



*Building The Wireless Future™*

September 23, 2003

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: Telephone Number Portability, CC Docket No. 95-116**

Dear Ms. Dortch:

The Cellular Telecommunications & Internet Association (“CTIA”)<sup>1</sup> has filed two petitions this year requesting guidance on issues relating to the implementation of local number portability (“LNP”). Among the issues raised in these petitions is whether LECs may force upon CMRS carriers lengthy negotiation procedures for the purpose of testing and agreeing to the terms and conditions of LEC-CMRS local number portability. CTIA has advocated a streamlined approach to the administration of LNP agreements, while several LECs and rural wireless carriers call for a more arduous negotiation process in order to facilitate number portability.<sup>2</sup>

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<sup>1</sup> CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

<sup>2</sup> See Telephone Local Number Portability, CC Docket No. 95-116, *Ex Parte Presentation of Sprint*, (filed Aug. 8, 2003) (showing that many LECs are demanding negotiations pursuant to Section 251 prior to entering into LNP agreements with CMRS carriers); Telephone Local Number Portability, CC Docket No. 95-116, *Comments of T-Mobile USA, Inc.* (filed Sept. 5, 2003) (noting the last-minute attempt by LECs to stall LEC-CMRS LNP by claiming that such agreements fall under Section 251 and 252 Commission authority). See also Telephone Local Number Portability, CC Docket No. 95-116, *Ex Parte Presentation of The Rural Wireless Working Group RE: Rural Wireless Number Portability Guidelines Association* (filed Aug. 25, 2003).



Recently, SBC reiterated its contention that LEC-CMRS LNP arrangements must be subjected to lengthy negotiations and state filing pursuant to sections 251 and 252 of the Communications Act of 1934 as amended (“Act”).<sup>3</sup> In comments filed in response to CTIA’s petitions, SBC relied upon the Commission’s October 2002 *Qwest Order*.<sup>4</sup> According to SBC and others in this proceeding, the *Qwest Order* stands for the proposition that CMRS-LEC (“intermodal”) LNP arrangements can only be reached through a singular means; negotiated pursuant to section 251(c) and filed with state commissions pursuant to section 252(a)(1).<sup>5</sup> This is indisputably not the case.

As CTIA has previously explained, reliance upon this decision for this proposition is misplaced. As an initial matter, the Commission ordered intermodal LNP pursuant to sections 1, 2, 4(i), and 332 of the Act.<sup>6</sup> Questions concerning intermodal LNP arrangements are to be considered under those provisions. The Commission cannot be constrained by the terms of sections 251 and 252 when it in fact ordered intermodal LNP under an alternative regulatory regime. CTIA made this clear in its comments, and it has gone unrefuted. SBC and other have not only ignored this fact, they essentially argue that the Commission lacks the discretion to do that which it already did -- engage in the regulation of intermodal LNP in an arrangement other than sections 251 and 252.

Notwithstanding LEC efforts to engage in an overly broad reading of the *Qwest Order*, and an unnecessarily narrow interpretation of the Commission’s authority, the *Qwest Order*, by its terms, has done nothing to change the *LNP First Report and Order*’s

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<sup>3</sup> See Telephone Local Number Portability, CC Docket No. 95-116, *Ex Parte filing of SBC Communications, Inc. in Opposition to Petition for Declaratory Ruling of the Cellular Telecommunications and Internet Association* (filed Aug. 29, 2003) (stating that “SBC has argued... [that f]or incumbent LECs, the section 252 interconnection agreement is the mechanism by which they fulfill the duties described in paragraphs (1) through (5) of subsection (b) of section 251, one of which is the duty to provide number portability... If porting arrangements are not already part of these agreements, then the parties can merely seek to amend existing agreements to address LNP issues.”).

<sup>4</sup> Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements under Section 252(a)(1), WC Docket No. 02-89, *Memorandum Opinion and Order*, 17 FCC Rcd 19337 (2002) (“*Qwest Order*”)

<sup>5</sup> See Telephone Local Number Portability, CC Docket No. 95-116, *Comments of SBC Communications, Inc. in Opposition to Petition for Declaratory Ruling of the Cellular Telecommunications and Internet Association* (filed Feb. 26, 2003).

