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95-116

Building The Wireless Future

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April 1, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, Room 814
Washington, D.C. 20554

Dear Chairman Kennard:

The Commission is currently reviewing CTIA's Petition for Forbearance from CMRS number portability. In light of the pending Petition, I would like to take this opportunity to provide you with a brief review of the wireless industry's position on CMRS number portability.

When the Commission initiated its proceeding on number portability in 1995, the CMRS industry looked very different from today's competitive marketplace. For instance, in July 1995, when the Commission issued its Notice of Proposed Rulemaking on number portability, none of the new wireless carriers (*i.e.*, PCS carriers) had turned on their systems. In effect, the Commission was seeking comment from a nascent industry that had not yet experienced the challenges of competition. Now, three years later, more than 83 million potential customers have the ability to choose among four or more providers of wireless service.

The formal record in the number portability docket reflects the significant difference between "theory" and "practice." In the original phase of the FCC's proceeding on number portability, approximately eight wireless entities supported the implementation of a national wireless number portability mandate. These entities consisted mainly of potential and actual PCS licensees. Having experienced a tremendous amount of growth in wireless competition over the last three years, the needs and priorities of the wireless industry have changed. Carriers now have the benefit of experience in building out their systems and deploying their networks. The comments submitted in response to CTIA's Petition indicate that carriers are viewing the importance of CMRS number portability in a different light. Specifically, three of the wireless entities that supported CMRS portability in the original proceeding have changed their positions, given the realities of the marketplace. Of the original wireless entities that supported CMRS number portability, only Nextel continues to affirmatively support mandatory CMRS portability.

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CTIA was directed by a unanimous vote of its Board of Directors, which represents both cellular and broadband PCS carriers, to file a Petition for Forbearance of the CMRS number portability requirements. Significantly, the PCS carriers, which are the intended beneficiaries of the number portability rules, are now supporting the requested forbearance. As you will note in the record of this proceeding and in CTIA's most recent comments in the proceeding (*see* attached), competition in the CMRS industry is being fostered today through increased network coverage and aggressive pricing of services, and the availability of CMRS service provider number portability is not as critical to a CMRS carrier's success as is its network buildout and rate structure. Moreover, a recent trade press report stated that "wireless number portability will cost wireless carriers more than any other single issue." Given these considerations, the Commission should forbear from enforcing the June 30, 1999 implementation deadline for CMRS number portability at least until the five-year buildout period for PCS carriers has expired.

The Commission also should be aware that CTIA's request for forbearance from CMRS number portability will not affect the implementation of number portability for the wireline networks. CMRS carriers are committed to making the necessary network changes required to support wireline number portability as required by the Commission's mandate.

Sincerely,

Brian

Brian F. Fontes

Enclosure

CTIA
STAMP & RETURN

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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

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REPLY COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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March 10, 1998

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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

REPLY COMMENTS OF
THE CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA")[1] submits its Reply Comments on its Petition for Forbearance from CMRS number portability obligations in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

The Telecommunications Act of 1996 ("1996 Act") requires that the Commission forbear from enforcing any of its regulations, provided that the record demonstrates that enforcement is not necessary to protect carriers or consumers, and furthers the public interest.[2] The CTIA Petition for Forbearance satisfies the Congressionally mandated three-prong

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

[2] 47 U.S.C. § 160.

test for forbearance, and provides the Commission with an opportunity to meet the demands of a fluid, competitive marketplace by removing the burdensome obligations of CMRS service provider number portability.[3] As noted by Congress, "[g]iven that the purpose of this [1996 Act] legislation is to shift monopoly markets to competition as quickly as possible, the Committee anticipates this forbearance authority will be a useful tool in ending unnecessary regulation."[4] Moreover, Congress solely mandated number portability for local exchange carriers, providing the Commission with the discretionary authority to implement or forbear from wireless number portability.[5] By granting CTIA's Petition for Forbearance, the Commission will further the goals of the 1996 Act by repudiating unnecessary regulation and fostering competition among CMRS providers. Any other conclusion will likely stifle future competition with little attendant benefit to consumers.

