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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
Telephone Number Portability	)	RM 8535
	)	

NYNEX REPLY COMMENTS

The NYNEX Telephone Companies

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Dated: September 16, 1996

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SUMMARY

The record confirms that the FCC should take a leadership role to ensure fair and reasonable allocation among all telecommunications carriers of the costs caused by the need to implement federally-mandated long-term number portability. The FCC should establish a framework whereby carriers will be able to actually recover these costs in a competitively neutral, simple manner from end users under a pooling mechanism with an explicit end user surcharge based on total telecommunications retail revenues. It should be emphasized that other approaches to cost recovery, such as allocators based on total gross telecommunications revenues minus charges paid to other carriers, would be unreasonable and not competitively neutral. Such approaches would allocate a disproportionate share of costs to incumbent LECs (who will receive a relatively higher share of revenues from exchange access, resale and unbundled network elements), and place them at a competitive disadvantage as interexchange carriers ("IXCs") and other entities enter the intrastate market including local and intraLATA toll. Those IXCs and other entities will pay charges to other carriers for exchange access, resale and unbundled elements (and subtract those charges out from their base for cost allocation). Also, incumbent LECs may very well be precluded from recovering number portability costs in rate elements for carrier access, resale and unbundled elements. This would require those incumbent LECs to recover the costs over a relatively smaller customer base compared to other carriers.

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NYNEX REPLY COMMENTS

I. INTRODUCTION

The NYNEX Telephone Companies[1] ("NYNEX") submit these Reply Comments to parties' comments filed August 16, 1996, in the above-captioned matter. The record confirms that the FCC should take a leadership role to ensure fair and reasonable allocation among all telecommunications carriers of the costs caused by the need to implement federally-mandated long-term number portability. The FCC should establish a framework whereby carriers will be able to actually recover these costs in a competitively neutral, simple manner from end users under a pooling mechanism with an explicit end user surcharge based on total telecommunications retail revenues. It should be emphasized that other approaches to cost recovery, such as allocators based on total gross telecommunications revenues minus charges paid to other carriers, would be unreasonable and not competitively neutral. Such approaches would allocate a disproportionate share of costs to incumbent LECs (who will receive a relatively higher share of revenues from exchange access, resale

[1] New England Telephone and Telegraph Company and New York Telephone Company.

and unbundled network elements), and place them at a competitive disadvantage as interexchange carriers ("IXCs") and other entities enter the intrastate market including local and intraLATA toll. Those IXCs and other entities will pay charges to other carriers for exchange access, resale and unbundled elements (and subtract those charges out from their base for cost allocation). Also, incumbent LECs may very well be precluded from recovering number portability costs in rate elements for carrier access, resale and unbundled elements. This would require those incumbent LECs to recover the costs over a relatively smaller customer base compared to other carriers.

II. THE RECORD SUPPORTS ALLOCATION AMONG ALL TELECOMMUNICATIONS CARRIERS OF COSTS INCURRED TO ESTABLISH LONG-TERM NUMBER PORTABILITY AND RECOVERY THROUGH AN EXPLICIT END USER SURCHARGE, WHERE SUCH ALLOCATION AND RECOVERY ARE BASED ON TOTAL TELECOMMUNICATIONS RETAIL REVENUES

A. Allocation Should Be Across All Telecommunications Carriers

Section 251(e)(2) of the Communications Act, added by the Telecommunications Act of 1996 (the "Act"), requires that "[t]he cost of establishing numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." [Emphasis added.] The plain language of the Act thus requires that all telecommunications carriers -- without exception -- bear number portability costs.[2] The small number of commentors[3] that urge exclusion of certain carriers do not reconcile their position with the plain language of the Act, and in essence offer a self-serving

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[2] See, e.g., NYNEX 5-6, Ameritech, Bell Atlantic, Cal. Dept. of Consumer Affairs, MFS, Omnipoint, TCG, Time Warner, USTA, WinStar. In its Second Report and Order released August 8, 1996 in CC Docket No. 96-98 (¶¶ 95, 342), the FCC has determined that the costs of number portability must be allocated to all telecommunications carriers in order to comply with the Act.

[3] See AirTouch Paging, ITCs, Inc., NCTA/OPASTCO, TRA.

position. Some of those commentors contend that only cost causers, such as LECs required to provide long-term number portability, should bear the costs.[4] This contention is wrong. Congress and the Commission have determined that "number portability will benefit all telecommunications carriers and users of telecommunications services through increased competition."[5] Thus, for example, number portability is expected to enhance telecommunications competition and consumer choice, reduce rates and increase usage, thereby benefiting all telecommunications carriers and their end users. All these beneficiaries should help bear the costs.

