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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 95-116
	)	RM 8535
Telephone Number Portability	)	

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COMMENTS OF OMNIPOINT COMMUNICATIONS, INC.

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys, files these comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above-captioned proceeding.[1]

SUMMARY

The Telecommunication Act of 1996 requires the Commission to establish rules for the costs of telephone number portability to "be borne by all telecommunications carriers on a competitively neutral basis." 47 U.S.C. § 251(e)(2). Omnipoint submits that this statutory directive requires for the Commission to take two broad actions in this proceeding.

First, each carrier should be required to pay an equitable portion of the costs of facilities shared by all carriers, such as the costs of creating, maintaining, and administering a neutral database for number portability. Omnipoint believes that a per-query charge is more consistent with the statutory objectives of competitive neutrality than the proposed gross revenues charge, and that all telecommunications carriers that query the database should pay the charge.

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1 "In the Matter of Telephone Number Portability," First Report and Order and Further Notice of Proposed Rulemaking, CC Dkt. No. 95-116, RM 8535, FCC 96-286, ¶¶ 199-230 (rel. July 2, 1996).

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Additionally, the payment methodology needs to be simple and should not disclose competition-sensitive information.

Second, competitive neutrality also dictates that each competitor in a local exchange market bear the costs of improving its own network; carrier-specific costs -- whether directly related to number portability or not -- should be paid by each competing carrier alone. Otherwise, some carriers would be forced to subsidize their competitors' network upgrades in violation of the principle of competitive neutrality and the 1996 Act's intended purpose: the creation of local exchange services driven by market demand, not regulatory subsidies. Because market demand is created through offering a service or set of services at a price that beats the competition, proposals of "pooling" or spreading the costs of some carriers' network upgrades across all carriers works against the Congressional objective.

DISCUSSION

I. Each Carrier Competing In A Local Exchange Market Should Pay an Equitable Share of Common Costs for Number Portability in that Market

The Commission seeks comment on several proposals for sharing the costs of the database facilities used by all carriers. FNPRM at ¶¶ 212-220. The Commission asks what method of cost sharing is most appropriate, who should be required to pay a share of common costs, and how best to ensure compliance with the rules in a competitively neutral manner. Id. Omnipoint believes that the most appropriate way to recover costs is to charge each carrier a fixed fee for each query that the carrier makes to the database. The fixed per query fee would incorporate a ratable portion of non-recurring costs, recurring monthly maintenance costs, and costs associated with uploading and downloading database information.

Omnipoint believes that the Commission's tentative conclusion that common costs should be allocated "in proportion to each telecommunication carrier's total gross revenues minus charges paid to other carriers," FNPRM at ¶ 213, would place new entrants and wireless providers at a competitive disadvantage. Wireless providers will likely charge each customer a

higher fee for local exchange service than the incumbent wireline LEC charges its average residential customer. A nominal price differential would persist even in a fully competitive market because wireless services offer added functionality, more technically-advanced features, and wireless providers must pay tremendous build-out and CMRS license fee costs. Therefore, under a gross revenue-based formula, wireless providers would pay more of the common costs on a per-subscriber basis than wireline carriers. Such a gross revenue charge, therefore, is not technology-neutral, because it allocates a disproportionate share of common costs to wireless carriers, i.e., an incumbent LEC will pay less than a wireless carrier with the same number of subscribers. Moreover, a gross revenue formula would interfere directly with carriers' pricing decisions, since a higher retail price will result in a higher common cost burden. Omnipoint believes that a per-query charge would be fair to all carriers and avoid unintended effects on a carrier's retail pricing decisions.

The Commission also should require that, consistent with the statutory language, all "telecommunications carriers" pay for the common costs of number portability, including resellers and IXCs.[2] See 47 U.S.C. §251(e)(2). As a matter of statutory construction, Congress chose to require that all "telecommunications carriers" pay for the costs of number portability, and this term includes carriers such as resellers and IXCs. 47 U.S.C. § 153(44). Significantly, Congress chose not to limit the cost participants to only those carriers which provide "telephone exchange services." Id. at § 153(47). This Congressional decision must be interpreted in a meaningful way by the Commission. See MCI Telecommunications Corp. v. AT&T, 114 S. Ct. 2223, 2232 n.4 (1994) (FCC and courts "are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those

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2 To the extent that an information service provider, such as a 411 service provider, also provides a telecommunications service to transport a query to the independent database, it also should be subject to the per-query charge.

purposes."); City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588, 1593 (1994) ("'[I]t is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another'") (citations omitted)).

Finally, the Commission's cost-recovery mechanisms should minimize the reporting burden and should not force carriers to disclose competitively sensitive information. Again, the per-query method would allocate charges in a straightforward manner based on the number of queries processed for each carrier. Charges could be assessed on a monthly basis, with adjustments for the costs reassessed annually to take account of changes in non-recurring and administrative expenses and the costs of necessary improvements to the database facilities. While the Commission tentatively favored a contribution system based on gross revenues, disclosure of gross revenues would generate significant administrative costs as a result of the need to police each carrier's calculation and reporting methods. The gross revenue figures would be competitively sensitive, so the Commission would have to keep each carrier's submission secret, creating more administrative problems. At the very least, the Commission should ensure that carriers' gross revenue information is protected and confidential. See 47 C.F.R. § 0.459.