The comments filed in this proceeding overwhelmingly support CTIA's Petition for Forbearance. Commenters demonstrate that the

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[3] Unlike other forbearance proceedings, the CTIA Petition for Forbearance does not require the Commission to speculate as to the effect forbearance will have on the competitive forces of the market -- existing competition will continue to flourish. On the other hand, enforcing these provisions will likely result in unintended consequences, including a reduction in system buildout and higher consumer prices for CMRS service.

[4] H.R. Rep. No. 104-204, pt. 1, at 89 (1995); see also MCI Comments at 8 ("The objective of forbearance is to eliminate regulation where competitive market forces can substitute for regulatory requirements.")

[5] See infra p. 8-9.

significant level of competition in the CMRS market warrants forbearance from number portability obligations. The Commission should give considerable weight to the fact that all commenting facilities-based PCS and cellular licensees favor forbearance. In other words, support for CTIA's Petition for Forbearance not only includes incumbent cellular providers, but also the new entrant carriers that the Commission had hoped to benefit through its number portability policies[6] as well as rural carriers who will be saddled with unjustifiable financial obligations.[7] In fact, the record demonstrates unequivocally that the Commission's earlier prediction that "the inability of customers to keep their telephone numbers when switching carriers . . . hinders the successful entrance of new service providers into the cellular, broadband PCS, and SMR markets" is inconsistent with existing marketplace realities.[8] While number portability may prove to be an important service to remove barriers to competition in the wireline industry, the presence of robust competition in the CMRS

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6 The Commission noted in its 1996 decision that "[m]ost PCS providers maintain that number portability is important in the CMRS industry . . . PCIA supports long-term number portability solutions for broadband PCS systems when they are technically feasible . . ." Telephone Number Portability, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352 at ¶ 144 (1996) ("First Report and Order"). Today, however, PCS carriers along with PCIA support CTIA's Petition for Forbearance because they recognize that competition in the CMRS marketplace has not evolved slowly under the wireline monopoly model, but rather has flourished with few barriers to competition.

7 See The Rural Telecommunications Group Comments at 3-4.

8 First Report and Order at ¶ 157.

market is proof that the absence of number portability is not creating barriers to wireless competition.

Those few commenters opposing CTIA's Petition merely rely upon previous Commission statements made in the First Report and Order without further support.[9] No commenter has challenged CTIA's observation that the level of competition in the CMRS market is rising and that dramatically changed circumstances exist in the marketplace. Moreover, commenters have not disputed that number portability will be costly and unnecessarily burdensome.[10] While simply believing that number portability implementation is worth the effort, these carriers who have no wireless facilities would not have to incur the expense of implementing wireless number portability, and therefore do not feel encumbered by any cost/benefit analysis which would reveal

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9 See, e.g., Nextel Comments at 5 ("The Commission has previously concluded that LNP is in the public interest.") (emphasis deleted); The Telecommunications Resellers Association ("TRA") Comments at 3-5.

10 TRA's assertion that CMRS carriers have remained profitable in spite of increased competition and auctions does not justify imposing onerous regulatory obligations, whose burdens outweigh their competitive benefit, nor does it refute CTIA's contention that every carrier has a finite amount of resources available to it. See TRA Comments at 10. See also Nextel Comments at 4 (arguing that all competitive carriers will find the funds to continue to expand coverage and to reduce prices, while also implementing service provider number portability). The notion that carriers in a competitive market have unlimited resources to devote to any marginally competitive factor is baseless. Moreover, it directly contradicts Commission statements that "every dollar we take out of carriers' hands is a dollar they cannot use to enter new markets, bring new innovations to market and otherwise expand and energize competition." Commissioner Michael K. Powell, *Lessons from the Underground Railroad*, Address at the Douglass Policy Institute (February 17, 1998).

only marginal benefit at exceptional expense.[11] The Commission, however, does not have this option. As it reviews the facts in the current record and applies them to the Section 10 forbearance analysis, there can be no doubt that forbearance is warranted in this case.[12]

II. THE EXCEPTIONAL LEVEL OF COMPETITION IN THE CMRS INDUSTRY DEMONSTRATES THAT NUMBER PORTABILITY IS NOT NEEDED TO PROTECT CONSUMERS' INTERESTS.