<sup>6</sup> See In the Matter of Telephone Local Number Portability, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352, ¶ 153 (1996) (“*LNP First Report and Order*”).

decision to require CMRS-LEC LNP pursuant to section 332, not section 251. Accordingly, there is no basis in law or policy for the Commission to accede to the view that intermodal LNP cannot proceed without carriers first negotiating agreements under sections 251 and 252.

In the *Qwest Order*, the Commission examined the statutory language of section 252(a)(1) and 251(c)(1) and found that:

the binding agreement between the *incumbent LEC* and the requesting *competitive LEC* must include a “detailed schedule of itemized charges for interconnection and each service or network element included in the agreement.” In addition, section 251(c)(1) requires incumbent LECs to negotiate in good faith, in accordance with section 252, the particular terms and conditions of agreements to implement their duties set forth in sections 251(b) and (c). Based on these statutory provisions, we find that an agreement that creates an ongoing obligation pertaining to resale, [LNP], 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).<sup>7</sup>

The Commission’s decision in the *Qwest Order* makes clear that the applicability of sections 251 and 252 is reserved for agreements creating ongoing relationships between ILECs and CLECs: “This standard...recognizes the statutory balance between the rights of *competitive LECs* to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impediments to commercial relations *between incumbent and competitive LECs*.”<sup>8</sup>

Given the fact that the *Qwest Order* makes no mention that sections 251 and 252 apply to LEC-CMRS relationships, it is impossible to attribute this decision, at least facially, to LEC-CMRS LNP arrangements.

Additionally, the definition of a LEC in the Communications Act states that CMRS carriers are not to be regulated as LECs unless and until the Commission determines that CMRS should be included in the definition.<sup>9</sup> In the *LNP First Report and Order*, the Commission declined to make this determination and it has not done so elsewhere.<sup>10</sup> Thus, neither Congress nor the Commission (in the *Qwest Order* or in any

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<sup>7</sup> *Qwest Order* ¶ 8 (italic emphasis added, underline and emphasis in original) (citations omitted).

<sup>8</sup> *Id.* (italic emphasis added).

<sup>9</sup> *See* 47 U.S.C. § 153(26).

<sup>10</sup> *See LNP First Report and Order* ¶ 153 (citations omitted).

other decision) has ever expressed an intent to include CMRS providers -- or LEC-CMRS LNP negotiations -- in the section 251(b) mandates or state jurisdiction associated with sections 251 and 252. However, the Commission has made clear its determination of the applicable statutory authority governing intermodal LNP negotiations, and it rests in sections 1, 2, 4(i), and 332 of the Act.

In the *LNP First Report and Order*, the Commission ordered LNP between CMRS providers and wireline providers pursuant to sections 1, 2, 4(i), and 332, not 251.<sup>11</sup> It made this decision clear when it determined to

. . . include those [CMRS] carriers in our mandate to provide long-term service provider portability. . . pursuant to our authority under sections 1, 2, 4(i), and 332 of the Communications Act of 1934. *This mandate applies when switching among wireline service providers and broadband CMRS providers*, as well as among broadband CMRS providers, even if the broadband CMRS and wireline service providers or the two broadband CMRS providers are affiliated.<sup>12</sup>

Thus, intermodal LNP was expressly ordered pursuant to the Commission's general jurisdiction to promote local competition by CMRS carriers under sections 1, 2, 4(i) and 332, not section 251.

More recently, the Commission explained to the D.C. Circuit with respect to CMRS number portability, that “[b]ecause the development of the wireless industry has a different history -- in which service already was provided by a number of carriers in 1996, and not through a monopoly -- Congress did not explicitly impose all of the obligations in section 251 on wireless carriers.”<sup>13</sup> Rather, Congress directed the Commission generally to regulate CMRS pursuant to the provisions of section 332, and the Commission specifically ordered CMRS providers to engage in intermodal LNP under those terms. Other than to limit the competitive effects of intermodal LNP, there is no apparent motive for the LECs' and rural wireless carriers' insistence on cumbersome procedures under section 251.

