

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Numbering Resource Optimization)	CC Docket No. 99-200
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions of the Telecommunications Act of 1996)	
)	
Telephone Number Portability)	CC Docket No. 95-116

**COMMENTS OF WESTERN WIRELESS CORPORATION ON THE
THIRD ORDER ON RECONSIDERATION FURTHER NOTICE OF PROPOSED
RULEMAKING**

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SUMMARY

The Commission should not expand the list of the “largest 100 MSAs” to include the combined MSAs (CMSAs). By modifying the list of largest 100 MSAs in which carriers must offer local number portability (LNP), the Commission imposed an LNP obligation on previously unaffected carriers. It did so without prior notice or opportunity for comment, and less than eleven months before the LNP implementation date for CMRS carriers.

The Commission also should not require carriers to implement LNP capability inside the top 100 MSAs absent a carrier request for portability. Maintaining the requirement of a request will ensure that the substantial burdens of compliance are not imposed where there will not be a corresponding competitive benefit.

Both of these proposed rule changes would expand the scope of the LNP obligation beyond what is necessary to ensure the competitive benefits of LNP. In addition, these changes would have a disproportionate impact on smaller carriers such as Western Wireless that lack a large subscriber base over which to spread the costs of LNP implementation.

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Western Wireless Corporation (“Western Wireless”) hereby submits these Comments on the Commission’s further notice of proposed rulemaking in the above-captioned proceeding.¹ Western Wireless opposes the redefinition of the areas in which carriers must implement the local number portability (“LNP”) and pooling requirements.

I. INTRODUCTION AND BACKGROUND

Western Wireless is a leading provider of cellular telecommunications services in the western United States. The Company holds cellular licenses in 88 RSAs and 18 MSAs, with over one million conventional cellular customers and several thousand wireless local loop customers. The rural nature of Western Wireless’ service area is

¹ *Numbering Resource Optimization, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Telephone Number Portability, Third Order on Reconsideration in CC Docket No. 99-200, Third Further Notice of Proposed Rulemaking in CC Docket No. 99-200, and Second Further Notice of Proposed Rulemaking in CC Docket No. 95-116, FCC 02-73 (rel. March 14, 2002) (“Third Reconsideration Order and FNPRM”).*

reflected by the fact that the Company's service area has an average population density of less than eleven people per square mile.

In its comments in the CMRS LNP forbearance proceeding, Western Wireless explained that the cost of implementing LNP has a disproportionate impact on rural CMRS carriers with little, if any, countervailing public interest benefits.² In these comments, Western Wireless reaffirms its position that the costs of implementing LNP outweigh any benefits and responds to the discrete issues raised in the Third Reconsideration Order and FNPRM. Specifically, Western Wireless argues that the Commission: (1) should not change its definition of the "largest 100 Metropolitan Statistical Areas (MSAs), and thus should not include the Combined Metropolitan Statistical Areas (CMSAs) in the Commission's list of top 100 MSAs, nor allow the states to do so; and (2) should maintain its earlier holding that LNP should not be required of all carriers within the largest 100 MSAs unless they have received a specific request from another carrier to provide LNP.

The 1996 Act requires LECs to offer, "to the extent technically feasible, number portability in accordance with requirements prescribed by the FCC."³ The Commission required wireline carriers in the largest 100 MSAs that have received requests from another carrier to provide LNP pursuant to a phased implementation schedule spread over five quarters, which ended on December 31, 1998.⁴ Beginning January 1, 1999,

² Reply Comments of Western Wireless Corporation, WT Docket No. 01-184 (filed Oct. 22, 2001) at 6-7.

³ 47 U.S.C. § 252(e).

⁴ 47 CFR § 52.23(b).

telecommunications carriers outside of the top largest 100 MSAs are permitted to file requests for number portability with LNP-capable carriers, which are required to provide LNP no later than six months after a request is received.⁵ The Commission established a separate LNP implementation schedule for CMRS providers, providing an implementation date of November 24, 2002.⁶ In addition, the Commission mandated that CMRS carriers to be capable of participating in pooling in the top 100 MSAs by that date.⁷

Prior to the adoption of the *Third Report and Order*, CMRS carriers such as Western Wireless who did not operate in the top 100 MSAs, not including the CMSAs, were not subject to the porting and pooling mandates.⁸ The *Third Report and Order* changed that in two important ways: (1) it required carriers in the top 100 MSAs to port and pool regardless of whether they received a request from a competing carrier; and (2) it expanded the number of markets in which carriers were required to comply with LNP and pooling by combining MSAs that by themselves were not in the top 100 MSAs into combined MSAs or CMSAs. As a result, carriers like Western Wireless, which did not previously face LNP or pooling obligations because they did not serve markets in the top

⁵ 47 CFR § 52.23(b)(2)(iv).

