Sprint

Luisa L. Lancetti
Vice President
Regulatory Affairs - PCS

401 9th Street, NW, Suite 400
Washington, DC 20004
Voice 202 585 1923
Fax 202 585 1892

September 22, 2003

Michael K. Powell, Chairman
Federal Communications Commission
Office of the Secretary
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Written Ex Parte Communication***
Wireless Local Number Portability Implementation
CC Docket No. 95-116

Dear Chairman Powell:

Sprint Corporation below responds to points that SBC Communications made in its letter to you dated August 29, 2003.[1] As the nation's fifth largest incumbent local exchange carrier and fourth largest wireless carrier, Sprint can state with confidence that the concerns SBC raises regarding LEC-to-wireless porting are not grounded in fact.

The Commission recently reaffirmed that "all local exchange carriers and covered CMRS carriers in the 100 largest MSAs are required to provide LNP upon receipt of a specific request for the provision of LNP by another carrier," emphasizing that LNP constitutes "an important tool for enhancing competition . . . and giving customers greater choices."[2] A recent customer survey found that more than 16 percent of LEC residential customers would definitely or probably port their number to wireless service.[3] Although LEC-to-wireless porting becomes technically feasible in only two months, SBC now wants the Commission to prevent all LEC customers from porting their numbers to wireless services beginning November 24, 2003, thereby inhibiting intermodal competition and limiting by regulatory fiat the choices available to consumers. As Sprint demonstrates below, the Commission cannot grant this SBC delay request as a matter of law, and a Commission order restricting the porting options available to LEC customers would be contrary to the public interest.

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[1] *See* Letter from James C. Smith, SBC Senior Vice President, to the Hon. Michael K. Powell, FCC Chairman, CC Docket No. 95-116 (Aug. 29, 2003)("SBC Aug. 29 Letter").

[2] *Fourth Report and Order,* CC Docket No. 95-116, FCC 03-126 at ¶¶ 8-9 (June 18, 2003)("*Fourth LNP Order*").

[3] *See* The Management Network Group, *TMNG Study Reveals 39 Million Wireless Phone Users Read to Switch Providers (June 18, 2003), available at* www.tmg.com/News/Releases/2003-06-18.htm. *See also* RCR WIRELESS NEWS, *LNP Costs Could Trigger Consolidation* (Sept. 8, 2003)("Gartner added that nearly 10 percent of wireline customers will transfer their service to wireless providers once wireline-to-wireless number portability is implemented in addition to those that plan to migrate regardless of whether they get to keep their wireline numbers.").

I. The Rate Center (or Full vs. Partial Portability) Issue: the Commission Cannot Legally Grant the Delay SBC Seeks, and SBC's Arguments Are Factually Incorrect in Any Event

While professing an interest in "ensuring that consumers receive the full benefits of LNP from all providers," SBC argues that *all* of its customers should be precluded from porting their numbers to wireless carriers when wireless carriers become LNP capable two months from now.[4] According to SBC, the Commission should "defer inter-modal porting between wireline and wireless carriers" while it commences a new rulemaking proceeding addressing the "rate center issue."[5]

The simple response to this SBC request for delay is that the Commission cannot grant it as a matter of law. SBC's duty to provide LNP is imposed by statute and this duty extends to all carriers, including wireless providers.[6] SBC is thus required by statute to permit its customers to port to any wireless carrier that is LNP capable, and this statutory duty exists independent of any wireless LNP rule. As Sprint has demonstrated in a separate *ex parte* filing to the FCC's General Counsel filed this date, the Commission does not possess the legal authority to waive or suspect mandatory duties set forth by statute.[7] If Sprint PCS is LNP-capable and if it provides its services where an SBC customer is located, that SBC customer has a statutory right to port his number to Sprint PCS.

In addition, the two reasons SBC advances for delaying the date that its customers can port their numbers to wireless carriers lack merit. SBC first claims it has "legitimate rating/ routing concerns" if the CTIA rate center petition is granted.[8] In fact, grant of the CTIA rate center petition will have ***no impact*** on the rating or routing of land-to-mobile calls and ***no impact*** on LEC rate center structures because:

- Call rating for ported numbers does not change in any way, because a ported number remains associated with the original rate center, as SBC acknowledges;[9] and

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[4] SBC Aug. 29 Letter at 2.

[5] *Id.* at 6.

[6] *See, e.g., First LNP Order,* 11 FCC Rcd 8352, 8357 ¶ 8 (1996)("Because CMRS falls within the statutory definition of telecommunications service, CMRS carriers are telecommunications carriers under the 1996 Act. As a result, LECs are obligated under the statute to provide number portability to customers seeking to switch to CMRS carriers.").

[7] *See* Letter from Luisa L. Lancetti, Sprint Vice President, PCS Regulatory Affairs, to John Rogovin, FCC General Counsel, CC Docket No. 95-116 (Sept. 22, 2003), a copy of which is attached.

[8] SBC Aug. 29 Letter at 5.

[9] *See id.* at 4 ("[I]t is true that NXX codes assigned to wireless carriers are associated with a specific wireline rate center.").

- Calls to ported numbers will be routed in the same way as calls are routed today to non-ported wireless numbers.

Thus, the parade of horribles that SBC mentions in its letter – grant of the CTIA petition would cause "consumer confusion"; would have "serious implications for existing state telecommunications rates"; would require a "revamping [of] local rate structures" and would "necessitate major revisions to call classifications, local calling scopes and pricing structures"[10] – are factually inaccurate.[11]

What *will* cause consumer confusion is adoption of SBC's position. ILEC customers understandably will not comprehend why they cannot port a number to a wireless carrier when they are told that LEC-wireless porting is technically feasible and when a wireless carrier provides services at the customer's home or business location.