While CTIA has expressed deep misgivings about the comparative costs and benefits of wireless LNP, the Commission's decision in 1996 to regulate intermodal LNP under its section 332 jurisdiction, as opposed to section 251, is consistent with Congress' effort to create a minimally regulated, largely federal jurisdiction for CMRS. Section 332

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<sup>11</sup> See *id.* ¶ 155.

<sup>12</sup> *Id.* (emphasis added); see also *Cellular Telecommunications & Internet Association and Cellco Partnership, d/b/a Verizon Wireless v. FCC*, No. 02-1264 (D.C. Cir. 2003), Brief for Respondents at 7.

<sup>13</sup> *Id.* at 34.

exclusively preserves for the Commission the authority to regulate CMRS activities, including those associated with LNP negotiations. In 1993, when Congress amended section 332, it intended to promote a uniformly regulated, efficient, competitive mobile wireless service.<sup>14</sup> For this reason, Congress charged the Commission with implementing regulatory policies that foster the full development of CMRS, including as a competitor in the local exchange market. To this end, Congress gave the Commission express authority to order LEC-CMRS interconnection and to regulate the relationships between CMRS providers and LECs.<sup>15</sup> Further, in recognition of the interstate nature of mobile services and the federal interest in fostering nationwide, seamless wireless networks, Congress broadly preempted state regulation of CMRS rates and entry.<sup>16</sup> As a result, the Commission has found that CMRS LNP falls under the exclusive purview of section 332 and Commission's jurisdiction thereunder.<sup>17</sup> SBC's proposal to submit LNP agreements involving CMRS providers to state jurisdiction completely undermines the regime envisioned by Congress.

To the extent that there is any ambiguity as to section 251's application to intermodal LNP, SBC's request to subject LNP agreements to the detailed processes called for under section 252 is still not a prerequisite. By its terms, section 251(b)(2) requires LECs to provide LNP "in accordance with requirements prescribed by the Commission."<sup>18</sup> Therefore, even if the Commission disregards precedent for regulation of LNP under its more general authority and finds that intermodal LNP is also governed

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<sup>14</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §§ 6002(b)(2)(A), 6002(B)(2)(B), 107 Stat. 312 (1993).

<sup>15</sup> Section 332 contains examples of Congress' recognition of and providing for competitive entry by CMRS carriers into the local exchange market. *See, e.g.*, 47 U.S.C. § 332(c)(3)(A); H.R. Conf. Rep. No. 103-213, at 493, *reprinted in* 1993 U.S.C.C.A.N. 1088, 1182 (1993) (noting that "the Commission should permit States to regulate radio service provided for basic telephone service if subscribers have no alternative means of obtaining basic telephone service. If, however, several companies offer radio service as a means of providing basic telephone service in competition with each other, ... it is not the intention of the conferees that States should be permitted to regulate these competitive services...").

<sup>16</sup> *See* 47 U.S.C. § 332(c)(3)(A); *see also* H.R. Rep. No. 103-111, at 260 (1993) *reprinted in* 1993 U.S.C.C.A.N. 378, 587 ("To foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, new section 332(c)(3)(A) also would preempt state rate and entry regulation of all commercial mobile services.").

<sup>17</sup> *See, e.g.*, *LNP First Report and Order* ¶ 153.

<sup>18</sup> *See* 47 U.S.C. § 251(b)(2).

by section 251, section 251(b)(2) allows the FCC to adopt the streamlined procedures for LEC-CMRS LNP agreements CTIA has called for.

Moreover, a streamlined approach to regulating LEC-CMRS LNP arrangements is entirely consistent with the Commission's interconnection orders. When the Commission ordered CMRS providers to engage in interconnection under sections 251 and 252, it specifically reserved authority to act under section 332, as well as or in the alternative to section 251, when the public interest so required.

