

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

UNITED STATES TELECOM ASS'N <i>et al.</i> ,)	
)	
)	
Petitioners,)	
)	
v.)	No. 03-1414
)	
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
)	
Respondents.)	

OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION
TO EMERGENCY MOTION FOR STAY

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The FCC respectfully opposes USTA's emergency motion for a stay. The Court should deny the motion because USTA has shown neither a likelihood of success on the merits nor irreparable injury in the absence of a stay, and because the public interest strongly favors the immediate implementation of the policy at issue in this case, which will bring immediate and substantial competitive benefits to millions of consumers. USTA claims on the merits that the FCC unlawfully *modified* a rule without notice and comment, but the record shows that the FCC simply *clarified* a longstanding rule, an action as to which the APA does not require notice and comment. USTA also claims that it will be subject to unfair competition, but the rule at issue simply reflects technological and marketplace realities, and there is no error in its doing so. Ultimately, USTA's case boils down to an attack not on the order that is before the Court, but on the underlying rule that was clarified in the order on review. The time for review of that rule has long passed. USTA is not likely to suffer irreparable injury in the absence of a stay because, it will generally be free to compete to win back any customers it loses.

BACKGROUND

Wireline telephone service has long been provided by local exchange companies (LECs) that held monopolies in their markets. In the Telecommunications Act of 1996, Congress undertook to eliminate the LEC monopoly and to replace it with competition. *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371-372 (1999). Congress set forth rules to govern the development of competition, including requirements governing conduct between carriers. One of those rules required LECs to allow customers to keep their telephone numbers when they change from one service provider to another, which is known as "number portability." 47 U.S.C. §§ 153(30) (defining term) and 251(b)(2) (imposing requirement). Congress viewed number portability as one of the minimum requirements "necessary for opening the local exchange

market to competition.” *See, e.g.*, S. Rep. No. 23, 104th Cong., 1st Sess. At 19-20 (1995). “[T]he ability to change service providers,” the House Commerce Committee found, “is only meaningful if a customer can retain his or her local telephone number.” H.R. Rep. No. 204, 104th Cong. 1st Sess. At 72 (1995); *accord CTIA v. FCC*, 330 F.3d 502, 513 (D.C. Cir. 2003).

Within five months of the passage of the 1996 Act, the FCC promulgated rules and deployment schedules for the implementation of number portability. *Telephone Number Portability*, 11 FCC Rcd 8352 (1996) (*First Portability Order*), *recon. denied*, 12 FCC Rcd 7236 (1997). Consistent with the statute, the Commission adopted broad porting requirements: “number portability must be provided . . . by all LECs to all telecommunications carriers, including commercial mobile radio services (CMRS) providers.” *Id.*, 11 FCC Rcd at 8355 ¶ 3; *see also id.* at 8431 ¶ 152. CMRS providers are commonly known as wireless providers, and we use the terms interchangeably. The Commission also required CMRS carriers to institute number portability among themselves. *Id.* at 8433 ¶ 155. Transferring a number from a wireline carrier to a wireless carrier, or vice versa, is known as “intermodal” porting, and it is the subject of the order on review in this case, FCC No. 03-284, which we refer to as the *Intermodal Order* and is attached to USTA’s motion.

The implementation of number portability raised a host of technical issues that affected different industry participants differently. In an effort to streamline the resolution of those issues, the Commission turned to a federal advisory committee called the North American Numbering Council (NANC, pronounced “nancy”), which comprised representatives of a broad range of telecommunications interests. The agency had earlier created NANC to develop consensus in the industry on technical issues relating to the administration of the country’s telephone numbers and to provide advice to the FCC based on that consensus. *See First*

Portability Order, 11 FCC. In August 1997, after issuing a public notice soliciting comment on the NANC's report, the Commission adopted recommendations from the NANC for the implementation of wireline-to-wireline number portability. See *Telephone Number Portability*, 12 FCC Rcd 12281 (1997) (*Second Portability Order*). Under the guidelines developed by the NANC, porting between LECs was limited to carriers with facilities or numbering resources in the same rate center to accommodate technical limitations associated with the proper rating of wireline calls. *Intermodal Order* at ¶ 7.

