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January 10, 2003

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: Written Ex Parte Communication  
2002 Biennial Review Proceedings  
WC Docket No. 02-313; WT Docket No. 02-310

Dear Ms. Dortch:

The attached ex parte letter was filed this morning. The attachment to the letter was inadvertently omitted from the filing. Accordingly, a revised copy, including the attachment, is filed herewith.

Please direct any questions regarding this filing to the undersigned.

Sincerely yours,

WILKINSON BARKER KNAUER, LLP

By: \_\_\_\_\_/s/  
L. Charles Keller

Enclosures

January 10, 2003

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

Re: Written Ex Parte Communication  
2002 Biennial Review Proceedings  
WC Docket No. 02-313; WT Docket No. 02-310

Dear Ms. Dortch:

This letter is filed on behalf of ALLTEL Communications, Inc., (“ALLTEL”); AT&T Wireless Services, Inc. (“AWS”); Dobson Communications Corporation (“Dobson”); and Cingular Wireless LLC (“Cingular”), to bring the Commission’s attention to the urgent need to review the Commercial Mobile Radio Service (“CMRS”) local number portability (“LNP”) requirements<sup>1</sup> in the context of the above-referenced 2002 Biennial Review proceedings.<sup>2</sup>

The parties to this letter are also intervenors in the D.C. Circuit appeal of the Commission’s decision not to forbear from the CMRS LNP requirement.<sup>3</sup> In that case, the intervenors have drawn the Court’s attention to: (1) the Commission’s lack of jurisdiction to adopt the CMRS LNP requirement in the first instance, and (2) the Commission’s repeated failure to subject the CMRS LNP requirement to the biennial review required by section 11.<sup>4</sup> A copy of the intervenors’ brief is attached hereto and incorporated by reference. Briefing of

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<sup>1</sup> The CMRS LNP rule is codified at 47 C.F.R. § 52.31. Related, uncodified requirements (for example, the requirement to provide LNP upon carrier request outside the largest 100 MSAs) can be found in various orders in CC Docket Nos. 95-116 and 99-200.

<sup>2</sup> See also Cellular Telecommunications & Internet Ass’n Petition for Rulemaking Concurring the Biennial Review of Regulations Affecting CMRS Carriers, WT Docket No. 02-310 (filed July 25, 2002); Sprint Reply Comments, WT Docket No. 02-310 (filed Nov. 4, 2002).

<sup>3</sup> *Cellular Telecommunications & Internet Ass’n and Cellco Partnership d/b/a Verizon Wireless v. FCC*, Case No. 02-1264 (D.C. Cir. pending), seeking review of *Verizon Wireless’s Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, Memorandum Opinion & Order, 17 FCC Rcd 14972 (2002) (“*Order Denying Forbearance*”).

<sup>4</sup> Intervenors also demonstrate that the FCC violated section 10 by ignoring most of the record and applicable standards in denying Verizon’s forbearance petition.

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this case will be complete on February 24, 2003, and oral argument is scheduled for April 15, 2003.

The jurisdictional argument is in large part based on a recent case, *MPAA v. FCC*,<sup>5</sup> which holds that where Congress intentionally limits the agency's authority in a particular area, ancillary authority cannot be utilized to subvert the limitation – Congress has “filled the hole,” leaving no room for agency action. The same principle applies here in light of the specificity of section 251 and its limitation on applying LNP only to LECs.

Given the obvious overlap of issues, the Commission cannot ignore review of section 52.31 in its 2002 biennial review. If the FCC lacked jurisdiction to impose the rule in the first place, then it is not possible to find the rule “necessary” because Congress obviously reached a different conclusion – it limited the FCC's authority to impose it on CMRS carriers. Congress's decision not to delegate authority to the Commission to require CMRS carriers to provide LNP was based on an analysis of the same market factors to be considered under section 11. Moreover, to date, the rule has never been subjected to a biennial review. Section 11 contains no exception for rules that have undergone section 10 forbearance review. In any event, as demonstrated in the intervenors' brief, that review has been superficial at best.

Because substantial questions have been raised about the Commission's jurisdiction, and whether it has complied with section 11 (and section 10), and important LNP rules have not yet even been clarified even though the deadline is rapidly approaching,<sup>6</sup> the Commission should review the CMRS LNP requirement now.

## **I. The FCC Lacked Jurisdiction to Adopt the CMRS LNP Requirement**

An agency has no power to act without a delegation by Congress;<sup>7</sup> it possesses only those powers *granted* by Congress. Stated another way, an agency does not possess all powers *except those forbidden* by Congress – otherwise agencies would have virtually limitless discretion in violation of *Chevron* and the Constitution.<sup>8</sup> In *MPAA*, the D.C. Circuit found that the FCC

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<sup>5</sup> *Motion Picture Ass'n v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (*pet. reh'g. pending*) (“*MPAA*”).

<sup>6</sup> For example, whether the FCC will retain the request requirement for LNP.

<sup>7</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Stark v. Wickard*, 321 U.S. 288, 309 (1944); *MPAA*, 309 F.3d at 801.

<sup>8</sup> *MPAA*, 309 F.3d at 805-06; *Railway Labor Exec Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 665, 670-71 (D.C. Cir. 1994) (“*Railway*”).

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cannot adopt rules simply because Congress “did not expressly foreclose the possibility”<sup>9</sup> of such a rule, especially where Congress left no hole “for the agency to fill.”<sup>10</sup>

With respect to LNP, section 251 of the Act is the starting point for analyzing the LNP requirement because it is the sole statutory provision addressing LNP.<sup>11</sup> Congress not only confined the delegation to the specific requirement (LNP), but also took the next step by limiting the carrier class to which it applies.

Section 251 is the only section in the Act dealing with numbering in general and LNP specifically. Therefore, the FCC is empowered to require LNP only to the extent specified in section 251. That section references all telecommunications carriers (including CMRS providers), LECs and incumbent LECs, and delineates which entities are required to provide LNP. “Statutory provisions *in pari materia* normally are construed together to discern their meaning.”<sup>12</sup> Accordingly, the various provisions of section 251, construed together, establish the scope of the Commission’s power to require LNP.

Sections 251(a)-(c) set forth a “carefully-calibrated regulatory regime crafted by Congress,” with a “three-tiered hierarchy of escalating obligations based on the type of carrier involved.”<sup>13</sup> Subsection (a) sets forth the relatively limited duties applicable to all telecommunications carriers, but is silent regarding LNP. Subsection (b) imposes five separate obligations, including LNP, *applicable only to LECs*, and gives the Commission LNP standard-setting authority. At the same time, Congress defined LECs to *exclude* CMRS carriers unless and until the FCC determines otherwise,<sup>14</sup> a finding the FCC has repeatedly and correctly declined to make.<sup>15</sup> Section 251(c) imposes additional requirements on *incumbent* LECs.

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<sup>9</sup> *MPAA*, 309 F.3d at 805-06; *see also Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4<sup>th</sup> Cir. 1998) (“[A]gency power is ‘not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.’”) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)), *aff’d*, 529 U.S. 120 (2000).

<sup>10</sup> *MPAA*, 309 F.3d at 801 (citing *Railway*, 29 F.3d at 671; *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1994)).

<sup>11</sup> *MPAA*, 309 F.3d at 801 (citing *Railway*, 29 F.3d at 671; *Chevron*, 467 U.S. at 843-44).

<sup>12</sup> *MPAA*, 309 F.3d at 801 (citing *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972)).

<sup>13</sup> *Guam Public Utilities Commission*, 12 FCC.Rcd 6925, 6937-38 (1997).

<sup>14</sup> 47 U.S.C. § 153(26) (The term “local exchange carrier” . . . does *not* include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term) (emphasis added).

<sup>15</sup> *See Order Denying Forbearance*, 17 FCC Rcd at 14972-73 (“Commercial Mobile Radio Service (CMRS) carriers are not LECs, and thus are not included in section 251(b) . . . .”); *Petition of the State Independence Alliance for a*

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Moreover, in contrast to the limited authority to impose LNP in subsection (b), section 251(e) gives the FCC plenary authority over numbering administration. Thus, it is clear Congress knew how to include and exclude CMRS carriers regarding LNP and to define the FCC's jurisdiction narrowly (LNP) or broadly (numbering administration) as it deemed appropriate. It reviewed the competitive landscape and decided LNP should be required only of LECs.

The exclusion of carriers other than LECs from LNP requirements and other section 251 requirements reflects a deliberate choice by Congress, negating any implied power of the Commission to choose otherwise. As the Supreme Court has held, "an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance."<sup>16</sup> Here, Congress intended to confine the LNP requirement to LECs.

The FCC recognized in implementing section 251 that the statute withdrew authority to impose LNP on wireless carriers:

The 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, unless the Commission concludes that they should be included in the definition of local exchange carrier.<sup>17</sup>

In the same breath, however, the Commission found "independent authority" to require wireless LNP "as we deem appropriate" from the general delegations in sections 1, 2, 4(i), and 332 of the Act.<sup>18</sup> These provisions do not mention LNP, nor can they serve as a jurisdictional basis to override the specific reservations in section 251.

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*Declaratory Ruling*, 17 FCC Rcd 14802, 14806 (2002) ("CMRS providers are not subject to the statutory requirements imposed on LECs in section 251(b)."); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15996 (1996) (stating that the FCC will not define CMRS providers as LECs absent evidence that wireless services "replace wireline loops for the provision of local exchange service.") (subsequent history omitted); *Administration of the North American Numbering Plan Carrier Identification Codes*, 13 FCC Rcd 3201, 3206 n.21 (1998) (noting that CMRS providers "are not classified as LECs").

<sup>16</sup> *Field v. Mans*, 516 U.S. 59, 67 (1995).

<sup>17</sup> *LNP First Report*, 11 FCC Rcd at 8431 (emphasis added).

<sup>18</sup> *Id.* at 8431-32. The *Order Denying Forbearance* references the *LNP First Report* where, in response to challenges by Petitioners and others, the FCC fully addressed its implied authority to require wireless LNP. See *Order Denying Forbearance*, 17 FCC Rcd at 14972 & n.3.

