IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	No. 08-1071

OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION TO PETITIONER'S EMERGENCY MOTION FOR A STAY

The FCC opposes petitioner's motion for a stay of a rule that requires land-line telephone companies to allow customers to keep their phone numbers if they switch to wireless service. Petitioner has little chance of success on the merits. It asserts that the FCC has violated the Regulatory Flexibility Act, but that Act is a procedural statute that requires only that an agency undertake various analyses of its rules. Here, the FCC conducted the required analyses and reached reasonable conclusions on all of them, finding in particular that the record showed that the economic burden of number portability is small and does not justify excusing all small carriers from an express statutory duty. Petitioner does not agree with that policy outcome, but it has not seriously challenged the analysis.

Petitioner has also failed to demonstrate any credible risk of irreparable injury. Its principal claim is that the Commission's allegedly faulty analysis has deprived it of proper administrative procedure, but that is hardly the sort of injury

that justifies extraordinary equitable relief. Petitioner's vague and unsupported claim of concrete harm is equally weak. If carriers are already providing number portability to other wireline carriers, the incremental implementation cost of porting to wireless carriers is minor. Moreover, if petitioner is correct that there is little demand for number porting in rural areas, then there is correspondingly little likelihood of any injury at all, because small carriers generally need take no action at all until they receive a request to port. Finally, a stay would harm the public interest since it would deprive customers in rural areas of many of the benefits of number portability, which Congress made a cornerstone of its effort to open monopoly phone markets to competition. The motion for stay should be denied.

BACKGROUND

Congress has imposed on "each" local exchange carrier, including rural and small carriers, a "duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). Number portability is the ability of customers to keep their telephone numbers when they switch from one service provider to another. *See* 47 U.S.C. § 153(30). The duty to provide portability is one of the basic components of Congress's effort to eliminate the longstanding monopoly of wireline local exchange carriers (LECs) in the local telephone market and replace that monopoly with competition. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371-372 (1999). Congress viewed number portability as an essential requirement of a competitive marketplace. "[T]he ability to change service providers," the House Commerce Committee found, "is only meaningful if a customer can retain his or

her local telephone number." H.R. Rep. No. 204, 104th Cong. 1st Sess. At 72 (1995); *accord CTIA v. FCC*, 330 F.3d 502, 513 (D.C. Cir. 2003). Although petitioner's members are small LECs, they nonetheless in most cases are the dominant service provider in their markets.

1a. Consistent with Section 251, the Commission has adopted broad porting requirements: "number portability must be provided … by all LECs to all telecommunications carriers, including commercial mobile radio services (CMRS) providers." *Telephone Number Portability*, 11 FCC Rcd 8352 (1996) (*First Portability Order*), *recon. denied*, 12 FCC Rcd 7236, 8355 (1997); *see also id*. at 8431.[1] CMRS is colloquially referred to as wireless or cell phone service. Transferring a number from a LEC to a CMRS carrier (or vice versa) is known as "intermodal" porting. *First Portability Order*, 11 FCC Rcd at 8447. Intermodal porting facilitates competition between CMRS providers and traditional land-line phone companies by making it easier for customers to "cut the cord" and exclusively rely on wireless phone service. *See Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT 07-71, 2008 WL 312884, ¶292 (Feb. 4, 2008) (nearly 12 percent of adults live in households with only wireless phones, up from 3.5 percent in 2003).

Although in the *First Portability Order* the agency required LECs to offer "service provider" portability – *i.e.*, the ability of a user to switch numbers between

[1] FCC rules allow all carriers to pass through to their customers many of the costs of number portability. 47 C.F.R. § 52.33.

competing providers – it did not in that order mandate "location portability," which is the ability to retain a telephone number "when moving from one physical location to another." But as mentioned above, the service provider portability obligation always required LECs to transfer phone numbers to CMRS providers, even though wireless phones are inherently mobile.

In a subsequent order, the Commission defined further the intermodal porting requirement by making clear which CMRS providers were entitled to port numbers from a LEC. Specifically, the Commission explained that a LEC must port numbers to any CMRS provider whose service area overlaps the "rate center" to which the relevant number is assigned, without regard to whether the CMRS carrier operates interconnection facilities within that rate center. *Telephone Number Portability*, 18 FCC Rcd 23697 (2003) (*Intermodal Order*). A rate center is a geographic area designated by a LEC and state regulators that is used to determine whether a given call is a toll call. The Commission declined to impose the requirement that a CMRS carrier have a point of interconnection in every rate center in which it wished to engage in porting numbers. Such a requirement, the Commission found, would "deprive the majority of wireline consumers of the ability to port their number to a wireless carrier." *Id*. ¶27.

