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

In re:	)	
	)	
Cellular Telecommunications &	)	
Internet Association	)	
	)	No. 03-1270
	)	
Petitioner	)	

OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION TO PETITION FOR WRIT OF MANDAMUS

INTRODUCTION

In January 2003 and May 2003, the Cellular Telecommunications & Internet Association ("CTIA") filed petitions with the Federal Communications Commission ("FCC") seeking guidance on a number of issues relating to the implementation of wireless number portability ("wireless LNP"). Nearly three months before the November 24, 2003, deadline for providing wireless LNP, CTIA filed a petition for a writ of mandamus in this Court, insisting that the FCC's failure to resolve the two petitions filed earlier this year constituted unreasonable delay. Pursuant to the court's order dated September 24, 2003, the FCC files this opposition to CTIA's petition.

The Court should deny the mandamus petition because CTIA has not satisfied the standard for this extraordinary form of relief for undue agency delay. *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 72 (D.C. Cir. 1984) ("*TRAC*"). CTIA has not made out a case of unreasonable delay, for the following reasons: (1) the FCC is not obligated to resolve the CTIA petitions by a specific statutory deadline; (2) the issues raised in the petitions do not have to be resolved before November 24, 2003, in order for wireless number portability to go forward on that date; (3) the agency's resources are currently pressed by a number of other important issues; and (4) the CTIA petitions have been pending at the agency for less than a year – in fact, one petition has been pending for less than half a year. Moreover, FCC staff is finalizing a draft order that is to be placed on circulation before the Commission shortly. Because the FCC is "moving expeditiously" to resolve the issues raised by CTIA in its mandamus request, this Court should deny the petition. *See TRAC*, 750 F.2d at 80. Counsel for the Commission will inform the Court promptly when the Commission has acted on the two CTIA petitions.

BACKGROUND

1. The Commission's Wireless LNP Orders and Related Litigation

Number portability refers to the ability of consumers to keep their phone numbers when they switch carriers. *See, e.g., Cellular Telecommunications & Internet Association v. FCC,* 330 F.3d 502, 503 (D.C. Cir. 2003) ("*CTIA*").[1] As this Court explained in *CTIA*, the "simple truth is that having to change phone numbers presents a barrier to switching carriers." 330 F.3d at 513. Implementation of wireless local number portability is intended to reduce that "barrier," making it easier for customers to "compare and choose between various service plans and options," and promoting a more competitive environment. *See id*.

On July 2, 1996, the FCC promulgated rules requiring both local exchange carriers ("LECs") and wireless carriers to provide number portability. *Telephone Number Portability*, First Report and Order`, 11 FCC Rcd 8352 ("*First Report and Order*"). The Commission asserted and exercised authority under 47 U.S.C. §§ 151, 152, 154(i) and 332 in applying number portability to wireless carriers, and it set an initial compliance date of June 30, 1999, for wireless carriers. *Id*. at 8355 (para. 4); *see also CTIA*,

[1] *See also* 47 U.S.C. 153(30), which defines 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."

330 F.3d at 505. On May 30, 1997, Bell Atlantic NYNEX Mobile Inc.[2] filed a petition for judicial review of the *First Report and Order* and the *First Reconsideration Order*,[3] and the case was briefed before the Tenth Circuit.

On December 16, 1997, while that case was pending in the Tenth Circuit, CTIA filed a petition with the FCC seeking temporary forbearance from the local number portability requirements on broadband CMRS carriers until the "five-year buildout period" for such carriers was completed. *CTIA Petition for Forbearance From CMRS Number Portability Obligations*, 14 FCC Rcd 3092, 3093 (para. 1) (1999) ("*1999 Order"*); *see also id*. at 3098 (para. 12) ("CTIA argues that the implementation deadline for wireless service provider portability should be extended" because of, among other reasons, the technical complexity of implementing portability). The Commission in response extended the deadline until November 24, 2002. 14 FCC Rcd at 3093, 3116-17 (paras. 1, 49). In extending the deadline, the Commission found, among other things, that an extension would give the wireless industry additional time "to develop and deploy the technology that

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[2] Bell Atlantic NYNEX Mobile Inc. is the predecessor to Verizon Wireless. Although Verizon Wireless was a petitioner in *CTIA*, it now publicly supports wireless number portability. *See* Carmen Nobel, "Verizon Charts Own Course on Cell Number Portability," PC Week, Aug. 25, 2003, 2003 WL 5736676.