SBC also asserts that wireless carriers will realize a "competitive advantage" from intermodal porting because wireless customers "will not have an equal opportunity to select from *all* providers without changing their telephone numbers."[12] According to SBC, while LEC-to-wireless porting will be "virtually unlimited," wireless-to-LEC porting will be "limited" because there will be circumstances where it is supposedly "impossible" for a wireless customer to port his number to a LEC:

> In other words, even though a wireless end user may live in rate center X, his wireless number may actually be associated with rate center Y, making it impossible under present LNP rules for a wireline service provider to honor a wireless customer's request to have his number ported.[13]

This SBC representation is incorrect. SBC has a tariffed foreign exchange ("FX") service whereby a SBC customer can reside in rate center X but have a telephone number associated

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[10] SBC Aug. 29 Letter at 4-5.

[11] Also baseless is SBC's claim that wireless carriers want LECs to provide location portability rather than service provider portability, as Sprint has previously documented. *See* Sprint Ex Parte Letter, CC Docket No. 95-115 (Aug. 18, 2003). SBC did not respond to these points in Sprint's letter.

[12] Letter from Jay Bennett, SBC Executive Director, Federal Regulatory, to Marlene H. Dortch, FCC Secretary, CC Docket No. 95-116, at 1 (Sept. 12, 2003)("SBC Sept. 12 Letter") (emphasis in original). SBC is mistaken in asserting that "wireless numbers are not assigned in conformance with ILEC rate center boundaries." *Id.* Wireless numbers are associated with specific LEC rate centers just as LEC numbers are associated with specific rate centers, precisely so LECs can properly rate land-to-mobile calls. Wireless customers choose their wireless number based on where they expect to receive most of their calls. While some customers choose their residence location, other customers choose their work or business location.

[13] SBC Aug. 29 Letter at 4-5. In support of its position, SBC purports to quote from "the *NANC 1998 Wireless Wireline Integration Report.*" *Id.* In fact, the quotes were taken from the "Wireline Position Paper;" they were not made by NANC.

with rate center Y – that is, use a number "outside" of the rate center.[14] SBC is thus fully capable of serving a wireless customer who resides in rate center X but happens to have a number associated with rate center Y.[15] Accordingly, there is no basis to SBC's assertions that it cannot serve a subset of wireless customers because they happen to have a wireless number rated in a different rate center than where they live and that as a result, LEC-wireless porting "under present LNP rules" creates some type of "competitive fairness issue."[16]

SBC's "competitive advantage" argument appears, moreover, to be a red herring. Neither SBC nor any other LEC for that matter has submitted a *bona fide* request seeking LNP from Sprint PCS. The absence of any LEC *bona fide* request when wireless LNP is only two months away suggests that LECs have little current interest in marketing their services to wireless customers.

There certainly are differences between landline and wireless services, and consumers will weigh the pros and cons of each service differently. But as the Commission has noted, these technological differences "simply [are] not relevant" in applying obligations imposed by the Act or FCC rules.[17] The Act, the Commission has observed, "expresses no preference for the technology that carriers should use to complete with the incumbent LECs."[18] Besides, as you have previously observed, "government is at its worst when it attempts to pick competitive winners or losers, or worse, when it tries to pick a technology":

> We must resist the temptation that is often presented to us, sometimes by competitors, to shape evolving markets in some image that we preordain.[19]

Finally, the new rulemaking SBC seeks would be pointless in any event. The FCC has had the benefit of two rounds of comments on the rate center issue, in 1998 and earlier this year in response to the CTIA declaratory ruling petition.[20] There have also been extensive *ex parte*

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[14] *See, e.g.,* Southwestern Bell Telephone Company, Texas Private Line Service Tariff, Sheet 35, § 2.3.8. *See also* Sprint Ex Parte Letter, CC Docket No. 95-116, at 4-5 (Aug. 18, 2003).

[15] Admittedly, SBC charges its customers more for foreign exchange service than it charges for ordinary exchange services. How an individual competitor chooses to price its services does not present a "competitive fairness" issue, however.

[16] Even if there was a "competitive fairness issue" (and there is not), this should not be a concern to the FCC. After all, it was Congress that decided to adopt to impose an LNP obligation on LECs but not wireless carriers. Under the regime that Congress established, LECs are required to port to wireless carriers (if they are LNP capable), but wireless carriers had no obligations to port numbers to LECs.

[17] *See Cost-Based Terminating Compensation for CMRS Providers,* CC Docket No. 95-185, *Order,* FCC 03-215, at ¶¶ 11-12 (Sept. 3, 2003)("*CMRS Terminating Compensation Order*")(FCC rejects SBC argument that applying the statutory phrase, 'additional costs,' results in wireless carriers having "a greater right to reciprocal compensation than that provided to LECs.").

[18] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, *Report and Order,* FCC 03-36, at ¶ 97 (Aug. 21, 2003).

[19] Remarks of Chairman Powell, Keynote Address at Supercomm 2001 (June 6, 2001).

[20] *See* SBC Aug. 29 Letter at 4.

presentations on the subject. The third round of comments that SBC proposes will not realistically provide the FCC with any fact or argument that is not already in the record. As courts have noted, the "only result" of commencing a new rulemaking now "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."[21]

II. The Commission Has Already Rejected SBC's Arguments that ILEC Statutory Duties Are Conditioned Upon the Execution of a Section 252 Interconnection Contract.

SBC contends that Section 252 agreements – contracts negotiated, arbitrated and approved by PUCs per the procedure specified in Section 252 of the Act – are "necessary" and "essential to incumbent LEC provisioning of LNP."[22] In other words, according to SBC, its LNP obligations set forth in Section 251(b)(2) and Rule 52.23 are not triggered until a wireless carrier negotiates or arbitrates a new interconnection contract.