⁶ 47 CFR § 52.31.

⁷ *Numbering Resource Optimization*, Third Report and Order, 17 FCC Rcd 252, 263 paras. 22-23 (2001) (“*Numbering Third Report and Order*”).

⁸ 47 CFR § 52.31(a) (requiring CMRS carriers to deploy LNP only in the largest 100 MSAs); *Numbering Resource Optimization*, Report & Order & Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574, 7627 para. 125 (2000) (“*Numbering First Report & Order*”) (making pooling participation mandatory for all carriers required to provide LNP).

100 MSAs, will now face such obligations as a result of the expanded MSA list. Both of these changes were illegal and bad policy, and should be reversed.

II. THE COMMISSION SHOULD NOT MODIFY THE LIST OF MSAS IN WHICH LNP IS REQUIRED.

In the *Third Report and Order*, released less than eleven months before CMRS carriers' deadline to implement number portability and number pooling, the Commission redefined the area in which CMRS carriers are required to offer LNP.⁹ Whereas carriers had previously been required to offer LNP in the largest 100 MSAs (as defined in the *Local Number Portability First Report & Order* and listed in the appendix to Part 52 of the Commission's Rules), the *Third Report & Order* expanded the mandate to include the top 126 MSAs by combining contiguous MSAs into larger "combined MSAs" (CMSAs). As a result of this change to the scope of the mandate, carriers including Western Wireless that previously had not been subject to the LNP and pooling requirements suddenly were subject to them – with only a short time remaining to comply. Indeed, this rule change caused a market in which Western Wireless provides service (McAllen-Brownsville, Texas), that previously was not among the largest 100 MSAs, to appear on the "largest 100 MSAs" list.

Before making this change to the rules, which fundamentally affected the compliance obligations of Western Wireless and certainly other carriers as well, the

⁹ CMRS carriers are required to deploy LNP only inside the top 100 MSAs. 47 CFR § 52.31. Although the Commission's rules require LECs to deploy LNP outside the top 100 MSAs within 6 months of a carrier request, 47 CFR § 52.23(c), the CMRS LNP rule contains no such provision. See 47 CFR § 52.31. Section 52.31(a)(1)(v) only requires the deployment of LNP in switches located outside the top 100 MSAs that serve territory inside a top 100 MSA.

Commission provided no prior notice of which Western Wireless is aware. The issue was not raised in the further notice of proposed rulemaking attached to the prior order in this docket.¹⁰ It is, of course, a fundamental principle of administrative law that agencies may not change substantive rules without providing advance public notice and an opportunity for comment.¹¹ Thus, the alteration of the geographic scope of the LNP and pooling requirements was illegal.

In addition, changing the rules so drastically at this late stage of the compliance timeline operates in a manner that is discriminatory and unfair to carriers such as Western Wireless that were suddenly and unexpectedly subject to the LNP and pooling requirements. Other carriers have had several years to prepare for LNP implementation, while Western Wireless will have a mere 11 months, if the requirement is allowed to stand. This will require Western Wireless to divert significant resources, without the benefit of economies of scale available to larger carriers, in order to implement LNP in one market out of a total of 106 in which the company provides service.

Implementing LNP in one market will disproportionately affect Western Wireless and similar carriers that serve primarily sparsely populated rural areas. Carriers such as Western Wireless do not have a large subscriber base to absorb the significant costs associated with LNP.¹² Thus, Western Wireless' per-customer costs will increase more than those of its competitors. Such cost increases will directly affect Western Wireless'

¹⁰ *Numbering Resource Optimization*, Second Report & Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 306 (2000).

¹¹ 5 U.S.C. § 553.

¹² Western estimates that these costs will exceed \$6 million.

ability to compete with larger CMRS carriers and LECs, as well as the affordability of its service to subscribers. Such a significant increase in the cost of providing service, therefore, is of significant concern to Western Wireless. In addition, because Western Wireless is the primary service provider to thousands of subscribers, large impacts on the affordability of its service could be all the more significant to its subscribers.

Implementation of LNP also will require that resources be diverted from other priorities that are important to small, rural CMRS providers, their customers, and the Commission. For example, Western is in the process of expending significant amounts of money to expand its service areas and convert to feature-rich digital service. At the same time, Western is spending significant time and resources to comply with Commission mandates to implement complex and/or untested technologies such as E911, CALEA, and number pooling.¹³ Diverting resources from these important priorities and Commission mandates to LNP, which offers few countervailing benefits to consumers, would be contrary to the public interest.

