

realize all the savings achieved by providing number portability more efficiently, and would not be fully responsible for any cost-increasing inefficiencies. Instituting a cost pool would also require the Commission to impose significant cost accounting and distribution mechanisms on both regulated and previously unregulated carriers.

141. We also observe that under LRN-based long-term number portability the LEC serving the customer who places a local call will generally be responsible for the query. Thus, winning a customer shifts responsibility for the queries needed to complete that customer's local calls from the original carrier to the acquiring carrier. Similarly, the IXC serving the customer who places an interexchange call will be responsible for any query needed. Consequently, under the LRN approach to number portability, query costs follow customers, and requiring each carrier to bear its own carrier-specific costs directly related to providing number portability is competitively neutral.

142. Under the requirements we adopt today, an incumbent LEC may recover its carrier-specific costs directly related to providing long-term number portability to end users by establishing a monthly, number portability charge in tariffs filed with the Commission. We determine, however, that recovery from end users should be designed so that end users generally receive the charges only when and where they are reasonably able to begin receiving the direct benefits of long-term number portability. To achieve this, we will allow the monthly number-portability charge to begin no earlier than February 1, 1999, on a date the incumbent LEC carrier selects, and to last no longer than five years. We choose this start date for the federal end-user charge because by the end of 1998, under the implementation schedule the Commission has mandated for number portability, a large proportion of customers will reside in areas where number portability is available: the largest 100 MSAs.⁴⁷⁷ In contrast, if the end-user charge were permitted to start immediately, substantially fewer customers would be in areas where number portability is available. Thus, the February 1, 1999, start date will better tailor recovery to areas where customers can receive number portability than would an earlier start date for recovery. We choose February 1, 1999, rather than January 1, 1999, to provide a brief additional time-period to ensure that number portability has been implemented before customers incur charges, and because carriers will also be filing tariff revisions to take effect January 1, 1999, to implement PICC and SLC adjustments.

143. In addition, we will allow an incumbent LEC to assess the monthly charge only on end users it serves in the 100 largest MSAs, and end users it serves outside the 100 largest metropolitan statistical areas from a number-portability-capable switch. Because carriers may make any switch number-portability capable, this approach will encourage carriers to install number portability and help ensure that end-users are assessed number portability charges only where they are reasonably likely to be benefitting from number portability. If a carrier receives an extension past February 1, 1999, for one of the 100 largest MSAs, the carrier may not assess the monthly charge in that MSA until it begins providing long-term number portability in the MSA. The incumbent local

⁴⁷⁷ The top 100 MSAs comprise approximately 61.1% of all subscriber lines, a conservative estimate, based on our calculation that approximately 61.1% of the United States population resides in the 100 largest MSAs. We calculated this percentage from population estimates of the United States Census Bureau. See MA-96-5 Estimates of the Population of Metropolitan Areas: Annual Time Series, July 1, 1991 to July 1, 1996 (Internet release date: December 1997) (available at <http://www.census.gov/population/estimates/metro-city/ma96-05.txt>).

exchange carrier shall levelize⁴⁷⁸ the monthly number-portability charge over five years by setting a rate for each charge at which the present value of the revenue recovered by the charge equals the present value of the cost being recovered. The carriers shall use a discount rate equal to the rate of return on investment which the Commission has authorized for regulated interstate access services pursuant to Part 65 of the Commission's Rules. Currently, this rate is 11.25 percent.⁴⁷⁹ We require levelization of the monthly charge to protect consumers from varying rates. Incumbent LECs may collect less than the maximum allowable charge, or decline to collect the charge, from some or all of their customers so long as they do so in a reasonable and nondiscriminatory manner. Thus we will not, for example, allow incumbent LECs to offset such lower charges by collecting higher charges in areas where no competitive carriers are present.⁴⁸⁰

144. We choose the five-year period for the end-user charge because it will enable incumbent LECs to recover their portability costs in a timely fashion, but will also help produce reasonable charges for customers and avoid imposing those charges for an unduly long period. A longer period would increase the total charges consumers pay because, as discussed, carriers' unrecovered capital investment will be subject to an 11.25 percent return, while a shorter period would increase the monthly charge to consumers. We find that a five-year period effectively balances these concerns. After a carrier establishes its levelized end-user charge in the tariff review process we do not anticipate that it may raise the charge during the five-year period unless it can show that the end-user charge was not reasonable based on the information available at the time it was initially set. Furthermore, once incumbent LECs have recovered their initial implementation costs, number portability will be a normal network feature, and a special end-user charge will no longer be necessary to ensure that incumbent LECs recover their number portability costs on a competitively neutral basis. Carriers can recover any remaining costs through existing mechanisms available for recovery of general costs of providing service.

