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

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

SPRINT NEXTEL OPPOSITION TO THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION'S MOTION FOR STAY

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Sprint Nextel Corporation ("Sprint Nextel") submits the following Opposition to the Motion for Stay Pending Judicial Review filed on February 22, 2008, by the National Telecommunications Cooperative Association ("NTCA").[1] NTCA's stay motion is an impermissible collateral attack on the Commission's *Intermodal Order* and Commission rules and orders governing the proper rating and routing of telecommunications traffic. NTCA provides no justification for further delay of number portability in rural areas, and its motion does not meet the rigorous standards required for a stay.

INTRODUCTION AND SUMMARY

The Federal Communications Commission ("FCC" or "Commission"), in its 2003 *Intermodal Order*, clarified that wireline carriers must port telephone numbers to wireless carriers where "the requesting wireless carrier's 'coverage area' overlaps the geographic location of the rate center."[2] The FCC expressly found that such porting was technically feasible and did not require an interconnection agreement, even if the wireless carrier did not have a point of inter-

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[1] *See* National Telecommunications Cooperative Association, Motion for Stay Pending Judicial Review, CC Docket No 95-116 (Feb. 22, 2008)("NTCA Stay Motion").

[2] *Intermodal Porting Order*, 18 FCC Rcd 23697, 23698 ¶ 1, 23706 ¶ 22 (2003)("*Intermodal Order*").

connection or numbers within the rate center. No one, including NTCA, challenged the substantive merits of this 2003 *Order.*[3]

The *Intermodal Order* was challenged for failure to provide notice and comment, but the Court of Appeals largely rejected this argument, ruling that "if there was any procedural failure, it was harmless."[4] Nonetheless, the Court did find that the Commission erred in not preparing a Final Regulatory Flexibility Analysis ("FRFA"), and it remanded the case for the preparation of an FRFA and stayed enforcement of the *Intermodal Order* "until the FCC completes its final regulatory flexibility analysis."[5] The Commission recently completed an FRFA in compliance with the Court's remand order.[6] This action lifted the Court's stay which, in turn, enables consumers in rural areas finally to enjoy the benefits of number portability that consumers in urban areas have enjoyed for years.

NTCA now claims that the Commission did not engage in a "reasonable, good faith" effort in preparing its FRFA.[7] NTCA further asserts that the Commission's lack of good faith is so egregious that it will likely prevail on appeal and that as a result, the Commission should exempt during the pendency of the appeal all rural LECs from their statutory duty to permit their customers to port their numbers to wireless carriers.

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[3] *USTA v. FCC*, 400 F.3d 29, 39 (D.C. Cir., 2005) ("[T]he petitioners do not challenge the substantive reasonableness of the rule.").

[4] *Id*. at 41.

[5] *Id.* at 43.

[6] *See Intermodal Order on Remand,* 22 FCC Rcd 19531, 19605-11 (Nov. 8, 2007)(Appendix D)("*Intermodal Remand Order*"), *published in* 73 Fed. Reg. 9463, 9478-81 (Feb. 21, 2008).

[7] *See* NTCA Stay Motion at 3 and 15. *See also id.* at 16 ("[I]t is apparent that the FRFA amounts to no more than a rote exercise").

It is important to understand the impact of the stay that NTCA wants the Commission to impose. Over a decade ago, Congress required all LECs to provide number portability,[8] but it developed a procedure for small carriers to be relieved of this statutory obligation. Specifically, Congress empowered State commissions to entertain rural LEC petitions for suspension and to determine, using criteria Congress established, whether particular rural LECs should be relieved from providing number portability.[9]

State commissions have suspended the portability obligation for some rural LECs, because the LECs demonstrated that the provision of number portability would be unduly burdensome. The blanket stay NTCA seeks would be of no benefit to these rural LECs, as they are already relieved of providing number portability by their State commission suspension order.

With respect to other rural LECs, State commissions have determined that these LECs did not meet the statutory suspension criteria and that, as a result, they should not be relieved of providing number portability. The blanket exemption NTCA seeks would benefit these rural LECs because they would be relieved from providing portability even though their respective State commission, based on a specific factual record, determined they should provide such portability. NTCA thus wants the FCC effectively to overrule these State commission decisions and to ignore and undermine the very procedure that Congress developed specifically for small carriers.