As an ILEC itself, Sprint can assure the Commission that these LNP contracts are not "necessary" and "essential" to incumbent LEC provisioning of LNP. Whether or not a customer ports a number to another carrier has nothing to do with the interconnection arrangements two carriers utilize – or do not utilize – for the exchange of traffic (because existing interconnection arrangements do not change once LNP becomes available). Section 252 contracts were not necessary to implement number pooling, and they are not necessary for LNP. Moreover, the FCC has already rejected the legal argument that SBC makes – namely, the argument that a LEC's statutory obligations in Section 251 of the Act are not triggered until a contract is executed in accordance with the procedures set forth in the Section 252.[23]

Also baseless is SBC's assertion that use of the Section 252 process with LNP would provide "real benefits to carriers and the public alike," such as a "ready-made structure under which agreements can be negotiated and approved, the public disclosure of these agreements, and the mechanism for resolving disputes that might arise both during and after contracting."[24]

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[21] *Chisholm* v. *FCC,* 538 F.2d 349, 364-65 (D.C. Cir.), *cert. denied,* 429 U.S. 890 (1976). SBC is wrong in asserting that the FCC "must initiate a rulemaking." SBC Aug. 29 Letter at 4. The FCC reaffirmed earlier this month (in rejecting similar arguments advanced by SBC) that an APA rulemaking is not required when existing rules and obligations are being clarified rather than changed. *See CMRS Terminating Compensation Order, supra* at ¶¶ 22-25. CTIA's petition asks the FCC to clarify existing law, not change it. Indeed, the FCC cannot deny the CTIA petition without first completing a new rulemaking proceeding to change its current LEC-CMRS interconnection rules. *See* Sprint Ex Parte Letter, CC Docket No. 95-116, at 4-6 (Sept. 2, 2003).

[22] SBC Aug. 29 Letter at 3.

[23] *See* Letter from Luisa L. Lancetti, Sprint Vice President, PCS Regulatory Affairs, to John Rogovin, FCC General Counsel, CC Docket No. 95-116 (Sept. 22, 2003),

[24] SBC Aug. 29 Letter at 3.

In fact, carriers and customers would not benefit from SBC's proposal. As noted, interconnection contracts are not required for LNP; indeed, wireless carriers interconnect with most other carriers without a contract of any kind, and it would be odd for the Commission to require a contract for LNP when carriers have been exchanging traffic for years without any contract.[25] What SBC's proposal would do is delay the availability of wireless LNP to consumers and increase carriers costs, as carriers negotiate, possibly arbitrate and in the case of SBC, obtain regulatory approval in 13 different states. Under SBC's proposal, hundreds of Section 252 negotiations and arbitrations would have to be conducted, needlessly increasing costs and delaying the availability of new options to consumers

Consumers have been told that beginning on November 24, 2003, they will be able to port their LEC number to wireless service. Consumers will thus be surprised (and certainly will not understand) when told that while the porting they desire is technically feasible, they cannot port their number because the Section 252 negotiation/arbitration/PUC approval process has not been completed.

In fact, the SBC position would harm consumers by adding needless confusion to the porting process. Consider a person who walks into a retail store wanting to purchase wireless service and to port his LEC number. Under SBC's proposal, the sales employee would be unable to answer the customer's simple question whether porting is available without knowing whether the customer's current and new service providers have negotiated/arbitrated an LNP contract that the state regulator has approved. Sprint PCS has thousands of service representatives that deal with customers and thousands more sell Sprint PCS service in retail outlets across the country. How are these sales personnel supposed to learn of the status of the Section 252 process with any of the hundreds of carriers whose customers may want to port their number to Sprint PCS? And how can a retail floor sales person, who sells the services of several wireless carriers, possibly to get the facts needed so the customer can be told that LEC number porting is available with which wireless services?

Wireless LNP is being implemented pursuant to FCC rule, not pursuant to Section 251(b). Consistent with the Congressional directive that the Commission "establish a Federal regulatory framework to govern the offering of all commercial mobile services,"[26] the Commission should set the parameters for the implementation of its own rule. No purpose would be served by delegating this FCC rule implementation function to the 50 different states. As the Commission recently stated in an analogous situation:

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[25] SBC's assertion "most, if not all, wireless carriers have already negotiated interconnection agreements" (*id.*) — is not factually accurate. In fact, contracts are required only when two carriers interconnect directly, which for wireless carriers that use Type 2 interconnection, involves the LATA tandem switch owner (generally, a RBOC). As a general rule, wireless carriers do not have contracts with other carriers that subtend the LATA tandem switch (*e.g.,* other CMRS, CLECs, smaller ILECs) because of volumes of traffic exchanged do not justify the costs of negotiating, securing approval and implementing the contract. Moreover, the majority of SBC's interconnection contracts do not contain wireless LNP provisions, so amendments to these contracts would have to be negotiated or arbitrated and approved in each of SBC's 13 states.

[26] H.R. CONF. REP. NO. 103-213, 193d Cong., 1st Sess., at 490 (1993).

> Complainants allege violations throughout SBC's 13-state region. If the statute were read to exclude complaint authority in this case, the parties would have to litigate the same issue in multiple states. Allowing for the filing of a single complaint under section 208 enhances enforcement and competition, by resolving the issues economically, helping to achieve uniform results, and relieving the parties of the burdens of multistate litigation.[27]

III. LEC-Wireless Porting Intervals

CTIA has asked the Commission to reduce the current four-day porting intervals for LEC-to-wireless ports, and SBC "opposes any reduction in the[se] current porting intervals."[28] In this instance, Sprint does not agree with either CTIA or SBC.

The Commission cannot at this time reduce existing LEC porting intervals as CTIA requests without understanding the costs that LECs would incur in making the network/system modifications that would be needed to implement a reduced interval. Because added costs invariably are passed through to customers, the Commission should not impose a new mandate without ensuring itself that the benefits of any reduced interval are outweighed by the costs. The critical facts the Commission needs to make such a reasoned decision do not currently exist in the record.[29]

On the other hand, Sprint cannot agree with SBC that the LEC porting intervals adopted six years ago should be forever immune from reevaluation. Over 21 million ports have been implemented since LNP became available, and the lessons learned from this experience alone warrant a reexamination of current practices. Sprint therefore recommends that the Commission charge industry with investigating the technical feasibility of reduced porting intervals and preparing an associated cost-benefits analysis. Once it receives the industry's report, the Commission can then determine whether rule revisions and a new rulemaking would be appropriate.