145. We will allow incumbent LECs to assess one monthly number-portability charge per line, except that one PBX trunk shall receive nine monthly number-portability charges and one primary rate interface integrated services digital network line (PRI ISDN line) shall receive five monthly number-portability charges. As the Commission observed in the access charge reform proceeding, a PBX trunk provides on average the equivalent service capacity of nine Centrex lines.⁴⁸¹ We set the PBX charge at nine times the level of the ordinary charge because Centrex and PBX arrangements are functionally equivalent. To do otherwise could encourage a large customer to

⁴⁷⁸ A levelized rate is one that is calculated to remain constant over a recovery period and is set at the level at which the discounted present value of the stream of payments is equal to the discounted present value of the stream of costs over the period.

⁴⁷⁹ See generally *In re Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Order, 5 FCC Rcd. 7507 (1990).

⁴⁸⁰ Cf. Teleport Comments at 12 (expressing concern that incumbent LECs might shift number portability costs to customers in areas with less competition).

⁴⁸¹ *In re Access Charge Reform*, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd. 16606, 16615-18 (1997) (Second Access Reform Reconsideration Order).

choose one of these arrangements over the other because of the number portability charge, and thus would not be competitively neutral.⁴⁸² Similarly, the access charge reform proceeding set a five to one equivalency ratio for PRI ISDN lines,⁴⁸³ and we apply that equivalency ratio here. To further our goals for the Lifeline Assistance Program, carriers may not impose the monthly number-portability charge on customers in that program.

146. The incumbent LEC may assess the monthly charge on resellers of the incumbent LEC's local service, as well as on purchasers of switching ports as unbundled network elements under section 251 of the Communications Act, because the incumbent LEC will be providing the underlying number portability functionality even though the incumbent LEC will no longer have a direct relationship with the end user. Thus, it appears that the reseller and the purchaser of the unbundled switch port will receive all their number portability functionality through these arrangements. Consequently, allowing the incumbent LEC to assess the charge will be competitively neutral because the reseller and the purchaser of the switch port will incur the charge in lieu of costs they would otherwise incur in obtaining long-term number portability functionality elsewhere. The unregulated reseller and purchaser of the switch port may recover in any lawful manner the charges the incumbent LEC assesses on them. The incumbent local exchange carrier may not assess the monthly number-portability charge on carriers that purchase the incumbent local exchange carrier's local loops as unbundled network elements under section 251. We do not allow the incumbent LEC to assess such a charge because the unbundled loop does not contain the number portability functionality. The purchaser of the unbundled loop will still be responsible for providing such functionality, and thus incurring elsewhere the corresponding cost. Congress has directed the Commission to provide for the recovery of number portability costs.⁴⁸⁴ Because we have so provided in this proceeding, we presume that state commissions will not include the costs of number portability when pricing unbundled network elements.

147. As noted above, local service providers may query calls for other carriers by arrangement,⁴⁸⁵ or may receive unqueried, default-routed traffic when the N-1 carrier has not performed the query.⁴⁸⁶ Thus we also will allow incumbent LECs to recover from N-1 carriers in a federally tariffed query-service charge their carrier-specific costs directly related to providing prearranged and default query services. Other carriers required or permitted to file federal tariffs may also tariff query services. Carriers shall indicate in the cost support section of their tariffs the portion of their carrier-specific costs directly related to providing number portability attributable to the number

⁴⁸² Cf. *id.* at 16616 (setting equivalency factors to prevent the PICC from affecting consumer choice between Centrex and PBX).

⁴⁸³ See *id.* at 16618.

⁴⁸⁴ See 47 U.S.C. § 251(e)(2) (stating that all telecommunications carriers shall bear the costs of number portability "as determined by the Commission"). For further discussion of the Commission's jurisdiction over number portability and the scope of its mandate, see parts III.A and III.B, *supra*.

⁴⁸⁵ See *supra* paragraph 15.

⁴⁸⁶ See *supra* paragraph 21.

portability services they provide end users, and that portion attributable to the number portability query services they provide on behalf of other carriers.

148. All the RBOCs and GTE have submitted, and periodically revised, estimates of the costs they will incur in implementing LRN number portability. In reviewing the record, we observe a wide variation among companies' estimated costs and their categorization of those costs as directly related or not directly related to providing number portability. We remind the incumbent LECs that only costs directly related to providing number portability are recoverable through the long-term number portability cost recovery mechanism we establish in this *Third Report and Order*. As discussed above in Part IV, the Chief, Common Carrier Bureau, will further consider methods of identifying the portion of joint costs that incumbent LECs should treat as carrier-specific costs directly related to providing number portability.

149. We disagree with GTE's argument that we must create a uniform, mandatory end-user charge for recovery of number portability costs to avoid a violation of the Fifth Amendment.⁴⁸⁷ A violation of the takings clause of the Fifth Amendment requires a taking of private property without just compensation. The rules we adopt here do not create a *per se* taking because they do not involve governmental action that physically invades or permanently appropriates any carrier's property; rather, they require members of a regulated industry to incur costs in furtherance of valid regulatory and statutory goals mandated by Congress.⁴⁸⁸ Even if costs are incurred as a result of these rules, the rules do not constitute a regulatory taking because their net effect or end result is not confiscatory.⁴⁸⁹ Furthermore, even if deemed a regulatory taking, our rules do not violate the Fifth Amendment because just compensation is available. Under prevailing standards, a rate regulation of the type

⁴⁸⁷ See *supra* text accompanying note 425.

