

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

In the Matter of)	
)	
Telephone Number Portability)	CC Docket No. 95-116
)	

**COMMENTS OF THE
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION,
ON THE SECOND FURTHER NOTICE OF PROPOSED RULEMAKING
AND 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 its *Second Further Notice of Proposed Rulemaking* (“Second FNPRM”)¹ in the above-captioned proceeding.

In the Initial Regulatory Flexibility Analysis (“IRFA”) accompanying the Second FNPRM, the FCC recognizes that reducing the porting interval may require system upgrades and impose new obligations and costs on carriers.² The FCC seeks comments on the impacts of the North American Numbering Council (“NANC”) recommendations on small and rural telephone companies, and on the need for exemptions or deferred implementation timeframes to reduce the impact on such small entities pursuant to the Regulatory Flexibility Act (“RFA”).³ Advocacy appreciates the specific identification by the FCC for less burdensome alternatives and recommends that the FCC either exempt these small entities or adopt a deferred timeframe to

¹ *In the Matter of* Telephone Number Portability, CC Dkt. No. 96-116, FCC 04-217, 69 Fed. Reg. 61334 (rel. Sept. 16, 2004) [hereinafter referred to as the “Second FNPRM”].

² *Id.* para. 32.

³ *Id.*, paras. 32-34.

accommodate the unique needs of small and rural telephone companies.

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 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 properly consider the impact of their regulations on small entities. In addition, Executive Order 13272 authorizes Advocacy to

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>.

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>>.

provide comment on draft rules to the agency that has proposed the rule, as well as to the Office of Information and Regulatory Affairs of the Office of Management and Budget.⁹ 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.¹⁰

2. The Reduced Intermodal Porting Interval Will Have a Significant Impact on Small Telephone Companies

In the IRFA accompanying the Second FNPRM, the FCC solicits comment on “whether the costs of a reduced intermodal porting interval outweigh the benefits of making it quicker for customers to port their numbers.”¹¹ The FCC also requests comment on exemptions for certain classes of small carriers and the appropriate length of time for an exemption or alternate means to reduce the impact on small carriers.¹²

The FCC acknowledges that NANC has estimated its recommendation would impose industry-wide cost of approximately \$50 million,¹³ however, the IRFA does not breakdown that cost and does not analyze what portion of that cost would be borne by the small carriers as a group or at the firm level. The Commission did recognize, however, that reducing the intermodal porting interval presents unique challenges for small telephone companies,¹⁴ and the FCC proposed alternatives that would minimize the impact on small telephone companies, such

⁹ E.O. 13272, at § 2(c).

¹⁰ *Id.* at § 3(c).

¹¹ Second FNPRM para. 21.

¹² *Id.*

¹³ Second FNPRM, para. 32 (referencing the *NANC Report and Recommendation on Intermodal Porting Intervals*, Prepared for the NANC by the Intermodal Porting Interval Issue Management Group (dated May 3, 2004).

¹⁴ *Id.* para. 14.

as exemptions and alternative timeframes.¹⁵ The Commission asked for more information on the impacts and possible alternatives, which Advocacy addresses below.

Advocacy has spoken to several small and rural telephone companies to determine the impact on them.¹⁶ The small telephone companies observed that the C2 proposal¹⁷ in the NANC report requires all providers to have an automated service order processing system in place (something the larger providers already have). They suggest that the costs associated with implementing this new order processing system would be substantial, especially because such systems are currently designed to handle a larger volume of requests than small and rural telephone companies require. The smallest-sized modules available are too large for the volume of porting requests these providers handle. They estimate that hardware, software, and transition costs can add up to \$100,000.¹⁸ Small telephone companies have also suggested that an automated system such as that represented by C2 is not appropriately sized for their applications. They have instead developed manual systems that better fit their customer base and needs.¹⁹

Small telephone companies reported that they rely on third-party contractors to perform number ports for them. These third-party contractors charge from \$1,200 to \$1,800 for the initial location set up, plus a recurring cost of \$180 to \$1,000 a month, depending upon the volume of ports.²⁰ The third parties are capable of acting as the automated recipient, but this would increase the costs to small telephone companies, with the cost raising with the volume of ports.

¹⁵ *Id.* para. 34.

¹⁶ Advocacy spoke to the following entities: Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”), National Telecommunications Cooperative Association (“NTCA”), National Exchange Carrier Association (“NECA”), and Northwest Communications.

¹⁷ The C2 proposal called for orders to be received in a mechanized manner and responded to in five hours or less. The A3 proposal called for the ten-digit triggers to be set a full day before 12:01 a.m. of the confirmed due date.

¹⁸ The figure based upon conversations with Northwest Communications. Second FNPRM paras. 7-9.

¹⁹ Based upon conversations with OPASTCO and NTCA.

²⁰ Based upon conversations with OPASTCO and NECA.

In addition, there are concerns about sharing customer proprietary network information, because the small businesses would have to give the third-party vendors information on their customers.

To date, small and rural telephone companies have already incurred substantial costs to upgrade their switches and activate local number portability.²¹ Further, small telephone companies have informed Advocacy that they have received a very low volume of porting requests,²² so these costs are practically sunk costs, (i.e., not practically recoverable). The costs that they would incur as a result of NANC's recommendation on interval porting are also likely to be sunk, as they do not foresee a jump in porting requests.

