

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

In the Matter of )  
 )  
Telephone Number Portability )  
 )  
July 3, 2003 Letter from John Muleta, Chief, )  
Wireless Telecommunications Bureau, to John )  
T. Scott, III, Vice President and Deputy General )  
Counsel, Verizon Wireless, and Michael T. )  
Altschul, Senior Vice President, General )  
Counsel, Cellular Telecommunications & )  
Internet Association )  
\_\_\_\_\_ )

CC Docket No. 95-116  
DA 03-2190

To: The Commission

**OPPOSITION OF VERIZON WIRELESS TO  
PETITION FOR DECLARATORY RULING OR, IN THE ALTERNATIVE,  
APPLICATION FOR REVIEW**

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Verizon Wireless opposes the Petition for Declaratory Ruling or, in the Alternative, Application for Review filed by the Wireless Carrier Group (“WCG” or “Petitioners”) regarding the above-captioned letter (“WTB Letter”).<sup>1</sup>

**SUMMARY**

The WTB Letter was right and should be affirmed immediately. It correctly stated that wireless carriers may not delay the porting of a number for any reason unrelated to validating a customer’s identity. The Commission imposed wireless local number portability (“LNP”) to

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<sup>1</sup> Petition for Declaratory Ruling or, In the Alternative, Application for Review, CC Docket No. 95-116, filed Aug. 1, 2003 (“Petition” or “Application for Review”). The WCG consists of ALLTEL, Cingular Wireless, AT&T Wireless, Nextel, and Sprint Corporation, but not T-Mobile or any other wireless carriers.

*reduce* barriers to switching carriers and thereby protect customers and promote competition.

The Commission defended that rationale through years of proceedings and court appeals.

Now, on the verge of achieving wireless LNP, the Commission faces a direct challenge to it that, if not quickly and firmly rejected, will gut the effectiveness of the mandate. WCG argues that carriers may delay or block porting for their own business reasons, including holding up ports until customers pay off their accounts. Its members dare the Commission to enforce the WTB Letter by declaring that they will treat that letter as “non-binding.” They make it clear that they will slow or block a customer’s desire to change carriers and keep the same numbers until the customer fully “settles up” his account (presumably even if some charges are in dispute). This threatens LNP because, if the WCG is right, there will be no limit to what carriers can do to restrict or burden porting. They will amend their contracts to authorize the restrictions they want or simply impose the restrictions as a business practice.

WCG’s position should be quickly denied. It would *erect new barriers* to competitive switching that do not exist today. It would transform LNP into a tool for restricting customer churn rather than enhancing customers’ freedom to switch carriers. It would subvert the legal rationale for the mandate because conditions on each customer’s ability to port would be set by each carrier, even though the FCC determined that market forces were insufficient to protect consumers. Wireline carriers – which have not held up porting to collect on accounts – would surely begin doing so, undermining *landline* LNP. And it would allow the public numbering resource, which the FCC has many times said does not belong to carriers, to be held hostage by carriers and misused as a tool for bill collection purposes.

The Commission should not be fooled by WCG’s effort to transform LNP into an anti-competitive, anti-consumer device that each carrier deploys in its own way. That outcome would

frustrate and confuse the public and lead to major problems for the Commission come November. None of the arguments that WCG offers are valid:

- Leaving the issue of porting restrictions to the market, as WCG requests, would conflict with the record and the Commission’s rationale for requiring LNP.
- Deferring the issue to a rulemaking is not required because there is no need for a new rule. The Bureau correctly ruled that the current rule does not permit the porting restrictions WCG wants to impose. In any event, these carriers have had ample notice and opportunity to comment on the issue of porting restrictions. CTIA already sought Commission action on porting restrictions in its own Petition for Declaratory Ruling, the Commission put this and other issues out for public comment, and WCG’s members advocated their views in that notice and comment proceeding. Although clearly unnecessary, a new rulemaking would stop LNP in its tracks.
- The claim that the WTB Letter abrogates carrier contracts is wrong on the facts and the law. There is nothing to abrogate. Other than Cingular, no carrier has shown that its current customer service agreements contain a provision requiring payment of a customer’s arrearages as a condition of porting. Cingular’s current contract contains a porting restriction that was clearly added *after* the FCC adopted the LNP rule, and the contract also contemplates elimination of the “full payment” provision if necessary to comply with regulatory requirements. Even if WCG had attempted to show some “abrogation” of pre-existing contractual provisions, the law authorizes the Commission to require carriers to modify contractual provisions that are inconsistent with its rules or public interest findings. The Commission should thus declare that contractual provisions

that limit the ability of a customer to port his number (beyond necessary validation requirements) are inconsistent with the public interest and are unenforceable.

- WCG's claims that this is about consumer disclosure or that the WTB Letter will somehow impair carriers' remedies are particularly egregious. The issue here is *not* disclosure. Carriers already should be educating their customers as to contract obligations, and if WCG's members think their customers may not be aware of their obligations, they should revise their own consumer disclosure procedures. Moreover, carriers have no fewer remedies under LNP to seek payments from customers after LNP takes effect than they do today. WCG's claims are really about customer coercion. They seek the right to leverage the public numbering resource to collect fees or dissuade a customer who has already decided to go to a competitor. They want to transform the LNP mandate into a means of impeding customer choice.

Verizon Wireless agrees with one point in the Application for Review: The Commission should issue a final decision on WCG's challenge to the Bureau by September 1, 2003, as WCG requests. There can be no doubt that delay in action will impede the deployment of LNP.

**I. THE COMMISSION MUST ACT NOW TO ENSURE THAT CONSUMERS CAN FREELY TAKE THEIR NUMBERS.**

The Commission is at a crossroads on wireless LNP. One path is for the Commission to resolve the implementation issues that are before it, and adopt a process to decide quickly other issues that are certain to arise. The other path is to leave consumers and carriers uncertain as to their rights and obligations regarding LNP implementation.

