

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Numbering Resource Optimization)	CC Docket No. 99-200
)	
Telephone Number Portability)	CC Docket No. 95-116
)	
Western Wireless' Limited, Conditional Petition for)	
Waiver of Local Number Portability and)	
Thousands-Block Number Pooling Obligations)	

ORDER

Adopted: November 21, 2003

Released: November 24, 2003

By the Deputy Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, we deny the petition for waiver filed by Western Wireless Corporation (Western) to extend the thousands-block number pooling (pooling) and local number portability (LNP or porting) deadlines.¹ In doing so, we find that Western has not demonstrated that special circumstances exist for an extension of the porting and pooling deadlines until May 24, 2004 or that such an extension is in the public interest. We will not, however, enforce Western's LNP and pooling obligations until sixty

¹ Western filed its initial petition on November 27, 2002. *See* Western Wireless' Limited, Conditional Petition for Waiver of Number Pooling Obligations in McAllen-Edinburg-Mission, Texas, filed Nov. 27, 2002 (Waiver Petition) (requesting a waiver of its pooling obligation for a period of three years). Western subsequently filed supplemental petitions and reply comments that, among other things, expanded its waiver request to include its porting obligations and modified its requested time period for that waiver to May 24, 2004. *See* Letter to Marlene H. Dortch, Secretary, FCC, from Gene DeJordy, Western Wireless Corporation, dated June 24, 2003 (Supplemental Letter); Supplement to Petition for Waiver and Petition for Clarification of Western Wireless Corporation filed Mar. 3, 2003 (Supplemental Petition); Reply Comments of Western Wireless Corporation, filed Apr. 14, 2003 (Western Reply Comments). *See also* Letter to Marlene H. Dortch, Secretary, FCC, from Gene DeJordy, Western Wireless Corporation, dated November 21, 2003 (outlining the remaining steps required for Western to implement LNP) (LNP Implementation Letter). In particular, Western requests a waiver of these requirements in the following rate centers: McAllen, Edinburg, and Weslaco (McAllen-Edinburg-Mission, Texas MSA), Greenville and Commerce (Dallas, TX MSA), Paola (Kansas City, MO MSA), Hesston and Newton (Wichita, KS MSA), Round Mountain, Pahrump and Tonopah (Las Vegas, NV-AZ MSA), Fremont, Kennard, and Plattsmouth (Omaha, NE-IA MSA), and Anadarko. Supplemental Letter at 2-3. According to Western, Anadarko is not in the top 100 MSAs, but is subject to pooling because the Oklahoma Commission had previously received delegated authority to implement pooling. *Id.* at 3.

days after the release of this Order. We find that a sixty-day non-enforcement period will provide Western the time needed to properly implement and commence LNP and pooling. We also reject Western's claim that it is not required to pool or port in rural service areas (RSAs) that overlap the top 100 Metropolitan Statistical Areas (MSAs) as defined for numbering purposes.

II. BACKGROUND

A. Local Number Portability and Thousands-Block Number Pooling Requirements

2. *Local Number Portability.* Section 251(b) of the Communications Act of 1934, as amended, (Act)² mandates local exchange carriers to provide LNP in accordance with the requirements outlined by the Commission.³ The Commission, in the *Number Portability First Report and Order*, established the parameters for LNP and required commercial mobile radio service (CMRS or wireless) providers to become LNP-capable pursuant to sections 1, 2, 4(i), and 332 of the Act.⁴ Initially, CMRS providers were required to become LNP-capable by June 30, 1999.⁵ Subsequently, the Commission extended that deadline twice, and concluded that CMRS carriers operating in the top 100 MSAs are required to provide number portability upon request by another carrier effective November 24, 2003.⁶ CMRS carriers operating outside the top 100 MSAs must become LNP-capable upon request by May 24, 2004, or within six months of a request.⁷

² Pub. L. No. 104-104, 110 Stat. 56. The Act amended the Communications Act of 1934, 47 U.S.C. §§ 151-174.

³ 47 U.S.C. §251(b).