[3] *See Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236 (1997) ("*First Reconsideration Order*").

will allow viable implementation of service provider portability" and would give "CMRS carriers greater flexibility in that time-frame to complete network buildout, technical upgrade, and other improvements . . . ." *Id*. at 3104-05 (para. 25).[4]

As the 2002 deadline approached, Verizon Wireless filed a petition with the Commission seeking permanent forbearance from wireless local number portability. *CTIA*, 330 F.3d at 506. On July 26, 2002, the Commission denied permanent forbearance but again extended the deadline, this time until November 24, 2003. *Verizon Wireless' Petition for Partial Forbearance*, 17 FCC Rcd 14972 (2002) ("*2002 Order*"). The Commission's extension of the deadline was based on technical considerations and the pendency of other regulatory deadlines. *Id.* at 14981 (para. 23). CTIA and Verizon Wireless filed a petition for judicial review of the denial of permanent forbearance. In June 2003, this Court rejected their claims in the *CTIA* case.[5]

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[4] On March 19, 1999, given "the Commission's extension of the enforcement deadline to November 24, 2002, Bell Atlantic and the Commission agreed to dismiss without prejudice the case that was pending before the Tenth Circuit." *CTIA*, 330 F.3d at 506. On March 24, 1999, the Tenth Circuit granted the parties' joint motion for dismissal.

[5] The Court held that the petitioners' challenge to the FCC's authority to adopt the rule was time-barred. 330 F.3d at 504, 508-09. The Court also upheld the denial of forbearance, rejecting petitioners' challenges on the merits. The Court found that the FCC had reasonably concluded that continued application of the rule was "necessary for the protection of consumers," within the meaning of the forbearance statute. *CTIA,* 330 F.3d at 509; *see also* 47 U.S.C. § 160(a)(2).

Along with its legal challenge to wireless LNP, CTIA has asserted that a host of technical questions have to be resolved by the Commission before the impending implementation deadline of November 24, 2003, in order for wireless carriers to offer number portability. Some concern the ability of customers to keep their phone numbers when switching from one wireless carrier to another wireless carrier (intramodal number portability), while others concern the ability of customers to keep their phone numbers when switching from a wireline carrier to a wireless carrier (intermodal number portability). The questions raised by CTIA's mandamus petition are discussed below.

2. CTIA's Petitions Before the FCC

The January 2003 Petition. On January 23, 2003, CTIA filed a petition for declaratory ruling at the FCC seeking guidance on whether "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" and on whether the only agreement necessary for number portability to occur is "a standard service-level porting agreement" between two carriers. *See* Petition for Declaratory Ruling of CTIA, CC Docket No. 95-116, January 23, 2003 ("January 2003 Petition"), at 1. On January 27, 2003, the Commission issued a public notice setting February

26, 2003, as the deadline for comments on the petition, and March 13, 2003, as the deadline for reply comments.

The first issue raised by the petition, known as the rate center issue, arises from a disagreement between wireless and wireline carriers as to the size of the service area within which wireline carriers must port their numbers to wireless carriers. Wireless carriers generally have much larger service area boundaries than wireline carriers; according to CTIA, "wireless carriers typically serve the same service area as a LEC by establishing a presence in one rate center where a LEC on average will have eight rate centers." January 2003 Petition at 6.

Wireless carriers insist that wireline carriers should be required to port numbers to any wireless carrier whose service area overlaps the wireline carrier's rate center that is associated with the ported number. *See*, *e.g.*, January 2003 Petition at 17. Wireline carriers, on the other hand, assert that the area in which wireline-to-wireless porting is required should be limited to a wireline carrier's rate center boundaries. *See*, *e.g.*, Comments of SBC Communications, CC Docket No. 95-116, filed on February 26, 2003, at 1. ("Briefly, the CTIA wants wireless carriers to have the right to capture a wireline customer and to have the wireline carrier port that customer's number regardless of where the customer resides in the wireless carrier's

local calling area, while wireline carriers would be limited to porting within rate centers.").

The second issue raised by the petition, known as the interconnection issue, arises from a disagreement between wireline carriers and wireless carriers over what steps have to be taken for a wireline carrier to port a telephone number to a wireless carrier. In its January 2003 Petition, CTIA insisted that only "a standard service-level porting agreement[] is necessary" and requested that the Commission confirm this understanding in a declaratory ruling. Some LECs, citing 47 U.S.C. §§ 251 and 252, have asserted that interconnection agreements approved by state public utility commissions are necessary to establish number portability. *See* Comments of SBC Communications, CC Docket No. 95-116, filed on June 13, 2003, at iv ("SBC believes that, under Commission precedent, incumbent LECs need to enter into interconnection agreement[s] with other carriers in order to meet section 251 obligations, like number porting.").