The correct path is clear. Everyone – CTIA, the parties that commented on CTIA’s May 13 Petition,<sup>2</sup> the WCG carriers and Verizon Wireless – agrees that the Commission must take forceful action and do so by September 1. Having imposed the LNP mandate, the Commission bears responsibility to ensure that it is implemented effectively so that it can achieve its goals for competition and consumers.

The need for Commission action cannot be overstated. The WCG carriers claim that they do not seek to delay implementation of wireless LNP,<sup>3</sup> but their actions speak otherwise. They waited the maximum 30 days to seek review of the Bureau letter even though they assert that immediate relief is urgent. They have announced their intention to impose porting-out restrictions on customers with early termination fees or other arrearages. The proposed porting-out barriers do not end here, however. Nextel warns that some carriers intend “to implement ‘porting windows’ during which ports will be processed, *i.e.*, ports will only be processed between 1:00 a.m. and 5:00 a.m.”<sup>4</sup> Customers who visit stores on Saturday may not be able to get new service with their old number until the next week or later. Some carriers intend to refuse porting requests in circumstances where the requesting carrier’s information does not match “perfectly” with the information in the porting carrier’s record (*e.g.*, “1400 I Street v. “1400 Eye St.”).

It is apparent that there will be no shortage of business and technical justifications which carriers will employ to slow down or block port requests. The Commission must not be misled by the facade that porting restrictions will benefit consumers when they in fact will hurt

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<sup>2</sup> Petition for Declaratory Ruling of the Cellular Telecommunications & Internet Association, CC Docket No. 95-116, filed May 13, 2003, at 15 (“CTIA May 13 Petition”).

<sup>3</sup> Petition at 3.

<sup>4</sup> Nextel Comments on CTIA Petition at 9.

consumer welfare. Allowing carriers to impose restrictions on the porting-out process beyond necessary customer validation requirements would result in the exception swallowing the rule, leaving open-ended when a customer will ultimately have his or her requested port completed. Allowing carriers to block porting for their own business reasons would not only subvert the porting mandate, but also would *erect new barriers* to competitive switching that do not exist today.

If LNP is to work for consumers come November 24 and have any hope of achieving the benefits on which it is based, the full Commission must act now on the implementation issues before it. The Commission should issue a final decision resolving the Application for Review by September 1, 2003, as WCG requests, and it should act on CTIA's two petitions for declaratory ruling by then as well.

WCG coupled its Application for Review with a Petition for Declaratory Ruling that asks the Commission to rule that the WTB Letter is non-binding because it was merely a staff letter issued without proper authority. The Commission should not waste time on this Petition. WCG is incorrect on the law. Of course the Commission's Bureaus can and do issue enforceable, binding rulings such as this. Under WCG's flawed reasoning, only the full Commission can bind parties. The full Commission must now act in any event, because the carriers have warned that they will not do what the Bureau directed, unless the Commission confirms that direction. Diverting attention to a procedural debate on whether the WTB Letter is binding would serve no practical purpose. Full Commission action will moot any issue as to the WTB's authority.

Accordingly, the Commission should deny the Application for Review, dismiss the Petition for Declaratory Ruling as moot, and affirm the findings in the WTB Letter.

## II. THE BUREAU MADE THE CORRECT RULING.

Verizon Wireless demonstrated in its letter to the Commission dated May 20, 2003 (“Verizon Wireless Letter”), that the consumer benefits expected from LNP will be undermined if carriers are allowed to circumvent the Commission’s industry-wide mandate by “impos[ing] non-porting related conditions as an impediment to porting, *e.g.*, by refusing to port if a consumer owes an early termination fee to the old service provider or otherwise has an arrearage on his or her account.”<sup>5</sup> The WTB agreed, finding that the definition of LNP “contemplates an environment where it is as easy for consumers to switch carriers and port their existing telephone number as it is for consumers to switch carriers without taking their existing number with them.”<sup>6</sup> WCG contemplates a very different environment – one in which customers will be confronted with multiple obstacles to porting that may vary carrier by carrier.

WCG’s position on LNP is contradicted by the record in this proceeding. The Commission imposed wireless LNP on the industry to make it *easier* for customers to switch carriers, finding that “[u]nless LNP is available, increasing numbers of wireless service consumers - especially those who routinely provide their wireless number to others - will find themselves forced to stay with carriers with whom they may be dissatisfied because the cost of giving up their wireless phone number in order to move to another carrier is too high.”<sup>7</sup> The Bureau appropriately evaluated proposals to restrict porting in light of the Commission’s intent to *remove* barriers for customers who desire to retain their numbers when changing carriers.

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<sup>5</sup> Verizon Wireless, *Ex Parte* Presentation, CC Docket No. 95-116, filed May 20, 2003, at 2 (“Verizon Wireless Letter”).

<sup>6</sup> WTB Letter at 3.

<sup>7</sup> *Verizon Wireless’s Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, Telephone Number Portability*, Memorandum Opinion and Order, 17 FCC Rcd 14972, ¶ 18 (2002) (“*VZW Forbearance Order*”), *aff’d sub nom. CTIA v. FCC*, \_\_\_ F.3d \_\_\_, No. 021264, Slip Op. at 18 (D.C. Cir. June 6, 2003).

Moreover, the Bureau's order was fully consistent with the LNP rules. Those rules require carriers to allow customers to take their numbers with them when they decide to change carriers. They do not allow carriers to impede that simple right by demanding payment or by pursuing any similar business purpose. Carriers are, of course, free to seek payments or to attempt win back the customer as they do now – but they cannot hold the number hostage while they do so. WCG can offer nothing in the language of the rule or the order in which it was adopted to justify its position that the rule means less than it says, and that porting requests need only be completed if the customer meets certain requirements.

WCG instead offers a number of weak arguments to avoid automatic, fast porting. These carriers claim that (1) the use of porting restrictions should be decided by market forces; (2) the Bureau's finding is procedurally defective; (3) the ruling would unlawfully abrogate valid carrier contracts; (4) porting restrictions are pro-consumer; and (5) the ruling would unduly compromise wireless carriers' breach of contract remedies. None of these arguments withstand scrutiny.