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Reliance on these provisions is barred by the canon of statutory construction that “the specific governs the general.”<sup>19</sup> This canon is “a warning against applying a general provision *when doing so would undermine limitations created by a more specific provision.*”<sup>20</sup> Congress spoke comprehensively and specifically to LNP in section 251(b). Thus, the FCC cannot rely on general powers conferred by sections 1, 2, 4(i) and 332 to negate Congress’ contrary directive. The separate statement of Commissioner Furchtgott-Roth in the *2000 Forbearance Reconsideration Order* aptly observes:

The Commission has grounded its [wireless LNP] authority in sections 1, 2, 4(i), and 332 of the Communications Act. I have long voiced concern about this agency’s efforts to impose costly and far-reaching regulatory obligations based on authority cobbled together from various general and ancillary provisions of the Act. Such assertions of jurisdiction are particularly troubling here in light of section 251’s statutory provision specifically mandating number portability solely for local exchange carriers.<sup>21</sup>

Nor do these sections grant the Commission independent jurisdiction to impose LNP requirements on CMRS providers. As the Court recognized in *MPAA*, the FCC has “necessary and proper” authority only where another provision contains a specific delegation of authority.<sup>22</sup>

Section 1 constitutes a general delegation of authority to the Commission and never mentions LNP.<sup>23</sup> It grants the Commission only such limited authority as is “reasonably ancillary to the effective performance of the Commission’s various responsibilities.”<sup>24</sup> Courts have upheld the FCC’s exercise of ancillary jurisdiction in cases where (1) Congress did *not* expressly address and define the scope of the Commission’s authority with respect to the regulated area at issue, and (2) there was a demonstrated need to imply authority to discharge the

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<sup>19</sup> *Morales v. Transworld AirLines*, 504 U.S. 374, 384-385 (1992) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)).

<sup>20</sup> *Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996) (emphasis added).

<sup>21</sup> *Telephone Number Portability, Cellular Telecommunication and Industry Association’s Petition for Forbearance, Order on Reconsideration*, 15 FCC Rcd 4727, 4739 (2000) (*2000 Forbearance Reconsideration Order*) (Separate Statement of Commissioner Furchtgott-Roth).

<sup>22</sup> *MPAA*, 309 F.3d at 806.

<sup>23</sup> *Cf.* 47 U.S.C. § 151.

<sup>24</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also California v. FCC*, 905 F.2d 1217, 1240-41 & n.35 (9th Cir. 1990).

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will of Congress.<sup>25</sup> Here, however, Congress has clearly expressed its will regarding LNP in section 251(b) and thus there is no basis to invoke ancillary authority under section 1.

In fact, the D.C. Circuit recently found that section 1 was enacted to ensure that all Americans “have access to wire and radio communication transmissions” and the mandate is a “reference to the geographic availability of service.”<sup>26</sup> LNP, however, does not deal with access to service in a particular area. It is a service feature provided to a subscriber who already *has* service.

Finally, section 332 cannot serve as authority for the FCC to impose a wireless LNP mandate. This section requires the Commission to treat CMRS providers as common carriers but permits the FCC to forbear from certain statutory requirements normally associated with landline service, *e.g.*, tariffs.<sup>27</sup> It also preempts state regulation over wireless rates and market entry.<sup>28</sup> The main objectives of section 332 are regulatory parity among like wireless services and deregulation.<sup>29</sup> Thus, as the FCC has recognized:

Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.<sup>30</sup>

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<sup>25</sup> See, *e.g.*, *Southwestern Cable*, 392 U.S. at 164-78 (upholding FCC authority to regulate cable where there were no preexisting statutory provisions regarding FCC oversight of the cable industry and the FCC demonstrated a need to regulate flowing from its broadcast responsibilities).

<sup>26</sup> *MPAA*, 309 F.3d at 804.

<sup>27</sup> See 47 U.S.C. § 332(c)(1)(A). Under the Act and the Commission’s rules, a “common carrier” is not the same as a “LEC.” “Common carrier” is a broad category of entities that offer services to the public, while “LEC” includes only carriers that offer service within, and access to, a telephone exchange network.

<sup>28</sup> See *id.* § 332(c)(3)(A).

<sup>29</sup> See H.R. Rep. No. 103-111, at 259-60 (1993) (emphasizing the purpose of section 332 to achieve “regulatory parity” among providers of “equivalent mobile services”); *Petition of the Connecticut Department of Public Utility Control*, 10 FCC Rcd 7025, 7030-31 (1995) (“*Connecticut DPUC*”) (recognizing that section 332 expresses a “general preference in favor of reliance on market forces rather than regulation,” and “places on [the FCC] the burden of demonstrating that continued regulation will promote competitive market conditions”), *aff’d sub nom. Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2<sup>nd</sup> Cir. 1996).

<sup>30</sup> *Connecticut DPUC*, 10 FCC Rcd at 7035 (1995); see also *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order*, 9 FCC Rcd 7988, 7992 (1994) (“[C]onsumer demand, not regulatory decree, [should] dictate[] the course of the mobile services marketplace.”).

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No showing can (nor has) been made that imposing wireless LNP is needed to carry out the objectives of section 332.

Because the FCC lacked delegated authority to impose LNP on wireless carriers, the Commission has the obligation in the 2002 Biennial Review proceeding to review and repeal the wireless LNP rule.

## **II. Section 11 Has Been Violated Because The CMRS LNP Rule Has Never Been Subjected to a Biennial Review and, in Any Event, Cannot Withstand Section 11 Analysis**

Congress, in section 11 of the 1996 Act, commanded that the FCC “shall” review biennially “all regulations.”

In every even-numbered year (beginning with 1998), the Commission (1) shall review all regulations issued under this chapter in effect at the time of the review that apply to the operations or activities of any provider of telecommunications service; and (2) shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.<sup>31</sup>

Despite the clarity of this statutory directive, the FCC has *never* conducted a biennial review of its wireless LNP rule. It did not conduct such a review in its 1998 biennial review, nor did it do so in 2000.<sup>32</sup>

Had the FCC conducted the required section 11 review of its number portability rule, it would have been compelled to eliminate the rule. Section 11 requires the FCC to repeal “all regulations” that it finds are “no longer necessary in the public interest as the result of meaningful economic competition between providers of such service.”<sup>33</sup> The FCC has already determined that, for purposes of section 11, “there is meaningful economic competition in CMRS mobile telephony generally”:

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<sup>31</sup> 47 U.S.C. § 161(a).

<sup>32</sup> The FCC was specifically asked in the 2002 LNP forbearance proceeding to conduct a section 11 analysis, yet it ignored this request. *See, e.g.*, VoiceStream Wireless/U.S. Cellular Joint Reply Comments (WT Docket No. 01-184) at 11-13 (Oct. 22, 2001).

<sup>33</sup> 47 U.S.C. §§ 161(a)(2). *See also id.* at § 161(b) (“The Commission shall repeal or modify any regulation it determines to be no longer necessary in the public interest.”).

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Evidence in MSAs [Metropolitan Statistical Areas] regarding the current state of these [wireless] markets clearly shows that the presence of multiple competitors is effectively restraining prices, promoting innovation and diversity, and increasing output.<sup>34</sup>

Indeed, Chairman Powell has observed that by “any standard,” the CMRS market is “the most competitive market in the communications industry.”<sup>35</sup>

There can be no question that the number portability requirement is not “necessary in the public interest” given this significant economic competition. Number portability is not “necessary” to promote competition between wireless carriers – a market the FCC has recognized already exhibits “a high level of competition for most consumers.”<sup>36</sup> According to the FCC’s own data:

- Eighty percent (80%) of the U.S. population lives in counties with five or more wireless carriers (with 53% of the population having a choice of at least six providers).<sup>37</sup>
- The Cellular Price Index (maintained by Bureau of Labor Statistics) has declined “almost 33 percent since the end of 1997.”<sup>38</sup>
- “[M]ore than 30 percent of subscribers change service providers each year.”<sup>39</sup>

According to FCC data, there were over 128 million mobile customers at the end of 2001.<sup>40</sup> If “more than 30 percent of subscribers change service providers each year,” then more than 41 million mobile customers switched carriers during 2001 alone. Thus, number portability cannot possibly be considered “necessary” to facilitate competition among wireless carriers.

Nor can it be said that number portability is “necessary” to promote competition between wireless and landline services, the second reason the FCC has cited for its mandate. In the *Order*

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<sup>34</sup> 2000 Biennial Regulatory Review – Spectrum Aggregation Limits, 16 FCC Rcd 22668, 22693 ¶ 46 (2001).

<sup>35</sup> *Id.* at 22727 (Separate Statement of Chairman Powell).

<sup>36</sup> Seventh CMRS Annual Competition Report, 17 FCC Rcd 12985, 13004 (2002).

<sup>37</sup> *See id.* at 12990-91.

<sup>38</sup> *Id.* at 13014.

<sup>39</sup> *Id.* at 13008.

<sup>40</sup> *See id.* at 13006.

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*Denying Forbearance*, the FCC opined (without the recitation of a single fact or market study) that:

[a]s more consumers choose to use wireless instead of wireline services, the inability to transfer their wireline number to a wireless service provider *may* slow the adoption of wireless by those consumers that wish to keep the same telephone number they had with their wireline service provider.<sup>41</sup>

The FCC does not provide a single fact to support the proposition that its regulatory mandate “may” increase wireless-LEC competition. In fact, the wireless LNP mandate will have the perverse effect of inhibiting competition between wireless and landline carriers. The FCC has recognized that wireless services will not compete meaningfully with landline services until wireless carriers offer a value proposition similar to landline carriers, including prices and service quality (ubiquity of coverage).<sup>42</sup> Number portability would increase a wireless carrier’s cost structure, which, in turn, adversely affects its pricing. In addition, number portability diverts the capital dollars wireless carriers need to expand the coverage of their network and improve their service quality. As a result, LNP undermines the very capabilities wireless carriers need to compete directly with landline carriers.

Moreover, the FCC has never explained why existing mobile customers would want to port their landline telephone numbers to wireless service when the customers already have mobile telephone numbers. According to the FCC’s own data, 45% of the U.S. population (counting all individuals, not just households) already subscribes to wireless service.<sup>43</sup> And, the *Order Denying Forbearance* neglects to note that wireless carriers could (and would) deploy number portability (without a government mandate) if they believed that the costs of the capability would be outweighed by the benefits of obtaining new customers who want to port their landline telephone number. That wireless carriers have not done so constitutes powerful evidence that landline customers are not demanding to have the capability of porting their telephone number to wireless services. Finally, the FCC should consider the concerns raised by the public safety community about the impact of LNP on E-911 and emergency response.<sup>44</sup>

In sum, the FCC has already determined that “meaningful economic competition” exists in the wireless market, and the LNP rule is not “necessary in the public interest” given this

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<sup>41</sup> Order at 14981 ¶ 18 (emphasis added).

<sup>42</sup> See, e.g., *First CMRS Competition Report*, 10 FCC Rcd 8844, 8869 ¶ 75 (1995); *Second CMRS Competition Report*, 12 FCC Rcd 11266, 11323-26 (1997).

<sup>43</sup> See *Seventh CMRS Competition Report*, 17 FCC Rcd at 13017.

<sup>44</sup> See Ex parte letter of NENA, APCO and NANSA, WT Docket No. 01-184 (filed May 1, 2001).

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competition. Accordingly, section 11 requires that the FCC repeal its number portability rule as applied to wireless carriers.