⁴⁸⁸ See, e.g., *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222, 225-27 (1986) (concluding that provisions of 1980 federal pension act amendments that required employer withdrawing from multiemployer pension plan to fund its share of the plan obligations incurred during its association with the plan did not constitute a taking; governmental action did not physically invade or permanently appropriate any of the employer's assets, but instead adjusted benefits and burdens of economic life to promote common good; legislature may require one party to use own assets to the benefit of another without violating the takings clause; fact that employer must pay money to comply with act was but necessary consequence of Act's regulatory mechanism); *Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995) (stating that even though taxes or special municipal assessments indisputably "take" money from individuals or businesses, they are not treated as *per se* takings under the Fifth Amendment because of government's high degree of control over commercial dealings); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990) (concluding that requiring uranium producer to spend large sums of money for reclamation and decommissioning of uranium tailings and mill upon termination of license was not a taking because requiring expenditures of funds is not a taking).

⁴⁸⁹ See *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (stating that government rate regulation may effect a taking of property without due process of law when the permitted rate is so unjust as to destroy the value of the property for all purpose for which it was acquired); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) (stating that whether a particular rate is so low as to be confiscatory will depend to some extent on what is a fair rate of return given the risks under a rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return).

adopted here will violate the Fifth Amendment only if it "threatens the financial integrity of the regulated carrier or otherwise impedes its ability to attract capital."⁴⁹⁰ Our recovery mechanism allows incumbent LECs a reasonable opportunity to receive just compensation for their carrier-specific costs directly related to long-term number portability through monthly number-portability charges and intercarrier charges for query services. Other carriers not subject to economic rate regulation may recover their costs in any lawful manner. Because providing this opportunity for recovery of costs is sufficient to avoid a taking, we need not mandate a uniform end-user charge for all carriers. We also note that when the government provides an adequate procedure for obtaining compensation, a takings claim is not ripe for review until the litigant has used the procedure and been denied just compensation.⁴⁹¹

VII. REGULATORY FLEXIBILITY ACT ANALYSIS

150. As required by Section 603 of the Regulatory Flexibility Act (RFA),⁴⁹² an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice*. The Commission sought written public comments on the proposals in the *Further Notice*, including on the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA)⁴⁹³ in this *Third Report and Order* is as follows:

151. Need for and Objectives of Rules: The Commission, in compliance with sections 251(b)(2), 251(d)(1), and 251(e)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, adopts rules and procedures intended to ensure the implementation of telephone number portability with the minimum regulatory and administrative burden on telecommunications carriers. In implementing the statute, the Commission has the responsibility to adopt rules that will implement most quickly and effectively the national telecommunications policy embodied in the Act and to promote the pro-competitive, deregulatory markets envisioned by Congress. Congress has recognized that number portability will lower barriers to entry and promote competition in the local exchange marketplace. To prevent the cost of number portability from itself becoming a barrier to local competition, however, section 251(e)(2) requires that "[t]he 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."

⁴⁹⁰ *Illinois Bell Telephone Co.*, 988 F.2d 1254, 1263 (D.C. Cir. 1993).

⁴⁹¹ *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 195 (1985); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 818 (8th Cir. July 18, 1997), cert. granted on other grounds sub nom. *AT&T Corp. v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1998).

⁴⁹² See 5 U.S.C. § 603.

⁴⁹³ Our analysis conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, P.L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Subtitle II of CWAAA is the "Small Business Regulatory Fairness Act of 1996" (SBREFA).

152. Summary of Significant Issues Raised by the Public in Response to the IRFA: There were no comments submitted specifically in response to the IRFA. However, in their general comments, some commenters assert that if competition is to emerge in the local exchange market the regulatory standards adopted by the Commission to recover the cost of implementing long-term number portability should not disproportionately burden small entities, especially new entrants. In the *Third Report and Order*, we adopt rules and regulations to ensure that the way all telecommunications carriers, including small entities, bear the costs of number portability does not significantly affect any carrier's ability to compete with other carriers for customers in the marketplace.

153. Description and Estimate of Number of Small Businesses to Which Rules Will Apply: The Regulatory Flexibility Act generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act.⁴⁹⁴ A small business concern is one which (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).⁴⁹⁵ According to the SBA's regulations, entities engaged in the provision of telephone service may have a maximum of 1,500 employees in order to qualify as a small business concern.⁴⁹⁶ This standard also applies in determining whether an entity is a small business for purposes of the RFA.