The *Second Portability Order* did not address intermodal porting or place any limits on the requirement of such porting; instead, it asked the NANC to develop a consensus recommendation on various outstanding matters, including “how to account for differences between service area boundaries of wireline versus wireless services.” *Id.*, 12 FCC Rcd at 12333-12334 ¶ 91. That issue implicates the “rate center” disparity, which arises because a wireless telephone number is not, by the nature of the service, tied to a geographic area served by a particular switch, but, due to technological and regulatory limitations, a wireline number generally is. A “rate center” is a geographic area established by state regulators that is used to determine whether a given call is a local call or a toll call. A wireless carrier can typically port in any number that has been assigned to a wireline rate center located within the wireless service area. A wireline carrier, on the other hand, can port in only those wireless numbers that are assigned to the rate center where the customer lives.¹

The NANC reported to the Commission in May 1998 that its members were not able to reach consensus on intermodal porting because of the rate center disparity and that it would not

¹ LECs may be able to use so-called “foreign exchange” services that allow them to “serve customers with numbers ported from wireless carriers” without regard to the number’s assigned rate center. *Intermodal Order* at ¶ 44. The NPRM part of the *Intermodal Order* seeks comment on that possibility.

make a recommendation on the topic. See *Local Number Portability Administration Working Group Report on Wireless Wireline Integration*, May 8, 1998, CC Docket No. 95-116, at §3.1 (filed May 18, 1998). That outcome was not surprising, because the NANC comprises all industry sectors and works by consensus. The Commission sought public comment on the NANC report. See *Common Carrier Bureau Seeks Comment on Recommendation Concerning Local Number Portability Administration*, 13 FCC Rcd 17342 (1998).

The Commission did not address the matter for some time. That is largely because it did not have to: although the Commission had originally ordered CMRS carriers to implement number portability by June 30, 1999, *First Portability Order*, 11 FCC Rcd 8355 ¶ 4, the Commission subsequently found that the carriers needed additional time “to develop and deploy the technology that will allow viable implementation of service provider portability,” *Forbearance From CMRS Number Portability Obligations*, 14 FCC Rcd 3092, 3104-3105 ¶ 25 (1999). In the absence of that technology, the Commission could focus its attention elsewhere without jeopardizing intermodal porting. That is because, as a practical matter, there could be no porting of numbers by CMRS carriers until they implemented the necessary technology.

In July 2002, however, the Commission established a firm deadline of November 24, 2003, for wireless number portability within the 100 largest localities. *Verizon Wireless’ Petition for Partial Forbearance*, 17 FCC Rcd 14972 14985-86 ¶ 31 (2002), *aff’d*, *CTIA v. FCC*, 330 F.3d 502. Wireless carriers outside of the largest 100 localities were required to allow end users to port their numbers by the later of May 24, 2004, or six months after receiving a porting request *Ibid.* (The Court denied a stay of that requirement as it applied to porting between CMRS carriers by Order of November 21, 2003 in case No. 03-1405.)

That looming deadline brought intermodal portability to the fore once again. On January 23, 2003, CTIA, a trade group that represents CMRS carriers, petitioned the Commission for a declaratory ruling on the matter. It asked the FCC to declare that LECs are required to port numbers to CMRS providers whose service areas overlap with the LEC's rate center, without regard to whether the CMRS carrier operates facilities within the rate center or has been assigned numbers associated with that rate center. The Commission issued a public notice seeking comment on the CTIA petition, allowing interested parties another opportunity to advise the agency on intermodal number portability (USTA filed comments). On November 10, 2003, the Commission released the *Intermodal Order*, in which it declared that the obligation imposed by the 1996 Act, as implemented in the *First Portability Order*, requires LECs to port numbers to CMRS carriers as long as the wireless carrier's service area overlaps with the rate center associated with the number at issue. CMRS carriers are likewise required to port numbers to LECs, as long as the number is assigned to the rate center of the customer's residence. The Commission made clear that LEC-CMRS porting would begin at the same time CMRS carriers had in place their porting capabilities: November 24.