### Conclusion

The CMRS LNP rule was beyond the Commission's authority from the outset, and is not necessary in the public interest given the robust competition in the CMRS marketplace. The significant questions about the FCC's jurisdiction to adopt the CMRS LNP rule, Congress's statutory judgment that LNP should not be imposed on CMRS carriers in section 251, and the rule's validity under the section 11 criteria, combined with the substantial carrier costs as well as other resource expenditures and unintended consequences from imposition of wireless LNP,<sup>45</sup> militate strongly in favor of a thorough section 11 analysis now.

The FCC also should waste no time completing this process. Under the statute, the FCC is required to "review" its regulations *and* "determine" whether they are still necessary in competitive markets *during each even-numbered year*.<sup>46</sup> The year 2002 has now concluded without the determination that the statute requires.

Sincerely yours,

WILKINSON BARKER KNAUER, LLP

By: \_\_\_\_\_ /s/  
L. Andrew Tollin  
L. Charles Keller  
J. Wade Lindsay

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<sup>45</sup> It is not clear that the full impact of LNP on national security and homeland security has been analyzed.

<sup>46</sup> 47 U.S.C. § 161(a).

**STAMP AND RETURN**

U.S. COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

Oral Argument Scheduled for April 15, 2003

2003 JAN 3 PM 10:57

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

FILING DEPOSITION

Case No. 02-1264

**CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION AND  
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,**  
*Petitioners,*

v.

**FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,**  
*Respondents.*

**BRIEF OF INTERVENORS IN SUPPORT OF PETITIONERS**

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January 3, 2003

FILING DEPOSITION

2003 JAN -3 PM 10:57

RECEIVED  
U.S. COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Case No. 02-1264

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CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION AND  
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,  
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,  
*Respondents.*

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**CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

ALLTEL Communications, Inc. (“ALLTEL”), AT&T Wireless Services, Inc. (“AWS”), Cingular Wireless LLC (“Cingular”), Dobson Communications Corporation (“Dobson”), and Sprint Spectrum, L.P. d/b/a Sprint PCS (“Sprint”) (collectively, the “Petitioner-Intervenors”), hereby file their intervenors’ brief in support of the Petitioners. These wireless providers include national, regional and rural carriers. Pursuant to D.C. Cir. Rule 28(a)(1), Petitioner-Intervenors hereby certify the following information to be true and correct, upon information and belief:

**A. Parties and *Amici*.**

Petitioner-Intervenors hereby incorporate by reference the list of parties, intervenors, and *amici* set forth in the Brief for Petitioners, the Cellular Telecommunications & Internet Association (“CTIA”) and Cellco Partnership d/b/a Verizon Wireless (“VZW”). Pursuant to F.R.A.P. 26.1 and D.C. Cir. Rule 26.1, the Petitioner-Intervenors further make the following disclosures:

***ALLTEL Communications, Inc.*** ALLTEL is a provider of telecommunications services and is part of the diversified family of ALLTEL communications companies. ALLTEL provides

Commercial Mobile Radio Services to approximately 7.5 million wireless subscribers nationwide, predominantly in rural areas and mid-sized urban areas in the Southeast. ALLTEL also has substantial service territories in the Southwest and Midwest. ALLTEL is a wholly-owned subsidiary of ALLTEL Corporation, which is a publicly-traded company with debt and equity in the hands of the public. ALLTEL Corporation has no parent companies and no publicly-held company has a 10 percent or greater interest in ALLTEL Corporation.

*AT&T Wireless Services, Inc.* AWS is a CMRS provider and has no parent company. NTT DoCoMo USA Inc. owns approximately 17 percent of AWS' voting securities and is the only company that owns more than 10 percent of the stock of AWS.

*Cingular Wireless LLC.* Cingular is the joint venture created by the combination of the domestic wireless operations of SBC Communications Inc. ("SBC") and BellSouth Corporation ("BellSouth"), each of which is a publicly-held corporation. Cingular is a CMRS provider.

SBC, through various wholly-owned subsidiaries, none of which is publicly held, indirectly holds approximately 60 percent of Cingular's LLC Units. BellSouth, through various wholly-owned subsidiaries, none of which is publicly held, indirectly holds approximately 40 percent of Cingular's LLC Units. Cingular Wireless Corporation directly holds less than one percent of Cingular's LLC Units and is not publicly held.

SBC and BellSouth equally own and control Cingular Wireless Corporation, which – in addition to the *de minimis* ownership interest in Cingular described above – controls Cingular. Therefore, although the economic interests in Cingular are divided approximately 60/40 between SBC subsidiaries and BellSouth subsidiaries, control is equally shared.

SBC holds its indirect interests in Cingular through SBC Alloy Holdings, Inc. SBC Alloy Holdings, Inc. is jointly owned by ten wholly-owned subsidiaries of SBC: New Southwest-

ern Bell Mobile Systems, Inc. (“New SBMS;” 62.01 percent); Ameritech Corporation (“Ameritech;” 11.04 percent); AWACS, Inc. (9.15 percent); Southern New England Telecommunications Corporation (“SNET;” 6.31 percent); Associated Communications Corporation (“Associated;” 4.53 percent); New SBC Wireless, Inc. (“New SBCW;” 3.45 percent); Pacific Telesis Group (“PTG;” 2.72 percent); SBC Services, Inc. (“SBC Services;” 0.47 percent); Radiofone Holdings, Inc. (“Radiofone;” 0.29 percent); and SBC Management Services, L.P. (“SBC Management;” 0.03 percent). SBC directly owns SNET, PTG, New SBCW, SBC Management Services Holdings, Inc. (“SBC MSH”), SBC Services, Inc. and Ameritech. New SBCW owns 80 percent and PTG owns 20 percent of New SBMS. New SBCW also owns Associated and Radiofone in addition to Delaware Valley Cellular Corporation, which directly owns AWACS, Inc. SBC MSH directly holds a 99 percent limited partnership interest in SBC Management and holds 100 percent of SBC-MSI, LLC, which directly holds a 1 percent general partnership interest in SBC Management.

BellSouth holds its indirect interests in Cingular through BLS Cingular Holdings, LLC (“BLS”). The members of BLS are: BellSouth Mobile Data, Inc. (“BSMD;” 92.80 percent); AB Cellular Holding, LLC (“AB Cellular;” 2.60 percent); Wireless Telecommunications Investment Company LLC (“WTIC;” 2.40 percent); and RAM Broadcasting Corporation (“RAM;” 2.20 percent). BellSouth directly owns BellSouth Enterprises, Inc. (“BSE”) and RAM. BSE directly owns BellSouth Mobile Systems, Inc., which directly owns BSMD. BSMD directly owns Los Angeles RCCs, LLC (“LA RCC”). LA RCC directly owns ACCC of Los Angeles, Inc., which directly owns BSCC of Houston, LLC, WTIC, and 61.054 percent of AB Cellular. BSCC of Houston, LLC directly owns BSCC of Houston Holdings, Inc. and 37.024 percent of AB Cellular. BSCC of Houston Holdings, Inc. directly owns 1.922 percent of AB Cellular.

***Dobson Communications Corporation.*** Dobson is a corporation organized and existing under the laws of the State of Oklahoma. Dobson, through various wholly-owned subsidiaries, is a CMRS provider. Dobson is a publicly-traded company with debt and equity in the hands of the public. Dobson is owned in majority by Dobson CC Limited Partnership (“DCCLP”), which holds an 81.46% voting interest. No other entity directly holds a 10% or greater interest in Dobson. DCCLP has no parent companies and no publicly held company has a 10% or greater interest in DCCLP.

***Sprint Spectrum L.P. d/b/a Sprint PCS.*** Sprint is a wholly-owned subsidiary of Sprint Corporation, and together with other subsidiaries that are wholly-owned by Sprint Corporation comprise the wireless division of Sprint Corporation and is a CMRS provider. Sprint Corporation is a holding company whose subsidiaries engage in telecommunications and related businesses. Sprint Corporation stock is publicly traded under the names of Sprint FON and Sprint PCS. Sprint Corporation has no parent companies and no publicly-held company has a 10 percent or greater interest in Sprint Corporation.

**B. Ruling(s) Under Review.**

Petitioners-Intervenors hereby incorporate by reference the certificate of ruling(s) under review set forth in the Brief for Petitioners.

**C. Related Cases.**

None.



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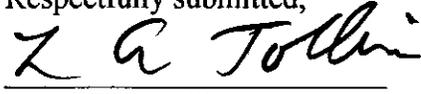
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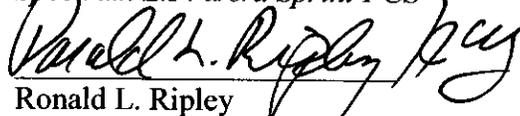
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## GLOSSARY

1996 Act	Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996), which amended the Communications Act of 1934.
The Act	Communications Act of 1934, 47 U.S.C. § 151 <i>et seq.</i>
CPP	Calling Party Pays is a system where wireless subscribers pay only for the calls they place to others; the calling party is responsible for any charges associated with calls placed to a wireless subscriber.
CMRS	Commercial Mobile Radio Services are wireless services offered on a common carrier basis by FCC-licensed entities in areas not defined by local exchange boundaries. <i>See</i> 47 C.F.R. § 20.3.
FCC or Commission	Federal Communications Commission
Incumbent LEC	Local exchange carriers extant at the time of the 1996 Act, such as the Regional Bell Operating Companies. <i>See</i> 47 U.S.C. § 251(h)(1).
LEC	Local Exchange Carrier is a common carrier engaged in landline telephone service within local exchanges, excluding CMRS unless the FCC determines otherwise. <i>See</i> 47 U.S.C. § 153(26).
LNP	Local Number Portability is the ability to port from one carrier to another a customer's telephone number. <i>See</i> 47 U.S.C. §§ 153(30), 251(b)(2); 47 C.F.R. § 51.21(k).
NANP	North American Numbering Plan is the telephone numbering plan used in the United States (and other North American countries). <i>See</i> 47 C.F.R. § 52.5(c).
Numbering Administration	Plenary authority granted the FCC to administer the NANP. <i>See</i> 47 U.S.C. § 251(e).
<i>Order</i>	The order under review, <i>Verizon Wireless' Petition for Partial Forbearance from the CMRS Number Portability Obligation</i> , WT Docket No. 01-184 & CC Docket No. 95-116, <i>Memorandum Opinion and Order</i> , 17 F.C.C.R. 14972 (2002) (JA ____).
Telecommunications Carrier	A provider of common carrier telecommunication services to the public for a fee, including CMRS. <i>See</i> 47 U.S.C. § 153(44).

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Case No. 02-1264

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**CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION AND  
CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS,**  
*Petitioners,*

v.

**FEDERAL COMMUNICATIONS COMMISSION  
and UNITED STATES OF AMERICA,**  
*Respondents.*

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**BRIEF OF INTERVENORS IN SUPPORT OF PETITIONERS**

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**STATUTES AND REGULATIONS**

Pertinent statutes and regulations are set forth in the Addendum to Petitioners' Brief.

