
LEGAL UPDATE

MARKET EFFECTS OF NUMBER PORTABILITY:

VERIZON WIRELESS V. F.C.C.

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I. INTRODUCTION

The Telecommunications Act of 1996¹ 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.² In layman’s terms this means that if you switch phone services you can keep your number. This will allow customers to shop for the best plans on the basis of price and service without the fear of being ‘locked-in’ to any specific company. The telecommunications industry cannot argue to keep these numbers for themselves because no property interest exists in a number.³ The Federal Communications Committee (“FCC”) promulgated regulations requiring wireless carriers to provide number portability and originally set a compliance date of June 30, 1999. After several extensions, as requested by the wireless phone industries, a final compliance date was set for November 24, 2003.⁴ The industries sought permanent forbearance, but this request was denied.⁵ Verizon Wireless, Inc. (“Verizon”) appealed this decision

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¹ 47 U.S.C.S. § 151 (1996).

² 47 U.S.C.S. § 153(30) (1996).

³ See 47 C.F.R. § 52.107(a) (2004); see also *Jahn v. 1-800-Flowers.com, Inc.*, 284 F.3d 807 (7th. Cir. 2002) (“The subscriber has at most a right to use a given number, and whether that number tags along when the customer switches carriers depends on contracts plus rules to be found in statutes and regulations.”).

⁴ See *Verizon Wireless’s Petition for Partial Forbearance for the Commercial Mobile Radio Services Number Portability Obligation, Memorandum and Order*, 17 F.C.C.R. 14972, (2002).

⁵ *Id.*

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to the U.S. Court of Appeals,⁶ but the compliance date was upheld. With cellular phone use being as wide spread as it is today, it is important to examine the way these rules have developed, why the wireless industry has fought so hard against them, and what this will mean to the consumer in the future.

II. FCC DECISIONS ON NUMBER PORTABILITY

A. 1999 Memorandum.

The 1999 Memorandum by the FCC was in reference to a 1997 petition by the Cellular Telecommunications Industry Association (CTIA) requesting five-year forbearance from imposing local number portability (LNP) on the industry until the completion of a five-year build out period for broadband personal communications service (PCS) carriers.⁷ CTIA argued that the implementation deadline for wireless service provider portability should be extended not only because of the technical complexity of implementation, but also on the grounds that near-term implementation of wireless number portability is not essential to competition and could harm existing competition by forcing wireless carriers to divert resources from other endeavors such as expanding network coverage and improving service quality.⁸ The FCC granted the petition, but their analysis is important to understand number portability.

The memorandum began by addressing why number portability was to be considered at all. In 1996, the Commission determined that enabling wireless carriers to keep their phone numbers when changing carriers would enhance competition between carriers as well as promote competition between wireless and landline customers.⁹ The FCC required that cellular, broadband PCS, and covered specialized mobile radio (SMR) carriers have the capability to deliver calls from their networks to ported numbers anywhere in the country, giving carriers the ability to deliver telephone calls made by customers on a wireless phone to landline customers who have retained their telephone number but switched service providers.¹⁰ The FCC recognized that wireless carriers were only beginning to develop the technical standards and protocols necessary, and that they would need to configure their networks so that wireless users with ported numbers would be able to make and receive calls while roaming outside

⁶ *Verizon Wireless v. F.C.C.*, 330 F.3d 502 (D.C. Cir. 2003).

⁷ *In the Matter of Cellular Telecommunications Industry Association's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations and Telephone Number Portability*, 14 F.C.C.R. 3092, 3093 (1999).

⁸ *Id.* at 3098.

⁹ *Id.* at 3093.

