

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

In the Matter of)	
)	
Telephone Number Portability)	
)	CC Dkt. No. 95-116
CTIA Petitions for Declaratory Ruling on)	
Wireline-Wireless Porting Issues)	

**COMMENTS OF THE
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION,
ON THE INITIAL REGULATORY FLEXIBILITY ANALYSIS**

The Office of Advocacy of the U. S. Small Business Administration (“Advocacy”) submits these Comments to the Federal Communications Commission (“FCC” or “Commission”) regarding the *Public Notice* in the above-captioned proceeding.¹ The Commission is seeking comment on an initial regulatory flexibility analysis (“IRFA”) addressing an FCC order which required small rural telecommunications carriers to provide wireline-to-wireless (also called intermodal) telephone number portability.² The Commission issued the IRFA in response to a court order which held that the FCC had not complied with the Regulatory Flexibility Act (“RFA”) and directed the agency to conduct the analysis.³

Under the RFA, the FCC must both analyze the economic impacts on small entities and consider significant alternatives to minimize the impact. Advocacy is concerned that the IRFA does not provide sufficient analysis of either to satisfy the requirements of the RFA and recommends that the FCC issue a supplemental IRFA with a more thorough analysis of the

¹ *In the Matter of Telephone Number Portability, Public Notice*, CC Dkt. No. 95-116, FCC 05-87 (rel. April 22, 2005).

² *In the Matter of Telephone Number Portability, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 95-116, FCC 03-284 (rel. Nov. 10, 2003) (“*Intermodal Order*”).

³ *U.S. Telecom Ass’n v. FCC*, 400 F.3d 29 (D.C. Cir. 2005).

impacts and significant alternatives. If the Commission declines to conduct a supplemental IRFA, the FCC should give careful consideration to economic impacts and significant alternatives presented by small entities in the final regulatory flexibility analysis (“FRFA”). To assist the FCC in its analysis, Advocacy has solicited input from small entities, reviewed their recommendations, and prepared these comments reviewing the impacts and available alternatives.

1. Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (“SBA”), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Section 612 of the RFA requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.⁴

Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁵ To this end, the RFA requires agencies to analyze the economic impact of draft regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency’s goal while minimizing the burden on small entities.⁶

On August 13, 2002, President George W. Bush signed Executive Order 13272 requiring federal agencies to implement policies protecting small entities when writing new rules and

⁴ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

⁵ Pub. L. 96-354, FINDINGS AND PURPOSES, SEC. 2 (a)(4)-(5), 126 CONG. REC. S299 (1980).

⁶ See generally, Office of Advocacy, U.S. Small Business Administration, *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act* (2003), available at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

regulations.⁷ This Executive Order highlights the President's goal of giving "small business owners a voice in the complex and confusing federal regulatory process"⁸ by directing agencies to work closely with the Office of Advocacy and consider properly the impact of their regulations on small entities. Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁹

2. The FCC's IRFA Does Not Consider Adequately the Impacts on Small Businesses

Advocacy has reviewed the FCC's IRFA in the *Public Notice* and is concerned that the Commission's analysis is not sufficient to meet the requirements of the RFA. In the *Public Notice*, the FCC recognizes that intermodal number portability would have the following impacts: (1) by making porting more widely available, the requirement may increase the number of ports, which may necessitate additional personnel, updated porting procedures, or upgraded software; (2) porting beyond a carrier's boundaries may cause small rural carriers to incur transport costs when delivering calls to ported numbers served by distant switches, and (3) porting to wireless carriers may give them an economic advantage over small wireline carriers.¹⁰

However, the Commission does not provide any estimates on the costs associated with handling additional ports, such as price of automation, personnel training, and software upgrades. The annual costs for porting beyond carrier boundaries were not discussed, such as the transport

⁷ Exec. Order. No. 13272 at § 1, 67 Fed. Reg. 53,461 (2002).

⁸ White House Home Page, *President Bush's Small Business Agenda*, (announced March 19, 2002) (last viewed February 2, 2004) <<http://www.whitehouse.gov/infocus/smallbusiness/regulatory.html>>.

⁹ *Id.* at § 3(c).

¹⁰ *Public Notice*, para. 10-11.

fees and other carriage costs. Furthermore, there is no discussion of projected recordkeeping or other compliance requirements that intermodal number portability would impose on small businesses, or the professional skills necessary to comply with the requirement.

This information is available to the Commission and should have been considered in the IRFA. Small rural carriers provided this information to the FCC in earlier comments so the agency has access to this information.¹¹ The small rural carriers have filed petitions with state utility commissions to suspend or modify number portability requirements. These petitions provide an excellent resource for the FCC to gather information on the impact on small businesses.