**A. Market Forces Will Not Resolve This Problem.**

WCG claims that resolution of these issues should be left to market forces. It is telling that some of the very carriers that have urged the Commission to exercise its regulatory authority to resolve a wide range of LNP implementation issues now cry foul when they get an answer on how to implement LNP they do not like – and assert that market forces must instead govern. In any event, the Commission has already soundly rejected WCG's notion that wireless LNP can work without regulatory intervention:

Although certain carriers may want all wireless carriers to implement LNP because they believe it will result in a net gain of subscribers, other carriers may feel differently and will not have any incentive to implement LNP because they may be convinced that industry-wide LNP will only serve to make it easier for

their subscribers to leave them. Consequently, it is unlikely for the entire industry to agree to move to wireless LNP voluntarily.<sup>8</sup>

The Commission noted further that “there may be economic disincentives for any individual carrier to be the first to voluntarily adopt full LNP . . . because, absent the implementation of full LNP by other wireless carriers, that carrier could not gain any new wireless customers from the non-participating wireless carriers.”<sup>9</sup> The Commission was also aware that other disincentives could adversely affect LNP development: “[i]f certain carriers conclude that they will sustain a net loss in customers overall under a LNP scenario, they will have little, if any, incentive to implement LNP in the absence of a requirement.”<sup>10</sup> These concerns necessarily extend to LNP implementation details, the Commission correctly noted, because uniform standards for LNP provisioning “are essential to the efficient deployment of local number portability across the nation” and to “ensure that communication between and among service providers . . . proceed in a clear and orderly fashion so that number portability requests *are handled in an efficient and timely manner.*”<sup>11</sup> The Bureau’s determination provides for fair competition by preventing one carrier from implementing portability subject to restrictive conditions, such as refusing to port a customer who has an impaired balance, while other carriers allow customers to leave freely upon validation of identity.<sup>12</sup>

In short, adopting the carriers’ position that market forces should allow carriers to set the terms and conditions of porting cannot be squared with the premise on which the wireless LNP

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<sup>8</sup> *VZW Forbearance Order* ¶ 21.

<sup>9</sup> *Id.*

<sup>10</sup> *CTIA Forbearance Order* ¶ 41.

<sup>11</sup> *Id.* at ¶ 58 (emphasis added).

<sup>12</sup> Verizon Wireless Letter at 1.

mandate was based. By agreeing with the WCG, the Commission would be handing opponents of LNP a weapon to use to support their challenge to the validity of the LNP rules altogether.

## **B. The WTB Letter Complied With the APA.**

WCG incorrectly complains that the WTB Letter was defective because it did not comply with Administrative Procedure Act (“APA”) requirements. This claim ignores the fact that the Bureau simply interpreted the wireless LNP rule it is charged to administer and did not attempt to write a new rule or change existing rules.<sup>13</sup> To the contrary, the Bureau explained why its action was fully consistent with carriers’ existing obligations under the LNP rules and its rationale was drawn from the actual language of the rule itself.<sup>14</sup> “A rule does not . . . become an amendment merely because it supplies crisper and more detailed lines than the authority being interpreted.”<sup>15</sup>

Contrary to WCG’s arguments, the fact that the WTB Letter uses mandatory language is irrelevant.<sup>16</sup> The Bureau’s language is based on the fact that the underlying LNP obligation itself is a mandate, and the fact that the Letter will affect how carriers act “and has the “*effect* of creating new duties” does not change its status as an interpretive rule.<sup>17</sup> Moreover, as noted

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<sup>13</sup> See *American Mining Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (citing *Attorney General’s Manual on the Administrative Procedure Act*, at 30 n.3 (1947)); *United Technologies Corp. v. EPA*, 821 F.2d 714, 719-720 (D.C. Cir. 1987) (“legislative rule that actually establishes a duty or right is likely to be relatively specific (and the agency’s refinement will be interpretive)”).

<sup>14</sup> See *Paralyzed Veterans of Amer. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997).

<sup>15</sup> See *American Mining Cong.*, 995 F.2d at 1112; *Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993).

<sup>16</sup> See Application for Review at 12-13.

<sup>17</sup> See *American Mining Cong.*, 995 F.2d at 1111 (“an interpretation will use interpretive language – or at least have imperative meaning – if the interpreted term is part of a command”); *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991).

above, there are numerous conceivable business-related reasons a wireless carrier could derive to deny porting requests; forcing the Commission to address each and every practice via a notice-and-comment rulemaking proceeding is a formula for inertia that would significantly undermine the consumer benefits of LNP.<sup>18</sup>

The Bureau correctly found that nothing in the LNP rules, or in the language of the orders adopting and modifying these rules, authorizes carriers to impose the type of restrictions that the WCG now advocates.<sup>19</sup> Indeed, as discussed in the preceding section, the Commission's rules and orders compel the WTB Letter's conclusion. Put another way, nothing in the WTB Letter conflicts with the current rules. For this reason alone, there is no requirement for the Commission to conduct a new rulemaking simply to confirm that these restrictions on porting may not be imposed.<sup>20</sup> Because, as discussed above, "[t]he Bureau's decision is a reasonable interpretation of existing Commission rules, policy and precedent," it did not effect a new rule and is consistent with the notice and comment requirements of the APA.<sup>21</sup> This is particularly true "in view of the Commission's policy goals for the implementation of wireless" LNP – *i.e.*, the removal of barriers to number portability.<sup>22</sup> The WTB Letter was thus not a substantive, legislative rule requiring a full-blown rulemaking proceeding.

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<sup>18</sup> See *Caraballo v. Reich*, 11 F.3d at 195 ("If we were to require an agency to promulgate every regulatory or statutory interpretation arrived at in the course of adjudicating specific cases, agencies would be condemned to inactivity").