154. Our rules governing long-term number portability cost recovery apply to all telecommunications carriers, including incumbent LECs, new LEC entrants, and IXCs, as well as cellular, broadband PCS, and covered SMR providers. Small incumbent LECs subject to these rules are either dominant in their field of operations or are independently owned and operated, and, consistent with the Commission's prior practice, are excluded from the definition of "small entities" and "small business concerns."⁴⁹⁷ Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs.⁴⁹⁸ Out of an abundance of caution, however, for regulatory flexibility analysis purposes,⁴⁹⁹ we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by the SBA as "small business concerns."

155. Insofar as our rules apply to all telecommunications carriers, they may have an economic impact on a substantial number of small businesses, as well as on small incumbent LECs.

⁴⁹⁴ See 15 U.S.C. § 632.

⁴⁹⁵ *Id.*

⁴⁹⁶ See 13 C.F.R. § 121.201.

⁴⁹⁷ See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 16144-45, 16149-50 (1996) (Local Competition Order), *vacated in part, aff'd in part*, Iowa Utils. Bd. v. FCC, 120 F.3d 753, 792-800 & n. 21 (8th Cir. 1997), *cert. granted on other grounds sub nom.* AT&T Corp. v. Iowa Utils. Bd., 118 S. Ct. 879 (1998).

⁴⁹⁸ *Local Competition Order*, 11 FCC Rcd. at 16150.

⁴⁹⁹ See 13 C.F.R. § 121.902(b)(4).

The rules may have an impact upon new entrant LECs and small incumbent LECs, as well as cellular, broadband PCS, and covered SMR providers. Based upon data contained in the most recent census and a report by the Commission's Common Carrier Bureau, we estimate that 2,100 small entities could be affected. We have derived this estimate based on the following analysis:

156. According to the 1992 Census of Transportation, Communications, and Utilities, there were approximately 3,469 firms with under 1,000 employees operating under the Standard Industrial Classification (SIC) category 481 -- Telephone. See U.S. Dept. of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities (issued May 1995). Many of these firms are the incumbent LECs and, as noted above, would not satisfy the SBA definition of a small business because of their market dominance. There were approximately 1,350 LECs in 1995. Industry Analysis Division, FCC, Carrier Locator: Interstate Service Providers at Table 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue) (December 1995). Subtracting this number from the total number of firms leaves approximately 2,119 entities which potentially are small businesses which may be affected. This number contains various categories of carriers, including small incumbent LECs, competitive access providers, cellular carriers, interexchange carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. Some of these carriers—although not dominant—may not meet the other requirement of the definition of a small business because they are not "independently owned and operated." See 15 U.S.C. Section 632(a)(1). For example, a PCS provider which is affiliated with a long distance company with more than 1,500 employees would not meet the definition of a small business. Another example would be if a cellular provider is affiliated with a dominant LEC. Thus, a reasonable estimate of the number of "small businesses" affected by this Order would be approximately 2,100.

157. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rules: The *Third Report and Order* concludes that the costs raised in this proceeding should be divided into three categories: shared costs, carrier-specific costs directly related to number portability, and carrier-specific costs not directly related to number portability. Shared costs are those costs incurred on behalf of the industry as a whole, such as the costs of the regional database administrator to build, operate, and maintain the databases needed to provide number portability. The *Third Report and Order* concludes that all telecommunications carriers with end-user revenues are required to pay an allocated portion of the shared costs incurred by the regional database administrator in proportion to that carrier's international, interstate, and intrastate end-user telecommunications revenues for that region. While carriers already track their sales to end-users for billing purposes, they will need to identify their regional end-user revenues. That information, along with periodic updates, must be provided to the regional database administrator for the appropriate allocation of shared costs.

158. The *Third Report and Order* requires incumbent LECs to maintain records that detail both the nature and specific amount of those carrier-specific costs that are directly related to number portability, and those carrier-specific costs that are not directly related to number portability. The *Third Report and Order* directs carriers and interested parties to file comments by August 3, 1998, and reply comments by September 16, 1998, proposing ways to apportion the different types of joint costs between portability and nonportability services. The *Third Report and Order* requires incumbent LECs that choose to recover their carrier-specific costs directly related to providing number portability

to use federally-tariffed end-user charges.

159. Steps Taken to Minimize Impact on Small Entities Consistent with Stated Objectives:

The record in this proceeding indicates that the need for customers to change their telephone numbers when changing local service providers is a barrier to local competition. Requiring number portability, and ensuring that all telecommunications carriers bear the costs of number portability on a competitively neutral basis, will make it easier for competitive providers, many of which may be small entities, to enter the market. We have attempted to keep regulatory burdens on all local exchange carriers to a minimum to ensure that the public receives the benefits of the expeditious provision of service provider number portability in accordance with the statutory requirements. For example, the *Third Report and Order* concludes that all telecommunications carriers with end-user revenues are required to pay an allocated portion of the shared costs incurred by the regional database administrator in proportion to that carrier's international, interstate, and intrastate end-user telecommunications revenues for the region. Apportioning shared costs in this way will further the statutory purpose of ensuring that carriers bear the costs of number portability on a competitively neutral basis. Furthermore, the *Third Report and Order* concludes that regulated carriers may identify that portion of their joint costs that is demonstrably an incremental cost that they incurred in the provision of long-term number portability. Allowing such identification recognizes that number portability will cause some carriers, including small entities, to incur costs that they would not ordinarily have incurred in providing telecommunications services. The *Third Report and Order* also concludes that non-dominant carriers, such as competitive LECs, CMRS providers, and IXC's—some of which will be small entities—are not subject to extensive regulation and may recover their number portability costs in any manner otherwise consistent with Commission rules and the Communications Act.