The Act and the existing porting rules, the Commission found, "impose broad porting obligations on LECs," and there are no technical issues or existing regulatory requirements that would prevent porting to a CMRS carrier that does not have numbers assigned to the LEC rate center or an interconnection agreement with the LEC. *Intermodal Order* ¶¶ 9, 23-24. Because the agency "has never adopted any limits regarding wireline-to-wireless number portability," the Commission held, "as of November 24, 2003, LECs must port numbers to wireless carriers where the requesting wireless carrier's coverage area overlaps the geographic location of the rate center to which the number is assigned." *Id.* ¶ 25. The agency rejected the claim that it needed

to issue an NPRM before it could so order. The porting obligations imposed in the *First Portability Order* were not limited in any way, and the agency's response to the CTIA petition amounted only to "clarifications" to the existing rules, which do not require a new notice.

The Commission also rejected the claim that it could not impose LEC-to-CMRS porting because, due to the rate center disparity, CMRS carriers could port in from LECs more numbers than LECs can port in from CMRS carriers. "The fact that there may be technical obstacles that could prevent some . . . types of porting does not justify denying wireline consumers the benefit of being able to port their wireline numbers to wireless carriers. Each type of service offers its own advantages and disadvantages . . . and wireline customers will consider these attributes in determining whether or not to port their number." *Intermodal Order* ¶ 27. The Commission nevertheless remained sensitive to the rate center problem. In the *Intermodal Order*, it published a further notice of proposed rulemaking in which it sought additional comment on the rate center issue and possible regulatory responses to it. *Id.* ¶¶ 41-44.

USTA now asks the Court to stay the LEC-CMRS porting requirement.

ARGUMENT

In considering stay motions, the Court assesses: (1) the likelihood that the petitioner will prevail on the merits of the appeal; (2) the likelihood that it will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest. Circuit Rule 18(a); see *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 673-74 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

A. USTA Is Not Likely To Succeed On The Merits.

In the *First Portability Order*, issued in 1996, the Commission established the requirement that numbers be portable between LECs and CMRS providers. The Commission

imposed no limitations on that rule. In the *Intermodal Order*, the Commission declared that under the terms of the previously established rule, LECs must port numbers to CMRS carriers whenever the CMRS carrier's service area overlaps the rate center associated with the telephone number at issue, whether or not the CMRS carrier has numbers assigned to it that are also associated with that rate center, and whether or not the CMRS carrier has facilities located in the rate center. USTA's fundamental claim is that the *Intermodal Portability Order* amounts to a new substantive rule that was promulgated without notice and an opportunity for comment. That contention is wrong because the order on review amounts only to a clarification of the underlying requirement of LEC/CMRS number portability, which has been on the books since 1996. The law is clear that that such a clarification is an interpretive rule, as to which the Administrative Procedure Act requires no notice.

The APA requires an agency to publish in the Federal Register a “[g]eneral notice of proposed rule making” when the agency is proposing to make new legislative-type rules. 5 U.S.C. § 553(b). But the Act exempts “interpretive rules” from the scope of the notice requirement. 5 U.S.C. § 553(b)(3)(A). Thus, an agency can “declare its understanding of what a [regulation] requires” without notice and comment. *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1308 (D.C.Cir.1991); *see also* 5 U.S.C. § 554(e) (agency may issue declaratory ruling to remove uncertainty); 47 C.F.R. § 1.2 (FCC may issue declaratory rulings).

There is no precise demarcation between legislative and interpretive rules. The Court has stated that one of the key inquiries in making such a determination is “whether the [agency's action] effectively amends a prior legislative rule.” *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). “If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first;

and, of course, an amendment to a legislative rule must itself be legislative.” *National Family Planning & Reproductive Health Ass’n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992). By contrast, a rule is interpretive if it “confirm[s] a regulatory requirement, or maintain[s] a consistent agency policy.” *Id.*, 979 F.2d at 237. “[T]he legislative or interpretive status of the agency rules turns . . . on the prior existence or non-existence of legal duties and rights.” *American Mining Cong.*, 995 F.2d at 1110.

