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May 27, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20054

Re: Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations, WT Docket No. 98-229 and Telephone Number Portability, CC Docket No. 95-116

Dear Ms. Salas:

Enclosed for filing in the referenced proceedings on behalf of the Telecommunications Resellers Association are an original and four copies of the Petition for Reconsideration of the Commission's February 9, 1999, Memorandum Opinion and Order. Please file stamp and return one copy of the Petition (additional copy provided).

Please contact me if you have any questions.

Respectfully submitted,

Linda L. Oliver

Linda L. Oliver
Counsel for Telecommunications
Resellers Association

Enclosures

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

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MAY 27 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations	)	WT Docket No. 98-229
	)	
and	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116

PETITION FOR RECONSIDERATION

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SUMMARY

In its Order granting forbearance until November 24, 2002, of the deadline for implementing wireless number portability, the Commission failed to justify its decision under the three-part test for forbearance set forth in Section 10 of the 1996 Act, 47 U.S.C. § 160(a).

First, the Commission erroneously determined that prompt implementation of wireless number portability is unnecessary to ensure that wireless rates are just, reasonable, and not unjustly or unreasonably discriminatory. The Commission itself has acknowledged that number portability would increase competition in the wireless market, and thus would lead to lower rates and better service. Data submitted by the PCS industry association (PCIA) in the commercial mobile radio service (CMRS) spectrum cap proceeding shows that the CMRS market remains, in PCIA's words, "extraordinarily concentrated."

The Commission also erred in concluding that consumers would be "protected" without speedy implementation of number portability. It assumed, without solid evidence, that consumers are indifferent to whether they may keep their telephone numbers when they switch carriers. The Commission did not adequately consider the barrier to switching posed by the absence of number portability, nor did it consider the consumer inconvenience that will persist if number portability is delayed.

Finally, the Commission erred in determining that the public interest would be served by forbearing. The Commission assumed, without data to support that assumption, that funds not spent on implementing wireless number portability

would be spent on faster buildout or conversion to digital. The Commission also failed to consider the availability of an alternative method for implementing wireless number portability, the LRN-Relay method proposed by TRA, which would have cost less to implement, could have been in place more quickly, and would have had less financial impact on carriers serving less densely populated areas. The Commission rejected this alternative without even conducting a technical assessment of its relative merits as compared with the MIN/MDN method proposed by industry, and without comparing the relative cost of the two methods. Finally, the Commission erred in failing to weigh the impact on number conservation of delay in implementation of wireless number portability.

Because CTIA failed to justify forbearance on each of the three required prongs of the Section 10 test, the Commission should grant reconsideration and reinstate the March 31, 2000 deadline for implementation of wireless number portability.

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

In the Matter of	)	
	)	
Cellular Telecommunications Industry	)	
Association's Petition for Forbearance	)	WT Docket No. 98-229
From Commercial Mobile Radio Services	)	
Number Portability Obligations	)	
	)	
and	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116

PETITION FOR RECONSIDERATION

The Telecommunications Resellers Association ("TRA") hereby petitions for reconsideration of the Commission's February 9, 1999, Memorandum Opinion and Order in the referenced dockets ("the Forbearance Order"). 1/

In that Order, the Commission delayed the start of wireless number portability until November 24, 2002. / In so doing, the Commission misapplied the three-part statutory test for forbearance. It also failed to give adequate consideration to alternative methods for achieving wireless number portability

1/ Cellular Telecommunications Industry Association's Petition for Forbearance from Commercial Mobile Radio Services Number Portability Obligations, WT Docket No. 98-229, and Telephone Number Portability, CC Docket No. 95-116, FCC 99-19 (released Feb. 9, 1999), 64 Fed. Reg. 22562 (April 27, 1999) ("Forbearance Order").

within the time frame already established in the Commission's July, 1996, Number Portability Order. 2/

For the reasons given below, the Commission should reconsider its decision to forbear and require CMRS providers to implement wireless number portability by the March 31, 2000 due date.

INTRODUCTION

The Telecommunications Resellers Association is a national trade association representing more than 700 entities engaged in, or providing products and services in support of, telecommunications resale. TRA's members provide a wide range of telecommunications services in all markets, including local wireline, interexchange, and wireless. TRA has participated actively in the Commission's number portability proceedings (both wireline and wireless). TRA filed an opposition to CTIA's forbearance petition on February 23, 1998.

