

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

1200 19TH STREET, N.W.

SUITE 500

WASHINGTON, D.C. 20036

(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA
TOKYO, JAPAN

FACSIMILE
(202) 955-9792
www.kelleydrye.com

DIRECT LINE: (202) 955-9788
EMAIL: tdaubert@kelleydrye.com

October 24, 2003

VIA ELECTRONIC MAIL DELIVERY

Mr. William Maher, Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Mr. John Muleta, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation by
T-Mobile USA, Inc. in CC Docket No. 95-116

Gentlemen:

I am writing on behalf of T-Mobile USA, Inc. ("T-Mobile") to urge the Commission to adopt a declaratory ruling reaffirming the obligation of all carriers to implement local number portability ("LNP") in a manner that enhances competition and maximizes consumer choice. Prompt action by the Commission is necessary to prevent some carriers from unilaterally imposing unnecessary restrictions on the rights of customers under the Telecommunications Act of 1996 to retain their telephone number when switching carriers.

Despite the flurry of recent *ex parte* presentations on this subject, the necessary ruling is straightforward. Specifically, in order to foster competition and customer choice as envisioned by the Telecommunications Act of 1996 (the "Act") and the Commission's current rules and policies regarding local number portability ("LNP"), the Commission should adopt the following ruling:

Mr. William Maher, Chief
Mr. John Muleta, Chief
October 24, 2003
Page Two

Upon request by an end user, a carrier – whether wireline or wireless – must port a telephone number to any other carrier – whether wireline or wireless – that serves the rate center with which that telephone number is associated (*i.e.*, is capable of originating and terminating calls within the rate center).

This ruling is simple, clear and technologically neutral because it applies equally to every type of carrier (*i.e.*, the obligation it imposes does not vary based on technology). The ruling is also consistent with the requirements of the Act and the Commission's current rules and policies regarding LNP because it allows an end user to retain his or her telephone number while switching to a competitive service provider, which is exactly the same standard that applies to both wireline-to-wireline portability and wireless-to-wireless portability today. Nothing in the Act or the Commission's existing rules and policies could justify applying a different standard to intermodal (*i.e.*, wireless-to-wireline and wireline-to-wireless) portability, particularly when the Commission concluded in 1996 that intermodal portability constitutes "service provider portability" that carriers must implement to further the pro-consumer and competition goals of the Act.

In order to ensure that carriers cannot unilaterally undermine the ability of end users to retain their telephone number when switching to a competitive carrier, the Commission should also make two further clarifications. **First**, the Commission should reaffirm its earlier ruling that switching among wireline and wireless carriers constitutes "service provider portability," which the Act and the Commission's rules and policies require all carriers to provide, rather than "location portability" or "service portability," which are not mandatory.¹ Therefore, a carrier cannot deny an end user's port request solely because the new carrier is a CMRS provider. In this regard, the Commission should also clarify that the porting of a number from a wireline carrier to a CMRS provider constitutes "service provider" portability rather than "location portability" so long as the ported telephone number remains associated with the same rate center and thus "at the same location."

Second, the Commission should reaffirm that the sole limitation on service provider portability that the Act and the Commission's current rules and regulations recognize is technical feasibility. Therefore, carriers cannot create and impose additional "restrictions" on service provider portability that prevent an end user from keeping his or her number when

¹ *Telephone Number Portability*, 11 FCC Rcd 8352, ¶172 (1996) ("*LNP First Report and Order*") (ruling that "switching among wireline service providers and broadband CMRS providers, or among broadband CMRS providers, as changing service providers, not changing services."). In so ruling, the Commission clarified that an end user who wants to switch from a wireline carrier to a wireless carrier is requesting "service provider portability," not "location portability," and the Act requires the LEC to comply with the end user's request.

Mr. William Maher, Chief
Mr. John Muleta, Chief
October 24, 2003
Page Three

changing carriers. Accordingly, the Commission should clarify that a carrier cannot deny an otherwise valid port request merely because:

- The requesting carrier does not currently have any of its own telephone numbers in the rate center associated with the number to be ported;
- The requesting carrier does not have a direct interconnection with the current carrier in the rate center associated with the number to be ported;
- The requesting carrier does not have any “facilities” in the rate center associated with the number to be ported;
- The requesting carrier is not directly interconnected with the current carrier;
- The requesting carrier and the current carrier do not have an interconnection agreement (“ICA”) or service level agreement (“SLA”);
- The requesting carrier and the current carrier have a pending dispute about intercarrier compensation, interconnection or any other issue that is not related to an end user’s right to retain his or her number when switching carriers; and
- The current carrier and the end user have a pending dispute about billing, minimum contract terms, early termination fees, credit requirements or any other issue that is not related to technical feasibility of the requested port.