**SUMMARY OF ARGUMENT**

The 1996 Act excludes wireless ("CMRS") carriers from the local number portability ("LNP") obligation it placed only on local exchange carriers ("LECs"). Nevertheless, the FCC found it possessed "independent authority" to require wireless LNP as it "deem[ed] appropriate."<sup>1</sup>

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<sup>1</sup>*Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8352, 8431 (1996) (*LNP First Report*).

The FCC is wrong. It cannot will wireless LNP into existence because it lacks delegated authority given the specificity of the statute. The FCC's authority must be grounded in a delegation of power from Congress.<sup>2</sup> Where Congress delegates limited authority, the FCC cannot adopt rules expanding that authority simply because Congress "did not expressly foreclose the possibility."<sup>3</sup> The Commission cannot act where Congress has left no hole "for the agency to fill."<sup>4</sup> The statute here not only fully addresses the subject matter (*i.e.*, LNP) but also delineates the carriers (*i.e.*, only LECs) subject thereto. The Commission's authority over LNP was thus clearly bounded.

The FCC's authority to impose LNP requirements derives from Section 251(b) of the Act. Section 251(b)(2) imposes the duty to provide number portability in accordance with the requirements prescribed by the Commission and provides the FCC with standard-setting authority. Unlike other subsections in Section 251 which apply to the broader class of telecommunications carriers<sup>5</sup> or the narrower class of incumbent LECs,<sup>6</sup> Section 251(b) pertains only to LECs. The statutory definition of LECs specifically excludes wireless carriers, unless the Commission determines there is a demonstrated regulatory need to deem them LECs. As the *Order* recognizes, the FCC has held that wireless carriers are not LECs. Thus, it is clear from the statutory scheme that Congress intentionally limited the FCC's authority to impose LNP and specifically exempted CMRS.

The Commission's invocation of implied authority to impose wireless LNP through the general provisions of Sections 1, 2, 4(i) and 332 of the Act is without merit because it conflicts

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<sup>2</sup> See *Motion Picture Ass'n v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) ("*MPAA*"), *pet. reh'g pending*.

<sup>3</sup> *Id.* at 801, 805-06.

<sup>4</sup> *Id.*

<sup>5</sup> *E.g.*, 47 U.S.C. § 251(a).

<sup>6</sup> *E.g.*, 47 U.S.C. § 251(c).

with the statutory scheme. Wireless LNP is not mentioned in these sections and is not necessary for the Commission to discharge its responsibilities.<sup>7</sup> The FCC's wireless LNP rule, 47 C.F.R. § 52.31, is therefore beyond the FCC's statutory authority and should be vacated.

The FCC's Section 10 forbearance analysis is equally flawed. A proper evaluation of the record evidence under the Section 10 criteria demonstrates that wireless LNP is not needed. The FCC failed even to analyze the first criterion, utilized a different test under the second criterion than in the previous forbearance order, and ignored facts previously found to support forbearance (e.g., high industry churn rate).

The FCC determined in 1999 that the state of competition in the wireless market was sufficiently robust that the Section 10 criteria warranted temporary forbearance from enforcement of the wireless LNP rule.<sup>8</sup> The only development since the *1999 Forbearance Order* is that the wireless market has become even more intensely competitive. In the three years between the *1999 Forbearance Order* and the *Order*: (1) prices for wireless services fell almost 24%; (2) the number of facilities-based carriers increased from at least 3 to at least 6 (at least 75% of the market has at least five or more facilities-based carriers); and (3) churn is 30% a year, with approximately 20 million customers changing carriers in 2000.

This dramatic, continued growth in competition occurred *without* wireless LNP. Yet, the FCC ignored this record evidence of present-day market circumstances and declined to forbear from the wireless LNP rule based on a policy decision that wireless LNP may become an important service offering in the future. The *Order* never engaged in any cost/benefit analysis to examine whether the billions of dollars in LNP implementation and maintenance costs and other

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<sup>7</sup> See *MPAA*, 309 F.3d at 802.

<sup>8</sup> *Telephone Number Portability, Cellular Telecommunication and Industry Association's Petition for Forbearance, Memorandum Opinion and Order*, 14 F.C.C.R. 3092 (1999) (*1999 Forbearance Order*).

resource expenditures were offset by the potential benefits to customers. Because the *Order*'s superficial approach violates the deregulatory intent of Congress expressed in the 1996 Act, no deference should be afforded the agency's decision not to forbear. For these reasons, the Court should reverse the *Order* and direct the FCC to forbear from enforcing the wireless LNP rule.

Finally, the *Order* failed to satisfy the requirement in Section 11 of the Act to review and determine every two years whether rules are necessary given the state of competition in the subject industry. To date, the FCC has never conducted a biennial review of the LNP rule despite the adoption of the requirement in 1996. Had it done so, the rule could not have been retained.

## ARGUMENT

### I. THE FCC LACKED DELEGATED AUTHORITY TO REQUIRE WIRELESS CARRIERS TO PROVIDE LNP.

As a threshold matter, the Court must decide whether Congress delegated authority to take the action at issue to decide the applicable standard of review. In *MPAA*, this Court stated that an agency “may not promulgate even reasonable regulations that claim a force of law *without delegated authority from Congress.*”<sup>9</sup> Thus, the FCC’s decision “is not entitled to deference absent a *delegation of authority* from Congress to regulate in the areas at issue.”<sup>10</sup> While such authority can be implied, “deference is warranted only when Congress has left a gap for the agency to fill.”<sup>11</sup> Here, there is no gap left to fill. Authority to adopt an LNP requirement for CMRS was delegated *only* insofar as the FCC redefines “LECs” to include wireless carriers,

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<sup>9</sup> *MPAA*, 309 F.3d at 801 (emphasis added).

<sup>10</sup> *See id.* (emphasis in original); *see also United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).

<sup>11</sup> *Railway Labor Executives Ass'n v. National Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (*Chevron*)), *cited in MPAA*, 309 F.3d at 801.

which it has declined to do. Thus, the FCC's decision not to forbear should receive no deference and the wireless LNP rule should be vacated as *ultra vires*.

**A. Congress Imposed LNP Requirements on LECs, but Deliberately Excluded Wireless Carriers.**

Section 251 of the Act is the starting point for review of the *Order* because it is the sole provision addressing LNP and an agency has no power to act without a delegation by Congress;<sup>12</sup> it possesses only those powers *granted* by Congress. Conversely, an agency does not possess all powers *except those forbidden* by Congress. Otherwise agencies would have virtually limitless discretion in violation of *Chevron* and the Constitution.<sup>13</sup> In *MPAA*, this Court found that the FCC cannot adopt rules simply because Congress “did not expressly foreclose the possibility”<sup>14</sup> of such a rule, especially where Congress left no hole “for the agency to fill.”<sup>15</sup> Here, Congress not only confined the delegation to the specific requirement (LNP), but also took the next step by limiting the carrier class to which it applies.

Section 251 is the only section in the Act dealing with numbering in general and LNP specifically. It references all telecommunications carriers (including CMRS providers), LECs and incumbent LECs, and delineates which entities are required to provide LNP. This Court has held that “[s]tatutory provisions *in pari materia* normally are construed together to discern their

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<sup>12</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986); *Lyng v. Payne*, 476 U.S. 926, 937 (1986); *Stark v. Wickard*, 321 U.S. 288, 309 (1944); *MPAA*, 309 F.3d at 801.

<sup>13</sup> *MPAA*, 309 F.3d at 805-06; *Railway*, 29 F.3d at 670-71.

<sup>14</sup> *MPAA*, 309 F.3d at 805-06; see also *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4<sup>th</sup> Cir. 1998) (“[A]gency power is ‘not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.’”) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976)), *aff'd*, 529 U.S. 120 (2000).

<sup>15</sup> *MPAA*, 309 F.3d at 801 (citing *Railway*, 29 F.3d at 671; *Chevron*, 467 U.S. at 843-44).

meaning.”<sup>16</sup> Accordingly, the various provisions of Section 251, construed together, establish the scope of the Commission’s power to require wireless LNP.

Sections 251(a)-(c) set forth a “carefully-calibrated regulatory regime crafted by Congress,” with a “three-tiered hierarchy of escalating obligations based on the type of carrier involved.”<sup>17</sup> Subsection (a) sets forth the relatively limited duties applicable to all telecommunications carriers, but is silent regarding LNP. Subsection (b) imposes five separate obligations, including LNP, applicable only to LECs, and gives the Commission LNP standard-setting authority. At the same time, Congress defined LECs to exclude CMRS carriers unless and until the FCC determines otherwise,<sup>18</sup> a finding the FCC has repeatedly declined to make.<sup>19</sup> Section 251(c) imposes additional requirements on incumbent LECs. Moreover, in contrast to the limited authority to impose LNP in subsection (b), Section 251(e) gives the FCC plenary authority over numbering administration. Thus, it is clear Congress knew how to include and exclude CMRS carriers regarding LNP and define the FCC’s jurisdiction narrowly (LNP) or broadly (numbering administration) as it deemed appropriate. It reviewed the competitive landscape and decided LNP should be required only of LECs.

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<sup>16</sup> *MPAA*, 309 F.3d at 801 (citing *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972)).

<sup>17</sup> *Guam Public Utilities Commission*, 12 F.C.C.R. 6925, 6937-38 (1997).

<sup>18</sup> 47 U.S.C. § 153(26) (The term “local exchange carrier” . . . does *not* include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) of this title, except to the extent that the Commission finds that such service should be included in the definition of such term) (emphasis added).

<sup>19</sup> See *Order*, 17 F.C.C.R. at 14972-73 (JA\_\_\_) (“Commercial Mobile Radio Service (CMRS) carriers are not LECs, and thus are not included in section 251(b) . . . .”); *Petition of the State Independence Alliance for a Declaratory Ruling*, 17 F.C.C.R. 14802, 14806 (2002) (“CMRS providers are not subject to the statutory requirements imposed on LECs in section 251(b).”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 15996 (1996) (stating that the FCC will not define CMRS providers as LECs absent evidence that wireless services “replace wireline loops for the provision of local exchange service.”) (subsequent history omitted); *Administration of the North American Numbering Plan Carrier Identification Codes*, 13 F.C.C.R. 3201, 3206 n.21 (1998) (noting that CMRS providers “are not classified as LECs”).

The exclusion of carriers other than LECs from LNP requirements and other Section 251 requirements reflects a deliberate choice by Congress, negating any implied power of the Commission to choose otherwise. As the Supreme Court has held, “an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance.”<sup>20</sup> Here, Congress was anything but silent.

**B. The FCC’s Reliance on Sections 1, 2, 4(i) and 332 Is Misplaced.**

The FCC recognized in implementing Section 251 that the statute withdrew authority to impose LNP on wireless carriers:

The 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, unless the Commission concludes that they should be included in the definition of local exchange carrier.<sup>21</sup>

Immediately thereafter, a majority of the FCC Commissioners found “independent authority” to require wireless LNP “as we deem appropriate” from the general delegations in sections 1, 2, 4(i), and 332 of the Act.<sup>22</sup> These provisions do not mention LNP, nor can they serve as a jurisdictional basis to override the specific reservations in Section 251.