The record before the Commission in this proceeding provides ample evidence that the CMRS industry, without number portability, offers one of the most competitive telecommunications services in the United States. The wireless industry, as Senator McCain proclaimed at the CTIA Wireless '98 Convention, is a "shining exception" in this regard.[13] In addition to the information presented by CTIA in its Petition,[14] many commenters provide the Commission with further evidentiary support that the CMRS industry is competitive and that new

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11 This enables those resellers who oppose forbearance to recommend regulatory decisions without bothering to undertake any cost/benefit analysis. Their position, if adopted, would have the effect, perhaps intended, of raising their rivals' cost of operation in an area where the expenditures would produce a nearterm deadweight loss. Acceptance of their position without sufficient analytical support would be injurious to all wireless subscribers.

12 See PrimeCo Personal Communications ("PrimeCo") Comments at 11-15 ("[T]he other speculative benefits of [number portability] cited by the Commission clearly do not outweigh the tangible high costs associated with its implementation.")

13 *Wireless '98 Opening Session Features Survey Results; Remarks By McCain, Kennard*, Mobile Phone News, March 2, 1998, at 3.

14 See CTIA Petition for Forbearance at 5-6, n. 14.

entrants are quickly gaining market share -- a goal the Commission had sought to achieve by imposing number portability requirements.

As an illustration, Bell Atlantic Mobile reports in its Comments that several investment companies have concluded that new PCS entrants have captured significant market share both in the form of new wireless subscribers and former cellular subscribers.[15] Furthermore, PrimeCo notes a report from Anderson Consulting which concludes that "wireless customers churn at annual rates of 30% . . . and that such rates may increase beyond 40% in the future."[16] Southwestern Bell Mobile Systems has also furnished additional examples supporting the proposition that the CMRS market is competitive and that PCS providers are succeeding in the mobile arena.[17] Moreover, Bell Atlantic Mobile's recent announcement that it is lowering prices for airtime, reducing roaming charges, offering flat rate wireless-to-wireless pricing, and leasing new telephones provides further evidence of competition.[18] Wireless carriers are aggressively competing, offering consumers lower prices, improved service offerings, and the freedom to switch carriers.

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15 Bell Atlantic Mobile Comments at 12.

16 PrimeCo Comments at 9-10, n.25 (citing News Release, Loss of Wireless Customers Reaching Epidemic Proportions, According to Andersen Consulting Study, Andersen Consulting, August 18, 1997, available at http://www.ac.com).

17 Southwestern Bell Mobile Systems and Pacific Bell Mobile Services at 3-4, 7.

18 *Bell Atlantic Takes "Aggressive" Step In Cutting Cellular Rates 15%*, Communications Daily, March 3, 1998.

Opponents of CTIA's Petition, however, refuse to recognize existing marketplace realities, choosing instead to rely on unsubstantiated assertions.[19] For instance, MCI contends "[i]f CMRS providers do not deploy number portability, wireless customers will be harmed by being unable, without changing phone numbers, to freely change wireless service providers."[20] The facts, however, prove otherwise.[21] Consumers are freely changing wireless service providers.[22] Subscribers have demonstrated that they do not consider changing their telephone numbers to be an obstacle to switching service providers. In the wireless

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19 See, e.g., WorldCom Comments at 6 ("The obvious fact that there are competitors in the wireless arena does not equate to robust competition in the wireless arena.") This unsupported declaration is contrary to the facts. Consumers are switching wireless carriers regularly and easily. While WorldCom may not believe that the annual churn rate in the industry is a sufficient demonstration of consumer choice, it has not offered an alternate method for measuring competition. In fact, TRA agrees that "'churn' is 'competition'" and that the CMRS market can be characterized by "'the fury of churn' and the 'fierce battle to gain and retain elusive customers.'" TRA Comments at 11.