NTCA's motion does not meet any of the four requirements necessary for a stay:

1. NTCA has not demonstrated that it will likely prevail on the merits in an appeal. The FCC's RFA analysis is not defective and is not likely to be overturned on appeal.

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8 *See* 47 U.S.C. § 251(b)(2).

9 *See id.* at § 251(f)(2).

2. NTCA has not demonstrated that its members will face irreparable injury in the absence of a stay. Those rural LECs that would face extraordinary costs in providing portability are already relieved of this obligation by State commission suspension orders.
3. NTCA has not demonstrated that a stay would not harm wireless and other competitive carriers. In fact, the blanket exemption NTCA seeks would exempt those rural LECs which State commissions have determined should provide number portability because it would not impose an undue burden on them.
4. NTCA has not demonstrated that a stay would promote the public interest. Notably, NTCA has not challenged the Commission's determination that reinstatement of the intermodal requirement would "ensure that more consumers in small and rural communities will be able to port and experience the competitive benefits of LNP."[10]

Congress has determined that consumers in rural areas deserve access to the same services and features that are available to consumers in urban areas.[11] It is time, finally, that consumers in rural areas enjoy the competitive benefits of number portability.

DISCUSSION

NTCA has failed to demonstrate the existence of any of the four criteria that the Commission considers in a stay proceeding.[12]

I. NTCA IS UNLIKELY TO PREVAIL ON THE MERITS

NTCA contends that the FRFA is defective in two ways: the Commission allegedly "(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."[13] These contentions are factually incorrect. The FCC not only con-

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[10] *Intermodal Porting FRFA*, 22 FCC Rcd at 19611 ¶ 16.

[11] *See* 47 U.S.C. § 254(b)(3).

[12] *See Intermodal Porting Stay Denial Order*, 18 FCC Rcd 24664 (2003)(FCC denies motion to stay the *Intermodal Order* applying the four criteria set forth in *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958)).

[13] NTCA Stay Motion at 8.

sidered the claims asserted by the NTCA, it properly rejected the continued efforts of these carriers to suppress competition in rural areas.

A. Assessment of the Economic Burdens on Small Entities

NTCA claims that the intermodal location portability requirement adopted in the *Intermodal Order* imposes "significant additional economic burdens" on its members and that the Commission's FRFA "failed to acknowledge" these burdens.[14] In fact, the Commission, based on the record evidence, determined that rural LECs had "not demonstrated such significant costs" and that their claims of "large" implementation costs were at best based on "scant support."[15] NTCA does not even allege, much less demonstrate, that these agency factual findings are unsupported by record evidence.

In addition, the appellate court directed the Commission to prepare a FRFA for what it perceived was a new requirement in the *Intermodal Order* – the provision of intermodal location portability (vs. intermodal service provider portability).[16] As NTCA notes, the Commission was thus required to assess the "*additional* economic burdens imposed by the *Intermodal Order*."[17]

NTCA is mistaken in claiming that its members will incur "substantial new implementation costs related to the *Intermodal Order*."[18] The hardware and software LECs need to provide

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[14] *See* NTCA Stay Motion at 2-3.

[15] *Intermodal FRFA*, 22 FCC Rcd at 19606-07 ¶ 5. For example, the FCC was fully justified in disregarding the results of an "informal" NTCA survey (*see* Stay Motion at 9), when no cost documentation was submitted to support the claims and when rural LECs had every incentive to inflate their claimed compliance costs.

[16] *See USTA* v. FCC, 400 F.3d 29, 42-43 (D.C. Cir. 2005). Regrettably, the appellate court confused terminal mobility with location portability. *See* Sprint Nextel Reply Comments, CC Docket No. 95-116, at 2-7 (Sept. 6, 2003). Nevertheless, this misunderstanding is not important as a practical matter given that the requirements of the *Intermodal Order* were not challenged on appeal and thus can now be enforced.

[17] NTCA Stay Motion at 3 (emphasis added).

[18] *Id.* at 8.

intermodal location portability are the same hardware and software these LECs need to provide intermodal service provider portability, a requirement that rural LECs also have not challenged, because the functions a LEC performs are identical. These are also the same costs a rural LEC will incur to meet its obligation to provide *intramodal* porting with other *wireline* carriers, an obligation of all rural LECs regardless of whether there is an additional obligation to provide intermodal porting. Thus, rural LECs will incur no "additional" non-recurring costs in provisioning intermodal location portability.