The May 2003 Petition. Shortly after oral argument in *CTIA*, the trade association filed a second petition for declaratory ruling with the FCC,[6] seeking additional guidance on a number of technical and implementation

[6] Oral argument in *CTIA* was held on April 15, 2003. The court issued its decision in that case rejecting *CTIA's* arguments seven weeks later, on June 6, 2003.

issues. *See* Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association, CC Docket No. 95-116, May 13, 2003 ("May 2003 Petition"). On May 22, the Commission issued a public notice setting June 13 as the deadline for comments, and June 24 as the deadline for reply comments.

In this petition, CTIA reiterated its request that the Commission clarify that number portability be implemented without requiring interconnection agreements between wireless and wireline carriers. CTIA also sought regulatory guidance on the appropriate length of the porting interval – the time it takes to port a customer's number from one carrier to another carrier. According to CTIA, "CMRS carriers [have] established a goal of processing ports within two and one half hours," while "ports between wireline carriers take nearly a week (as long as four business days to complete." May 2003 Petition at 7. CTIA asked the Commission to establish a uniform porting interval of two-and-a-half hours. *Id*. at 7, 15. Wireline carriers opposed this request, asserting that they would have to make substantial changes to their operations systems in order to reduce the porting interval to less than half a day. *See*, *e.g.*, Comments of SBC, filed June 13, at 8. ("SBC opposes any attempt by wireless carriers to impose

their shorter intervals on wireline carriers, who have already invested millions of dollars to provision number porting and have created OSS and operational methods and procedures based entirely upon the existing NANC provisioning flows.").[7]

3. The Commission's Response to the Petitions

As noted above, the Commission solicited public comment and compiled a record on the issues raised by CTIA in its January 2003 and May 2003 petitions. On July 3, the FCC's Wireless Telecommunications Bureau, acting on delegated authority, issued a letter providing guidance on several issues related to the implementation of wireless number portability raised by CTIA. *See* Letter from John B. Muleta, Chief of the Wireless Telecommunications Bureau, CC Dkt. 95-116, DA 03-2190 (July 3, 2003) ("Staff Ruling") (providing response to porting interval issue raised in May 2003 petition, and to separate LNP implementation issue raised by Verizon Wireless in *ex parte* letter dated May 20, 2003). Several wireless carriers immediately challenged this action by applying for Commission review of

[7] In the May 2003 Petition, CTIA also asked the Commission to address several other outstanding issues related to the implementation of number portability, in particular (1) an intercarrier compensation dispute between Sprint and BellSouth, *see*, *e.g.*, Comment Sought on Sprint Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic, CC Docket No. 01-92, *Public Notice*, 17 FCC Rcd 13,859 (2002); (2) BellSouth's claims with respect to number portability by wireless customers who are served by carriers that purchase Type 1 interconnection from LECs; and (3) several CMRS-specific issues. *See* May 2003 Petition at 23-33. CTIA has not raised any of these issues in its mandamus request.

this staff letter. Those carriers objected to the substantive holdings in the Staff Ruling, and also insist that the staff letter represents only nonbinding "guidance" without legal effect.[8]

On October 7, the Commission released an order addressing issues related to wireless-wireless transfer of numbers. *See Telephone Number Portability*, CC Docket No. 95-116, Memorandum Opinion and Order (Oct. 7, 2003) ("*October 2003 Order*"). Among other things, the Commission resolved several issues raised in CTIA's May 2003 Petition. For example, the Commission encouraged wireless carriers to complete "simple" ports to other wireless carriers within the industry-established two-and-a-half hour porting interval, and clarified that, although a wireless carrier may voluntarily negotiate an interconnection agreement with another wireless carrier, such an agreement is not required for wireless to wireless porting. *October 2003 Order* at paras. 25-26 (addressing porting interval for wireless-wireless ports), 19-24 (permitting but not requiring interconnection agreement between wireless carriers). The Commission also rejected the substantive claims made in the petition for review of the Staff Ruling.

[8] *But see* 47 U.S.C. § 155(c)(3) (action taken by staff on delegated authority "shall have same force and effect" as action by the Commission).

October 2003 Order at paras. 9, 10-18, 44 (denying petition for review filed by Wireless Petitioners).