20 MCI comments at 6.

21 MCI also ignores marketplace realities when it states that "the same conditions existed when the Commission decided [in 1996] that wireless carriers should provide number portability . . ." MCI Comments at 3; see also Nextel Comments at 3 ("Nothing in the CMRS industry has changed that would justify a departure from those conclusions in the [First Report and Order].") When the Commission decided to impose number portability as a means of lowering the barriers to competition, PCS service was in its infancy, providing service in only a handful of markets. Today, most large markets have between four and seven CMRS providers vigorously competing for new customers.

22 The churn rate among interexchange carriers, long considered a competitive market, is comparable to that of the CMRS industry. Thus, claims by IXCs that the CMRS industry lacks competition appear unfounded. See Liza Henderson, *Race to the Home*, Telephony, October 27, 1997.

industry, consumers evidently place less value on maintaining their telephone numbers and more value on increased coverage and price competition.[23] CMRS number portability is a costly mandate in search of a marketplace deficiency that does not exist in today's wireless industry.[24]

III. UNDER THE SECTION 10 FORBEARANCE TEST, THE COMMISSION MUST FORBEAR FROM ENFORCING ITS CMRS SERVICE PROVIDER NUMBER PORTABILITY OBLIGATIONS.

Congress expressly considered the issue of service provider number portability when it amended the Communications Act "to

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23 See PrimeCo Comments at 10 ("[A]s evidenced by a survey of PrimeCo customers undertaken during the fourth quarter of 1997 . . . [consumers] are far more concerned about coverage issues and price than about their ability to retain their phone numbers."); Bell Atlantic Mobile Comments at 13 ("A survey of 1,000 wireless customers revealed that price, coverage and reliability of service were the key competitive factors in decisions as to which carrier to use. The need to obtain a new phone number in changing carriers was not mentioned as a factor. (citing Peter D. Hart Research Associates, "Competition in the Wireless Market," February 1997.))

24 TRA claims that Chairman Kennard's "Consumer Bill of Rights" renders number portability a goal in and of itself. TRA Comments at 8. A complete examination of the Chairman's statements demonstrates that he was referring to local exchange carriers and not necessarily to the CMRS industry. In his statement before a Congressional Subcommittee, Chairman Kennard offered to Congress his "Bill of Rights" and stated that "BOCs (and all local carriers) must provide for number portability. . . . If my grandmother had to change the phone number she has had for the past 50 years in order to change service providers, that would be a major disincentive for her to switch phone companies." Chairman William E. Kennard, *The Telecommunications Act of 1996 -- Moving Toward Competition Under Section 271*, Statement Before the Subcommittee on Antitrust, Business Rights, and Competition Committee on the Judiciary (March 4, 1998). As such, Chairman Kennard simply states what Section 251 of the 1996 Act already requires -- LEC number portability. As noted below, Congress did not mandate number portability for CMRS.

provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . ."[25] In Section 251(b)(2), Congress mandated that only local exchange carriers must provide number portability to the extent that it is technically feasible.[26] Though WorldCom may believe that this requirement somehow imposes a statutory obligation upon CMRS carriers to provide number portability, the Commission has already stated otherwise.[27] Specifically, it concluded that "[t]he statute . . . explicitly excludes commercial mobile service providers from the definition of local exchange carrier, and therefore from the section 251(b) obligation to provide number portability."[28] Thus, in a statute intended to foster competition, Congress expressly considered the importance of number portability, imposed the obligation on local exchange carriers, and refused to require CMRS number portability. In

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25 S. Conf. Rep. No. 104-230, at 1 (1996).

26 47 U.S.C. § 251(b)(2). See AirTouch Comments at 8-9; PrimeCo Comments at 3-5.

27 WorldCom Comments at 3 ("The language of the statute makes clear that all providers of telecommunications services . . . must themselves implement LNP.")

28 First Report and Order at ¶ 152 (emphasis added); see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499 at ¶ 1004 (1996) ("We are not persuaded by those arguing that CMRS providers should be treated as LECs, and decline at this time to treat CMRS providers as LECs.")

other words, Congress conducted its own analysis and rejected the notion that the absence of number portability serves as a barrier to CMRS competition.

