

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

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

REPLY OF GTE SERVICE CORPORATION

Dated: July 8, 1999

GTE Service Corporation and its telephone
and wireless companies

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SUMMARY

In the *Memorandum Opinion and Order* ("Order") released February 9, 1999, the Commission held that forbearance from enforcement of the wireless local number portability ("LNP") rule was warranted, but it did not forbear as Section 10 of the Communications Act requires. Instead the Commission merely deferred the compliance deadline for wireless LNP and directed carriers to continue working toward LNP deployment. GTE sought reconsideration of the *Order*. GTE argued (1) that forbearance requires the Commission to eliminate the obligation to comply with a statute or regulation, not postpone its enforcement; (2) that the Commission's decision to keep the wireless LNP requirement was based on legally improper and factually invalid assumptions that number pooling might eventually be required and that wireless LNP was essential to number pooling; and (3) that pro-competitive trends in the CMRS industry cannot and should not be used as a reason to retain the LNP deadline.

None of the few parties responding to GTE's Petition refutes GTE's legal argument or factual showing on these three points. For example, regarding the argument that the Commission must eliminate not postpone enforcement of the LNP requirement, MCI WorldCom argued that the Commission has various alternatives, including rule changes and waivers, to extend the implementation date in accordance with the public interest. MCI's argument, however, is completely beside the point since the Commission in the *Order* was not asked to invoke any authority to extend a date, it was petitioned to forbear.

Regarding the linkage between LNP and number pooling, TRA argues that the Commission's concerns about number conservation are "legitimate." But that is precisely why the Commission has initiated a separate rulemaking to consider number conservation measures. The adoption of the *Notice* in which the Commission is now seeking information about pooling after release of the *Order* confirms GTE's point that there was no factual or legal basis for the *Order* to conclude that wireless LNP is essential to number pooling.

Finally, regarding the need to retain the LNP requirement in light of growing CMRS competition, TRA argues that the Commission did not abandon its original public interest findings supporting the wireless LNP rule. The fact that over three years ago the Commission found that wireless LNP would serve the public interest, however, is irrelevant to a Section 10 analysis today. Section 10 (along with the "biennial review" requirement of Section 11) impose specific procedures for the Commission to conduct that review. If, as TRA argues, past public interest findings dictated the result of a subsequent forbearance analysis, there would be no forbearance.

Based on GTE's demonstration of error, and the failure of any contrary legal or factual record, GTE requests that its Petition for Reconsideration be granted forthwith.

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| Telephone Number Portability |) | CC Docket No. 95-116 |

REPLY OF GTE SERVICE CORPORATION

Pursuant to Section 1.429(g) of the Commission's Rules, GTE replies to the comments on and oppositions to its May 27, 1999, "Petition for Reconsideration" of the *Memorandum Opinion and Order (Order)* released February 9, 1999.

In the *Order*, the Federal Communications Commission ("FCC" or "Commission") held that forbearance from enforcement of the wireless local number portability ("LNP") rule was warranted, but it did not forbear as Section 10 of the Communications Act requires. Instead the Commission merely deferred the compliance deadline for wireless LNP and directed carriers to continue working toward LNP deployment. GTE sought reconsideration of this pseudo-forbearance to correct the following legal and factual errors and grant what Section 10 requires:

-- Forbearance requires the Commission to eliminate the obligation to comply with a statute or regulation where the statutory tests for forbearance are all met. But, in the face of its findings that these tests were met, the Commission did not follow Section 10 because it

did not eliminate an obligation; it kept it. The Commission's recent statement that it may retract the "forbearance" already granted reveals even more clearly how far the Commission strayed from the mandate of Section 10.

-- The Commission based its requirement that CMRS providers deploy LNP by 2002 based on legally improper and factually invalid assumptions that number pooling might eventually be required and that wireless LNP was essential to number pooling (even though there is no such pooling requirement). A rule cannot be maintained based on speculation that it might at some time be needed for a possible future rule. And, as GTE showed through a sworn declaration, the Commission's linkage between pooling and LNP is incorrect.

-- The *Order* relied on pro-competitive trends in the CMRS industry as a reason to retain the deadline, even though Congress and the Commission have determined that competition should bring with it less regulation. This about-face is unexplained and unsupported by the factual record. The untenable result is that CMRS carriers face new, costly and technically complex burdens as the "reward" for competitive success.