When a LEC wireline customer places a call to a number that has been ported to a CMRS carrier, the call must be transported to the CMRS carrier's point of interconnection. If that facility is outside of the LEC's service area, the transport may result in additional costs (although that cost is no different whether the call is to a ported number or to a number assigned to the rate center that the

CMRS carrier obtained directly). In the *Intermodal Order*, the Commission addressed concerns raised by small and rural LECs, including petitioner NTCA, that requiring small carriers to provide intermodal porting imposes "a disproportionate burden" on them "to transport originating calls to the interconnection points." *Intermodal Order* ¶39. The Commission "recognized" such concerns, but deemed them to fall "outside the scope of this order." *Id*. ¶40. "[T]he requirements of [the number portability] rules do not vary depending on how calls to the number will be routed after the port occurs." Moreover, "the rating and routing issues raised by the rural wireline carriers have been raised in the context of non-ported numbers and are before the Commission in other proceedings." *Ibid*. For example, the question of who bears the burden of any transport cost is no different for a ported number than it is for a number initially allocated to a CMRS carrier that is assigned to a rural LEC's rate center. The Commission accordingly deferred consideration of transport costs to those other pending proceedings.

1b. The Commission issued the *Intermodal Order* without having first published a notice of proposed rulemaking in the Federal Register (the agency did seek comment in a less formal manner) or conducted an analysis of the impact of the order on small businesses pursuant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 601 *et seq*. The agency believed that the matters addressed in the order amounted only to clarifications of the existing rules, rendering the resulting order a merely interpretative rule and thus subject to neither the notice-and-comment provisions of the APA nor the RFA, which requires a "final regulatory flexibility

analysis" (FRFA) to be conducted along with the promulgation of final rules. *Intermodal Order* ¶26; *see* 5 U.S.C. §§ 553(b)(A) (NPRM requirement "does not apply to interpretative rules"), 604(a) (FRFA required only when NPRM is required).

2. Petitioner and other parties challenged the *Intermodal Order* on procedural grounds; no party "challenge[d] the merits of the order." *United States Telecom Ass'n v. FCC*, 400 F.3d 29, 34 (D.C. Cir. 2005) (*USTA*); *see also id*. at 39 ("petitioners do not challenge the substantive reasonableness of the rule"). On review, the Court held that, by requiring location portability, the *Intermodal Order* was not an interpretative rule. The *First Portability Order* "declare[d] that [the FCC] would not require 'location portability.'" *USTA* at 35. "The *Intermodal Order*, by contrast, requires carriers to provide users with the ability to retain their existing numbers *regardless of* physical location." *USTA* at 35 (emphasis in original). "[T]he *Intermodal Order* effectively requires carriers to provide their subscribers with the ability to retain their numbers 'when moving from one physical location to another,' notwithstanding the *First [Portability] Order*'s declaration that such location portability would not be mandated." *Ibid*.

The Court found that even though the Commission did not treat the *Intermodal* proceeding as a rulemaking matter subject to §553, "it appears that the Commission satisfied" the requirements of the APA by publishing notice and seeking comment on a proposed rule. The Court found that "if there was a procedural failure, it was harmless." *Id*. at 41.

The Court also held, however, that the FCC violated the RFA by failing to perform a FRFA analysis. "Because we have concluded that the FCC was required by section 553 to publish [an NPRM], the RFA's requirements are applicable to the *Intermodal Order*." 400 F.3d at 42. The Court "remand[ed] the *Intermodal Order* to the FCC for the Commission to prepare the required final regulatory flexibility analysis." *Id*. at 43. The Court stayed "future enforcement of the *Intermodal Order* only as applied to carriers that qualify as small entities," with the stay to "remain in effect until the FCC completes" a FRFA. *Ibid*.

3. After receiving comments on an initial regulatory flexibility analysis, the Commission published a FRFA on February 21, 2008. 73 Fed. Reg. 9478. The FRFA analyzed each of the five specified RFA topics. 5 U.S.C. § 604(a). Pertinent here are the assessment of the significant issues and the steps taken to minimize impacts consistent with the statutory objectives.

