WIRELESS LOCAL NUMBER PORTABILITY: NEW RULES WILL HAVE BROAD EFFECTS

STEPHEN M. KESSING[1]

ABSTRACT

After a delay of over seven years, wireless local number portability rules ("WLNP") finally went into effect on November 24, 2003. These rules, promulgated by the Federal Communications Commission, allow wireless subscribers to change service providers within a given location while retaining the same phone number. The rules also allow consumers to transfer a land-based telephone number to a cellular provider. These new choices will likely have a significant impact on the wireless industry and increase competition in an already intense playing field. This iBrief provides a summary of the new rules, looks at the history and litigation, and predicts how increasing wireless options will benefit consumers and promote competition in local telephony.

INTRODUCTION

¶1 For years, consumers with traditional land-line phones (or "wireline phones")[2] have been able to switch from one local carrier to another in the same geographical area without having to change their phone number.[3] On November 24, 2003, the new rules were phased into effect in order to provide the same flexibility for wireless consumers.[4] These rules immediately apply to wireless carriers in the top 100 Metropolitan Statistical Areas and will generally apply to all wireless carriers within six months.[5] In addition to requiring portability between wireless carriers, the rules also provide that some consumers can switch between a wireline carrier and a wireless carrier and still keep the same phone number.[6]

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[1] J.D. Candidate, 2005, Duke University School of Law; M.B.A., 2001, University of Southern California; B.S. in Systems Analysis, 1995, Miami University.

[2] Traditional land-line phones, commonly and hereinafter referred to as "wireline" phones, are phone lines that are fixed in homes, businesses, offices, and other physical locations.

[3] Fed. Communications Comm'n, *Wireless Local Number Portability*, *at* http://www.fcc.gov/cgb/consumerfacts/wirelessportability.html (last reviewed/updated Nov. 21, 2003) [hereinafter Fact Sheet].

[4] *Id.*

[5] *Id.*

[6] *Id.*

¶2 The new rules were originally proposed by the Federal Communication Commission ("FCC") in 1996, but legal challenges by wireless provider Verizon Wireless ("Verizon") and industry advocate Cellular Telecommunications & Internet Association ("CTIA") resulted in several delays. A June 6, 2003, ruling by the United States Court of Appeals for the District of Columbia Circuit ended the appeals and cleared the way for the FCC to implement the rules starting November 24, 2003.[7] This iBrief examines the legal background leading up to the final implementation of the portability rules and predicts how the rules will affect consumers and the wireless industry.

I. BACKGROUND HISTORY: THE TELECOMMUNICATIONS ACT OF 1996 AND THE ENSUING LITIGATION

¶3 Congress passed the Telecommunications Act of 1996 ("the Act") in order to stimulate competition in telecommunication services.[8] Among other topics, the Act defined and addressed number portability[9] and set an initial compliance date for wireless providers of June 30, 1999.[10] The FCC believed that local number portability would "enhance competition between . . . carriers, as well as promote competition between wireless and wireline carriers."[11] Number portability was initially supported by many participants in the wireless industry, especially newer wireless providers who were eager to compete with established providers.[12]

¶4 The compliance date has been extended on multiple occasions; it was initially extended six months and then again to November 24, 2002 after CTIA requested a temporary forbearance from enforcement.[13] Verizon then sought a permanent forbearance from the portability rules. Verizon's forbearance petition was denied, but the FCC agreed to again extend the deadline an additional year to November 24, 2003.[14] Verizon then appealed to the D.C. Circuit.

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[7] *See* Cellular Telecomms. & Internet Ass'n v. FCC, 330 F.3d 502, 513 (D.C. Cir. 2003).
[8] Pub. L. No. 104-104, 110 Stat. 56 (1996).
[9] *See* 47 U.S.C. § 153(30) (2000) (defining "number portability" as the ability of consumers to keep their phone numbers when they switch wireless carriers).
[10] 47 C.F.R. § 52.31 (2003).
[11] *See In re* Cellular Telecomms. & Internet Ass'n, 14 F.C.C.R. 3092, 3093 (1999) (mem. op. and order) [hereinafter Second Order].
[12] *Id.*
[13] *See id.* at 3092.
[14] *See In re* Verizon Wireless, 17 F.C.C.R. 14,972 (2002) (mem. op. and order) [hereinafter Third Order].

