

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

REYNOLDS TELEPHONE COMPANY)	
)	
)	
Petition For Suspension Or Modification of)	Docket No. 04-0206
Section 251(b)(2) requirements of the Federal)	
Telecommunications Act pursuant to Section)	
251(f)(2) of said Act; for entry of Interim)	
Order; and for other necessary relief.)	

**VERIFIED PETITION TO REOPEN
ON THE COMMISSION'S OWN MOTION**

NOW COMES Reynolds Telephone Company (“Reynolds” or “Petitioner”), by its attorneys, and petitions the Illinois Commerce Commission (the “Commission”) to reopen the captioned docket (“Docket”) on its own motion, pursuant to the first sentence of Section 10-113 of the Public Utilities Act, 220 ILCS 5/10-113, and 83 Ill. Adm. Code Section 200.900, and to enter an Amendatory Order on Reopening, extending the suspension of the wireline-to-wireless local number portability (“LNP”) requirements for an additional year from January 1, 2006 to January 1, 2007, or a continuing suspension until further order of the Commission and for all other necessary and appropriate relief. In support of this Petition, Reynolds states as follows:

1. By order dated August 25, 2004 (“August 25, 2004 Order”), this Commission, pursuant to Section 251(f)(2) of the Federal Telecommunications Act, 47 U.S.C. § 251(f)(2) (the “Federal Act”), suspended until January 1, 2006 Petitioner’s obligations to provide wireline-to-wireless LNP as imposed by the Federal Communications Commission (“FCC”) in a November 10, 2003 *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in CC Docket No. 95-116 (“FCC Intermodal Order”). (A copy of this

Commission's August 25, 2004 Order is attached hereto as Attachment 1 and incorporated herein by reference.)

2. In granting the original suspension, the Commission relied in part upon the absence of any evidence of significant demand for wireline-to-wireless LNP and upon the significant non-recurring costs of establishing wireline-to-wireless LNP in face of regulatory uncertainty about its implementation. Since the entry of the Commission's August 25, 2004 Order, there has been no substantial increase in demand for wireline-to-wireless LNP (even where it is actually available) and no change in the regulatory uncertainties cited by this Commission in its August 25, 2004 Order. Moreover, due to a recent federal appellate court decision, *United States Telecom Association v. Federal Communications Commission*, Slip Op. Docket No. 03-1414 (D.C. Cir. March 11, 2005) ("*USTA*") (a copy of which is attached as Attachment 2), it is unlikely there will be any new information on demand in the foreseeable future.

3. In the August 25, 2004 Order, the Commission found that Reynolds met its burden of demonstrating that a sufficient adverse economic impact would be imposed on its customers if required to implement wireline-to-wireless LNP (August 25, 2004 Order at 16) and found that a temporary suspension of the requirement to provide wireline-to-wireless LNP was consistent with the public interest, convenience, and necessity (August 25, 2004 Order at 16).

4. In this Docket, Reynolds and Staff presented evidence that the take rate for wireline-to-wireless LNP, where it was available, was low at that time and that the demand for wireline-to-wireless LNP would likely be low within Petitioner's service territory. In addressing the wireline-to-wireless LNP "take rate" and demand issue in the August 25, 2004 Order, the Commission stated in part as follows (Order at 16):

... While actual demand upon implementation of wireline-to-wireless LNP is impossible to predict, the Commission finds that the record sufficiently indicates that the take rate at this time is quite low. . . .

* * *

... Although the level of demand for wireline-to-wireless LNP is difficult to predict, Staff and Petitioner have demonstrated with sufficient certainty that it is likely to be low for some time in the future. As noted above, Petitioner and Staff anticipate that demand will be low. Staff relies on take rates for wireline-to-wireless LNP for SBC and Verizon for the first two months that it was offered. While actual interest in LNP among Petitioner's customers and take rate data for SBC and Verizon over a longer period of time may or may not be higher than what Petitioner and Staff expect, estimating a future take rate is an inherently uncertain task. We agree with Staff that demand during the suspension period is nevertheless likely to be low and when weighed against the costs to Petitioner and its customers that Staff has analyzed in its Scenario #1, justifies the grant of this limited temporary suspension.

5. The limited temporary suspension to January 1, 2006 granted by the August 25, 2004 Order allowed not only the Commission, but Reynolds and the Staff as well, to obtain additional wireline-to-wireless LNP "take rate" experience from companies offering the service in connection with any request for a further suspension of the obligation to provide wireline-to-wireless LNP. Attached to this Petition (as Attachment 3) is an affidavit filed on behalf of Reynolds, demonstrating, consistent with the Commission expectation, that there has been no substantial increase nationally in the "take rate" for rural companies that offer wireline-to-wireless LNP and that Reynolds (which does not) has not received any requests for wireline-to-wireless LNP either from its customer or from any wireless carriers.

6. In this Docket, Reynolds and Staff presented evidence about the transport and transit costs that would be incurred by Reynolds to provide wireline-to-wireless LNP in conjunction with the uncertainty that existed concerning whether the FCC would allow the

recovery of those costs through an LNP surcharge. In addressing those issues the Commission, in the August 25, 2004 Order, stated in part as follows (Order at 16-17):

... Moreover, the Commission recognizes that uncertainty exists as to whether the FCC will prohibit recovery by the Petitioner of transport and transit costs of an LNP surcharge. Until the FCC resolves this uncertainty, however, the Commission is compelled to assume that the Petitioner or its customers would bear the burden of those costs. Consequently, Staff's analysis set forth in Scenario #1 not only addresses many of the concerns regarding costs raised above, it is also most consistent with the current state of the law regarding LNP costs and surcharges. Therefore, the Commission bases its findings in this proceeding on Staff's cost analysis set forth in Scenario #1.

* * *

Additionally, the Commission understands that Petitioner foresees difficulties in implementing wireline-to-wireless LNP and has concerns over regulatory uncertainties. The Commission considers these difficulties and uncertainties to be additional costs to be weighed against the benefits of wireline-to-wireless LNP.

7. As of the date of the filing of this Petition (and as further supported by the attached affidavit), the FCC has not resolved the uncertainty discussed above in regard to the recovery of transport and transit costs. Moreover, in the *USTA* decision, decided on March 11, 2005, the federal Court of Appeals found that the FCC had failed to conduct a required analysis under the Regulatory Flexibility Act ("RFA") regarding the impact of the FCC Intermodal Order on small entities, specifically small rural carriers like Petitioner.¹ Although the Appellate Court decision did not in any way clarify the allocation of transport transit costs -- the issue identified by this Commission -- the Court of Appeals remanded the FCC Intermodal Order back to the FCC and "stay[ed] future enforcement of the [FCC Intermodal Order] against carriers that are "small entities" under the RFA until the FCC prepares and publishes the RFA analysis.

¹ The FCC treats any local exchange carrier with fewer than 1,500 employees as a small entity. *See, e.g.*, FCC Order at Appendix B. ¶ 5.

Therefore, the regulatory uncertainties discussed in the August 25, 2004 Order as set forth above remain in existence today and are unlikely to be addressed by the remand to the FCC.

8. Not only does the Appellate Court's stay of enforcement of the FCC Intermodal Order leave the regulatory uncertainty in place, it may cause a direct conflict with the August 25, 2004 Order. As entered by the Commission, the August 25, 2004 Order states an affirmative obligation for the Petitioner to implement wireline-to-wireless LNP by January 1, 2006. If the FCC has not completed its RFA analysis by that time, that Commission directive will conflict with the *USTA* decision's stay of enforcement. And, as stated above, even if the FCC completes its RFA analysis before January 1, 2006, it is still unlikely to address any of the regulatory uncertainties identified by the Commission's August 25, 2004 Order.

9. Also as supported by the attached Affidavit, there has been no material change in the projected technical, administrative and operational requirements nor the costs thereof from those described in the evidence introduced into the record in this Docket nor any reason why the Commission should alter its Findings and Conclusions in regard to that evidence from that set forth in the August 25, 2004 Order.

10. Because there has been no material change in circumstances since the Commission's August 25, 2004 Order, and because, due in part to the *USTA* decision, there is no immediate prospect of any change, and because the *USTA* decision creates a conflict with the August 25, 2004 Order, Reynolds seeks an Order from the Commission reopening this Docket to suspend Petitioner's obligation to provide wireline-to-wireless LNP for an additional year, *i.e.*, from January 1, 2006 to January 1, 2007, or a continuing suspension until further order of the Commission.

11. The granting of the requested reopening and Amendatory Order on Reopening of the wireline-to-wireless LNP suspension by an additional year is consistent with the public interest, convenience and necessary for the same reasons that the suspension granted in the August 25, 2004 Order was found to be consistent with the public interest, convenience and necessity. It is also in the public interest insofar as it removes any opportunity for conflict with the *USTA* decision.

12. Without a reopening and an Amendatory Order on Reopening, only a new suspension petition can avoid the significant adverse economic impact on all customers of Reynolds due to the level of increased rates or surcharges necessary to recover both the non-recurring and recurring costs associated with the provision of wireline-to-wireless LNP. The evidence in a new suspension petition will be virtually identical to the evidence already before the Commission (including the attached Affidavit) in this Docket. Given (1) the impending expiration of the temporary suspension of wireline-to-wireless LNP obligations granted by the August 25, 2004 Order; (2) the 180-day timeline established by Section 251(f)(2)(B) of the Federal Act for a Commission decision on a new suspension petition; and (3) the necessary lead time and the significant cash expenditure to implement wireline-to-wireless LNP if the Commission were to decline additional suspensions, Reynolds would have to file its new suspension case by early April, 2005 in the absence of an earlier Commission action on this Petition. All of the applicable timelines would be made more complicated if the FCC were to complete its RFA analysis and re-institute immediate enforcement of the FCC Intermodal Order sometime between now and year-end.

13. Section 200.900 of the Commission's Rules of Practice provides that: "[a]fter issuance of an order by the Commission, the Commission may, on its own motion, reopen any

proceeding when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, such reopening.” In its earlier Order, the Commission anticipated changes in available information about take rates and anticipated clarification of the regulatory framework for wireline-to-wireless LNP. The change in conditions of fact supporting reopening is that, to date, neither of these anticipated events has occurred. The change in law supporting reopening is the procedural complication and potential direct conflict created by the *USTA* decision. Moreover, it remains contrary to the public interest to impose the costs of implementing wireline-to-wireless LNP on customers when there is no substantial evidence of demand for the service. An Amendatory Order is also in the public interest because it will avoid the unnecessary expenditure of human resources by the Commission and the Petitioner and financial resources by the Petitioner that would be required to undertake full renewed suspension proceedings when the conditions justifying the original temporary suspension have not materially changed since the August 25, 2004 order was entered.

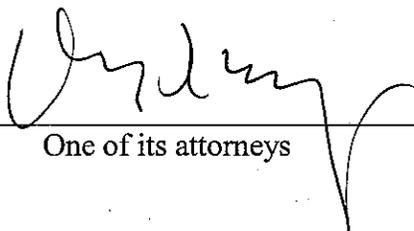
WHEREFORE, Reynolds Telephone Company respectfully requests that the Commission enter an order reopening this Docket and amending its final Order with an Amendatory Order on Reopen to suspend Petitioner’s obligations under Section 251(b)(2) of the Federal Telecommunications Act of 1996 to provide wireline-to-wireless local number portability until January 1, 2007 or until further order of the Commission, consistent with the record of this proceeding and the statutory criteria contained in Section 251(f)(2) of the Federal Act and to

make such further determinations and grant any other necessary relief, as appropriate, based upon the record of this Docket.

Dated this 23rd day of March, 2005.

Respectfully submitted,

REYNOLDS TELEPHONE COMPANY,

By  _____
One of its attorneys

Dennis K. Muncy
Joseph D. Murphy
MEYER CAPEL
A Professional Corporation
306 W. Church Street
Post Office Box 6750
Champaign, IL 61820
Telephone: 217/352-0030
Facsimile: 217/352-9294
dmuncy@meyercafel.com
jmurphy@meyercafel.com

VERIFICATION

STATE OF ILLINOIS)
)
COUNTY OF ROCK ISLAND)

SS:

Grace Ochsner, being first duly sworn on oath, deposes and states that she is General Manager of Reynolds Telephone Company, that she has read the above and foregoing Petition and knows the contents thereof, and that the same are true to the best of her knowledge, information and belief.

Grace Ochsner

Subscribed and Sworn to before me
this 21 day of March, 2005.

Cynthia Ann Flack
Notary Public



Certificate of Service

(Docket No. 04-0206)

A copy of Reynolds Telephone Company's Verified Petition to Reopen on the Commission's Own Motion with attachments was served upon the following persons by e-mail this 28th day of March, 2005.