A. Enforcement Of CMRS Service Provider Number Portability Is Not Necessary To Ensure That CMRS Carrier Rates And Practices Are Just And Reasonable And Reasonably Nondiscriminatory.

Forbearance from number portability requirements for CMRS carriers is consistent with the first part of the Section 10 forbearance test.[29] As shown by the record in this proceeding and in CTIA's Petition for Forbearance, the CMRS market is operating in a competitive environment, with no one carrier exercising substantial monopoly power.[30] This necessarily results in CMRS carriers being barred from engaging in unjust or unreasonable practices as a matter of course.[31]

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29 47 U.S.C. § 160(a)(1) requires that "enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."

30 See CTIA Petition for Forbearance at 7-8 (Dec. 16, 1997) (citing Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Second Report*, 12 FCC Rcd 11266, 11276 (1997)).

31 See Alexander C. Larson, *An Economic Guide to Competitive Standards in Telecommunications Regulation*, 1 CommLaw Conspectus 31, 34, 43 (1993) ("Central to the deregulation of any industry are three economic maxims. . . . [T]he second maxim . . . is that regulation should only be applied to services for which there is 'market power.'" The analysis for deregulation and competition further notes that, "the greater the number of substitute services, the greater the supply elasticity in the market, and the lower the market power of a given firm operating in that market. Thus, it is wiser to rely on determinants such as the existence of competitors, and hence of substitutes, if one

Indeed, CMRS market conditions have proven that number portability is not a prerequisite to competition. At present, consumers of CMRS services -- including those served by incumbents and new entrants alike -- generally have no vested interest in their wireless telephone numbers. As explained further below, their cost to switch among wireless service providers is low. In light of this situation, CMRS carriers do not have market power resulting from their inability to port a particular subscriber's telephone number. The empirical evidence demonstrates that CMRS numbers have little or no significance as barriers to competition; therefore, number portability obligations are unnecessary to protect against unjust, unreasonable, or discriminatory practices, especially when the high cost associated with implementation is considered.[32]

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is deriving a practical rule that can actually be implemented in an industry as complicated as telecommunications.") The purpose of the Commission's forbearance authority is to deregulate those aspects of the telecommunications industry where competitive forces are in operation. Forbearing from enforcing CMRS service provider number portability satisfies this criteria.

32 Should the Commission ever conclude that the absence of number portability may allow carriers to endeavor in unjust, unreasonable, or discriminatory conduct, it may still rely upon its residual authority under Sections 201 and 202, 47 U.S.C. §§ 201, 202. Similarly, in its decision to forbear from the prior approval requirements for non-substantial transfers of control, the Commission recognized that not only is the first prong not entirely applicable, but its residual authority under these other Sections of the Communications Act serve to adequately protect the pertinent interests. See Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, FCC 98-18 (Rel. February 4, 1998) at ¶ 12, n.38 ("Given the existence of other mechanisms to deal with these [Section

As a fundamental matter, the presence of competition within the CMRS market should inform the Commission's assessment of the efficacy of number portability regulations. No one can deny that competition is presently flourishing in the CMRS market, notwithstanding the lack of number portability. Nor can claims be sustained that new entrants have been thwarted from successfully entering the market and providing viable services and competition due to the lack of number portability. The presence of significant competition within the CMRS market means that all carriers, incumbents and new entrants alike, have equal footing when managing their customers' use of numbers. There is simply no meaningful advantage imparted by a carrier's exclusive control over a customer's telephone numbers. This compels forbearance under the first prong of the forbearance test.

B. Enforcement of CMRS Service Provider Number Portability Is Not Necessary To Protect Consumers.

The ease with which consumers of mobile wireless services are able to switch between CMRS carriers is *prima facie* evidence that number portability is not required to protect the interests

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10(a)] issues, and the fact that we have had no need to consider them in the context of *pro forma* transactions, we conclude that the first prong of the forbearance standard is met. . . . For example, pursuant to section 208 of the Act, the Commission must investigate and act on a complaint by any party or entity concerning a common carrier's charges, classifications, regulations, or practices."); see also Bell Atlantic Mobile Comments at 5-6 (citing Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, at ¶ 176 (1994) ("Compliance with Sections 201, 202, and 208 is sufficient to protect consumers [from the absence of CMRS tariffs]. In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices . . .")

of consumers. To the contrary, imposition of CMRS number portability obligations by the Commission will burden the vast majority of consumers because of the costs associated with number portability. Thus, forbearance from enforcing CMRS number portability obligations is required not only because there will be no harm to consumers, but because imposition of number portability may impair the development of the competitive marketplace, thereby injuring consumers.

