

**SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN,
APPROVING IN PART AND DISSENTING IN PART**

Re: Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation, Memorandum Opinion and Order, WT Docket No. 01-184, CC Docket No. 95-116

I vote in support of the Commission's decision to deny Verizon's petition for permanent forbearance from the Commission's wireless number local portability (LNP) rules but to grant carriers a twelve-month extension to come into compliance. I dissent, however, from this item's discussion of the legal standard used to assess Verizon's petition.

1. Under the standard adopted by the majority, I do not find a sufficient basis for granting Verizon's petition for permanent forbearance, and I agree that the Commission's LNP mandate is "important" for the protection of consumers.

As I have previously explained, I believe that competition is preferable to regulation. Market forces are the best method of delivering choice, innovation, and affordability to consumers across our nation. But that does not mean that the Commission has no role to play. The Commission has an important role to play in creating an environment in which competition can flourish. And where there are market failures, the Commission may need to step in and take action.

The inability of consumers to keep their phone numbers when they switch carriers can be an impediment to competition. It imposes a cost to switching carriers, which, for many consumers, could be significant. In order to make a switch, consumers must contact the full range of people from whom they expect to receive calls, and many must also change business cards, letterhead, advertisements, and professional directories. These costs not only provide a disincentive for consumers that may want to switch providers, they also disadvantage new entrants to the market.

Thus, LNP can be important for competition. It allows consumers to choose a cheaper or more innovative wireless service without incurring some of these not insignificant switching costs. Moreover, it allows consumers more easily to replace their wireline phones with wireless phones, providing direct competition to the incumbent wireline telephone providers. A recent poll found that 18 % of wireless phone owners use their wireless phones as their primary phones. LNP may be an important part of ensuring that competition with wireline phones continues to grow.

The ability of new entrants to compete with established providers may become an even more important issue as additional deregulatory steps that the Commission has already taken go into effect. For example, the spectrum cap regulations, which limit the amount of spectrum any carrier can hold and thus ensure that there can be at least four competitors in any given market, will sunset January 1, 2003. In the post-spectrum-cap environment, in which some further consolidation may occur, the ability of smaller, new

entrants to compete with even larger wireless carriers may be critical to maintaining a vibrant competitive wireless market and thereby ensure that consumers continue to receive the most innovative and affordable services.

For all of these reasons, I support the Commission's conclusion that our LNP rules are consistent with the protection of consumers and thus not to forbear permanently from applying them. I also support the Commission's decision to delay implementing those rules for a period of one year. Several public safety groups – the National Emergency Number Association (NENA), the Association of Public-Safety Communications Officials-International, Inc. (APCO), and the National Association of State Nine One One Administrators (NASNA) – have sought a sixth-month delay to ensure our E911 rules are implemented effectively in conjunction with LNP. As I have stated before, implementation of E911 must be a fundamental priority, and I agree that a short delay of LNP requirements is appropriate to ensure this implementation is not jeopardized. I also find merit in certain carriers' claims that implementing LNP at the same time that they implement pooling will create hardship, due to the need to ensure the technical workability of each functionality. While I know that some carriers would have liked an even longer delay, I believe we have struck a fair balance between the carriers' needs and those of consumers.

2. Although I support the Commission's conclusion under the forbearance standard adopted by the majority, I would have preferred to change this standard. Section 10 of the Communications Act (47 U.S.C. § 160) states in relevant part: "Any [forbearance] petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it." 47 U.S.C. § 160(c). Subsection (a) in turn states:

[T]he Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, 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.

47 U.S.C. § 160(a).

I believe that the present item fails to give sufficient content to this language, in particular its use of the term “necessary.” Section 10 requires, among other things, that forbearance be granted if enforcement of the challenged regulation is not “necessary” to ensure that charges, practices, etc., are just and reasonable, and enforcement of the regulation is not “necessary” for the protection of consumers. 47 U.S.C. § 160(a). In this item, the Commission does not offer a definition of “necessary,” although it suggests that the term means something like “consistent with” or “important.” For example, the item’s analysis rests on the conclusion that “permanent forbearance from the LNP requirements for CMRS carriers is not *consistent with* the protection of consumers” and finds that “we continue to view wireless LNP as providing *important* benefits to consumers.” Order ¶¶ 16, 18 (emphasis added). I find this ambiguity particularly troubling, because, in another context, the Commission has recently argued explicitly that the term “necessary” means “useful” or “appropriate.” See FCC’s Petition for Rehearing or Rehearing *En Banc, Fox Television Stations, Inc. v. FCC*, Nos. 00-1222, *et al.*, 2002 WL 1343461, at 5 (D.C. Cir. Jun 21, 2002) (“Terms such as ‘necessary’ and ‘required’ must be read in their statutory context and, so read, can reasonably be interpreted as meaning ‘useful’ or ‘appropriate’ rather than ‘indispensable’ or ‘essential.’”). As I have explained elsewhere, I believe the term “necessary” should mean something more than merely “useful” or “appropriate.” See Separate statement of Commissioner Kevin J. Martin, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, CS Docket No. 01-290 (adopted June 13, 2002). Rather, I believe the term should be read in accordance with its plain meaning, to mean something closer to “essential.” In any event, I believe that it should mean something more than merely “useful,” “appropriate,” “consistent with,” or “important.”

I am also troubled by the fact that this item does not state that the burden, in judging a forbearance petition, is on the Commission. The language of section 10 places affirmative obligations on the Commission. Subsection (c) requires that a forbearance petition is automatically granted (the “petition shall be deemed granted”) absent an action of the Commission to deny the petition. Subsection (a) then directs the Commission to “determine” specific factors and then mandates forbearance (“the Commission shall forbear”) if those factors are met. This language makes grant of a forbearance petition the default outcome, placing the burden of justifying a denial of a forbearance petition on the Commission. In other words, the statute requires the Commission, when faced with a petition to forbear from applying a particular regulation, to grant the petition unless it can justify continued application of the regulation.

Despite this statutory language, the Commission has, in the past, placed the burden on forbearance petitioners to demonstrate that a regulation is no longer necessary. See, e.g., *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd 16857, ¶ 25 (1998) (“[T]he record does not show

that today’s market conditions eliminate all remaining concerns about whether broadband PCS providers’ rates and practices are just, reasonable, and non-discriminatory.”). While the present item appears to offer some improvement, it does not address this past precedent or explicitly state where the burden lies. In my view, the Commission ought to clarify that the burden lies with the Commission.

For these reasons, I dissent from the item’s discussion of the forbearance standard. These are matters of critical importance to me, and, in this item, are of critical significance. As I explained above, I am comfortable deciding that LNP is “useful” for or even “consistent with” the protection of consumers. However, it is less clear that LNP could meet the more appropriate and higher standard of the statute – “necessary” – and I am disappointed that this question was not the subject of our debate.