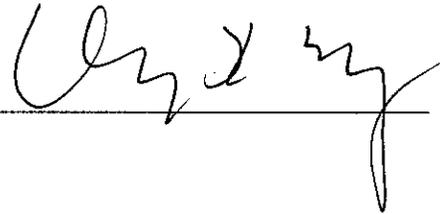
John Albers
Administrative Law Judge
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
jalbers@icc.state.il.us

Tom Stanton
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Suite C-800
Chicago, IL 60601-3104
tstanton@icc.state.il.us

Jeff Hoagg
Telecommunications Division
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, IL 62701
jhoagg@icc.state.il.us

Roderick S. Coy
Haran C. Rashes
Brian M. Ziff
Clark Hill PLC
Lansing, Michigan Office:
212 East Grand River Avenue
Lansing, MI 48906
rcoy@clarkhill.com
hrashes@clarkhill.com
bziff@clarkhill.com

Anne Hoskins
Lolita Forbes
Verizon Wireless
1300 "Eye" Street N.W.
Suite 400 West
Washington, DC 20005
anne.hoskins@verizonwireless.com
lolita.forbes@verizonwireless.com



A handwritten signature in black ink, appearing to read "R. S. Coy", is written over a horizontal line.

Attachment 1

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Reynolds Telephone Company :
: :
Petition for Suspension or :
Modification of Section 251(b)(2) :
Requirements of the Federal : 04-0206
Telecommunications Act Pursuant :
to Section 251(f)(2) of said Act; for :
entry of Interim Order; and for other :
necessary relief. :

ORDER

By the Commission:

I. INTRODUCTION

On March 5, 2004, Reynolds Telephone Company ("Petitioner") filed with the Illinois Commerce Commission ("Commission") a verified petition pursuant to Section 251(f)(2) of the Federal Telecommunications Act of 1996 ("TA96"), 47 U.S.C. 151 et seq. Petitioner seeks an order suspending or modifying the local number portability ("LNP") requirements imposed by Section 251(b)(2) of the TA96. On May 11, 2004, the Commission entered, as requested by Petitioner, an Interim Order suspending any obligation of Petitioner to provide wireline-to-wireless LNP until a final order is entered in this proceeding.

Pursuant to due notice, hearings were held in this matter before a duly authorized Administrative Law Judge of the Commission at its offices in Springfield, Illinois on April 1, April 5, April 27, and June 11, 2004. Appearances were entered by counsel on behalf of Petitioner, Commission Staff ("Staff"), and the only intervener, Verizon Wireless ("VW"). No other appearances were entered. At the June 11 evidentiary hearing, Gordon Kraut, a manager with Kiesling Associates LLP and a certified public accountant,¹ offered testimony on behalf of Petitioner. Staff called Jeff Hoagg, Principal Policy Advisor in the Commission's Telecommunications Division, and Mark Hanson, a Rate Analyst in the Telecommunications Division, to testify. Michael McDermott, VW's Regional Director of State Public Policy, testified on behalf of VW. At the end of the June 11 hearing, the record was marked "Heard and Taken." Petitioner, Staff, and VW each submitted a Brief. A Proposed Order was served on the parties.

¹ Kiesling Associates LLP provides accounting, auditing, consulting, and other financial services to over 200 telecommunications and public utility entities in multiple states.

Petitioner, Staff and VW each filed a Brief on Exceptions, which were considered in the preparation of this Order.²

II. BACKGROUND

Petitioner is a facilities-based incumbent local exchange carrier ("LEC") providing local exchange telecommunications services as defined in Section 13-204 of the Public Utilities Act ("Act"), 220 ILCS 5/1-101 *et seq.*, and is subject to the jurisdiction of the Commission. Petitioner provides service in the Reynolds Exchange, which is not located in a Top 100 Metropolitan Statistical Area ("MSA"). As of December 31, 2003, Petitioner provided service to approximately 565 access lines, which is less than 2% of subscriber lines nationwide. Petitioner's service area consists of approximately 54 square miles. Petitioner is a "rural telephone company" within the meaning of Section 153(37) of the TA96 and Section 51.5 of the rules of the Federal Communications Commission ("FCC"). As a rural telephone company, Petitioner possesses a rural exemption under Section 251(f)(1)(A) of the TA96 from the requirements of Section 251(c) of the TA96.

III. GOVERNING LAW

Section 251(b)(2) of the TA96 provides in part:

(b) Obligations of All Local Exchange Carriers.—Each local exchange carrier has the following duties:

* * *

(2) Number Portability.—The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the [FCC].

In implementing its authority, the FCC, on November 10, 2003, released a *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in CC Docket No. 95-116 ("FCC Order"). The FCC concluded in part that LECs must port numbers to wireless carriers where the requesting wireless carriers' "coverage area" overlaps the geographic locations of the rate center in which the customer's wireline number was provisioned, provided that the porting-in carrier maintains the number's original rate center designation following the port. As it pertains to incumbent LECs ("ILEC") outside of the Top 100 MSAs, the FCC Order concludes, in part, at paragraph 29 as follows:

[W]e hereby waive, until May 24, 2004, the requirement that these carriers port numbers to wireless carriers that do not have a point of interconnection or numbering resources in the rate center where the

² In light of the statutory deadline in this matter, the schedule did not call for the submission of Reply Briefs or Briefs in Reply to Exceptions or Briefs in Reply to Exceptions.

customer's wireline number is provisioned. We find that this transition period will help ensure a smooth transition for carriers operating outside of the 100 largest MSAs and provide them with sufficient time to make necessary modifications to their systems.

Previously, however, the FCC adopted 47 C.F.R 52.23(c), which also concerns LNP and provides that:

(c) Beginning January 1, 1999, all LECs must make a long-term database method for number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.

Despite the FCC's rules, though, rural telephone companies may still avoid LNP requirements pursuant to Section 251(f)(2) of the TA96. This section states:

(2) Suspensions and Modifications For Rural Carriers.—A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

(A) is necessary—

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

IV. PARTIES' POSITIONS

A. Petitioner's Position

Petitioner requests a suspension of its obligation to provide wireline-to-wireless LNP until November 24, 2006. At the evidentiary hearing, Petitioner indicated that it

was limiting the grounds for its request to the criteria contained in Section 251(f)(2)(A)(i); i.e., to avoid a significant adverse economic impact on users of telecommunications services generally, and (B); i.e., is consistent with the public interests, convenience and necessity. Petitioner indicates that it is limiting its request in this manner since that is the statutory criteria under which Staff is recommending that Petitioner be granted a temporary suspension. Generally, Petitioner considers the monthly charge to customers resulting from its implementation of wireline-to-wireless LNP unreasonably high for customers to bear. Petitioner also generally believes a temporary suspension is in the public interest because it anticipates minimal demand for wireline-to-wireless LNP, foresees difficulties in implementing wireline-to-wireless LNP, and has concerns over regulatory uncertainties stemming from questions yet to be answered by the FCC.

In light of many of the arguments raised by VW, Petitioner wants the Commission to have a clear understanding of what is at issue in this proceeding. This docket is not about whether VW or other wireless carriers can currently compete for Petitioner's customers. Petitioner states that VW and other wireless carriers already provide service in Petitioner's local serving area. Therefore, Petitioner asserts, the presence or absence of wireline-to-wireless LNP will not impact or reduce the current level of competition for customers in Petitioner's serving area or narrow the alternatives for any customers living in Petitioner's serving area. Rather, Petitioner continues, wireline-to-wireless LNP is only an incremental extension of competition, allowing customers who wish to abandon their wireline telephone altogether to port their wireline telephone number to their wireless carrier, thus abandoning their current wireless numbers. Petitioner states further that this case is also not about whether customers are interested in porting telephone numbers from one wireless carrier to another wireless carrier. While customers porting from one wireless carrier to another wireless carrier are expressing a preference only among different wireless carriers (which would have no impact on their wireline service), Petitioner explains that customers seeking a wireline-to-wireless port are normally replacing their wireline service with a wireless-only alternative, thus foregoing wireline service altogether. What this case is about, Petitioner emphasizes, is the cost of wireline-to-wireless LNP to customers who chose not to port their number and remain with their LEC.

As a general matter, Petitioner states that it provides to its customers the services they want when a sufficient number of customers desire the service and all of its customers are willing to pay the associated costs. Petitioner does not believe that it should be required to incur the associated costs to provide wireline-to-wireless LNP nor its customers be required to pay for what it characterizes as a discretionary service until its customers want the service and are willing to pay for wireline-to-wireless LNP. Petitioner's witness testifies that as a small company, Petitioner is in close contact with its customers and has received no request from its customers for wireline-to-wireless LNP.

While correspondence and documents received by Petitioner from at least one wireless carrier related to wireline-to-wireless LNP were entered into the record, it is

Petitioner's position that this Commission need not make a determination as to whether or not those documents constitute a bona fide request ("BFR") in connection with the determinations to be made in this docket. Regardless of whether or not it has received a BFR for wireline-to-wireless LNP, Petitioner believes that it is best to defer implementation of wireline-to-wireless LNP within its serving area until such time as the operational, administrative, and technical problems associated with its provision have been worked out on a more global basis by the larger ILECs, such as SBC, and the larger wireless carriers requesting number portability. Petitioner's witness considers it significant that (1) Petitioner has not received a 251(c) BFR for interconnection, services, or network elements from any telecommunications carrier; (2) no telecommunications carrier has asked the Commission to terminate Petitioner's rural exemption pursuant to the provisions of 251(f)(1)(B) of the TA96; and (3) no wireline telecommunications carrier has requested LNP. These facts, Petitioner argues, evidence the lack of sufficient or significant demand for LNP or service from competitive providers. These facts, according to Petitioner, also indicate that Petitioner lacks any experience in providing LNP and would have to incur new or incremental costs to provide wireline-to-wireless LNP now.

Companies such as SBC, on the other hand, have been providing some type of LNP for a number of years, according to Petitioner. Those companies, Petitioner observes, have already made the incremental investment to provide LNP and have trained employees and have had ongoing business experience in the provision of at least some type of LNP. Petitioner asserts that statements from the FCC, news stories, and the trade press have made clear that there are indeed operational, administrative, and technical problems that need to be worked through on an industry basis.

In Petitioner's view, from a policy and industry perspective, this would appear to be similar to the situation when customers were initially allowed to presubscribe to interexchange carriers. Petitioner states that presubscription was initially implemented by the large carriers, such as the regional bell operating companies; and the operational, administrative, and technical difficulties associated with presubscription were worked out over a period of time between those large ILECs and the large interexchange carriers, such as AT&T, MCI, and Sprint. In connection with determinations made related to the Primary Toll Carrier Plan in Illinois, Petitioner relates that the Commission provided a different and subsequent timetable of presubscription for small companies, such as itself, after experience had been gained from the larger companies.

With regard to implementing wireline-to-wireless LNP, Petitioner reports that the FCC's orders and rules as they now stand do not require a wireless carrier to have a point of presence within Petitioner's serving area, nor do they require the wireless carrier to establish direct trunks to Petitioner for the purpose of delivering calls. Since no wireless carrier has a point of interconnection or numbering resources in any exchange or rate center within its serving area, Petitioner believes, based upon the FCC's current requirements, that all calls from one of its wireline customers to one of its customers who had ported his/her number to a wireless carrier would have to be

transported to the tandem that particular Petitioner office subtends for delivery to the wireless carrier where it does have interconnection. Petitioner states that the routing of a call to a location outside of its local calling area would normally lead to such a call being rated as an interexchange call or toll call.

Additionally, Petitioner argues that it should in no event be required to provide wireline-to-wireless LNP until such time as regulatory decisions have been made and mechanisms put in place that will allow it to recover all of its costs associated with the provision of wireline-to-wireless LNP. Petitioner complains that the FCC's orders to date, including the November 10, 2003 FCC Order, fail to address how numerous significant costs, such as the cost of transporting calls to wireless points of interconnection outside of the ILEC's serving area and associated transiting or tandem switching costs, will be recovered. While it is Petitioner's belief that those costs should not be borne by it or its customers, Petitioner states that no regulatory decision by the FCC or this Commission has been made as to how those costs will be recovered and mechanisms put in place to allow for such recovery.

While it does not believe that it or its customers should be responsible for the transport and transiting costs associated with delivering calls to wireless carriers, for purposes of evaluating the economic burden in this proceeding Petitioner has assumed that it, and ultimately its customers, will be responsible for such costs.³ Petitioner uses the FCC's existing rules regarding cost recovery for wireline-to-wireless LNP pursuant to which a federal end-user surcharge could be tariffed and filed. The FCC's rules provide for certain investment costs and certain ongoing expenses to be recovered over a five-year period. In estimating its costs, Petitioner uses a model based on cost support filed and approved by the National Exchange Carrier Association ("NECA") in a LNP filing it made with the FCC in NECA's Transmittal #956.

In estimating its costs, Petitioner notes that while the current generic software contained in its switch will accommodate number portability and that capacity has been "loaded," it has not been "activated." Personnel from the switch manufacturer would, according to Petitioner, have to activate that capability, as well as make translations in switches and perform testing and verification. Petitioner indicates in its testimony that it would need to file an application with the Number Portability Administration Center ("NPAC") and sign agreements to access the NPAC service management system and would need to enter into an agreement with a vendor to provide LNP Service Order Administration Services. Since at least calls to ported numbers and long distance calls would need to have a database dip in connection with the provision of LNP, Petitioner further asserts it would need to enter into an agreement with an LNP database provider, which would include query charges being assessed to Petitioner. Technical training for its employees, Petitioner continues, would also be necessary. Petitioner's witness also testified that incremental costs would be incurred by Petitioner in connection with administrative, order processing, customer service, regulatory and legal costs, as well as costs associated with general employee training and customer education.

