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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop Code 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: CC Docket No. 95-116

Yesterday, September 22, Patricia Diaz-Dennis, Alan Ciamporcero, Zeke Robertson and the undersigned representing SBC/Pacific Bell met with Kathleen Franco and Commissioner Rachelle Chong to discuss issues in the above referenced docket.

The discussion focused on cost recovery for long term number portability. The attached document details the position taken by SBC/Pacific Bell on this issue.

Please include this letter and the attachments in the record of these proceedings in accordance with Section 1.1206(a)(1) of the Commission's Rules.

Acknowledgment and date of receipt of this transmittal are requested. A duplicate transmittal letter is attached concerning this matter.

Respectfully submitted,

Link Brown

Attachments

cc: Kathleen Franco

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THE FCC HAS "INTRASTATE" AND "INTERSTATE" JURISDICTION OVER NUMBER PORTABILITY—CONGRESS HAS PLACED IN ITS HANDS THE AUTHORITY TO "DETERMINE" THE MEANS OF COST RECOVERY, AND BASED UPON POLICY CONSIDERATIONS, IT SHOULD EXERCISE THAT AUTHORITY.

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SUMMARY

- THROUGH SECTION 251(e)(2) AND UNDER THE 8TH CIRCUIT'S RECENT RULINGS, THE COMMISSION HAS A "DIRECT AND UNAMBIGUOUS" GRANT OF INTRASTATE AUTHORITY TO DETERMINE A "COMPETITIVELY NEUTRAL" MEANS OF ALLOCATING NUMBER PORTABILITY COSTS. THIS GRANT OF AUTHORITY IS SUPPORTED BY THE POLICIES THAT THE COMMISSION CITED IN THE FIRST REPORT AND ORDER. HOWEVER, ALLOCATION WITHOUT RECOVERY--WHETHER FROM CARRIERS OR FROM CONSUMERS--IS MEANINGLESS, AND THE COMMISSION'S OWN STANDARDS FOR COMPETITIVE NEUTRALITY CANNOT BE MET WITHOUT COST RECOVERY.

  - The Commission has exercised extraordinary breadth in prescribing detailed requirements for number portability. So encompassing is the Commission's exercise of jurisdiction over the timing and technology of number portability that neither the states nor the telecommunications carriers that provide number portability have any material control over the implementation costs that must be incurred.

  - The Commission has been granted the statutory authority to "see the job through" by means of Section 251(e)(2). The Eighth Circuit opinions confirm that the Commission has an unambiguous and direct grant of intrastate jurisdiction over number portability cost recovery.

  - The policies the Commission espouses in the First Report and Order to support interim number portability cost recovery and the national rules for number portability implementation are equally applicable in this context.

- THE COMMISSION HAS DETERMINED IN THE FIRST REPORT AND ORDER ON RECOVERY OF INTERIM NUMBER PORTABILITY COSTS THAT SECTION 251(e)(2) REQUIRES THAT CARRIERS THAT INCUR NUMBER PORTABILITY COSTS "RECOVER" THOSE COSTS IN A COMPETITIVELY NEUTRAL MANNER.

- THE COMMISSION SHOULD CONCLUDE IN THIS PROCEEDING—CONSISTENTLY WITH THE DETERMINATIONS IN THE FIRST REPORT AND ORDER—THAT "COMPETITIVE NEUTRALITY" CANNOT BE MET WITHOUT A CARRIER'S ABILITY TO RECOVER ALL OF THE COSTS IT INCURS TO IMPLEMENT NUMBER PORTABILITY (BOTH TYPE I AND TYPE II COSTS).

LONG-TERM NUMBER PORTABILITY (LNP)—COST RECOVERY PRINCIPLES

THE COMMISSION HAS AMPLE SUPPORT IN THE TELECOMMUNICATIONS ACT FOR THE EXERCISE OF PLENARY JURISDICTION.

Sections 251(b) and (e)(2) contain substantially similar requirements that the FCC determine the means of number portability implementation. Accordingly, the FCC should construe the extent of its intrastate jurisdiction as substantially similar under both sections.

- Section 251(b)(2)—LECs are to provide, "to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."

- Section 251(e)(2)—requires that the costs of number portability must be "borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."