None of the few parties responding to GTE's Petition refutes GTE's legal argument or factual showing on these three points. Based on GTE's demonstration of error, and the failure of any contrary legal or factual record, GTE requests that its Petition for Reconsideration be granted forthwith.

I. NO PARTY HAS REBUTTED GTE'S SHOWING THAT THE ORDER FAILED TO COMPLY WITH SECTION 10, AND THE ORDER'S ERROR IS MADE EVEN CLEARER BY RECENT COMMISSION ACTION.

Once the Commission determined that forbearance from the wireless LNP rule was required under the statutory standard, the Commission was obligated to eliminate enforcement. Yet instead, the Commission only extended the compliance date. The rule thus remains in force and carriers remain subject to compliance. Indeed, the Commission specifically noted that carriers should make progress toward compliance.

Order at ¶ 42. GTE presented the history of Section 10 and the many Commission statements on forbearance, which establish that keeping regulation in place while changing its effective date is not "forbearance." Once the statutory criteria are met, Section 10 requires that enforcement of a rule be terminated, not merely that the rule be amended, as the Commission did in the *Order*. GTE Petition at 5-12.

None of the parties addressing GTE's Petition presented any legal authority that was contrary to GTE's argument on the proper action required by Section 10 when the forbearance tests are met. Indeed, CTIA agreed with GTE that forbearance means to eliminate an obligation.¹ MCI WorldCom opposed GTE's argument, but merely claimed (without citation), "However characterized, it is clearly within the Commission's power and ability to change implementation dates for Commission orders. The Commission has various alternatives, including rule changes and waivers, to extend the implementation date in accordance with the public interest." MCI Comments at 2. MCI's argument, however, is completely beside the point. The Commission has authority through rulemaking or waivers to extend a compliance date. But the *Order* was not the culmination of a rulemaking to modify the LNP compliance date nor to grant a waiver of the compliance date. Instead, the Commission was petitioned to forbear. If forbearance simply meant extending a date, Section 10 would not have been a

¹ CTIA reviews the legislative history of Section 10, and concludes, "The fact that Congress believes that the Commission's forbearance authority should be used to end unnecessary regulation supports GTE's contention that the Commission improperly narrowed its forbearance decision in the *Order*." CTIA Opposition to Petitions for Reconsideration at 5 n. 8.

necessary amendment to the Commission's authority. Only by eliminating compliance with the rule can the Commission fulfill this legislative mandate.

GTE's concern with the *Order's* failure to grant forbearance as the law requires is heightened by the Commission's recent *Notice of Proposed Rulemaking* ("*Notice*") seeking comment on various number resource optimization methods.² The *Notice* states that if the Commission requires CMRS carriers to implement number pooling, it may consider an "accelerated schedule" for LNP deployment. It seeks input on whether there are "benefits from CMRS participation in pooling earlier than November 2002 that would be sufficient to justify the significant added cost and burden that would be borne by covered CMRS providers in deploying LNP architecture on a accelerated basis." *Notice* at ¶ 168 (emphasis added). Seemingly forgotten is the fact that the Commission chose the November 2002 date based on the application of Section 10; no mention is made of any proceeding to revoke that forbearance finding. Indeed, the *Notice* confirms GTE's argument that the Commission did not forbear, because it refers repeatedly to having "extended the LNP deadline" – an extension that it now threatens to take away. The *Notice* underscores the fact that forbearance has in reality not been granted. Section 10 demands more fidelity than this.

II. NO PARTY UNDERMINES GTE'S SHOWING THAT THE ORDER INAPPROPRIATELY LINKED WIRELESS LNP TO POOLING.

The *Order* asserted, "[i]mplementation of LNP is a necessary precondition to the implementation of number pooling techniques used to conserve numbers," and on that

² Number Resource Optimization, *Notice of Proposed Rulemaking*, CC Docket No. 99-200, FCC 99-122 (released June 2, 1999).

basis merely deferred the wireless LNP rule. *Order* at ¶ 43 (emphasis supplied). GTE showed that this finding was neither legally proper nor factually correct. GTE Petition at 13-18. It was improper to retain a rule based on what might happen in a future rulemaking, and that action contradicted established Commission policy. The linkage was also incorrect because, as the Declaration of Daniel S. Mead attached to GTE's Petition demonstrated, there are many approaches to conserving number resources that are not dependent on Phase II LNP, and the most-discussed type of number pooling, "thousands-block pooling," does not necessarily require wireless LNP at all.