3a. Analysis of Significant Issues.

The Commission addressed two significant issues that had been raised in the comments. First, it "reject[ed] arguments that carriers that qualify as 'small entities' should not have to comply with the intermodal porting requirements until the Commission addresses issues pertaining to rating and routing that are pending in the intercarrier compensation proceeding." FRFA ¶4. Those issues are common to "all numbers (without distinguishing between ported or non-ported numbers)," and are "outside the scope of this proceeding." *Ibid*. The Commission accordingly determined, as it had in Paragraph 40 of the *Intermodal Order*, to consider them in the currently pending intercarrier compensation rulemaking proceeding. "[T]he

requirements of our [portability] rules do not vary depending on how calls to the number will be routed after the port occurs." *Intermodal Order* ¶40.

Second, the Commission declined to exempt small carriers from intermodal porting obligations due to the costs of implementation. The record showed that the estimated cost of implementing intermodal portability ranged from as low as 11 cents per line per month to as high as $30 per line per month, with multiple carriers reported costs in the 18-20 cent range. FRFA nn.13, 14. The Commission declined to rely on the high-end estimates, given their "scant support" and their proponents' "failure to demonstrate that all the estimated costs are of the sort that the Commission would allow to be attributed to" portability implementation cost accounts. *Id*. ¶5. For example, some of the higher estimates included transport costs, which, as described above, the Commission will consider in a different proceeding. The higher estimates also included costs beyond those that the Commission deems attributable to the implementation of number portability. *See Cost Classification Order*, 13 FCC Rcd 24495, 24498-24504 (Com Car. Bur. 1998), *aff'd* 17 FCC Rcd 2578 (2002). In addition, the costs may be even lower for LECs that have already implemented wireline-to-wireline porting capabilities. *Id*. n.13. The data credited by the Commission showed that the cost of intermodal portability "does not impose a significant economic burden on small entities." *Id*. ¶5.

3b. Consideration Of Steps Taken To Minimize Impact.

The Commission "considered the potential economic impact of the intermodal porting rules on small entities" and decided that small LECs should

bear the same intermodal porting obligations as other LECs. FRFA ¶13. That approach "best balances the impact of the costs that may be associated with the wireline-to-wireless intermodal porting rules for small carriers and the public interest benefits of those requirements." *Ibid*.

Specifically, the Commission considered and rejected two ways to minimize the impact of intermodal porting on small LECs. First, it considered whether to limit small carriers' intermodal porting requirement to CMRS carriers that had a point of interconnection in the small LEC service area. The Commission rejected that approach, pointing out that it had already considered and rejected that very idea in the *Intermodal Order*. FRFA ¶14. "[L]imiting wireline-to-wireless porting to rate centers where a wireless carrier has a point of interconnection … would deprive the majority of wireline consumers of the ability to port their number to a wireless carrier." *Intermodal Order* ¶27.

Second, the Commission considered whether it should excuse small LECs from the portability requirement until it resolves issues regarding rating, routing and transport costs. Relying again on its previous consideration of that question in the *Intermodal Order*, the Commission determined that "such concerns [are] outside the scope of the number portability proceeding" and would be taken up in the pending intercarrier compensation proceedings. FRFA ¶14.

The Commission noted, however, that even though it would not relieve all small carriers of porting obligations, relief may be available in appropriate individual circumstances "where a carrier faces extraordinary costs." FRFA ¶15. One source of potential relief is the Commission's own waiver process, under

which the agency can modify or waive porting requirements where "special circumstances … warrant departure from" the rules. *Ibid*. Another source is 47 U.S.C. § 251(f)(2), which authorizes state public utility commissions to "suspen[d] or modif[y]" the number porting obligation for carriers with fewer than 2% of nationwide lines if doing so is necessary "to avoid imposing a requirement that is unduly economically burdensome." The record before the Commission indicated that § 251(f) proceedings have been a "highly effective" way of securing individualized determinations. FRFA n.43. Those avenues of relief "effectively constitute steps that minimize the economic impact of LNP on small entities." *Id*. ¶15.