NTCA also claims its members will also incur sizable "recurring costs for interconnection, transport, service order administrator functions and LNP query charges."[19] This cannot be accurate given NTCA's repeated statement that the demand for intermodal portability is "very low" and "minimal."[20] Even if the demand were substantial resulting in higher recurring costs, then preference must be given to consumers who desire an alternative to the services provided by the incumbent LEC.[21]

In the end, there are no appreciable "additional" costs in providing intermodal location portability once a LEC is capable of providing intermodal service provider portability, because the same hardware, software, administrative functions, query costs and transport are used/incurred in provisioning both types of portability.[22] In fact, the record evidence in response to the Initial Regulatory Flexibility Analysis ("IFRA") was uncontroverted that "not a single LEC commenter has submitted any facts on the incremental additional costs of providing intermodal

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[19] *Id.* at 10.

[20] *See, e.g.*, NTCA Stay Motion at 2 (twice), 9, 10 and 17.

[21] *See Remand Order FRFA*, 22 FCC Rcd at 19611 ¶ 16 ("While we recognize that wireless carriers will still incur implementation and recurrent costs, we conclude that the benefits to the public of requiring wireline-to-wireless intermodal LNP outweigh the economic burden imposed on these carriers.").

[22] *See, e.g.*, Sprint Reply Comments, CC Docket No. 95-116, at 11-12 (Sept. 6, 2005).

'location portability' – that is, the costs that would be incurred above those needed to provide service provider portability."[23]

Completely without merit is NTCA's additional claim, entirely unsupported, that the *Intermodal Order* imposed a "new obligation" on rural LECs:

> The *Intermodal Order* . . . 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."[24]

These are not new obligations as NTCA claims. As the FCC General Counsel has stated, the rural LEC "complaint about their obligation to transport traffic is in fact a grievance with an obligation that is imposed by the Commission's long-standing interconnection rules – not by the *Order* clarifying intermodal portability":

> Rural LECs thus always have been required to deliver traffic to other carriers through direct or indirect interconnection – even when a wireless carrier's switch is not located in the rural LEC's rate center. The FCC's LEC/CMRS interconnection rules were upheld in *Iowa Utilities Board*, and this Court has rejected efforts to attack those rules collaterally. It is too late in the day for [rural LECs] to challenge the Commission's long standing interconnection rules.[25]

The Commission has rejected the position advocated by NTCA.[26] And, every federal court that has addressed this transport issue has reached the same result.[27]

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[23] *Id.* at 11. The FCC would thus have been justified in certifying that the provision of intermodal location portability, in addition to intermodal service provider portability, would "not . . . have a significant economic impact on a substantial number of small entities." 47 U.S.C. § 605(b).

[24] NTCA Stay Motion at 11.

[25] FCC Answer Brief, *USTA* v. *FCC*, Nos. 03-1414, 03-1443, at 32-33 (D.C. Cir., July 7, 2004) (supporting legal citations omitted). *See also* FCC Answer Brief, *Central Texas Telephone Coop*. v. *FCC*, No. 03-1405, at 10 (D.C. Cir., June 24, 2004)("The Commission has construed [Rule 51.703(b)] to mean that an incumbent LEC must bear the cost of delivering traffic (including the facilities over which the traffic is carried) that it originates to the POI selected by a competing telecommunications carrier.").

[26] *See, e.g.*, *Mountain Communications* v. *Qwest*, 21 FCC Rcd 11577 (2006); *TSR Wireless* v. *US WEST*, 15 FCC Rcd 11166, 11184 ¶ 31 (2001), *aff'd Qwest* v. *FCC*, 252 F.3d 462 (D.C. Cir. 2001); *Virginia Arbitration Order*, 17 FCC Rcd 27039, 27057 ¶ 37, 27063-65 ¶¶ 51-53 (2002).