For example, the Consolidated Telephone Company, a small carrier with 5,995 access lines, estimated that as a result of the intermodal number portability requirement, it will have to charge an additional \$2.50 per subscriber per month and an additional transport cost of \$7.50 per subscriber per month. This company estimates the monthly cost of intermodal number portability to be \$6,300 and the non-recurring costs to be \$327,000.¹² Another group of small rural carriers members provided estimates that the cost of hardware upgrades is a minimum of \$10,000, but may exceed \$100,000. The costs of the additional software needed to provide number portability is approximately \$5,000; recurring costs for service order administrator services and number portability query services on a recurring basis is between \$600 and \$1,500 per month, and the cost of transport of telephone calls range between \$0.89 and \$8.94 per month

¹¹ Reply Comments of the Office of Advocacy, U.S. Small Business Administration, to the *Further notice of Proposed Rulemaking* in CC Dkt. No. 95-116 (Feb. 4, 2003) (Advocacy discussed many of the cost estimates from small rural telecommunications carriers. Many of the small rural carrier organizations filed separate comments addressing the regulatory impact upon them.).

¹² *In the Matter of* the Application of Consolidated Telephone Co., et al., Before the Nebraska Public Service Commission, Application No. C-3111, paras. 49, 56 (February 14, 2004).

per customer.¹³

Small businesses have been extensively involved in this particular rulemaking, providing the Commission with ample information of the economic impacts of its number portability rules. With so much data from small businesses readily available, we had hoped that FCC's IRFA would have provided a substantive analysis of the impacts, including the estimated financial costs of intermodal number portability and an estimate of the professional skills and time necessary to comply with the rule.

3. The FCC's IRFA Did Not Adequately Consider Significant Alternatives that Would Minimize the Impact on Small Businesses

Upon reviewing the *Public Notice*, Advocacy believes that the IRFA does not adequately satisfy the RFA requirements that the Commission consider alternatives to minimize significant economic impact on small entities.¹⁴ The IRFA discusses three alternatives: (1) limiting intermodal porting to instances where there is a physical point of interconnection, (2) a delay in the implementation date, and (3) petitions for relief from the state utility commissions. For the reasons addressed below, the IRFA's discussion does not reasonably consider one alternative, addresses an alternative that does not provide meaningful relief, and presents an alternative that shifts the burden to small businesses.

a. Requiring Physical Points of Interconnection

The IRFA states that the FCC considered limiting number portability to instances where there is a physical point of interconnection in the *Intermodal Order* but it had found that the cost did not justify denying wireline customers the benefits of porting.¹⁵ The FCC also states that the

¹³ *In Re Rural Iowa Independent Telephone Associations and Iowa Telephone Associations, Joint Petition for Suspension of Intermodal Numbering Portability Requirements for Iowa 2% Carriers*, Before the Iowa Utilities Board, SPU-04-3, at 5-6 (February 18, 2004).

¹⁴ 5 U.S.C. § 603(c).

¹⁵ *Public Notice* para. 13.

Intermodal Order concluded that “concerns [about the cost of the regulation] were outside the scope of the number portability rulemaking and noted that the rating and routing issues . . . were before the Commission in other proceedings.”¹⁶ For these two reasons, the FCC rejects further consideration of limiting to instances where there is a physical point of interconnection.

Advocacy is concerned that the Commission did not properly consider this alternative. The language in the IRFA repeats conclusions reached earlier by the FCC in the *Intermodal Order* and contains no evidence that the Commission considered the value of this alternative as part of a regulatory flexibility analysis; nor is it clear that the FCC is aware of the regulatory burdens it is placing upon small rural carriers. Advocacy believes that it is contradictory to the intent of the RFA for an agency to impose regulatory burdens in one rulemaking, but refuse to analyze the immediate economic impact by claiming that it is addressing them in another rulemaking that is still on-going and may not be resolved at any point in the near future. In other words, the RFA requires agencies to address the impact of a proposal at the time of promulgation – not at some undetermined date in the future.

b. Delaying the Implementation Date

The second alternative the FCC mentions is that it waived the requirement to port numbers until May 24, 2004 (a delay of approximately six months) for carriers outside of the top 100 metropolitan statistical areas.¹⁷ While a delay in an implementation date often assists small businesses, in this instance it is not a very effective remedy because the costs of intermodal porting are recurring and could actually increase with time. The small rural carriers are required to pay for the transport across third-party lines to forward calls to the new number. This

¹⁶ *Id.* (The IRFA refers to the *Intermodal Order* para 40, where the FCC claims that it cannot address the issue without prejudging its proceeding *In the Matter of Sprint Petition for Declaratory Ruling, Obligation of Incumbent LECs to Load Numbering Resources Lawfully Acquired and to Honor Routing and Rating Points Designated by Interconnecting Carriers, Sprint Petition for Declaratory Ruling*, CC Dkt. No. 01-92 (filed July 18, 2002).