160. Report to Congress: The Commission shall send a copy of this FRFA, along with this *Third Report and Order*, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.⁵⁰⁰ A copy of the *Third Report and Order* and this FRFA (or summaries thereof) will also be published in the Federal Register and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.⁵⁰¹

VIII. PAPERWORK REDUCTION ACT

161. This *Third Report and Order* concludes that the costs raised in this proceeding should be divided into three categories: shared costs, carrier-specific costs directly related to number portability, and carrier-specific costs not directly related to number portability. Shared costs are those costs incurred on behalf of the industry as a whole, such as the costs of the regional database administrator to build, operate, and maintain the databases needed to provide number portability. The *Third Report and Order* concludes that all telecommunications carriers with end-user revenues are required to pay an allocated portion of the shared costs incurred by the regional database administrator in proportion to that carrier's international, interstate, and intrastate end-user telecommunications revenues for the region. While carriers already track their sales to end-users for billing purposes, they

⁵⁰⁰ See 5 U.S.C. § 801(a)(1)(A).

⁵⁰¹ See 5 U.S.C. § 604(b).

will need to identify their regional end-user revenues. That information, along with periodic updates, must be provided to the regional database administrator for the appropriate allocation of shared costs. The *Third Report and Order* also requires incumbent LECs to maintain records that detail both the nature and specific amount of those carrier-specific costs that are directly related to number portability, and those carrier-specific costs that are not directly related to number portability. The *Third Report and Order* requires incumbent LECs that choose to recover their carrier-specific costs directly related to providing number portability to use federally-tariffed end-user charges. These information collection requirements are contingent upon approval of the Office of Management and Budget (OMB).

IX. ORDERING CLAUSES

162. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1, 2, 4(i), 201-205, 215, 251(b)(2), 251(e)(2), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201-205, 215, 251(b)(2), 251(e)(2), and 332, Part 52 of the Commission's rules IS AMENDED as set forth in Appendix B hereto.

163. IT IS FURTHER ORDERED that the policies, rules and requirements set forth herein ARE ADOPTED.

164. IT IS FURTHER ORDERED that the policies, rules and requirements adopted herein SHALL BE EFFECTIVE 30 days after publication in the Federal Register, except for the collections of information that are contingent upon approval of the Office of Management and Budget (OMB).

165. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs, References Operations Division, SHALL SEND a copy of this Third Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

166. IT IS FURTHER ORDERED that incumbent local exchange carriers MAY FILE tariffs to take effect no earlier than February 1, 1999, setting out the monthly number portability charge they intend to collect from their end users, in accordance with this Order.

167. IT IS FURTHER ORDERED that pursuant to authority contained in section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(1), the Chief, Common Carrier Bureau, IS DELEGATED authority to determine appropriate methods for apportioning joint costs among portability and nonportability services, and to issue any orders to provide guidance to incumbent LECs before they file their tariffs, which are to take effect no earlier than February 1, 1999. To facilitate determination of the portion of joint costs carriers shall treat as carrier-specific costs directly related to providing number portability, and to facilitate evaluation of the cost support that carriers will file in their federal tariffs, carriers and interested parties may file comments by August 3, 1998 proposing ways to apportion the different types of joint costs. Carriers and interested

parties may file reply comments by September 16, 1998.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

Appendix A—List of Commenters

Comments

1. Ad Hoc Telecommunications Users Committee
2. AirTouch Communications Inc.
3. AirTouch Paging, Cal-Autofone and Radio Electronic Products Corp. (Airtouch Paging)
4. Ameritech
5. Association for Local Telecommunications Services (ALTS)
6. AT&T
7. Bell Atlantic
8. BellSouth Corp.
9. California Department of Consumer Affairs (Calif. Dep't Consumer Affairs)
10. California Public Utilities Commission (Calif. Pub. Utils. Comm'n)
11. Cellular Telecommunications Industry Association (CTIA)
12. Cincinnati Bell Telephone Co.
13. Colorado Public Utilities Commission Staff and Office of Consumer Counsel (Colo. Pub. Utils. Comm'n)
14. Florida Public Service Commission (Fla. Pub. Servs. Comm'n)
15. Frontier Corp.
16. General Services Administration (GSA)
17. GTE
18. Illinois Commerce Commission (Ill. Commerce Comm'n) (late-filed Aug. 19, 1996)
19. ITCs Inc.
20. MCI
21. MFS Communications Co.
22. Missouri Public Service Commission (Mo. Pub. Servs. Comm'n)
23. National Telephone Cooperative Association and the Organization for the Promotion and Advancement of Small Telecommunications Cos. (NTCA & OPASTCO)
24. New York Department of Public Service (N.Y. Dep't Pub. Serv.)
25. Nextel Communications Inc.
26. NYNEX
27. Omnipoint Communications
28. Pacific Telesis Group (PacTel)
29. Personal Communications Industry Association (PCIA)
30. Public Utilities Commission of Ohio (Ohio Pub. Utils. Comm'n)
31. SBC Communications
32. Scherers Communications Group
33. Sprint
34. Telecommunications Resellers Association (TRA) (late-filed Aug. 19, 1996)
35. Teleport Communications Group
36. Time Warner Communications Holdings Inc.
37. U S WEST Inc.
38. United States Telephone Association (USTA)
39. WinStar Communications Inc.