⁴ *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8431-8442 (1996) (*Number Portability First Report and Order*).

⁵ *Id.* at 8440.

⁶ See *Telephone Number Portability, Cellular Telecommunications Industry Association's Petition for Forbearance from Commercial Mobile Radio Services Number Portability Obligations*, Memorandum Opinion and Order, 14 FCC Rcd 3092 (1999) (extending the LNP deadline date for wireless providers to November 24, 2002); *Verizon Wireless Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation and Telephone Number Portability*, Memorandum Opinion and Order, 17 FCC Rcd 14972, 14986 (2002) (*Verizon Wireless LNP Forbearance Order*) (denying Verizon Wireless' request for permanent forbearance from the LNP requirement and extending the November 24, 2002 LNP deadline for one year), *dismissed in part and denied in part, Cellular Telecommunications & Internet Association v. FCC*, No. 02-1264 (D.C. Cir. June 6, 2003).

⁷ CMRS carriers operating within the top 100 MSAs must be LNP-capable by November 24, 2003 if requests from other carriers were received by February 24, 2003. *Verizon Wireless LNP Forbearance Order*, 17 FCC Rcd at 14985-14986. See also *Telephone Number Portability, Carrier Requests for Clarification of Wireless-Wireless Porting Issues*, Memorandum Opinion and Order, FCC 03-237 (rel. Oct. 7, 2003) (providing guidance for porting between wireless carriers and addressing LNP implementation issues); *Telephone Number Portability, CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, FCC 03-248 (rel. Nov. 10, 2003) (providing guidance for porting between wireless and wireline carriers and seeking comment on related issues).

3. *Thousands-Block Number Pooling*.⁸ In 1999, the Commission initiated the *Numbering Resource Optimization* proceeding to establish administrative and technical measures that would promote more efficient use of numbering resources. In the *Numbering Resource Optimization First Report and Order*, the Commission adopted a nationwide system for allocating numbers in blocks of 1,000, rather than 10,000. National rollout of thousands-block number pooling commenced on March 15, 2002, starting with the top 100 MSAs and area codes previously in pooling pursuant to state delegations.⁹ Initially, only LNP-capable carriers were required to participate in pooling. Then, in the *Numbering Resource Optimization Fourth Report and Order*, the Commission concluded that all carriers, including CMRS carriers, must participate in pooling where it is implemented, except for those carriers expressly exempted.¹⁰ CMRS providers began pooling on November 24, 2002.

B. The Top 100 MSAs

4. In June 2003, in the *Numbering Resource Optimization Fourth Report and Order*, the Commission declined to expand the list of top 100 MSAs to include regions in Combined Metropolitan Statistical Areas (CMSAs) that would not otherwise be among the 100 largest MSAs.¹¹ The Commission, however, delegated authority to state commissions to require pooling in those non-top 100 MSA regions.¹² The Commission concluded that state commissions are uniquely positioned to understand whether the CMSAs outside the top 100 MSAs have certain factors present, such as sufficient competition, to justify pooling.¹³

5. In that Order, the Commission also determined that rural telephone carriers and Tier III wireless carriers in the top 100 MSAs are exempt from pooling unless another carrier makes a request for LNP.¹⁴ The Commission reasoned that the pooling costs incurred by rural and small carriers could result in increased costs for customers.¹⁵ In addition, the Commission exempted service providers that are the

⁸ Section 251(e) of the Act gives the Commission plenary jurisdiction over numbering administration. *See* 47 U.S.C. § 251(e).

⁹ *Numbering Resource Optimization*, Order, 17 FCC Rcd 7347, 7348 (2002).

¹⁰ 47 C.F.R. §52.20(b). *See infra* for a discussion on exempted carriers.

¹¹ *Numbering Resource Optimization*, Fourth Report and Order in CC Docket No. 99-200 and CC Docket No. 95-116, and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 99-200, 18 FCC Rcd 12472, 12480 (2003) (*Numbering Resource Optimization Fourth Report and Order*). The Commission determined, based on the record before it, that it did not have enough evidence to determine whether areas within CMSAs have sufficient competition to justify their inclusion into the MSA list, and therefore declined to determine which, if any, of those areas should be included on the MSA list. *Id.* at 12480.

