23 while the residential 1-party rate benchmark in Nebraska is \$17.50 without taxes and surcharges.¹³ Other parties presented data showing that the small carriers would be required to make expensive investments in hardware and switching upgrades for the first time as a result of the Intermodal Order.¹⁴ NTCA and others submitted data showing that the requests for porting in rural areas were very low in comparison to the cost involved.¹⁵

Despite the data submitted by the parties, the Commission summarily concluded that the cost of wireline-to-wireless intermodal LNP does not impose a significant economic burden on small entities.¹⁶ The Commission’s conclusion is arbitrary and capricious because it is not possible to tell from this conclusory finding what measure the Commission employs to determine either the level or the type of costs that meets the definition of a “significant economic burden” for purposes of the Commission’s analysis. It is not apparent, for example, whether costs that would double a consumer’s monthly residential rate (without taxes and unrelated surcharges) would be an economic burden on

¹² See Comments of NTCA and OPASTCO filed August 19, 2005 in this proceeding, *In the Matter of Telephone Number Portability, Initial Regulatory Flexibility Analysis*, CC Docket No. 95-116 (“Petitioner’s Initial Comments”) at 11.

¹³ Initial Comments of the Nebraska Rural Independent Companies in this proceeding (“Nebraska Comments”) at 4.

¹⁴ See, e.g., Initial Comments of Office of Advocacy at 4, Initial Comments of the Missouri Small Telephone Group at 3-7.

¹⁵ See Petitioner’s Initial Comments at 12-13, Initial Comments of United States Telecom Association (“USTA”) at 8-10.

¹⁶ *Order on Remand, Appendix D*, paras. 5-6.

a small carrier with a limited customer base, the situation that applies to most of the wireline carriers qualifying as “small entities.” Further, by failing to consider the small number of port request to small rural wireline carriers, the Commission failed to properly consider the cost burden on “small entities” in relationship to the objectives of promoting competition. The Commission merely concludes that the new rule will promote competition. It fails to explain why it is necessary to burden small wireline carriers with the full impact of the location portability rule in order to achieve this uncertain objective.

2. The Commission Avoided Its Obligation To Consider The Economic Impact Of Recurring Costs Associated With Wireline-To-Wireless Porting.

The *Intermodal Order* results in recurring costs for interconnection, transport, service order administrator functions and LNP query charges.¹⁷ The economic impact of these costs is not considered in the FRFA.

The Commission does not even address interconnection, administrator services and LNP query charges. It excuses its failure to consider transport costs as an economic burden on the grounds that the transport costs issues associated with calls to ported number are outside the scope of this proceeding.¹⁸ The excuse that the Commission provides is inconsistent with the RFA. Small wireline carriers have commented that significant economic impacts must be considered in the FRFA if those impacts result from compliance with the agency rule.¹⁹ That is the case here. The additional costs that are identified by the small carriers are a direct result of the requirement that these carriers

¹⁷ See Petitioner’s Initial Comments at 11.

¹⁸ The Commission does not contend that the new rule will not cause small ILECs to incur transport costs for which they will not be compensated. It also does not address the technical difficulty of self help methods of ensuring compensation.

¹⁹ Nebraska Companies Reply Comments in this proceeding, filed September 6, 2005 at p. 4-5.

port numbers outside their own service areas for the benefit of wireless carriers that have no interconnection facilities in small carrier service areas.²⁰ The *Intermodal Order* in particular and not the pending *Intercarrier Compensation* proceeding, requires the small wireline carriers to transport calls beyond their service areas and networks to ported numbers and to treat such calls as “locally-rated, non-toll calls.” Because the Commission requires such calls to be “locally-rated,” the new rule eliminates the small wireline carriers’ ability to follow what is common practice with respect to other traffic destined to distant switches, *i.e.*, to utilize existing toll facilities to deliver this traffic (calls to numbers ported to distant switches) outside their service areas. This is a new obligation that is a direct effect of the *Intermodal Order* and it comes with significant new economic impacts.

The Commission errs by treating transport costs as if they are an external factor unrelated to the new and additional costs arising from the *Intermodal Order* and in ignoring resulting transport costs on the grounds that they are being considered in another proceeding that may or may not provide a remedy for ensuring that small ILECs are compensated for the costs they incur to port numbers to and from wireless carriers. Timely resolution of the transport costs issue is entirely within the Commission’s control. It is unjustifiable for the Commission to excuse its failure to address economic burdens when it has the ability to resolve these very grave issues before imposing the obligations of location portability on the small carriers.

²⁰ USTA commented that the Commission’s new rule required many carriers to implement LNP for the first time. USTA Initial Comments at 5-7.

B. The Commission Has Erroneously Concluded That Rights Guaranteed By The Telecommunications Act Excuse It From Describing Steps The Agency Has Taken.