At bottom, the Commission acknowledged that small carriers will incur some costs in implementing intermodal number portability, but it concluded that "[c]reating a partial or blanket exception" from the porting responsibility "would harm consumers in small and rural areas" and "might also discourage further growth of competition between wireless and wireline carriers in smaller markets across the country." FRFA ¶16. "By reinstating, immediately, the wireline-to-wireless intermodal porting requirement, … more consumers in small and rural communities will be able to port and experience the competitive benefits" of portability. *Ibid*.

4. The Court in *USTA* had ordered its stay to "remain in effect until the FCC completes" the FRFA. 400 F.3d at 43. Thus, with the FRFA's completion, the stay dissolved of its own accord. The Commission directed that the porting obligation take effect 30 days after Federal Register publication, which occurred

on February 21, 2008. *See* 73 Fed. Reg. 9481 ¶30. Thus, beginning March 24, 2008, small LECs must accept requests for intermodal porting. As the Commission pointed out, however, "wireline carriers generally only are required to provide [number portability] upon receipt of a specific request for the provision of [portability] by another carrier. Thus, many of the small carriers may not be required to implement [portability] immediately because there is no request to do so." FRFA ¶15. "In addition," the Commission noted, "carriers operating outside of the 100 largest [markets] have six months after receiving a request from another carrier in which to provide [portability]." *Id*. n.44.

ARGUMENT

In considering stay motions, the Court assesses: (1) the likelihood that the petitioner will prevail on the merits of the appeal; (2) the likelihood that it will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest. Circuit Rule 18(a); *see Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 673-74 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986). Petitioner can clear none of those hurdles.

A. *NTCA Is Not Likely To Succeed On The Merits*.

The question presented in this case is whether the Commission's FRFA satisfies the requirements of the RFA. The RFA is a "[p]urely procedural" statute that "requires nothing more than that the agency file a FRFA demonstrating a 'reasonable, good-faith effort to carry out [RFA's] mandate.'" *United States Cellular Corp. v. FCC*, 254 F.3d 78, 88 (D.C. Cir. 2001), quoting *Alenco Communications, Inc. v. FCC*, 201 F.3d 608, 625 (5th Cir. 2000). "[T]he analyses

required by the RFA are essentially procedural hurdles; after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it sees fit." *Environmental. Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 879 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004). The RFA thus "does not command an agency to take specific substantive measures, but, rather, only to give explicit consideration to less onerous options," and "the RFA should not be construed to undermine other legislatively mandated goals." *Associated Fisheries of Maine, Inc. v. Daley*, 127 F.3d 104, 114 (1st Cir. 1997). The Commission easily met that modest burden with its careful analysis of all the statutory factors.

NTCA claims first that the Commission improperly assessed the evidence documenting the costs of implementing portability. The argument is that "[d]espite the data submitted by the parties, the Commission summarily concluded that the cost of … [intermodal portability] does not impose a significant economic burden on small entities." Mot. 9. That was error, NTCA asserts, 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.'" *Ibid.*

That argument is not likely to succeed because the Commission conscientiously assessed the range of cost figures before it and reasonably decided to rely on the estimated costs of implementing portability that fell in the lower end of the range, which was about eleven to seventy cents per line per month. FRFA ¶6 & nn.13, 14. That level of costs (which generally are passed on to customers) did not amount to a "burden" sufficient to exempt every small carrier across the

country from a congressionally mandated program. The Commission explained that it rejected the higher end numbers both because of their "scant support" and because they appeared to include costs that are not fairly attributable to number portability implementation. *Id*. ¶6. *See In re Core Communications*, 455 F.3d 267, 279 (D.C. Cir. 2006) (the Court "will not 'second-guess' an agency's economic analysis"). NTCA cites no authority for the proposition that the Commission must state precisely the point at which costs become a "significant economic burden" under the RFA, but eleven to seventy cents per line per month (which will be passed through to the subscribers) does not rise to that point under any approach.

Moreover, the Commission noted two specific avenues for possible individual relief in cases where small carriers face unusually high costs. FRFA ¶15. The statutory mechanism of § 251(f)(2) in particular has been "highly effective" in protecting small carriers on a case-by-case basis. *Id*. n.43. Indeed, one of the exhibits to the motion is a decision of the Nebraska Public Service Commission granting suspensions of the number portability requirement to 31 small companies. *See also, e.g., Re Rural Iowa Independent Telephone Association*, 2004 WL 2465490 (granting suspensions of various lengths to about 140 rural carriers).

