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Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W. – Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket No. 95-116, Telephone Number Portability

Dear Mr. Caton:

This letter responds to BellSouth's August 5, 1997 memorandum¹ discussing the implications of the Eighth Circuit's recent decision in Iowa Utilities Board v. FCC² on the Commission's pending decision to establish cost recovery rules for permanent local number portability ("LNP"). Contrary to BellSouth's assertions, § 251(e)(2) unambiguously grants the FCC the power to determine how LNP-related costs will be allocated among carriers, and nothing in Iowa Utilities Board suggests any limitations on that authority. BellSouth's memo also makes the unsupported claim that § 251(e)(2) requires that Type II LNP costs be pooled and spread across all telecommunications carriers. In fact, treating Type II costs in the manner the memo proposes would not satisfy that section's requirement that LNP cost recovery be "competitively neutral."

I. The 1996 Act Expressly Authorizes The Commission To Prescribe Cost Recovery Rules for LNP

BellSouth's claim that Iowa Utilities Board somehow limits the Commission's authority to promulgate rules for LNP cost recovery is meritless. The Eighth Circuit's holding was confined to provisions of the 1996 Act that, according to that decision, do not confer jurisdiction on the FCC. The court explicitly acknowledged that the commission may prescribe rules that affect intrastate services or facilities in areas in which Congress grants it power to do so.

¹ See "Cost Recovery for Number Portability," an attachment to Letter from Cynthia Cox, Executive Director, Federal and State Relations, BellSouth, to William F. Caton, Acting Secretary, Federal Communications Commission, August 5, 1997 ("BellSouth Memo").

² No. 96-3321 (8th Cir. July 18, 1997).

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In the case of LNP cost recovery, it could not be clearer that the FCC has such authority³. The plain language of that section admits of no qualification or limitation: "The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." Indeed, Iowa Utilities Board twice refers to § 251(e)(2) as an example of an area in which "Congress expressly called for the FCC's involvement,"⁴ and the Eighth Circuit's decision in California v. FCC reiterates this conclusion.⁵

BellSouth's contrary argument is based entirely on a single passage from Iowa Utilities Board:

[C]ertain nonpricing provisions of the Telecommunications Act provide the FCC with much more direct and unambiguous grants of intrastate authority than the FCC's strained reading of subsections 251(d) and 251(c). For instance, subsection 251(b)(2) burdens LECs with '[t]he duty to provide ... number portability in accordance with requirements prescribed by the Commission.' 47 U.S.C.A. § 251(b)(2).⁶

BellSouth argues that the above reference to "nonpricing provisions" indicates that even in those areas over which the court held that the FCC has jurisdiction, such as LNP cost recovery, the Commission may not take any action that might "unduly" affect state rate making.⁷ But the snippet BellSouth cites applies by its express terms to § 251(b), not to the cost recovery provisions of § 251(e)(2). Moreover, prescribing a cost recovery mechanism for the implementation of number portability does not constitute rate making; and even if it did, the specific language of § 251(e)(2) would override any contrary implication as to the Commission's authority.

³ SBC stated in an August 6, 1997 *ex parte* letter that it also believes that §251(e)(2) grants the Commission "direct and unambiguous authority" over LNP cost recovery. Letter from Link Brown, Director, Federal Regulatory, SBC Communications, Inc., to William F. Caton, Acting Secretary, Federal Communications Commission, August 6, 1997, at 2.

⁴ Iowa Utilities Board, slip op. at 4 n. 10; see also id., slip op. at 12, n.23 ("The FCC is specifically authorized to issue regulations under subsections 251(b)(2) ... [and] 251(e)").

⁵ See California v. FCC, No. 96-3519 (8th Cir. August 22, 1997), slip op. at 4 (citing § 251(e)(2) among sections which "expressly call for the FCC's participation in implementing their requirements").

⁶ Iowa Utilities Board, slip op. at 6 (emphasis added).

⁷ See BellSouth Memo, pp. 4-6. BellSouth nowhere explains what might constitute an "undue" effect.

II. The Act Does Not Require That Type II Costs Be Pooled And Allocated Among Telecommunications Carriers

In addition to its discussion of the Eighth Circuit's decision, BellSouth's memo states *ipse dixit* that § 251(e)(2) requires the Commission to ensure that "all the costs of establishing number portability under section 251(b)(2) of the 1996 Act are borne by all telecommunications carriers."⁸ In fact, § 251(e)(2) does not require that costs be pooled and spread across all carriers, but merely that carriers bear LNP costs "on a competitively neutral basis." As AT&T has demonstrated (and four BOCs have agreed),⁹ pooling all LNP costs in the manner BellSouth suggests is not required for "competitive neutrality."

The BellSouth memo attempts to bootstrap its misreading of § 251(e)(2) to argue that all Type II costs must be allocated among all carriers.¹⁰ It would not be competitively neutral to permit recovery of Type II costs because such a policy effectively would force carriers to subsidize their competitors' network upgrades. The cost recovery regime BellSouth proposes would give carriers strong incentives to misallocate as "LNP costs" expenses not properly attributable to that service, or to engage in "gold plating" by over-engineering network upgrades, because the costs of those modifications would be paid for in part by other carriers. BellSouth's plan also would reward carriers that have not yet modernized their networks by permitting them to add upgrade costs to an LNP "pool." Perhaps most significantly, if carriers are allowed to recover Type II costs, the FCC and state commissions will be forced to wade into a quagmire of accounting and engineering questions as to whether the costs of particular network modifications should be allocated to an LNP pool, or treated as Type III costs and borne by an individual carrier

Sincerely,



cc: A. Richard Metzger
J. Schlichting
P. Donovan
N. Fried

⁸ Id., pp. 1-2 (emphasis in original).

⁹ See Attachment to Letter from Frank Simone, Regulatory Division Manager, Federal Government Affairs, AT&T, to William F. Caton, Acting Secretary, Federal Communications Commission, May 15, 1997, pp. 5-6 (citing comments and *ex parte* statements by PacTel, Ameritech, U S West, and SBC).

¹⁰ See BellSouth Memo, pp. 8-9.