¹² *Id.*

¹³ *Id.* at 12480. The Commission also stated that state commission should consider certain factors such as the number of competing service providers and whether pooling in the extended areas would achieve the Commission's competitive and numbering resource optimization goals. *Id.*

¹⁴ *Id.* at 12479.

¹⁵ *Id.* The Commission, however, allowed state commissions to file a petition with the Commission requesting delegated authority to mandate exempted carriers to pool within the top 100 MSAs. *Id.*

only entity obtaining numbering resources from a particular rate center unless that carrier receives a porting request.¹⁶

C. Western's Waiver Request

6. Western requests a waiver of the porting and pooling requirements until May 24, 2004, six months following the November 24, 2003 wireless LNP deadline.¹⁷ Western argues that good cause has been shown to warrant a waiver because: (1) the small numbering resource optimization benefits to be gained will be far outweighed by the significant costs and burdens¹⁸ of implementing these obligations by a rural carrier that has a smaller customer base for spreading out the those costs and burdens;¹⁹ (2) an extension of the pooling and porting deadlines would help Western concentrate on its other upcoming and significant regulatory obligations; (3) implementing pooling in RSAs that contain counties included in the top 100 MSAs and CMSAs would impose significant costs on Western;²⁰ and (4) Western had no reason to believe that it would fall under the pooling requirement until December 28, 2001, thereby giving Western little notice to prepare for these regulatory obligations.²¹ In the alternative, Western requests the Commission to clarify that Western is not required to pool or port in RSAs that overlap the top 100 MSAs because RSAs, as defined, are outside of MSAs.²²

7. Commenters in support of Western's petition agree that RSAs, by definition, should not be deemed within MSAs.²³ Some commenters also contend that they face situations similar to Western, and they argue that relief from the porting and/or pooling requirements should be granted to all carriers in this situation.²⁴ Mid Missouri Cellular (MMC) supports providing the pooling and porting relief that Western requests, but opposes the waiver petition because it believes that the facts set forth by Western are not unique. Instead, MMC argues that unresolved pooling and porting issues should be addressed in a

¹⁶ *Id.* at 12480.

¹⁷ Supplemental Letter at 4. We note that Western has received some requests for LNP from national carriers. Western Reply Comments at 5.

¹⁸ Supplemental Letter at 4.

¹⁹ Waiver Petition at 7.

²⁰ Supplemental Petition at 9. An RSA is a cellular market established and used by the Commission as an administrative convenience in the licensing of cellular systems. *See* 47 C.F.R. § 22.909.

²¹ *See* Waiver Petition at 8.

²² Supplemental Petition at 7.

²³ *See* Cellular Mobile Systems of St. Cloud, LLC Comments (CMS Comments); Corr Wireless Communications, LLC (Corr Wireless) Reply Comments; and United State Cellular Corporation (USCC) Comments.

²⁴ *See, e.g.,* Corr Wireless Reply Comments at 1, 3; USCC Comments at 3-5. *See also* CMS Comments; Eatel Corporation Comments. Although CMS and Eatel comment that they should be granted a waiver of their porting and/or pooling obligations as well, we decline to treat these comments as petitions for waiver.

separate proceeding.²⁵ Conversely, the Michigan Public Service Commission (Michigan Commission) argues that the MSA/RSA distinction is irrelevant because wireless and wireline carriers participate in pooling in areas that are both metropolitan and rural.²⁶ Additionally, the Michigan Commission contends that granting the petition will encourage other carriers to request similar relief.²⁷

D. Waiver Standard

8. The Commission's rules may be waived when good cause is demonstrated.²⁸ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.²⁹ In doing so, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.³⁰ Commission rules are presumed valid, however, and an applicant for waiver bears a heavy burden.³¹ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.³²

III. DISCUSSION

9. We find that Western has not demonstrated good cause to justify waiving the pooling and porting requirements until May 24, 2004. In particular, we agree with MMC that Western has not shown that special circumstances warrant an extension of the pooling and porting deadlines until May 24, 2004 or that postponing porting and pooling will serve the public interest. We decline, however, to enforce Western's LNP and pooling obligations for sixty days following the release of this Order.