<sup>19</sup> See WTB Letter at 3 ("carriers may not refuse to port while attempting to collect fees or settle an account, or for other reasons unrelated to validating a customer's identity").

<sup>20</sup> See 5 U.S.C. § 553(b) (notice and comment not required for interpretive rules).

<sup>21</sup> See *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request of King County, Washington*, Order on Reconsideration, 17 FCC Rcd 14789, ¶ 20 (2002).

<sup>22</sup> See *id.*

Even assuming that the WTB Letter is not an interpretive rule, the Commission has afforded ample procedural safeguards that allow it to uphold the WTB Letter.<sup>23</sup> The critical concern of the courts in applying the APA is whether, where appropriate, affected parties have had sufficient opportunity to be heard. Agencies are free to proceed through rulemaking or informal adjudication, as long as the requirement of adequate notice and comment is satisfied.<sup>24</sup> The D.C. Circuit's rationale in considering an earlier Commission decision to make policy via declaratory ruling is particularly relevant here:

[T]he issues were fully aired before the Commission, which had the benefit of all arguments raised before this court. It is therefore difficult to see how requiring the Commission to go through the motions of notice and comment rulemaking at this point would in any way improve the quality of the information available to the Commission or change its decision. The only result would be delay while the Commission accomplished the same objective under a different label. Such empty formality is not required where the record demonstrates that the agency in fact has had the benefit of petitioners' comments.<sup>25</sup>

The Commission has considerable discretion in determining how to proceed with notice in the informal adjudication context,<sup>26</sup> and has more than adequately complied with the law here.

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<sup>23</sup> *Viacom International, Inc. v. FCC*, 672 F.2d 1034, 1042 (D.C. Cir. 1982) (citing *Trans International Airlines, Inc. v. CAB*, 432 F.2d 607, 612 n.9, 139 U.S. App. D.C. 174 (D.C. Cir. 1970)).

<sup>24</sup> *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency”); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (agency “is not precluded from announcing new principles in an adjudicative proceeding”); *American Airlines, Inc. v. Dept. of Transportation*, 202 F.3d 788, 796-97 (5<sup>th</sup> Cir. 2000) (citing *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 923 (D.C. Cir. 1982)); *Cassell v. FCC*, 154 F.3d 478, 485-86 (D.C. Cir. 1998).

<sup>25</sup> *Chisholm v. FCC*, 538 F.2d 349, 364-66 (D.C. Cir.), *cert. denied sub nom. Democratic National Committee v. FCC*, 429 U.S. 890, 97 S. Ct. 247, 50 L. Ed. 2d 173 (1976) (citing *Banzhaf v. FCC*, 405 F.2d 1082, 1104 (1968), *cert. denied*, 396 U.S. 842 (1969)); *see also New York State Comm’n on Cable TV v. FCC*, 749 F.2d 804, 815 (D.C. Cir. 1984); *Viacom International, Inc. v. FCC*, 672 F.2d at 1042.

<sup>26</sup> *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 655-56 (1990) (APA does not require notice and opportunity to be heard in informal agency adjudications); *Dr.*

It is already engaged in two informal adjudications on these issues: one addressing the CTIA May 13 Petition and one reviewing the WTB Letter.<sup>27</sup> WCG itself agrees that the issues in the WTB Letter also are raised in CTIA’s May 13 Petition<sup>28</sup> and, indeed, the Commission already has amassed a considerable record on which to affirm the WTB Letter. In this regard, CTIA’s May 13 Petition for Declaratory Ruling expressly requested that the Commission address the issues of disparate carrier restrictions and standards in the context of porting intervals. As CTIA explained:

- “[A]bsent Commission guidance, each carrier may adopt its own porting interval – making it impossible for a wireless sales representative to inform a customer as to when a port might be completed . . . A customer may not be able to port unless the underlying carriers have established some agreement for doing so.”<sup>29</sup>
- The issue of the porting interval “may also delay CMRS-CMRS ports where certain CMRS providers may refuse to complete a port within the agreed-upon time frames established by industry working groups.”<sup>30</sup>
- “CMRS carriers appear free to implement number portability in any manner they see fit, even if it conflicts with decisions reached in industry fora. Some providers have already expressed an interest in imposing their own unique requirements in addition to or instead of generally approved procedures.”<sup>31</sup>
- The Commission “has opened the door for certain wireless carriers to impose their own unique porting interval rules.”<sup>32</sup>

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*Pepper/Seven-Up Companies, Inc. v. FTC*, 991 F.2d 859, 862-63 (D.C. Cir 1993)(APA permits FTC’s use of certain “informal notice and comment procedures” in informal adjudication); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, 12 FCC Rcd. 15639, ¶ 34 (1997).

<sup>27</sup> 5 U.S.C. § 554(e) (declaratory ruling proceeding is an adjudication).

<sup>28</sup> See Application for Review at 12-13 (objecting to WTB Letter on basis that “the issue of permissible porting restrictions has been raised in the” CTIA May 13 Petition proceeding).

<sup>29</sup> CTIA May 13 Petition at 5.

<sup>30</sup> *Id.* at 8.

<sup>31</sup> *Id.* 8, n.16.

<sup>32</sup> *Id.* at 11 n.25.

The Bureau then sought comment “on the issues raised in the Petition.”<sup>33</sup> Verizon Wireless filed its letter with the Bureau, in the same docket, requesting further clarification on the issue of carrier contracts restricting porting where a customer’s balance is unpaid. In their comments and reply comments, interested parties (including the WCG carriers) addressed matters raised in CTIA’s May 13 Petition and also commented on the issue addressed in Verizon Wireless’ letter.<sup>34</sup> Not only does the Commission already have an ample record on which to act on the CTIA May 13 Petition, but interested parties have been afforded multiple opportunities to comment – and in fact have commented -- on the issue addressed by the WTB Letter.