IV. Conclusion

The Commission faces a stark choice. Sprint and other wireless carriers believe that all customers served by LNP-capable LECs should have the opportunity to chose to port their number to wireless service, as the LNP statute plainly requires. SBC, while professing to support the "full benefits of LNP" and the "best interests of . . . consumers,"[30] contends that the Commission should prevent all LEC customers from porting their numbers to wireless services while a new

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[27] *Core Communications* v. *SBC,* 18 FCC Rcd 7568 ¶ 18 (April 17, 2003).

[28] *See* SBC Aug. 29 Letter at 2.

[29] Additionally, because the FCC adopted the current LEC porting intervals in a rulemaking proceeding, *see Second LNP Order,* 12 FCC Rcd 12281 (1997), it is unlikely the FCC could change these intervals without conducting a new rulemaking proceeding. *See Shalala* v. *Guernsey Memorial Hospital,* 514 U.S. 87 (1995); *Sprint* v. *FCC,* 315 F.3d 369 (D.C. Cir. 2003).

[30] SBC Aug. 29 Letter at 2 and 5.

proceeding is being conducted or new requirements imposed. SBC's position clearly undermines the very reasons the Commission imposed an LNP requirement on wireless carriers – namely, to "enhanc[e] competition, promot[e] numbering resource optimization, and [give] consumers greater choices."[31]

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this letter is being electronically filed with the Secretary's office for filing in CC Docket No. 95-116.

Respectfully submitted,

Luisa L. Lancetti

Attachment: Sprint September 22, 2003 *Ex Parte* Letter to John Rogovin, FCC General Counsel

cc: Commissioner Abernathy
Commissioner Copps
Commissioner Martin
Commissioner Adelstein
John Rogovin, General Counsel
William Maher, Chief
John Muleta, Chief
Christopher Libertelli
Bryan Tramont
Matt Brill
Jennifer Manner
Barry Ohlson
Jessica Rosenworcel
Dan Gonzalez
Jordan Goldstein
Sam Feder
Lisa Zaina
Sheryl Wilkerson

[31] *Fourth LNP Order, supra*, at ¶ 9.

ATTACHMENT

Sprint

September 22, 2003

Via Electronic Mail Delivery

John Rogovin, General Counsel
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Written Ex Parte Communication***
Wireless Local Number Portability Implementation
CC Docket No. 95-116

Dear Mr. Rogovin:

Certain incumbent local exchange carriers ("ILECs") have been making the following legal arguments in an effort to delay the date that their customers can port their numbers to wireless services:

- Some ILECs maintain that an ILEC's statutory obligation to provide local number portability ("LNP") is not triggered until the wireless carrier negotiates or arbitrates an LNP contract that a state commission approves pursuant to the procedures set forth in Section 252 of the Communications Act; and
- Some ILECs further argue that the FCC cannot require LECs to provide LNP to wireless carriers until it conducts a new rulemaking under the Administrative Procedure Act because, these ILECs say, they would incur additional transport costs under a LNP regime.

Sprint Corporation demonstrates below that these ILEC arguments are incorrect as a matter of law. The Commission should reject these arguments and take action to ensure LEC-CMRS porting occurs, as required.

I. A LEC'S LNP OBLIGATION IS NOT CONTINGENT UPON PUC APPROVAL OF A SECTION 252 CONTRACT

Certain (again not all) ILECs assert they are not required to comply with the obligations imposed by Section 251(b) of the Act, including the LNP obligation contained in Section 251(b)(2), until they have received a request for interconnection under Section 251(c)(1), the negotiation/arbitration time period has passed, and a conforming agreement has been filed with and

approved by a state commission. In support, these LECs cite the Commission's decision last fall in the *Qwest Negotiated Contract Declaratory Ruling Order*.[1]

As Sprint demonstrates below, this argument is inconsistent with both the plain language of the Act and the FCC's implementing rules. In fact, the Commission has already rejected this very ILEC argument.

A. The Obligations Contained in Section 251(b) Are Mandatory and Not Contingent

Section 251(b) provides that "[e]ach local exchange carrier has [five] duties,"[2] one of which is the obligation to provide local number portability:

> The duty to provide, to the extent technically feasible, number portability in accordance with the requirements imposed by the Commission.[3]

The language of Section 251(b) and the use of the present tense make apparent that the specified obligations imposed on all LECs (whether competitive or incumbent) are mandatory and not contingent.

Some ILECs have nonetheless argued that the five duties contained in Section 251(b), such as the obligation to provide dialing parity and LNP, are not triggered until the requesting carrier negotiates an interconnection agreement that complies with the provisions set forth in Section 252 of the Act. In support, these ILECs rely on Section 251(c)(1), which provides in relevant part that an incumbent LEC has certain "additional obligations," including the following:

> The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection.[4]

This Section 251(c)(1) provision does *not* condition the obligations imposed by Section 251(b). The Section 251(b) duties apply to all LECs. In contrast, the Section 251(c)(1) duty to negotiate applies to ILECs only – actually, a subset of ILECs.[5] Indeed, under the ILEC argument, incumbent LECs would be entitled to more favorable treatment than competitive LECs. Specifically, under their position, competitive LECs are required to provide LNP uncondition-

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[1] *See Qwest Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1),* WC Docket No. 02-89, *Memorandum Opinion and Order,* FCC 02-276, 17 FCC Rcd 19337 (Oct. 4, 2002)("*Qwest Order*").

[2] 47 U.S.C. § 251(b).

[3] *Id.* at § 251(b)(2). ILECs are no longer suggesting that providing LNP to wireless carriers is technically infeasible, and Sprint can confirm that there is no technical impediment to LEC-wireless porting.