ARGUMENT

CTIA filed its petition for a writ of mandamus in this Court on September 5. CTIA seeks an order compelling the agency to address the three intermodal number portability issues cited in its January 2003 and May 2003 petitions: the rate center issue, the interconnection issue, and the porting interval issue. Mandamus Petition at 7-13, 26-27. As we explain below, CTIA has not satisfied the standard for obtaining mandamus; in any event, the Commission is moving expeditiously to resolve the issues identified in the mandamus petition.

A. The Standard For Obtaining Mandamus.

As this Court has explained, "[m]andamus is an extraordinary remedy, warranted only when agency delay is egregious." *In re Monroe Communications Corp.,* 840 F.2d 942, 945 (D.C. Cir. 1988). *See also Kerr v. United States District Court*, 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L.Ed.2d 725 (1976) (mandamus is a drastic remedy appropriate only in "extraordinary situations"); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1361 (D.C.Cir.1985) ("[m]andamus is an extraordinary remedy [and] we require similarly extraordinary circumstances to be present before

we will interfere with an ongoing agency process."). Furthermore, this Court has recognized that an "agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing." *Cutler v. Hayes*, 818 F.2d 879, 896 n.150 (D.C. Cir. 1987).

In assessing whether an agency's delay in a particular case is so egregious as to warrant mandamus, this Court typically considers the factors set forth in *TRAC*, which provide "the hexagonal contours of a standard":

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'"

TRAC, 750 F.2d at 80 (citations omitted).

TRAC remains the governing authority with respect to the availability of mandamus in this Circuit. *See, e.g., In re United Mine Workers of America International Union*, 190 F.3d 545, 549 (D.C. Cir. 1999) ("[i]n

exercising our equitable powers under the All Writs Act, we are guided by the factors outlined in" *TRAC* "for assessing claims of agency delay"). This Court has made clear, however, that it need not apply the *TRAC* factors to analyze agency delay in cases where the agency has provided assurance that it is "moving expeditiously" to resolve the issues in question. *TRAC,* 750 F.2d at 72, 80.

B. The Commission Has Not Unduly Delayed Acting On The CTIA Petitions Pending At The Agency.

Application of the *TRAC* factors in this case demonstrates that petitioners have not made out a case of unreasonable delay. Because (1) the FCC is not obligated to resolve the CTIA petitions by a specific statutory deadline; (2) the issues raised in the petitions do not have to be resolved in order for wireless number portability to begin on November 24, 2003; (3) the agency's resources are currently pressed by a number of equally important issues in addition to other concerns pertaining to the implementation of wireless LNP; and (4) the CTIA petitions have been pending at the agency for less than a year, petitioners have not established that the FCC has "unreasonabl[y] delay[ed]" acting on the pending CTIA petitions. We elaborate below.

First, although the deadline for implementing wireless number portability is a month away, the FCC is under no obligation to resolve the

pending petitions by a specific statutory deadline. CTIA has not established that "Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed" on the implementation issues pertaining to wireless number portability. *See TRAC*, 750 F.2d at 80.

Second, it is not necessary for the Commission to resolve the three issues raised by CTIA in its mandamus petition before November 24, in order for wireless number portability to go forward. Resolution of the issues raised by CTIA – the size of the service area, the need for an interconnection agreement, and the length of the porting interval – may facilitate implementation of wireless LNP. But CTIA has not established that a failure to resolve these three issues before November 24 would prevent or delay the implementation of wireless number portability.

For example, the dispute over the porting interval does not present a significant obstacle for the implementation of wireless LNP. CTIA asserts that the FCC's failure to act on the January and May 2003 petitions implicates public safety. Mandamus Petition at 18-21. Yet claims about the risks posed to E911 service by the "mixed service period" – when "a customer essentially has service with two carriers with the same phone number until the porting process is complete"[9] – were minimized by NANC

[9] *See* Staff Ruling at 2.

Chair John Hoffman. *See* Letter from John R. Hoffman to Dorothy Atwood, *Re: 3rd Report on Wireless/Wireline Integration from the Local Number Portability Administration (LNPA) Working Group*, November 29, 2000, at 2 (describing "mixed service period," and noting that the National Emergency Number Association "agreed that the probability that this situation [E911 service failure] might occur was very low and did not see this as a 'show stopper' to the proposed process."). The Wireless Telecommunications Bureau reasonably made a similar evaluation of the concerns raised with respect to E911 service during a period of mixed service in its July 2003 letter. *See* Staff Ruling at 2 ("the Commission's E911 rules do not prohibit the industry from adopting a 'mixed service' approach"); *see also* Mandamus Petition at 19 (noting that mixed service period has been "deemed permissible" by NANC). CTIA's assertion that its mandamus request implicates public safety concerns is unavailing, and should not be credited when evaluating its claim of undue delay.

