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EX PARTE OR LATE FILED

Bell Atlantic

February 24, 1998

Ex Parte

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Number Portability Cost Recovery - Docket No. 95-116

Dear Ms. Salas:

On Monday, February 23, 1998, on behalf of Bell Atlantic, John Goodman, Michael Glover and the undersigned, met with Christopher Wright, General Counsel, Suzanne Tetreault, Debra Weiner, Stewart Block and Aaron Rappaport, all of the Office of General Counsel, to discuss Bell Atlantic's position on number portability cost recovery.

This letter briefly summarizes the points that we made in our discussion yesterday.

The Telecommunications Act of 1996 requires local exchange carriers to provide telephone number portability in accordance with requirements prescribed by the Commission. It also requires, in section 251(e)(2), that the Commission establish a system for all telecommunications carriers to bear the substantial costs of number portability "on a competitively neutral basis."

In July 1996, the Commission ordered the industry to deploy number portability on an expedited schedule — starting in 15 months in the largest cities in the country and spreading through the 100 largest MSAs over the following 15 months. The industry has begun to provide number portability under this schedule. Bell Atlantic, for example, made the first commercial offering last October, and has already spent hundreds of millions of dollars to obey the Commission's mandate.

We understand that one proposal in this proceeding would have incumbent LECs recover their number portability costs through a line-item charge on end users' bills. As a general matter, this concept is sound because it is end users who will benefit from the greater ease in changing carriers. Under one version of this proposal, however, incumbent LECs would have to defer collecting this charge from most of their customers for several years. This would be inconsistent with the Act, arbitrary and capricious and raise serious constitutional issues.

Section 251(e)(2) of the Act prescribes that the Commission must act in a "competitively neutral" manner. It cannot be competitively neutral to allow some carriers to recover their costs today and to make other carriers wait years for recovery. This would create a plain competitive disparity. Bell Atlantic would not be able to recover its sizable investment in number portability for several years and would not be able to reinvest that money to offer new services or to make its existing services more attractive in the marketplace. Bell Atlantic's competitors would not be similarly restricted.

The possibility that Bell Atlantic's inability to recover its costs might constrain the amount by which its competitors could raise their prices to do so is beside the point. These competitors would still be free to recover these costs; Bell Atlantic would be prevented by law from doing likewise.

In any event, so long as Bell Atlantic is required to charge averaged prices, competing local carriers will be able (at a minimum) to recover these costs from relatively low cost customers while still pricing their services at or below Bell Atlantic's averaged rates. And recent history shows that long distance companies can and will recover these costs from their own end user customers. In response to the Commission's recent universal service and access reform orders, for example, the long distance carriers added an item to their bills to recover the added costs they supposedly incurred – and more (to the tune of some $2.3 billion in price increases in response to increased costs of only $265 million).

In addition to contravening the requirements of the Act, such a system would be arbitrary and capricious. There would be no reasoned basis for the Commission to adopt a plan that would permit immediate recovery of number portability costs from end users served by some carriers in a given geographic area, while delaying recovery from others for some period of years. This is all the more true given that the Commission itself has long recognized that carriers should be permitted to recover costs imposed on them by government mandate (for example, by treating these costs as exogenous under its price cap rules).

Finally, deferring recovery would raise serious constitutional issues under the takings clause of the fifth amendment. Deferral would deny these local exchange carriers the use of their property — the capital they were required to invest to provide number portability. As the courts have made clear, depriving a property owner of the use of its property — even if the deprivation is intermittent or of limited duration — constitutes a taking. Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-32 (1987); Skip Kirchdorfer, Inc. V. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993).

The FCC may not take carrier's property, even for a limited period of time, unless it has express statutory authority — a "clear warrant" — to do so and the carriers receive just compensation. Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1445-46 (D.C. Cir. 1994); see also Rust v. Sullivan, 500 U.S. 173, 190-91 (1991). In this case, the FCC has no clear statutory warrant to require incumbent local exchange carriers alone to provide number portability without compensation. In fact, the statutory directive is precisely the opposite — the Commission's cost recovery plan must be competitively neutral.

Even if this were not the case, it would be no answer to say that the incumbent LECs might, or might not, be able to recover in the future the investments that they were required to make. With the emergence of competition in all aspects of the LECs' businesses, there is no assurance that the LECs will be able to recover the investment they were directed to make or a reasonable return on that investment. Associated Gas Distributors v. FERC, 824 F.2d 981, 1034 (D.C. Cir. 1987) ("Where competition prevails, a firm cannot compensate itself for losses on one venture by raising prices on other lines of business...."). Under these circumstances, the Commission cannot first direct the LECs to provide a new service, and then direct them to forgo recovery of the cost of that service in the hope they can make up the loss years later by adding to the bill for other, competitive services. See Brooks-Scanlon Co. V. Railroad Comm'n, 251 U.S. 396, 399 (1920) (a regulated entity cannot be required to operate regulated segments of its business at a loss on the theory that profits from competitive activities may compensate for the losses).

Due to the lateness of the hour, this ex parte is being filed one day late. Please enter this document into the record as appropriate.

Sincerely,

cc: Chairman William E. Kennard
Commissioner Harold Furchtgott-Roth
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani
Christopher Wright
Debra Weiner
Stewart Block
Aaron Rappaport
Suzanne Tetreault
Thomas Power
Kyle Dixon
Paul Gallant
Jim Casserly
Kevin Martin