I. THE PUBLIC INTEREST BENEFITS OF WIRELESS NUMBER PORTABILITY FAR OUTWEIGH THE COSTS.

In the Forbearance Order the Commission failed to give adequate weight (or in some cases any weight) to the factors that prompted it to order the implementation of wireless number portability in the first place. This alone is

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2/ Telephone Number Portability, First Report and Order and Second Notice of Proposed Rulemaking, CC Docket No. 95-116, 11 FCC Rcd 8352 (1996) ("Number Portability Order"), recon., 13 FCC Rcd 21204 (1998), petition for review pending.

grounds for reconsideration of its decision to forbear from the March 31, 2000 implementation date.

A. Benefits

1. Consumer Benefits

In its 1996 Order mandating implementation of wireless number portability, the Commission correctly recognized the importance of number portability to achieving lower prices, greater choice, and increased convenience for consumers of wireless services. 3/ As Chairman Kennard once put it, CMRS number portability is critical to protection of the "fundamental rights" of consumers -- including "[t]he right to change carriers without changing telephone numbers" 4/ -- and for ensuring that consumers receive the full benefits of competition. Consumers obviously will be reluctant to switch carriers if they must change their numbers. They will be forced to choose between giving out their wireless numbers broadly -- something that may be essential to the usefulness of their phone -- and having the ability to switch carriers to take advantage of a better offer (and increasing competition from new wireless entrants).

3/ Id. at ¶ 157-161.

4/ Remarks by William Kennard, Chairman, FCC, to the National Association of State Utility Consumer Advocates (Feb. 9, 1998) (available on the Internet at http://www.fcc.gov/Speeches/Kennard/spwek803.html) (as prepared for delivery) ("Kennard 2/9/98 Speech"); Remarks by William Kennard, Chairman, FCC, to the Practicing Law Institute (Dec. 11, 1997) (available on the Internet at http://www.fcc.gov/Speeches/Kennard/spwek702.html) (as prepared for delivery) ("Kennard 12/11/97 Speech").

The value of other consumer services also will be greatly enhanced by the availability of portable wireless numbers. For example, if Calling Party Pays option is introduced, the value consumers place on an unchanging wireless number will increase greatly. 5/

2. Benefits to Competition in the Wireless and Local Wireline Markets

The Commission also recognized in its 1996 Number Portability Order that prompt implementation of wireless number portability is essential to the achievement of a truly competitive wireless market 6/. Competition, in turn, is necessary to ensure that telecommunications rates, terms, and conditions are reasonable and not unreasonably discriminatory. The ease with which consumers can switch carriers post-number portability forces carriers to reduce their rates and to improve their service offerings in order to attract and retain customers. Number portability is thus essential to vigorous competition, as the Commission has already found. 7/

As the Commission recognized in 1996, wireless number portability is also essential if wireless services are to be successful in competing head-to-head with local wireline services. 8/ Increasingly, wireless services are being substituted

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5/ See Forbearance Order at ¶ 22.

6/ Number Portability Order at ¶¶ 157-159.

7/ Id.

8/ Id. at ¶ 160.

for wireline services. The success of wireless nationwide one-rate programs is a testament to consumer willingness to substitute wireless for wireline phones. Without wireless number portability, that substitutability will remain limited.

3. Number Conservation

Finally, speedy implementation of wireless number portability would enable wireless carriers to participate in telephone number pooling and other numbering resource optimization measures. Such participation is crucial for the continued development and expansion of a competitive telecommunications industry. 9/ The Commission should be requiring industry -- including the wireless industry -- to do everything it can to promote efficient use of numbering resources, because a shortage of numbers will impede the robust development of competitive telecommunications markets, both wireline and wireless. A number of state commissions opposed the CTIA forbearance petition on this very ground. 10/ Wireless carriers should not be permitted to reap the benefits of number resources without incurring the costs of deploying number portability.

B. Costs of Implementation

In the Forbearance Order, the Commission recognized that each of these above benefits still existed. 11/ The Commission in no way suggested, moreover, that they were any less important today than they were in 1996.

9/ Id. at ¶ 153.

10/ Forbearance Order at ¶ 43 and n.120.

11/ Id. at ¶ 40-41, 48.