None of these “restrictions” or “conditions” relate to technical feasibility. Likewise, none are recognized or permitted by the Act or the Commission’s current rules and policies. They are not permitted today for wireline-to-wireline portability or wireless-to-wireless portability, and there is no reason why they should be permitted for intermodal portability. At every opportunity, the Commission has made clear that the LNP obligations of carriers, particularly the statutory LNP obligations of LECs, cannot be limited or restricted due to inter-carrier disputes or disputes with the consumer who wants to switch carriers.

The rulings that T-Mobile supports will ensure that customers can continue to retain their telephone number when switching to the carrier of their choice upon introduction of wireless LNP on November 24, 2003, which will foster competition and further the goals of the

Mr. William Maher, Chief
Mr. John Muleta, Chief
October 24, 2003
Page Four

Act and the Commission's rules and policies with respect to LNP.² As explained in more detail below, these rulings would apply the same standard to intermodal portability as currently applies to both wireline-to-wireline portability and wireless-to-wireless portability. Therefore, the Commission can adopt the rulings without issuing yet another further notice of proposed rulemaking.

The FCC Can Clarify the Existing LNP Obligations Without Further Notice

The rulings discussed above would apply the exact same standard to intermodal portability that currently applies to wireline-to-wireline and wireless-to-wireless portability today. Moreover, the Act and the FCC's past decisions regarding LNP make clear to all parties that the same standard must apply to intermodal portability as applies to all forms of number portability. The Act defines "number portability" as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."³ As the Commission explained in the LNP First Report and Order,

Because the 1996 Act's definition of number portability requires LECs to provide number portability when customers switch from any telecommunications carrier to any other, the statutory obligation of LECs to provide number portability runs to other telecommunications carriers. 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.***⁴

The Commission also ruled that it regards "switching among wireline service providers and broadband CMRS providers, or among broadband CMRS providers, as changing service providers, not changing services"⁵ In so ruling, the Commission clarified that an end user who wants to switch from a wireline carrier to a wireless carrier is requesting "service provider portability," not "location portability," and the Act requires the LEC to comply with the end user's request.

² The Commission has repeatedly stressed the importance of local number portability as a means of providing competitive options for consumers. See e.g., *Telephone Number Portability*, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, cite, ¶28; *Second Report and Order*, cite, ¶4; *Third Report and Order*, 13 FCC Rcd 11,701 (1998).

³ 47 U.S.C. §153(3).

⁴ *LNP First Report and Order*, 11 FCC Rcd at ¶8 (footnotes omitted and emphasis added).

⁵ *Id.*, ¶172.

Mr. William Maher, Chief
Mr. John Muleta, Chief
October 24, 2003
Page Five

The Commission recently reaffirmed these principles in its rulings with respect to wireless-to-wireless portability:

In considering whether the LNP rules permit carriers to impose restrictions on the porting out process, we must first analyze the definition of number portability. Under the Act and the Commission's rules, number portability is defined as the "ability of users of telecommunications services to retain at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another." *We interpret this language to mean that consumers must be able to change carriers while keeping their telephone number as easily as they may change carriers without taking their telephone number with them.*⁶

As a whole, these previous rulings demonstrate that, under the Act and the Commission's *current* rules and policies with respect to LNP, consumers must be able to change carriers, whether wireless or wireline, while keeping their telephone number as easily as they may change carriers without taking their telephone number with them. Accordingly, the FCC can adopt the following ruling without issuing yet another further notice of proposed rulemaking, because it represents the application of existing FCC LNP rules and policies to intermodal portability, which the Commission first ordered in 1996:

Upon request by an end user, a carrier – whether wireline or wireless – must port a telephone number to any other carrier – whether wireline or wireless – that serves the rate center with which that telephone number is associated (*i.e.*, is capable of originating and terminating calls within the rate center).

