

ALERT

NTIA Petition for Rulemaking on Mobile Device Unlocking

September 24, 2013

On September 17, 2013, the National Telecommunications and Information Administration (NTIA), citing the need for greater competition and consumer choice in the marketplace for wireless services, petitioned the Federal Communications Commission (Commission) to commence a rulemaking to add a new section to Part 20 of the Commission's rules. The new rule would require a provider of certain commercial mobile services, upon request, to unlock any wireless device furnished by that provider, so that the requesting person may use that device in conjunction with another lawfully obtained commercial mobile service.

NTIA's proposed rule specifically states that the unlocking must be furnished without fee. The customer making the unlocking request must be in good standing under an existing service agreement with the provider. The rule would apply to a wide range of devices, including smartphones and tablets. In addition, a provider of commercial mobile radio service or commercial mobile data service could comply with the rule by providing authorization and sufficient information, software, or other tools to another provider of commercial mobile radio service or commercial mobile data service, so that the other provider can perform the unlocking sought by the customer.

NTIA states that a broad unlocking rule would enhance user choice within service areas and allow consumers to move more freely among providers. Provided that a consumer continues to adhere to any existing service agreement – or pays the specified fees or penalties for prematurely terminating that agreement – the unlocking rule's benefit for consumers would not unduly burden the original providers. The proposed rule would also aid consumers who travel

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outside their usual service areas. Additionally, the proposed rule would permit, under certain conditions, persons other than existing or former subscribers to request a covered provider to unlock a wireless device. As long as the original customer has complied with any contractual service obligations, and the mobile service provider does not have reasonable evidence that the wireless device was obtained unlawfully, the provider would have the obligation to unlock the device.

NTIA urges the Commission to seek comment on related issues, including:

- The period of time within which a mobile service provider must act on a customer's request to unlock a device.
- Whether it may be appropriate for the Commission to exempt devices originally sold years before the date of its petition, because mobile service providers may not have foreseen a regulatory need to retain unlocking codes or mechanisms for very old devices (although NTIA believes that consumers should be able to have older wireless devices unlocked).
- Whether consumers would benefit from a requirement that a mobile service provider to which a consumer seeks to switch service be able to obtain the needed unlocking codes and authorization from the prior provider.
- Whether consumers would benefit from a requirement that service providers post or make available their unlocking policies in a particular manner or location, and what such a requirement should entail.
- Whether there are any special considerations or protections appropriate for members of the military or Foreign Service and their families.
- Whether any particular guidance is needed to guard against the theft and later use or resale of wireless devices.
- Whether exclusive dealing arrangements between device manufacturers and service providers (which may be enforced by device locking) warrant any special consideration.
- Whether the market for devices sold for use with prepaid service warrants any special consideration (although NTIA supports the unlocking of such devices).

NTIA's petition claims that adoption of the proposed rule would be in the public interest. First, given the fact that many wireless devices are or will be capable of functioning on networks other than the ones for which they are originally sold, the proposed rule would benefit consumers by enabling them to use their devices on any technically compatible wireless networks. Second, locked wireless devices hinder the market for used or previously deactivated devices. Third, mobile service operators will still be able to bundle consumer equipment with mobile services – NTIA does not intend to disturb this business model by its proposed rule.

NTIA concludes that Title III of the Telecommunications Act of 1934 provides the Commission the authority to adopt a wireless device unlocking rule. In the 700 MHz proceeding, the Commission imposed upon firms as a condition of their C block licenses a prohibition against locking handsets, concluding that doing so "falls squarely" within the Commission's authority. In addition to the authority asserted by the Commission in the 700 MHz proceeding, NTIA states that section 316 of the Act empowers the Commission to modify any radio

license if the public interest would be served. Further, NTIA notes that none of the constraints that courts have recognized on the Commission's Title III powers would bar the Commission from issuing the proposed unlocking rule.