In nevertheless deciding to forbear, the Commission relied primarily on generalized industry allegations that wireless carriers would rather spend money that would have gone to implementation of number portability on other things, such as network buildout and CALEA compliance. 12/ The Commission, however, has no guarantee that the money the carriers save (or more correctly put, that they defer paying) will go to fund faster or broader network buildout or to faster conversion to digital technology. CTIA also offered no evidence in its petition to show that the costs of number portability are too high to be affordable or to prove that money saved would go to fund network improvements that otherwise would not be made. 13/

In addition to giving little weight to the acknowledged benefits of wireless number portability, the Commission also disregarded the availability of an alternative method for implementing number portability that would have cost less and been quicker to implement, with less impact on wireless carriers in less densely populated areas -- the TRA-proposed "LRN-Relay" methodology. 14/ In the Forbearance Order, the Commission dismissed this alternative without even attempting to resolve issues regarding its technical feasibility. 15/

12/ Forbearance Order at ¶ 38.

13/ "Petition for Forbearance of the Cellular Telecommunications Industry Association," Docket No. 95-116, filed Dec. 16, 1997 ("CTIA Petition")..

14/ See "Wireless Number Portability: The Case for LRN-Relay," filed by TRA in CC Docket No. 95-116, Nov. 24, 1998 ("LRN-Relay Report").

15/ Forbearance Order at ¶ 32.

The Commission also completely ignored the statistics on relative cost that were set forth in the TRA report on LRN-Relay, which showed that TRA's alternative was less expensive to implement and less burdensome for carriers in rural areas. 16/ The Commission ignored this cost data even as it relied on the supposed (but undocumented) high cost of implementing wireless number portability to grant forbearance.

In sum, the Commission's decision to forbear must be reconsidered because the Commission failed to adequate weight (or indeed any weight) to the many public interest benefits of number portability. This failure infected its analysis with respect to each of the prongs of the three-part statutory forbearance test. We discuss the Commission's application of this test in the next section.

II. THE COMMISSION ERRED IN DECIDING THAT EACH OF THE PRONGS OF THE FORBEARANCE TEST HAD BEEN MET BY CTIA.

At the outset, it is important to emphasize that a party seeking forbearance is required to show that each of the prongs of the three-part test for forbearance has been satisfied. 47 U.S.C. § 160(a). If any of the prongs are not met, then forbearance is not permissible.

16/ LRN-Relay Report at 20-25. As CTIA acknowledged in its petition, the industry's proposed method for implementing wireless number portability would require all wireless providers, not just those in the top 100 MSAs, to make the changes necessary to implement number portability. CTIA Petition at 8 n.15. The LRN-Relay method, in contrast, does not require carriers outside the top 100 MSAs to make substantial investments.

A. The Commission Failed to Consider the State of CMRS Competition and the Role of Prompt Implementation of Number Portability in Promoting that Competition.

Under the first prong of the forbearance analysis under Section 10 of the Act, the Commission must find that enforcement of its regulation is not necessary to ensure that rates, charges and practices are "just and reasonable and are not unjustly or unreasonably discriminatory." 47 U.S.C. § 160(a)(1). The Commission failed to consider three important aspects of the competitive analysis in its order.

First, the Commission does not attempt to measure the direct adverse impact on competition due to a delay in the availability of wireless number portability. The Commission did not change its earlier view that without number portability, consumers will be more reluctant to switch carriers. Rather, it apparently concluded that competition was increasing *enough* in the CMRS market simply due the entry of additional carriers (PCS and SMR carriers, for example) to make it unnecessary to add the competitive spur of number portability. 17/

The Commission cannot simply rely on the existence of some additional market entry to determine that the added competitive pressure that would flow from number portability is unnecessary. There is no such thing as "enough" competition. With number portability in place, consumers would have no barriers to switching wireless carriers. This would undoubtedly place pressure on

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17/ Forbearance Order at ¶¶ 19-20.

carrier pricing and service quality that would not otherwise exist. It also would provide strong incentives for carriers to complete their buildouts and to convert to digital *more* quickly. 18/ These are the same goals that the Commission thought it was promoting by *not* requiring number portability.

Second, Commission's sanguine conclusions about the extent of competition in the wireless market are belied by the facts. Data provided in another FCC docket by the Personal Communications Industry Association (PCIA) show that competition is proceeding very slowly in this market. 19/ In its reply comments in the CMRS spectrum cap proceeding, PCIA argued that the CMRS market remains "extraordinarily concentrated." 20/ PCIA there pointed to statistics that show without a doubt that something more is needed to generate robust competition in the CMRS market. For example, PCIA states that PCS operators have a zero market share as measured by subscribers in 49% of the top 200

18/ The Commission had no foundation for its assumption that because the carriers might have to spend money to implement number portability, they would necessarily slow their buildout plans. The arrival of number portability might actually stimulate such buildout.

19/ Reply Comments of the Personal Communications Industry Association ("PCIA") filed in 1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers, WT Docket No. 98-205, et al, filed Feb. 10, 1999. A copy of these comments will be placed in the record of the captioned dockets.