[4] 47 U.S.C. § 251(c)(1).

[5] Under Section 251(f)(1), rural telephone companies are automatically excluded from the duties imposed by Section 251(c) until certain conditions are met. *See* 47 U.S.C. § 251(f)(1)(A).

ally, while incumbent LECs would be excused from providing the same capability *until* the ILEC agrees in negotiation (or the PUC orders in arbitration) to provide LNP. This is an untenable result given the objectives Congress sought to achieve with Sections 251(a), (b) and (c) of the 1996 Act.[6] And remarkable, based on fact that LNP obligation is statutorily based in the first instance, Congress adopted Section 251(c) to impose *additional* obligations on incumbent LECs, *not* fewer obligations than imposed on competitive LECs in Section 251(b).

B. The FCC's LNP Rule Is Not Conditioned on the Availability of a Section 252 Contract

Section 251(b)(2) requires LECs to provide LNP "in accordance with the requirements imposed by the Commission."[7] The FCC has adopted LNP rules pursuant to this provision, including Rule 52.23(c), which provides:

> Beginning January 1, 1999, all LECs must make a long-term database method for number portability available within six months after a specific request by another telecommunications carrier in areas in which that telecommunications carrier is operating or plans to operate.[8]

The Commission confirmed only three months ago that under this rule, carriers are "required to make number portability available within specified time-frames after a specific request by another telecommunications carrier in the areas in which the requesting carrier is operating or plans to operate."[9] The FCC also described the requirements for a valid *bona fide* LNP request:

> Requesting telecommunications carriers must specifically request portability, identify the discrete geographic area covered by the request, and provide a tentative date by which the carrier expects to utilize number portability to port prospective customers.[10]

There is nothing in Rule 52.23 or in the Commission's interpretation of this Rule which suggests that LECs may further condition their obligation to provide LNP based on the execution of an interconnection contract pursuant to the procedures set forth in Section 252 of the Act – that is,

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[6] Congress rather included in Section 251(c)(1) the reference to the Section 251(b) duties because it recognized that certain competitive carriers may waive their rights to Section 251(b) ILEC duties in exchange for more favorable terms in other areas. *See* 47 U.S.C. § 252(a)(1). However, an ILEC cannot reasonably contend that it can be excused from complying with its Section 251(b) duties while it attempts to convince a competitive carrier that it should agree to forgo rights contained in Section 251(b).

[7] 47 U.S.C. § 252(b)(2).

[8] 47 C.F.R. § 52.23(c). *See also* 47 C.F.R. § 52.23(b)(1).

[9] *Fourth Report and Order,* CC Docket No. 95-116, FCC 03-126, at ¶ 10 (June 18, 2003)("*Fourth LNP Order*"). *See also id.* at ¶ 8 ("[A]ll local exchange carriers and covered CMRS carriers in the 100 largest MSAs are required to provide LNP upon receipt of a specific request for the provision of LNP by another carrier.").

[10] *Id.* at ¶ 10.

refuse to provide LNP within six months even though the Section 252 process may not have been invoked or completed.

Rule 52.23 also disposes of other additional eligibility criteria that certain ILECs have announced they intend to impose on their provision of LNP. For example, some ILECs have declared they will not permit their customers to port out unless the new carrier has its own set of telephone numbers in the rate center. Some ILECs have also stated they will preclude their customers from porting unless the new carrier interconnects directly with the ILEC in the rate center. And certain ILECs have further stated they will not permit their customers to port unless the new carrier agrees to indemnify the old carrier for any unpaid account balance or termination fee owed by the porting customer.

The simple response is that Rule 52.23 sets forth the conditions under which a LEC must provide LNP, and a LEC's duties under this rule – and by statute – do not depend on such factors as telephone number assignments, use of direct rather than indirect interconnection, or execution of an indemnification agreement.

C. The FCC Has Already Rejected the Argument That ILEC Section 251(b) Duties Are Contingent Upon an Interconnection Contract

The Commission has already rejected the very legal argument that certain ILECs are advancing in the LNP proceeding – namely, that their obligations under Section 251(b) and implementing rules are contingent upon the execution of a contract pursuant to the procedures set forth in Section 252 of the Act.

The FCC, in implementing the reciprocal compensation statute, Section 251(b)(5), adopted Rule 51.703(b), which provides: "A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network."[11] In *TSR Wireless* v. *U S WEST,* a wireless carrier filed a complaint alleging that an ILEC's facilities charges contravened Rule 51.703(b).[12] In defense, the ILEC argued that "even if section 51.703(b) requires LECs to deliver LEC-originated traffic to complainants without charge, CMRS providers may only obtain that benefit by engaging in the section 252 agreement process":

> Defendants assert that, because Complainants did not make a formal request for interconnection negotiations under section 252, they are not entitled to the benefits available under section 251(b)(5) of the Act and section 51.703(b) of the Commission's rules. The Defendants argue that the Act does not authorize the Commission to impose the reciprocal compensation duties of section 251(b)(5) - one of the statutory bases for section 51.703(b) - outside the context of negotia-

[11] 47 C.F.R. § 51.703(b). *See also Local Competition Order,* 11 FCC Rcd 15499, 16028 ¶ 1062 (1996), *aff'd in relevant part, Iowa Utilities Board* v. *FCC,* 120 F.3d 753 (8th Cir. 1997), *vacated in part on other grounds, AT&T* v. *Iowa Utilities Board,* 525 U.S. 366 (1999).

[12] *TSR Wireless* v. *U S WEST,* 15 FCC Rcd 11166 (2000), *aff'd Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001).