Section 251(b)(2) imposes on LECs a broad “duty to provide . . . number portability.” Congress defined number portability to mean “the ability of users . . . to retain . . . existing [telephone] numbers . . . when switching from one telecommunications carrier to another.” 47 U.S.C. § 153(30). In the *First Portability Order*, the Commission found that “Section 251(b) requires local exchange carriers to provide number portability to all telecommunications carriers, and thus to CMRS providers as well as wireline service providers.” *Id.*, 11 FCC Rcd at 8431 ¶ 152. Such intermodal portability, the Commission found, will “promote competition between CMRS and wireline service providers as CMRS providers offer comparable local exchange . . . services.” *Id.*, 11 FCC Rcd at 8436 ¶ 160. The Commission’s original rules thus imposed a porting obligation on all LECs, including the duty to port to CMRS carriers. *See* 47 C.F.R. § 52.23(a) & (b)(2)(i) (1997) (providing that all LECs must provide number portability and that “any licensed CMRS provider” may request porting). The Commission imposed no limitations on the LECs’ duty of wireline-to-wireless porting.

The Commission did not specify any circumstances under which a LEC would *not* have to comply with the intermodal portability requirement. In the *Second Portability Order*, the Commission referred several intermodal portability matters to NANC for recommendations, but NANC was unable to reach consensus on the matter. *See Intermodal Order* ¶ 11. Some LECs

nevertheless contended that they had no duty to port when a CMRS carrier did not have numbers assigned to a particular rate center or facilities within the rate center. CTIA accordingly asked the Commission to resolve the dispute itself, seeking “a declaratory ruling that wireline carriers have an obligation to port their customers’ telephone numbers to a CMRS provider whose service area overlaps the wireline carrier’s rate center.” Petition for Declaratory Ruling at 1; *see also Intermodal Order* ¶ 20.

The Commission addressed that petition in the *Intermodal Order*, which was issued on November 10, 2003. It found that in light of the “broad porting obligations” imposed on LECs by the statute and by “the Commission’s rules reflect[ing] those requirements,” which did not “require wireless carriers to have points of interconnection or numbering resources in the same rate center as the assigned number for wireline-to-wireless porting,” LECs must “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.” *Id.* at ¶¶ 21-22, 24.

Given the breadth of the statutory porting requirement, the unqualified nature of the Commission’s 1996 rule implementing that requirement, and the policy of increasing competition that underlies portability, the November 10 ruling that LECs must port numbers to a CMRS carrier as long as the CMRS carrier serves the area that contains the pertinent rate center only clarifies – and does not amend – the original rule. The breadth of the original rule shows that nothing in the *Intermodal Order* “effectively amends [the] prior legislative rule,” *American Mining Congress*, 995 F.2d at 1112, nor is the *Intermodal Order* a “nonobvious and unanticipated reading of [the earlier] regulation, which has the effect of cutting back significantly on its scope and proscriptions,” *National Family Planning*, 979 F.2d at 235. The *Intermodal*

Order does not “work substantive changes in prior regulations,” does not “repudiate” the existing rule, and is not “irreconcilable” with the existing rule. *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). Rather, the *Intermodal Order* resolves an industry controversy by confirming the breadth of the pre-existing duty that Congress and the Commission imposed on LECs years ago; it “illustrate[s] [the Commission’s] original intent,” which is precisely what the Court has held a clarification order may do. *Sprint*, 315 F.3d at 374; *see Intermodal Order* ¶ 26.

USTA claims that the *Intermodal Order* amended the existing rule in three ways:

1. USTA argues that allowing wireline-to-wireless portability in the absence of a CMRS carrier “presence” in the rate center implements “location portability,” which, USTA claims, conflicts with the Commission’s decision in the *First Portability Order* not to impose location portability. Motion at 9-10. USTA’s argument fails because it rests on an incorrect understanding of location portability. The Commission has always made it clear that LEC-to-CMRS porting did not constitute location porting, but had to do with customers changing their home addresses and wanting to take their wireline numbers with them to the new address. To the extent the prior orders were not clear on that point (and we believe they were), the *Intermodal Order* only clarifies, and does not amend, the existing rule.