A. CTIA's Initial Petitions

¶5 On December 16, 1997, the CTIA filed a petition pursuant to 47 U.S.C. § 160 requesting temporary forbearance from the local number portability provisions for an additional five years.[15] After a lengthy delay, the FCC granted the petition and delayed the imposition of local number portability for all wireless carriers until November 24, 2002.[16]

¶6 CTIA's petition argued that the delay should be granted because of the technical complexities involved in implementing portability and immediate implementation would not benefit consumers.[17] CTIA maintained that consumers might actually be harmed because wireless carriers would be forced to expend resources on portability instead of continuing to improve network coverage and service quality.[18] The FCC received comments from many wireless providers that supported CTIA's arguments and indicated that immediate implementation would significantly affect current plans for improved network coverage and service quality and would restrict their ability to offer lower prices.[19] Other commentators, mostly wireless resellers and wireline carriers, opposed the delay and argued that the potential problems were being exaggerated by CTIA.[20] While the record does not indicate specifically why some carriers opposed further delays, it is likely that these carriers believed that they would benefit by being able to attract current customers of larger providers and that they had less potential of losing existing customers.

¶7 The FCC applied a three-prong analysis provided in 47 U.S.C. § 160(a) to determine if the forbearance petition should be granted.[21] Under this analysis, forbearance from complying with a regulation or provision should be granted when the:

> (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 telecommunication carrier or telecommunications service are just and reasonable, and are not unjustly or unreasonably discriminatory;

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[15] *Second Order*, 14 F.C.C.R. at 3092-93.
[16] *Id.* at 3093.
[17] *Id.* at 3098.
[18] *Id.*
[19] *See Second Order*, 14 F.C.C.R. at 3099 (listing Airtouch, Century Cellunet, and Rural Telecommunication Group among many wireless industry commentators supporting the CTIA position).
[20] *Id.* (noting that Microcell, Nextel, the Telecommunications Resellers Association, and Worldcom Wireless Inc. opposed any further extension of the wireless number portability deadline).
[21] *Id.* at 3101.

> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
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> (3) forbearance from applying such provision or regulation is consistent with the public interest.[22]

¶8 After considering all of the factors in the analysis, the FCC determined that allowing wireless providers more time to comply with the portability requirements would not subject consumers to unjust or unreasonable charges or practices, jeopardize consumer protection, or interfere with public interest.[23] The petition for forbearance was therefore granted, and implementation of the portability requirements was delayed until November 24, 2002.[24] However, the FCC specifically rejected arguments for complete forbearance of the rules, determining that the partial forbearance[25] provided adequate relief to the wireless providers.[26] As a result of the FCC's Order, Bell Atlantic voluntarily agreed to dismiss a similar challenge that was then pending in the Tenth Circuit Court of Appeals.[27]

B. Verizon's Subsequent Forbearance Petition

¶9 In July 2001, Verizon filed a petition with the FCC requesting that the FCC permanently forebear imposing the portability requirements.[28] Verizon argued that the portability requirements imposed significant expenses and technical burdens on wireless providers not justified by the minimal benefits provided to consumers.[29] Verizon further argued that forbearance would allow wireless providers to focus on meeting impending deadlines for number pooling.[30] Unsurprisingly, a majority of wireless

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[22] 47 U.S.C. § 160(a) (2000).
[23] *Second Order*, 14 F.C.C.R. at 3101-04.
[24] *Id.* at 3093.
[25] The forbearance provisions of the Act of 1996 allow the FCC to grant permanent or partial forbearance from regulations if it is determined that forbearance is consistent with public interest. 47 U.S.C. § 160(a) (2000). The original five year delay of implementation, from December 16, 1997 to November 24, 2002, was a partial forbearance. *See Second Order*, 14 F.C.C.R. at 3093. Under the provisions of 47 U.S.C. §160(a) the FCC could have determined instead that permanent forbearance was appropriate as some wireless industry commentators argued. *See Second Order*, 14 F.C.C.R. at 3099.
[26] *Id.* at 3112-13.
[27] Joint Mot. for Dismissal, *Bell Atlantic NYNEX Mobile, Inc. v. FCC*, No. 97-9551 (10th Cir. filed Mar. 19, 1999).
[28] *See Third Order*, 17 F.C.C.R. at 14,972.
[29] *Id.* at 14,976.
[30] *See generally id*. Phone numbers had historically been allocated in blocks of 10,000 numbers. The FCC adopted rules in 1999 that required numbers to be allocated in blocks of 1,000. The pooling requirements referred to by Verizon

providers submitted comments to the FCC supporting Verizon's position.[31] However, some of the comments indicated a preference to further delay the portability requirements instead of permanently forbearing their implementation.[32]