> tions undertaken pursuant to the procedures established in section 252 of the Act.[13]

The Commission rejected this ILEC argument and entered judgment for the wireless carrier:

> Defendants' argument that the benefits of section 51.703(b) of the Commission's rules are available only through a section 252 interconnection process is incorrect. . . . The Commission's *Local Competition Order* clearly calls for LECs immediately to cease charging CMRS providers for terminating LEC-originated traffic; the order does not require a section 252 agreement before imposing such an obligation on the LEC.[14]

This same analysis applies with the LNP rule. Rule 52.23 requires all LECs to provide LNP within six months of a request by a carrier that operates in the area. The rule does not require a Section 252 agreement before a LEC's LNP obligation is triggered, and the absence of an agreement does not authorize a LEC to avoid the rule requirement that a LEC provide LNP within six months of a *bona fide* request.

D. The FCC's *Qwest Declaratory Ruling Order* Did Not Upset This Precedent

Some ILECs have cited the *Qwest Negotiated Contract Declaratory Ruling Order* for the proposition Section 252 contracts are required before an ILEC need provide LNP to CMRS carriers.[15] These ILECs point to a sentence in paragraph 8 of that *Order*, where the FCC stated:

> Based on these statutory provisions, we find that an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to Section 252(a)(1).[16]

These ILECs assert that under this sentence, their Section 252(b) obligations, including the LNP obligation, are not triggered until a Section 252 contract is negotiated or arbitrated and approved by a state regulator.

Sprint submits that this ILEC argument misstates the holding of the *Qwest Order*. The *Qwest Order* held that ILECs cannot avoid their 252(i) obligations by failing to publicly file contracts setting forth terms and conditions implementing their 251(b) obligations. The Commission did not hold that a written agreement is necessary for a carrier to avail itself of the rights enumerated in 251(b), only that agreements outlining such terms and conditions must be filed and made available to all other carriers. There is nothing in the *Qwest Order* that even intimates that

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[13] *Id.* at 11182 ¶ 27.

[14] *Id.* at 11183 ¶¶ 28-29.

[15] *See Qwest Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1),* WC Docket No. 02-89, *Memorandum Opinion and Order,* FCC 02-276, 17 FCC Rcd 19337 (Oct. 4, 2002)("*Qwest Order*").

[16] *Id.* at 19341 ¶ 8 (emphasis omitted).

the FCC intended to overturn its prior precedent squarely rejecting the ILEC position that LEC obligations set forth in Section 251(b) are "available only through the section 252 interconnection process."[17]

Adoption of the ILEC's reading of the *Qwest Order* would lead to the illogical result discussed above: ILECs would be entitled to more favorable treatment under the Act because their Section 251(b) duties would not be triggered until the Section 252 process is completed, while competitive LECs are automatically required to provide LNP with or without any negotiations. The ILEC argument would also mean that Rule 52.23 does not mean what it says, because in addition to making a *bona fide* request, the requesting carrier would also be required to engage in and complete the Section 252 process – at least with incumbent LECs. In Qwest, it should also be noted that the FCC also recognized that day-to-day operational agreements designed to implement statutory or rule obligations need not be filed with a PUC. The information carriers need to exchange in order to effectuate a port (e.g., carrier contact information) falls within this day-to-day operational agreement exception.[18]

The holding in the *Qwest Order* was limited to the issue of whether interconnection contracts, once negotiated, must be filed with a state commission and made available to others under section 252(i). More specifically, the Commission was concerned that ILECs and certain CLECs had executed special deal contracts which they did not make publicly available, thereby thwarting other carriers from exercising their Section 252(i) right to opt-into the same contract. Opt-in rights have nothing to do with ILEC obligations specified in the Act and implementing FCC rules.[19]

E. Interconnection Contracts for LNP Make No Sense

Interconnection contracts are not required to implement LNP. Whether or not a customer ports a number from one carrier to another has nothing to do with the interconnection arrangements two carriers utilize for the exchange of traffic. Existing interconnection arrangements do not change in any way once LNP becomes available; calls to ported numbers are routed in the same manner as calls to non-ported numbers are routed today.

You should be aware that most wireless carriers interconnect with most other carriers without *any* interconnection contract. Such contracts are most commonly executed when two carriers interconnect directly with each other. With Type 2 interconnection, wireless carriers have interconnection contracts with the owners of the LATA tandem switches (generally, the RBOCs), the place where they interconnect with the rest of the public switched telephone network.[20] Wireless carriers often do not have contracts with other carriers that subtend the tandem

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[17] *See TSR Wireless, supra,* 15 FCC Rcd at 11183 ¶ 28.

[18] *See Qwest Order* at ¶ 13 and n.33.

[19] Even for carriers that interconnect directly and have a Section 252 contract, such details ordinarily are not included in the Section 252 contract; they are rather handled separately, by an operational contract.

[20] These RBOC-wireless carrier Section 252 contracts, first negotiated five and six years ago, generally do not address LNP because the subject was not relevant at the time.

switches (CLECs, other ILECs, other wireless carriers) because the traffic volumes exchanged often are not large enough to justify the cost of negotiating, securing approval and implementing/maintaining contracts. It would make no sense for the Commission to announce now that interconnection contracts are required as a condition for ILECs to comply with their Section 251(b) duties, such as dialing parity and number portability, when most carriers have not executed interconnection contracts for interconnection and the exchange of traffic.

F. The Commission Should Recognize the Section 332(c) Alternative

Sprint does not believe that the *Qwest Order* discussed above overruled the holding in *TSR Wireless*. If, however, you disagree with this assessment, then Sprint asks that you advise the Commission that it possesses authority under Section 332(c) of the Act to regulate the interconnection of LECs and wireless carriers and that exercise of this authority would be appropriate in the circumstances presented.