The level of competition and the manner in which consumers easily change carriers is illustrative of the fact that switching costs between wireless carriers are not significant. In other words, subscribers are not locked-in to service with any one carrier despite the lack of number portability but rather are free to migrate between carriers for service.[33] In an environment of unfettered movement between competitors, the Commission should not supplant these market conditions with predictive conclusions as to what might foster further competition.[34] The marginal benefits which may be realized by such a policy are outweighed by the significant costs of

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[33] It should be clear that if high switching costs existed in the CMRS industry, the new entrant PCS licensees would be demanding number portability rather than seeking forbearance from its enforcement.

[34] Indeed, in the 1996 First Report and Order, prior to the widespread entry of PCS service providers into the CMRS market, the Commission hypothesized that CMRS number portability would further competition. Today, the record demonstrates that price and coverage are the primary factors driving competition in the wireless industry. See supra n. 23.

implementation and by the obvious potential for injury to the marketplace and to consumers.

The switching costs consumers face when choosing between competitors are important factors in assessing market power and possible barriers to competition. In Eastman Kodak Co. v. Image Technical Services, Inc., the Supreme Court recognized that "[i]f the cost of switching is high, consumers who already have purchased the equipment and are thus 'locked-in,' will tolerate some level of service-price increases before changing equipment brands. Under this scenario, a seller profitably could maintain supracompetitive prices . . . if the switching costs were high relative to the increase in service prices."[35] Although the Commission had anticipated displacing this type of conduct through its number portability rules (i.e., carriers locking-in customers who will tolerate higher prices rather than switch service providers and their telephone numbers in the process), the Commission's reasoning is inapplicable because the CMRS market has demonstrated that no carrier can maintain non-competitive prices by locking-in customers to a particular telephone number.

The absence of number portability does not establish a lock-in effect to any one carrier because consumers do not value maintaining their numbers when switching among CMRS competitors. In another case measuring the implications of switching costs on market power, Judge Easterbrook dismissed the defendant's

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[35] Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 476 (1992).

antitrust counterclaim after determining that switching costs between competitors were insignificant.[36] The court concluded that "Uniq has not supplied such evidence . . . suggest[ing] that DEC was able to raise prices, or exploit any customer. . . . And there is a reason the record lacks such evidence: DEC's policy does not enable it to exploit any customer locked-in to its equipment."[37] Similarly, wireless carriers cannot exploit consumers by locking them into a particular service provider.[38] If a carrier attempted to raise its prices above market levels, consumers have the demonstrated ability to switch to another service provider. Thus, Commission action to enforce service provider number portability obligations on CMRS carriers is not necessary to protect consumers.

C. Forbearance From Enforcing CMRS Service Provider Number Portability Obligations Is In The Public Interest.

Under Sections 10(a)(3) and 10(b), the Commission must determine whether forbearance is in the public interest and in so doing must consider whether forbearance will promote competitive market conditions.[39] Forbearance in this instance would meet this standard because it would eliminate the possibility that enforcement of CMRS service provider number portability will

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36 Digital Equip. Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756 (7th Cir. 1996).

37 Id. at 763.

38 Indeed, the widespread practice of deeply discounting CMRS handsets further lowers the CMRS customer's costs of switching carriers.

39 47 U.S.C. §§ 160(a)(3), 160(b).

dampen future competition. Furthermore, the Commission has determined "that any burdens and costs to carriers, as well as the impact on competition, are all appropriately considered" when meeting the third prong of Section 10.[40] The record in this matter establishes that the costs associated with implementing the Commission's service provider number portability regulations are burdensome and will not significantly improve competition.[41] This is especially true for rural carriers who, even though they are outside of the 100 largest MSAs, will have to modify their networks to support roaming.[42]

In its Petition for Forbearance, CTIA noted that requiring CMRS providers to divert resources from known competitive factors such as price competition and increased coverage areas would reduce competition without providing commensurate benefits to the public.[43] Other commenters have offered further evidence of

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40 Bell Atlantic Mobile Comments at 8 (citation omitted).