20/ Id. at 8.

markets, and "in no top 200 market does the combined total of all operating PCS licensees yet exceed 25% of mobile two-way voice subscribers." 21/

The point here is not that the Commission erred in finding that competition was increasing in the CMRS market. Rather, the point is that number portability would have *added* to that competition in a market that still is highly concentrated and in need of more vigorous competition, by the admission of the PCS industry's own trade association. The Commission failed to evaluate the impact of the loss of that increased competition on the reasonableness and nondiscriminatory nature of rates under the first prong of the forbearance test. This failure warrants reconsideration of the decision that delaying portability will not affect the justness, reasonableness, and nondiscriminatory nature of the rates to consumers, the first prong of the forbearance test.

B. The Commission Failed to Justify Its Conclusion that Prompt Implementation of Wireless Number Portability Is Unnecessary To Protect Consumers.

It is a matter of common sense that consumers would prefer to be able to keep their wireless telephone numbers when changing wireless carriers. The rapid rate of churn in this industry suggests that the lack of number portability causes significant inconvenience for consumers. High rates of churn do not mean that consumers would not prefer to have the advantages of wireless number portability. Rather, it shows that, as in many telecommunications markets,

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21/ Id. at iii.

consumers are driven by price considerations and are willing to switch carriers and incur inconvenience in order to get the benefits of better prices. Indeed, in the United Kingdom, consumers have had the benefits of wireless number portability since January of this year.

The Commission in this order and in earlier orders concluded that wireless number portability is indeed in the interest of consumers, and that a big reason for requiring number portability is to protect consumers. 22/ In the Forbearance Order, the Commission ticked off a number of consumer benefits to be derived from wireless number portability: (1) Consumers can substitute their wireless for their wireline phones more easily; (2) the introduction of calling party pays will encourage customers to give out their wireless phone numbers just as they give out their wireline phone numbers today; (3) competitive choice is promoted by the ability to port numbers both to and from wireless carriers; and (4) number conservation will be promoted. 23/

The Commission did not attempt to weigh these benefits against the cost in applying the second prong of the forbearance test. It appeared, in fact, to apply the wrong standard under Section 160(a): it asked whether adhering to the current implementation schedule "is necessary *to prevent affirmative harm* to

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22/ Forbearance Order at ¶¶ 22, 40; Number Portability Order at ¶ 157.

23/ Forbearance Order at ¶¶ 23, 40, 48. See also Number Portability Order at ¶¶ 157, 160.

consumers." 24/ But far more is required for forbearance. The statutory test is much different, and much harder to satisfy: the Commission must find that the challenged regulation "is not necessary for the protection of consumers." 47 U.S.C. § 160(a)(2).

The Commission also did not convincingly explain how it could justify a conclusion that wireless number portability "is not necessary for the protection of consumers," other than to rely on the self-serving assertions of industry commenters. 25/ The Commission's reliance on trade press articles citing surveys showing that consumers value other factors in deciding which carrier to choose is irrelevant. 26/ The cited surveys did not appear even to ask consumers about their views on the ability to switch providers without changing their number. 27/ The Commission simply assumed that consumers do not care about wireless number portability, without coming to grips with the real barrier it presents.

24/ Id at ¶ 22.

25/ Forbearance Order at ¶ 22 & n.66, ¶ 34 & n.97.

26/ Forbearance Order at ¶ 34 n.96.

27/ See Forbearance Order at ¶ 34 n.97. The one mention of number portability in the cited articles actually *supports* prompt implementation of wireless number portability. The article states that survey respondents "who were not thinking about switching carriers indicated calling party pays, Internet access and *number portability* were the most important features that would cause customers to change carriers." Beckman, Kristin, "Customer Satisfaction Unstable Among Many Carriers," RCR, September 28, 1998, at 32. This suggests that the availability of number portability would prompt these customers to switch carriers when they otherwise might not, showing that number portability is indeed a barrier to switching.

In sum, the Commission applied the incorrect test under this prong and failed to weigh the implications for consumers -- in the form of higher prices, fewer choices, and greater inconvenience -- of further delay in implementation of wireless number portability.

C. The Commission Failed to Support its Conclusion That Forbearance is Consistent with the Public Interest.

The Commission erred in concluding that the public interest would be served by forbearance with respect to the wireless number portability implementation requirement -- the third prong of the Section 10 test.