Were there any remaining concern as to opportunity for public comment, the WCG’s own Application for Review disposes of it. Interested parties can comment on WCG’s positions in response to the Application for Review, and WCG and its member carriers can reply in turn, giving them yet another opportunity to be heard.<sup>35</sup> Given these many opportunities to express their views, and their notice that the issue is before the Commission, WCG cannot credibly claim

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<sup>33</sup> Public Notice, *Comment Sought on CTIA Petition for Declaratory Ruling on Local Number Portability Issues*, CC Docket No. 95-116 DA 03-1753, at 1 (rel. May 22, 2003).

<sup>34</sup> Cingular Comments at 20-25; Nextel Comments at 7-9; AT&T Reply Comments at 8; ALLTEL Reply Comments at 5.

<sup>35</sup> The Commission generally does not even require prior notice and opportunity for comment on staff-level declaratory rulings. *See, e.g., Radio Multiple Ownership Rules*, Second Memorandum Opinion and Order, 9 FCC Rcd 7183, ¶ 55 n.77 (1994) (declining to require “formal public notice and comment on [staff-level] declaratory rulings”); Letter from Thomas Sugrue, Chief, Wireless Telecom. Bur., to Kathleen B. Levitz et al., in CC Docket No. 94-102 (dated Oct. 28, 2002) (clarifying E911 rules via letter ruling, no formal notice and comment opportunity provided). Here, however, the Commission *did* seek comment on the CTIA May 13 Petition and its rules expressly provide a public comment cycle for review of the WTB Letter. As evidenced by comments and reply comments addressing the subject matter of Verizon Wireless’ letter, the subject matter of the Application for Review, and the instant filing, “interested parties [will] have provided the Commission with both sufficient quantity and diversity of information upon which to decide the questions presented.” *See New York State Commission*, 749 F.2d at 815 (citing *Chisholm*, 538 F.2d at 365).

that carriers have had no notice and opportunity to comment. The APA does not require the Commission to initiate a full notice and comment rulemaking in order to affirm the WTB Letter.

In sum, while the WTB Letter did not create a new rule and thus did not require notice and comment procedures, WCG's APA claim would in any event be invalid, because all parties have been afforded adequate notice and opportunity to comment through the explicit request for public comment on wireless carrier agreements and practices in the CTIA proceeding, and now this proceeding.<sup>36</sup>

**C. There Is No “Abrogation” Here, and Even Were There an Abrogation Issue, the Commission Possesses the Authority to Abrogate Unlawful Provisions in Carrier Agreements.**

WCG argues that the WTB Letter is invalid because it unlawfully “abrogates” existing contracts with their customers. This is a red herring.

The Commission's first question should be: *What abrogation?* Aside from Cingular, none of the WCG carriers claimed that its current customer service contract includes a provision that requires subscribers to pay in full before their number is ported or otherwise restricts porting. Absent such a provision, there is nothing to abrogate.

But even Cingular's abrogation argument is not sustainable. Its contract language<sup>37</sup> reveals that the provision was added *after* the Commission adopted the LNP rule, and abrogation

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<sup>36</sup> See *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 151 (1995) (rejecting “call for a ‘full investigation’ through a rulemaking proceeding [instead of informal adjudication/declaratory ruling], as we already have a full and adequate record before us”); see also *King County Reconsideration Order*, ¶ 21 (issue of delegated authority “rendered moot . . . since the Commission is addressing the merits of the . . . substantive claims”); *Beehive Tel., Inc. v. The Bell Operating Cos.*, Memorandum Opinion and Order, 12 FCC Rcd 17930, ¶ 16 (1997) (same).

<sup>37</sup> Cingular's customer contract now includes a provision that states “In the event that portability is required, your account must be paid in full in order to request transfer of the number to another carrier.” Cingular Comments at 21 (CC Docket No. 95-116 (June 13, 2003)).

presumes a pre-existing provision. In any event, Cingular's contract also includes language informing customers that their service is subject to the Commission's jurisdiction, that federal laws will govern the agreement, and that if any provision of the agreement is found to be unenforceable by an agency of competent jurisdiction, the remaining provisions will remain in full force and effect. Cingular argues that confirmation of the WTB Letter would interfere with its contract, although in fact, that contract expressly subjects its terms to Commission action. In other words, a requirement to eliminate a contract provision as a result of regulatory action is part of the "bargain" that Cingular struck with its customers.

Moreover, the WCG carriers are wrong on the law, even if they could show some "abrogation" of a preexisting provision. The law is settled that the Commission has ample authority to abrogate any contract term that is inconsistent with its rules and orders. The Commission retains authority to deem terms and conditions in carriers' service agreements unlawful, and continues to enforce Sections 201 and 202 of the Act through requiring changes to carrier contracts. The WCG itself *concedes* that the Commission *does* have authority to abrogate contracts under proper circumstances, but claims there is an insufficient record to do so here. This claim is baseless.

As discussed above, the Commission has determined through numerous notice-and-comment rulemaking proceedings that wireless LNP is necessary in the public interest. Parties commented on issues related to porting restrictions and contractual provisions were addressed in CTIA's May 13 Petition. A further opportunity to comment is provided in response to the Application for Review. Through these proceedings, the Commission has more than adequately engaged in the "process" necessary to determine that a wireless carrier may not impose barriers

to LNP through contractual provisions with its customers, and that such barriers are contrary to the public interest and unlawful.

As far as the Commission's authority to abrogate contracts is concerned, it is well-established that private parties may not circumvent the applicability of the Commission's authority by enforcing contractual provisions that are inconsistent with the Commission's rules.

As the Supreme Court has found:

“Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.” If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions.<sup>38</sup>

The Commission has determined, consistent with the holding in *Regents v. Carroll*, that “limits on the ability of licensees to hold certain types of interests *and engage in certain types of contracts* are required under the Communications Act.”<sup>39</sup> The Commission, in fact, has exercised its authority to prohibit specific contracts and contractual provisions in numerous contexts, including: notice and comment rulemakings;<sup>40</sup> cellular licensing;<sup>41</sup> a Section 208

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<sup>38</sup> See *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 224-25 (1986) (citing *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-308 (1935)).