In addition, this expansion of the top 100 MSA requirement runs counter to the policy reasons underlying the rule. The Commission stated in the *Third Report and Order* that:

“[m]any of the carriers outside of the largest 100 MSAs operate in rate centers where there are few, if any,

¹³ Since the Commission enacted the LNP requirement in 1996, it has become clear that CMRS carriers need not deploy LNP in order to participate fully in number pooling. See Petition of Verizon Wireless Pursuant to 47 USC § 160 for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, WT Docket No. 01-184 (filed July 26, 2001); Reply Comments of Western Wireless Corporation, WT Docket No. 01-184 (filed Oct. 22, 2001) at 6-7.

competing carriers. Specifically, data from the LERG shows that in the approximately 2,102 rate centers in the 180 MSAs beyond the largest 100, approximately 300 are rate centers where there is only one competing service provider. We agree with commenters who argue that it would be unreasonable to require non-LNP capable carriers in these areas to establish pooling capability because they would have few, if any, carriers with which to pool.”¹⁴

The Commission does not state whether the rate centers in its survey of areas in the 180 MSAs below the top 100 include the redefined CMSAs or not. In any event, however, it remains true that the Commission has recognized that the utility of LNP and pooling decrease along with the size of the MSA. By arbitrarily lengthening the list of MSAs in which carriers must provide LNP and pooling, the Commission has increased the likelihood that these heavy burdens will fall where they provide little if any benefit.

For all these reasons, the Commission also should not permit state commissions to require CMRS carriers to deploy LNP beyond the largest 100 MSAs absent a federal requirement. The Commission has recognized that “the industry and consumers are best served by national numbering resource optimization standards implemented consistently and in a competitively neutral manner across the nation.”¹⁵

¹⁴ *Numbering Third Report & Order*, 17 FCC Rcd at 261, para. 19.)

¹⁵ Third Reconsideration Order and FNPRM at para. 9.

III. THE COMMISSION SHOULD NOT REVERSE ITS EARLIER DECISION TO REQUIRE LNP CAPABILITY WITHIN THE LARGEST 100 MSAs ONLY IN SWITCHES THAT RECEIVE A SPECIFIC REQUEST FROM ANOTHER CARRIER TO PROVIDE LNP.

In establishing its LNP deployment schedule, the Commission originally required carriers to deploy LNP in all switches within the largest 100 MSAs.¹⁶ Subsequently, in response to carrier urging, the Commission changed the rule to require deployment within the largest 100 MSAs only in switches where a carrier has received a specific request for number portability.¹⁷ In making this decision, the Commission found that limiting the obligation to switches that had been subject to a carrier request would address the concerns of small carriers that “may have to upgrade their networks at significant expense even if no competitors desire portability” and would allow carriers to focus implementation on “areas where competing carriers plan to enter.”¹⁸

The Commission now seeks comment on whether it should impose a requirement that carriers within the top 100 MSAs implement LNP even without a carrier request.¹⁹ Western Wireless strongly urges the Commission to continue to limit the LNP requirement – if it imposes it on CMRS carriers at all²⁰ – to switches within the top 100

¹⁶ *Telephone Number Portability*, First Report & Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8393 para. 77 (1996).

¹⁷ *Telephone Number Portability*, First Memorandum Opinion & Order on Reconsideration, 12 FCC Rcd 7236, 7276 para. 60 (wireline carriers), 7313-14 para. 137 (wireless carriers) (1997).

¹⁸ *Id.* at 7272 para. 59.

¹⁹ Third Reconsideration Order and FNPRM at para. 8.

²⁰ Western Wireless continues to believe that the Commission should forbear from requiring CMRS carriers to provide LNP. See Reply Comments of Western Wireless Corporation, WT Docket No. 01-184 (filed Oct. 22, 2001) at 6-7.

MSAs for which there has been a carrier request for portability. At the very least, the Commission should so limit the requirement for CMRS providers.

The Commission's reasons for restricting the LNP obligation to switches where there has been a carrier request for portability remain fundamentally valid.²¹ Carriers should be able to develop rational deployment plans focused on areas where the deployment of LNP actually will benefit consumers – i.e., where competing carriers have requested the ability to port numbers. The Commission also correctly recognized the need to protect small carriers from the substantial expense of deploying LNP in areas where there is not a real competitive justification to do so. This same rationale applies to CMRS carriers such as Western Wireless that serve primarily rural areas.