Reliance on these provisions is barred by the canon of statutory construction that “the specific governs the general.”<sup>23</sup> This canon is “a warning against applying a general provision *when doing so would undermine limitations created by a more specific provision.*”<sup>24</sup> Congress

<sup>20</sup> *Field v. Mans*, 516 U.S. 59, 67 (1995).

<sup>21</sup> *LNP First Report*, 11 F.C.C.R. at 8431 (emphasis added).

<sup>22</sup> *Id.* at 8431-32. The *Order* references the *LNP First Report* where, in response to challenges by Petitioners and others, the FCC fully addressed its implied authority to require wireless LNP. *See Order*, 17 F.C.C.R. at 14972 & n.3 (JA\_\_\_).

<sup>23</sup> *Morales v. Transworld AirLines*, 504 U.S. 374, 384-385 (1992) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987)).

<sup>24</sup> *Variety Corp. v. Howe*, 516 U.S. 489, 511 (1996) (emphasis added).

spoke comprehensively and specifically to LNP in Section 251(b). Thus, the FCC cannot rely on general powers conferred by Sections 1, 2, 4(i) and 332 to negate Congress' contrary directive. The separate statement of Commissioner Furchtgott-Roth in the *2000 Forbearance Reconsideration Order* aptly observes:

The Commission has grounded its [wireless LNP] authority in sections 1, 2, 4(i), and 332, of the Communications Act. I have long voiced concern about this agency's efforts to impose costly and far-reaching regulatory obligations based on authority cobbled together from various general and ancillary provisions of the Act. Such assertions of jurisdiction are particularly troubling here in light of Section 251's statutory provision specifically mandating number portability solely for local exchange carriers.<sup>25</sup>

Nor do these sections grant the Commission independent jurisdiction to impose LNP requirements on CMRS providers. Sections 2 and 4(i) contain no affirmative mandates.<sup>26</sup> As this Court recognized in *MPAA*, the FCC has "necessary and proper" authority only where another provision contains a specific delegation of authority.<sup>27</sup>

Section 1 constitutes a general delegation of authority to the Commission and never mentions LNP.<sup>28</sup> It grants the Commission only such limited authority as is "reasonably ancillary to the effective performance of the Commission's various responsibilities."<sup>29</sup> Courts have upheld the FCC's exercise of ancillary jurisdiction in cases where (1) Congress did *not* expressly address and define the scope of the Commission's authority with respect to the regulated area at issue, and (2) there was a demonstrated need to imply authority to discharge the will of Con-

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<sup>25</sup> *Telephone Number Portability, Cellular Telecommunication and Industry Association's Petition for Forbearance, Order on Reconsideration*, 15 F.C.C.R. 4727, 4739 (2000) (*2000 Forbearance Reconsideration Order*) (Separate Statement of Commissioner Furchtgott-Roth).

<sup>26</sup> *Cf.* 47 U.S.C. §§ 152, 154(i).

<sup>27</sup> *MPAA*, 309 F.3d at 806.

<sup>28</sup> *Cf.* 47 U.S.C. § 151.

<sup>29</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *see also California v. FCC*, 905 F.2d 1217, 1240-41 & n.35 (9th Cir. 1990).

gress.<sup>30</sup> Here, however, Congress has clearly expressed its will regarding LNP in Section 251(b) and thus there is no basis to invoke ancillary authority under Section 1.

In fact, this Court has recently found that Section 1 was enacted to ensure that all Americans “have access to wire and radio communication transmissions” and the mandate is a “reference to the geographic availability of service.”<sup>31</sup> LNP, however, does not deal with access to service in a particular area. It is a service feature provided to a subscriber who already *has* service.

Finally, Section 332 cannot serve as authority for the FCC to impose a wireless LNP mandate. This section requires the Commission to treat CMRS providers as common carriers but permits the FCC to forbear from certain statutory requirements normally associated with landline service, *e.g.*, tariffs.<sup>32</sup> It also preempts state entry and rate regulation.<sup>33</sup> The main objectives of Section 332 are regulatory parity among like wireless services and deregulation.<sup>34</sup> Thus, as the FCC has recognized:

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<sup>30</sup> See, *e.g.*, *Southwestern Cable*, 392 U.S. at 164-78 (upholding FCC authority to regulate cable where there were no preexisting statutory provisions regarding FCC oversight of the cable industry and the FCC demonstrated a need to regulate flowing from its broadcast responsibilities).

<sup>31</sup> *MPAA*, 309 F.3d at 804.

<sup>32</sup> See 47 U.S.C. § 332(c)(1)(A). Under the Act and the Commission’s rules, a “common carrier” is not the same as a “LEC.” “Common carrier” is a broad category of entities that offer services to the public, while “LEC” includes only carriers that offer service within, and access to, a telephone exchange network.

<sup>33</sup> See *id.* § 332(c)(3)(A).

<sup>34</sup> See H.R. Rep. No. 103-111, at 259-60 (1993) (emphasizing the purpose of Section 332 to achieve “regulatory parity” among providers of “equivalent mobile services”); *Petition of the Connecticut Department of Public Utility Control*, 10 F.C.C.R. 7025, 7030-31 (1995) (*Connecticut DPUC*) (recognizing that Section 332 expresses a “general preference in favor of reliance on market forces rather than regulation,” and “places on [the FCC] the burden of demonstrating that continued regulation will promote competitive market conditions”), *aff’d sub nom. Connecticut Department of Public Utility Control v. FCC*, 78 F.3d 842 (2<sup>nd</sup> Cir. 1996).

Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need.<sup>35</sup>

No showing can (nor has) been made that imposing wireless LNP is needed to carry out the objectives of Section 332.

In sum, the FCC lacked delegated authority to impose LNP on wireless carriers, and thus the wireless LNP rule should be vacated. At minimum, the *Order* should be reversed and the FCC directed to forbear from enforcement.

## **II. THE FCC LARGELY IGNORED A RECORD SUPPORTING FORBEARANCE.**

As part of the 1996 Act, Congress adopted new Section 10 requiring the Commission to forbear from enforcing any rule that is not necessary to: (1) ensure just and reasonable rates and practices; (2) protect consumers; and (3) protect the public interest.<sup>36</sup> In considering a petition for forbearance under Section 10, the Commission must analyze each of these elements based on present-day circumstances and must conduct a comparative assessment of the elements.<sup>37</sup>

Section 10 also reflects a presumption favoring forbearance rather than regulation.<sup>38</sup>

As discussed below, however, the FCC denied VZW's petition for forbearance without undertaking the required analysis. Indeed, the FCC failed to acknowledge or address contradic-

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<sup>35</sup> *Connecticut DPUC*, 10 F.C.C.R. at 7035 (1995); see also *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Third Report and Order*, 9 F.C.C.R. 7988, 7992 (1994) (“[C]onsumer demand, not regulatory decree, [should] dictate[] the course of the mobile services marketplace.”).

<sup>36</sup> 47 U.S.C. § 160; see H.R. Conf. Rep. No. 104-458, at 184-85 (1996).

<sup>37</sup> See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, *Memorandum Opinion and Order*, FCC 02-340, at ¶ 13 (rel. Dec. 31, 2002) (“In evaluating whether [the Section 10] criteria are met, we focus on SBC’s present corporate structure and operations . . . rather than on other, largely hypothetical ways in which SBC might choose to provide advanced services.”) (*SBC Forbearance Order*); *1999 Forbearance Order*, 14 F.C.C.R. at 3100-01 (“applying the three-prong analysis of section 10” and “address[ing] each criteria in turn”).

<sup>38</sup> See 47 U.S.C. §160(b), (c); see also Petitioners’ Brief at 17-18.

tory evidence suggesting that the *Order* is “a product of ‘result-oriented’ rationalization.”<sup>39</sup>

Basic principles of administrative law require the FCC to “‘examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.’”<sup>40</sup> “Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the deferential standards of our review.”<sup>41</sup> An FCC judgment is owed deference only where it takes account of the record compiled in the proceeding.<sup>42</sup>

Here, the FCC largely ignored the contrary record and applied the statutory criteria inconsistently to reach a pre-ordained result, requiring LNP despite the highly competitive state of the industry. This disregard of Congress’ Section 10 objective – to determine whether agency-created regulations are needed – was not reasoned decisionmaking and the forbearance ruling deserves no deference.

**A. Wireless LNP Is Not Necessary to Ensure Just and Reasonable Rates.**

Under the first criterion of Section 10, the Commission must consider whether the regulation “is not necessary” to ensure just and reasonable pricing and non-discriminatory practices in

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<sup>39</sup> *Continental AirLines v. CAB*, 519 F.2d 944, 957 (D.C. Cir. 1975).

<sup>40</sup> *AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001) (quoting *U.S. Telecom. Ass’n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000) and *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983)); see also *GTE Service Corp. v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000) (failure “to consider an important aspect of the problem” is error); *Archernar Broadcasting v. FCC*, 62 F.3d 1441, 1445 (D.C. Cir. 1995) (no deference is due where the FCC does not exercise its expert judgment).

<sup>41</sup> *AT&T Wireless*, 270 F.3d at 968.

<sup>42</sup> See, e.g., *Telocator Network of America v. FCC*, 691 F.2d 525, 549-50 (D.C. Cir. 1982) (predictive judgment must have “ascertainable foundation in the record” showing “thoughtful consideration duly attentive to the comments received”); *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752, 760 (6<sup>th</sup> Cir. 1995) (predictive judgment without record support is “highly suspect”).

the relevant market.<sup>43</sup> The *Order* simply omits any analysis of the record under this element. In contrast, when the FCC forbore from the wireless LNP rule in 1999, it “found that LNP requirements were not necessary, at that time, to ensure just and reasonable charges and practices in the wireless industry” because “competition in the wireless market had increased significantly” and “prices were falling” – all without LNP.<sup>44</sup> As described by then-Commissioner Powell, the CMRS market in 1999 was the most competitive segment of the telecommunications industry: “Prices are down and falling. Innovation, churn and penetration are up and still climbing.”<sup>45</sup>

The *Order* fails to address whether there have been any changed circumstances which would support a finding that wireless LNP is necessary to ensure just and reasonable rates and practices. This failure is no coincidence; the record in this case demonstrates that competitive trends have continued since 1999 and thus, under the FCC’s earlier rationale, LNP continues to be unnecessary to ensure just and reasonable rates:

- Statistics from each of the Commission’s *Fourth, Fifth and Sixth Competition Reports* demonstrate the vitality of CMRS competition in the absence of LNP.<sup>46</sup> These include increasing subscribership and market penetration rates, additional competitors and consumer choice, improved coverage and service offerings, and declining prices.<sup>47</sup>
- Since 1996 when the rule was first adopted (but did not take effect), the average price per minute of wireless service has declined almost 40% from \$0.54 to \$0.21.<sup>48</sup> Prices have declined 24% since the *1999 Forbearance Order* was released, and 32% since December 1997 – again, in the

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<sup>43</sup> 47 U.S.C. § 160(a)(1).