10. *Special Circumstances.* We are not persuaded by Western's claim that special circumstances exist because the costs of porting and pooling will outweigh the resulting numbering resource optimization benefits. First, Western has not demonstrated that it will sustain any costs that are different from, or more burdensome than, the costs of similarly situated Tier II wireless carriers. Like Western,

²⁵ MMC Comments at 3-4. MMC also argues that the Commission should address the MIN/MDN separation issue in this broader context. *Id.* at 4. MMC further argues that compliance with mandates such as LNP imposes undue hardships on small carriers and gives competing large carriers an advantage because they have a greater subscriber base to cover those costs. *Id.* at 4-5. MMC notes that large carriers have already requested LNP from smaller carriers, even in markets where the large carriers hold no numbering resources in the same rate center as the small carrier as well as markets where large carriers do not hold a CMRS license. *Id.* The Bureau declines to address these issues because the Bureau believes that such issues are best addressed outside of the context of a waiver petition.

²⁶ Michigan Commission Comments at 2.

²⁷ *Id.* at 3.

²⁸ 47 C.F.R. § 1.3; *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

²⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (*Northeast Cellular*).

³⁰ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

³¹ *WAIT Radio*, 418 F.2d at 1157.

³² *Id.* at 1159.

these Tier II carriers also must spread their costs over fewer customers than carriers operating in more densely populated areas.³³ In addition, even rural telephone companies and Tier III wireless providers, which are explicitly exempt from the pooling requirement, must implement and bear the costs of pooling and LNP if they receive a request to implement LNP. Western, as a Tier II carrier, serves approximately one million customers,³⁴ at least 500,000 more than the largest Tier III wireless carrier.³⁵ Further, in the *Verizon Wireless LNP Forbearance Order*, some commenters provided evidence that costs to implement porting would not be nearly as burdensome as certain carriers claimed.³⁶ We do not believe that the burdens will disproportionately affect Western as compared to other carriers. We therefore find that Western has not demonstrated special circumstances.

11. We also disagree that special circumstances exist because Western must satisfy other important regulatory obligations. As discussed in the *Verizon Wireless LNP Forbearance Order*, carriers have received extensions for other regulatory obligations such as E911 and CALEA.³⁷ In addition, the Commission stated that “. . . absent extraordinary circumstances, we expect wireless carriers to comply with the schedule set forth in [the *Verizon Wireless LNP Forbearance Order*].”³⁸ We find that the presence of other regulatory obligations constitutes neither special nor extraordinary circumstances. Western has had sufficient notice and time to plan for and implement porting and pooling in addition to satisfying its other regulatory obligations.

12. We further find that operating in RSAs does not constitute special circumstances justifying exemption from the pooling and porting requirements and, therefore, reject Western’s and other commenters’ arguments regarding RSAs. Section 22.909 of the Commission’s rules narrowly defines RSAs as cellular markets, which are geographic areas utilized by the Commission for cellular licensing purposes.³⁹ Because pooling and porting policies are independent from cellular licensing, the RSA definition does not affect the MSA definition used for numbering resource optimization purposes. Therefore, carriers operating in RSAs that are overlapped by a top 100 MSA are not exempt from the porting and pooling requirements.

13. Finally, we reject Western’s claim that it faces special circumstances because it did not receive sufficient notice that its service areas would be included in the top 100 MSAs. The Commission first indicated its intention to tie the pooling deployment schedule to the largest 100 MSAs in the *Numbering Resource Optimization Notice of Proposed Rulemaking* in 1999.⁴⁰ The Commission later

³³ See Waiver Petition at 7.

³⁴ *Id.* at 2.

³⁵ Tier III wireless carriers provide service to 500,000 or fewer customers. See *E911 Stay Order*, 17 FCC Rcd at 14847.