41 In addition to its Petition for Forbearance, CTIA furnished the Commission with further details regarding the financial burdens and technical difficulties of implementing CMRS number portability in its petition for extension of the number portability implementation deadlines. Telephone Number Portability, CC Docket No. 95-116, *Petition for Extension of Implementation Deadlines of the Cellular Telecommunications Industry Association* (filed November 24, 1997); *Wireless Telecommunications Bureau Seeks Comment on CTIA Petition for Waiver to Extend the Implementation Deadlines of Wireless Number Portability*, DA 97-2579 (released December 9, 1997)

42 See CTIA Petition for Extension of Implementation Deadlines at 6-7.

43 CTIA Petition for Forbearance at 4-5; see also AirTouch Comments at 4 ("consumers who are considering purchasing broadband CMRS service consider the following attributes to be most important when selecting a carrier: 1) Reliable Call Transmission; 2) Price and Pricing Flexibility; 3) Clear

this. PrimeCo confirms that "[t]he intense competition between PCS and incumbent cellular providers necessitates that PCS providers strongly focus on their core business - meeting the mobile wireless demands of their customers, and competing with incumbent cellular providers as they upgrade their networks and lower prices."[44] Moreover, the increased carrier costs resulting from the implementation of wireless number portability will lead to higher CMRS charges, further delaying the day when "CMRS carriers are likely to change their pricing structures to resemble more closely wireline pricing structures."[45]

CMRS service provider number portability is not only an unnecessary burden on carriers operating in highly competitive wireless markets, it is also an unreasonable requirement for smaller and rural carriers. The Rural Telecommunications Group requests that the Commission grant the CTIA Petition, in part because

> the lack of designated entity preferences for rural telephone companies and the adoption of large geographic license areas has made the provision of spectrum-based CMRS services by rural carriers an uphill financial battle. Now that many rural carriers, including RTG members, have made the tremendous resource commitments to bring CMRS services to underserved parts of the country, requiring them to divert those same resources to the implementation of number portability would delay, and possibly halt, the progress these entities are making in the delivery of new services to rural areas.[46]

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call quality; 4) Good coverage of calling area; 5) Ability to Resolve Customer Problems").

44 PrimeCo Comments at 14-15.

45 First Report and Order at ¶ 161.

46 The Rural Telecommunications Group Comments at 3; see also Bell Atlantic Mobile Comments at 19 ("[C]ompetition could also be hindered as carriers with smaller service areas (and

Thus, CMRS service provider number portability will not only stem competition among carriers in the top 100 MSAs, but also threatens the provision of mobile wireless service in many parts of the nation.

D. The Commission Should Not Rely On The Unsubstantiated Claims Of The Resellers.

Rather than recognize the forward-looking nature of a forbearance proceeding to examine market conditions, TRA has instead chosen to rely on the Commission's previous conclusions based on different market presumptions.[47] Though TRA argues that number portability is critical for wireless resale, it never explains why CMRS number portability is more important for a reseller than for a facilities based carrier.[48] On the whole,

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the concomitant need to rely on roaming) are forced to incur the costs of implementing portability.") These costs also affect rural consumers disproportionately because the carriers have a smaller base of subscribers from whom they can recover their costs.

47 See TRA Comments at 9 ("But the Commission has already found that implementation of number portability -- including its implementation by wireless carriers -- would generate tremendous public interest benefits.")