¹⁰ *Id.* at 3094.

their home service areas.¹¹

In response to the current arguments, the Commission analyzed all arguments under the three-part test for forbearance set out in Section 10 of the 1996 Telecommunications Act.¹² Under the first prong, just and reasonable charges and practices, the FCC noted that the schedule as planned was not necessary to prevent unjust or unreasonable charges or practices.¹³ While the regulation was necessary some delay could be permitted.¹⁴ Neither did the FCC find that consumer protection would be harmed by forbearance. In 1999 the demand for wireless number portability was low and consumers were more concerned about competition in other areas such as price and service quality.¹⁵ The high volume of “churn,” or switching between wireless carriers, was another indication that wireless customers easily and routinely switched without the benefit of number portability.¹⁶ While the demand was low in 1999 the FCC believed that as wireless service rates continued to fall, the use of wireless services would increase and people would be more apt to use them as potential substitutes for their landline phones.¹⁷

Under the public interest prong of the three-part test, the CTIA argued that the current schedule compromised the ability of new entrants to build out their networks infrastructure and introduced vigorous competition in the marketplace, but forbearance would allow new carriers to focus on expanding service to the public and provide services at a lower cost.¹⁸ The FCC ruled that forbearance was consistent with the public interest for three reasons. First, the industry needed additional time to develop and deploy the technology that would allow viable implementation of service provider portability, including

¹¹ *Id.*

¹² See 47 U.S.C. § 160(a) (1996):

Section 10 provides that the Commission must forbear from applying any regulation or provision of the Act to a telecommunications carrier if the Commission determines that:

1. Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications or regulations by, for or in connection with that telecommunications carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;
2. Enforcement of such regulation or provision is not necessary for the protection of consumers; and
3. Forbearance from applying such provision or regulation is consistent with the public interest.

¹³ 14. F.C.C.R. at 3101.

¹⁴ *Id.* at 3102.

¹⁵ *Id.* at 3103.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 3104.

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the ability to support seamless nationwide roaming.¹⁹ Second, that extending the deadline was consistent with the public interest for competitive reasons because it gave carriers greater flexibility in that time-frame to complete network build out, technical upgrades, and other improvements that were likely to have a more immediate impact on enhancing service to the public, thus promoting competition in the telecommunications marketplace.²⁰ Finally, the FCC wanted to ensure that extending the timeframe for implementation would not affect the ability of carriers to utilize numbering resources.²¹

The Commission recognized that the wireless industry should decide how to address the obstacles involved with implementing LNP, both on technological and competitive grounds.²² Surveys taken by industry analysts determined that price, service area coverage, and service quality were key factors in consumer choice.²³ In fact, most customers did not give out their wireless numbers in an effort to limit the amount of incoming calls,²⁴ therefore, in 1999, lack of number portability was not a barrier to switching carriers.²⁵ Furthermore, the price differentials between wireless and landline communications were high and aggregate wireless minutes of use were significantly less than landline minutes.²⁶

Many parties, however, argued against forbearance. MCI, a landline representative, asserted that granting forbearance could give wireless carriers an unfair advantage in retaining and attracting customers because landline carriers would have to accommodate subscribers who want to port their numbers to wireless carriers, while wireless carriers would not be required to port a number if the customer switched to a landline carrier.²⁷ The Commission found this argument limited because technology only granted wireless carriers limited ability to import numbers until they changed their own networks.²⁸

Arguments for permanent forbearance were rejected, however, because the competitive reasons for number portability were still valid. Number portability would increase competition both within the wireless industry and with landline

¹⁹ 14. F.C.C.R. at 3104-05

²⁰ *Id.* at 3105.

²¹ The memorandum then went on to discuss these technical issues such as the separation of the Mobile Directory Number (MDN), the number that is dialed to reach the mobile unit, from the Mobile Identification Number (MIN), which is used to identify the mobile unit to the carrier's network and to the networks of the carrier's roaming partners. *Id.*

²² *Id.* at 3108.

²³ *Id.* at 3109.

²⁴ *Id.*

²⁵ 14. F.C.C.R. at 3109..

²⁶ *Id.*

²⁷ *Id.* at 3010.