In addition, the proposal in the FNPRM to provide relief to small carriers is inadequate to address Western Wireless's concerns. The FNPRM proposes to exempt small carriers from the LNP requirement if they have "switches either within the largest 100 MSAs or in areas adjoining the largest 100 MSAs, but provide service to no or few customers within the MSA ... because they are not likely to receive a request for LNP."²² As this proposal acknowledges, the key fact is not whether customers reside within Census Bureau's MSA boundaries, but whether another carrier actually wishes to port a number. This concern is best addressed, however, by requiring carriers to implement LNP once they have had a request from (but *only* when they have had a request from) another carrier. The proposal also would require carriers to ascertain the number of

²¹ *Telephone Number Portability*, First Memorandum Opinion and Order on Reconsideration, 12 FCC Red at 7276, para. 60.

²² Third Reconsideration Order and FNPRM at para. 8.

customers they serve within and outside the MSA boundary, which would place an additional burden on reporting carriers as well as the Commission, which burden would be all the more difficult for CMRS carriers because of the mobile nature of the service.

Similarly unconvincing are the other reasons suggested in the FNPRM for extending the LNP mandate to switches in the top 100 MSAs that have not been subject to a request. The Commission first suggests that LNP should be deployed throughout the top 100 MSAs because of the competitive benefits of LNP.²³ The full competitive benefit of LNP will be realized, however, as long as carriers are required to implement LNP, after a request, in switches in the top 100 MSAs. If no carrier requests have been tendered, it is difficult to see how a customer could benefit from a carrier's implementation of LNP.

The FNPRM also suggests that LNP capability could "alleviate number shortages by implementing code sharing and other mechanisms to transfer unused numbers among carriers that need numbering resources."²⁴ Western Wireless supports the implementation of reasonable numbering optimization measures. It is unrealistic to expect, however, that substantial numbering shortages will arise where competition is not robust enough to have triggered an LNP request – particularly now that the rate of number assignment has substantially slowed. Certainly, the Commission cannot justify imposing the very real, enormous cost of LNP implementation on carriers – particularly small carriers – in the name of a slight possibility of a number conservation benefit.

²³ Third Order on Reconsideration and FNPRM at para. 7.

²⁴ *Id.*

Even if the Commission concludes that LECs should be required to implement LNP in the top 100 MSAs even without a request, the Commission should impose no such obligation on CMRS providers. In contrast to LECs, CMRS carriers are not required by statute to offer LNP. Further, the policy arguments in favor of an LNP requirement for wireless carriers are substantially weaker than those for LECs.²⁵ The CMRS marketplace has never been a monopoly environment, and competition is robust today, leaving no justification for a “market-opening” requirement like LNP. Further, the weak experience with LNP in the wireline market militate against extending it to CMRS.²⁶ As a result, the Commission should be all the more cautious – if it retains the mandate at all – not to extend it to areas and carriers where it is not needed.

In sum, the Commission cannot now reverse its earlier decision to limit the LNP requirement to switches that have been subject to a request without a reasoned explanation for doing so.²⁷ As described above, no reasoned explanation for doing so exists. The Commission therefore should continue to limit the LNP obligation to switches within the top 100 MSAs that have been subject to a bona fide request, at least for CMRS carriers.

²⁵ See generally Petition of Verizon Wireless Pursuant to 47 USC § 160 for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, WT Docket No. 01-184 (filed July 26, 2001); Reply Comments of Western Wireless Corporation, WT Docket No. 01-184 (filed Oct. 22, 2001).

²⁶ See Letter from Thomas E. Wheeler, President/CEO, CTIA, to Michael K. Powell, Chairman, FCC, dated Feb. 13, 2002 (WT Docket No. 01-184).

²⁷ *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 748 (D.C. Cir. 2001). See also *INS v. Cardozo-Fonseca*, 480 U.S. 421, 446 (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981).

IV. CONCLUSION

In expanding the list of MSAs in which carriers must implement LNP and pooling, and requiring carriers in the largest 100 MSAs to implement LNP and pooling whether or not they have had a carrier request, the *Numbering Third Report & Order* substantially expanded the scope of the LNP and pooling mandates. Western Wireless is certainly but one of many carriers that suddenly has found itself subject, less than a year from the deadline, to an enormous regulatory obligation for which other carriers have had years to prepare. Coming without prior notice, these new requirements were both illegal and bad policy. Fortunately, in the Third Reconsideration Order and FNPRM, the Commission has given itself a valuable opportunity to correct these errors. The Commission should not expand the "top 100 MSAs" list to include the CMSAs, and should not require carriers, particularly CMRS carriers, that have not received a carrier request to provide LNP.

Respectfully submitted,

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