Indeed, NTCA itself has acknowledged these long-standing interconnection rules. Specifically, NTCA has advised the Commission that wireless carriers and rural LECs generally interconnect indirectly rather than directly because the "most feasible and cost-effective option for most rural LECs is to use the RBOC's tandem for transiting functions."[28] NTCA has further recognized that "the carrier that originates the call will pay for the transiting function."[29] Thus, NTCA has acknowledged that under FCC interconnection rules affirmed on appeal, the wireless carrier pays for transit on mobile-to-land calls while the rural LEC pays for transit on land-to-mobile calls.[30]

Nor did the *Intermodal Order* establish new call rating rules, as NTCA further claims (again without any support). As the Commission has recognized, it is "standard industry practice for telecommunications carriers to compare the NPA/NXX codes of the calling and called parties to determine the proper rating of a call" for end users:

> [A] call is rated as local if the called number is assigned to a rate center within the local calling area of the originating rate center. If the called number is assigned to

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[27] *See, e.g.*, *Atlas Telephone* v. *Oklahoma Comm'n*, 400 F.3d 1256 (10th Cir. 2005); *Mountain Communications* v. *FCC*, 355 F.3d 644 (D.C. Cir. 2004); *MCImetro* v. *BellSouth*, 352 F.3d 872 (4th Cir. 2003); *Southwestern Bell* v. *Texas Comm'n*, 348 F.3d 482 (5th Cir. 2003). PUCs have also rejected rural LEC arguments that FCC rules excuse them from having to pay the cost of transporting their land-to-mobile traffic to a wireless carrier's network. *See, e.g.*, *Wireless Carrier/Rural LEC Final Arbitration Order*, Application 06-02-2006 (California, Jan. 14, 2008)(RLEC argument "mis-reads the Act"); *T-Mobile/Rural LEC Arbitration Order*, Case No. IO-2005-0468, 2005 Mo. PSC LEXIS 1766, at *33-34 (Missouri, Oct. 6, 2005)(RLEC position on "transport costs for intraMTA land-to-mobile traffic conflicts with FCC rules.").

[28] NTCA, *Bill and Keep: Is It Right for Rural America?*, at 41 (March 2004), *appended to* NTCA Ex Parte, CC Docket No. 01-92 (March 10, 2004).

[29] *Id.* at 40.

[30] The FCC recognized long ago that rural LECs and wireless carriers would interconnect indirectly and use third party transit services in routing to each other calls to ported numbers. *See First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7305 n.399 (1997).

> a rate center outside the local calling area of the originating rate center, it is rated as a toll call.[31]

Accordingly, if a call to a telephone number is local today, the same call to the same number necessarily will remain local after the number is ported.[32]

In summary, there is no basis whatsoever for NTCA's unsupported assertion that the *Intermodal Order* imposed new interconnection and call rating rules on carriers. Consequently, there was no need for the Commission to address this subject in its FRFA.

B. Review of Significant Alternatives

NTCA further asserts that the FRFA is defective because the Commission "failed to consider" three alternatives that NTCA proposed. In fact, the "alternatives" NTCA identified are not alternatives at all. Accordingly, the Commission had good reason not to discuss these NTCA proposals in its FRFA.

1. A Temporary Blanket Stay or Exemption. NTCA claims that the Commission "fail[ed] to consider" its proposal for "a temporary stay until the Commission decides the transport issues."[33] NTCA is wrong. The Commission explicitly considered, but rejected, the proposal to create "a partial or blanket exemption from the wireline-to-wireless intermodal porting requirements for small entities":

> [Such 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. It

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[31] *Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, 4747 ¶ 141 (2005). *See also Virginia Arbitration Order*, 17 FCC Rcd 27039, 27181-82 (2002); *Atlas Telephone* v. *Oklahoma Comm'n*, 309 F. Supp. 2d 1313, 1317 (W.D. OK. 2004), *aff'd* 400 F.3d 1256 (10th Cir. 2005).

[32] In addition, local dialing parity rules are clear in specifying that a LEC "shall permit" its customers to dial "the same number of digits to make a local telephone call notwithstanding the identity of the . . . called party's telecommunications service provider." 47 C.F.R. § 51.207. *See also WWC License* v. *Boyle*, 459 F.3d 880 (8th Cir. 2006).

[33] NTCA Stay Motion at 15.