<sup>44</sup> *1999 Forbearance Order*, 14 F.C.C.R. at 3101-02.

<sup>45</sup> *1998 Biennial Regulatory Review – Spectrum Aggregation Limits*, 15 F.C.C.R. 9219, 9296 (1999) (Separate Statement of Commissioner Powell), cited in Sprint Reply at 9 (JA\_\_\_); VoiceStream Wireless Corporation (“VoiceStream”)/United States Cellular Corporation (“USCC”) Reply at 11-12 (JA\_\_\_).

<sup>46</sup> See VZW Petition at 17-18 (JA\_\_\_).

<sup>47</sup> See VZW *Ex Parte* at 1 (Jan. 10, 2002) (JA\_\_\_); Sprint *Ex Parte* at 3 (Jan. 14, 2002) (JA\_\_\_).

<sup>48</sup> See, e.g., VZW Petition at 19 (JA\_\_\_); Western Wireless Corporation Reply (“Western”) at 4-5 (JA\_\_\_).

absence of LNP.<sup>49</sup> Since 1993, average cellular prices have declined by 64%,<sup>50</sup> while wireless subscribership is up 584% and minutes of use are up 1263%.<sup>51</sup>

- There are now at least 6 national facilities-based carriers, twice the number that existed in early 1999; at least 91% of the market has access to 3 or more carriers; 75% of the market has at least 5 or more; and 47% has at least 6.<sup>52</sup> During the same timeframe, wireless subscribership has tripled to more than 122 million subscribers.<sup>53</sup>

Reasoned decisionmaking and consistency with the *1999 Forbearance Order* required analysis of this element. The FCC's failure to do so was reversible error.

### B. Wireless LNP Is Not Necessary to Protect Consumers.

Under the second forbearance criterion, the Commission must consider whether the regulation “is not necessary” to protect consumers.<sup>54</sup> The Commission addressed this question in 1999, finding “no evidence that requiring wireless carriers to adhere to the current implementation schedule *is necessary to prevent affirmative harm to consumers.*”<sup>55</sup> The *Order*, however, applies the different and more lenient standard – “*consistent with the protection of consumers.*” *Order*, 17 F.C.C.R. at 14978 (JA\_\_\_) (emphasis added). The Commission offers no explanation for this change in standards.

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<sup>49</sup> See, e.g., VoiceStream/USCC Comments at 7 (JA\_\_\_); AWS Comments at 5 (JA\_\_\_); Sprint Reply at 4-5 (JA\_\_\_); CTIA Reply at 6 (JA\_\_\_); Sprint *Ex Parte* at 1 (Nov. 14, 2001) (JA\_\_\_).

<sup>50</sup> See Connecticut DPUC Comments at 5 (JA\_\_\_).

<sup>51</sup> See Cingular Comments at 7 (JA\_\_\_). Indeed, the Commission long ago forbore from imposing any tariff filing obligations upon CMRS providers under specific authorization by Congress in 1993, see 47 U.S.C. § 332(c)(1)(A), recognizing wireless was already *then* sufficiently competitive. See *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Second Report and Order*, 9 F.C.C.R. 1411, 1478-79 (1994).

<sup>52</sup> See, e.g., VZW Petition at 18 (JA\_\_\_); AWS Comments at 6-7 (JA\_\_\_); Cingular Comments at 7 (JA\_\_\_); Rural Cellular Association (“RCA”) Comments at 3 (JA\_\_\_); Sprint Reply at 18 (JA\_\_\_); Western Reply at 5 (JA\_\_\_); Connecticut Department of Public Utility Control (“DPUC”) Comments at 6 (JA\_\_\_); CTIA Reply at 5-6 (JA\_\_\_); CWA *Ex Parte* at 1 (Feb. 11, 2002) (JA\_\_\_).

<sup>53</sup> Cingular Comments at 6 (JA\_\_\_); Sprint Reply at 12 (JA\_\_\_).

<sup>54</sup> 47 U.S.C. § 160(a)(2).

<sup>55</sup> *1999 Forbearance Order*, 14 F.C.C.R. at 3103-04 (emphasis added).

Further, the FCC's conclusion in 1999 that wireless LNP was not necessary to protect consumers was based on findings that (i) "consumers are more concerned about competition in other areas such as price and service quality" than LNP and (ii) "the high incidence of switching [among] wireless carriers (popularly referred to as 'churn') indicates that many wireless customers easily and routinely switch from one carrier to another without the benefit of number portability."<sup>56</sup> Nevertheless, the FCC only temporarily forbore because it predicted that wireless phones would be increasingly relied upon and thus LNP would be desirable "in the longer term," especially if a "calling party pays" ("CPP") billing scheme was adopted."<sup>57</sup>

In the *Order*, the FCC simply concluded that "permanent forbearance . . . is not consistent with the protection of consumers," *Order*, 17 F.C.C.R. at 14978 (emphasis added) (JA \_\_\_), rather than re-examining the factors in the earlier decision to see if market conditions had improved. The *Order* offers no discussion of the level of customers' continued interest in other service factors (*e.g.*, coverage, service quality, price) and how that compares to consumer interest in wireless LNP. Similarly, the *Order* makes no reference to the fact that the CPP requirements previously cited as justification for the "temporary" forbearance were never adopted.<sup>58</sup>

Instead of addressing these issues, the Commission merely predicts that consumers will place greater reliance on their wireless phones, asserting that "as these trends continue," it "anticipate[s]" that consumers "will be reluctant to change" carriers without LNP. *Order*, 17 F.C.C.R. at 14979-80 (JA \_\_\_). The Commission never analyzes whether consumers are now

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<sup>56</sup> *Id.* at 3103, cited in *Order* at 14978 (JA \_\_\_).

<sup>57</sup> *See id.* at 3103-04.

<sup>58</sup> *See Calling Party Pays Service Offering in the Commercial Mobile Services*, 16 F.C.C.R. 8297 (2001).

more concerned with LNP than with the factors previously found to be more important, *e.g.*, coverage, service quality and price.<sup>59</sup>

The FCC cannot reasonably rely on such predictions in dealing with the second Section 10 element.<sup>60</sup> Section 10(a)(2) does not ask whether the rule “will” or “may” be necessary in the future; it asks whether the rule “is” necessary *today* to protect consumers.<sup>61</sup> Indeed, predictive judgments have no place in consideration of petitions for forbearance under Section 10. Under this provision, a rule remains on the books but is not enforced because of present-day circumstances. The FCC can reverse a decision to forbear in the future if the Section 10 criteria are no longer met.<sup>62</sup> The FCC’s reliance on a “prediction” that customers “will be reluctant to change providers” as they continue to rely on their phone numbers does not support denying forbearance today. In fact, the FCC made the same prediction in 1999 when it *granted* forbearance.<sup>63</sup>

The FCC offers only thin evidence in support of its predictions, citing to evidence showing increasing wireless usage and subscriber reliance thereon, including a USA Today article (never made part of the record) and letters from a few hundred subscribers (out of 122 million) who “feel restricted” because they cannot take their number with them. *See Order*, 17 F.C.C.R. at 14979-80 & nn.63, 67 (JA\_\_\_). These letters do not establish that LNP is *necessary* to protect consumers. Merely because a customer would prefer to have something does not mean that a regulatory requirement should be adopted to mandate it.

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<sup>59</sup> *See 1999 Forbearance Order*, 14 F.C.C.R. at 3103; *VZW Ex Parte* at 3 (Dec. 20, 2001) (JA\_\_\_).

<sup>60</sup> *See SBC Forbearance Order* at ¶ 29 (stating “our focus in addressing SBC’s forbearance request is on the separate affiliate structure and commitments under which SBC intends to provide advanced services, rather than on other, largely hypothetical ways in which SBC might choose to conduct its advanced services operations”).

<sup>61</sup> 47 U.S.C. § 160(a)(2).

<sup>62</sup> *See VZW Reply* at 12 (JA\_\_\_); *VZW Ex Parte* at 1 (Dec. 5, 2001) (JA\_\_\_). By contrast, Section 11 of the Act requires the FCC to *repeal* (or modify) rules if they are no longer necessary. 47 U.S.C. § 161.

<sup>63</sup> *See 1999 Forbearance Order* at 3103 (“[W]e consider it likely that in the longer term, wireless number portability will be an increasingly important issue for consumers.”).

Moreover, the concern that consumers are barred from switching carriers because they lack wireless LNP is contradicted by the extraordinary churn rate among wireless customers. In 1999, the Commission identified churn as a critical component to its finding that the LNP rule was *not* necessary to protect consumers, yet it is ignored here. There has been no diminution in the churn rate since 1999. Record evidence shows that churn is approximately 30% a year and growing – with 20 million customers changing carriers in 2000.<sup>64</sup> Even NARUC, which advocates wireless LNP, admits that the annual churn rate is increasing and will grow to 40% over the next 5 years.<sup>65</sup> The record actually shows that 44% of users have no strong commitment to stay with their current carrier.<sup>66</sup> The length of time a wireless user stays with a carrier before switching actually decreased in 2001.<sup>67</sup> As Commissioner Abernathy noted:

Based on Commission data, we have not seen any significant decline in churn over time. Nor has any party to this proceeding produced any evidence of a significant decline in churn in any market segment or region of the country. *Number portability cannot be justified* based on a slow-down in churn due to increased customer identification with their numbers.

*Order*, 17 F.C.C.R. at 14992 (JA\_\_\_) (Separate Statement of Commissioner Kathleen Q. Abernathy) (emphasis added). Thus, the failure to consider churn in appraising the need for wireless LNP is clear error.

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<sup>64</sup> See, e.g., Cingular Comments at 9-10 (JA\_\_\_); Texas Public Utility Commission Comments at 3 (JA\_\_\_); Verizon Telephone Companies Reply at 3 (JA\_\_\_); National Association of Regulatory Utility Commissioners (“NARUC”) Comments at 2 (JA\_\_\_); AWS Comments at 7.

<sup>65</sup> NARUC Comments at 2 (JA\_\_\_).

<sup>66</sup> See Cingular Comments at 10 (JA\_\_\_); VZW *Ex Parte* at 2 (JA\_\_\_).

<sup>67</sup> See Sprint Reply at 9 (JA\_\_\_).

In sum, the *Order* fails to satisfy the second prong of the Section 10 analysis based on the record, abandons without explanation the “necessary to prevent affirmative harm” standard it used in its *1999 Forbearance Order*, and ignores the basis upon which the FCC decided forbearance was warranted.