¶10 In the Third Order, issued July 26, 2002, the FCC again utilized the three-prong analysis from § 160(a) to decide whether to grant Verizon's petition.[33] However, this time the FCC determined that, although the petition met the first prong of the test for forbearance, the portability rules were needed in order to protect consumers and promote the public interest.[34] The FCC determined that the wireless industry had developed significantly over the previous two years and therefore portability was even more necessary in order to meet consumer needs.[35] For example, the FCC noted that many consumers were now using wireless providers as their only telephone service and the ability to retain a phone number would allow more consumers to make this choice.[36]

¶11 The Third Order did strike a compromise for the wireless providers. Although the FCC determined that permanent forbearance was not justified, the Order provided wireless providers with an additional year to meet the portability requirements.[37] However, the additional one-year delay was significantly shorter than a three-year delay that was alternatively proposed by several providers.[38] The net result was that the implementation was again delayed—this time until November 24, 2003.

C. CTIA and Verizon's Appeal

¶12 As the deadline for implementation approached and with options for relief from the FCC exhausted, Verizon and CTIA focused their efforts on appealing the most recent FCC Order. In August 2002, CTIA and Verizon filed an appeal of the FCC's Order in the D.C. Circuit.[39]

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related to changes wireless providers needed to make to accommodate the new allocation system. *Id.*

[31] *Id*.

[32] *Id.* at 14,976-77.

[33] *Id.* at 14,977.

[34] *Id.*

[35] *See id.* at 14,979 (noting that 5 million people had replaced some wireline long distance usage with wireless service and that wireless was now competing more heavily with wireline service).

[36] *See id*. (noting that new pricing plans and other changes make it easier for consumers to utilize wireless providers in place of traditional wireline service).

[37] *Third Order*, 17 F.C.C.R. at 14,972.

[38] *Id.* at 14,984.

[39] CTIA v. FCC, 330 F.3d 502 (D.C. Cir. 2003).

¶13 On appeal, CTIA and Verizon argued that the FCC exceeded its statutory authority to impose portability and misinterpreted and misapplied § 160(a) in its decision to deny Verizon's petition for permanent forbearance.[40] The court dismissed CTIA's statutory authority claim, without much discussion, holding that the statutory time limit for challenging the FCC's authority to implement the rules had expired long before the issue was raised on appeal.[41]

¶14 CTIA's second claim was primarily based on the use of "necessary" as it is used in the second prong of the § 160(a) analysis. CTIA claimed that "necessary" should be interpreted as "absolutely essential" and that the portability rules were not absolutely essential in order to protect consumers.[42] The court proceeded to review the use of "necessary" in other statutes and also considered the Congressional intent behind the Act.[43] The court determined that the interpretation espoused by CTIA was not applicable and that the FCC's Order passed the required "arbitrary and capricious" standard of review required.[44]

¶15 The decision of the Court of Appeals received a great deal of publicity and appeared to be the end of the road for CTIA and Verizon's attempts to avoid implementation of the portability rules.

D. The Last-Ditch Appeals

¶16 The United States Telecom Association made one last ditch effort to halt the rules from going into effect by filing a motion for an emergency injunction a few days before the rules were scheduled to take effect. The D.C. Circuit denied the request to block the rule from going into effect[45] but did agree to hear an appeal concerning the portion of the rule affecting wireline-to-wireless portability.[46] In a subsequent opinion issued in March 2004, the D.C. Circuit upheld the FCC's interpretation of the Act and no further appeals are pending.[47]

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[40] *Id.* at 504.
[41] *Id.*
[42] *Id.* at 509-13.
[43] *See id.* at 512 (holding that the FCC's interpretation of necessary was reasonable and Congress did not clearly intend for the use of necessary to indicate "absolutely required" or "indispensable").
[44] *Id.* at 502.
[45] Jonathan D. Salant, *Court OKs Home-To-Cell Number Transfers*, NEWSMAX.COM, Nov. 21, 2003, *at* http://www.newsmax.com/archives/articles/2003/11/21/215927.shtml.
[46] United States Telecom Ass'n v. FCC, 2003 U.S. App. LEXIS 19142.
[47] Cellco P'ship v. FCC, 357 F.3d 88 (D.C. Cir. 2004).

II. MECHANICS: HOW THE NEW RULES FUNCTION AND WHAT THEY REQUIRE

¶17 Despite the technical complexities that may be involved on the part of the wireless providers, the portability rules and benefits for consumers are relatively easy to understand. Since November 24, 2003, wireless consumers have been able to switch wireless carriers within the same geographic region and retain the same phone number.[48] For example, if you are currently a Verizon Wireless customer in Durham, North Carolina, and are remaining in the same area, you may "port"[49] your existing phone number and obtain new wireless service from Sprint, Cingular, or any other local wireless provider. The portability rules take effect immediately for users in the top 100 Metropolitan Statistical Areas (most major cities and markets) and must be available in all markets within six months of November 24, 2003.[50]

¶18 In addition to flexibility for wireless service, the Act provides most consumers the ability to also port their existing wireline number to a wireless provider as well.[51] This means that if you have a land-based phone number in your home or apartment, you can convert that existing number to a wireless service.