Replies

1. AirTouch Communications Inc.
2. AirTouch Paging, Cal-Autofone and Radio Electronic Products Corp. (Airtouch Paging)
3. Ameritech
4. Arch Communications Group
5. AT&T
6. Bell Atlantic
7. BellSouth Corp.
8. California Public Utilities Commission (Calif. Pub. Utils. Comm'n)
9. Cincinnati Bell Telephone Co.
10. CommNet Cellular Inc.
11. General Services Administration (GSA)
12. GST Telecom Inc. (late-filed Sept. 18, 1996)
13. GTE
14. Iowa Network Services Inc. (Iowa Net. Servs.)
15. MCI
16. MFS Communications Co.
17. MobileMedia Communications
18. National Association of Regulatory Utilities Commissioners (NARUC)
19. National Cable Television Association (NCTA)
20. National Exchange Carriers Association Inc. (NECA)
21. NYNEX
22. Omnipoint Communications
23. Pacific Telesis Group (PacTel)
24. Paging Network Inc.
25. Personal Communications Industry Association (PCIA)
26. SBC Communications
27. Sprint
28. Telecommunications Resellers Association (TRA)
29. Time Warner Communications Holdings Inc.
30. U S WEST Inc.
31. United States Telephone Association (USTA)
32. Washington Utilities and Transportation Commission (Wash. Utils. Transp. Comm'n)
33. WinStar Communications Inc. (late-filed Sept. 17, 1996)

Appendix B—Final Rules

Part 52, subpart C, of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority for Part 52 continues to read as follows:

AUTHORITY: Sec. 1, 2, 4, 5, 48 Stat. 1066, as amended; 47 U.S.C. § 151, 152, 154, 155, 251 unless otherwise noted. Interpret or apply secs. 3, 4, 201-05, 207-09, 218, 225-27, 251-52, 271 and 332, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 153, 154, 201-05, 207-09, 218, 225-27, 251-52, 271 and 332 unless otherwise noted.

§ 52.32 Allocation of the shared costs of long-term number portability

(a) The local number portability administrator, as defined in section 52.21(h), of each regional database, as defined in section 52.21(1), shall recover the shared costs of long-term number portability attributable to that regional database from all telecommunications carriers providing telecommunications service in areas that regional database serves. Pursuant to its duties under section 52.26, the local number portability administrator shall collect sufficient revenues to fund the operation of the regional database by:

(1) assessing a \$100 yearly contribution on each telecommunications carrier identified in paragraph (a) that has no intrastate, interstate, or international end-user telecommunications revenue derived from providing telecommunications service in the areas that regional database serves, and

(2) assessing on each of the other telecommunications carriers providing telecommunications service in areas that regional database serves, a charge that recovers the remaining shared costs of long-term number portability attributable to that regional database in proportion to the ratio of:

(A) the sum of the intrastate, interstate, and international end-user telecommunications revenues that such telecommunications carrier derives from providing telecommunications service in the areas that regional database serves,

(B) to the sum of the intrastate, interstate, and international end-user telecommunications revenues that all telecommunications carriers derive from providing telecommunications service in the areas that regional database serves.

(b) The local number portability administrator for a particular regional database may require the telecommunications carriers providing telecommunications service in the areas served by the regional database to provide once a year that data necessary to calculate, pursuant to subparagraph (a)(1) or (a)(2) of this section, those carriers' portions of the shared costs of long-term number portability attributable to that regional database. All such telecommunications carriers shall comply with any such requests.

(c) Once a telecommunications carrier has been allocated, pursuant to subparagraph (a)(1) or (a)(2) of this section, its portion of the shared costs of long-term number portability attributable to a regional database, the carrier shall treat that portion as a carrier-specific cost directly related to providing number portability.

§ 52.33 **Recovery of carrier-specific costs directly related to providing long-term number portability**

(a) Incumbent local exchange carriers may recover their carrier-specific costs directly related to providing long-term number portability by establishing in tariffs filed with the Federal Communications Commission a monthly number-portability charge, as specified in subparagraph (a)(1), and a number portability query-service charge, as specified in subparagraph (a)(2).