> might also discourage further growth of competition between wireless and wireline carriers in smaller markets across the country.[34]

NTCA's only response to these Commission determinations is its unexplained assertion that the benefits of competition are "uncertain."[35]

But NTCA's stay proposal suffers from two more fundamental defects. First, the Commission lacks the authority to grant a blanket stay, or exemption, from the statutory number portability requirement. Congress, in the Telecommunications Act of 1996, required all LECs, including rural LECs, to provide number portability if technically feasible.[36] Congress imposed this mandate because it "recognized that number portability was necessary in developing competition for local exchange services because customers are reluctant to switch carriers if they must also change their telephone numbers."[37] The Commission lacks the authority to exempt carriers from requirements imposed by Congress. As the Commission held over a decade ago, "we find no statutory basis for excusing such a LEC from its obligations to provide number portability."[38]

Importantly, Congress did create a procedure – a "significant alternative" under the parlance of the Regulatory Flexibility Act – for small carriers to be relieved of having to provide number portability:

> The only statutory avenue for relief from the Section 251(b) requirements specifically for eligible LECs is to request suspension or modification of the number

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34 *Remand Order FRFA*, 22 FCC Rcd at 19611 ¶ 16.

35 NTCA Stay Motion at 10.

36 *See* 47 U.S.C. § 251(b)(2). *See also First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7304 ¶ 119 (1997)("[T[he requirements of Section 251(b) apply to a rural LEC. . . . We find such [a rural LEC] interpretation to be contrary to Congress's mandate that all LECs provide number portability."); *First LNP Order*, 11 FCC Rcd 8352, 8391-92 ¶¶ 73-74 (1996).

37 *Number Portability Costs*, 21 FCC Rcd 10140 at ¶ 2 (2004).

38 *First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7303 ¶ 116 (1997). Of course, the FCC possesses the authority under Section 10 of the Act to forbear from applying the statutory LNP mandate if the petitioner can demonstrate that the statutory forbearance criteria are present. *See* 47 U.S.C. § 160. No rural LEC has filed such a forbearance petition.

> portability requirements under the process [Congress] established by Section 251(f)(2).[39]

Congress determined that State commissions, rather than the FCC, should evaluate petitions for relief – and to consider such petitions on a case-by-case basis by applying the statutory criteria Congress developed.[40] This statute only reinforces the point that this Commission lacks the authority to grant LECs blanket relief from their statutory obligation to provide number portability.

Under the Regulatory Flexibility Act, an alternative is "significant" only if the alternative is "consistent with the stated objectives of applicable statutes."[41] Congress' stated goal in requiring all LECs to provide number portability was to reduce barriers to competition and to promote competition for the benefit of consumers. It is understandable that NTCA never explains its assertion that a blanket exemption "would achieve the objectives of the new rule,"[42] because such an exemption would continue barriers to competition rather than remove them. In any event, as the Commission has already recognized, it lacks the authority to grant a blanket exemption from a statutory requirement, and a proposed alternative can hardly be considered a "significant alternative" if the agency lacks the authority to adopt it.

There is a second defect with NTCA's stay proposal – namely, there is no need for the requested stay. According to NTCA, a blanket stay should be imposed "until the routing and rat-

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39 *First LNP Reconsideration Order*, 12 FCC Rcd at 7304 ¶ 117.

40 *See* 47 U.S.C. § 251(f)(2).

41 5 U.S.C. § 604(a)(5). NTCA recognizes that to be significant, alternatives must "achieve the objects of the Telecommunications Act." Stay Motion at 8. *See also* 47 U.S.C. § 606 (FRFA requirements do "not alter in any manner standards otherwise applicable by law to agency action."); *Little Bay Lobster* vs. *Evans*, 352 F.3d 462, 470 (1st Cir. 2003)(FRA does "not alter the substantive mission of the agencies under their own statutes; rather, the Act creates procedural obligations to assure that the special concerns of small entities are given attention in the comments and analysis process when the agency undertakes rule-making that affect small entities.").

42 NTCA Stay Motion at 13.

ing issues are resolved by the Commission."[43] But as Sprint documents in Part I.A above, the Commission resolved the routing and rating issues long ago, and federal courts have uniformly confirmed these FCC requirements.

In summary, the Commission cannot, as a matter of law, adopt the NTCA's stay proposal. The proposal is not an alternative, much less a "significant" alternative, and there was no reason for the Commission to discuss this NTCA proposal in is FRFA.

2. A New POI/Direct Interconnection Requirement. NTCA further asserts that the Commission should have considered the option of requiring a "point of interconnection ("POI") within a rural local exchange carrier ("RLEC") service area."[44] A POI between a rural LEC and a wireless carrier makes sense only if the two carriers interconnect directly with each other. Thus, in requesting a POI within a rural LEC's service area, NTCA is effectively asking the Commission to require wireless carriers and rural LECs always to interconnect directly with each other.