²⁸ *Id.*

services, and this competition would provide incentives for all carriers to provide innovative, higher quality service at lower prices.²⁹ Several industry analysts asserted that there was no demand for number portability, and if this demand should ever arise the industry would respond to it.³⁰ The FCC believed that market forces alone would be ineffective in bringing about number portability due to the fact that in order to be effective, both carriers would have to implement LNP. If any carrier determined there would be a net loss of customers under an LNP scenario, there would be little, if any, incentive to implement LNP.³¹

A final argument supporting number portability was that it promoted the efficient use of numbering resources.³² With the increase in cell phone customers, thousands of additional phone numbers would be required. These arguments were not fully developed in this early FCC memorandum, and a more detailed discussion was developed in subsequent memos.

B. 2002 Memorandum.

Several years after the 1999 memorandum, Verizon Wireless (Verizon) filed another petition seeking permanent forbearance from the Commission's wireless local portability (LNP) rules.³³ This time, however, the Commission denied the petition, finding that the competitive reasons behind the original order remained valid,³⁴ and that there were sufficient competitive and consumer benefits in terms of innovative service offerings, higher quality services, and lower prices that justified the cost of implementation.³⁵

In addition to the consumer and competitive benefits, the Commission's 2002 Memorandum also emphasized numbering exhaust and number resource optimization.³⁶ The influx of thousands of new cell phone subscribers to the marketplace also created a need for thousands of new phone numbers. To accommodate this increasing need, the FCC adopted a new system for allocating numbers designed to provide for more efficient allocation of

²⁹ *Id.* at 3112.

³⁰ *Id.* at 3109.

³¹ 14 F.C.C.R. at 3113.

³² *Id.* at 30.

³³ *Verizon Wireless's Petition for Partial Forbearance for the Commercial Mobile Radio Services Number Portability Obligation, Memorandum and Order*, 17 F.C.C.R. 14972, (2002).

³⁴ See discussion, Section II(A), *infra* (many of the same justifications were used in the 2002 Memorandum as were used in the 1999 Memorandum, so for the purposes of this update, I will address those briefly and focus more on the arguments that were further developed, updated, or entirely new).

³⁵ 17 F.C.C.R. 14972 (2002).

³⁶ See Numbering Resource Optimization, CC Docket No. 99-200, *Notice of Proposed Rulemaking*, 14 F.C.C.R. 10322 (1999).

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numbers by not giving carriers more than they need.³⁷ Several wireless companies argued that imposing simultaneous requirements of number pooling and number portability would be unduly burdensome and that additional time was needed to make the appropriate changes to their systems.³⁸ The Commission declined to grant these petitions, noting that public interest requires covered carriers to participate in pooling as soon as possible to maximize number efficiency.³⁹

In response to the permanent forbearance petition, the Commission went through the same three-prong analysis of Section 10(a) discussed earlier.⁴⁰ The Commission noted that even though they determined that there has been growth and competition in the wireless industry under the first prong of the test, the second and third prongs were not satisfied.⁴¹ LNP requirements for wireless carriers were both necessary to protect consumers and consistent with the public interest.⁴²

By 2002, the wireless market was changing. The Commission noted that many consumers were beginning to change the way in which they used their wireless phones.⁴³ Carriers began to offer pricing plans that provided large buckets of air time for a fixed monthly rate.⁴⁴ There was a 51% increase in minutes used July through December between 2000 and 2001.⁴⁵ One survey found that about 3% of people used their cell phone as their only phone, and another found that 30% of wireless phone users said that they would rather give up their home telephone than their cell phone.⁴⁶ A third survey found that

³⁷ 17 F.C.C.R. at 14975 (numbers are now given in blocks of 1,000 rather than in blocks of 10,000).

³⁸ See *supra* n.28 (Bellsouth, CTIA, Cingular Wireless LLC, Qwest, and Sprint all filed petitions for reconsideration and forbearance); For further arguments against the Commission imposing number portability regulation, see Brian Fontes, *Second Annual Quello Telecommunications Policy and Law Symposium: Suggestions for Regulation by the Federal Communications Commission*, 2001 L. REV. MICH. ST. U. – DET. C. L. 263 (2001) (Fontes, Vice President for Government Relations for Cingular Wireless and former Chief of Staff at the F.C.C. argues the complicated nature of number portability and the need for less government regulation, not more).

