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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 95-116
Telephone Number Portability	)	RM 8535
Cost Classification Proceeding	)	

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APPLICATION FOR REVIEW

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SUMMARY

Incumbent LECs have spent hundreds of millions of dollars upgrading their switches, signaling networks, and operations support systems to implement local number portability ("LNP") in accordance with Congress's and the Commission's instructions. In its Third Report and Order in this docket (the "Commission Order"), the Commission ruled that the LECs are entitled to recover the portion of these expenses that is "demonstrably an incremental cost that carriers incur in the provision of long-term number portability." Commission Order ¶ 73. The Commission ruled further that these costs should be recovered through end-user surcharges, and barred LECs from loading these costs into access charges. *Id.* ¶ 135. The Commission also decided that the federal LNP mandate required an "exclusively federal recovery mechanism" for the costs it imposed. *Id.* ¶ 29. The Commission delegated the task of drafting specific tariffing guidelines for these LNP surcharges to the Common Carrier Bureau.

Instead of carrying out these instructions, the Common Carrier Bureau adopted an order (the "Bureau Order") that directly contradicts them. Whereas the Commission held that LECs could use LNP surcharges to recover all network and system investments that are "demonstrably . . . incremental" to the LNP mandate, the Bureau limited the surcharge to the portion of hardware and software costs representing the cost of designing LNP functionality into the products. The Bureau simply decreed that "[a]ll of the other costs" of these upgrades are not eligible for recovery through the LNP surcharge because they "support non-portability services *. . . even though these costs may not have been incurred absent telephone number portability.*" Bureau Order ¶ 24 (emphasis added). The Bureau declared the remaining upgrade costs to be the "ordinary costs of doing business," *id.* ¶ 9, and it suggested that the LECs try to recover them through federal access charges and state recovery mechanisms. The Bureau never acknowledged that the Commission expressly foreclosed these avenues, nor did it try to explain how LECs could use them.

Pursuant to 47 C.F.R. § 1.115(a), U S WEST Communications, Inc. respectfully asks the Commission to review and vacate the Bureau Order as contrary to statute, regulation, case precedent and established policy. By adopting cost recovery rules that directly contradict the Commission Order, the Bureau violated 47 U.S.C. § 251(e)(2), exceeded its delegated authority, and engaged in substantive rulemaking without giving proper notice. In addition, the effect of the Bureau Order is to make the costs shifted out of the LNP unrecoverable; the Bureau Order therefore takes incumbent LECs' property without authorization from Congress. Because the five-year clock for collecting surcharges will soon begin to run, U S WEST requests that the Commission expedite consideration of and action on this application.

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APPLICATION FOR REVIEW

Pursuant to 47 C.F.R. § 1.115(a), U S WEST Communications, Inc. ("U S WEST") respectfully asks the Commission to review and vacate the Common Carrier Bureau's Memorandum Opinion and Order in the above-captioned docket, DA 98-2534 (released Dec. 14, 1998) (the "Bureau Order"). The Bureau Order unlawfully reverses course from the Commission's Third Report and Order in this docket, 13 FCC Rcd 11701 (1998) (the "Commission Order"), by barring incumbent LECs from recovering a substantial portion of their network and system upgrade costs through the local number portability ("LNP") end-user surcharge, even though they would not have incurred those costs but for the Commission's mandate to implement LNP. The application presents the following questions:

> 1. Did the Bureau violate 47 U.S.C. § 251(e)(2), act without authority, and engage in rulemaking without proper notice when it barred LECs from recovering a substantial portion of their LNP-caused upgrade costs through the LNP surcharge, in direct contradiction to the Commission's ruling that all "demonstrably incremental" costs of complying with the LNP mandate are recoverable?
>
> 2. Did the Bureau violate 47 U.S.C. § 251(e)(2), act without authority, and engage in rulemaking without proper notice when it ruled that LECs must recover a substantial portion of their LNP-caused costs through interstate access charges and state cost recovery mechanisms, in direct contradiction to the Commission's rulings that LNP costs (a) may not be recovered through access charges, and (b) may not be shifted to the state jurisdiction?

3. By making LECs' LNP costs effectively unrecoverable, does the Bureau Order take incumbent LECs' property without clear authorization from Congress?

Pursuant to 47 C.F.R. § 1.115(b)(2)(i), U S WEST states that it seeks review of the Bureau Order on the grounds that it is in conflict with statute, regulation, case precedent, and established Commission policy.