By opting to proceed under sections 251 and 252, we are not finding that section 332 jurisdiction over interconnection has been repealed by implication, or rejecting it as an alternative basis for jurisdiction. We acknowledge that section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection; we simply decline to define the precise extent of that jurisdiction at this time. . . . Although we are applying sections 251 and 252 to LEC-CMRS interconnection at this time, we preserve the option to revisit this determination in the future. . . . Should the Commission determine that 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, the Commission may revisit its determination . . . .<sup>19</sup>

Courts too have recognized the Commission's unique authority to regulate LEC-CMRS relationships outside the sections 251 and 252 regime -- even where the relationship expressly governed the interconnection of facilities (as opposed to less cumbersome LNP arrangements). In *Iowa Utilities Board v. FCC*, the Eighth Circuit overturned the Commission's *Local Competition Order*, but it expressly maintained the Commission's authority to regulate LEC-CMRS interconnection as a result of section 332 authority.<sup>20</sup> Although the Commission in the *Local Competition Order* declined to exercise its section 332 and 2(b) jurisdiction over LEC-CMRS interconnection, the court's decision with respect to LEC-CMRS interconnection turned on these provisions. Specifically, the court preserved the "rules of special concern to the CMRS providers,"<sup>21</sup> including the Commission's regulations that established CMRS providers' right to renegotiate existing, non-reciprocal transport and termination arrangements as well as the symmetrical reciprocal compensation pricing arrangements for transport and termination

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<sup>19</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 96-98; 95-185, *First Report and Order*, 11 FCC Red 15499, ¶¶ 1023, 1025 (1996) ("*Local Competition Order*") (italic emphasis added).

<sup>20</sup> *Iowa Utils. Bd. v. FCC*, 120 F. 3d 753, 800 n. 21 (8<sup>th</sup> Cir. 1997).

<sup>21</sup> *Id.*

of traffic between LECs and CMRS providers -- arrangements that the court believed the Commission lacked jurisdiction to adopt for LECs, but has jurisdiction to adopt for CMRS interconnection precisely because of its expansive authority under sections 332 and 2(b).

In *Qwest Corp. v. FCC*,<sup>22</sup> the D.C. Circuit similarly determined that, for purposes of regulating interconnection between CMRS providers and LECs, section 332 gives the Commission the authority to order LECs to interconnect with CMRS carriers, and “to issue the rules of special concern to the CMRS providers, i.e., 47 C.F.R. §§ 51.701, 51.703....”<sup>23</sup>

Both the Commission and federal courts have thus preserved the Commission’s section 332 jurisdiction over LEC-CMRS interconnection terms. Nothing in the Act, in Commission precedent, or judicial declaration requires the Commission to order LNP agreements be subject to the procedures set forth on sections 251 and 252.

The justification for and importance of regulating CMRS under section 332 speaks to the need to promote competition through efficient regulation, and concomitant need to avoid submitting intermodal LNP agreements to a lengthy, unnecessary, and inappropriate process that includes state public utility commission participation. In amending section 332, Congress intended that the Commission have authority to govern the terms of CMRS market entry. Were intermodal LNP agreements forced into the section 251 and 252 process under a contrived reading of the *Qwest Order*, the goal of section 332 and that stated in the *LNP First Report and Order* -- to remove barriers that will prevent consumers from making CMRS a viable competitor in the local exchange market -- will be thwarted. Additionally, Congress’ direction that CMRS activities -- even those requiring negotiations with LECs -- be regulated by the Commission would be eviscerated.

Importantly, the Commission has previously concluded that if it allowed states to have a role in intermodal LNP, as they would under sections 251 and 252, a result could be the “deployment of different number portability solutions across the country, which would significantly impact the provision of interstate telecommunications services.”<sup>24</sup> Thus, the Commission has expressly rejected the notion of shackling CMRS LNP agreements with incongruous, time-consuming state processes that cannot serve the purpose of alleviating regulations that could stifle LEC-CMRS competition.

Finally, there is nothing in sections 251 and 252 that make operating under this regime preferable to simple, streamlined arrangements for LNP. Engaging in detailed

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<sup>22</sup> 252 F.3d 462 (D.C. Cir. 2001).

<sup>23</sup> *Iowa Utilities*, 120 F.3d at 800 n.21.

<sup>24</sup> *LNP First Report and Order* ¶ 153 (footnote omitted).

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state arbitration for months, subject to federal court review and appeals will only serve to delay the deployment of intermodal LNP for years. Such an outcome cannot be deemed anything other than harmful to consumers and the public interest.

Respectfully submitted,

/s/ Michael F. Altschul

Michael F. Altschul