- In its review of the Interconnection Order in Iowa Utilities Board, et al., v. Federal Communications Commission, et al., the United States Court of Appeals for the Eighth Circuit cited Sections 251(b)(2) and (e) as provisions in the Act that grant the FCC "direct and unambiguous . . . intrastate authority." Iowa Utilities Board v. FCC, No. 96-3321 and consolidated cases, Slip. Op. at 103-05, nn. 10, 12 (8th Cir. July 18, 1997) (emphasis added).

- In reviewing the Commission's intraLATA dialing parity rules, the Eighth Circuit again pointed to Section 251(e) as an example of intrastate authority appropriately delegated to the FCC. California v. FCC, No. 96-3519 and consolidated cases, Slip Op. at 15-16 (8th Cir. August 22, 1997). The California court also had an opportunity to address directly the meaning of competitively neutral allocation in Section 251(e), but did not do so based upon ripeness concerns.

- As with its exercise of authority in determining the technical requirements, cost structure, and schedule for implementing LNP under Section 251(b)(2), the Commission has, therefore, a "direct and unambiguous grant of intrastate authority" over cost recovery under Section 251(e)(2).

LONG-TERM NUMBER PORTABILITY (LNP)—COST RECOVERY PRINCIPLES

In the First Report and Order, the FCC determined that Section 251(e)(2) is applicable to the recovery of interim number portability costs.

- In this context, the FCC concluded that "section 251(e)(2) gives [the FCC] specific authority to prescribe pricing principles that ensure that the costs of number portability are allocated on a 'competitively neutral' basis." First Report and Order at para. 126 (emphasis added).

- The FCC further concluded that under the authority set forth in Section 251(e)(2), it should "adopt guidelines that the states must follow in mandating cost recovery mechanisms for currently available number portability mechanisms." First Report and Order at para. 127. Though it permitted flexibility to the States, the FCC set forth a stringent competitive neutrality definition which in concert with the requirement that number portability costs be recovered from all telecommunications carriers eliminated many of the cost recovery mechanisms for interim number portability that the States had used.

- As a legal and policy matter, to use properly its Section 251(e)(2) authority, the FCC must in this proceeding determine, define, and prescribe--either at the federal or State level--an efficient and immediate mechanism for the recovery of number portability costs.

LONG-TERM NUMBER PORTABILITY (LNP)—COST RECOVERY PRINCIPLES

AS A POLICY MATTER THE COMMISSION SHOULD EXERCISE ITS PLENARY JURISDICTION OVER NUMBER PORTABILITY COST ALLOCATION AND RECOVERY

The FCC should not delegate to the States its clear responsibility to prescribe number portability requirements—including, perhaps most importantly, cost recovery.

- As the FCC has proclaimed, "We believe that Congress has determined that this Commission should develop a national number portability policy and has specifically directed us to prescribe the requirements that all local exchange carriers, both incumbents and others, must meet to satisfy their statutory obligations . . .. Consistent with the role assigned to the Commission by the 1996 Act, the record developed in this proceeding overwhelmingly indicates that the Commission should take a leadership role with respect to number portability. We, therefore, affirm our conclusion that we should take a leadership role in developing a national number portability policy. . . . Congress[] mandate[d the FCC] to prescribe requirements for number portability." First Report and Order at para. 36.

- The FCC also pointed out that it "believe[s] it is important that [the FCC] adopt uniform national rules . . . [because of the impact of number portability] on interstate, as well as local, telecommunications services." The FCC further opined that "allowing number portability to develop on a state-by-state basis could potentially thwart the intentions of Congress in mandating a national number portability policy, and could retard the development of competition in the provision of telecommunications services." First Report and Order at para. 37.

- These determinations are equally applicable to the FCC's duty under Section 251(e)(2).

LONG-TERM NUMBER PORTABILITY (LNP)—COST RECOVERY PRINCIPLES

The exercise of plenary jurisdiction is reasonable and appropriate and supported by the record in this Docket as the Commission has cited it.

- Number portability has ubiquitous, "nationwide" impact; virtually all calls require the use of the system of databases and signaling systems. The service itself is not one that is provided only to those consumers that port their telephone numbers to facilities-based carriers. Instead, number portability mechanisms permit all customers of N-1 carriers to reach consumers whose telephone numbers have been ported.