B. All Costs Caused By Number Portability Should Be Eligible For Recovery

NYNEX has demonstrated (pp. 3-5) that, in determining what number portability costs are eligible for recovery, the FCC should focus on whether costs are caused by the need to establish number portability, rather than whether costs are "directly related" to number portability.[6] GSA and TRA would exclude costs of upgrading network facilities and infrastructure, such as those used for number portability database inquiries, since such facilities and infrastructure will not be used solely to support number portability.[7] This position should be rejected, since those parties

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[4] See NCTA/OPASTCO, TRA.

[5] See Docket 95-116 Further Notice of Proposed Rulemaking ("Notice") released July 2, 1996, ¶ 213. From this perspective, Congress and the Commission are the true cost causers, not NYNEX.

[6] See also Bell Atlantic, BellSouth, USTA, U S WEST. Cf. Notice ¶ 227 (tentatively concluding that: the costs of upgrading SS7 capabilities or adding IN or AIN capabilities are associated with the provision of a wide variety of services, and will facilitate the ability of incumbent carriers to compete with the offerings of new entrants; and therefore that these costs are not directly related to the provision of number portability.)

[7] See also AT&T, MFS, Omnipoint, SCG, Inc. MFS goes so far as to baldly assert (p. 5): "MFS reiterates that carrier-specific costs associated with number portability should not be recoverable ...." [Emphasis in original.]

ignore cost causation and proper allocation,[8] thus inequitably shielding themselves from bearing an appropriate share of costs. If costs would not have been incurred but for the number portability mandate, or are incurred sooner than otherwise due to that mandate, then those costs should be eligible for recovery.[9] These parties do not explain how their proposals would provide for costs to be borne by all telecommunications carriers as required by the Act. FCC denial of carriers' opportunity to recover such costs caused by the need to implement federally-mandated long-term number portability, would raise a serious question as to the unlawful taking of private property for public use without just compensation.[10]

C. It Would Not Be Competitively Neutral For Carriers To Have To Bear Their Own Costs For Number Portability

Some parties argue that carriers should be forced to absorb their own, carrier-specific costs of implementing number portability.[11] Some of these parties contend, for example, that such costs are similar to the costs of other network upgrades.[12]

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[8] Although other services, in general, may use capabilities such as SS7 or SCPs, NYNEX has already taken the needs of other services into account in equipping its network. The costs discussed here are the costs above and beyond the needs of other services that implementation of number portability is generating. NYNEX should be afforded recovery of these costs from number portability "charges" themselves. If other services were to benefit from the installation of any of these capabilities in the future, NYNEX would be willing to allocate by usage percentage the costs that are shared in the network.

[9] See Ameritech, GTE, USTA, U S WEST.

[10] See Fifth Amendment to U.S. Constitution; Dolan v. City of Trigard, 114 S. Ct. 2309 (1994); Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989); FPC v. Hope Natural Gas Co., 320 U.S. 591 (1994). See also GTE, U S WEST.

[11] E.g., ALTS, AT&T, MCI, MFS, SCG, Inc., Time Warner, TRA.

[12] See AT&T, MCI.

These parties' position is contrary to the Act. Incumbent LECs such as NYNEX will have a much larger investment to implement number portability[13] than their competitors (such as CLECs and IXCs) that urge carriers' absorption of their own costs. Long-term number portability is a sweeping mandate imposed by Congress and the Commission which will entail substantial costs and have a profound impact on the telecommunications industry. Long-term number portability is not a discretionary network service deployed selectively by carriers to meet market demand.

Again, the Act requires that the costs of establishing long-term number portability be borne in a competitively neutral manner. As observed by the Commission, the competitive neutrality requirement dictates that no service provider be given an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber.[14] To require carriers to bear their own category 2 number portability costs (i.e., carrier-specific costs incurred to provide number portability, such as the costs to purchase the switch software implementing number portability), would plainly disadvantage incumbent LECs such as NYNEX and be contrary to the Commission's criteria for a competitively neutral cost recovery mechanism.[15] As pointed out by SBC, the intent of the Act is that "the Commission [should] establish regulations requiring full compensation to the LEC for costs of providing services related to ... number portability."[16] Congress did not intend for each carrier to simply absorb its own costs, especially the category 2

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[13] See Cal. Dept. of Consumer Affairs 20.

[14] See Docket 95-116 Report and Order released July 2, 1996 ("Order"), ¶ 132.

[15] See Order ¶¶ 132, 135.

[16] See SBC 4-5 & n. 9, citing from Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., Preamble (1996) (Joint Explanatory Statement) at p. 121 (House Amendment) and p. 122 (Conference Report).

costs which will represent the lion's share of costs. As NYNEX has shown (pp. 10-14), and as described infra, the Commission should recognize that, to maintain competitive neutrality, cost allocation and cost recovery are inseparable; and carriers' category 1[17] and category 2 costs should be pooled, and allocated and recovered based on total telecommunications retail revenues, which is a superior, competitively neutral allocator.