³ Petitioner does not seek Commission approval of any type of end user surcharge or other increased rate associated with the provision of wireline-to-wireless LNP.

Petitioner calculates that initial LNP start-up costs and certain ongoing expenses over a five year period amount to \$83,857 before applying present value factors. After applying present value factors, the cost is \$73,313. To recover its costs, Petitioner estimates that it would have to recover \$3.19 per month from each access line. Attachment 1 to Petitioner's Exhibit 1 shows how Petitioner arrived at these cost estimates.⁴ In light of these costs, it is Petitioner's position that a suspension or modification of any obligation it may have to provide wireline-to-wireless LNP is necessary to avoid a significant adverse economic impact on its customers and that the granting of such further suspension is consistent with the public interest, convenience and necessity. Even after all cost recovery and technical matters are resolved, Petitioner states that it should not have to provide wireline-to-wireless LNP until between 6%-10% of its customers express a desire for wireline-to-wireless LNP.

Petitioner concurs with and supports the costs/benefit analysis contained in the testimony of Staff witness Hoagg, as well as his recommendation that Petitioner be granted a temporary suspension. Petitioner indicates that the costs/benefit analysis and the focus on the adverse impact of cost recovery on Petitioner's customers is particularly appropriate since the FCC surcharge is imposed on all customer access lines that do not elect to port their landline number, rather than the cost causers; i.e., the wireless carriers and any customer who does elect to port his or her number.

Petitioner acknowledges that because not every LEC is requesting a suspension of the wireline-to-wireless LNP requirements a patchwork of wireline-to-wireless LNP availability may result. But Petitioner does not believe that such a patchwork should be a significant concern to the Commission. Petitioner asserts that two other facts available to the Commission support Petitioner's position regarding the potential patchwork. First, wireline-to-wireline LNP has been available in some but not other Illinois exchanges for a number of years. Petitioner explains that that patchwork is the result of the FCC's own plan for initiating number portability, i.e., that it be rolled out initially only in the Top 100 MSAs and thereafter only in exchanges where there was a BFR for interconnection and LNP. Despite the fact that neighbors across a road who happen to live on two sides of an exchange boundary may have different access to wireline-to-wireline LNP, Petitioner states that there is no record that this patchwork has caused any consumer confusion or complaints.

Second, customers in different areas of Illinois have different access to advanced services. Petitioner notes that in 2001, the General Assembly enacted Section 13-517 of the Act, requiring every ILEC in Illinois to provide advanced telecommunications services to not less than 80% of its customers by January 1, 2005. Although Section 13-517 has a suspension provision, neither Petitioner nor any other small carrier in Illinois has sought to invoke it. In fact, only one ILEC has sought and has been granted

⁴ While Petitioner does not necessarily agree with some of Staff's adjustments to its cost estimates, Petitioner acknowledges that any discussion of the adjustments is academic in light of Staff's support for a temporary suspension and the fact that Staff's support for a temporary suspension is based upon the lower per access line per month charge of \$2.18.

a suspension—Verizon. (See Order of June 24, 2003 in Docket No. 02-0560) Petitioner asserts that the patchwork availability of advanced telecommunications services did not outweigh the Commission's decision to suspend for three years the requirements of 13-517. Nor, Petitioner continues, does the existence of a patchwork of different service availability outweigh the public interest in granting this suspension.

With regard to the connection between number portability and number pooling, Petitioner wants the Commission to understand that delaying wireline-to-wireless LNP will not materially increase the use of numbering resources as a result of competition. Wireless carriers, Petitioner observes, already compete in the areas served by Petitioner and already have their own numbering resources. Petitioner states further that no competitive LEC has sought to interconnect with it and no wireless carrier has a rating point in its exchanges. Therefore, even if Petitioner could participate in number pooling, Petitioner asserts that there is no carrier with which it could share thousands blocks, since all thousands blocks must be rated to the same rating point. Petitioner maintains that suspending its wireline-to-wireless LNP obligations will not have any material impact on numbering resources.

In responding to VW, Petitioner asserts that VW presented no evidence challenging the LNP incremental cost analysis and evidence presented by Petitioner and Staff that a suspension is necessary in order to avoid a significant adverse economic impact on Petitioner's customers. Petitioner argues further that VW's reference to and reliance upon the Federal standard contained in 47 C.F.R. § 51.405(d) related to "undue economic burden" on a company is irrelevant since it pertains to the statutory standard contained in Section 251(f)(2)(A)(ii), not Section 251(f)(2)(A)(i)—the standard under which Petitioner has sought and Staff has recommended a further temporary suspension.

According to Petitioner, VW's argument that a suspension under Section 251(f)(2)(A) is not available to Petitioner is simply wrong. While the FCC may have relied on Section 332 of the TA96 to impose LNP obligations on wireless carriers (Section 251(b) is applicable only to LECs), the LECs' obligations, including Petitioner's, arise only from Section 251(b). Petitioner avers that seeking a suspension or modification of a Section 251(b) or (c) obligation is the statutory right and remedy provided to 2% LECs as set forth in the TA96.

Petitioner also addresses VW's claim that Petitioner has been dilatory in seeking a suspension. According to Petitioner, VW mischaracterizes the FCC's path to ordering wireline-to-wireless LNP. As Petitioner's testimony sets out, no wireless carrier has a point of presence or numbering resources in Petitioner's serving area. While the FCC's earlier orders required "service provider" number portability, the FCC had never required "geographic" or "location" number portability. Prior to the FCC's November 10, 2003 Order, Petitioner, as well as other LECs in Illinois and throughout the nation, had concluded that, in circumstances where wireless carriers did not have a point of presence or numbering resources within a LEC serving area, any request for porting would constitute "location" portability that was outside of the FCC requirement.

Petitioner also observes that it, together with other small companies in Illinois, had monitored a request for a temporary suspension filed by five other small ILECs in a Top 100 MSA.⁵ Rather than immediately burdening Staff and the Commission with additional suspension requests, Petitioner promptly filed its petition with the Commission after Staff in the first five dockets recommended at the February 23, 2004 hearing that a temporary suspension was justified and should be granted to those companies until November 24, 2006.

Petitioner argues that VW's claim that the Commission should not consider the request for a temporary suspension because the FCC has already determined that wireline-to-wireless LNP is in the public interest is also totally without merit. That argument contradicts the very purpose of Sections 251(f)(2)(A) and (B) and would have the effect of negating those Sections since it would prevent any state Commission from ever examining on a carrier-specific basis a general policy set by the FCC on a national basis. In fact, the FCC stated in its First Report and Order On Local Competition, cited by VW, that "We conclude that Section 251(f) adequately provides for varying treatment for smaller or rural LECs where such variances are justified in particular instances." (Paragraph 1265) Petitioner insists that it has a right under Section 251(f)(2)(A) to seek a suspension or modification based on its company-specific circumstances and has presented company-specific evidence that would allow this Commission to make determinations under Sections 251(f)(2)(A) and (B) so as to grant the requested further temporary suspension sought by Petitioner and recommended by Staff.

B. Staff's Position

As a general matter, Staff believes that the deployment of number portability capabilities by Illinois LECs is desirable. Staff points out that Congress required all telecommunications carriers to provide number portability pursuant to rules promulgated by the FCC. Staff notes that the FCC has promulgated a number of such rules and on at least one occasion has stated that the failure of telecommunications carriers to provide number portability hampers the development of local competition. Additionally, Staff states that the FCC has emphasized that carriers offering number portability also participate in number pooling to optimize numbering resources, which benefits consumers by staving off the creation of new area codes. Staff believes that the Commission should consider the fact that requiring wireline-to-wireless LNP would have the effect of making Petitioner number pooling capable. Staff also states that the Commission should consider the fact that granting a suspension to Petitioner (and to other petitioners in other dockets) will have the effect of creating a patchwork of suspensions in Illinois where wireline-to-wireless LNP is and is not available.

Nevertheless, Staff recommends a temporary suspension of Petitioner's obligation to provide wireline-to-wireless LNP. In making its recommendation, Staff focuses on Section 251(f)(2)(A)(i) of the TA96 as the most directly applicable of the three standards that appear in Section 251(f)(2)(A). According to Staff, FCC rules, specifically 47 CFR §§ 52.21-52.33, provide that Petitioner may recover most LNP-

⁵ See Docket Nos. 03-0726, 03-0730, 03-0731, 03-0732, and 03-0733.

related costs from end users (on a per-access line basis as prescribed in the rules) over a period of five years. Staff understands that Petitioner will do so if and when it is required to implement wireline-to-wireless LNP. Since costs associated with wireline-to-wireless LNP will be borne by Petitioner's customers generally, Staff asserts that a central question for the Commission is whether such costs would cause a "significant adverse economic impact on users of telecommunications services generally." In this specific application of Section 251(f)(2)(A)(i), Staff states that the phrase "users of telecommunications services generally" is best understood to refer to the general body of Petitioner's subscribers. Thus, Staff believes that the fact that wireline-to-wireless LNP costs would be borne largely by end-users warrants a Commission focus on Section 251(f)(2)(A)(i). Staff does not address Section 251(f)(2)(A)(ii) and simply asserts that Section 251(f)(2)(A)(iii) is not at issue in this proceeding since deployment of wireline-to-wireless LNP by Petitioner is technically feasible.

With regard to the cost burden on end-user customers and Petitioner, Staff states that there are two cost-related circumstances that are of concern. First, Staff notes that Petitioner does not currently provide wireline-to-wireline LNP. Because of this fact, Staff relates that Petitioner would need to recover all LNP related costs for the sole purpose of providing wireline-to-wireless LNP. This is in contrast, Staff observes, to carriers that already have LNP capabilities and whose incremental cost of extending the capability to wireless carriers is minimal at best. Second, Staff agrees with Petitioner that the issue of cost recovery for transit and transport has not yet been resolved. Because of its current routing arrangements, all calls from Petitioner's local exchange customers to numbers that have been ported (from Petitioner to wireless carriers) would incur routing and transport costs. Without a recovery mechanism in place, Staff indicates that it can not be determined how these costs will impact Petitioner or its end-users.

In an attempt to determine whether Petitioner's customers would experience a significant adverse economic impact, Staff reviewed Petitioner's cost estimates associated with providing wireline-to-wireless LNP.⁶ Staff's testimony questions Petitioner's characterization of some costs and Petitioner's estimates of certain other costs. The impact of Staff's recommendations (Staff Scenario 1) regarding the Petitioner's cost analysis is a reduction in the estimated costs per access line per month from \$3.19 to \$2.18. Staff emphasizes that this figure is not a recommended rate for a LNP surcharge, but rather is a means to gauge the impact of wireline-to-wireless LNP on Petitioner's end-users. Staff also submitted a Scenario 2, where in addition to the adjustments made in Scenario 1, Staff also deleted transport and transiting costs because it is unclear whether the FCC will allow Petitioner to recover these costs through a LNP surcharge. Under Scenario 2, Petitioner's estimated LNP surcharge is \$1.79 per access line per month. Staff witness Hoagg relies on the Scenario 1 estimates in making his recommendation that a temporary suspension be granted.

Because Staff is not aware of any quantitative or precise measure (or any generally accepted methodology) to determine whether a given level of costs or charges

⁶ Staff notes that the Commission has no role in determining the appropriate rates for LNP cost recovery. All cost recovery for LNP associated costs is obtained via ILEC tariffs filed with the FCC.

would cause "a significant adverse economic impact on users of telecommunications services generally," Staff recommends the careful application of judgment on a case specific basis. Staff compares the estimated LNP surcharge of \$2.18 per access line per month for Petitioner to SBC's surcharge of \$0.28 per access line per month. Staff points out that the estimated per line surcharge for Petitioner is higher than the comparable figure for SBC. While not directly comparable, Staff believes that the figure for SBC provides a useful benchmark. Moreover, Staff asserts that the estimated per line surcharge for Petitioner's subscribers appears unduly high in the context of the expected demand for and subscriber benefits associated with wireline-to-wireless LNP at this time. In this instance, Staff therefore concludes that the application of judgment warrants a temporary suspension of the wireline-to-wireless LNP requirements.

In evaluating the anticipated benefits of wireline-to-wireless LNP, Staff considered both direct and indirect benefits. Indirect benefits are, according to Staff, those benefits that non-porting customers receive by virtue of the fact that other customers of Petitioner can and do take advantage of the ability to port numbers from wireline to wireless carriers. Staff notes that the indirect beneficiaries share directly in the costs associated with wireline-to-wireless LNP since these costs are recovered over all access lines. Staff describes direct beneficiaries of wireline-to-wireless LNP as those customers who port a wireline telephone number to a wireless service. Staff states that the direct benefits are considerably larger, per subscriber, than any indirect benefits gained by those who do not port their telephone number. Assuming its assessment of the benefits is accurate, Staff indicates that the level of benefits realized by Petitioner's customers depends on the number of customers choosing to port their wireline number to a wireless carrier. As of January 2004, Staff understands that the "take rate" for wireline-to-wireless LNP in areas where it is available is quite low (less than 1%). Based upon this information and other information available to the Staff concerning Petitioner's serving area, Staff opines that the demand for wireline-to-wireless LNP in Petitioner's service area is quite low.