- All "N-1" telecommunications carriers (ILECs, CLECs, IXCs, cellular and PCS providers) require the use of number portability infrastructure to complete calls.

- Virtually all calls of all customers in number portability areas or calls to number portability areas, intrastate and interstate, will require use of number portability infrastructure:
  - In number portability areas;
  - Around number portability areas;
  - Interexchange calls--both interstate AND intrastate;
  - Cellular/PCS calls.

- Only the FCC has the necessary jurisdiction to regulate "all telecommunications carriers" as to number portability.

LONG-TERM NUMBER PORTABILITY (LNP)—COST RECOVERY PRINCIPLES

The FCC has said that all consumers—both in and out of number portability areas—will benefit from competition fostered by number portability.

- The FCC has said that it agrees with that portion of the legislative history of the 1996 Act that finds that number portability is necessary for competition ("To the extent that customers are reluctant to change service providers due to the absence of number portability, demand for services by new service providers will be depressed. This could well discourage entry by new service providers and thereby frustrate the pro-competitive goals of the 1996 Act." First Report and Order at para. 31. See also para. 2.).

- The FCC acknowledges that it "has a significant interest in promoting the nationwide availability of number portability due to its impact on interstate telecommunications . . .. based [upon] four grounds: (1) our obligation to promote an efficient and fair telecommunications system; (2) the inability to separate the impact of number portability between intrastate and interstate telecommunications; (3) the likely adverse impact deploying different number portability solutions across the country would have on the provision of interstate telecommunications services; and (4) the impact that number portability could have on the use of the numbering resource, that is, ensuring that the use of numbers is efficient and does not contribute to area code exhaust." First Report and Order at para. 32.

LONG-TERM NUMBER PORTABILITY (LNP)—COST RECOVERY PRINCIPLES

The FCC has gone far down the path of establishing uniform national rules and policies for number portability.

- Using the Congressional command that number portability be implemented in accordance with requirements prescribed "by the Commission," the FCC has:

  - Defined the technical attributes of number portability in a manner that, within the other requirements of the First Report and Order and the Memorandum Opinion and First Order on Reconsideration, limit local exchange companies to the "local routing number" technology;

  - Precluded another technology that in conjunction with LRN was demonstrated to diminish costs (if in disputed amounts);

  - Defined with specificity the time within which all local exchange carriers must deploy number portability technology, thereby increasing the demand upon vendors of software and hardware, thereby driving up the market value of those items and their cost to consumers;

  - Precluded the States from interfering with its planned deployment—even if the States chose to do so to diminish costs.

  - Through the Second Report and Order, the Commission has solidified its hold on number portability deployment, e.g.:

    - BOC Regions for number portability administrators;
    - Lockheed and Perot as suppliers;
    - N-1 architecture;
    - NANC "national oversight" of number portability administration; and
    - "uniform national standards."

THE COMMISSION MUST UPHOLD ITS OWN TEST OF "COMPETITIVE NEUTRALITY" IN IMPLEMENTING COST RECOVERY. THE FCC'S FAILURE TO MAKE APPROPRIATE COST RECOVERY AVAILABLE TO ALL CARRIERS--BUT ESPECIALLY INCUMBENT LOCAL EXCHANGE COMPANIES WHO WILL INCUR THE BULK OF TYPE II COSTS-- WOULD UNDERMINE COMPETITIVE NEUTRALITY.

LONG-TERM NUMBER PORTABILITY (LNP)—COST RECOVERY PRINCIPLES

A competitively neutral cost recovery mechanism should not:

- "give one service provider an appreciable, incremental cost advantage over another service provider, when competing for a specific subscriber"; or
- "have a disparate effect on the ability of competing service providers to earn a normal return."

First Report and Order at paras. 132-34.

LONG-TERM NUMBER PORTABILITY (LNP)—COST RECOVERY PRINCIPLES

The FCC should adopt a recovery mechanism that provides expeditious recovery in order to avoid violating the FCC's own competitive neutrality principles.

- If the FCC does not act expeditiously, a carrier's ability to earn a normal return in the year costs are incurred will be precluded—huge expense will be incurred without a defined means of recovery. Delegation to the States without, at a minimum, specific direction, could have the same effect.