(1) The monthly number-portability charge may take effect no earlier than February 1, 1999, on a date the incumbent local exchange carrier selects, and may end no later than five years after that date.

(A) An incumbent local exchange carrier may assess each end user it serves in the 100 largest metropolitan statistical areas, and each end user it serves from a number-portability-capable switch outside the 100 largest metropolitan statistical areas, one monthly number-portability charge per line except that:

- (i) One PBX trunk shall receive nine monthly number-portability charges.
- (ii) One PRI ISDN line shall receive five monthly number-portability charges.
- (iii) Lifeline Assistance Program customers shall not receive the monthly number-

portability charge.

(B) An incumbent local exchange carrier may assess on carriers that purchase the incumbent local exchange carrier's switching ports as unbundled network elements under section 251 of the Communications Act, and resellers of the incumbent local exchange carrier's local service, the same charges as described in subparagraph (a)(1)(A), as if the incumbent local exchange carrier were serving those carriers' end users.

(C) An incumbent local exchange carrier may not assess a monthly number-portability charge for local loops carriers purchase as unbundled network elements under section 251.

(D) The incumbent local exchange carrier shall levelize the monthly number-portability charge over five years by setting a rate for the charge at which the present value of the revenue recovered by the charge does not exceed the present value of the cost being recovered, using a discount rate equal to the rate of return on investment which the Commission has prescribed for interstate access services pursuant to Part 65 of the Commission's Rules.

(2) The number portability query-service charge may recover only carrier-specific costs directly related to providing long-term number portability that the incumbent local exchange carrier incurs to provide long-term number portability query service to carriers on a prearranged and default basis.

(b) All telecommunications carriers other than incumbent local exchange carriers may recover their number portability costs in any manner consistent with applicable state and federal laws and regulations.

**Separate Statement
of Chairman William E. Kennard**

Re: Telephone Number Portability, Third Report and Order, CC Docket No. 95-116.

Local number portability is crucial to the development of competition in local telephone markets because it means that consumers need not give up their phone numbers when changing carriers. As today's order recognizes, the cost of implementing local number portability throughout the nation is not insignificant. That's because the provisions governing local number portability, like other requirements of the Telecommunications Act of 1996, call for converting a network that was designed for use by a single carrier into a network capable of accommodating multiple competitors. Congress had the wisdom to mandate this conversion, however, because it perceived the attendant costs to be an investment in competition that ultimately will bring more choice and lower prices to consumers. Time and again we have seen these investments pay off for consumers, and I am confident that the investment in local number portability that the Act mandates will reap rewards for the American consumer.

Congress specifically directed that the costs of number portability "be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."¹ I believe today's order implements a cost recovery mechanism that meets this standard.

While I support our decision today, I believe we must carefully monitor the rollout of local number portability and the pace of local telephone competition, particularly for residential customers. Unless a consumer has competitive choice for local phone service, the availability of local number portability is meaningless. We should not ask consumers to pay for number portability before they are able to enjoy the benefits of the competitive options that number portability is designed to facilitate.

The Commission should revisit today's decision if it appears that consumers will end up paying for number portability before they have a competitive choice in local phone service. For now, I am satisfied that the rules we adopt today fulfill Congress's directive that the costs of number portability be borne by all telecommunications carriers in a competitively neutral manner, and therefore I support today's order.

¹47 U.S.C. § 251(e)(2).

**Concurring Statement
of Commissioner Susan Ness**

Re: Local number portability cost recovery

I respectfully concur, in part, because of reservations about that portion of the order that concerns the ability of incumbent local exchange carriers (ILECs) to recover their costs from residential consumers.

The Telecommunications Act of 1996 requires local number portability. There will be real costs of deploying number portability, but Congress concluded -- wisely, I believe -- that the benefits to competition exceed the costs. It's just common sense that consumers will be reluctant to change carriers if to do so they must also change their telephone number.

The costs of deploying number portability will be borne by all carriers -- ILECs, competitive local exchange carriers (CLECs), wireless carriers, and interexchange carriers (IXC). There are shared costs, which will be pooled, and the costs each carrier must incur to perform its own "look-up" responsibilities. In an interstate long distance call, for example, the look-up requirement falls on the IXC (which is the "n minus one" carrier), and it must either perform the requisite look-up itself or pay someone else to do so. In a local call from one subscriber to her neighbor, the caller's LEC (whether ILEC or CLEC) will bear the look-up responsibility.

All of these carriers are entitled to an opportunity to recover their costs. All of these carriers, except ILECs, will have an opportunity to recover these costs *only from customers who have a choice of service provider*; generally speaking, any customer of a CLEC, IXC, or wireless carrier can obtain local exchange service, long distance service, or wireless service, respectively, from at least one additional supplier. In contrast, the ILEC will, in most instances, be able to seek to recover its costs from subscribers who do *not* have a choice of local exchange service provider. This is of special concern in the case of residential consumers, who -- notwithstanding long distance rate reductions and substantial decreases in the prices for wireless services -- thus far have seen few direct benefits from the Telecommunications Act of 1996.