<sup>39</sup> *Kirk Merkle, Receiver*, 94 FCC 2d 829, 838 (1983) (emphasis added), citing 338 U.S. 586, 600, 602-603 (1949). While the Supreme Court held in *Regents* that the Act does not give the Commission authority to determine the validity of contracts between licensees and others, the Supreme Court also held that the Commission could take into account a violation of the Act (through a contract) in making licensing determinations.

<sup>40</sup> *Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, 6 FCC Rcd. 4582, ¶ 8 (1991) (finding “contrary to the public interest” and anti-competitive contract provisions binding airlines exclusively to GTE and authorizing termination “at [airlines’] option and without penalty”); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd. 15499, ¶¶ 1094-95 (1996) (authorizing “CMRS providers [then] operating under arrangements with non-mutual transport and termination rates to renegotiate such arrangements . . . with no termination liabilities or other

complaint proceeding;<sup>42</sup> international operators' agreements;<sup>43</sup> and even in the context of 800 number portability.<sup>44</sup>

WCG's reliance on cases involving the filed rate doctrine<sup>45</sup> is misplaced. These cases involved circumstances in which a carrier seeks to change the terms of a contract to which it is a party by unilaterally changing the terms of the governing tariff; the "abrogation" results from the Commission's approval of the tariff amendment. Courts have prohibited abrogation as a means of preventing abuse of the filed rate doctrine. Thus, the court's statement in *MCI* cited in WCG's Petition that the Communications Act "grants the FCC no authority to authorize

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contract penalties"); *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, 9 FCC Rcd 7123, ¶¶ 28, 33 (1994) (parties to management or joint marketing agreements resulting in prohibited attributable interest must "bring such agreements . . . into compliance [PCS] rules" or else "be subject to appropriate enforcement actions"); *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, ¶¶ 66, 76 (1992) (imposing deadlines for broadcasters to modify their time brokerage agreements consistent with new rules), *recon. granted in part and denied in part*, 9 FCC Rcd 7183 (1994) (affirming in relevant part).

<sup>41</sup> 3 FCC Rcd. 3962, ¶¶ 16, 18 (1988), *aff'd* 4 FCC Rcd. 2599, ¶ 3 (1989) (finding contract provision contrary to the Commission's rules, rejecting arguments that matter was "not subject to FCC jurisdiction" and granting application "conditioned on removal of provision from agreement").

<sup>42</sup> *Telecommunications Research and Action Center v. International Telecharge, Inc.*, et. al., DA 89-237 (rel. February 27, 1989), *aff'd on recon.* 4 FCC Rcd 3950 (1989) (finding operator service providers ("OSP") "call blocking" unreasonable under Section 201(b), and requiring amendment of contracts consistent with decision).

<sup>43</sup> *AT&T Corporation Country Direct Service Agreement with Telecomunicaciones Internacionales de Argentina Telintar, S.A.*, 11 FCC Rcd 13893, ¶¶ 9-10 (1996) ("[t]he Commission . . . will void operating agreements, or portions of operating agreements that violate Commission policy").

<sup>44</sup> *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, ¶¶ 150-151 (1991) ("customers . . . [may] terminate these packages within ninety days of the time 800 numbers become portable without the imposition of any termination liabilities" to "ensure that customers who may be dependent on a specific 800 number cannot be leveraged by AT&T into long term commitments for Tariff 12 packages that prevent their taking advantage of 800 number portability when it arrives"), *aff'd in relevant part*, 7 FCC Rcd 2677, ¶ 23 (1992) (FCC provided "adequate notice of and opportunity to comment on the 'fresh look' requirement").

unilateral changes in agreements” refers to unilateral changes *initiated by the carrier itself*, not to a Commission finding in a rulemaking or other proceeding in which a contractual provision is deemed unlawful.<sup>46</sup> The filed rate doctrine is not at issue here, but even in that context, courts have held that “the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful . . . , *and to modify other provisions of private contracts when necessary to serve the public interest.*”<sup>47</sup> Similarly, in *MCI*, the court explained that contract modification is appropriate after “investigation and a determination that the contract was unjust, unreasonable, unduly discriminatory, or preferential” or otherwise “contravene[d] the public interest . . . .”<sup>48</sup>

Thus, where, as here, the Commission properly exercises its authority to develop rules and policies that are in the public interest and are consistent with the agency’s statutory responsibilities, it may act against licensees who seek to enforce contractual provisions in a manner contrary to regulatory requirements. WCG concedes as much, and its argument that the Commission has not made the requisite findings to support abrogation are unfounded.

#### **D. Consumers Will Be Harmed By Porting Restrictions.**

WCG alleges that adoption of WTB’s Letter ruling would result in customers not receiving notice that they have past due amounts or that they have not satisfied a minimum contract term or similar obligation. Application at 19. The Commission should not be fooled by

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<sup>45</sup> *MCI Telecommunications Corp. v. FCC*, 665 F.2d 1300, 1303 (D.C. Cir. 1981).

<sup>46</sup> *See MCI*, 665 F.2d at 1302.

<sup>47</sup> *Western Union Tel. Co. v. FCC*, 815 F.2d 1495 (D.C. Cir. 1987) (emphasis added, citing *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353-55 (1956), and *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956)); *Ryder Communications, Inc. v. AT&T Corp.*, FCC 03-163, ¶ 24, n.78 (rel. July 7, 2003) (applying rationale to carrier-customer contracts); *see also Mississippi Indus. v. FERC*, 808 F.2d 1525, 1553 (D.C. Cir.), *cert. denied* 484 U.S. 985 (1987).