There are numerous fatal flaws with NTCA's POI/direct interconnection proposal. First, the Commission recognized over a decade ago that rural LEC and competitive carriers may interconnect indirectly in the context of routing to each other calls to ported telephone numbers.[45] The time to challenge that ruling on appeal has long since passed.

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43 NTCA Stay Motion at 13.

44 NTCA Stay Motion at 13.

45 *See First LNP Reconsideration Order*, 12 FCC Rcd 7236, 7305 n.399 (1997).

Second, the Commission reaffirmed in its *Intermodal Order* that wireless carriers need not establish a POI in a rural LEC's service area before a rural LEC can be required to provide number portability.[46] Once again, no rural LEC chose to challenge this ruling on appeal.

Third, under current rules, it is the competitive carrier, rather than the incumbent LEC, that makes the decision whether to interconnect directly or indirectly.[47] Thus, the Commission could not require wireless carriers to interconnect directly with rural LECs without first commencing (and completing) a new rulemaking proceeding. Given the time most rulemakings consume, this NTCA POI proposal cannot reasonably be considered as an alternative to number portability requirements imposed long ago.

Finally, a POI/direct interconnection obligation would harm, rather than benefit, rural LECs. Under current rules, the cost of a direct interconnection facility is shared between each carrier based on the proportion of the traffic each carrier sends to the other.[48] Since, as NTCA has recognized, rural LECs generally find indirect interconnection to be more cost effective than direct interconnection,[49] NTCA's POI proposal would have the effect of needlessly increasing

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[46] *See Intermodal Order*, 18 FCC Rcd at 23707 ¶ 24 ("[N]either the Commission's LNP rules nor any of the LNP orders have required wireless carriers to have points of interconnection or numbering resources in the same rate center as the assigned number for wireline-to-wireless porting.").

[47] *See, e.g.*, FCC Answer Brief, *Central Texas Telephone Coop*. v. *FCC*, No. 03-1405, at 31 (D.C. Cir., June 24, 2004)("Contrary to this [rural LEC] statement, CMRS carriers have never been required to have a 'presence' (or POI) within every wireline local service area. Under the Act and the Commission's orders, CMRS carriers have a right to interconnect *indirectly* with other carriers.")(emphasis in original) (supporting citations omitted).

[48] *See* 47 C.F.R. § 51.709(b).

[49] *See* NTCA, *Bill and Keep: Is It Right for Rural America?*, at 41 (March 2004), *appended to* NTCA Ex Parte, CC Docket No. 01-92 (March 10, 2004).

the transport costs that rural LECs would incur in sending their land-to-mobile traffic to wireless carriers.[50]

3. A New Non-Symmetrical Interconnection Arrangement. NTCA's final proposal is that wireless carriers should be required "pay for the transport and termination of traffic outside of the small carrier's service area."[51] Again, this proposal would change existing rules, as Sprint documents in Part I.A above. Thus, the Commission could not impose this requirement on wireless carriers without commencing and completing a new rulemaking proceeding.

But there are two more fundamental problems with this NTCA proposal. First, it is doubtful that the Commission could adopt this proposal as a matter of law. Congress has specified that LECs must establish "reciprocal compensation arrangements for the transport . . . of telecommunications."[52] The arrangement NTCA wants the Commission to adopt is *not* reciprocal, because under its proposal, a wireless carrier would pay 100 percent of the costs for transporting traffic between its network and a rural LEC's network (for both mobile-to-land and land-to-mobile traffic), while rural LECs would pay *nothing* towards the cost of transporting traffic that the parties exchange.

In addition, NTCA's proposal could not be implemented as a practical matter. NTCA has recognized that both rural LECs and wireless carriers benefit from indirect interconnection, because each enjoys reduced transport costs.[53] But if rural LECs are not obligated to pay the transport costs for traffic that originates on their network (*i.e.*, pay a third party's transit fees), wire-

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[50] Wireless carrier transport costs would increase as well, and the public interest hardly would be served by a new rule increasing needlessly the cost of service for both interconnecting carriers.

[51] NTCA Stay Motion at 13.

[52] 47 U.S.C. § 251(b)(5).