Whether such a temporary waiver is consistent with the public interest, convenience, and necessity is Staff's next inquiry. As noted above, Staff believes that there is currently very little interest in wireline-to-wireless LNP among Petitioner's customers. Furthermore, Staff continues, the risks of a significant loss or downside from a decision to temporarily suspend the wireline-to-wireless LNP requirements are quite small. The fact that court challenges to various aspects of the FCC's orders imposing wireline-to-wireless LNP on small carriers are currently pending also leads Staff to believe that a temporary waiver is appropriate. If the Commission does not now temporarily suspend these requirements and the small rural carriers prevail partially or wholly in the pending federal court proceedings, Staff is concerned by the possibility that Petitioner and/or its customers would incur at least some costs associated with wireline-to-wireless LNP even if Petitioner ultimately was not required to deploy wireline-to-wireless LNP. For these reasons, Staff believes that a temporary suspension of the wireline-to-wireless LNP requirements is consistent with the public interest, convenience, and necessity.

In light of the foregoing, Staff concludes that several factors and several policy considerations unique to smaller, more rural ILECs in Illinois render the FCC decision to require wireline-to-wireless LNP by these carriers no later than May 24, 2004 premature. Specifically, Staff opines that given the record, a suspension is necessary to avoid imposing a significant adverse economic impact on Petitioner's customers. Staff believes that a temporary suspension of these requirements by the Commission is warranted under Section 251(f)(2) of the TA96 and would be consistent with the public interest, convenience, and necessity.

Staff makes this recommendation despite its position that Petitioner has received a BFR for wireline-to-wireless LNP from a wireless carrier. From both a policy and a legal perspective, Staff does not believe that a receipt of a valid BFR should impede the grant of a suspension under the circumstances.

Staff recommends a suspension of approximately two years and no more than 30 months in length. Staff indicates that a suspension of approximately two years should be sufficient to allow for the resolution of relevant issues addressed in its testimony and to obtain additional vital information related to customer demand and the costs of providing wireline-to-wireless LNP. Staff notes that the Commission previously granted suspensions to five other ILECs that were 30 months in duration.⁷

C. VW's Position

VW notes that Petitioner's case is essentially identical to those presented by 39 other petitioners seeking a suspension from the Commission of the requirement to provide wireline-to-wireless LNP. VW argues that Petitioner, as well as many of its counterparts in the other proceedings, has failed to meet the applicable legal standards set forth in Section 251(f)(2) of the TA96. VW contends that the law and sound public policy necessitate the denial of Petitioner's request.

According to VW, the FCC assigned the burden of proof in a suspension request, under Section 251(f)(2) of the TA96, to Petitioner in 47 C.F.R. §51.405(b). VW maintains that Petitioner has failed to demonstrate how a suspension is necessary to avoid adverse impacts on it, its customers, wireless carriers, and customers of wireless carriers. VW acknowledges that it casts a wider net when examining the impact of a suspension and explains that it disagrees with Petitioner and Staff's narrower application of the phrase "users of telecommunications services generally" from Section 251(f)(2)(a)(i) of the TA96. Based on rules of grammatical construction, legislative intent, and statutory construction, VW insists that the word "generally" can not mean that the Commission should look only at users of Petitioner's service. Rather, VW posits, the word "generally" means that the Commission must examine the impact of a suspension on users of telecommunications services who would be affected by an additional suspension. VW contends that Petitioner failed to raise or prove that a suspension would have an adverse impact on anyone but Petitioner and its customers.

⁷ The suspensions granted to the five ILECs in Docket Nos. 03-0726, 03-0730, 03-0731, 03-0732, and 03-0733 are currently being reconsidered by the Commission.

VW also raises concerns that Petitioner and Staff failed to examine various public interest standards which it believes this Commission must consider. VW first asserts that the Commission must consider the fact that LNP has already been determined by the FCC and this Commission to be in the public interest. VW avers next that this Commission must consider the fact that LNP optimizes number resources, which is in the public interest. A third public interest consideration that VW raises is the impact on competition that a suspension might have. By granting a suspension, VW is concerned that local competition will be hampered. But according to VW, denying Petitioner's request will, on the other hand, foster competition—a long stated goal of, and a statutory requirement imposed on, this Commission. A fourth consideration that VW maintains that the Commission must take into account is the adverse impact a suspension would have on the public interest because of consumer confusion caused by the fact that some residents of the state will be able to port their telephone numbers and other residents will not, creating a patchwork approach to a Federal mandate designed to benefit all consumers.

Copies of correspondence from VW, US Cellular, and AT&T Wireless that Petitioner has included with its testimony are of significance to VW. This correspondence, VW asserts, demonstrates that wireless carriers sought to have LNP made available in Petitioner's service territory. But instead of complying with the TA96 and the FCC's rules, VW points out that Petitioner sought to avoid its obligation to provide wireline-to-wireless LNP and even specifically requests that the Commission not decide whether or not the correspondence constitutes a BFR.

VW points out that Petitioner contends that it should not be required to provide wireline-to-wireless LNP until there is a demonstrated demand. Demand for the service, however, is not determinative of the public interest and is not the legal standard to be met in order to qualify for a suspension from LNP, according to VW. Moreover, VW continues, Petitioner's claim that there is no demand for wireline-to-wireless LNP is not based on substantial or credible evidence. VW observes that Petitioner has not taken any formal steps to quantify or measure if there is any demand in its service territory. VW states that wireline-to-wireless LNP is a new, forward-looking requirement that seeks to spur competition among carriers and in the local exchange market. VW believes that the availability and marketing of wireline-to-wireless LNP will create its own demand once consumers begin to realize the benefits of competition.

Among the shortcomings VW perceives in Petitioner's case are numerous flaws and inflations contained in Petitioner's costs analysis. VW asserts that the FCC requires that only carrier specific costs directly related to providing number portability can be recovered through an LNP surcharge. VW recommends that the reductions applied by Staff be applied to the Petitioner's cost analysis before the Commission considers the amount of any LNP surcharge in this proceeding. VW also understands that the FCC separates considerations regarding routing calls from the obligation to provide LNP. Therefore, VW asserts, this Commission should not consider transiting and transport costs in any analysis of the impact of an LNP surcharge upon the

Petitioner's customers. When transiting and transport is removed from the equation, VW points out that Staff calculates Petitioner's estimated LNP surcharge to be \$1.79 per subscriber per month. VW argues that this amount is not significant and would not constitute a significant adverse impact on the Petitioner's customers and certainly not on "users of telecommunications services generally."

VW observes further that Staff's policy witness failed to analyze the LNP surcharge with transiting and transport costs removed. VW also claims that Staff's policy witness relied on Petitioner's position without independently verifying or examining assumptions made by Petitioner. VW criticizes Staff's policy witness for providing the exact same testimony in each suspension proceeding before this Commission, despite a statutory obligation for this Commission to examine such petitions on a case-by-case basis. VW also points out that not all Illinois ILECs have requested a suspension of the wireline-to-wireless LNP requirements.

Additionally, VW raises numerous procedural arguments regarding this and other petitions for suspensions from LNP obligations. Among these arguments is that the grant of the petition along with the other pending petitions would constitute a blanket waiver, which is not permitted by statute. VW also believes that granting the requested relief would constitute an improper collateral attack on the FCC's Number Portability Orders.

VW recommends that the Commission deny Petitioner's request for a suspension, and require Petitioner to provide wireline-to-wireless LNP as soon as practicable, but no later than November 24, 2004. In addition, VW requests that the Commission order Petitioner to provide periodic updates on the progress it is making toward such provision.

V. COMMISSION CONCLUSION

Section 251(b)(2) of the TA96 obligates LECs, including Petitioner, to provide, to the extent technically feasible,⁸ number portability in accordance with requirements prescribed by the FCC. The FCC has considered number portability and determined that LECs, including Petitioner, must provide wireline-to-wireless LNP. But as is its right under Section 251(f)(2) of the TA96, Petitioner now asks this Commission to suspend its obligation to provide wireline-to-wireless LNP until November 24, 2006. Petitioner seeks the suspension under Section 251(f)(2)(A)(i) and (B) of the TA96; and, pursuant to 47 C.F.R. §51.205, Petitioner bears the burden of proving that it is entitled to the desired suspension. Accordingly, the Commission must determine whether Petitioner has demonstrated that a suspension is necessary to avoid a significant adverse economic impact on users of telecommunications services generally and is consistent with the public interest, convenience, and necessity.

⁸ No suggestion has been made in this proceeding that wireline-to-wireless LNP is not technically feasible.

Before addressing the statutory criteria, a word on certain correspondence from wireless carriers is warranted. Clearly Petitioner received correspondence from at least one wireless carrier inquiring about Petitioner's ability to provide wireline-to-wireless LNP. Whether or not the correspondence constitutes a BFR, however, need not be determined by the Commission since this question is not before the Commission.

The first question for the Commission to resolve concerns the proper understanding of the word "generally" in the phrase "significant adverse economic impact on users of telecommunications services generally" found at Section 251(f)(2)(A)(i). Petitioner and Staff maintain that "generally" refers to Petitioner's customers generally while VW argues that the scope of "generally" is much broader and requires an assessment of the impact on *all users* of telecommunications services who would be affected by any suspension. VW's position is thought provoking, but unpersuasive at this time. Perhaps with further explanation and support, the Commission could be persuaded that VW's interpretation truly reflects legislative intent but at present the Commission finds the interpretation of Petitioner and Staff more reasonable.

With regard to the economic impact on Petitioner's customers, the Commission is cognizant that it is not being asked to approve any particular cost to be included in a LNP surcharge. That task falls on the FCC. Nevertheless, the Commission must consider the reasonableness of including the estimated costs in a LNP surcharge. Only by doing so can the Commission properly gauge the economic impact of wireline-to-wireless LNP on Petitioner's end-users and carry out its duty under Section 251(f)(2).

After calculating the costs that it says it expects to incur and recover from customers, Petitioner insists that its estimated LNP surcharge of \$3.19 per access line per month is accurate and at this level constitutes a significant adverse economic impact on its customers. According to Attachment 1 to Petitioner's Exhibit 1, Petitioner's estimate includes costs for software; switch translations; regulatory and legal start up activities, as well as administrative and order processing activities; employee education; technical trouble; customer education; and query, transport, and transit costs over a five year period reflecting a 10% take rate at the end of the five year period. Transport and transit costs are among the largest of Petitioner's estimated costs. In evaluating the estimated costs, however, the Commission is unfortunately without the benefit of a definitive cost analysis. During the course of this proceeding, questions have arisen regarding inclusion of certain costs for transport and transit, legal expenses, employee education, customer education, and other activities arguably associated with implementing wireline-to-wireless LNP. With regard to customer education, for example, Staff questions the need to repeatedly mail notices to customers informing them of wireline-to-wireless LNP. Although the most appropriate number of customer mailings is uncertain, the Commission concurs that the redundancy called for by Petitioner is unnecessary.

Another troubling aspect of Petitioner's cost estimates is the inclusion of transport and transit costs ultimately reflecting a 10% demand for wireline-to-wireless

LNP. Petitioner and Staff both assert that they expect demand for wireline-to-wireless LNP in Petitioner's service area to be very low—significantly less than 1%. Yet when Petitioner developed its estimated LNP surcharge, it based transport and transit costs on a significantly higher "take rate." The result of using such a high demand level is a dramatic, arguably artificial, increase in the estimated LNP surcharge. If Petitioner anticipates a very low demand for wireline-to-wireless LNP, it is difficult to understand why Petitioner used such a high demand level for purposes of estimating the LNP surcharge in this proceeding. While actual demand upon implementation of wireline-to-wireless LNP is impossible to predict, the Commission finds that the record sufficiently indicates that the take rate at this time is quite low. Moreover, the Commission recognizes that uncertainty exists as to whether the FCC will prohibit recovery by the Petitioner of transport and transit costs through a LNP surcharge. Until the FCC resolves this uncertainty, however, the Commission is compelled to assume that the Petitioner or its customers will bear the burden of these costs. Consequently, Staff's analysis set forth in Scenario #1 not only addresses many of the concerns regarding costs raised above, it is also most consistent with the current state of the law regarding LNP costs and surcharges. Therefore, the Commission bases its findings in this proceeding on Staff's cost analysis set forth in Scenario #1.

Notwithstanding some of these concerns regarding the costs presented by Petitioner, the Commission finds that Petitioner has met its burden of demonstrating that a significant adverse economic impact would be imposed on its customers if required to implement wireline-to-wireless LNP.

We agree with Petitioner and Staff that the burden imposed by LNP implementation must be weighed against the benefit to be received. Although the level of demand for wireline-to-wireless LNP is difficult to predict, Staff and Petitioner have demonstrated with sufficient certainty that it is likely to be low for some time in the future. As noted above, Petitioner and Staff anticipate that demand will be low. Staff relies on take rates for wireline-to-wireless LNP for SBC and Verizon for the first two months that it was offered. While actual interest in LNP among Petitioner's customers and take rate data for SBC and Verizon over a longer period of time may or may not be higher than what Petitioner and Staff expect, estimating a future take rate is an inherently uncertain task. We agree with Staff that demand during the suspension period is nevertheless likely to be low and when weighed against the costs to Petitioner and its customers that Staff has analyzed in its Scenario #1, justifies the grant of this limited temporary suspension.