<sup>48</sup> 665 F.2d at 1303. Such authority may also be exercised to meaningfully effect generally-applicable rules. *See Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 709-710 (D.C. Cir. 2000).

the absurd argument that consumers will somehow benefit from porting restrictions. Porting restrictions are about *creating new barriers* to customers desiring to switch service providers.<sup>49</sup> Waiting until all financial obligations are paid in full could take days, weeks, or longer, especially if carriers are allowed to delay until roaming balances are paid. Consumer interest is not the issue here. It should be obvious that, given free rein to impose business restrictions, there will be no end to the types of restrictions any carrier may develop to slow the loss of customers to competitors.

WCG's professed concern about the need to stop the port so its members can "educate" customers on their contractual duties really means that they want to hold the number hostage until the customer agrees to pay up. In any event, carriers already take many actions to inform subscribers of their obligations. Verizon Wireless, for example, follows consumer clear disclosure procedures that fully inform customers of their contractual charges. Its "Worry Free Guarantee" allows new customers to cancel service within a reasonable time period if they are unhappy with the transaction for any reason. Other carriers provide similar "opt-out" opportunities for their customers. Moreover, Verizon Wireless plans to notify the porting-in customer that he may have existing contractual obligations with his old service provider. If the customer decides to return to his old provider during the Worry Free period, the customer can cancel his new service without penalty. Each wireless carrier has every incentive to accurately inform its customers and ex-customers what they owe at any time. That incentive exists today, and will exist after LNP takes effect. LNP does not create new consumer "confusion" that somehow justifies carriers to block or delay ports so they can collect money from customers.

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<sup>49</sup> The Commission can dispense with WCG's argument that prohibiting porting restrictions may result in a reduction of handset subsidies. If this occurs (and this is purely speculative), it will result from the availability and competitive impact of LNP, not from a

The Commission has determined repeatedly that market failures justify regulatory intervention to facilitate number portability for consumers. Indeed, the Commission has found that the absence of number portability, “[b]y raising the costs of changing providers for many consumers, . . . might permit carriers to harm customers who are ‘locked in’ to their provider by failing to offer those customers reasonable deals.”<sup>50</sup> Given the Commission’s precedent, there is no possible basis to conclude that carriers will promote the public interest by *restricting* the ability of customers to port their numbers. Reaching that conclusion would only undermine the premise on which LNP was based. Consumers will derive no benefit from porting restrictions, which would further “lock” them in.

WCG’s “need” to slow porting for an indefinite time also conflicts with the positions these carriers took in response to the CTIA May 13 Petition and with the industry’s own adoption of an automated, quick porting process. CTIA told the Commission that “Consumers will not avail themselves of LNP to switch service providers if the porting interval is too long, as well as unpredictable . . . .”<sup>51</sup> CTIA thus touted the wireless industry’s proposed 2½ hour porting interval as “pro-competitive” in part “because it minimizes consumer inconvenience with porting numbers,” while deriding the wireline industry’s porting interval as one “that will stifle

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prohibition on porting restrictions.

<sup>50</sup> *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance For Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 16857, ¶¶ 23, 26 (1998); *see also Implementation of the Subscriber Carrier Selection Changes Provisions of The Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, 14 FCC Rcd 1508, ¶ 103 (1998) (unreasonable delays in executing carrier changes may be unreasonable practice in violation of section 201(b)).

<sup>51</sup> CTIA May 13 Petition at 15.

competition and cause consumers to hesitate to change service providers.”<sup>52</sup> Nextel likewise describes the wireless industry’s 2 ½ hour porting interval as “efficient and pro-consumer” and asserts that the wireline industry’s process “will frustrate consumers.”<sup>53</sup> “A *consistent* porting interval between wireline carriers and wireless carriers, and one that is not unnecessarily long,” Nextel asserts, “is critical to enhancing competition, particularly intermodal competition.”<sup>54</sup> AT&T Wireless also expresses similar concern for “customer and industry confusion” and “a smooth porting process,” and that “customers will not know what to expect in terms of how quickly their number will be ported.”<sup>55</sup>

Yet these same carriers now take the position that they should be free to refuse and indefinitely delay a porting-out request to a customer who has an impaired balance.<sup>56</sup> They argue that each carrier (driven by “market” forces) should be able to adopt the porting procedures (read: barriers) that it deems desirable. The industry standard of 2 ½ hours, which was supported by most if not all of the WCG carriers in industry fora, would be nullified if the

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<sup>52</sup> *Id.*; see also T-Mobile Comments at 6 (“[c]ompetition will not be enhanced if consumers are confused about whether they will be able to keep their number when switching carriers”).

<sup>53</sup> Nextel Comments at 5.

<sup>54</sup> *Id.* (emphasis added); see also Sprint Comments on CTIA Petition at 6 (customers “will expect that their desired number ports will occur in a reasonable amount of time” and “that their desired port will occur by a date and time certain”).

<sup>55</sup> AT&T Wireless Comments on CTIA Petition at 5.

<sup>56</sup> WCG wrongly claims the WTB Letter conflicts with existing rules because it imposed an “absolute” obligation to port, while the rules do not impose such an obligation, citing to rules for disconnected numbers, 500/900 numbers, and 800 numbers. Application at 9. The Commission excluded those categories of numbers for reasons specific to those categories. The fact that the Commission determined not to mandate porting of disconnected, unassigned, or 500/900 and 800 numbers is irrelevant – unlike those numbers, the rules explicitly require that assigned local numbers be ported. These exemptions do not somehow invalidate the WTB Letter or authorize carriers to impose porting restrictions on the very numbers that the Commission said must be freely portable.

WCG has its way. Since most consumers will likely owe some amount of money to a carrier when they cancel service (even if their contract has just expired), carriers could deny a port request indefinitely (until all final bills are distributed and paid), converting the wireless porting interval from days into weeks or more. Even if all carriers do is “educate” customers or request that they not switch, the inevitable and indefinite delay will preclude customers from obtaining new service with their old number at the point of sale, disrupting customer expectations and service. Customers would be further confused and frustrated if their experience varied carrier by carrier, but this is the necessary result of WCG’s position that each carrier should be free to impose “reasonable” porting restrictions. Allowing carriers to impose different restrictions on porting, particularly a requirement that a number will not be released until some future, unknown date when all balances are paid in full, would undermine LNP.