[53] *See* NTCA, *Bill and Keep: Is It Right for Rural America?*, at 41 (March 2004), *appended to* NTCA Ex Parte, CC Docket No. 01-92 (March 10, 2004).

less carriers will never receive any land-to-mobile traffic from the transit carrier – and thus, will not even know that a rural LEC customer is attempting to call one of its customers. As a practical matter, then, under this NTCA proposal customers of rural LECs would never be able to call consumers served by wireless carriers, because if a rural LEC refuses to pay the transit carrier for land-to-mobile calls, the calls will simply be dropped. Such an arrangement hardly promotes the public interest.

* * *

In summary, there are good reasons why the Commission did not consider NTCA's three proposed alternatives: none of them are alternatives in fact.[54]

II. NTCA HAS NOT DEMONSTRATED ITS MEMBERS WILL FACE IRREPARABLE INJURY IN THE ABSENCE OF A STAY

NTCA asserts that its members "will be irreparably harmed if the Commission's 'location portability' rule goes into effect."[55] This is not accurate because, as documented above, the uncontroverted record evidence is that rural LECs will incur no significant *additional* costs in providing intermodal location portability – that is, costs above those incurred in provisioning intermodal service provider portability or intramodal service provider portability.

NTCA further asserts that its members will be irreparably harmed because the Commission "may adopt a totally different approach for small entities after it does a proper FRFA."[56] But as Sprint demonstrates in Part I.B above, the Commission could not adopt any of the three "alternatives" that NTCA has identified.

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[54] *See, e.g.*, *Assoc. Fisheries* v. *Daley*, 127 F.3d 104, 115 (1st Cir. 1997)("Section 604 does not require that an FRFA address every alternative, but only that it address significant ones.").

[55] NTCA Stay Motion at 16.

[56] *Id.* at 16.

In point of fact, the blanket exemption that NTCA seeks would not protect those rural LECs that face extraordinary costs, but would rather overrule State commission decisions finding that the provision of intermodal portability by certain other rural LECs would not be economically burdensome and that as a result, these rural LECs should provide intermodal portability for the benefit of consumers in rural areas.

Rural LECs fall into one of three categories:

1. Rural LECs Receiving a Section 251(f)(2) Suspension. Some rural LECs have invoked the suspension procedure that Congress established for them and have successfully demonstrated to their State commission that a suspension is appropriate. The blanket exemption that NTCA seeks would be of no benefit to these rural LECs, as they are already relieved of providing intermodal portability.
2. Rural LECs Whose Suspension Petitions Have Been Denied. With respect to other rural LECs, State commissions have determined that the petitioning LECs did not meet the statutory suspension criteria and that as a result, they should be required to provide intermodal portability. The blanket exemption NTCA seeks would benefit these rural LECs because they would be relieved from providing intermodal portability even though their respective State commission, based on a specific factual record, determined they should provide such portability. NTCA thus effectively wants the FCC to overrule these State commission decisions – even though Congress explicitly empowered State commissions to make these determinations.
3. Rural LECs That Chose Not to File a Suspension Petition. Some rural LECs never filed a suspension petition with their State commission, having determined presumably that providing intermodal portability is not economically burdensome. Some of

these rural LECs are providing intermodal portability today. The blanket exemption NTCA seeks would authorize these rural LECs to terminate their provision of intermodal portability.

Courts have held that to warrant a stay, the harm must be shown to be "both certain and great; it must be actual and not theoretical;" and the harm must be of "such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm."[57] NTCA has not even begun to satisfy this legal standard.

III. NTCA HAS NOT DEMONSTRATED THAT OTHER PARTIES WILL NOT BE HARMED IF THE STAY IS GRANTED

NTCA claims that there would be "no harm to wireless carriers" by entry of a stay.[58] It is understandable that NTCA provides no explanation for this bald assertion. As discussed above, denial of a stay will not adversely affect those rural LECs that have demonstrated to their State commissions that they would face an undue burden in providing intermodal portability. On the other hand, grant of a stay would overturn those State commission decisions that have held that other rural LECs should be providing intermodal portability.

Obviously, wireless carriers would be harmed if rural LECs stopped providing intermodal portability. Furthermore, wireless carriers would be harmed if not given the opportunity to provide service to customers served by any rural LEC that does not seek relief under Section 251(f)(2) or is incapable of demonstrating to a State commission that intermodal porting is unduly burdensome under Section 251(f)(2).

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[57] *Wisconsin Gas* v. *FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

[58] *See* NTCA Stay Motion at 17.