³⁹ 17 F.C.C.R. at 14976.

⁴⁰ See *supra* note 11.

⁴¹ 17 F.C.C.R. at 14978.

⁴² *Id.*

⁴³ *Id.* at 14979.

⁴⁴ *Id.*

⁴⁵ *Id.* (citing June 2001 CTIA Survey (minutes of use through 2000), at 169); Todd Rethemeier *et al*, *Talk is Cheaper, Demand is Steeper*, Bear Sterns, Equity Research, May 21, 2002, at 1 (citing CTIA 2001 MOU results).

⁴⁶ Judy Saries, *Wireless Users Hanging Up on Landline Phones*, NASHVILLE BUS. JOURNAL, Feb. 2, 2001; *Will Wireless Phones Make Traditional Home Telephones*

18% of people used their cell phone as their primary phone, and that users were substituting wireless minutes for traditional long-distance.⁴⁷

With these recent changes in the industry, the Commission anticipated that an increasing number of consumers would be reluctant to change carriers unless they could keep the same number.⁴⁸ Several hundred consumers filed comments with the FCC claiming that they felt restricted from switching among carriers because of the inability to take their number with them.⁴⁹ For instance, in switching numbers, costs associated with replacing business cards and stationary can become prohibitive, as well as the time wasted informing others of the new number. Therefore, the FCC maintained its stance that number portability is important for consumer protection and reluctance to switch carriers was but one reason to deny permanent forbearance.

The FCC also maintained that requiring LNP on wireless carriers was in the public interest. The Commission was unconvinced that market forces alone would be sufficient to ensure implementation of LNP.⁵⁰ Requiring number portability would eliminate customer lock-in effect because customers would be able to keep their number and would be free to choose a carrier on factors such as price, quality, service, and coverage.⁵¹ Competition in the industry would also increase because existing carriers would have to compete on the above factors. Newer carriers could offer competitive service to existing wireless customers who would be willing switch provided that they would not have to change their number.⁵²

Despite the fact that permanent forbearance was denied, the Commission did find that a limited extension (in this case, one year) was warranted. The limited forbearance would provide adequate time to resolve all issues with LNP, including personnel training and other non-technical issues such as public safety coordination.⁵³ This would avoid any potential network disruptions.⁵⁴ The FCC believed that a delay beyond the one year period could impair the development of competition unnecessarily and thereby harm

Obsolete?, News Release, Consumer Electronics Association, Apr. 6, 2000.

⁴⁷ 17 F.C.C.R. at 14979.

⁴⁸ *Id.*

⁴⁹ *Id.* at 14980.

⁵⁰ *Id.* at 14981.

⁵¹ *Id.*

⁵² *Id.*

⁵³ 17 F.C.C.R. at 14981.

⁵⁴ The carriers argued that their networks were not sufficiently prepared to handle the combined volumes from porting and pooling, and that pooling efforts would be adversely affected because calls would not route to the properly pooled block, rendering them useless as a number resource until the problems were resolved. The FCC agreed with this argument and it is one of the reasons they granted the extension. *Id.*

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customers.⁵⁵ Cingular Wireless estimated an on-going annual cost of LNP of \$50 million, but spread across a subscriber base of roughly 30 million subscribers this breaks down to a per-subscriber monthly assessment of 10 to 20 cents.⁵⁶

III. *VERIZON WIRELESS V. FCC*

A. Background

After the denial of permanent forbearance in the Commission's 2002 Memorandum,⁵⁷ Verizon appealed to the U.S. Court of Appeals for the District of Columbia Circuit in 2003.⁵⁸ Verizon challenged both the Commission's statutory authority to impose wireless number portability, and also claimed that the Commission misinterpreted and misapplied § 10(a) of the Telecommunications Act of 1996,⁵⁹ dealing with forbearance.⁶⁰