The only two parties responding to this point do not rebut it. The Telecommunications Resellers Association ("TRA") argues that the Commission considered number conservation when it originally adopted LNP rules and that the Commission was required to consider number pooling issues in its public interest analysis under Section 10. But, when it adopted those rules, the Commission mentioned number conservation only in passing and in the context of landline LNP.³ In contrast, it expressly based the separate wireless LNP rule on promoting wireless-wireless and wireless-wireline competition.⁴ In any event, even if number conservation was properly part of the public interest analysis, this does not rectify the *Order's* factual error in assuming a necessary linkage between wireless LNP and number pooling.

³ Telephone Number Portability, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, ¶¶ 36-37, 153 (1996) ("LNP Order").

⁴ *LNP Order*, 11 FCC Rcd 8352, ¶¶ 153, 157-160.

TRA also argues that the Commission's concerns about number conservation are "legitimate." But that is precisely why the Commission has initiated a separate rulemaking to consider number conservation measures.⁵ The adoption of the *Notice* in which the Commission is now seeking information about pooling after release of the *Order* confirms GTE's point that there was no factual or legal basis for the *Order* to conclude that wireless LNP is essential to number pooling.

TRA then reverses course and claims that the Commission's discussion of number pooling was, after all, only tangential to continuing the wireless LNP rule. To the contrary, the Commission squarely based its decision on its conclusion that "[i]mplementation of LNP is a necessary precondition to the implementation of number pooling techniques to conserve numbers." *Order* at ¶ 43. Because the decision was based on an unlawful and incorrect premise, it cannot stand.⁶

AT&T Wireless Services takes issue with what it calls GTE's "suggestion that wireless carriers could participate in number pooling in the absence of full wireless LNP." Opposition at 3. AT&T is concerned that wireless carriers could not implement system changes necessary to allow them to participate in number pooling quickly and

⁵ *Notice*, n. 2.

⁶ TRA asserts that GTE failed to recognize that TRA's proposed number portability technology, "LRN-Relay," is based on the same LRN method used for number pooling. TRA Opposition at 9-10. LRN-Relay was not accepted by the *Order*, and the record shows that decision was correct. CTIA Opposition to Petitions for Reconsideration, June 25, 1999, at 12; AT&T Opposition at 7. TRA's point is in any event irrelevant. Even assuming one of several LNP techniques is linked to number pooling, it does not follow that LNP is a "necessary precondition" to number pooling.

that making such changes would strain carrier resources by diverting resources away from implementing LNP. AT&T is also concerned that wireless participation in number pooling would be cumbersome from a technical standpoint. Opposition at 13-15.

AT&T misconstrues the arguments raised in GTE's Petition. GTE's point was that in retaining the wireless LNP requirement, the Commission relied upon a factual premise – that implementation of LNP by wireless carriers is a necessary precondition to implementation of number pooling – that is not correct. GTE did not intend to suggest (and GTE does not support) that wireless carriers should be required to participate in thousands-block number pooling. Thus, in the Petition, GTE stated “nothing GTE says in the context of this pleading should be read as support for thousands-block number pooling. There is no record basis for the Commission to impose thousands-block number pooling on wireless carriers.” GTE Petition at 16. Indeed, GTE agrees with the bulk of AT&T's arguments advocating that number pooling should not be imposed on wireless carriers.

III. NO PARTY JUSTIFIES THE DISCONNECT IN THE ORDER BETWEEN ITS FINDINGS ON CMRS COMPETITION AND ITS FAILURE TO GRANT FORBEARANCE.

The Commission correctly concluded that each of the three statutory tests for forbearance was met because of competitive conditions and trends in the wireless marketplace. *Order* at ¶¶ 23-25. Yet, the Commission inexplicably found that those same trends justified retaining the wireless LNP rule and directing carriers to proceed toward compliance. The Commission found that more competition and growth justifies more regulation, not less. None of the pleadings on reconsideration justifies clearly inconsistent rationalization.