NTCA next contends that the Commission improperly refused to consider transport costs in assessing the economic impact of number portability on small carriers. NTCA may not raise that challenge in the present case. The Commission decided as a substantive matter in the *Intermodal Order* that transport costs are an issue that transcends number portability and is common to all numbers, ported or

not, and thus should be considered in a separate, currently pending rulemaking. *Intermodal Order* ¶40. NTCA decided not to challenge that decision on its merits; instead, it opted only to challenge the procedures the Commission followed in reaching that determination (and others). *See USTA*, 400 F.3d at 34, 39. To allow NTCA to challenge a substantive merits determination in the guise of a challenge to the FRFA would give it a second bite at the apple long after the time to seek review of the *Intermodal Order* itself has passed. *See CTIA*, 330 F.3d at 508-509 (dismissing as untimely substantive challenge to FCC's imposition of wireless number portability).

In any event, the Commission properly determined that transport costs are best considered in other proceedings "in the context of all numbers (without distinguishing between ported or non-ported numbers)." FRFA ¶4. The Commission has discretion "to defer consideration of particular issues to future proceedings when it thinks that doing so would be conducive to the efficient dispatch of business and the ends of justice." *United States Telephone Ass'n v. FCC*, 359 F.3d 554, 558 (D.C. Cir. 2004); *accord National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984) (agencies need not address all problems "in one fell swoop"), citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955) ("[R]eform may take place one step at a time, addressing itself to the phase of the problem which seems most acute to the [regulatory] mind.").

For that very reason, in *Central Texas Telephone Co-Op, Inc. v. FCC*, 402 F.3d 205 (D.C. Cir. 2005), a companion case to *USTA*, the Court affirmed – over the objection of rural carriers who posed the same argument they make here – the

Commission's decision to defer consideration of transport cost issues to the intercarrier compensation proceeding. *Id*. at 215. *Central Texas*, which involved wireless-to-wireless portability, was decided by the same panel on the same day as *USTA*, and the Court held that the Commission's deferral of the matter was reasonable. NTCA has not shown why the outcome should be different here. Having properly taken the issue of transport costs off the table as a substantive matter, the Commission reasonably declined to consider that issue as a procedural matter.[2]

Third, NTCA complains that the Commission did not "describe any steps that it has taken to minimize the impact" of number portability on small entities. Mot. 12-14. That claim is not likely to succeed because, as described above, the Commission predicted that the impact on most carriers was likely to be fairly small. Furthermore, NTCA's argument wrongly assumes that the RFA always requires an agency to take some affirmative step to minimize impact. Rather, the RFA imposes "essentially procedural hurdles," and "after considering the relevant impacts and alternatives, an administrative agency remains free to regulate as it

[2] In any event, the record before the Commission showed that transport cost matters could be resolved between the companies involved. The Iowa Utilities Board, for example, informed the Commission that transport is not "a significant issue in Iowa. This [is] because the petitioners and wireless companies entered into interconnection agreements for the delivery and termination of telecommunications traffic that originated on the other party's network." Comments of the Iowa Utilities Board, Aug. 19, 2005 at 5 (available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518148482). Moreover, because most small incumbent LECs likely are rate-of-return carriers, they ultimately bear few such costs themselves, but pass them on to their customers.

sees fit." *Environmental. Defense Ctr.*, 344 F.3d at 879. The Commission was not required to take any steps at all, especially in the face of a small impact.

Moreover, the RFA expressly requires a balancing between the impact of a regulatory program on small entities and "the stated objectives of applicable statutes." 5 U.S.C. § 604(a)(5). As described at page 2 above, number portability is one of the key requirements in Congress's plan to fundamentally restructure the wireline telephone market and to eliminate monopolies of the sort historically enjoyed by all LECs, both large and small. *See, e.g.*, *Central Texas*, 402 F.3d at 206 ("Congress viewed number portability as a means of encouraging competition"). Congress did not see fit to excuse small LECs from the requirement, and the FCC's granting a blanket exemption to small LECs would fundamentally undermine the legislative objectives.

The Commission reasonably pointed out that the various methods of obtaining case-by-case mitigation, discussed at page 13 above, "effectively constitute steps that minimize the economic impact of LNP on small entities." FRFA ¶15. NTCA argues that the agency cannot rely on such existing statutory relief mechanisms under the RFA, but it has not cited any cases so holding. Nothing in the statutory text precludes reliance on pre-existing mitigating factors.