The Court of Appeals went through the background of the regulations as previously discussed in this update. To summarize, Congress passed the Telecommunications Act of 1996 to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."⁶¹ Section 251(b) of the Act requires all local exchange carriers⁶² "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."⁶³ The Act does not expressly require wireless carriers to provide number portability.⁶⁴ Although wireless carriers are not local exchange carriers, the Commission concluded it had independent authority under the Act to require wireless carriers to provide number portability.⁶⁵ The

⁵⁵ *Id.* at 14984.

⁵⁶ *Id.* at 14984-85.

⁵⁷ *See supra* Section II(B).

⁵⁸ *Verizon Wireless, LLC. v. F.C.C.*, 330 F.3d 502 (D.C. Cir. 2003).

⁵⁹ 47 U.S.C. § 160(a) (1996).

⁶⁰ 330 F.3d at 504.

⁶¹ *Id.* (citing 47 U.S.C. § 151 *et seq.*).

⁶² *Id.*; 47 U.S.C. § 153(26) (Local exchange carriers are defined as:

"[A]ny person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of mobile service under § 332(c) of [the Act], except to the extent that the Commission finds that such service should be included in the definition of such term.").

⁶³ 330 F.3d at 504 (citing 47 U.S.C. § 251(b)(2)).

⁶⁴ *Id.*

⁶⁵ *Id.* (citing *Telephone Number Portability, First Report and Order and Further Notice of Proposed Rule*, 11 F.C.C.R. 8352, 8355 (1996)).

Court then summarized the two Memoranda discussed in this Update.⁶⁶

*B. Analysis*⁶⁷

The Court noted that the three-prongs of § 10(a) are conjunctive, therefore the Commission could properly deny a petition if they find one of the prongs is unsatisfied.⁶⁸ The challenge focused upon the second prong, or that “enforcement . . . is not necessary for the protection of consumers.”⁶⁹ Verizon’s position was that the FCC must forbear from enforcement of the wireless number portability rules if enforcement is not absolutely necessary, and that in the case at bar, forbearance is not absolutely necessary because the rate of wireless consumers switching carriers is high even absent number portability.⁷⁰

In *AT&T Corp. v. Iowa Utilities Bd.*, the Supreme Court narrowed the construction of “necessary” in reviewing a challenge to the Commission’s interpretation.⁷¹ Following suit, the D.C. circuit held that “a statutory reference to ‘necessary’ must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.*, so as to limit ‘necessary’ to that which is required to achieve a desired goal.”⁷² The Court reasoned that a definition of “necessary” that embraces only a narrow construction in all contexts makes no sense.⁷³

In the case of Verizon’s petition, the Court held that application of their definition would lead to an absurd result because it is difficult to imagine a regulation whose enforcement is *absolutely required* or *indispensable* to

⁶⁶ For procedural history, see *supra* Sections II(A) and II(B).

⁶⁷ The first two parts of the analysis involved the standard of review and timeliness of the review. They followed the standard set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) holding that “if the intent of Congress is clear, that is the end of the matter; for the court, as well as for the agency, . . . [and that] the agency’s interpretation of the statute is entitled to deference so long as it is ‘reasonable’ and not otherwise ‘arbitrary, capricious, or manifestly contrary to the statute.’”

The Court of Appeals also dismissed the claim in regards to the Commission’s authority to impose wireless number portability because that was set forth in the 1996 Order, and a petition for judicial review to challenge a final order of the FCC must be filed “within 60 days after its entry.” 330 F.3d at 508, 509 (citing 28 U.S.C. § 2344).

⁶⁸ 330 F.3d at 509.

⁶⁹ *Id.* (citing 47 U.S.C. § 160(a)).