IV. NTCA HAS NOT DEMONSTRATED THAT A STAY WOULD PROMOTE THE PUBLIC INTEREST

NTCA finally claims that the "public will benefit from the grant of a stay."[59] Once again, NTCA provides no support or explanation for this bald assertion.

The Commission has already addressed the public interest at some length, stating:

> [W]e conclude that the benefits to the public of requiring wireline-to-wireless intermodal LNP outweigh the economic burden imposed on these [small] carriers. Creating a partial or blanket exemption from the wireline-to-wireless intermodal porting requirements for small entities would harm consumers in small and rural areas across the country by preventing them from being able to port on a permanent basis. It might also discourage further growth of competition between wireless and wireline carriers in smaller markets across the country. We continue to believe that the intermodal LNP requirements are important for promoting competition between the wireless and wireline industries and generating innovative service offerings and lower prices for consumers. Wireless number porting activity since the advent of porting has been significant and evidence shows that the implementation of LNP has, in fact, yielded important benefits for consumers, such as improved customer retention efforts by carriers. By reinstating, immediately, the wireline-to-wireless intermodal porting requirement, this approach ensures that more consumers in small and rural communities will be able to port and experience the competitive benefits of LNP.[60]

Notably, NTCA makes no attempt to challenge any of these Commission findings.

* * *

In summary, NTCA has failed to demonstrate the presence of any of the four stay criteria. Accordingly, it stay motion must be denied as a matter of law.

V. NTCA'S DEMAND – THE COMMISSION SHOULD DECIDE ITS MOTION IN THREE BUSINESS DAYS – IS COMPLETELY UNREASONABLE

Under FCC rules, interested parties have until Friday, February 29, 2008, in which to file an opposition to NTCA's stay motion.[61] Nevertheless, NTCA asks the Commission to "rule on

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59 NTCA Stay Motion at 18.

60 *Remand Order FRFA*, 22 FCC Rcd at 19611 ¶ 16.

61 . NTCA filed its stay motion pursuant to FCC Rule 1.43, which incorporates Rule 1.45(d). Rule 1.45(d) specifies that an opposition to a stay motion "shall be filed within 7 days after the [stay] request is

this Motion no later than Wednesday, February 27, 2008," or only three business days after it filed its motion.[62] NTCA states that if the Commission does not act by this date, it will file "an Emergency Motion for Stay Pending Judicial Review before the United States Court of Appeals for the District of Columbia Circuit."[63] In other words, NTCA is demanding that the Commission decide its motion before it can develop a complete record in which to address the stay motion.

NTCA's position is entirely unreasonable. The Commission released its *Intermodal Remand Order* on November 8, 2007 – or over 3.5 months ago.[64] In asking the Commission to act on its stay motion in three business days, NTCA never explains why it did not file its stay motion in sufficient time to allow other parties to provide a meaningful opposition. NTCA cannot reasonably ask the Commission to decide its stay motion in three business days, *before* all interested parties have an opportunity to submit oppositions, when NTCA waited over 3.5 months in filing its Motion.

Accordingly, Sprint recommends that the Commission ignore NTCA's request to decide its motion before oppositions are due. If NTCA proceeds with its threat – namely, files a stay petition with the appellate court if the Commission does not act within three business days – the Commission should advise the Court of NTCA's unreasonable conduct. The appellate court deserves the benefit of the Commission's consideration on the stay motion, and the Commission

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filed." Since NTCA filed its stay motion on Friday, February 22, 2008, oppositions are due on Friday, February 29, 2008.

[62] NTCA Stay Motion at n.1.

[63] *Id.*

[64] *See Local Number Portability*, WC Docket No. 95-116, *Order on Remand*, FCC 07-188, 22 FCC Rcd 19531 (Nov. 8, 2007).

cannot reasonably be expected to act without the benefit of a full record, including the impacts of a stay on U.S. telecommunications consumers who reside in rural areas.

CONCLUSION

For the foregoing reasons, Sprint Nextel Corporation respectfully requests that the Commission deny NTCA's stay motion.

Respectfully submitted,

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February 27, 2008

CERTIFICATE OF SERVICE

I, Jo-Ann Monroe, do hereby certify that on this 27th day of February 2008, I caused a copy of the foregoing Opposition of Sprint Nextel Corporation to be served by first class United State mail, postage prepaid, to the following:

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