The Commission also asks for comment on how telephone companies can recover the costs of LNP and suggests either a line item charge or having the costs subsumed by the network.²³ Small and rural telephone companies do not have the diversity in their customer base that large telephone companies have, and small telephone companies do not have as large a footprint, which limits their ability to pass through costs. For those costs that cannot be passed through, small telephone companies are again at a disadvantage; they do not have the requisite scope to absorb the increase in costs. Advocacy's studies substantiate the concern that small and rural telephone companies will experience a heavier burden. According to studies by Hopkins (1995)²⁴ and Crain and Hopkins (2001),²⁵ small businesses bear a disproportionate share of the federal regulatory burden. The costs per employee incurred by small businesses are 60 percent higher than those faced by their larger counterparts. They have a smaller number of employees,

²¹ According to industry estimates from Northwest Communications, the average cost of updating a switch runs about \$100,000 per switch, and validating the license to run LNP costs about \$25,000 on average.

²² Based on conversations with OPASTCO and NTCA.

²³ Second FNPRM para. 17.

²⁴ Thomas D. Hopkins, *Profiles of Regulatory Costs*, A Report to the U.S. Small Business Administration (November 1995).

²⁵ W. Mark Crain and Thomas D. Hopkins, *The Impact of the Regulatory Costs on Small Firms*, A Report to the U.S. Small Business Administration (2001).

fewer resources, and any equal amount of regulation stands to affect their bottom line disproportionately.

3. The FCC Should Adopt Alternatives that Will Minimize the Impact on Small Telephone Companies.

In the Second NPRM and IRFA, the FCC proposed alternatives that would minimize the impact on small telephone companies. The FCC was looking at two alternatives in particular: exemptions and an alternate timeframe.²⁶ Advocacy believes that these alternatives would minimize the impact on small businesses and recommends that the Commission adopt one or both in the final rule. The FCC recognized the unique challenges facing smaller telephone companies,²⁷ and part of that is the ability to pass on costs to customers which is extremely limited for small businesses. Advocacy's discussion of alternatives below is based on our conversations with small telephone companies and their representatives:

Small Business Exemption: This alternative would exempt small telephone companies from having to comply with a shortened porting interval requirement.²⁸ The current four-day porting interval would remain in effect for small telephone companies and their customers. The low number of ports requested of rural telephone companies means that few members of the public would be affected by such an exemption. Given the low number of port requests made to small telephone companies, allowing more small telephone companies to continue operating under the 96-hour porting interval would not work against the FCC's goal of shortening the porting interval. Under this alternative, the proposed rule would not impose any additional costs or burdens on small telephone companies.

²⁶ *Id.* para. 34.

²⁷ *Id.* para. 14.

²⁸ *Id.* para. 14.

Deferred Effective Date/Compliance Deadline: As a regulatory alternative, the FCC proposes additional time for small telephone companies to come into compliance with a new porting interval requirement.²⁹ The delayed compliance deadline would better enable small businesses to develop systems to comply with a shorter porting interval and for new equipment to be developed to meet the needs of the smaller telephone companies. The deferral of the compliance deadline should be at least 12 months, in addition to the 24 months NANC acknowledges the industry needs to implement its recommendation.

Tie the Porting Interval to the Business Week: Under this alternative, the FCC would tie the 53-hour clock to the business week for all telephone companies, small telephone companies, or rural telephone companies. For instance, the required porting interval could be defined as three business days rather than 53 hours. Small telephone companies do not have the personnel to operate on a 24/7 schedule. Because there is no one available to receive a porting request on weekends or after business hours, the process does not begin until the next business day. By tying the “clock” to the business calendar, this alternative recognizes this economic reality of small businesses and removes the potential need to incur 24-hour coverage. A variation on this regulatory alternative, which likewise eases the small telephone companies’ burden, would be for the porting interval “clock” to begin at 8 a.m. or 9 a.m. on the next business day if a porting request is made after business hours or over the weekend.

Out of these three alternatives, Advocacy recommends that the FCC grant an exemption to small telephone companies. A reduction in the porting interval as proposed by the NANC is expensive for small carriers who rely on their parties or perform the ports manually. Since the requests for an intermodal number ports is extremely rare in rural areas according to small telephone companies, an alternative that minimizes the requirement on small telephone

²⁹ *Id.* para. 15.

companies will not undermine the FCC's goal of local number portability. The FCC can re-examine the state of number portability in rural areas in another rulemaking after several years, to see if circumstances have changed.

4. Conclusion.

The FCC's Second FNPRM and IRFA show consideration for the needs and economic situation of small telephone companies. Advocacy is pleased the FCC is taking small businesses into account in its rulemaking. Advocacy recommends that the FCC include a more detailed analysis of how the rule effects small entities in its final rule and adopt an exemption or a delayed implementation timeframe to minimize the impact on small and rural carriers. For additional information or assistance, please contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov.

Respectfully submitted,

/s/ _____
Thomas M. Sullivan
Chief Counsel for Advocacy

/s/ _____
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

November 17, 2004

cc:

Chairman Michael K. Powell

Commissioner Kathleen Q. Abernathy

Commissioner Michael J. Copps

Commissioner Kevin J. Martin

Commissioner Jonathan S. Adelstein

Jeffrey Carlisle, Acting Bureau Chief, Wireline Communications Bureau

Carolyn Fleming Williams, Director, Office of Communications Business Opportunities

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 November 17, 2004, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

/s/ _____
Eric E. Menge

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

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

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

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

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

Qualex International Portals II
445 12th Street, S.W.
Room CY-B402
Washington, DC 20554

Carolyn Fleming Williams
Director
Office of Communications Business
Opportunities
445 12th Street, S.W.
Room 7-C250
Washington, DC 20554

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

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