**C. The FCC Ignored a Record Demonstrating that Forbearance Is in the Public Interest.**

The third prong of the Section 10 analysis requires the Commission to consider whether forbearance is necessary in the public interest.<sup>68</sup> As the Petitioners correctly point out, the FCC misapplied this element, because it found that regulation (as opposed to forbearance) was consistent with the public interest.<sup>69</sup> In any event, the reasons upon which the FCC did rely lack merit.

**1. The Record Does Not Justify the Conclusion that Wireless LNP Is Necessary for Competitive Reasons.**

The *1999 Forbearance Order* concluded that “not only is CMRS competition growing rapidly without LNP, but in the near term, LNP does not appear to be critical to ensuring that this growth continues.”<sup>70</sup> Three years later, the *Order* concludes that wireless LNP is needed (i) “to increase competition both within the CMRS marketplace and with wireline carriers,” (ii) because wireless LNP may not occur on its own, and (iii) to make it easier for newer carriers to compete. *Order*, 17 F.C.C.R. at 14980-81 (JA\_\_\_). The FCC’s ruling is based not on record evidence, but rather on mere *speculation* that wireless LNP will increase competition in the local exchange market and among wireless carriers.

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<sup>68</sup> 47 U.S.C. § 160(a)(3); H.R. Conf. Rep. No. 104-458 at 184-85.

<sup>69</sup> Petitioners’ Brief at 28-29.

<sup>70</sup> 14 F.C.C.R. at 3102.

**(a) Wireless LNP Is Not Necessary to Ensure Competition in the Local Exchange Market.**

Competition in the local exchange market cannot provide a basis for the wireless LNP rule. Opening local exchange networks to competition was the purpose of Section 251 of the Act. Therein, Congress decided that wireless LNP was not required to spur local exchange competition.<sup>71</sup> Again, the Commission is not free to ignore the judgment of Congress.

Moreover, the *Order* fails to address the concerns raised below that wireless LNP will actually make it harder for CMRS carriers to compete for landline customers through lower prices.<sup>72</sup> As VZW explained:

It is ironic, and counter-intuitive, to seek to infuse competition from wireless carriers into the landline market by imposing *more* regulatory burdens on the wireless industry. To the contrary, shackling wireless carriers with costly LNP obligations only will make it harder for them to compete for landline customers through lower prices.<sup>73</sup>

The *Order* offers no response.

Furthermore, the record here reflects that competition in the local exchange is increasing *without* wireless LNP.<sup>74</sup> There is no evidence that LNP is “necessary” for such competition.<sup>75</sup> Finally, even assuming some marginal increase in local exchange competition, the FCC fails to appraise the predicted degree of such increase and the benefits flowing therefrom, how any such

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<sup>71</sup> See *supra* Section I.A; see also VZW Reply at 11 (JA\_\_\_).

<sup>72</sup> Sprint *Ex Parte* at 10 (Jan. 8, 2002) (JA\_\_\_).

<sup>73</sup> VZW Reply at 10 (JA\_\_\_); see also Sprint *Ex Parte* at 4 (Jan. 8, 2002) (JA\_\_\_).

<sup>74</sup> See *Order* at 14991-93 (JA\_\_\_) (Separate Statement of Commissioner Abernathy); VZW Petition at 19-20 (JA\_\_\_); Sprint Comments at 9 (JA\_\_\_); WorldCom, Inc. Comments at 9 (JA\_\_\_); VoiceStream/USCC Reply at 10 (JA\_\_\_).

<sup>75</sup> VZW Petition at 20 (JA\_\_\_); see *Order*, Separate Statement of Commissioner Abernathy (“[I]t does not appear that LNP is essential for wireline/wireless competition.”) (JA\_\_\_); AWS Comments at 9 (JA\_\_\_); see also Cingular Reply at i, 11 (Oct. 22, 2001) (noting that the two services are not direct replacements for each other, so competition is limited in scope in any event) (JA\_\_\_).

increase is “necessary to protect consumers,” or how the perceived benefits would outweigh the substantial evidence that wireless LNP is not necessary.

**(b) Wireless LNP Is Not Necessary to Ensure Wireless Competition.**

The CMRS market is more competitive today than in 1996 when the wireless LNP rule was first adopted (but not implemented) and in 1999 when the Commission initially forbore from enforcing the rule. The record shows that there are 6 nationwide competitors; 91% of the country has access to 3 or more carriers and 75% has access to 5 or more; prices have fallen to historic lows; penetration rates are increasing; and churn is 30% annually and increasing.<sup>76</sup> Given the long-term trends of increasing competition in the CMRS market and the state of CMRS competition demonstrated in the record, there is no basis to conclude that LNP is *currently* necessary to promote wireless/wireless competition.<sup>77</sup>

Indeed, the *Order* cites to no studies or other evidence showing that customers need LNP to change carriers. The *Order* refers to letters from consumers indicating that some subscribers would like wireless LNP and find it useful. The fact that a miniscule fraction of all wireless consumers might like wireless LNP, however, is insufficient to satisfy the Section 10 “necessary” standard. Certainly, “desire” does not equate to “necessity.” As VZW pointed out (but was ignored):

The Commission is obligated to study “how many customers are impeded from changing service providers because they cannot keep their phone number” and, of that subset, “how many would choose to retain their number if wireless LNP resulted in an in-

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<sup>76</sup> See *supra* Section II.A; see also, e.g., VZW Petition at 18 (JA \_\_\_).

<sup>77</sup> See *Order* at 14972 (JA \_\_\_) (Separate Statement of Commissioner Abernathy) (“Along virtually every metric, the competitive landscape has only improved: subscribership has grown, prices have fallen, and build out continues.”). To the extent this changes in the future, the FCC can reevaluate whether continued forbearance is appropriate. See VZW Reply at 12 (JA \_\_\_); VZW *Ex Parte* at 1 (Dec. 5, 2001) (JA \_\_\_).

crease in service prices or activation time, or a porting transaction fee?”<sup>78</sup>

Moreover, record evidence from prominent economist Hal R. Varian, Ph.D., demonstrated that the lack of LNP does *not* impede consumers’ ability to switch carriers.<sup>79</sup> Dr. Varian recognized that the lack of LNP may result in certain costs to the customer associated with the customer switching telecommunications carriers, *i.e.*, “switching costs.” In a competitive market, however, switching costs do not invariably harm customers. As Dr. Varian points out, the existence of switching costs requires competitors to offer some value or benefit to induce customers to take their service, *e.g.*, handset subsidies.<sup>80</sup> The value of this inducement offsets, to some degree, the switching costs incurred by the consumer. Conversely, the carrier’s cost of providing such inducement offsets any profit it could attribute to a customer who switches. Dr. Varian, therefore, concludes that switching costs do not, in a competitive market, “represent a market failure that should necessarily be cured by government regulation.”<sup>81</sup>

The *Order* ignores this economic testimony. Indeed, the FCC could not rebut Dr. Varian’s conclusions, because the consistently high churn rates refute any suggestion that LNP may be necessary for consumers to enjoy the benefits of competition.<sup>82</sup> Further, the lack of LNP is not the only potential impediment to customers switching carriers, *e.g.*, customers have to obtain a new handset in order to switch to a carrier utilizing a different technology.<sup>83</sup>

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<sup>78</sup> VZW Reply at 19 (Oct. 22, 2001) (JA\_\_\_).

<sup>79</sup> Dr. Hal R. Varian (“Varian”) *Ex Parte* at 2 (Jan. 25, 2002) (JA\_\_\_).

<sup>80</sup> *Id.* (JA\_\_\_).

<sup>81</sup> *Id.* (JA\_\_\_).

<sup>82</sup> See VZW *Ex Parte* at 3 (Dec. 20, 2001) (JA\_\_\_).

<sup>83</sup> See, *e.g.*, Varian *Ex Parte* at 2 (Jan. 25, 2002) (JA\_\_\_); CPUC *Ex Parte* at 1, 3 (Nov. 19, 2001) (JA\_\_\_); VZW *Ex Parte* at 2-3 (Dec. 20, 2001) (JA\_\_\_).

**(c) Mandatory Wireless LNP Is Not Necessary In Lieu of Market Forces.**

The FCC's prediction that LNP cannot develop without regulatory intervention is rebutted by record evidence demonstrating that carriers will have an incentive to offer LNP as a new service offering to distinguish themselves from others. Now that number pooling is in place, it is possible, from a network perspective, for wireless carriers to port numbers with other carriers.<sup>84</sup> The record reveals at least two carriers willing to implement LNP,<sup>85</sup> which will in turn create competitive pressures on other carriers also to provide LNP.

**(d) Mandatory Wireless LNP May Be Harmful to Smaller/Rural Carriers.**

The FCC's conclusion that LNP is necessary to enable smaller carriers to better compete in the wireless marketplace is unsupported and contrary to the weight of the record. Smaller national and regional wireless carriers *supported* VZW's petition to forbear,<sup>86</sup> demonstrating the unique burdens LNP would impose on them:

- Increased costs and administrative burdens imposed by LNP would hinder E911, CALEA, and TTY efforts and would significantly outweigh any increased revenue generated from new subscribers.<sup>87</sup>
- LNP would pose network reliability issues, a troubling prospect for rural carriers for whom roaming is a critical component of their business.<sup>88</sup>
- LNP would compromise efforts to expand service in unserved areas and enhance service in existing rural service areas.<sup>89</sup>

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<sup>84</sup> See VZW *Ex Parte* at 6-7 (Dec. 20, 2001) (JA \_\_\_); AWS *Ex Parte* at 2 (Jan. 18, 2002) (JA \_\_\_).

<sup>85</sup> See Leap Reply at 22 (JA \_\_\_); Nextel Reply at 1 (JA \_\_\_).

<sup>86</sup> See, e.g., ALLTEL Comments at 9 (JA \_\_\_); CTIA Comments at 19 (JA \_\_\_); Dobson Comments at 3 (JA \_\_\_); ACS Wireless ("ACS") Reply at 2-3 (JA \_\_\_); ALLTEL Reply at 3 (JA \_\_\_); Public Service Cellular Reply at 2 (JA \_\_\_); RCA Reply at 3-5 (JA \_\_\_); Western Reply at 6-7 (JA \_\_\_); Dobson *Ex Parte* at 1 (Feb. 28, 2002) (JA \_\_\_); *Order*, 17 F.C.C.R. at 17491-92 (JA \_\_\_) (Separate Statement of Commissioner Abernathy). Leap, a small carrier, plans to implement LNP regardless of an FCC mandate. See Leap Reply at 22 (JA \_\_\_). Leap, however, does not provide roaming services, and thus does not face the same difficulties with LNP faced by other small carriers.

<sup>87</sup> See, e.g., ALLTEL/Western *Ex Parte* at 1 (Jan. 25, 2002) (JA \_\_\_).

<sup>88</sup> See, e.g., ALLTEL/Western *Ex Parte* at 1 (Jan. 25, 2002) (JA \_\_\_).