As you are aware, the Commission has a special obligation to develop uniform national rules for LEC-CMRS interconnection. Congress expanded FCC authority over wireless carriers in the Omnibus Budget Reconciliation Act of 1993 so that it could "establish a Federal regulatory framework to govern the offering of all commercial mobile services."[21] Congress noted that mobile services "by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure" and that "the right to interconnect [is] an important one which the Commission shall seek to promote, since interconnection serves to enhance competition and advance a seamless national network."[22] Among other things, Congress amended Sections 2(b) and 332(c) by giving the Commission the authority to establish the terms of LEC-wireless interconnection for all traffic, including intrastate traffic.[23] Federal courts have affirmed the FCC's special authority over LEC-CMRS interconnection,[24] and the Commission has stated it will invoke its independent Section 332(c) authority if "the regulatory scheme established by sections 251 and 252 does not sufficiently address the problems encountered by CMRS providers in obtaining interconnection on terms and conditions that are just, reasonable and nondiscriminatory."[25]

Section 332(c) provides the Commission authority to adopt national rules for ports between LECs and wireless carriers. Wireless LNP is being implemented pursuant to FCC rule,

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[21] H.R. CONF. REP. NO. 103-213, 193d Cong., 1st Sess., at 490 (1993).

[22] H.R. REP. NO. 103-111, 193d Cong., 1st Sess., at 260-61 (1993).

[23] *See, e.g., Unified Intercarrier Compensation Regime,* 16 FCC Rcd 9610, 9640 ¶ 84 (2001).

[24] *See, e.g., Qwest* v. *FCC,* 252 F.3d 462, 465-66 (D.C. Cir. 2001); *Iowa Utilities Board* v. *FCC,* 120 F.3d 753, 800 n.21 (8th Cir. 1997). No one, including no ILEC, challenged this ruling before the Supreme Court. *See AT&T* v. *Iowa Utilities Board,* 525 U.S. 366 (1999).

[25] *Local Competition Order,* 11 FCC Rcd 15499, 16006 ¶ 1025 (1996). *See also Unified Intercarrier Compensation Regime,* 16 FCC Rcd at 9638-39 ¶ 81.

not the Communications Act.[26] It therefore is appropriate that the Commission interpret, apply and enforce its own rule, rather than delegating this function to each of the 50 state commissions.

The Commission has ruled that its resolution of intercarrier disputes is appropriate even where the parties have an interconnection contract and could utilize the state dispute resolution process set forth in Section 252 or in the contract.[27] Given the Congressional command for the Commission to establish a "Federal regulatory framework" to govern the wireless industry and given that wireless LNP is being implemented pursuant to FCC rule rather than by statute, there is an even more compelling reason for the FCC to develop a national approach for the porting of numbers between wireless carriers and LECs.

II. THE FCC NEED NOT CONDUCT A NEW APA RULEMAKING BEFORE IMPLEMENTING WIRELESS PORTABILITY

The Commission ruled seven years ago that "Section 251(b) requires local exchange carriers to provide number portability to all telecommunications carriers, and thus to CMRS providers as well as wireline service providers."[28] Now that the wireless LNP deadline is only two months away, certain ILECs contend that LNP will cause them to incur increased transport costs and that the FCC cannot commence intermodal porting without commencing and completing a new rulemaking to address these increased costs.

This ILEC argument is baseless. While all carriers incur costs in becoming LNP capable and in operating in an LNP environment, those costs do not involve new or additional transport costs.[29] Consequently, ILECs cannot possibly incur increased transport costs as a result of LNP.

The LNP requirement compelled industry to change the way in which it identifies the carrier serving the party being called. Historically, originating carriers identified the destination, or terminating, carrier based on the first six digits of the dialed number (the NPA-NXX). Because a

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[26] *See First LNP Order,* 11 FCC Rcd 8352, 8431 ¶¶ 152-53 (1996)("The [LNP] 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. . . . We possess independent authority under sections 1, 2, 4(i), and 332 of the Communications Act of 1934, as amended, to require CMRS providers to provide number portability as we deem appropriate.").

[27] *See Core Communications* v. *SBC,* 18 FCC Rcd 7568 ¶ 18 (April 17, 2003)("Complainants allege violations throughout SBC's 13-state region. If the statute were read to exclude complaint authority in this case, the parties would have to litigate the same issue in multiple states. Allowing for the filing of a single complaint under section 208 enhances enforcement and competition, by resolving the issues economically, helping to achieve uniform results, and relieving the parties of the burdens of multistate litigation.").

[28] *First LNP Order,* 11 FCC Rcd at 8431 ¶ 152. *See also id.* at 8352, 8357 ¶ 8 ("LECs are obligated under the statute to provide number portability to customers seeking to switch to CMRS carriers.").

[29] In contrast to the current data base method of LNP, the interim portability method that LECs once used for LNP, Remote Call Forwarding ("RCF"), did involve transport costs. This is because under the RCF method, calls to ported numbers were first routed to the old service provider which then had to forward, or transport, the call attempt to the new service provider's network for completion.

unique NPA-NXX combination was assigned to each switch, the dialed digits enabled the originating carrier to identify not only the carrier serving the person being called but also the specific switch serving the called party.

This rigid method of identifying the destination carrier does not work with LNP, because the customer may decide to transfer his number from one carrier to another (with the result that the NPA-NXX no longer identifies the carrier or the switch serving the customer). LNP therefore required industry to develop a new addressing scheme, known as the Location Routing Number ("LRN") method. With LRN, a unique 10-digit number, or location routing number, is assigned to each switch. Calls to NXX codes that have been opened to porting require a database query to determine whether a specific number has been ported and if so, to obtain the LRN associated with the number.[30]

Importantly, LNP database queries are generated for "all calls to switches from which at least one number has been ported," whether a specific number has been ported or not.[31] Thus, an originating carrier incurs the same database query costs whether a call is destined to a ported number or a non-ported number.