Furthermore, CTIA's claimed injury is overstated because only intermodal number porting – between wireline and wireless carriers – is implicated by the issues raised in the mandamus petition. The rate center issue, for example, is only relevant to the size of the service area in which intermodal porting must occur. Similarly, the interconnection issue concerns

only intermodal portability and does not affect number portability between wireless carriers. The Commission's order in October 2003 resolved the interconnection issue with respect to number portability between wireless carriers, and a number of other issues raised in the May 2003 Petition with respect to intramodal number portability. Therefore, even assuming that the issues raised by CTIA's mandamus petition have not been resolved by November 24, that would not prevent implementation of wireless LNP from going forward.

Third, CTIA's mandamus petition arrives during one of the most pressing periods in recent agency history. During the same time that the January and May 2003 petitions have been pending, the Commission has had to address two fundamental policy decisions: local competition and media ownership. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 03-36 (released Aug. 21, 2003) ("Triennial Review Order") (revision of rules governing the unbundling obligations of incumbent local exchange carriers ("ILECs") under 47 U.S.C. 251(c)(3)); *2002 Biennial Regulatory Review*, 68 Fed. Reg. 46,286 (Aug. 5, 2003) (modification of media ownership rules). The Commission continues to address both issues since petitions for reconsideration of each order are pending at the agency. Furthermore, the Commission recently was required

to act promptly in order to ensure the establishment and operation of the national do-not-call registry, which resulted from efforts by the FCC and Federal Trade Commission.[10]

Finally, the wireless industry's steadfast resistance to adopting and implementing number portability has not made it any easier for the Commission to provide guidance. The FCC has had to devote considerable resources to responding to the wireless industry's repeated efforts attempting to block or delay number portability – resources that otherwise could have been deployed to address the implementation issues on which the wireless industry now seeks guidance. Last month, for example, the FCC was required to respond to another mandamus petition seeking a stay of the LNP implementation deadline until yet another challenge to the agency's authority to require wireless number portability is resolved. *See* Opposition of the FCC, filed on September 23, 2003, *In re AT&T Wireless Services, Inc.*, No. 03-1259 (D.C. Cir.). Accordingly, when considered in light of all of the FCC's "activities of a higher or competing priority," *see TRAC*, 750 F.2d at 80, CTIA has not established entitlement to the extraordinary writ. *See also Cutler v. Hayes*, 818 F.2d 879, 896 n. 150 (D.C. Cir. 1987)

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[10] *See*, *e.g.*, Statement of FCC Chairman Michael Powell on 10th Circuit Court of Appeals Lifting Stay of Do-Not Call Registry (released Oct. 7, 2003).The statement is available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239676A1.pdf.

("agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing").

Fourth and finally, CTIA's petitions have been pending at the FCC for less than a year. Indeed, the May 2003 Petition has been pending for less than half a year. CTIA has not cited a single case in which this Court has held that, in the absence of a statutory deadline, an agency's failure to act on a matter pending at the agency for less than a year constitutes undue delay. *Cf*. Mandamus Petition at 16 (collecting cases). The fact that the North American Numbering Council ("NANC") issued reports from 1998 through 2000 on the issues raised by CTIA does not change the analysis. The relevant period for evaluating any delay did not start until CTIA filed its petitions in January and May of this year.

Analyzing the factors set out in *TRAC* under a "rule of reason," CTIA has not established that is entitled to the extraordinary writ of mandamus in order to remedy "egregious" undue delay by the FCC for not yet resolving the January 2003 and May 2003 petitions.

C. The Commission is Moving Expeditiously to Address the Issues Raised by CTIA in its Petitions Pending at the Agency.

This Court made clear in the *TRAC* case itself that it need not consider the *TRAC* factors in cases where the agency has provided assurance that it is "moving expeditiously" to resolve the issues in question. *TRAC,* 750 F.2d at

72, 80. FCC staff is finalizing a draft order that is to be placed on circulation before the Commission shortly. The FCC thus is "moving expeditiously" to resolve the issues cited by CTIA in its mandamus request. That fact alone warrants denial of CTIA's petition.

CONCLUSION

For the foregoing reasons, CTIA's petition for mandamus should be denied.

Respectfully submitted,

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