- Failure to provide for ILECs' number portability cost recovery could damage competition by depressing market prices for competitive services. CLECs will have a share of number portability costs allocated to them and will incur comparatively small number portability costs themselves. To the extent that ILECs are hindered in their ability to recover the costs of implementing number portability, so too, will CLECs be hindered when they must price their unregulated services in competition with ILEC services that are depressed by the inability to recover costs. Both ILEC and competitive LEC prices will include the new, implicit "number portability subsidy."

- The 1996 Act contemplates that local exchange carriers will be required to install number portability capabilities that may serve to facilitate competition, but competitive neutrality is threatened where carriers are required to expend large sums for the benefit of competitors without contemporaneous cost recovery.

THE COMMISSION SHOULD DETERMINE THAT CARRIERS MAY RECOVER THEIR NUMBER PORTABILITY COSTS BEGINNING IMMEDIATELY

LONG-TERM NUMBER PORTABILITY (LNP)—COST RECOVERY PRINCIPLES

THE COMMISSION HAS THE DUTY TO "DETERMINE" THE COMPETITIVELY NEUTRAL METHOD OF NUMBER PORTABILITY COST RECOVERY. EVEN IF THE STATES DO NOT REGULATE THEM, ALL TELECOMMUNICATIONS CARRIERS HAVE THE NEED TO RELY UPON NUMBER PORTABILITY TECHNOLOGY TO COMPLETE CALLS AND THE OBLIGATION TO PAY FOR IT ON A "COMPETITIVELY NEUTRAL" BASIS. THE COMMISSION SHOULD, THEREFORE, IMPLEMENT A FEDERAL COST RECOVERY SCHEME.

- THROUGH A FEDERAL, MANDATORY, UNIFORM, END-USER CHARGE PAID BY CUSTOMERS ON THE BASIS OF "ELEMENTAL ACCESS LINES," AS SBC PROPOSED IN ITS COMMENTS AND REPLY COMMENTS IN THIS PROCEEDING

- THROUGH NEW PART 69 RATE ELEMENTS (END-USER, RESELLER, AND QUERY-BASED), AS PROPOSED BY SOUTHWESTERN BELL TELEPHONE COMPANY AND PACIFIC BELL IN THEIR RECENT TARIFF FILINGS

- THROUGH A COMBINATION OF FEDERAL AND STATE TARIFF OFFERINGS COMPARABLE TO THOSE PROPOSED BY SOUTHWESTERN BELL TELEPHONE COMPANY AND PACIFIC BELL THAT PERMIT CARRIERS TO INSTITUTE MANDATORY, NEW SERVICE RATE ELEMENTS

- THROUGH A COMBINATION OF FEDERAL AND STATE TARIFF OFFERINGS THAT PERMIT CARRIERS TO OBTAIN COMPLETE COST RECOVERY VIA A MANDATORY, NEW SERVICE RATE ELEMENT THAT IS BASED UPON A PERCENTAGE OF RETAIL REVENUES REFLECTED IN A GIVEN CUSTOMER'S BILL

REQUIRING LNP COSTS TO BE RECOVERED THROUGH SOURCES OTHER THAN NEW RATE ELEMENTS ONLY CREATES AN ADDITIONAL, IMPLICIT SUBSIDY, WHICH ULTIMATELY WILL MAKE IT MORE DIFFICULT FOR NEW ENTRANTS TO COMPETE. THE TELECOMMUNICATIONS ACT REQUIRES SUBSIDIES BE ELIMINATED.

State LNP Cost Recovery Concerns

- States in SBC/Pacific/Nevada territories do not have a mechanism to recover LNP costs through existing service rates.
- State statutes and regulatory rules do not permit rate increases on existing services that will adequately allow LNP cost recovery.
- State regulators are expecting the FCC to determine how LNP costs will be recovered.
- Deferral of LNP cost recovery to the state jurisdictions could put SWBT in a statutory and regulatory "Catch 22."
- If the FCC defers any LNP cost recovery to the states, the FCC must provide clear and concise guidelines on the methods to be employed by the states to implement full LNP cost recovery.
- Because of existing state statutes, many states may not have a viable cost recovery method unless the FCC declares LNP to be a mandatory new service applying to all customers.