¶19 The portability service is not cost-free in all cases. Carriers are allowed to charge a fee for porting, but the fee may not exceed their cost of providing the service.[52] While few details are currently available from major wireless providers, competition for new customers may lead some providers to offer to reimburse porting fees.[53] In addition, carriers may not refuse to port the number even if there is an outstanding balance on the transferring customer's account or the porting fee has not yet been paid by the transferring customer.[54] In most cases, porting a number can be accomplished in only a few hours. However, because wireless equipment is

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[48] Fact Sheet, *supra* note 3.

[49] The Telecommunications Act of 1996 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. 47 U.S.C. § 153(30).

[50] Fact Sheet, *supra* note 3.

[51] *Id.*

[52] *Id.*

[53] *See* Ben Charny, *Verizon: No Fee For Number Portability*, NEWS.COM, June 24, 2003, *at* http://news.com.com/2100-1039_3-1020501.html. Verizon, however, has indicated that it has no plans to charge a porting fee. *Id.*

[54] *Id.*

not always compatible across service providers, a customer may be required to purchase new equipment in order to use a new service provider.[55]

III. WHAT THE FUTURE HOLDS FOR WIRELESS PROVIDERS AND CONSUMERS

¶20 The ability to change providers and keep phone numbers should be a great benefit for consumers. As discussed in the 2002 FCC Order, consumers' wireless needs and preferences have changed significantly over the past several years.[56] Wireless providers have been able to restrict competition and avoid losing some consumers because of the high cost of switching carriers. In fact, the inability to retain a phone number has been cited by consumer advocates as one of the biggest reasons why consumers do not switch services.[57] The elimination of this barrier should enable consumers to seek better options at lower prices and shop freely for services that meet their individual needs. It has been estimated that 18 million, or 12%, of wireless customers will switch providers during the first year of the portability rules.[58] Clearly, consumers desire portability. Consequently, wireless providers will have to compete fiercely to attract and retain customers.[59]

¶21 The impact on business users will also be significant. Business users in some cases face even higher switching costs than personal consumers because they are forced to reprint stationary, business cards, and other materials containing an unretained wireless number.[60] There is also a risk of loss of customers and other effects if they can no longer be reached at their now defunct phone number. One industry analysts suggests that 25% of large businesses may switch carriers as a result of portability.[61]

¶22 While number portability may be good for consumers, the impact on carriers is less certain. Merrill Lynch, a leading investment firm, has suggested that wireless providers will benefit from "pent-up demand, as more and more customers anticipate the implementation of wireless local

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[55] *Id.*
[56] *Third Order*, 17 F.C.C.R. at 14,980.
[57] Associated Press, *Court Says Wireless Customers Should Be Able to Keep Cell Numbers*, FOXNEWS.COM, June 6, 2003, *at* http://www.foxnews.com/story/0,2933,88776,00.html.
[58] Associated Press, *Number Portability Nears Reality*, WASH. POST, Nov. 10, 2003.
[59] *Id.*
[60] *Third Order*, 17 F.C.C.R. at 14,980.
[61] Ben Charny, *It's Your Number–Take It With You*, NEWS.COM, Nov. 3, 2003, *at* http://news.com.com/2100-1037-5100892.html.

number portability."[62] Merrill Lynch further suggests that wireless carriers could see an increase of 13 million users in 2004.[63] However, other industry analysts have suggested that credit ratings and access to financing sources for some of the larger carriers may be negatively impacted because of fears of lower earnings and cash flow as customers leave under the new portability rules.[64] It is too early to tell how portability will impact individual carriers, but one thing is certain—they will likely have to change their strategies in order to remain competitive and attract and retain customers.

¶23 One additional area that is likely to continue to evolve over the coming months is portability fee structures. Even with the requirement that porting fees must be limited to the actual costs incurred for providing the service, wireless companies may be able to profit by charging porting fees that are higher than their actual costs. Over the past several months, many of the leading wireless providers have increased "cost recovery" fees that consumers are charged each month.[65] Companies are not currently required to report actual costs to the FCC and the agency is providing limited oversight.[66] However, Congress may intervene if it appears that carriers are taking advantage of consumers and charging excessive fees.[67] Whether the carriers will profit from the fees charged is unknown, but it is not unlikely that further regulation in this area is on the horizon.