¹⁷ *Id.* para. 14.

continues indefinitely, and as more customers port off a network, the costs mount. Additionally, the date of the waiver has already run and does nothing to minimize the impact on small businesses on a prospective basis.

c. Petitions for Relief with State Commissions

The final alternative that the FCC discusses is that small rural carriers can petition the state public utility commissions for relief from the FCC's number portability rules under Section 251(f)(2) of the Communications Act of 1934.¹⁸ The Commission pointed out that numerous small carriers have filed with state utility commissions and many of them have been granted temporary or permanent relief. Advocacy is concerned about using petitions for relief with either the state utility commissions or the FCC itself as a viable alternative to regulatory requirements, as petitions are expensive to prepare, require costly legal representation, and do not provide certain relief. Advocacy is concerned that by relying upon petitions the FCC is shifting the burden to minimize the economic impact from the agency to regulated small businesses.

4. The FCC Should Take Steps to Minimize the Impact on Small Businesses and Consider Alternatives

Through its outreach, Advocacy has identified three alternatives that the FCC could consider as part of its regulatory flexibility analysis. These alternatives are not intended to be an exhaustive list. The Commission should consider additional significant alternatives that are presented by small businesses in response to the *Public Notice*.

First, limiting number portability to instances where there is a point of physical interconnection is the primary alternative requested by small rural carriers, as it would eliminate transport costs, which may remove the majority of the recurring economic impact. If a wireless

¹⁸ *Id.* para. 15.

carrier wishes to port a number from a wireline carrier (and receive the economic benefits), it could bear the costs of establishing the point of interconnection instead of receiving an economic benefit while placing the costs on small businesses. Advocacy believes that the FCC could take a fresh look at requiring the physical point of interconnection as part of its RFA analysis and consider the impacts in this rulemaking.

A second alternative is to waive the enforcement of intermodal number portability until the Commission has issued a decision in the other rulemaking that addresses the rates and routing issue. As mentioned above, the FCC said that it wishes to consider the costs in that proceeding instead of in this one. If the FCC waives enforcement of the intermodal requirement until it addresses the compensation issue in the other rulemaking, the FCC would have the opportunity to consider the regulatory impacts on small businesses before it imposes the requirement upon them.

A third alternative is to exempt small rural wireline carriers from the intermodal portability requirement. Small rural carriers account for a small fraction of the overall lines in the nation. According to the petition requests filed by small carriers with the state commissions, they have received very few intermodal porting requests. If the Commission exempts these carriers from the intermodal requirements, very few customers would be affected, which could preserve the FCC's goal to maximize number portability while minimizing the impact on small businesses.

5. Conclusion

Advocacy urges the FCC to consider the regulatory impact on small rural carriers and recommends that the FCC issue a supplemental IRFA with a more thorough analysis of the impacts and significant alternatives. If the Commission declines to utilize a supplemental IRFA,

at a minimum the FCC should give careful consideration to economic impacts and significant alternatives presented by small entities in the FRFA. A supplemental IRFA is the preferred option because it provides far greater transparency at a stage in the rulemaking where RFA requirements can be addressed more fully.

The Office of Advocacy is available to assist the Commission in its outreach to small business or in its consideration of the impact on them. We urge the Commission to consult with us in either developing a supplemental IRFA or the FRFA for intermodal number portability. Advocacy has a unique statutory role to play in regard to the RFA, and we can assist the Commission in developing its regulatory flexibility analyses. Please contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov.

Respectfully submitted,

Thomas M. Sullivan
Chief Counsel for Advocacy

Eric E. Menge
Assistant Chief Counsel for Telecommunications

Office of Advocacy
U.S. Small Business Administration
409 3rd Street, S.W., Suite 7800
Washington, DC 20416

August 16, 2005

cc: Chairman Kevin J. Martin
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Dr. John D. Graham, Administrator, Office
of Information and Regulatory Affairs

Certificate of Service

I, Eric E. Menge, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this 16th day of August 2005, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

Eric E. Menge

Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204
Washington, DC 20554

Honorable John D. Graham
Administrator
Office of Information and Regulatory
Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503

Honorable Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115
Washington, DC 20554

Marlene Dortch
Secretary
Federal Communications Commission
445 12th St., S.W.
TW-B204
Washington, DC 20554

Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, DC 20554

Thomas Navin
Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th St., S.W.
Room 5-C450
Washington, DC 20554

Honorable Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-C302
Washington, DC 20554

Best Copy and Printing, Inc.
Portals II
445 12th St., S.W.
Room CY-B402
Washington, DC 20554