D. Total Telecommunications Retail Revenues Should Be The Basis For Allocating Number Portability Costs

NYNEX has shown that most category 1 and category 2 costs of establishing number portability should be pooled, and allocated among and funded by all telecommunications carriers based on their total telecommunications retail revenues.[18] We provided a numerical example illustrating that allocation and recovery based on total gross telecommunications revenues minus charges paid to other carriers, as proposed by the Commission with respect to category 1 costs[19] and now supported by several parties,[20] would not be competitively neutral. Under that approach, incumbent LECs would be allocated a disproportionately high share of costs, but could very well be limited to recovery over a disproportionately small base. This is because incumbent LECs would include carrier access revenues, as well as revenues from unbundled network elements and resale -- a relatively high proportion of their revenues compared to other carriers -- in their base for

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[17] Category 1 costs include shared costs incurred by the industry as a whole, such as those incurred by the third party administrator to build, operate and maintain the databases needed to provide number portability. See Notice ¶¶ 208, 212.

[18] NYNEX 7-10. See also Ameritech, Bell Atlantic, Pacific. Notably, AT&T has supported a retail revenues-based allocator in the context of the FCC's Universal Service Fund proceeding (CC Docket No. 96-45).

[19] See Notice ¶¶ 212-213.

[20] See MFS, TCG, TRA, Time Warner, USTA.

cost allocation. However, the carriers (e.g., IXCs, resellers) paying those revenues to incumbent LECs would subtract those revenues from their base for cost allocation. Thus, incumbent LECs would be allocated a disproportionately high share of costs, contrary to the principle of competitive neutrality. This inequity would be compounded by the fact that incumbent LECs may very well be unable to recover the costs in such rate elements as carrier access, unbundled network elements and resale. This is because the Commission's recent Interconnection/Section 251 Order,[21] under a strict reading, appears to preclude any subsidies from being placed on carrier charges.

For similar reasons, the FCC should reject various parties' proposals for allocation of category 1 costs based on carriers' total working telephone numbers,[22] number of access lines,[23] or based on purportedly cost-causative direct charges.[24] Such proposals would disadvantage incumbent LECs, as well as CLECs, and fail to apportion costs over all telecommunications carriers as required by the Act. Thus, for example, AT&T's and MCI's proposals would result in IXCs, resellers and certain other non-LEC carriers bearing no share of the costs of establishing regional SMS systems.[25] Again, federal policy under the Act is to allocate

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[21] See CC Docket No. 96-98, First Report and Order released August 8, 1996, ¶¶ 5, 713, 730.

[22] See GSA, MCI.

[23] See PUC of Ohio, SBC, Sprint.

[24] See AT&T, Colo. PUC, MCI.

[25] Under MCI's proposal to base allocation on total working numbers, it must be noted that since customers generally obtain numbers only from LECs (but obtain services from all telecommunications carriers), MCI would place a disparate cost burden on LECs. Thus, MCI would unfairly free itself from bearing costs. See also MFS 6 ("apportionment based on line counts fall disproportionately upon local telephone carriers and not on all telecommunications carriers, as required by the plain language of the Telecommunications Act.")

number portability costs across all telecommunications carriers, recognizing that number portability benefits all such carriers (even those that do not have to implement number portability) and all end users (even those that do not port their numbers).

E. A Pooling Mechanism Including Surcharge Funding Is Appropriate For Full And Fair Recovery Of Number Portability Costs

The pooling of carriers' category 1 and category 2 number portability costs through a neutral administrator, with the allocation and funding of those costs based on carriers' total telecommunications retail revenues and a mandatory end user surcharge applied on that basis, will appropriately fulfill the Act's requirement for costs being borne on a competitively neutral basis. There is significant support for pooling.[26] Even the California PSC, which expresses some concern with pooling, admits it is a competitively neutral way to ensure cost recovery.[27] Parties expressing concerns over pooling, e.g., that it may create incentives for carriers not to be efficient,[28] do not provide any substantiation or demonstration that such concerns cannot be effectively addressed.[29] Thus, for example, the Commission could issue evenhanded guidelines on how carriers should identify costs for inclusion in the pool, and could also provide for a cost audit process funded by carriers. The NANC, NANPA or other appropriate party selected by the Commission could oversee this process, with the oversight costs to be recovered in FCC regulatory fees. Further, no

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[26] See, e.g., Cal. PSC, Florida PSC, GSA, GTE, USTA.

[27] See Cal. PSC 12.