The Commission also finds that a temporary suspension of the requirement to provide wireline-to-wireless LNP is consistent with the public interest, convenience, and necessity. The FCC views LNP as a means to promote competition. The Commission concurs with this opinion. Although it is true that wireless carriers already operate in Petitioner's service area, wireline-to-wireless LNP removes an obstacle to competition by giving customers who would otherwise not switch providers because they do not want to change their telephone number the opportunity to keep their telephone number *and* switch providers. Moreover, the mere existence of this opportunity arguably

benefits customers who do not take advantage of wireline-to-wireless LNP because the existence of additional competition may induce Petitioner to offer better service and/or prices to retain those customers.

Furthermore, the Commission is well aware of the Numbering Plan Area ("NPA") relief planning efforts in the various area codes in Illinois. As a general principle, care must be taken to not exacerbate, and when possible to mitigate, the need for new area codes. The Commission generally understands that the software which makes a switch LNP capable is the same software which makes number pooling possible. While competing carriers currently operating in Petitioner's service area already have NXX codes assigned to them, the availability of number pooling could allow future carriers in Petitioner's area to share the block of numbers currently assigned to Petitioner. Such sharing would forestall the need for a new area code.

That said, Petitioner and Staff have demonstrated that in balancing these benefits against the costs to Petitioner and its customers, particularly in light of low demand, the implementation of wireline to wireless LNP is not warranted in Petitioner's territory at this time.

Additionally, the Commission understands that Petitioner foresees difficulties in implementing wireline-to-wireless LNP and has concerns over regulatory uncertainties. The Commission considers these difficulties and uncertainties to be additional costs to be weighed against the benefits of wireline-to-wireless LNP.

Accordingly, Petitioner's request for a temporary suspension is hereby granted.

VI. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein, is of the opinion and finds that:

- (1) Petitioner provides local exchange telecommunications services as defined in Section 13-204 of the Act;
- (2) the Commission has jurisdiction over the parties hereto and the subject matter hereof;
- (3) the facts recited and conclusions reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and law;
- (4) Petitioner's request for a temporary suspension of any wireline-to-wireless LNP obligations applicable to it under Section 251(b)(2) of the TA96 should be granted;

- (5) Petitioner should be prepared to provide wireline-to-wireless LNP no later than January 1, 2006; in the event that Petitioner is able to provide wireline-to-wireless LNP prior to January 1, 2006, Petitioner should notify the Chief Clerk of such through a compliance filing as described in the prefatory portion of this Order; and
- (6) all motions, petitions, objections, and other matters in this proceeding which remain unresolved should be disposed of consistent with the conclusions herein.

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that Reynolds Telephone Company's petition is hereby granted.

IT IS FURTHER ORDERED that Reynolds Telephone Company shall comply with Finding (5).

IT IS FURTHER ORDERED that all motions, petitions, objections, and other matters in this proceeding which remain unresolved are disposed of consistent with the conclusions herein.

IT IS FURTHER ORDERED that subject to the provisions of 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this 25th day of August, 2004.

(SIGNED) EDWARD C. HURLEY

Chairman

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 18, 2004

Decided March 11, 2005

No. 03-1414

UNITED STATES TELECOM ASSOCIATION AND
CENTURYTEL, INC.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
RESPONDENTS

CELLULAR TELECOMMUNICATIONS & INTERNET
ASSOCIATION, ET AL.,
INTERVENORS

Consolidated with
03-1443

On Petitions for Review of an Order of the
Federal Communications Commission

Aaron M. Panner argued the cause for petitioners. With him on the briefs were *Michael K. Kellogg*, *David E. Frulla*, *Andrew D. Herman*, *L. Marie Guillory*, *Jill Canfield*, and *Michael T. McMenamin*.

Gregory W. Whiteaker, Michael R. Bennet, and Rebecca L. Murphy were on the brief for intervenors Central Texas Telephone Cooperative, Inc., et al. in support of petitioners.

Ivan C. Evilsizer was on the brief for *amicus curiae* Hot Springs Telephone Co. in support of petitioners.

Joel Marcus, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *R. Hewitt Pate*, Assistant Attorney General, U.S. Department of Justice, *Catherine G. O'Sullivan* and *Andrea Limmer*, Attorneys, *John A. Rogovin*, General Counsel, Federal Communications Commission, *Richard K. Welch*, Associate General Counsel, *John E. Ingle*, Deputy Associate General Counsel, and *Rodger D. Citron*, Counsel.

Theodore C. Whitehouse, David M. Don, John J. LoCurto, Luisa L. Lancetti, Charles W. McKee, Michael F. Altschul, Robert J. Aamoath, and Todd D. Daubert were on the brief for intervenors Cellular Telecommunications & Internet Association, et al. in support of respondents.

Before: SENTELLE, RANDOLPH, and GARLAND, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge*: The petitioners in these consolidated petitions for review challenge an order of the Federal Communications Commission (FCC) that sets forth the conditions under which wireline telecommunications carriers must transfer telephone numbers to wireless carriers. The petitioners argue that the FCC's order is a legislative rule that requires notice and comment under the Administrative Procedure Act (APA), 5 U.S.C. § 553, and a regulatory

flexibility analysis under the Regulatory Flexibility Act (RFA), 5 U.S.C. § 604. The FCC contends that its order is an interpretative rule -- a rule that merely interprets one of the FCC's previous legislative rules -- and hence is exempt from APA and RFA requirements.

We conclude that the order is a legislative rule because it constitutes a substantive change in a prior rule. Although this rendered the order subject to the APA's notice-and-comment requirements, we find that the FCC effectively complied with those requirements (notwithstanding its view that it was not required to do so), and that any deviations were at most harmless error. There is no dispute, however, that the FCC failed to comply with the RFA's requirement to prepare a final regulatory flexibility analysis regarding the order's impact on small entities.

In light of these conclusions, we grant the petitions in part and deny them in part, remanding the order to the FCC to prepare a final regulatory flexibility analysis. Until that analysis is complete, we stay the effect of the order solely as it applies to those carriers that qualify as small entities under the RFA.

I

The Telecommunications Act of 1996 imposes numerous duties on local exchange carriers (LECs), which, for purposes of this case, are wireline carriers -- companies that provide telephone service over telephone wires. *See* 47 U.S.C. § 153(26) (defining LECs); *see also* FCC Br. at 2. The duty at issue here is the obligation "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). The Act defines "number portability" as "the ability of users of telecommunications services to retain, at the same location,

existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.” *Id.* § 153(30). The Act further directs the FCC “to establish regulations to implement” the statutory requirements. *Id.* § 251(d)(1).

On July 2, 1996, shortly after the 1996 Telecommunications Act became law, the FCC released its first order regarding number portability. *See* First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 F.C.C.R. 8352 (1996) (*First Order*). The *First Order* was issued pursuant to APA notice-and-comment procedures, and contained the regulatory flexibility analysis required by the RFA. *Id.* ¶ 1, at 8353-54, app. C, at 8486. In the *First Order*, the FCC recognized two kinds of portability that are relevant to this case: “service provider portability” and “location portability.” *Id.* ¶¶ 172, 174, at 8443.

The *First Order* required all carriers to provide service provider portability, which it made “synonymous with” the statutory definition of number portability: “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers . . . when switching from one telecommunications carrier to another.” *Id.* ¶ 27, at 8366-67. *Compare* 47 C.F.R. § 52.21(q), *with* 47 U.S.C. § 153(30). In addition, the *First Order* clarified that the portability obligation included not only porting between wireline carriers, but also “intermodal portability”: the porting of numbers from wireline carriers to wireless providers, and vice versa. *First Order* ¶ 152, 11 F.C.C.R. at 8431, ¶ 155, at 8433, ¶ 166, at 8440; *see* 47 C.F.R. §§ 52.23(b), 52.31(a).¹

¹The *First Order* also required porting between wireless providers. *First Order* ¶ 155, 11 F.C.C.R. at 8433. Although the Telecommunications Act of 1996 imposed porting duties only on

Although the *First Order* mandated service provider portability, it expressly declined to require “location portability,” which it defined as “the ability of users of telecommunications services to retain existing telecommunications numbers . . . when moving from one physical location to another.” *First Order* ¶ 174, 11 F.C.C.R. at 8443; *see id.* ¶ 6, at 8356; 47 C.F.R. § 52.21(j). But the *First Order* left many issues unresolved. In particular, while it required porting “at the same location,” and expressly declined to require porting when moving from “one physical location to another,” it did not define the word “location.”

The FCC enlisted a federal advisory committee, the North American Numbering Council (NANC), to make recommendations regarding the implementation of number portability. *See First Order* ¶¶ 94-95, 11 F.C.C.R. at 8401-02. The FCC also established a phased schedule requiring LECs to complete implementation of number portability in the 100 largest metropolitan areas by December 31, 1998. *See id.* ¶ 77, at 8393. As a result of subsequent postponements, the carriers’ intermodal porting duty did not commence until November 24, 2003 in large metropolitan areas, and until six months later in other areas. *See Verizon Wireless’ Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation* ¶ 31, 17 F.C.C.R. 14,972, 14,985-86, ¶ 34, at 14,986-87 (2002).

In 1997, the FCC received the NANC’s recommendations regarding wireline-to-wireline service provider portability and issued a second order that adopted those recommendations. *See*

LECs, the FCC relied on another statute, the Telecommunications Act of 1934, as the basis for imposing a porting obligation on wireless carriers. *Id.* ¶ 4, at 8355, ¶ 153, at 8431 (relying on the FCC’s authority over the wireless spectrum, as described in 47 U.S.C. § 332).

Second Report and Order, *Telephone Number Portability*, 12 F.C.C.R. 12,281 (1997) (*Second Order*); 47 C.F.R. § 52.26(a) (codifying the *NANC Working Group Report*). Like the *First Order*, the *Second Order* was issued pursuant to notice and comment and included a regulatory flexibility analysis. *Second Order* ¶ 2, 12 F.C.C.R. at 12,283, app. C, at 12,358. Under the *Second Order*, wireline-to-wireline number portability was “limited to carriers with facilities or numbering resources in the same rate center” See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues* ¶ 7, 18 F.C.C.R. 23,697, 23,700 (2003) (*Intermodal Order*) (citing the *Second Order*’s adoption of the NANC recommendations). Accordingly, a subscriber could not keep the same telephone number if he changed from a wireline telephone in one rate center to a wireline telephone physically located in a different rate center. *Id.* ¶ 7, at 23,700, ¶ 24, at 23,707. A “rate center” is a relatively small geographic area, designated by a LEC and state regulators, that is used to determine whether a given call is local or toll. See FCC, *FCC Clears Way for Local Number Portability Between Wireline and Wireless Carriers*, 2003 WL 22658210 (Nov. 10, 2003); FCC Br. at 6-7.

The *Second Order* was limited to wireline-to-wireline portability and did not resolve any issues relating to intermodal portability. Instead, the FCC once again enlisted the NANC to develop standards necessary to provide for wireless carriers’ participation in number portability. See *Second Order* ¶ 91, 12 F.C.C.R. at 12,333. In particular, the FCC asked the NANC to consider “how to account for differences between service area boundaries for wireline versus wireless services.” *Id.* ¶ 91, at 12,334. (The “service area” of a wireless carrier is typically considerably larger than the rate center of a LEC. See FCC Br. at 7.) But the NANC was unable to reach a consensus on

intermodal portability issues, especially because of the problem of “rate center disparity”:

[B]ecause wireline service is fixed to a specific location the subscriber’s telephone number is limited to use within the rate center within which it is assigned. By contrast, . . . because wireless service is mobile . . . , while the wireless subscriber’s number is associated with a specific geographic rate center, the wireless service is not limited to use within that rate center.

Intermodal Order ¶ 11, 18 F.C.C.R. at 23,701 (discussing NANC Report).

On January 23, 2003, the Cellular Telecommunications & Internet Association (CTIA) petitioned the FCC for a declaratory ruling that “wireline carriers have an obligation to port their customers’ telephone numbers to a [wireless] provider whose service area overlaps the wireline carrier’s rate center” associated with the requested number. *See* Petition for Declaratory Ruling of the CTIA, *Telephone Number Portability*, CC Docket No. 95-116 (Jan. 23, 2003), at 1. CTIA asked the FCC to reject the view of certain LECs that portability was required only when a wireless provider had a physical presence in the wireline rate center from which the customer sought to port the number. *Id.* at 3. The FCC issued a public notice seeking comments on CTIA’s proposed rule. *See Petition for Declaratory Ruling That Wireline Carriers Must Provide Portability to Wireless Carriers Operating Within Their Service Areas*, 68 Fed. Reg. 7323 (Feb. 13, 2003). Numerous members of the wireline industry, including several of the petitioners here,² submitted comments.