For the same reasons, the Commission can reaffirm that the sole limitation on service provider portability that the Act and the Commission's current rules and regulations recognize is technical feasibility. Nothing in the Act or the Commission's current rules and policies permits carriers to examine the network of the requesting carrier or the status of the consumers account before determining whether to comply with their statutory LNP obligation.

⁶ Telephone Number Portability, CC Docket No. 95-116, FCC 03-237, at ¶11 (rel. Oct. 7, 2003) (“Wireless LNP Order”).

Mr. William Maher, Chief
Mr. John Muleta, Chief
October 24, 2003
Page Six

Intermodal Portability is “Service Provider Portability” not “Location Portability”

The Commission has ruled that carriers must provide “service provider portability,” which the Commission defined as the “ability of users of telecommunications services to retain at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.”⁷ The Commission also has ruled that it regards “switching among wireline service providers and broadband CMRS providers, or among broadband CMRS providers, as changing service providers”⁸ In so ruling, the Commission clarified that an end user who wants to switch from a wireline carrier to a wireless carrier is requesting “service provider portability,” and the Act requires the LEC to comply with the end user’s request.

In light of the Commission’s previous ruling that intermodal portability is “service provider portability,” there are no grounds for claiming that a consumer request to port his or her number from a wireline carrier to a wireless carrier is a request for location portability or a request “to port a number outside the rate center” due to the mobility inherent in all wireless services. Indeed, if the mobile nature of CMRS constitutes “location” portability and ports to CMRS providers involve “ports outside the rate center,” then no carrier, whether wireline or wireless, would ever be obligated to port a telephone number to a CMRS provider – and no CMRS provider would ever have to port numbers out at all, which could not have been what the Commission had in mind when it ordered the implementation of wireless LNP, as every party to this proceeding is fully aware.⁹ Therefore, the FCC can reaffirm – without issuing another further notice of proposed rulemaking – that intermodal porting is “service provider portability” and thus a consumer request to port his or her number from a wireline carrier to a wireless carrier is not a request for location portability or “to port a number outside the rate center.”

The requested clarifications also respect the current rate center framework and the concept of service “location.” For example, with respect to wireline services, the NXX, and the rate center with which it is associated, of the customer’s telephone number is the network proxy for customer location. By contrast, the “customer premise” – the physical location where calls

⁷ *Id.*

⁸ *LNP First Report and Order*, 11 FCC Rcd at ¶172.

⁹ Likewise, the claim that intermodal portability could be implemented in a way that requires wireline carriers “to implement location portability beyond the rate center” and related suggestion that the porting of wireline numbers to CMRS providers will lead to customer confusion due to the subsequent mobility and “force[] consumers to dial ten, rather than seven, digits to place local calls to locations beyond existing rate centers” is pure nonsense. *See, e.g.* Written Ex Parte Presentation of BellSouth, CC Docket No. 95-116, 2 (filed Oct. 14, 2003). Intermodal portability will not cause the dialed number, or the rate center with which that number is associated, to be changed. As such, intermodal portability will not cause any customer confusion or require customers to change their dialing patterns to place calls to that number.

Mr. William Maher, Chief
Mr. John Muleta, Chief
October 24, 2003
Page Seven

to the customer's telephone number actually terminate – may or may not be physically located within the rate center associated with the customer's telephone number, as the CO Code Assignment Guidelines explicitly recognize. Specifically, Section 2.14 of the INC Guidelines provides that

It is assumed from a wireline perspective that CO codes [or NXXs]/blocks allocated to a wireline service provider are to be utilized to provide service to a customer's premise physically located in the same rate center that the CO codes [or NXXs] /blocks are assigned. *Exceptions exist, for example tariffed services such as foreign exchange service.*¹⁰

As such, if a customer wants to establish a customer premise that is not physically located within the rate center with which the customer's telephone number is associated, the wireline carrier can provide the service on an FX basis. However, the NXX of the customer's telephone number remains the proxy for customer location for all other carriers because calls are rated and routed based on that number: the FX aspect of the service is transparent to calling parties and their carriers. Therefore, the customer premise is *not* the network proxy for customer location. Similarly, the billing address may or may not be physically located within the rate center with which the NXX of the customer's telephone number is associated. Customers frequently designate a billing address that is in another rate center, area code, or even state than the rate center with which the NXX of the customer's telephone number is associated or the customer premise where calls to that number are terminated. Therefore, the billing address is *not* the network proxy for customer location.