[28] See AT&T.

[29] To the extent all carriers must share costs, it is not explained why carriers would increase the total costs which would thereby increase their individual shares. Cost allocation among all carriers means that all carriers will be encouraged to keep down the costs.

party demonstrates that pooling would be competitively disadvantageous to any carrier(s) nor that pooling would fail to facilitate full cost allocation and recovery.

With respect to end user surcharges, NYNEX has recommended (pp. 10-14) that the Commission: find that the category 1 and category 2 costs of long-term number portability benefit both intrastate and interstate service users; and direct that a mandatory end user surcharge on total telecommunications retail revenues be implemented for explicit cost recovery. The surcharge would be uniform and applied to all end users of telecommunications service, regardless of their service provider, as a fixed percentage applied to their billed amounts. The revenues from the surcharge would then be pooled and shared by telecommunications carriers in proportion to their number portability allocated costs. The general approach of applying an end user surcharge for number portability cost recovery has received substantial support in the comments.[30]

TCG asserts (p. ii) that "explicit surcharges should not be permitted because they unfairly paint number portability as raising costs rather than an essential element of effective competition that allows all carriers to compete, thus bringing benefits to all customers." With similar rhetoric, ALTS warns (p. 4) that an explicit surcharge "would be inherently disparaging and misleading to consumers ...," and would let incumbent LECs "'badmouth' long-term number portability on end user bills ...."[31] This position is wrong. Each telecommunications carrier providing service would charge the same surcharge in the same way, thus maintaining competitive neutrality. Making the surcharge explicit and visible to end users will provide more information to end users, and will not

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[30] E.g., Ameritech, Bell Atlantic, Cal. Dept. of Consumer Affairs, Cincinnati Bell, Frontier, Pacific, SBC, USTA, U S WEST.

[31] See also AT&T, MCI, TCG 10 ("Explicit surcharges on customer bills are not competitively neutral as mandated by the Act because they would improperly promote hostility toward number portability as a concept and toward potential competitors as users of the numbers.")

carry a negative connotation. TCG, ALTS and other parties would apparently prefer to see number portability costs hidden in other carriers' rates. The California Department of Consumer Affairs incisively states (at n. 11) that it "does not believe that potential consumer dissatisfaction about the cost of providing LNP is an adequate basis for failing to disclose that cost to consumers." But embedding the costs in carriers' rates would create distortions in the marketplace, and remove direct accountability for the costs. This would be contrary to the overall approach of the Act, which is to make various subsidies or contributions explicit and visible.[32]

Accordingly, notwithstanding parties' contentions opposing pooling and end user surcharges, the FCC should adopt NYNEX's recommendations which will properly effect the recognition by Congress and the FCC that long-term number portability benefits all telecommunications carriers and end users. New entrants such as CLECs especially stand to benefit from number portability, and our proposal will ensure they bear a fair share of costs reflecting such benefits. At the same time, our proposal provides for allocation over a wide base of carriers and recovery over a wide base of customers, and ensures competitive neutrality. Finally, since our surcharge approach would be uniformly applied by telecommunications carriers, end users will not be encouraged to switch service providers just because of how number portability costs are recovered.[33] This will comport with the FCC's desire for competitively neutral cost recovery mechanisms not giving one service provider a cost advantage over another.[34]

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[32] As NYNEX has shown (pp. 12-13), its surcharge approach to number portability cost recovery is supported by the treatment of Universal Service under Section 254 of the Act.

[33] See also Cal. Dept. of Consumer Affairs, Cincinnati Bell, GTE, SBC.

[34] See Notice ¶ 210.

Under the NYNEX proposal, end users can switch carriers based upon competitive merits -- such as price and quality -- consistent with the pro-competitive goals of the Act.[35]

III. CONCLUSION

The FCC should provide for full and fair allocation and recovery of the costs caused by the need for telecommunications carriers to implement federally-mandated long-term number portability. Using a pooling mechanism administered by a neutral administrator pursuant to FCC oversight, the FCC can and should achieve this goal by directing that a mandatory, explicit end user surcharge be applied based on total telecommunications revenues. The Commission should reject those parties' comments which would exclude particular telecommunications carriers from bearing costs, place disparate cost burdens on particular carriers (such as incumbent LECs) or deny a competitively neutral means of actual monetary recovery.

Respectfully submitted,

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Dated: September 16, 1996

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[35] See Order ¶ 2, Notice ¶ 210.

CERTIFICATE OF SERVICE

I, Yvonne Kuchler, hereby certify that copies of the foregoing NYNEX REPLY COMMENTS in CC Docket No. 95-116 were served on the parties listed on the attached service list, this 16th day of September, 1996, by first class United States mail, postage prepaid, or by hand where noted.

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