- LNP implementation costs for small carriers will not be proportionally lower than those of the large carriers. Small carriers, however, have a significantly smaller customer base over which to spread LNP implementation costs. As a consequence, fees to customers of small carriers will need to be unsustainably high to offset LNP costs, thereby placing smaller carriers at a competitive disadvantage.<sup>90</sup>
- The net result of these additional costs and burdens may be “weaker and fewer competitors, particularly in rural and underserved areas,” *Order*, 17 F.C.C.R. at 14991 (JA\_\_\_) (Separate Statement of Commissioner Abernathy), contrary to the pro-competitive goals of Section 10.

The *Order* ignores all of the adverse consequences LNP may have on smaller carriers and then inexplicably concludes LNP would be beneficial to such providers. Again, this was error.

## 2. The *Order* Fails to Weigh the Costs of the Rule Against the Perceived Benefits.

In previous Section 10 cases, the Commission has applied a cost/benefit analysis in evaluating the public interest component of the forbearance test.<sup>91</sup> The Commission applied such an analysis in the *1999 Forbearance Order* in this proceeding<sup>92</sup> and has repeatedly recognized the importance of carefully evaluating the impact of regulatory mandates in other circumstances.<sup>93</sup>

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(continued from previous page)

<sup>89</sup> See, e.g., *ACS Ex Parte* at 2 (Jan. 30, 2000) (JA\_\_\_); *Dobson Ex Parte*, Att. at 1 (Feb. 28, 2002) (JA\_\_\_).

<sup>90</sup> See, e.g., *ACS Ex Parte* at 3 (Jan. 30, 2000) (JA\_\_\_); *Dobson Ex Parte*, Att. at 1 (Feb. 28, 2002) (JA\_\_\_); see also *Order* at 14991 (JA\_\_\_) (Separate Statement of Commissioner Abernathy) (“The burden of additional mandates is particularly acute for providers in rural areas or those with small customer bases who are not capable of spreading their costs across millions of customers.”).

<sup>91</sup> See *SBC Forbearance Order* at ¶¶ 26-28; *Personal Communications Industry Association’s Petition for Forbearance for Broadband PCS*, 13 F.C.C.R. 16857, 16878-80, 16885-86, 16913 (1998).

<sup>92</sup> See *1999 Forbearance Order*, 14 F.C.C.R. at 3111, 3112 (finding that the costs of applying the wireless LNP rule did not outweigh the pro-competitive benefits of forbearance).

<sup>93</sup> See *VZW Petition* at 28 (JA\_\_\_) (citing *Automatic and Manual Roaming Obligations Pertaining to CMRS*, 15 F.C.C.R. 21628, 21636-37 (2000)); *BellSouth Reply* at 6 (Oct. 22, 2001) (JA\_\_\_) (citing *Numbering Resource Optimization, Second Further Notice of Proposed Rulemaking*, 16 F.C.C.R. 306, 368 (2000); *Computer III Further Remand Proceedings*, 13 F.C.C.R. 6040, 6067-70 (1998)); see also *Sprint Comments* at 8 (JA\_\_\_); *CTIA Ex Parte* at 1 (Feb. 13, 2002) (JA\_\_\_).

Here, the FCC's address of the forbearance elements reflects no cost/benefit analysis.<sup>94</sup>

As discussed above, the Commission predicts that wireless LNP might marginally enhance competition. *See Order*, 17 F.C.C.R. at 14980-81 (JA\_\_\_). The Commission, however, does not quantify in any way this predicted benefit.

The record evidence shows that LNP will cost the industry up to \$1 billion to implement and \$500 million annually to maintain,<sup>95</sup> and hundreds of workers will be needed to staff calling centers on a continuing basis.<sup>96</sup> An LNP mandate will divert resources away from facilities-based coverage issues, the rollout of advanced services, and other important, regulatory mandates, such as wireless E911, CALEA, and TTY.<sup>97</sup> Indeed, the record shows that with respect to one of the Commission's most important public interest mandates – E911 – wireless LNP may lead to E911 callback problems and will cause delays in service activation.<sup>98</sup> LNP will also increase prices to consumers since costs must be recovered from existing customers.<sup>99</sup>

The Commission fails to balance its hoped-for, yet unspecified, benefit of wireless LNP against the demonstrated costs as part of its public interest calculus under Section 10. It did not consider, for example, whether LNP would make the CMRS industry less able to address other important consumer needs given the funding, personnel and technical problems associated with implementation. Nor does the *Order* attempt to rebut its previous finding that, on balance, competition would be more positively influenced by focusing on price, service area coverage and

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<sup>94</sup> While the *Order* briefly addresses costs of the rule in dealing with whether to extend the LNP deadline, it does not do so as part of its Section 10 forbearance analysis and its conclusions thereunder. *Compare Order* at 14984-85 (JA\_\_\_) with *id.* at 14977-84 (JA\_\_\_).

<sup>95</sup> *See, e.g.,* VoiceStream/USCC Comments at 1 (JA\_\_\_); CTIA *Ex Parte* at 1 (Jan. 24, 2002) (JA\_\_\_).

<sup>96</sup> *See* Sprint Comments at 10 (JA\_\_\_).

<sup>97</sup> *See, e.g.,* VZW Petition at 27 (JA\_\_\_); Sprint Comments at 4 (JA\_\_\_); VoiceStream/USCC Comments at 9 (JA\_\_\_); BellSouth Reply at 3 (JA\_\_\_); Western Reply at 6 (JA\_\_\_).

<sup>98</sup> *See* VZW Reply at 11-12 (JA\_\_\_); VZW *Ex Parte*, Att. at 1 (Jan. 10, 2002) (JA\_\_\_).

<sup>99</sup> *See, e.g.,* Sprint *Ex Parte* at 2 (Nov. 14, 2001) (JA\_\_\_); Cingular Comments at 3 (JA\_\_\_).

service quality than on LNP.<sup>100</sup> The Commission's failures on these points constitute unreasoned decisionmaking.

### III. THE FCC VIOLATED SECTION 11 OF THE COMMUNICATIONS ACT.

Section 11 of the Act mandates that, on a biennial basis, the Commission "shall" review "all regulations" and "determine" whether each regulation is "no longer necessary."<sup>101</sup> Despite this express directive, the FCC excluded the wireless LNP rule from its biennial review in 1998 and 2000. Further, commenters in the proceeding below argued that the FCC was required by Section 11 to review the wireless LNP rule without regard to the VZW forbearance petition.<sup>102</sup> (There is no exclusion from the Section 11 mandate for rules which are the subject of a forbearance petition.) The *Order* ignores these comments and the FCC's Section 11 obligations.

Had the FCC engaged in the required Section 11 review, the rule could not have been retained. Section 11 requires the FCC to repeal "all regulations" that it finds are "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service."<sup>103</sup> The FCC has already determined that, for purposes of Section 11, "there is meaningful economic competition in CMRS mobile telephony generally."<sup>104</sup> As discussed above, there is no basis to conclude that wireless LNP is necessary for competition in the local exchange market.<sup>105</sup> Moreover, Section 11 places an affirmative burden on the Commission to demonstrate that its rules are still necessary and establishes a presumption that market

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<sup>100</sup> *1999 Forbearance Order*, 14 F.C.C.R. at 3109-10.

<sup>101</sup> 47 U.S.C. § 161.

<sup>102</sup> *See, e.g., VoiceStream/USCC Reply at 11-13 (JA\_\_\_); VoiceStream/ALLTEL/Cingular Ex Parte at 8 (Nov. 29, 2001) (JA\_\_\_).*

<sup>103</sup> 47 U.S.C. § 161.

<sup>104</sup> *2000 Biennial Regulatory Review – Spectrum Aggregation Limits*, 16 F.C.C.R. 22668, 22693 (2001); *see supra* text at 11-12, 18-19.

<sup>105</sup> *See supra* text at 17-18.

forces are superior to regulation. Thus, by repeatedly failing to undertake the required biennial review of the wireless LNP rule, the FCC has unlawfully retained the rule; it should be vacated.

### CONCLUSION

The FCC lacks statutory authority to require wireless LNP. Under the statutory scheme set forth in Section 251 of the Act, wireless carriers can be made subject to LNP only if the FCC first determines that wireless carriers are LECs. The FCC has refused to make such a finding on numerous occasions. Given this express statutory direction, the FCC cannot rely on implied authority under Sections 1, 2, 4(i) and 332 of the Act to implement wireless LNP. Moreover, the FCC's *Order* denying VZW's petition for forbearance violates Section 10 by failing to undertake a reasoned analysis of the merits of VZW's forbearance petition and the record as a whole. The FCC has also violated Section 11 of the Act by failing to ever subject the wireless LNP rule to biennial review. The Court should thus vacate the wireless LNP rule, 47 C.F.R. § 52.31, or, at a minimum, reverse the *Order* and direct the FCC to forbear.

Should the Court remand this matter for further proceedings, it should direct the FCC to forbear from enforcing the wireless LNP rule until the FCC order on remand is final and retain jurisdiction. To do otherwise would allow the FCC to frustrate the congressional deadline for action on forbearance petitions<sup>106</sup> through unlawful, perfunctory decisionmaking. Such relief is also necessary because, absent forbearance, the November 2003 deadline imposed in the *Order* will require wireless carriers to begin expending extraordinary resources to implement LNP – even though the final rules governing LNP have not yet been promulgated. Indeed, the problem

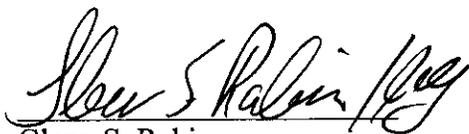
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<sup>106</sup> See 47 U.S.C. § 160(c).

is compounded by the fact that the Commission continues to consider LNP implementation issues in a pending *Further Notice of Proposed Rulemaking*.<sup>107</sup>

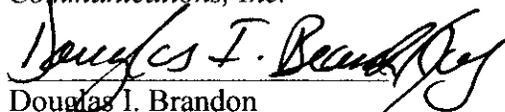
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<sup>107</sup> See *Numbering Resource Optimization, Third Further Notice of Proposed Rulemaking*, 17 F.C.C.R. 4784 (2002).



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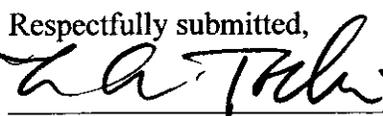
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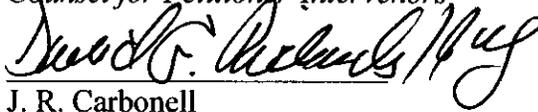
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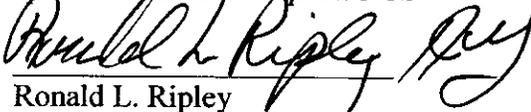
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Pursuant to F.R.A.P. 32(a)(7)(C) and D.C. Cir. R. 32(a)(3)(C), I hereby certify that the foregoing brief contains 8,231 words, in accordance with D.C. Cir. R. 32(a)(3)(B).



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January 3, 2003

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