48 MCI and WorldCom are also imposing the wireline interexchange model -- where number portability is an integral requirement for resellers -- on their analysis of wireless competition. However, this assumption is not applicable to the CMRS industry where other variables, such as the technology employed by the licensed carrier, impact a reseller's decision to change service providers. Given the multiplicity of digital air interfaces, a reseller of CMRS service must provide its customers with a new handset whenever it obtains service from a carrier with a different technology. Certainly, the Commission's decision to refrain from adopting one technical standard, thereby fostering a market based solution (which require consumers to switch handsets), cannot be criticized as creating lasting entry barriers. Nor should this temporary market phenomenon be relied upon as a basis for adopting number portability.

resale offers only limited opportunities for social gains because it does not involve expanding capacity. As the United States General Accounting Office concluded, "[b]ecause resellers do not own or operate cellular systems, they do not compete with the carriers at the wholesale level. . . . [R]esellers' presence in a market will not generally lead to lower rates to consumers."[49]

In this instance, the cost/benefit analysis of TRA's members is dramatically different than the burdens facing facilities based carriers who will have to implement the technology and standards to support the separation of the mobile identification number (MIN) and the mobile directory number (MDN).[50] CMRS resellers need not worry about the MIN and MDN split which will not affect the existing relationship between the CMRS switch and the resellers. This allows the reseller to retain, without modification, its existing billing and OSS systems based on the customer's MDN.

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[49] GAO Report to the Honorable Harry Reid, U.S. Senate, "Telecommunications: Concerns About Competition in the Cellular Telephone Service Industry," at 19 (July 1992); see also id. at 21-22 (Resellers "do not compete directly with carriers at the wholesale level and their presence does not alter the industry's duopoly market structure. . . . For example, the Federal Trade Commission recently stated, 'It is unlikely that cellular resellers will provide effective competition at the wholesale level to the two facilities-based cellular carriers.' Moreover even the FCC recently noted that resellers do not appear to provide significant competition to cellular carriers.") (citations omitted). If resellers are unlikely to offer price competition in a duopoly market structure, it is even less likely that they serve a competitive purpose in today's markets which are served by at least four carriers and as many as seven.

[50] See CTIA Petition for Extension of the Implementation Deadlines at 6-7.

E. CMRS Carriers Efficiently Distribute The Telephone Numbers Allocated To Them And Should Not Be Required To Implement Number Portability Because Of Wireline Constraints.

Finally, the Commission should reject the efforts of some commenters to confuse number portability implementation with numbering administration and conservation issues.[51] Number portability was established by the Commission to resolve an anticipated competitive failure in the market. Confusing the competitive necessity of number portability with arguments regarding numbering administration is not only unnecessary, but incorrect. The Commission is conducting separate inquiries into the distribution of numbers to carriers.[52] Moreover, the record in these inquiries demonstrates that alternative numbering administration mechanisms are not the panacea that some may claim, nor are they necessary for CMRS providers who already distribute numbers in a highly efficient manner.

IV. CONCLUSION

CMRS carriers are operating in a rapidly evolving competitive marketplace. Rather then acting in a predictive capacity, the Commission should await the completion of a significant portion of the PCS buildout. After this five-year

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51 See WorldCom Comments at 7; Paging Network, Inc. Comments.

52 Common Carrier Bureau Seeks Comment on North American Numbering Council Letter Seeking Clarification of the Term "Technology Neutral", *Public Notice*, DA 97-2234 (October 20, 1997); see also Common Carrier Bureau Seeks Comment on Petition for Declaratory Ruling and Request for Expedited Action Filed by Providers of Commercial Radio Service In Pennsylvania, NSD File No. L-97-42, *Public Notice*, 12 FCC Rcd 19502 (1997).

period, any determination regarding CMRS number portability should be made after the Commission has undertaken a fresh look to consider whether it is in the public interest to impose CMRS service provider number portability.[53] While some argue that delay is not in the public interest, imposing a regulatory obligation whose burdens outweigh the competitive benefit is inconsistent with the Commission's regulatory responsibility to promote beneficial outcomes. It is in the public interest to forbear from enforcing regulations which will raise prices, alter market forces in an already competitive market, and impose unnecessary costs on carriers and consumers alike.

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[53] Consumers' interest in retaining their wireless telephone numbers may change in the future as the wireless market evolves and the Commission fosters certain policies such as calling party pays and wireless local loops. Until that time, though, the extreme burdens of CMRS number portability are unjustifiable.