³⁶ *Verizon Wireless LNP Forbearance Order*, 17 FCC Rcd at 14984-14985.

³⁷ *Id.* at 14985.

³⁸ *Id.*

³⁹ See 47 C.F.R. § 22.909.

⁴⁰ See *Numbering Resource Optimization*, Notice of Proposed Rulemaking, 14 FCC Rcd 10322, 10386 (1999) (*Numbering Resource Optimization Notice of Proposed Rulemaking*).

clarified that the top 100 MSAs included those MSAs that were used to determine the scope of LNP deployment as well as all areas in any subsequent U.S. Census updates.⁴¹ We agree with the Michigan Commission that although the Commission reconsidered whether CMSAs should be included in the top 100 MSA list, the carriers still needed to comply with the MSA list in the *Numbering Resource Optimization Third Report and Order*.⁴² In fact, pooling has already commenced in most (if not all) of the rate centers listed in Western's Supplemental Letter.⁴³ In addition, with regard to LNP, wireless carriers have been on notice since 1999 to prepare for implementation of LNP. Thus, Western has had sufficient time to prepare for both pooling and LNP.

14. *Public Interest.* We also conclude that an extension of the porting and pooling deadlines until May 24, 2004 would not serve the public interest because it unnecessarily delays the benefits to the public. The portability requirement, as noted previously, has been delayed since 1999.⁴⁴ A further delay of porting could unnecessarily harm competition and consumers.⁴⁵ Portability will promote competition by allowing consumers to move to carriers that would better serve consumers' needs without having to make the difficult choice to give up their numbers.⁴⁶ Thus, we find that the public interest would be served by implementing porting as soon as possible.

15. We further find that the public interest is not served by unnecessarily delaying the implementation of pooling because, as the Commission has previously stated, wireless carriers should participate in pooling as soon as possible so that numbering efficiencies may be realized.⁴⁷ We believe that Western holds a sufficient number of thousands-blocks (over 100) in pooling areas for those efficiencies to be realized. We conclude that granting Western's request to extend the pooling requirement would be inconsistent with the Commission's policy to promote competition and efficient number use.

16. Although we are not persuaded that a waiver of the porting and pooling requirements until May 24, 2004 is justified, we decline to enforce Western's LNP and pooling obligations for sixty days following the release of this Order. We find that some limited time to allow Western to make the necessary preparations to implement LNP and donate blocks for pooling is reasonable to ensure compliance with our rules.⁴⁸ Non-enforcement for sixty days will also help to avoid any network

⁴¹ See *Numbering Resource Optimization*, Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200, 17 FCC Rcd 252, 307 (2001) (*Numbering Resource Optimization Third Report and Order*).

⁴² Western no longer seeks an exemption for those areas that are part of CMSAs because the Commission determined that CMSAs should not be included in MSAs unless included by a state commission. See Supplemental Letter; see also *Numbering Resource Optimization Fourth Report and Order*, 18 FCC Rcd at 12480.

⁴³ Supplemental Letter at 2-3. Pooling has commenced in over 200 area codes. This information is available at www.nationalpooling.com.

⁴⁴ See *infra* paragraph 2, note 6.

⁴⁵ *Verizon Wireless LNP Forbearance Order*, 17 FCC Rcd at 14984.

⁴⁶ *Id.*

⁴⁷ *Numbering Resource Optimization Third Report and Order*, 17 FCC Rcd at 263.

⁴⁸ See LNP Implementation Letter at 1-2.

disruptions, maximize trouble-free operation of LNP and pooling, and ensure that customers' requests for services will not be delayed due to carriers' difficulty in obtaining numbering resources. Accordingly, within sixty days from release of this Order, Western must commence pooling in all currently-pooled rate centers in which it operates and comply with the LNP requirements in the top 100 MSAs.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that, pursuant to authority contained in sections 1, 4(i), 251, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 251, 332, and the authority delegated under sections 0.91, 0.291, and 52.9(b) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 52.9(b), the petition filed by Western Wireless is DENIED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

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