II. "Competitive Neutrality" Means that No Carrier Should Be Required to Pay For Improvements to A Competitor's Network

Omnipoint strongly urges the Commission to "require individual carriers to bear their own costs of deploying number portability in their networks." FNPRM at ¶ 221. The alternative -- pooling the costs of all carriers and spreading them among all would-be competitors -- would eviscerate local competition, work at cross purposes to the 1996 Act, and invite abuse.

In a truly competitive environment, each carrier makes its own system upgrade decisions and bears its own costs, including the deployment of SS7, advanced intelligent network services, and upgrades in switching capabilities. When each carrier is forced to bear the full costs of its network decisions, those decisions are economically efficient and maximize consumer benefit. A carrier who has already developed a system that can accommodate long-term number portability

requirements should not be required to underwrite the costs of bringing the networks owned by incumbent LECs into compliance as well. Competitive neutrality exists only when each carrier is forced to accept the market-based benefits and burdens flowing from its investment decisions. By contrast, forcing one competitor to absorb the adverse consequences of the other carrier's shortsighted network architecture deployment decisions breaks down the fundamental risk/return associated with competitive markets. Any rule requiring carriers who have invested in advanced network technology to pay for the decision of their entrenched incumbent competitors to avoid upgrading their systems would reinforce the pattern of subsidization and oligopolistic markets that have characterized local exchange service in the past, a move directly contrary to the purposes of the 1996 Act.

A pooled cost rule would mean that the improvements paid for by all competitors would become the property of and part of the value of individual carriers' networks, but the profits from those investments would certainly not be shared equally among competitors. With a pooling scheme, some carriers in a given market would be able to (i) make their competitors pay for their own failure to upgrade their networks, and then (ii) retain the profits and value resulting from the upgrades financed by their competitors. This outcome is particularly offensive because the pooled subsidies will flow mostly in the direction of incumbent LECs while draining the resources of new entrants with more efficient and modern networks. While the Commission has pledged to encourage the entry of new service providers to break up the local exchange monopoly, potential entrants cannot afford to subsidize their entrenched competitors on top of the enormous spectrum license fees and build-out costs they must bear to begin service. A rule that compels new entrants to pay for incumbent LECs' past decisions not to upgrade their systems (decisions that have frustrated earlier attempts to provide local competition) effectively would ask the new entrant to pay twice: once for the costs that the absence of number portability has imposed on its current business, and again for the costs of updating the incumbent's network.

The "pooling" plan also fails to compensate carriers that have already deployed networks capable of number portability. These carriers have exercised the foresight to plan for number portability and invested substantial resources to provide it, and they are at least as deserving of compensation (plus a reasonable return on that investment) as the carriers who failed to act earlier. If the Commission decides that less forward-looking carriers should receive subsidies for future network upgrades, then fairness and rational economic principles dictate that all carriers, including those that planned in advance, should be compensated under the pooling plan. However, if all carriers are properly entitled to compensation from the "pool" and all carriers must also pay into the "pool," then it seems eminently more reasonable to simply require all carriers pay their own costs, and avoid the transactions costs and other detrimental effects of the "pool" entirely.

Finally, cost pooling is undesirable because it would create enormous potential for abuse and raise costs of reporting, administering, and compliance.[3] A carrier that avoids implementing a cost-effective upgrade plan because it assumes that it will simply be able to charge its competitor evinces a sense of entitlement that presents a substantial likelihood that it will attempt to overcharge the "pool." In light of this danger, the Commission and the NANC or some other administrator would be forced to expend significant resources simply preventing abuses, in addition to collecting and disbursing the funds. This policing may require physical inspections of a carrier's network, as well as federal regulatory oversight of the carrier's purchasing decisions, network upgrade deployment decisions, and adoption of cost-allocation rules. The time required to resolve these complex issues, even before they are implemented, would likely frustrate the

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3 With regard to recovering costs of number portability from consumers, FNPRM at ¶ 223, Omnipoint believes that carriers should be given the flexibility to recover their costs in any manner, either though the bundled cost of service or through a separate line-item charge, in accordance with existing federal and state laws.

Commission's long-term number portability timetable. In any case, it will certainly add delay and millions of dollars of costs to the deployment of long-term number portability, to the detriment of the American consumer.

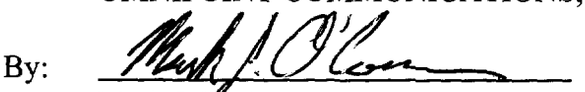
For these reasons, Omnipoint urges the Commission to require that each carrier pay its own network costs for compliance with long-term number portability.

CONCLUSION

Omnipoint urges the Commission to expeditiously establish a cost recovery scheme for long-term number portability that provides for equitable sharing of common costs among carriers and for each carrier to pay for its on network upgrades and improvements.

Respectfully submitted,

OMNIPOINT COMMUNICATIONS, INC.

By: 

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