The Commission does not describe any steps that it has taken to minimize the significant economic impact on small entities as it is required to do under 5 U.S.C. §604(a)(5).²¹ Instead, it finds that certain rights provided for in the Telecommunications Act (“the Act”) “effectively constitute steps that minimize the economic impact of LNP on small entities.”²² The rights described by the Commission are embedded in the Act, *i.e.*, the requirement that carriers provide LNP upon receipt of a specific request to the provision of LNP and the availability of suspensions and modifications under section 251(f) of the Act.²³ These statutory rights are not “steps the agency has taken.” If the Commission’s resort to rights already embedded in the Act is deemed to satisfy its obligations under the RFA, there is then no reason for the RFA and the Congress’ enactment of that law would be superfluous. It is presumed that Congress does not enact superfluous laws. The Commission also mentions the availability of waivers at the Commission. This process too is a preexisting procedure and not a step taken to minimize economic impacts.

Even if the Commission could lawfully rely on existing statutory rights or its own general waiver procedures to excuse its failure to describe the steps it has taken to

²¹ 5 U.S.C. § 604(a)(5) provides that each Final Regulatory Flexibility Analysis shall contain “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.”

²² *Order on Remand*, para. 15 (referring back to a finding in the First Number Portability Order on Reconsideration, 12 FCC Rcd at 7343-44), *see also*, App. D, paras. 29-30.

²³ *Order on Remand*, Appendix D.

minimize the economic impact of its new rule, its decision is arbitrary and capricious and contrary to the facts. The statutory rights and waiver procedure described do nothing to minimize economic impacts. First, the fact that the obligation to provide LNP may not be triggered until there is a request is no remedy for the small wireline carrier receiving a request to port. That carrier must comply with a request regardless of the number of ports the wireless carrier expects to complete. The fact is that the new rule imposes an immediate burden that can be triggered at any point by a request from a competitor. Second, the Commission is also incorrect in assuming that exercise of these rights comes without their own significant economic impact. The comments demonstrate that there are significant costs involved in seeking a waiver at the Commission or, in the case of carriers with no more than 2% of the installed subscriber lines in the nation, a suspension or modification of LNP obligations under section 251(f)(2) of the Act.²⁴

C. The Commission Did Not Consider Significant Alternatives That Would Achieve The Objectives Of The New Rule

NTCA and OPASTCO offered two significant alternatives capable of reducing the economic burdens imposed on the small ILECs while at the same time achieving the objectives of the new location portability rule. The associations proposed (1) a temporary stay of the new rule until the routing and rating issues are resolved by the Commission and (2) a requirement that wireless carriers either establish a point of interconnection (“POI”) within a rural local exchange carrier (“RLEC”) service area, or pay for the transport and termination of traffic outside of the small carrier’s service area.²⁵ The Associations made it clear in their comments that they are not requesting a permanent

²⁴ See, e.g., Petitioner’s Initial Comments at 16, USTA Initial Comments at 12.

²⁵ Petitioner’s Initial Comments at 19.

exemption from intermodal LNP requirements.²⁶ The Office of Advocacy also proposed that the Commission require wireless carriers to establish a POI within a RLEC service area.²⁷

Using the same excuse that it used to ignore transport costs, the Commission rejected the “temporary stay” alternative offered by NTCA, OPATSCO and others on the ground that (1) the issues pertaining to rating and routing are pending in the intercarrier proceeding and (2) the issue of transport costs is outside the scope of this proceeding and not relevant to the application of LNP obligations under the Act.²⁸ The Commission’s reasons for rejecting the “temporary stay” alternative are neither reasonable or consistent with the RFA.

First, the transport costs issue is not outside the scope of a FRFA, the exercise that the Commission undertook in the *Order on Remand*. As shown above, the transport costs that the small wireline carriers complain of are within the scope of this proceeding because they constitute an economic impact resulting from the new rule. A “temporary stay” is offered as an alternative to reduce the financial burden due to the lack of a compensation mechanism for transport costs. The small wireline carriers have brought that issue to the Commission’s attention and made it a part of this proceeding by demonstrating that it is an issue that has a significant economic impact on them. Second, these transport costs are a result of rules that impose new LNP obligations. If there is a causative effect between the new rules and the additional cost burden, the Commission is obliged to consider significant alternatives that may reduce the economic impact of its

²⁶ Petitioner’s Comments to IRFA, p. 3.

²⁷ Office of Advocacy Initial Comments at 7.

²⁸ *Order on Remand, Appendix D*, para. 4.

rule. Taken together with the rejection of other significant alternatives, the Commission's failure to consider this alternative demonstrates that the Commission's FRFA does not constitute a "reasonable, good-faith effort to carry out the RFA's mandate." *U.S. Cellular Corp. v. F.C.C.* 254 F.3d 78, 88 (C.A.D.C., 2001) citing *Alenco Communications, Inc. v. FCC*, 201 F. 3d 608, 625(5th Cir. 2000).

The interconnection alternative offered by NTCA and others is significant because it is based on the established practice that governs wireline-to-wireline porting and it solves technical rating and routing issues as well as compensation in the interim. It addresses the crux of the burden imposed by the new rule, the requirement that wireline carriers assume all the costs of compliance for delivering calls to locally-rated numbers ported to distant switches. That requirement is unique to the *Intermodal Order*. In the absence of interconnection agreements, neither small wireline carriers nor any other carriers have the obligation to transport toll calls (calls destined to distant switches outside the small wireline carriers service area) as if they were "locally-rated, non-toll" calls.