**E. Prohibiting Porting Restrictions Will Not Impair Wireless Carriers’ Remedies for Breach of Contract**

The WCG carriers also claim that action by the Commission confirming Verizon Wireless’ position may impede a carrier’s ability to achieve remedies for breach of contract, such as collection of early termination fees.<sup>57</sup> This argument is unfounded, as carriers will still have the same commercial means to collect any unpaid fees as they do prior to LNP implementation. Nothing in the WTB Letter precludes any carrier from collecting outstanding fees from customers pursuant to traditional contractual remedies. Today, if a customer discontinues service with Verizon Wireless before his or her contract term is completed, Verizon Wireless will be owed an early termination fee and an outstanding balance.<sup>58</sup> Verizon Wireless will send

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<sup>57</sup> See Cingular Comments at 20-25.

<sup>58</sup> Notably, today, customers can change service providers without first notifying their old service provider of their intention to change, even if the service contract term is not yet over.

the customer a final bill and, if it is not paid, Verizon Wireless will employ commercially acceptable and reasonable practices to collect payment. Verizon Wireless will hold customers just as accountable for their obligations after LNP is available as it does today. Other carriers follow similar practices. However, the Bureau correctly ruled, and the Commission should confirm, that carriers may not use the public numbering resource as leverage and as a separate tool to enhance their bill collection procedures.<sup>59</sup> Otherwise, the Commission would be allowing the creation of new barriers to customers moving to competing carriers. Moreover, while wireline carriers have not imposed business restrictions to delay or condition porting, a ruling that these restrictions do not violate the LNP rules may well lead wireline carriers to impose their own restrictions, undermining intermodal porting and even wireline-wireline porting.

WCG wrongly claims that the WTB Letter somehow forces carriers to assist in the “breach” of their contracts and to bear additional administrative expenses for a customer who is leaving. Many customers, of course, would not be breaching any contract by leaving for a competitor. Other customers today can and do change carriers before the term of the contract with their old carrier is over, and the old carrier’s rights and remedies will be no different post-LNP than they are today.

Moreover, WCG points to no specific administrative burdens that it will incur as a result of this situation. Whatever those burdens are, the old carrier faces exactly the same such burdens whether the customer is leaving mid-contract term or not, because those burdens arise from managing numbers in accordance with Commission rules.<sup>60</sup> The comparatively simple

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<sup>59</sup> As the Commission has explained, “numbers are a public resource, and are not the property of the carriers.” *Administration of the North American Numbering Plan*, Report and Order, 11 FCC Rcd 2588, ¶ 4 (1995).

<sup>60</sup> The privilege of using numbers from the national numbering resource (the NANP) comes with an obligation to comply with the Commission’s numbering policies. Even if a

administrative step of validating a port request from a new service provider is certainly not a legitimate basis for a carrier to hold a customer's number hostage for payment. WCG's members fail to offer any cost figures to justify their complaint that they will bear unjustifiable costs. Moreover, many are already recouping the costs of their LNP administrative systems across their entire customer base through monthly customer assessments.<sup>61</sup> The Commission should reject Petitioners' assertions that prohibiting porting restrictions will impair wireless carriers' breach of contract remedies or force such carriers to bear unreasonable burdens or expenses.

## CONCLUSION

For the foregoing reasons, the Commission should confirm the WTB Letter's interpretation that the Commission's rules and orders prohibit barriers to porting, and should declare that contractual provisions that would limit the ability of a customer to port his number beyond necessary validation requirements are inconsistent with the public interest and are

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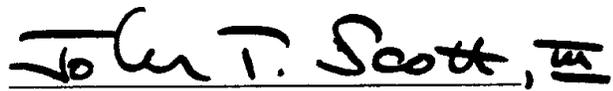
customer chooses not to port his number, a losing carrier will bear some number administration obligations. Specifically, a losing carrier would need to return a disconnected number to its numbering inventory and mark it as "unassigned." The carrier would need to take further administrative steps to account for this number in its inventory when making its bi-annual NRUF filings and if the return of such number into its inventory caused a carrier to have a thousand number block that was less than 10% "contaminated," the carrier would need to donate that block back to the pooling administrator and port back all of its assigned numbers. This fact further underscores that numbers are a regulated public resource, not the telecommunications equivalent of a lien to be used by carriers against their former customers as a penalty for deciding to switch to a competitor and keep their number.

<sup>61</sup> AT&T Wireless, Cingular and Sprint have recently been named as defendants in a class action suit in California, *Bucy v. AT&T Wireless Services, Inc.*, for imposing these charges on their customers before offering the wireless LNP service. According to the complaint, AT&T Wireless began charging \$1.75 per month in March 2003, Cingular began charging customers \$1.25 per month in April 2003, and Sprint began charging customers in or about June 2003, for fees that cover LNP (among other regulatory costs). See *Bucy v. AT&T Wireless Services, Inc.*, Complaint, Case No. CIV432021, at 14-20 (Cal. Super. Ct., San Mateo Co. filed June 16, 2003).

therefore unenforceable. It should accordingly deny the WCG's Application for Review and dismiss as moot the accompanying Petition for Declaratory Ruling.

**VERIZON WIRELESS**

By:

A handwritten signature in black ink that reads "John T. Scott, III". The signature is written in a cursive style and is underlined.

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August 14, 2003

### Certificate of Service

I hereby certify that on this 14<sup>th</sup> day of August copies of the foregoing “Opposition of Verizon Wireless to Petition for Declaratory Ruling or, in the Alternative, Application for Review” in CC Docket 95-116 were sent by U.S. Mail to the following parties:

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A handwritten signature in black ink that reads "Sarah E. Weisman". The signature is written in a cursive style and is positioned above a solid horizontal line.

Sarah E. Weisman