FCC rules define 'transport' as "the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC."[32] As is apparent, the transport of calls from one network to another has nothing to do with LNP, which instead involves the ability of customers to "retain, at the same location, existing telecommunications numbers . . . when switching from one telecommunications carrier to another."[33]

Some ILECs have argued that they will incur added transport costs if their customers port their number to a competitive carrier. Of course, they will incur added transport costs in this situation. But these transport costs are not caused by LNP; they are rather caused by competition and the reciprocal compensation statute, which requires the originating carrier to pay for its own costs of delivering its customers calls to the destination switch, and thereafter to compensate the destination carrier for its additional costs of call termination.[34] *The transport costs an ILEC incurs with a ported number are no different than the transport costs the ILEC incurs to a number that is not ported.* Indeed, the transport costs an ILEC incurs in connection with delivering a call to a former customer with a ported number is identical to the transport costs it incurs in deliver-

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[30] *See, e.g., First LNP Reconsideration Order,* 12 FCC Rcd 7236, 7239 (1997).

[31] *Id.* at 7239-40 ¶ 6. Indeed, the FCC specifically rejected an ILEC proposal whereby LNP queries would have been made only a calls to ported numbers, but not on calls to non-ported numbers. *See id.* at 7242-66 ¶¶ 11-47.

[32] 47 C.F.R. § 51.701(c).

[33] 47 U.S.C. § 153(30).

[34] *See* 47 U.S.C. § 252(b)(5). *See also* 47 U.S.C. § 252(d); 47 C.F.R. §§ 51.701 to 51.717; *Cost-Based Terminating Compensation for CMRS Providers,* CC Docket Nos. 95-185 and 96-98, *Order,* FCC 03-215 (Sept. 3, 2003).

ing a call to the same former customer if the customer instead decides to use a non-ported number with his new service provider. Thus, transport has nothing to do with LNP, and the ILEC argument that they will incur additional transport costs as a result of LNP lacks merit.

Moreover, the Commission cannot lawfully grant the relief these ILECs seek – namely, defer the commencement of intermodal porting. An ILEC's duty to provide LNP is imposed by statute and this statutory duty extends to all telecommunications carriers (including wireless carriers) that provide their services "at the same location" as ILEC customer wanting to port.[35] The Commission does not possess the authority to waive or suspend mandatory duties set forth in statutes.[36] In other words, if a wireless carrier is LNP-capable and if that carrier provides its services where an ILEC customer is located, that ILEC customer has a statutory right to port his number to the wireless carrier.

It is also important to emphasize that a LEC's statutory LNP duty is not contingent upon the wireless LNP rule. Under the LNP statute, LECs are required to permit their customers to port their number to any telecommunications carrier that is LNP capable. Thus, an ILEC would be required to permit its customers to port to LNP-capable wireless carriers even if the Commission had never adopted its wireless LNP rule. Even if the Commission was to delay the effective date of the wireless rule, LECs would still be required under Section 251(b)(2) to permit their customers to port their numbers to those wireless carriers that are LNP capable.

In the end, the concerns some ILECs raise with transport costs are directed not at LNP but at the reciprocal compensation statute and the FCC's implementing interconnection rules – rules that have been affirmed on appeal.[37] A new rulemaking would be required before the Commission can change these interconnection rules.[38] But there is no basis in law or policy to defer intermodal porting. An FCC order restricting the porting alternatives available to consumers would not promote the interests of consumers, or intermodal competition.

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[35] *See* 47 U.S.C. §§ 153(30), 252(b)(2). *See First LNP Order,* 11 FCC Rcd 8352, 8357 ¶ 8 (1996)("LECs are obligated under the statute to provide number portability to customers seeking to switch to CMRS carriers."). As noted above, the LNP statute provides only one exception to this duty – technical infeasibility – which does not apply here.

[36] *See, e.g., MCI* v. *AT&T,* 512 U.S. 218 (1994). The FCC could exercise its Section 10 forbearance powers to relieve LECs of their statutory duty to provide LNP to wireless carriers – although no LEC has filed a forbearance petition. But given that such action would *limit* the competitive choices available to LEC customers, it is unlikely the FCC could find the presence of the statutory forbearance criteria.

[37] *See Iowa Utilities Board* v. *FCC,* 120 F.3d 753, 800 n.21 (D.C. Cir. 1997), *vacated in part on other grounds, AT&T* v. *Iowa Utilities Board,* 525 U.S. 366 (1999). *See also Qwest* v. *FCC,* 252 F.3d 462 (D.C. Cir. 2001).

[38] Under current interconnection rules, it is the wireless carrier and not the ILEC, which chooses the type of interconnection to utilize. *See* 47 C.F.R. 20.11(a). *See also Bowles* v. *United Telephone,* 12 FCC Rcd 9840 (1997).

III. CONCLUSION

For the foregoing reasons, Sprint requests the Commission to confirm that incumbent LECs may not condition their statutory duty to provide number portability based on the execution of a Section 252 contract – or on other factors not set forth in the FCC's LNP rules. The Commission should further reject the ILEC argument that they may defer the date they permit their customers to port to wireless carriers, and reaffirm that ILECs are obligated to permit LEC-to wireless porting within six months of a *bona fide* request from a wireless carrier.

Pursuant to Section 1.1206(b) of the Commission's rules, a copy of this letter is being electronically filed with the Secretary's office for filing in CC Docket No. 95-116.

Respectfully submitted,

Luisa L. Lancetti
Vice President, PCS Regulatory Affairs
Sprint Corporation
401 9th Street, N.W., Suite 400
Washington, D.C. 20004
202-585-1923

Charles W. McKee
General Attorney
Sprint Corporation
6450 Sprint Parkway
Mail Stop: KSOPHN0212-2A553
Overland Park, KS 66251
913-315-9098

cc: William Maher
Robert Tanner
Carol Mattey
Eric Einhorn
Cheryl Callahan
Matt Brill
Jennifer Manner
Sam Feder
Dan Gonzalez
Scott Bergmann
Barry Ohlson
Jeffrey Dygert
John Muleta
Bryan Tramont
Sheryl Wilkerson
Christopher Libertelli
Paul Margie
Jessica Rosenworcel
Cathy Seidel
Jared Carlson
Walter Strack
Joseph Levin
Jennifer Tomchin
Jennifer Salhus
Jane Halprin