¶24 The new portability rules have been in effect for a very brief period of time. Although it will likely be several months yet before the economic effects of the new rules can be accurately accounted for, numerous sources have already begun speculating as to who the winners and losers will be. According to one industry analyst, Verizon Wireless and Nextel Communications have gained the most customers in the initial days of the rule changes.[68] This is somewhat ironic because Verizon had been one of the wireless providers who most openly opposed the new rules. The same

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[62] Dinesh C. Sharma, *Merrill Lynch Raises Wireless Forecasts*, NEWS.COM, Sept. 30, 2003, *at* http://news.com.com/2100-1039_3-5084260.html.
[63] *Id.*
[64] Eric Burroughs, *US Credit–What Impact on Wireless From Number Portability*, FORBES, Nov. 18, 2003, *available at* http://www.forbes.com/markets/newswire/2003/11/18/rtr1152737.html.
[65] Associated Press, *Fees to Cover Cell Number Switching May Reap Profits*, CNN.COM, Aug. 17, 2003, *at* http://www.cnn.com/2003/TECH/biztech/08/17/keeping.cell.nos.ap/.
[66] *Id.*
[67] *Id.*
[68] *Who Won First Battles for Cell-Phone Switchers?*, THEBOSTONCHANNEL.COM, Dec. 2, 2003, *at* http://www.thebostonchannel.com/money/2675816/detail.html.

sources have indicated that Cingular and AT&T have been the biggest losers with Sprint PCS and T-Mobile coming out about even.[69]

¶25 As expected, the initial consumers taking advantage of the new rules have encountered problems. Even though all wireless providers are required to be able to port numbers in less than two and one-half hours,[70] some providers have not been able to meet the target times and are beginning to draw the attention of regulators.[71] AT&T Wireless appears to have the most significant problems; it has already received a letter from the FCC, and the California Public Utilities Commission appears ready to launch an investigation into AT&T's portability problems.[72] The FCC's consumer bureau received a small number of complaints in the initial days after the portability rules took effect, but suspects that the problem is much larger and many consumers have not filed formal complaints.[73] While it is difficult to draw specific conclusions after such a brief period, it is clear that the FCC and the states will not allow wireless providers to continue violating the rules and will be very proactive in ensuring that the portability processes adhere to the required timelines.[74]

¶26 While the specific economic effects on consumers and wireless carriers remain uncertain, it is apparent that the number portability rules take another step in achieving some of the original goals of the Act, such as, promoting competition, securing lower prices and higher quality services, and encouraging development of new technologies.[75] As consumers have more choices and the ability to switch easily between wireless providers, the wireless providers will need to offer more competitive pricing plans, introduce new technologies faster, and offer higher quality service in order to attract or retain customers.[76] Over time, the number portability rules should encourage wireless providers to aggressively pursue these goals.

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[69] *Id.*

[70] Fed. Communications Comm'n, *Wireless Local Number Portability*, at http://www.fcc.gov/cgb/NumberPortability/#howlong (last reviewed/updated Apr. 4, 2004).

[71] Cynthia L. Webb, *Glitches for Cell Phone Switches*, WASH. POST, Dec. 5, 2003, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A38230-2003Dec5&notFound=true.

[72] *Id.*

[73] *Id.*

[74] *See id.* (noting that the FCC sent a warning letter on December 4, 2003 to AT&T).

[75] Reza Dibadj, *Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act to Blame?*, 81 WASH. U. L.Q. 1, 1-2 (2003).

[76] The effects of the number portability rules for wireless carriers should be comparable to the effects of the Act on competition for local phone service. For a good review of the effects of the Act on telecommunications services as a

CONCLUSION

¶27 Wireless local number portability is now a reality despite efforts by wireless providers and industry advocates to delay or eliminate the requirements. The changes will likely bring positive benefits to consumers, but the immediate and long range impact on wireless providers is hard to predict. As more customers are able to change providers and the providers offer more competitive pricing plans to lure customer the effect of the new rules will become clearer. Only then will we be able to determine if the number portability rules are helping to achieve some of the original goals of the 1996 Act. It is also likely that further regulation and restrictions that address porting fees and timing requirements will be needed to ensure that consumers receive the maximum value from local number portability.

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whole, *see generally* Eric M. Swedenburg, *Promoting Competition in the Telecommunications Markets: Why the FCC Should Adopt a Less Stringent Approach to its Review of Section 271 Applications*, 84 CORNELL. L. REV. 1418 (1999).