²*See, e.g.*, Comments of the U.S. Telecom Ass’n, *Telephone Number Portability*, CC Docket No. 95-116 (Feb. 26, 2003);

Some of the commenters argued that the FCC could not adopt the rule requested by CTIA without following APA rulemaking procedures.³ Those commenters contended that intermodal porting, as proposed by CTIA, necessarily entails location portability because it requires LECs to port numbers to a wireless carrier even if the carrier has no facilities or assigned telephone numbers within the rate center associated with the number to be ported.⁴ Other commenters focused on the merits of the proposal. Those contended, inter alia, that CTIA's proposal would give wireless carriers unfair advantages over wireline carriers: while it would permit wireless carriers to port numbers from -- and thus compete for -- wireline customers, wireline carriers would be unable to compete for wireless customers whose numbers were outside the wireline carriers' rate centers.⁵ Finally, some commenters contended that CTIA's proposal would impose special burdens on small and rural telephone companies. They argued that, because wireless carriers rarely have switching capability within the service areas of small, independent wireline carriers serving small towns or

Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, *Telephone Number Portability*, CC Docket No. 95-116 (Feb. 26, 2003).

³See, e.g., Ex Parte Letter from M.T. McMenamin, USTA, to M.H. Dortch, FCC, *Telephone Number Portability*, CC Docket No. 95-116 (Sept. 30, 2003); Ex Parte Letter from K.B. Levitz, BellSouth, to M.H. Dortch, FCC, *Telephone Number Portability*, CC Docket No. 95-116 (Sept. 30, 2003).

⁴See Ex Parte Letter of M.T. McMenamin, *supra*; Ex Parte Letter of K.B. Levitz, *supra*.

⁵See Ex Parte Letter from C. O'Connell, Qwest, to M.H. Dortch, FCC, *Telephone Number Portability*, CC Docket No. 95-116 (Oct. 17, 2003).

rural areas, those wireline carriers would have to bear the costs of transporting calls outside their local service territories when their customers made calls to wireless subscribers with ported numbers.⁶

On November 10, 2003, the FCC released the order at issue in this case, known as the *Intermodal Order*. 18 F.C.C.R. 23,697 (2003). The *Intermodal Order* adopted the rule proposed in the CTIA petition. It requires wireline carriers to “port numbers to wireless carriers where the requesting wireless carrier’s ‘coverage area’ overlaps the geographic location of the rate center in which the customer’s wireline number is provisioned,” so long as “the porting-in carrier maintains the number’s original rate center designation following the port.” *Id.* ¶ 22, at 23,706. A wireless carrier’s “coverage area” is defined as the “area in which wireless service can be received from the wireless carrier.” *Id.* ¶ 1, at 23,698.⁷

The FCC insisted that the *Intermodal Order* had merely adopted “clarifications” of the wireline carriers’ existing obligation under prior orders, and hence did not require a new rulemaking. *Id.* ¶ 26, at 23,708. The Commission rejected the contention that it had imposed a duty of location portability. Because the number has to retain its original rate center

⁶See Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies, *supra*.

⁷The order also required wireless carriers to port numbers to wireline carriers, but only to wireline carriers within a number’s originating rate center. Moreover, “because of the limitations on wireline carriers’ networks ability to port-in numbers from distant rate centers,” the FCC said it would “hold neither the wireline nor the wireless carriers liable for failing to port under these conditions,” but would instead issue a further notice of proposed rulemaking on the issue. *Intermodal Order* ¶ 22, at 23,706.

designation, the FCC said, the number remains at the “same location” for purposes of the statutory and regulatory definitions of portability. *Id.* ¶ 28, at 23,708-09. The fact that the order requires wireline carriers to port numbers to wireless carriers that do not have “a physical point of interconnection or numbering resources in the rate center where the number is assigned” does not, according to the FCC, amount to location portability. *Id.* ¶ 1, at 23,698; *see id.* ¶ 26, at 23,708.

The U.S. Telecom Association and other entities, principally advancing the interests of wireline carriers, now petition for review of the *Intermodal Order*. They do not challenge the merits of the order. Rather, they contend that it is invalid solely because it is a legislative rule issued without adherence to the procedural requirements of the APA and RFA.⁸

II

The Administrative Procedure Act imposes notice-and-comment requirements (the specifics of which we discuss in Part III) that must be followed before a rule may be issued. *See* 5 U.S.C. § 553. The APA expressly states, however, that those procedural requirements do not apply to “interpretative rules.” *See id.* § 553(b).⁹ This court and many commentators have

⁸On May 13, 2003, CTIA filed a separate petition with the FCC regarding wireless-to-wireless porting. The FCC issued an order resolving that petition on October 7, 2003. *See Telephone Number Portability - Carrier Requests for Clarification of Wireless-Wireless Porting Issues*, 18 F.C.C.R. 20,971 (2003). That order is the subject of another set of petitions for review in this court, which were argued on the same day as the present case. *See Central Tex. Tel. Coop., Inc. v. FCC*, No. 03-1405 (D.C. Cir. Mar. 11, 2005).

⁹Although the APA’s notice-and-comment procedures are also inapplicable to certain “adjudication[s],” the FCC made it clear that it

generally referred to the category of rules to which the notice-and-comment requirements do apply as “legislative rules.”¹⁰

The petitioners contend that the *Intermodal Order* constitutes a legislative rule because it effectively amends the FCC’s previous legislative rule -- the *First Order*. See, e.g., *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993) (stating that a rule that “effectively amends a prior legislative rule” is “a legislative, not an interpretative rule”).¹¹ Our cases have formulated this “effective amendment” test in a number of ways. We have, for example, held that “new rules *that work substantive changes*,” *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (emphasis added), or “*major substantive legal addition[s]*,” *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (emphasis added), to prior regulations are subject to the APA’s procedures.¹² Enunciating a similar test, the Supreme

regards the *Intermodal Order* as a rule rather than an adjudication. See FCC Br. at 18; Oral Arg. Tape at 30:02-30:35.

¹⁰See, e.g., *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020 & n.11 (D.C. Cir. 2000); RICHARD J. PIERCE, JR., I ADMINISTRATIVE LAW TREATISE § 6.1, at 304 (2002); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 893 (2004).

¹¹See also *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (noting that “an amendment to a legislative rule must itself be legislative” (quotation marks omitted)); *National Family Planning & Reprod. Health Ass’n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992) (same).

¹²See also *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“[W]hen an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it

Court has said that if an agency adopts “a new position *inconsistent with*” an existing regulation, or effects “a *substantive change in* the regulation,” notice and comment are required. *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995) (emphases added) (quotation marks omitted); *see id.* at 101. Although these verbal formulations vary somewhat, their underlying principle is the same: fidelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid those requirements by calling a substantive regulatory change an interpretative rule. *See Appalachian Power Co.*, 208 F.3d at 1024 (“An agency may not escape . . . notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.”); *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (holding that the FCC “may not bypass [the APA’s notice-and-comment] procedure by rewriting its rules under the rubric of ‘interpretation’”).

We agree with the petitioners that the *Intermodal Order* effects a substantive change in the *First Order*. The *First Order* required carriers to ensure “the ability of users of telecommunications services to retain, *at the same location*, existing telecommunications numbers . . . when switching from one telecommunications carrier to another.” *First Order* ¶ 27, 11 F.C.C.R. at 8366-67 (emphasis added); 47 C.F.R. § 52.21(q) (emphasis added). Although the *First Order* did not expressly define “same location,” the FCC did declare that it would not require “location portability,” which it defined as “the ability of users of telecommunications services to retain existing

may not accomplish without notice and comment.”); *American Mining Cong.*, 995 F.2d at 1109 (“[I]f a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first” (quotation mark omitted) (second alteration in original)).

telecommunication numbers . . . when moving from one *physical* location to another.” *First Order* ¶ 174, 11 F.C.C.R. at 8443 (emphasis added); *see id.* ¶ 6, at 8356; 47 C.F.R. § 52.21(j).

The *Intermodal Order*, by contrast, requires carriers to provide users with the ability to retain their existing numbers *regardless of* physical location. Under that order, a wireline carrier must port whenever “the requesting wireless carrier’s ‘coverage area’ overlaps the geographic location of the rate center in which the customer’s wireline number is provisioned,” provided that the porting-in carrier maintains the number’s original rate center designation. *Intermodal Order* ¶ 22, 18 F.C.C.R. at 23,706. Because wireless carriers’ coverage (service) areas are often quite expansive -- in some cases encompassing much of the United States -- the *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 Order*’s declaration that such location portability would not be mandated.

Nor can the *Intermodal Order* derive support from the *Second Order* -- another prior legislative rule, also issued pursuant to notice and comment. In the *Second Order*, which established the requirements for number portability in the wireline-to-wireline context, the FCC provided that such portability was “limited to carriers with facilities or numbering resources in the same rate center” *Intermodal Order* ¶ 7, 18 F.C.C.R. at 23,700. But the *Intermodal Order* rejects a similar limitation for wireline-to-wireless portability, and instead requires wireline carriers to port numbers to wireless carriers that do “not have a point of interconnection or numbering resources in the same rate center as the ported number” *Id.* ¶ 26, at 23,708; *see id.* ¶ 1, at 23,698

(describing a “point of interconnection” as something “physical”); *In re Starnet, Inc.*, 355 F.3d 634, 638 (7th Cir. 2004) (noting that “[u]sually a rate center corresponds to the group of customers (a subset of an area code) served by a given complement of telephone switching equipment”).

In short, the *Intermodal Order* requires wireline carriers to port telephone numbers without regard to the physical location of the subscriber, the equipment, or the carrier, and thus effectively requires location portability -- a requirement that the *First Order* had foresworn. Under the *Intermodal Order*, a wireline subscriber can move from New York to California -- 3000 miles from his original residence, from the wire attached to his original wireline telephone, from the geographic boundaries of the original rate center, and from the original wireline company’s point of interconnection -- and yet keep his telephone number provided that he switches to a wireless company with service overlapping the original rate center. Everything physical -- the person, the residence, the telephone, the point of interconnection -- is at a new location, yet porting is nonetheless required. Hence, by adopting the *Intermodal Order*, the FCC removed its prior “physical location” limitation on the duty to port.

The FCC makes three arguments in support of the contrary contention. First, it points to a single sentence in the *First Order* that, it maintains, provided notice of the interpretation later adopted in the *Intermodal Order*. That sentence, which comes directly after one that defines “location portability,” reads as follows: “Today, telephone subscribers must change their telephone numbers when they move outside the area served by their current central office.” *First Order* ¶ 174, 11 F.C.C.R. at 8443.

We do not see how this sentence provides support for the rule announced in the *Intermodal Order*. As the FCC concedes, the sentence described the FCC's then-current rules -- which did not require location portability. FCC Br. at 25. The sentence thus made clear that *unless* the Commission were to impose location portability -- which it declined to do and insists it still has not done¹³ -- subscribers would have to change their numbers if they moved outside the area served by their current carrier's central office. Yet as we have discussed, under the *Intermodal Order* subscribers need *not* change their telephone numbers when they move outside the area served by their central office: instead, they can switch to a cell phone and retain the same number as long as they move anywhere in the wireless company's overlapping service area -- even across the country. Hence, the *Intermodal Order* permits the very outcome that the Commission associated with *location* portability. Moreover, because the ported number includes the subscriber's original area code, this kind of portability exhibits a principal problem that the *First Order* associated with location portability: the "loss of geographic identity of one's telephone number." *First Order* ¶ 176, 11 F.C.C.R. at 8444.

This point is further driven home by examining the notice of proposed rulemaking that preceded the *First Order*. That notice contained the same sentence that would later appear in the *First Order*. But it also contained a succeeding sentence that made the Commission's meaning unmistakable by explaining what location portability would enable subscribers to do:

Today, telephone subscribers must change their telephone numbers when they move outside the area served by their current central office. *Location*

¹³See *Intermodal Order* ¶ 28, 11 F.C.C.R. at 23,708-09; FCC Br. at 5.

portability would enable subscribers to keep their telephone numbers when they move to a new neighborhood, a nearby community, across the state, or even, potentially, across the country.

Notice of Proposed Rulemaking, *Telephone Number Portability* ¶ 26, 10 F.C.C.R. 12,350, 12,360 (1995) (emphasis added). And that is precisely what the *Intermodal Order* now enables subscribers to do.

Second, the FCC argues that “porting from a wireline to a wireless carrier that does not have a point of interconnection or numbering resources in the same rate center as the ported number does not, in and of itself, constitute location portability, *because the rating of calls to the ported number stays the same.*” *Intermodal Order* ¶ 28, 18 F.C.C.R. at 23,708 (emphasis added). The rating remains the same because the FCC added that requirement as a proviso: a wireline carrier must port to a wireless carrier if the latter’s service area overlaps the rate center associated with the subscriber’s number, “provided that the porting-in carrier maintains the number’s original rate center designation following the port.” *Id.* ¶ 22, at 23,706. The FCC insists that under this proviso, “the *number* does not leave the rate center,” and hence “it has not been subject to location porting.” FCC Br. at 25-26 (emphasis in original) (citing *Intermodal Order* ¶ 28).

But this focus on the “location” of the telephone number, based solely on its rating, is at best *metaphysical*. It surely is not the physical location discussed in the *First Order*.¹⁴ Moreover,

¹⁴Indeed, at oral argument in the companion case, which concerned the FCC’s order on wireless-to-wireless porting, *see supra* note 8, FCC counsel conceded that to say a number is “located” within its rate center is “almost a bit of fiction; there really is no physical

the *First Order* emphasized the *user's* location, not the *number's*. See *First Order* ¶ 172, 11 F.C.C.R. at 8443 (defining location portability as “the ability of *users* . . . to retain existing telecommunications numbers . . . when moving from one physical location to another” (emphasis added)); *id.* ¶ 181, at 8447 (declaring that the “1996 Act’s requirement to provide number portability is limited to situations when *users* remain ‘at the same location’” (emphasis added)). Indeed, in the sentence highlighted by the FCC and discussed above, the *First Order* explained that in the absence of location portability, “*subscribers* must change their telephone numbers when *they* move outside the area served by their current central office.” *Id.* ¶ 174, at 8443 (emphases added).