State LNP Cost Recovery Concerns

Arkansas

Current Regulation and State Statutes

- Price Cap Regulation
- Local Exchange Service and Access Services rates frozen until 2-4-2000
- No method to increase existing rates to recover LNP costs
- There is no "state" ECUL and none is currently permitted
- New services are permitted

What is needed

- Best case, The FCC provide for all LNP cost to be recovered through federal charges
- Next best, The FCC provide clear and direct mandates to the states that LNP is a mandatory new service and costs must be recovered by a competitively neutral charge to customers

State LNP Cost Recovery Concerns

California

Current Regulation and State Statutes

- All Local Exchange Services rates are capped
- Price Caps on Access Services
- No method to increase existing rates to recover LNP costs
- There is no "state" ECUL and none is currently permitted
- New services are permitted

What is needed

- Best case, The FCC provide for all LNP cost to be recovered through federal charges
- Next best, The FCC provide clear and direct mandates to the states that LNP costs must be recovered from a competitively neutral surcharge applying to all customers

State LNP Cost Recovery Concerns

Kansas

Current Regulation and State Statutes

- Price Cap Regulation
- Under Price Cap Residence and Single Line Business local exchange rates capped until 1-1-2000
- Statutes require SWBT to move Access rates to parity with federal rates
- Very limited method to increase existing rates to recover LNP costs
- There is no "state" ECUL but there is a state USF assessment
- New services are permitted

What is needed

- Best case, The FCC provide for all LNP costs to be recovered through federal charges
- Next best, The FCC provide clear and direct mandates to the states that LNP is a mandatory new service and costs must be recovered by a competitively neutral charge to customers
- Kansas does have the ability to raise rates if LNP is declared an "exogenous" cost factor

State LNP Cost Recovery Concerns

Missouri

Current Regulation and State Statutes

- Rate of Return Regulation (ROR) but Price Cap regulation pending
- Under ROR no "single issue" ratemaking permitted, therefore no rate increases allowed just for LNP cost recovery
- Under Price Cap no rate increases permitted on Local Exchange Service and Access Service until 1-1-2000 and no increases permitted on other services until 1-1-1999
- No method to increase existing rates to recover LNP costs
- There is no "state" ECUL and none is currently permitted
- New services are permitted

What is needed

- Best case, The FCC provide for all LNP costs to be recovered through federal charges
- Next best, The FCC provide clear and direct mandates to the states that LNP is a mandatory new service and costs must be recovered by a competitively neutral charge to customers

State LNP Cost Recovery Concerns

Nevada

Current Regulation and State Statutes

- Price Cap Regulation
- All Basic Local Exchange service capped
- Access Service rates in parity with interstate rates
- No method to increase existing rates to recover LNP costs
- There is no "state" ECUL and none is currently permitted
- New services are permitted

What is needed

- Best case, The FCC provide for all LNP cost to be recovered through federal charges
- Next best, The FCC provide clear and direct mandates to the states that LNP costs must be recovered by a competitively neutral surcharge to customers

State LNP Cost Recovery Concerns

Oklahoma

Current Regulation and State Statutes

- Rate of Return Regulation (ROR) but cannot conduct a rate of return proceeding before 2-5-2001
- Under ROR no "single issue" ratemaking permitted, therefore no rate increases allowed just for LNP cost recovery
- Local rates are frozen
- Access rates must be in parity with interstate (or less)
- No method to increase existing rates to recover LNP costs
- There is no "state" ECUL and none is currently permitted
- New services are permitted

What is needed

- Best case, The FCC provide for all LNP costs to be recovered through federal charges
- Next best, The FCC provide clear and direct mandates to the states that LNP is a mandatory new service and costs must be recovered by a competitively neutral charge to customers
- Oklahoma does have a Universal Service Fund that could provide a competitively neutral mechanism to recover LNP cost if directed by the FCC

State LNP Cost Recovery Concerns

Texas

Current Regulation and State Statutes

- Price Caps on all Local Exchange Services (no rate increases until 1999)
- Price Caps on Access Services (no rate increases until 1999)
- Minimal increases to discretionary services permitted
  (Only allowed after numerous criteria are met)
- No method to increase existing rates to recover LNP costs
- There is no "state" ECUL and none is currently permitted
- New services are permitted

What is needed

- Best case, The FCC provide for all LNP cost to be recovered through federal charges
- Next best, The FCC provide clear and direct mandates to the states that LNP is a mandatory new service and costs must be recovered by a competitively neutral charge to customers