The deployment of number portability will be of significant help in establishing conditions conducive to local competition, thereby speeding the day when more residential consumers will be able to choose their local carrier. Nonetheless, I am troubled by the decision to permit a single class of carriers -- the ILECs -- to recover their costs from consumers who do not yet have a choice. I would have preferred that residential consumers be shielded from these charges until they actually experience the benefits of competition. There are a variety of ways in which this could have been done, consistent with the objective -- reflected in a variety of other Commission decisions -- of attempting to ensure that consumers reap the benefits of the changing telecommunications environment at the same time they experience the costs of the transition. But I am pleased that the Commission has decided that these costs should be borne only by consumers who reside in areas where local number portability is available, since these consumers at least have a greater prospect -- if not the current reality -- of experiencing the benefits of local competition.

I also want to note that I would have been willing to support a division of number portability costs between the states and federal jurisdictions, as recommended by the National Association of Regulatory Utility Commissioners. This approach would have enabled state commissions to make

judgments about the appropriate manner and timing of cost recovery on the part of ILECs.

There is no one "right" answer to the questions with which the Commission has been wrestling in this proceeding. But this order represents a workable approach to the matter, and, as we all recognize, a final order is long overdue. I particularly want to salute the carriers for not permitting the Commission's delay in the cost recovery rulemaking from distracting them from their responsibility to proceed apace in deploying LNP capabilities in the telephone network.

**Separate Statement
of Commissioner Harold Furchtgott-Roth**

Re: Telephone Number Portability, Third Report and Order, CC Docket No. 95-116.

Despite my concurrence with today's order, I remain deeply troubled by the steps that this Commission has taken on local number portability over the past two years.

For decades, compensation for telecommunications services has been dominated by a rate-of-return framework. Carriers without competitive pressures would "incur costs," and regulators were left to find funding mechanisms to "recover" those costs with an appropriate return on investment. It all seemed a very convenient process, at least for the regulators and the regulated.

In practice, however, this system of cost reimbursement was fatally flawed. It harmed carriers because they were spared the efficiency-inducing incentives to keep costs as low as possible. It harmed regulators because they were forced to review and to monitor countless and tedious records of costs. It harmed consumers because they ended up paying for this inefficient system of regulation.

"Cost recovery for local number portability" has turned into a replay of the same old cost-based, rate-of-return regulation. Rates are not based on a price cap but on reimbursement of actual costs. Consumers will again be faced with bills for services based not on market conditions but on regulatory fiat. Paradoxically, consumers will be paying a federally determined fee for a service that is by definition local.

A better approach would have been, from the outset and before any costs were incurred, to have established a maximum amount that could have been recovered from a federal fee. If through prudent management, company costs were less than the federal cap, the company would be rewarded for its efficiency. If costs were greater than the federal cap, the company could still seek recovery from appropriate state authorities. In either case, companies would have had a strong incentive to keep costs as low as possible to the benefit of consumers.

As Commissioner Ness noted, I also would have supported a division of number portability costs between the states and federal jurisdictions, as recommended by the National Association of Regulatory Utility Commissioners. Such an approach would have ensured that state commissions were involved in the method and timing of cost recovery.

Hindsight is, of course, 20-20. Yesterday's Commission decisions, and the subsequent reaction of businesses, cannot be changed. Today's decision is perhaps the best that can be made of a compromised situation.

**Separate Statement
of Commissioner Gloria Tristani**

Re: Telephone Number Portability

Telecommunications carriers, including many incumbent local exchange carriers, have expended significant sums of money to comply with the requirement that they deploy local number portability technology. They are entitled to a fair opportunity to recover that money. At the same time, I support allowing incumbent LECs to seek recovery of those costs only from customers who are most likely to see the real and direct benefits of local number portability. Today's Order appropriately balances these concerns.

As the Order candidly acknowledges, giving incumbent local carriers the option of recovering number portability costs from consumers through a monthly charge is a sensitive matter and is not undertaken lightly. However, this is neither the first nor the last time we will need to make a difficult decision to achieve sound public policy. Congress made the right decision when it required carriers to deploy number portability, and I believe we have made the right decision on how carriers will recover the costs associated with that deployment.

I have little doubt that those consumers who have number portability capability deployed on their lines will see significant benefits. For example, they will not have to change phone numbers to take advantage of a better offer from a competitor. Even if those consumers do not change carriers, the mere presence of number portability will make competition more effective in that serving area, thereby bringing those same customers the fruits of competition -- better service and lower prices. Thus, while I recognize the potential for consumer dissatisfaction associated with any line item charge, I am convinced that the short-term cost of number portability will be outweighed by the tangible long term benefits for those consumers served by number portability technology.

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