In the *First Portability Order*, the Commission defined “service provider porting” to include “switching among wireline service providers and . . . CMRS providers” – *i.e.*, intermodal porting. *Id.*, 11 FCC Rcd at 8443 ¶ 172. The Commission defined “location portability” to mean “the ability of users of telecommunications services to retain existing telecommunications numbers . . . when moving from one physical location to another.” *Id.* at 8443 ¶ 174. The Commission explained that “subscribers must change their telephone numbers *when they move outside the area served by their current central office.*” *Ibid.* (emphasis added); *see also*

Telephone Number Portability Notice of Proposed Rulemaking, 10 FCC Rcd 12350, 12360 ¶ 26 (1995) (“Location 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.”). The Commission declined to require location portability. *Id.* at ¶ 181. “[S]ervice provider portability is critical to the development of competition, but . . . location portability ha[s] not been demonstrated to be as important to the development of competition.” *Id.* at ¶ 182.

The *First Portability Order* is consistent with the *Intermodal Order*. It is clear from the *Notice* and the *First Portability Order* that location portability refers to disassociating a telephone number from the rate center at which it originated, which would occur if a wireline subscriber moved his residence and wished to take his wireline number with him. A wireless telephone number, by contrast, must always remain assigned to the same rate center from which it originated. *Intermodal Order* ¶ 28. Under the established definitions, if the number does not leave the rate center, it has not been subject to location porting. It makes no difference that the user may change “locations” – that is the very nature of wireless phones. Adopting USTA’s view would seriously curtail the scope of LEC-CMRS portability and thus “deprive the majority of wireline consumers of the ability to port their number to a wireless carrier.” *Id.* at ¶ 27. That outcome would neuter the usefulness of portability in creating new competition. That explains why the Commission saw no inconsistency between requiring in the *First Portability Order* broad intermodal portability – which it deemed critical to competition – and declining to require location portability – which is not.

The Commission was therefore correct when, in the *Intermodal Order*, it declared that intermodal porting “does not, in and of itself, constitute location portability.” *Id.* at ¶ 28. That

declaration confirmed the agency's understanding of location portability, but to the degree the ruling expanded on the *First Portability Order*, it was plainly a clarification of the Commission's original meaning. To accept USTA's contrary view would be to reject this Court's observation that "[a] rule does not . . . become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted. If that were so, no rule could pass as an interpretation of a legislative rule unless it were confined to parroting the rule or replacing the original vagueness with another." *American Mining Cong.*, 995 F.2d at 1112.

2. USTA next contends that the Commission's earlier portability orders "established a procedure for resolving the administrative and technical details" of portability – referral of such issues to the NANC – and that the agency violated that procedure in the *Intermodal Order* by deciding the issues on its own. Motion at 11. Even if that claim were factually correct, USTA has failed to explain how a change in the agency's *procedure* for getting guidance on its decisionmaking amounts to a change in a *rule* that requires notice and comment. In any event, the agency did not violate any established procedure.

The NANC, as described above, is a federal advisory committee established pursuant to 5 U.S.C. app. 2 that consists of representatives from various industry groups and companies with a stake in the regulation of numbering resources. The NANC has been useful in recommending regulatory approaches that are supported by a broad-based industry consensus, and the agency has referred to it many of the technical issues of number portability. In keeping with that practice, the FCC referred to NANC various LEC/CMRS portability implementation issues, including the very issues that were later presented in the CTIA petition. *See Second Portability Order*, 12 FCC Rcd at 1234 ¶ 92; *Intermodal Order* ¶ 10. This time, however, the NANC

members were not able to reach a consensus, and it made no recommendation. *Id.* ¶ 11. The Commission accordingly resolved the matters itself in response to the CTIA petition.