For similar reasons, the NXX, and the rate center with which it is associated, of the customer's telephone number is the network proxy for customer location with respect to wireless services. Wireless services provide customers with mobility, and thus the mobile handset is the "customer premise" because it is the physical location where calls to the customer terminate. The location of the handset is not fixed or associated with a single rate center. Accordingly, the customer premise cannot be the network proxy for customer location.¹¹ As with wireline services, the billing address for a wireless service may or may not be physically located within the rate center with which the NXX of the customer's telephone number is associated.

¹⁰ INC Guidelines, §2.14 (emphasis added).

¹¹ Indeed, CMRS can be viewed as a type of mobile "FX service" because it allows customers to establish a customer location for network purposes (*i.e.*, the NXX, and the rate center with which the NXX is associated, of the customer's telephone number) and a customer premise (*i.e.*, the mobile handset) in another location in a different rate center.

Mr. William Maher, Chief
Mr. John Muleta, Chief
October 24, 2003
Page Eight

Using the NXX, and the rate center with which it is associated, of the customer's telephone number as the network proxy for customer location makes perfect sense for both wireline and wireless services because it is the rate center that matters to all other carriers: calls are rated and routed based on the NXX of the dialed telephone number, not on the physical location of the customer premise or the billing address. Therefore, the NXX of the customer's telephone number should continue to be the indicator of customer location for LNP purposes after November 24, 2003. Accordingly, if a CMRS provider is capable of originating and terminating calls within a rate center, any wireline customer with a telephone number associated with that rate center should be able to port his or her number to that wireless carrier.

The Statutory LNP Obligation Cannot Be Limited Due to Alleged Competitive Disparity

Some, but not all, ILECs claim that the available scope of intermodal portability must be restricted or delayed because, unless the Commission artificially limits the available scope of intermodal portability, it allegedly would "place wireline carriers at a significant competitive disadvantage and would thus be glaringly inconsistent with the Commission's numbering and competitive policies"¹² The Act, like the Commission's numbering and competitive policies, requires the Commission to ensure that its rules and policies are technologically neutral. The ruling T-Mobile supports is technologically neutral because it applies equally to every type of carrier (*i.e.*, the obligation it imposes does not vary based on technology). The ruling is also consistent with the requirements of the Act and the Commission's current rules and policies regarding LNP because it allows an end user to retain his or her telephone number while switching to a competitive service provider, which is exactly the same standard that applies to both wireline-to-wireline portability and wireless-to-wireless portability today.

Those who urge the Commission to place artificial restrictions on the scope of intermodal portability inaccurately suggest that the Commission faces a choice between an option that is competitively neutral and an option that places only wireline carriers at a competitive disadvantage.¹³ For example, BellSouth argues that if the Commission applies the same standard to intermodal portability as currently applies to wireline-to-wireline portability and wireless-to-wireless portability, it will be placed at a competitive disadvantage because "wireless carriers could compete for everyone one of the wireline carrier's customers located within the wireless carrier's footprint" while the "wireline carrier, however, could compete only for wireless customers in, at most, one out of eight of those rate centers."¹⁴ BellSouth urges the Commission, therefore, to artificially limit the scope of intermodal portability by prohibiting

¹² See, e.g., Written Ex Parte Presentation of BellSouth, CC Docket No. 95-116, 2-3 (filed Oct. 14, 2003).

¹³ See *id.*

¹⁴ See *id.*

Mr. William Maher, Chief
Mr. John Muleta, Chief
October 24, 2003
Page Nine

CMRS providers from porting in a customer unless it has its own numbering resources in that rate center.

BellSouth's argument is wrong for two independent reasons. *First*, BellSouth's proposed solution, far from being competitively neutral, would also place CMRS providers at a competitive disadvantage. Specifically, if the Commission imposes the new, artificial restriction on the scope of intermodal portability that wireless carriers could only port in a number if they already have numbers in that rate center, wireless carriers could compete only for wireline customers in, on average, one out of eight of those rate centers unless they applied for unnecessary numbering resources in all of the remaining rate centers. There is simply no need in a wireless network for this type of wasteful use of numbering resources. The absurdity of this result highlights the fact that the BellSouth version of competitive neutrality would mean that ILECs are entitled to impose operational limitations associated with their legacy, wireline networks upon wireless and other competitive carriers.¹⁵ But requiring competing network platforms to replicate the characteristics of incumbent networks is the antithesis of true competitive neutrality. In implementing LNP, rather than focus on differences between wireline and wireless services and the networks used to provide them, the focus should be on maximizing consumer choice and fostering competition. It is clear that competition and customers choice is maximized by requiring carriers to honor all technically feasible port requests rather than permitting ILECs to impose artificial limits on the scope of available intermodal porting. Therefore, the Commission should adopt the clarification that T-Mobile supports rather than permit the ILECs to impose arbitrary and unnecessary restrictions on the right of customers to retain their telephone number when switching carriers.