⁷⁰ *Id.*

⁷¹ 525 U.S. 366, 390 (1999); For an in-depth analysis of *Iowa Utilities Board*, see John E. Taylor, *AT&T Corp. v. Iowa Utilities Board: The Supreme Court Recognizes Broad FCC Jurisdiction over Local Telephone Competition*, 78 N.C.L. REV. 1645 (2000).

⁷² *GTE Serv. Corp. v. FCC*, 205 F.3d 416, 423 (D.C. Cir. 2000).

⁷³ *Verizon*, 330 F. 3d at 510.

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protect consumers.⁷⁴ The Commission found that number portability rules are required to achieve the desired goal of consumer protection.⁷⁵ The Court held that this was reasonable and survived the arbitrary and capricious standard.⁷⁶

The Court held that while evidence that the rate of carrier switching was high even without number portability, this did not demonstrate that number portability is not necessary for the protection of consumers.⁷⁷ It was reasonable for the Commission to find that wireless customers would switch at an even higher rate if they had the ability to retain their numbers.⁷⁸ The Court agreed that simply having to change phone numbers presents a barrier to switching carriers, even if not a total barrier, since consumers cannot compare and choose between various service plans and options as efficiently.⁷⁹

IV. CONCLUSION

Number portability continues to be a topic of debate. As the deadline has passed, local number portability is in effect. In a recent order, the FCC has issued an order to help lay out coverage area questions associated with number portability.⁸⁰ A 2004 case, *Star Net*, centers on the difficulty in determining coverage area and central location for rate issues when dealing with an internet provider.⁸¹

The effect on the industry remains to be seen. One survey claims that about one in five U.S. wireless subscribers will change carriers in the coming year after the rule goes into effect.⁸² The Management Network Group (TMNG), which conducted a survey of more than 1,000 respondents in September, expects 30 million customers to change wireless service providers during the first 12 months after number portability takes effect.⁸³ Because each request for portability must be processed by two wireless providers, the industry would handle 60 million transactions during the first year.⁸⁴ An earlier TMNG study

⁷⁴ *Id.* at 511.

⁷⁵ *Id.* at 512.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 513.

⁸⁰ In the Matter of Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues, 18 F.C.C.R. 23697 (Nov. 10, 2003).

⁸¹ See *In re: Star Net, Inc.*, 2004 U.S. App. LEXIS 242 (7th. Cir. Jan. 9, 2004).

⁸² Reuters, "Number Portability May Spark Switching," CNN.com (Oct. 27, 2003), at <http://www.cnn.com/2003/TECH/ptech/10/26/sprj.ws.wireless.numbers.reut/>, last visited January 30, 2004. Ironically, that article also states that "Verizon Wireless, the largest U.S. wireless telephone operator, has also been in the forefront in supporting number portability."

⁸³ *Id.*

⁸⁴ *Id.*

found that about 24 percent of large businesses—the most likely segment to take advantage of number portability—are ready to switch services.⁸⁵

Despite their original protests, the wireless industry is scrambling to attract subscribers by discussing the benefits of number portability. Verizon, itself, is trying to gain customers by telling the advantages of keeping your number, such as “No new number to remember, No need to contact dozens of family members, friends and associates, and No unnecessary expense printing new stationery or business cards.”⁸⁶ It is also unclear whether a new phone would be involved in the switch.⁸⁷ Regardless, the primary goal of the Congress and the FCC to increase competition can be seen all over the industry in a lowering of rates, additional minutes, and special features offered by the various wireless carriers. The true effects remain to be seen.

⁸⁵ *Id.*

⁸⁶ At <http://www.verizonwireless.com/b2c/LNPCControllerServlet>, last visited January 30, 2004.

⁸⁷ “In order to enjoy all of Verizon Wireless’ services, you may need a Verizon Wireless phone. In some cases, depending on your current service provider’s network and your type of phone, you may be able to use your existing phone, but availability of services may vary.” at <http://www.verizonwireless.com/b2c/faq/FAQTopicDetail.jsp#727>, last visited January 30, 2004.