That background shows that the Commission did not violate an “established procedure,” but in fact *followed* its general practice of seeking industry consensus through an advisory panel. USTA contends that the Commission was under a duty to “send the issue back to the NANC” yet again, Motion at 11, and could not resolve matters itself, but no such duty exists under law or in agency practice. To the contrary, by creating the NANC and relying on many of its recommendations, the Commission did not abdicate or delegate permanently its decision-making role or its administrative prerogatives. And, more relevant to the real issue presented, nothing in the Commission’s resolving the matter itself, rather than relying on the NANC, rendered its ultimate decision an alteration of, as opposed to a clarification of, the pre-existing portability rule.²

If the Commission’s use of the NANC to help resolve portability issue has any relevance here, it is to show the extent to which all of the parties to this rulemaking process had notice that specific issues were presented to the agency and opportunities to comment on them. The Commission referred to the NANC the very issues it later resolved in the *Intermodal Order*. *Id.* at ¶ 10. Thus, all parties knew what regulatory questions were on the table. After the referral, all parties had multiple opportunities to participate in the decision-making process. First, USTA and many of its individual member companies are voting members of the NANC and were able to participate directly in the advisory process. *See Second Portability Order*, 12 FCC Rcd at

² USTA appears to contend that the *Intermodal Order* must have amended the earlier rule because it is different from the rules governing LEC-to-LEC porting. Motion at 11. That claim is wrong because LEC-to-CMRS porting presents different issues from LEC-to-LEC porting, and it is hardly surprising that the rules would be different. The Commission had adopted some NANC recommendations limiting LEC-to-LEC porting, but it “has never adopted any limits regarding wireline-to-wireless number portability.” *Intermodal Order* ¶ 25.

12282 n.3. Second, after the NANC indicated its inability to reach consensus, which had to do with the alleged competitive disparity now relied on by USTA, the Commission sought public comment on the NANC report. Third, the Commission sought comment directly on the CTIA request for declaratory ruling, which again squarely raised the issue at hand.

Those relevant and undeniable facts demonstrate the error in USTA's heavy reliance on the *Sprint* case. In *Sprint*, the Court held that the Commission fundamentally changed a rule without notice, pursuant to a petition for clarification that requested action different from the action the agency subsequently took. Here, CTIA's Petition for Declaratory Ruling sought exactly the clarification the Commission then rendered -- a situation that *Sprint* did not rule upon. 315 F.3d at 376. Moreover, the very matters at issue here were themselves subject to multiple rounds of comment when the NANC issued its report and again on the filing of the CTIA Petition. Thus, unlike in *Sprint*, no party was deprived of an opportunity to make its views known to the agency on the precise regulatory subject at hand.

3. USTA's final claim is that because the rate center disparity allows CMRS carriers to port numbers in some cases where a LEC could not port in a CMRS number, the *Intermodal Order* "represents a radical and unjustified departure from the nondiscrimination and competitive neutrality standards that the FCC had embraced in its prior number portability orders." Motion at 12. Again, even assuming that the Commission acted inconsistently with an established general policy, doing so does not present a question of failure of notice. Recognizing that shortcoming, USTA also claims that the Commission's action was arbitrary. Motion at 13. But the agency had never established a policy of the sort that USTA posits that required the same treatment of all industry players with respect to portability, and its actions were reasonable.

A fundamental point of the 1996 Act, including the number portability provision, was to eliminate the longstanding LEC monopoly in the local exchange market and open that market to effective competition for the first time. The Commission's actions implementing the Act have been taken with that overarching goal in mind. The Commission has been conscious of the need to foster competition by fair means, but fairness does not require that all parties be treated the same without regard to their differences. Wireless carriers and LECs are different in at least two fundamental ways. First, their market positions are fundamentally dissimilar. LECs are effective monopolists, with local wireline market shares above 90 percent and very little competition, whereas CMRS providers participate in a highly competitive wireless marketplace and have little share of the traditional home-based wireline market. Second, the services provided by LECs and CMRS carriers have an essential difference: the wireline phone is tied to a single physical location, whereas the wireless phone can travel at will. A regulatory approach that reflects those differences is not "unfair" or "discriminatory;" it is rational. The Court will intervene only when the agency "improperly discriminate[s] between *similarly situated* phone services *without a rational basis.*" *C.F. Communications v. FCC*, 128 F.3d 735, 740 (D.C. Cir. 1997) (emphasis added).