The Commission's first error was to assume that implementation of wireless number portability would necessarily preclude or interfere with the rapid buildout of wireless systems and conversion of existing analog systems to digital. 28/ While buildout and digital conversion may cost significant amounts of money, there is no guarantee that the deferring expenditures on wireless number portability implementation will necessarily generate funds that will actually be used for additional buildout (rather than to increase profits or be used for other purposes). It is significant that CTIA offers no evidence about the cost of implementation of number portability in its petition for forbearance. It merely asserts that whatever it would cost, that money might be better spent elsewhere. CTIA bears the burden

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28/ Forbearance Order at ¶ 38.

of justifying that forbearance is in the public interest, and its petition clearly did not meet that burden. 29/

The contrast between the factual support provided for the CTIA nine-month waiver petition and its forbearance petition is striking. The first petition (which TRA did not oppose) was fully supported with documentation of the technical and operational difficulties that the wireless industry would have in meeting the original December 31, 1998 deadline. 30/ In contrast, the forbearance petition CTIA filed just three weeks later was barren of such support. 31/ Forbearance cannot be granted on such a slim showing.

The Commission's second error was its failure to evaluate the potential of the TRA alternative methodology for number portability to address the Commission's concerns about cost and delay. TRA offered an alternative method for implementing that wireless number portability that would have cost significantly less, could have been implemented more quickly (in time to meet the March, 2000 deadline), and with far lower costs for those carriers located in markets below the top 100 MSA. 32/ Despite these major advantages, the Commission did not grapple

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29/ See, e.g., Implementation of the Telecommunications Act of 1996: Customers' Use of CPNI, CC Docket No. 96-115, 13 FCC Rcd 8061 (1998) at ¶ 50.

30/ See "Petition for Extension of Implementation Deadlines of the Cellular Telecommunications Industry Association," CC Docket No 95-116, filed Nov. 24, 1997.

31/ CTIA Petition, supra.

32/ The LRN-Relay approach features the following specific benefits: (1) speedier implementation; (2) no need for flash cut implementation by all carriers; (3) speedier implementation of wireless number portability, relieving pressure on

with the technical viability of either the TRA LRN-Relay approach nor the industry-proposed MIN/MDN separation method. 33/

The Commission's third error was to downplay the importance of competitive issues. As discussed above in Section II.A., and as shown by PCIA's own statistics, the Commission's reliance on the increasing level of competition in the wireless market are misplaced. The Commission attributes the existence of high churn rates to a lack of interest by consumers in having a portable number. As discussed with respect to the first prong of the forbearance analysis, consumers will be more reluctant to switch carriers if their number is not portable, all else being equal. TRA has never argued that lack of number portability is a complete barrier to consumers switching, but it certainly is a real barrier, as the Commission recognized in ordering wireless number portability in the first place.

Finally, the Commission put little weight on the value of prompt implementation of wireless number portability for number conservation purposes.

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limited number resources and speeding number pooling efforts; (4) lower cost of implementation because it builds on existing infrastructure and on the method used for wireline portability; (5) concentrates the most benefits in those areas in which the most customers reside (top MSAs), rather than requiring implementation everywhere.

33/ Forbearance Order at ¶ 32. The Commission in paragraph 33 of the Forbearance Order observed that "the wireless industry, not the Commission, should decide technical issues with respect to implementation of wireless LNP." TRA's goal in filing its report was not to have the FCC order that number portability be accomplished using this method, but rather to point out that there was a lower cost, faster option. To the extent that carriers preferred the higher cost option, that would be their decision. It should not, however, be allowed as an excuse to avoid implementing wireless number portability.

Wireless carriers should share in the task of conserving scarce numbering resources and in number pooling efforts. For this reason, several state commissions correctly opposed the CTIA petition.

In sum on the public interest point, the Commission chose to weigh the factors that favored delay of implementation and chose to ignore the factors that weighed in favor of speedy implementation. Moreover, the Commission performed this weighing without examining the data on the relative cost of implementing wireless number portability under the industry's proposed plan compared with the TRA LRN relay method, and without examining their relative technical merits. For these reasons, the Commission must reverse its decision to forbear.

CONCLUSION

For the reasons given, the Commission should grant reconsideration and reinstate the March 31, 2000 deadline for implementation of wireless number portability.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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May 27, 1999

CERTIFICATE OF SERVICE

I, Barbara E. Clocker, hereby certify that a copy of the foregoing Petition for Reconsideration of the Telecommunications Resellers Association filed in WT Docket 95-116, was served by first class mail upon the following:

Barbara E. Clocker

Dated: May 27, 1999

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