Finally, NTCA argues that the FCC failed to consider alternatives to imposing intermodal porting on small LECs. Mot. 14-18. Much of the argument is a rehash of the transport cost issue discussed above, and it fares no better in retelling. The remainder of the argument appears to claim that the Commission was required to suspend the porting obligation unless CMRS carriers establish a

point of interconnection in every rural LEC service area. The Commission expressly rejected that approach as a substantive matter in the *Intermodal Order*. NTCA did not challenge that determination, *see USTA*, 400 F3d at 34, 39, and it may not do so now. The Commission concluded that "limiting wireline-to-wireless porting to rate centers where a wireless carrier has a point of interconnection … would deprive the majority of wireline consumers of the ability to port their number to a wireless carrier." *Intermodal Order* ¶27; FRFA ¶14. In other words, NTCA's alternative proposal for intermodal porting would effectively nullify Congress's chosen policy in rural areas. The FCC reasonably declined to accept such a proposal, and NTCA's claim to the contrary is not likely to succeed.

In sum, the Commission "recognize[d] that wireline carriers will still incur implementation and recurrent costs," but it "conclude[d] that the benefits to the public of requiring … intermodal [portability] outweigh the economic burden imposed on these carriers." FRFA ¶16. That analysis fulfilled entirely the agency's responsibilities under the RFA, and the Commission's conclusion was well within its considerable discretion to balance various policies. NTCA would have preferred a different policy balance, but because it has failed to identify a genuine infirmity in the analytical process, there is no reason to believe that the Court ultimately will reverse the agency's determination.

B. *NTCA Has Not Established Irreparable Injury*.

NTCA's principal claim of injury is that in the absence of a stay its members will lose their "procedural rights to have the FCC make a 'reasonable good-faith effort' to comply with the RFA." Mot. 18. NTCA does not explain how the

alleged loss of such a procedural right by itself causes irreparable harm or why (should the Court ultimately find the FRFA inadequate) a remand for further analysis would be an insufficient remedy. It suggests (Mot. 19) that because the RFA *authorizes* the Court to stay an agency order, a violation of the RFA must always lead to a stay. But the statute says no such thing, and such an approach makes no sense. In *USTA*, the Court stayed intermodal porting in the face of a total failure to conduct any RFA analysis, but now the Commission has completed a FRFA and NTCA's procedural rights have been satisfied.

NTCA also suggests, largely in passing, that costs of compliance will result in irreparable injury, but it has provided no declarations or other evidence in support of that claim. The Commission noted that for carriers that have already implemented wireline-to-wireline portability, the incremental costs of adding intermodal portability will be small. FRFA n.13. And, as described above, carriers may recover virtually all of their costs from their customers. Moreover, at the same time it asserts that it will be injured in the absence of a stay, NTCA asserts that there is "sparse demand" for intermodal porting in rural areas. Mot. 19; *id*. 9, 20. Under the Commission's rules, no carrier need take any step or expend any resources until it has actually received a request to port, and even then, in most rural markets, a carrier has six months to implement portability. *See* FRFA ¶15 & n.16. To the extent that NTCA is correct that there is very little demand for porting in such markets, there is a correspondingly low likelihood that any small carrier will face any injury at all in the absence of a stay.

C. *A Stay Will Harm Others And The Public Interest*.

Congress has declared it to be the national policy that local exchange carriers implement number portability as an essential element of the introduction of market forces into longstanding monopoly service areas. Congress did not exempt small or rural LECs from that requirement. The public interest as determined by Congress thus will suffer from further delay in implementing intermodal portability. Not only will a stay deny the subscribers of small LECs the benefits of competition, but wireless carriers that wish to compete with small LECs will be harmed by being denied the chance to win their business.

Since 2003, more than 41 million numbers have been ported from one wireline carrier to another, and almost 2.4 million customers have ported their number from a wireline carrier to a CMRS carrier. *See Numbering Resource Utilization in the United States* at Table 14 (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-279929A1.pdf). Portability has been a successful program in fostering the competition that Congress envisioned. Yet the customers of small LECs have not had the chance to share equally in the benefits of competition. NTCA has presented no reason sufficient to continue to postpone the benefits of competition in small and rural telephone markets.

CONCLUSION

The Court should deny NTCA's motion for a stay.

Respectfully submitted,

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