The *Intermodal Order* reflects those differences. It requires numbers to be ported from LECs to CMRS carriers whenever the wireless service area overlaps a rate center, yet it acknowledges the current technical and regulatory limitations of the telephone system and thus requires porting in the other direction only where the CMRS customer lives within the rate center to which a the wireless number is assigned. That outcome simply reflects the technological difference between the two types of providers. The Commission was unwilling to subordinate the prime statutory objective of fostering competition in the local market to a policy of complete

equality of treatment. *Intermodal Order* ¶ 27. In that way, the portability rule reflects the 1996 Act itself, which places many requirements on LECs that it does not place on other carriers.³ There was not, as USTA wrongly charges, an “abandon[ment], without hardly a backward glance, [of] nondiscrimination requirements,” but a carefully chosen, and fully explained, balancing of regulatory priorities.

Moreover, LECs have ample opportunity to compete with wireless carriers. First, their product, at least for the time being, has advantages over wireless service, including a higher quality of transmission and an absence of dropped calls, *see Intermodal Order* ¶ 27, which give wireline service a competitive edge from the start. Second, in most cases, if a CMRS carrier lures away a LEC customer, portability works both ways, and the LEC can try to regain that customer. The exception is when the customer subsequently moves out of the rate center, which still gives the LEC the opportunity to compete to provide wireline service once again at that address. It is important to remember that, at this point, the vast majority of wireless customers still have wireline telephone service as well, so that right now wireless customers have relatively little incentive to port their numbers to their wireline service. The LECs’ abilities to compete in that regard ironically will not develop until a significant number of customers have given up their landline phones. The Commission thus properly deferred consideration of that issue to a further proceeding, which it began by a Further Notice of Proposed Rulemaking in the *Intermodal Order*. It is also important to remember that the thrust of the 1996 Act was to bring competition into the local exchange marketplace; the CMRS marketplace, by contrast, already

³ Most notably, the 1996 Act placed a statutory porting requirement only on LECs, and it expressly excluded CMRS carriers from the definition of a LEC, except “to the extent that” the Commission decides to include CMRS carriers within that definition. 47 U.S.C. §§ 251(b)(2); 153(26). In that way, Congress itself recognized that differences between carriers can require differential regulatory treatment. The Commission itself imposed different timetables on LEC-LEC and LEC-CMRS porting.

was subject to substantial competition. Thus, at least at first, the public policy in favor of competition mandates that the FCC focus on the monopoly market, and the nature of that competition necessarily will be somewhat one-sided. That imbalance simply reflects both the market reality and the congressional policy.

At bottom, USTA's challenge to the *Intermodal Order* is an objection to intermodal portability itself. Yet that basic obligation was imposed seven years ago in direct implementation of a statutory command, and the time for review of that decision has long expired. USTA has provided no credible argument that the *Intermodal Order* altered the existing rule in a way that would have required an NPRM under the APA.⁴ Nor has USTA shown that the agency's action is substantively unreasonable. USTA is not likely to succeed on the merits of its claim.

B. USTA Has Failed To Show Irreparable Injury.

USTA claims that because of the competitive asymmetry presented by the rate center disparity it will lose customers to CMRS carriers with no opportunity to compete for replacement customers and thus will suffer irreparable harm. That type of harm is unlikely to occur in the short run – the time frame relevant to the Court's consideration of a stay motion. That is because right now, the vast majority of wireless customers also subscribe to wireline service. Thus, there are few wireless customers whose business a LEC has the opportunity to gain by porting their numbers in. In other words, at this point, the rate center disparity does not present an actual competitive imbalance. Any harm that might later arise is of insufficient imminence to justify a stay. *See Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir.1986), *cert. denied*, 484 U.S. 828 (1987).

⁴ As such, USTA's discussion of exceptions to the notice-and-comment rules at pages 15 to 17 of its Motion is irrelevant.