TRA argues that the Commission merely found that only a "temporary delay" in implementation of wireless LNP was warranted, but mostly recites the *Order's* own conclusions (which, of course, does not make those conclusions correct). TRA argues that the Commission did not abandon its original public interest findings supporting the wireless LNP rule. TRA provides a litany of quotes from that decision and claims that wireless LNP will become more important in the future. Opposition at 3-6.

The fact that over three years ago the Commission found that wireless LNP would serve the public interest is irrelevant to a Section 10 analysis today. Every rule should, of course, be adopted based on a finding that, at the time, it would be in the public interest. But agencies are required to assess the need and basis for any rule on a continuing basis. Indeed, Section 10 (along with the "biennial review" requirement of Section 11) imposes specific procedures for the Commission to conduct that review. If, as TRA argues, past public interest findings dictated the result of a subsequent forbearance analysis, there would be no forbearance.

TRA's claim that future competition justifies keeping an obligation in place merely parrots the *Order* and thus suffers from the same legal and logical flaws. Speculation that the growth of competition over the next three years warrants regulation in 2002 is bereft of any factual support.⁷ It is also counterintuitive and contrary to Commission

⁷ Other parties have shown that TRA's assertions as to the need for wireless LNP and the state of CMRS competition are incorrect. AT&T Opposition at 4-7; CTIA Opposition at 3-11. TRA's claims are also undercut by the Commission's just-released annual report on CMRS competition. 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, *Fourth Report*, FCC 99-136 (released June 24, 1999).

policy, which is to reduce regulation in response to more competition. Chairman

Kennard recently declared:

Wireless is working like it should work -- governed by the marketplace and not by regulation -- and it is thriving. Common sense regulation by the FCC and Congress have helped foster the competitive nature of this industry. In a competitive market-place, excessive regulation can only handcuff the invisible hand, and wireless is a case study of achieving success through market forces instead of government.⁸

Chairman Kennard's statement and the *Order* are in flat conflict. The *Order* retains a government-imposed requirement in the face of the Chairman's acknowledgment of growing wireless competition. It is inexplicable that an increase in the competitive conditions which support forbearance now would support reimposition of the rule in the future. Having correctly concluded that current conditions in the wireless industry supported forbearance, the Commission should have fulfilled the necessary result of that finding and forbore, as Section 10 requires.⁹

⁸ Press Statement of Chairman William E. Kennard on Wireless Day, June 10, 1999, at 1.

⁹ In their own Petitions for Reconsideration, TRA and MCI request that the Commission reinstate the March 2000 deadline for wireless LNP. But their arguments were addressed and rejected by the *Order*, and they advance no new facts nor any legal precedent to support their position. AT&T and CTIA, in their Oppositions, fully refute TRA's and MCI's petitions, and GTE agrees that these petitions must be denied.

IV. CONCLUSION

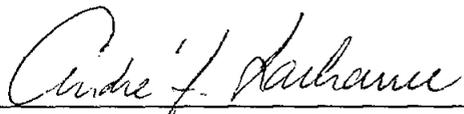
For the reasons set forth in its Petition and above, GTE requests that the Commission grant reconsideration and forbear from enforcing the wireless LNP rule. None of the parties commenting on GTE's Petition refute its arguments. At a future time, should the Commission determine that it should consider reimposing this requirement, it can initiate a proceeding to do so. But what it cannot do is to retain a rule (and direct carriers to comply with it), and call that forbearance.

Dated: July 8, 1999

Respectfully submitted,

GTE Service Corporation and its
Telephone and Wireless Companies

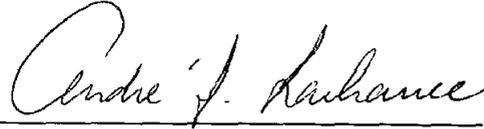
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CERTIFICATE OF SERVICE

I, Andre J. Lachance, hereby certify that copies of the foregoing "Reply of GTE Service Corporation" have been mailed by first class United States mail, postage prepaid, on July 8, 1999 to all parties of record.

A handwritten signature in cursive script that reads "Andre J. Lachance". The signature is written in black ink and is positioned above a horizontal line.

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