Third, the FCC argues that the *Intermodal Order* did not substantively change the *First Order*, but instead merely curtailed the unlimited portability requirement imposed in the *First Order*. The *First Order*, the FCC contends, “imposed no limitations on the LECs’ duty of wireline-to-wireless porting.” FCC Br. at 20. And in the Commission’s view, the petitioners have no reason to complain about a rule that merely reduced their preexisting obligations.

But it is simply wrong to say that the *First Order* “imposed no limitations” on a wireline carrier’s duty to port numbers to a wireless carrier. To the contrary, the order expressly limited that obligation by declaring that wireline carriers were not obligated to provide location portability. *First Order* ¶ 6, 11 F.C.C.R. at 8356. Accordingly, the petitioners have every reason to complain about a rule (if promulgated without notice and comment) that jettisoned the *First Order's* promise regarding location portability.

location” *Central Tex. Tel. Coop., Inc. v. FCC*, No. 03-1405, Oral Arg. Tape at 32:05-32:28.

Indeed, the FCC does not truly contend that the *Intermodal Order* would have been valid had it contained *no* limitation on the “unlimited” requirement of the *First Order*. Rather, as noted above, the FCC’s claim that the *Intermodal Order* does not impose location portability depends upon the order’s proviso that the porting-in carrier must maintain the number’s original rate center designation. Nor is that the only necessary limitation in the FCC’s view. The principal limit on portability announced by the *Intermodal Order* is that the wireless carrier’s coverage area must overlap the geographic rate center in which the customer’s wireline number is provisioned. And at oral argument, the FCC conceded that, had the *Intermodal Order* not included such a limit on the porting obligation, it “would have begun to be inconsistent with location portability.” Oral Arg. Tape at 38:51-39:28. It is thus clear that the *Intermodal Order* cannot be defended as an interpretation that merely cuts back on an ostensibly unlimited portability obligation imposed by the *First Order*.

In short, this is not a case in which an interpretative rule merely “supplies crisper and more detailed lines than the authority being interpreted,” *American Mining Cong.*, 995 F.2d at 1112, or simply provides “a clarification of an existing rule,” *Sprint Corp.*, 315 F.3d at 374. Rather, it is one in which the rule at issue substantively changes a preexisting legislative rule. Such a rule is a legislative rule, and it can be valid only if it satisfies the notice-and-comment requirements of the APA.

There is another reason, specific to the 1996 Telecommunications Act, to regard the rule at issue here as legislative. The 1996 Act mandates number porting “in accordance with requirements prescribed by the Commission,” 47 U.S.C. § 251(b)(2), requirements that are to be “implement[ed]” in “regulations.” *Id.* § 251(d). As we explained in *American Mining Congress*, when a statute defines

a duty in terms of agency regulations, those regulations are considered legislative rules. 995 F.2d at 1109.

Of course, even when a statute requires an agency to proceed by implementing regulations, it need not develop legislative rules to “address every conceivable question.” *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 96 (1995). But the question of what Congress meant by “at the same location” in its definition of number portability is not just any “conceivable question.” Rather, it is a crucial statutory element of the portability requirement itself, at least as far as wireline-to-wireless porting is concerned. Accordingly, the *First Order* did not satisfy the FCC’s statutory obligation to “establish regulations” to implement number portability when it merely required “service provider portability,” and then defined that phrase by parroting the definition of number portability already contained in the statute. *See supra* Part I; *cf. Pearson v. Shalala*, 164 F.3d 650, 660 (D.C. Cir. 1999) (“[W]e are quite unimpressed with the government’s argument that the agency is justified in employing this standard without definition because Congress used the same standard . . .”). Something more was necessary,¹⁵ and that something was provided by the specifics of the wireline-to-wireless regulations contained in the *Intermodal Order*.

Finally, the FCC complains that technological disparities require a different interpretation of the statutory term “location” in the intermodal context than in the wireline-to-wireline context, and that the Commission’s regulations should reflect that difference. The Commission may well be correct. We are

¹⁵As discussed above, to the extent that the *First Order* did do something more than parrot the statutory definition (e.g., by inserting the reference to “physical” location), it did so in language that is inconsistent with the *Intermodal Order*.

not suggesting that the *Intermodal Order* is unreasonable; indeed, the petitioners do not challenge the substantive reasonableness of the rule. See Oral Arg. Tape at 1:02:06-1:02:13.¹⁶ It may be that, as a matter of telecommunications policy, “location” should have reduced significance in the wireline-to-wireless context, and that the FCC would be justified in defining the word without reference to anything “physical.”

But in declaring that it was not requiring location portability, and in using the adjective “physical” in the definition of that term, the *First Order* made clear that it *did* regard location as a physical concept. Moreover, at least in the intermodal context, where one side of the porting transaction involves a wireline telephone, physical location is a quite meaningful concept.¹⁷ Accordingly, however physical location is measured -- whether by the residence or geographic rate center of the wireline user, the coordinates of the landline

¹⁶The petitioners do contend that the *Intermodal Order* represents a significant departure from the *First Order*'s promise that the FCC would maintain competitive neutrality between wireline and wireless carriers. The petitioners do not, however, contend that this asserted departure renders the *Intermodal Order* substantively invalid, but only argue that it supports the proposition that the *Intermodal Order* is so different from the *First Order* that it cannot be an interpretative rule. Pet'rs Br. at 24; Oral Arg. Tape at 1:01:45-1:02:07. Because we conclude that the *Intermodal Order* is not an interpretative rule for other reasons, we do not consider this argument. For the same reason, we do not consider the intervenors' argument that the *Intermodal Order* is a legislative rule because it assertedly changes interconnection obligations.

¹⁷This point distinguishes our analysis of the FCC's *Intermodal Order* from our analysis of the Commission's wireless-to-wireless order, as set forth in *Central Tex. Tel. Coop., Inc. v. FCC*, No. 03-1405 (D.C. Cir. Mar. 11, 2005).

attached to the user's telephone, or the point of interconnection of the user's wireline carrier -- a rule that requires the carrier to port the number to a wireless telephone that may be thousands of miles from any of those places represents a substantive change from the rule announced in the *First Order*.¹⁸ Such a change may be permissible, but to accomplish it the FCC must comply with the procedural requirements of the APA.¹⁹

For the foregoing reasons, we conclude that the *Intermodal Order* was a legislative rule, and that the FCC therefore had to issue it pursuant to the notice-and-comment requirements of APA § 553. As the next Part explains, however, that is not the end of the story.

III

The Administrative Procedure Act requires that “[g]eneral notice of proposed rule making shall be published in the Federal Register,” 5 U.S.C. § 553(b); that “[a]fter notice required by this

¹⁸*Cf. In re Starnet, Inc.*, 355 F.3d at 638 (noting that “[l]anguage in the regulations links ‘location portability’ to movement ‘from one physical location to another,’ but does not distinguish among the customer’s physical location, the end of the wire’s physical location, or the rate center’s physical location” (internal citation omitted)).

¹⁹*Cf. C.F. Communications Corp.*, 128 F.3d at 739 (holding that, although the Commission may be able to “amend its rules to render ‘premises’ a term of art encompassing telephone equipment or land . . . on which telephone equipment is located[,] . . . to do so, it must use the notice and comment procedure of the Administrative Procedure Act”); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) (“Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.”).

section, the agency shall give interested persons an opportunity to participate in the rule making through submission[s],” *id.* § 553(c); that “[a]fter consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose,” *id.*; and that a “substantive rule” shall be published “not less than 30 days before its effective date,” *id.* § 553(d). For the kind of informal rulemaking at issue here, no other procedures are required to satisfy the APA. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978).

Although the FCC does not raise the point, it appears that the Commission satisfied each of these requirements when it issued the *Intermodal Order*.²⁰ The FCC published notice in the Federal Register. *See* 68 Fed. Reg. 7323.²¹ The notice sought comments on CTIA’s proposal “that wireline carriers are obligated to provide portability of their customers’ telephone numbers to [wireless] providers whose service area overlaps the wireline carriers’ rate centers.” *Id.* The Commission received and considered comments on that proposal from, among others, the petitioners in this case. *See supra* note 2. It then adopted essentially the same rule proposed in the notice, in an order that explained the rule’s basis and purpose, and published that order. *See* 18 F.C.C.R. 23,697; *see generally supra* Part I.

²⁰At oral argument, the FCC explained that it did not press this point because APA compliance would not resolve the RFA issue. *See* Oral Arg. Tape at 26:30-26:40; *see also infra* Part IV.

²¹The APA requires that the notice include: “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b). The FCC’s notice contained each of these elements.

The only deficiency in these procedures identified by the petitioners is that the FCC labeled its published notice as a request for comment on CTIA's "Petition for Declaratory Ruling," rather than as a "Notice of Proposed Rulemaking."²² The label, however, is not fatal. As we held in *New York State Commission on Cable Television v. FCC*, "to remand solely because the Commission labeled the action a declaratory ruling would be to engage in an empty formality." 749 F.2d 804, 815 (D.C. Cir. 1984).

Nonetheless, because the FCC does not press it, we do not reach a final decision as to whether the procedures attending issuance of the *Intermodal Order* fully conformed to the APA. But we do address the question -- raised in the petitioners' own brief -- of whether any procedural error that might have occurred was harmless. Pet'rs Br. at 17, 27-30; see 5 U.S.C. § 706 (requiring courts to take "due account" of "the rule of prejudicial error"). In making that assessment, the petitioners urge us to heed our admonition in *Sprint Corp. v. FCC*, that "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." 315 F.3d 369, 376 (D.C. Cir. 2003) (quoting *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002)). As we have just noted, however, there was no "utter failure" in this case; indeed, we are hard pressed to discern any failure at all.

In any event, we have no uncertainty that if there was a procedural failure, it was harmless. The petitioners contend that by "proceeding without issuing a notice, the FCC constrained the industry's ability to propose solutions to technical and

²²As mentioned *supra* note 9, despite the label the FCC does not defend the *Intermodal Order* on the ground that it was a "declaratory ruling" that constituted an adjudication under 5 U.S.C. § 554(e).

regulatory barriers to intermodal portability that would have enabled the FCC to proceed in a balanced, nondiscriminatory fashion.” Pet’rs Br. at 17. But unlike the situation in *Sprint Corp.*, the FCC did not proceed without notice. To the contrary, the proposal published in the Federal Register made the issue under consideration crystal clear.²³ And as we have said, the proposal was virtually identical to the order ultimately adopted by the Commission.

Nor did the FCC “constrain[] the industry’s ability to propose solutions.” *Id.* Again to the contrary, the Commission invited and received comment from the industry on intermodal portability. Nor was the industry misled by the fact that the notice was labeled a request for comment on CTIA’s petition for a declaratory ruling, rather than as a notice of proposed rulemaking. Indeed, as the petitioners conceded at oral argument, every challenge to the *Intermodal Order* that they have raised in their appellate briefs was also made during the comment period. Oral Arg. Tape at 19:33-19:42.²⁴ And they cannot identify a single additional comment that they would have made but for the labeling of the notice, nor any other deficiency in the rulemaking process. *Id.*; see *New York State Comm’n*, 749 F.2d at 815 (declining to remand an FCC order,

²³Indeed, the title alone encapsulated the proposal under consideration: *Petition for Declaratory Ruling That Wireline Carriers Must Provide Portability to Wireless Carriers Operating Within Their Service Areas*, 18 F.C.C.R. 832 (2003).

²⁴See, e.g., *Intermodal Order* ¶ 16, 18 F.C.C.R. at 23,703-04 (noting comments that the CTIA proposal could not be promulgated without notice-and-comment rulemaking, that it would give wireless carriers an unfair competitive advantage over wireline carriers, that it would amount to a system of location portability, and that it would cause particular difficulties for rural LECs); *supra* Part I and notes 2-6.

despite a claim that the notice was mislabeled, where the “arguments raised in” the comments were “identical to the issues on appeal”).²⁵

Under these circumstances, any error -- if error there was -- was plainly harmless. Accordingly, although we conclude that the *Intermodal Order* was a legislative rule requiring adherence to the procedures specified in APA § 553, we find no deficiency in the procedures actually followed that would warrant vacating or remanding the order.²⁶

IV

The Regulatory Flexibility Act also imposes procedural requirements on agency rulemaking, in particular the preparation of a “final regulatory flexibility analysis” regarding the effect of

²⁵The *Intermodal Order* differed in each respect noted in the preceding two paragraphs from the payphone provider rule at issue in *Sprint Corp.*, 315 F.3d 369. In *Sprint Corp.*, the notice that preceded issuance of the payphone rule was not published in the Federal Register and described a proposal completely different from that which the FCC ultimately adopted. *Id.* at 374, 376. Moreover, “the comments submitted in response to the . . . Notice demonstrate[d] that the parties did not appreciate that the Commission was contemplating” the rule it finally issued. *Id.* at 376.