At present, because the porting obligation runs equally in both directions in a given rate center, the LECs can compete to regain any customer that terminates his wireline service in favor of wireless service. “[R]evenues and customers lost to competition which can be regained through competition” do not constitute irreparable harm sufficient to justify a stay. *Central & Southern Freight Tariff Ass’n v. United States*, 757 F.2d 301, 309 (D.C. Cir.), *cert. denied*, 474 U.S.1019 (1985). The only exception is the limited circumstance when a former wireline customer switches his service to a wireless carrier and then moves out of the rate center. USTA has provided no reason to believe that outcome will occur on a widespread basis, particularly within the relatively short time that it will take the Court to review the case on its merits. The law is clear that “relief will not be granted against something merely feared as liable to occur at some indefinite time,” and that a movant for a stay must supply “proof indicating that the harm is certain to occur in the near future.” *Wisconsin Gas*, 758 F.2d at 674. Moreover, if a subscriber does move from the rate center, the LEC may compete for the business of the new resident at that address. It is also worth noting that many LECs own their own wireless operations, and their wireless subsidiaries will pick up new customers as competition increases.

USTA’s claim of harm also ignores the reality of the local exchange marketplace: the LECs are virtual monopolists with more than 90 percent of the wireline market share, and at this point, most wireless customers still have wireline phones. The introduction of *any* type of competition into a monopoly marketplace will necessarily result in loss of customers by the monopolist; indeed, that is what is expected to happen upon introducing competition. Moreover, it is not correct to focus – as USTA would have the Court do – only on competition for particular wireless customers. Rather, the basic premise of the 1996 Act was that LECs would lose their monopoly in the local market in exchange for the ability to compete in other markets – such as

long distance – from which they were previously barred. Thus, looked at more broadly, as a result of the 1996 Act as a whole (of which the number portability requirement is only a part), the LECs have new opportunities to gain customers outside of their traditional markets. Losses in one marketplace may be offset by gains in another.

C. A Stay Will Harm Other Parties And The Public Interest.

As discussed above, number portability is a critical component of the development of a competitive local exchange market. As many as 75 million consumers stand to benefit immediately from number portability, in the form of lower rates and better service as CMRS carriers and LECs both strive to obtain or retain their loyalty. In the 1996 Act, Congress established that type of competition as a vital national goal, and it would be undermined by the grant of a stay, particularly where the LECs have failed to show irreparable injury or a likelihood of success on the merits. The public interest thus weighs heavily against a stay here.

The LECs claim that the public interest favors a stay because the public will be harmed by number portability. Specifically, it claims that customers who switch to wireless carriers will lose access to certain emergency “911” services. Motion at 19. That concern is merely another attack on LEC-to-CMRS portability generally, and it has no relevance at this point. The Commission addressed that matter in its order denying a stay, finding that “[t]hrough various consumer outreach programs, this Commission, wireless carriers, and the public safety community are actively getting the message out to consumers about what they can expect from their wireless devices’ ability to access emergency services. We do not find that these concerns, however, warrant a stay of the number portability rules.” Order Denying Stay at ¶ 8. In other words, the agency to which Congress has assigned the role of weighing competing public policies has determined that it can reasonably balance the competing policies of promoting local

competition while ensuring 911 access. USTA has given the Court no reason to second guess that considered judgment.⁵

Similarly without merit is USTA's claim that consumers should be denied the benefits of competition because they may not realize that phone numbers cannot always be transferred back to a wireline carrier if the customer moves. Motion at 19. The mantle of consumer advocate ill suits the incumbent monopolists. And, in any event, the competitors on both sides have strong incentives to educate consumers about the costs and benefits of portability.

A stay will also harm wireless carriers. They have invested substantial resources implementing number portability technology, on the promise of greater competitive opportunities. It would be unfair to deprive them of access to the significant wireline market.

CONCLUSION

For the foregoing reasons, the Court should deny USTA's motion for a stay.

Respectfully Submitted,

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⁵ The Commission also rejected USTA's claim of harm to rural carriers in paragraph 9 of the order denying a stay. USTA provides no reason to question the agency's ruling on the matter.