Second, the remedy that BellSouth proposes – requiring a wireless carrier to have its own numbering resources in a rate center before it can port in any numbers associated with that rate center – is unrelated to the harm of which BellSouth complains – wireline carriers can only port numbers to an end user premise if that premise is physically located within the rate center with which the number is associated, unless of course the wireline carrier provides the service on an FX or virtual FX basis. In other words, even if all of the wireless carriers applied for their own numbering resources in every rate center across the country – which would rapidly exhaust the NANP – a wireline carrier still would not be able to port in a number unless the end user premise is physically located within the rate center with which the number is associated.

¹⁵ Indeed, the Commission has repeatedly ruled that competitive carriers need not mirror the network of the ILECs.

Mr. William Maher, Chief
Mr. John Muleta, Chief
October 24, 2003
Page Ten

Accordingly, there is no basis under the Act or the Commission's LNP rules and policies for adopting an artificial restriction on the scope of intermodal portability.¹⁶

The Scope of Intermodal Portability Should Not Be Artificially Restricted Solely Due to Unrelated Disputes Over Intercarrier Compensation or Transport Costs

Various carriers have expressed concern about potential rating issues that may be associated with transporting calls to ported numbers.¹⁷ Likewise, increased competition may exacerbate disputes regarding intercarrier compensation and interconnection obligations by increasing the amount of traffic that carriers must exchange. However, LNP itself is not the cause of these disputes, and the Commission has never restricted the right of customers to retain their number when switching carriers solely due to inter-carrier disputes. In any event, these disputes are already before the Commission in other proceedings.¹⁸

Put simply, disputes over intercarrier compensation, transport costs or any other interconnection related issues should have no effect on the rights of customers to retain their number when switching carriers. In clarifying the obligations of carriers with respect to wireless-to-wireless portability, the Commission ruled that the "requirements of our wireless LNP rules on wireless carriers do not vary depending on how calls to the number will be rated and routed after the port occurs."¹⁹ There is no basis for distinguishing between wireless-to-wireless and intermodal portability, and thus the Commission should rule that LNP requirements do not vary depending on how calls to the number will be routed after the port occurs.

* * *

As required by Section 1.1206(b) of the Commission's Rules, I am filing electronically an ex parte notification of this written presentation for inclusion in the public record of the above-referenced proceeding.

Please direct any questions regarding this matter to the undersigned.

¹⁶ T-Mobile notes that the reasoning the Commission applied when ruling that "limiting wireless-to-wireless porting based on wireline rate centers . . . would . . . undermine the competitive benefits of wireless LNP" applies equally to intermodal portability. *Wireless LNP Order*, CC Docket No. 95-116, FCC 03-237, at ¶22.

¹⁷ *Id.* at ¶23.

¹⁸ *Id.*

¹⁹ *Id.*

KELLEY DRYE & WARREN LLP

Mr. William Maher, Chief
Mr. John Muleta, Chief
October 24, 2003
Page Eleven

Sincerely,

A handwritten signature in black ink, appearing to read "Todd D. Daubert", with a long horizontal line extending to the right from the end of the signature.

Todd D. Daubert,
Counsel for T-Mobile USA, Inc.

cc: Scott Bergmann
Matt Brill
Cheryl Callahan
Jared Carlson
Sharon Diskin
Jeff Dygert
Eric Einhorn
Sam Feder
David Furth
Dan Gonzalez
Joseph Levin
Christopher Libertelli
Jennifer Manner
Paul Margie
Carol Matthey
Steve Morris
Barry Ohlson
Jessica Rosenworcel
Jennifer Salhus
Cathy Seidel
Pam Slipakoff
Walter Strack
Josh Swift
Robert Tanner
Jennifer Tomchin
Bryan Tramont
Sheryl Wilkerson