The Commission also rejected a "partial or blanket exemption" proposed by other parties. It concluded that an exemption would harm consumers in small and rural areas across the country by preventing them from being able to port on a permanent basis.²⁹ Of course, the alternative that the Associations proposed was not a permanent exemption but a temporary stay until the Commission decides the transport issues and relieves small carriers from the obligation of bearing transport costs that are attributable to wireless traffic.

²⁹ *See Id.* at para.16.

When viewed as a whole, it is apparent that the FRFA amounts to no more than a rote exercise. No serious consideration is given to the comments that do not support the Commission's interpretation of the new "location portability" rule as a prior obligation imposed in the *First Order*. The Commission has magnified its errors by making conclusions that are not rationally related to the data presented in the record. As a result, the Commission has failed to exercise "reasonable good faith" in preparing the FRFA. Petitioner has shown that it will prevail on the merits and that the balance of the equities merits the granting of a stay.

II. THE BALANCE OF EQUITIES FAVORS PETITIONER

NTCA's members will be irreparably harmed if the Commission's "location portability" rule goes into effect before the Commission prepares a lawful FRFA. It is not possible to measure the damages that the small wireline carriers will suffer by having to comply with the new rule instead of a rule adopted after the consideration of alternative measures required to be considered under the RFA. The Commission may adopt a totally different approach for small entities after it does a proper FRFA. In the interim, a stay is needed to preserve the *status quo* and prevent the loss of the small carriers' procedural rights to have the Commission make a "reasonable, good-faith" effort to comply with the RFA. Monetary damages will not compensate the carriers for loss of this statutory right. The carriers will also suffer additional irreparable injuries in the absence of a stay. Because of the uncertainties and lack of resolution of the transport issues in the pending *Intercarrier Compensation* proceeding, it may not be possible, for example, for NTCA members to ever recover potentially unnecessary investments and ongoing expenditures that must be made upon request by a wireless carrier. The ongoing

obligations imposed by the new rule subject NTCA members to obligations that impose uncertain and changing costs on them and their customers.

The remedies provided in the RFA implicitly recognize that denial of the procedural right to a proper FRFA is not compensable through monetary or measurable damages. The RFA stay remedy assumes irreparable harm in the absence of strict compliance with the procedures required in the formulation of a FRFA. The remedial provisions in the RFA provide additional reasons for the Commission to find that a stay is warranted in the circumstances.

Denial of a stay and the effect of compliance with the new rule at this time will impose greater burdens on NTCA's members than it will on the wireless carriers interested in this proceeding. A stay will maintain the *status quo* for the limited number of carriers defined as "small entities" under the RFA. By definition, these carriers operations are not dominant in their field of operation.³⁰ They serve principally rural areas where the demand for LNP is limited while the per customer costs which must be passed on to all subscribers- whether or not they avail themselves of location portability- are often astronomical. The new rule's benefits to consumers are questionable in light of the sparse demand for LNP in the areas served by NTCA's members. This limited demand for "location portability" weighed against the substantial costs of providing it means that the burdens on the small carriers outweigh the benefits to the few consumers choosing "location portability." There is no harm to wireless carriers. A stay is already in place and no record evidence demonstrates that wireless carriers are losing significant

³⁰ *Order on Remand, Appendix D*, para. 8.

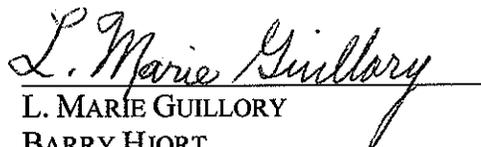
customers or incurring other financial burdens as a result of the judicial stay which is now in effect as to small entities.

The public will benefit from the grant of a stay. A stay will provide interim relief while the Court reviews this case and the Commission continues its consideration of transport issues in the *Interrcarrier Compensation* proceeding. A stay will prevent confusion and uncertainty and allow time for the Commission to resolve transport and other related issues that give rise to the significant economic burdens imposed by the “location portability” rule. Lastly, the grant of a stay will promote the public interest by preventing the imposition of unnecessary and exorbitant surcharges on consumers with few benefits, by promoting the preservation of scarce small company resources and encouraging small entities to channel scarce resources to services that directly benefit their rural customers.

III. CONCLUSION

For the above stated reasons, NTCA requests that the Commission grants its Motion for Stay Pending Judicial Review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Rita H. Bolden, hereby certify that on this 22nd day of February 2008, a true and accurate copy of the National Telecommunications Cooperative Association's Motion For Stay Pending Judicial Review has been served by first class United States mail, postage prepaid, or via hand or electronic mail, to those listed below:

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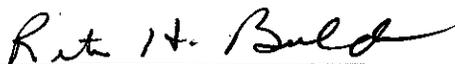
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