²⁶The petitioners also contend that the *First Order* and *Second Order* established a procedure for resolving number portability issues that required reference to the NANC. As a consequence, the petitioners maintain that until the NANC submits a proposal, the FCC may not impose a porting obligation without first engaging in APA rulemaking. Although we do not read the first two orders as establishing any such mandatory procedure, the contention is mooted by our conclusion that issuance of the *Intermodal Order* satisfied the APA.

the rule on small businesses. *See* 5 U.S.C. § 604.²⁷ That requirement applies “[w]hen an agency promulgates a final rule under section 553 of this title, after being required by that section or any other law to publish a general notice of proposed rulemaking.” *Id.* Because we have concluded that the FCC was required by section 553 to publish such a notice, the RFA’s requirements are applicable to the *Intermodal Order*.

By contrast to the notice-and-comment requirements, there is no dispute that the FCC utterly failed to follow the RFA when it issued the *Intermodal Order*. Nor is there an argument that the Commission’s failure was harmless, as it is impossible to determine whether a final regulatory flexibility analysis -- which must include an explanation for the rejection of alternatives designed to minimize significant economic impact on small entities, *see id.* § 604(a)(3) -- would have affected the final order when it was never prepared in the first place. *See Sprint Corp.*, 315 F.3d at 377 (holding that the wholesale failure to afford proper notice and comment was not harmless because “the effect of the Commission’s procedural errors is uncertain”).

The RFA outlines the remedies available for its violation as follows:

In granting any relief in an action under this section, the court shall order the agency to take corrective action . . . including, but not limited to--

(A) remanding the rule to the agency, and

²⁷Although the RFA grants courts jurisdiction to review claims of noncompliance with the provision of the Act that requires preparation of a final regulatory flexibility analysis, 5 U.S.C. § 604, judicial review under other provisions of the RFA is limited, *see* 5 U.S.C. § 611(a).

(B) deferring the enforcement of the rule against small entities unless the court finds that continued enforcement of the rule is in the public interest.

Id. § 611(a)(4). A combination of the two specified remedies -- remand coupled with a stay of enforcement against small entities -- is appropriate here.

The petitioners contend that the order will have a serious impact on small rural carriers, which will have to impose the initial cost of implementation and the continuing cost of transporting calls to ported numbers on a narrow base of rural subscribers. Those costs, the petitioners argue, “bring[] no benefit to the vast majority of rural subscribers that are unwilling to give up their wireline service, yet must bear the cost burden nonetheless.” Pet’rs Br. at 18. The petitioners do not seek to undo any porting of numbers that has already occurred; they ask only to stay the mandatory obligation to accede to new porting requests. Oral Arg. Tape at 57:15-57:55.

The FCC does not contest the petitioners’ argument, and it gives no reasons why continued enforcement of the order with respect to small entities pending a final regulatory flexibility analysis would be in the public interest.²⁸ Rather, it stands on its contention that no regulatory flexibility analysis was required at all. *See* FCC Br. at 30. Under these circumstances, we have no basis for finding that continued enforcement against statutorily defined small entities during the remand would be in the public interest.

²⁸The FCC *does* allege that the public interest weighs against vacating the *entire* rule (as to entities of every size), and that such a remedy would be overbroad given the injury claimed to rural carriers. FCC Br. at 36.

Accordingly, we remand the *Intermodal Order* to the FCC for the Commission to prepare the required final regulatory flexibility analysis. We stay future enforcement of the *Intermodal Order* only as applied to carriers that qualify as small entities under the RFA. The stay will remain in effect until the FCC completes its final regulatory flexibility analysis and publishes it in accordance with 5 U.S.C. § 604(b). Of course, nothing in this disposition prevents small carriers from voluntarily adhering to the *Intermodal Order*'s number portability requirements during that period.

V

For the foregoing reasons, we deny the petitions with respect to the APA claim, and grant the petitions with respect to the RFA claim. We remand the *Intermodal Order* to the FCC for the purpose of preparing a final regulatory flexibility analysis, and we stay future enforcement of the order against carriers that are “small entities” under the RFA until the FCC prepares and publishes that analysis.

So ordered.

Attachment 3
STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

REYNOLDS TELEPHONE COMPANY)
)
)
 Petition For Suspension Or Modification of) Docket No. 04-0206
 Section 251(b)(2) requirements of the Federal)
 Telecommunications Act pursuant to Section)
 251(f)(2) of said Act; for entry of Interim)
 Order; and for other necessary relief.)

AFFIDAVIT IN SUPPORT OF PETITION TO RE-OPEN DOCKET

Grace Ochsner, being duly sworn, states and deposes as follows:

1. I am the General Manager of Reynolds Telephone Company ("Reynolds") and I am making this affidavit in support of Reynolds' Petition to Re-Open this Docket and obtain an additional year of suspension. Since the Commission entered its suspension in this docket, Reynolds has monitored developments in wireline-to-wireless local number portability ("LNP") both directly and through its consultants and attorneys.
2. As a result of those efforts, I am aware that no action has yet occurred on various efforts to obtain more certainty about the ability of small companies, like ours obtaining cost recovery for the non-recurring and recurring costs of provisioning wireline-to-wireless LNP.
3. Also as a result of those efforts, I have become aware of a survey conducted by the National Telecommunications Cooperative Association ("NTCA") showing the demand (or lack of demand) for wireline-to-wireless LNP in the exchanges of NTCA members where it is available. I have attached a report on the results of NTCA's survey as Schedule 1 to this Affidavit.

4. Within Reynolds' own exchanges, I am aware of no requests by any customer to port a telephone number to a wireless carrier. Moreover, I am aware of no requests by any wireless carriers to have numbers ported from our switch.

5. When this docket was originally before the Commission, Reynolds put into evidence information about our company, its exchanges and the non-recurring and recurring costs of provisioning and providing wireline-to-wireless LNP. To the best of my knowledge, there has been no material change in any of that information or in any of those costs.

6. I believe an additional suspension of Reynolds' wireline-to-wireless LNP obligations would be consistent with the public interest, convenience and necessary for the same reasons that the suspension granted in the Commission's August 25, 2004 Order was found to be consistent with the public interest, convenience and necessity.

7. If this Commission does not extend the suspension in this Docket, Reynolds will need to file a new suspension petition in order to avoid the significant adverse economic impact on all customers of Reynolds due to the level of increased rates or surcharges necessary to recover both the non-recurring and recurring costs associated with the provision of wireline-to-wireless LNP. Because of the 180 day timeline for a Commission decision on a new suspension petition in connection with the necessary lead time and significant cash expenditure to establish wireline-to-wireless LNP if the Commission were to decline additional suspensions, Reynolds may have to

file its new suspension case by early April, 2005 in the absence of an earlier Commission action on this Petition.

Further Affiant sayeth not.

Grace Ochsner
Grace Ochsner, Manager

Subscribed and Sworn to before me
this 21 day of March, 2005.

Cynthia Ann Flack
Notary Public

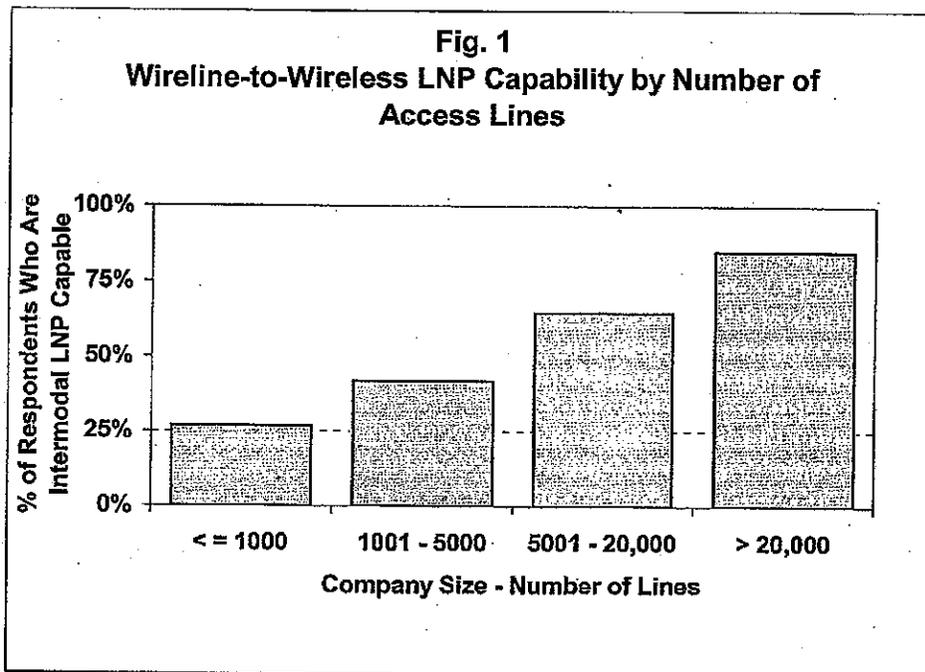


Schedule 1

NTCA 2005 Wireline-to-Wireless Local Number Portability Survey

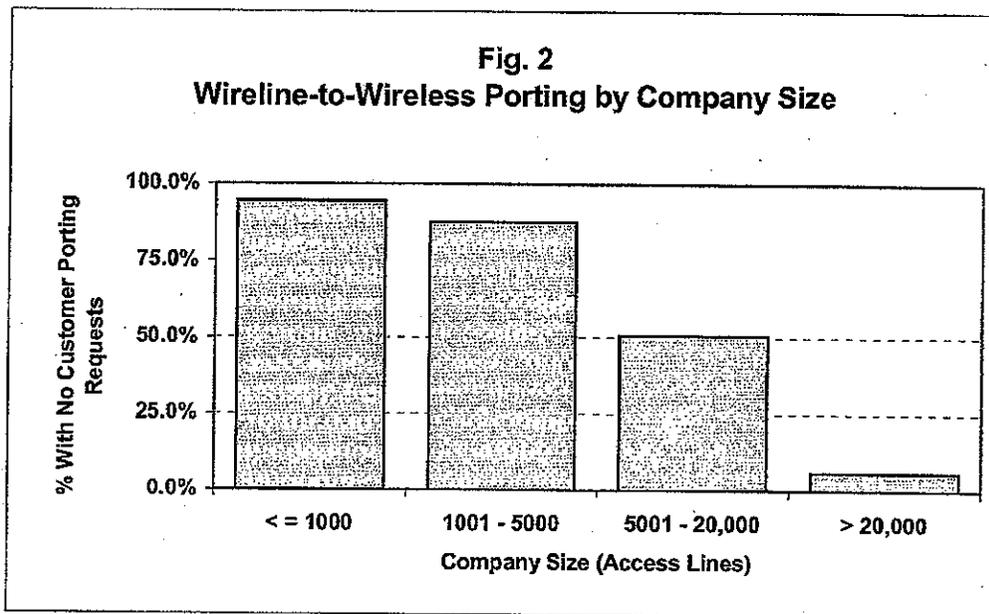
Wireline-to-wireless porting is an ongoing challenge for many NTCA member companies. In order to better understand the extent of these challenges and the steps member companies have taken toward providing wireline-to-wireless porting, NTCA surveyed its membership in January 2005.

More than 350 member companies responded to the survey, corresponding to a 63% response rate. The average respondent serves approximately 6,800 access lines. Just under half—49%—of respondents are currently capable of providing wireline-to-wireless local number portability (LNP). Seventy-one percent of those who are LNP capable have been so since July 2004 or earlier; the remaining 29% have become LNP capable in the six months prior to the survey. Larger companies are more likely to be wireline-to-wireless LNP capable than smaller companies—see Figure 1.



Yet despite having undertaken the expense and difficulty in developing the ability to port wireline numbers to wireless phones, survey respondents report that customer demand has not yet materialized. Nearly two-thirds (64%) of those respondents with intermodal LNP capability indicated that they have not yet performed a single wireline-to-wireless port. An additional 10% have only ported one such number. As Figure 2 shows, it is the smaller companies—those for whom the expense of providing wireline-to-wireless porting is proportionately the greatest—that are more likely to not receive any porting requests.

Fig. 2
Wireline-to-Wireless Porting by Company Size



Intermodal LNP take rates—calculated as the total number of intermodal ports divided by the total number of access lines served by wireline-to-wireless LNP capable carriers—are extremely low for each company size stratum. For responding companies serving 1,000 access lines or fewer, the overall take rate was 0.01%; for those serving between 1,000 and 5,000 lines, 0.03%; for those serving between 5,000 and 20,000 lines, 0.02%; and for those serving more than 20,000 lines, 0.04%.

Sixty-eight percent of those companies who are not wireline-to-wireless porting capable have obtained a waiver, suspension, modification or exemption from their state or the FCC, and 22% reported that no wireless company has yet requested wireline-to-wireless LNP capability from them. The remainder has only recently received a request and is currently in the process of developing intermodal porting capability. Sixty-three percent of those not currently providing wireline-to-wireless LNP indicated that they have a specific target date by which they expect to become LNP capable (typically within the next six to eighteen months); 37% stated that they currently have no plans for developing wireline-to-wireless porting capability.