U S WEST asks the Commission to vacate the Bureau Order and declare that incumbent LECs may use the surcharge to recover all of the network and OSS upgrade costs they incur specifically to meet the Commission's portability mandate, less the present value of the non-LNP benefits yielded by these upgrades. Because U S WEST's recovery of its number portability implementation costs has already been delayed far too long, and because the five-year clock for collecting surcharges will begin to run once U S WEST's soon-to-be-filed surcharge tariff becomes effective, U S WEST respectfully requests that the Commission expedite action on this application by issuing a summary decision separate from and in advance of a statement of reasons, *cf.* 47 C.F.R. § 1.115(g), and by issuing any new cost-recovery rules itself without further proceedings rather than delegating the matter to the Common Carrier Bureau a second time. *See* 47 C.F.R. § 1.115(h)(1)(i). This will enable U S WEST and other LECs to begin recovering their full LNP-caused costs on a timely basis.

BACKGROUND

The Telecommunications Act of 1996 directs all local exchange carriers "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). In the Act, Congress gave the Commission exclusive jurisdiction over the administration of the North American Numbering

Plan, to which LNP implementation is closely tied. *See id.* § 252(e)(1). It also charged the Commission with devising a "competitively neutral" method by which carriers could recover their "cost[s] of establishing . . . number portability." *Id.* § 251(e)(2). Congress instructed the Commission to "complete all actions necessary to establish regulations" setting portability standards and cost recovery principles by August 8, 1996. *See* 47 U.S.C. § 251(d)(1).

In July 1996, the Commission released an order directing LECs to implement a database method of providing LNP in their largest markets by dates certain. The Commission also asked for further comment on whether and how to permit carriers to recover their various costs of implementing this mandate. *See* First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 FCC Rcd 8352 (1996) ("FNPRM"). The Commission tentatively divided the costs associated with establishing LNP into three categories: (1) "costs incurred by the industry as a whole, such as those incurred by the third-party administrator to build, operate, and maintain the databases"; (2) "carrier-specific costs directly related to providing number portability," such as "the costs to purchase the switch software implementing" LNP; and (3) "carrier-specific costs not directly related to number portability," which included "the costs of network upgrades necessary to implement a database method." FNPRM ¶ 208. The Commission proposed creating a special federal mechanism to permit carriers to recover the first two categories of costs directly from their customers, *see id.* ¶¶ 215, 222-23, but proposed requiring carriers to try to recover the last category of costs (those associated with upgrades such as OSS, SS7, and AIN enhancements) as general network upgrades — *i.e.*, through federal access charges and state recovery mechanisms. *Id.* ¶¶ 226-28.

Finally, the Commission sought comment on what form any LNP-specific cost-recovery mechanism should take. *See, e.g.*, *id.* ¶ 223.

U S WEST and other commenters agreed with the Commission's observation that there are three categories of costs associated with LNP; however, they disagreed with the Commission's tentative assignment of network and systems upgrade costs to the third category. Contrary to the Commission's suggestion, they argued, two types of carrier-specific upgrade costs are in fact "directly related to providing number portability," in that they are caused *solely* by having to comply with the federal LNP mandate. First, the LNP mandate forces LECs to deploy network and OSS upgrades that they would not have deployed absent the mandate. Second, even with respect to upgrades that otherwise *would* have been made, the Commission's implementation timetable forces carriers to deploy those upgrades sooner than they originally planned.[1/] U S WEST and others argued that these unplanned-upgrade and acceleration costs could be segregated from other network upgrade costs by taking the stream of investments that a carrier must make to implement LNP on the Commission's required timetable, discounting them to present value, and subtracting the discounted value of the investments the carrier would have made in the absence of the LNP mandate.[2/] In answer to the Commission's concern that these upgrades might yield some incidental network benefits not related to LNP, the commenters

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1/ *See, e.g.*, Comments of U S WEST, Inc., CC Dkt. No. 95-116, at 10-11 (filed Aug. 16, 1996); Comments of BellSouth at 6; Comments of the California Department of Consumer Affairs at 9; Comments of GTE at 4; Comments of NYNEX at 3-4; Comments of the United States Telephone Association at 2.

2/ *See, e.g.*, Comments of U S WEST at 10-11; Comments of BellSouth at 6.

proposed subtracting the value of any such incidental benefits (again discounted to present value) from this total.[3]

In response to the Commission's call for comments on the scope and structure of a cost-recovery mechanism, U S WEST and many commenters supported the idea of allowing LECs to levy a non-traffic-sensitive surcharge on end users.[4] Commenters also argued that Congress gave the Commission primary jurisdiction over the implementation of number portability, and that the Commission was obligated to provide an exclusively federal cost recovery mechanism for this federal mandate.[5]

The Commission's Third Report and Order in this docket (the "Commission Order") largely adopted the framework that U S WEST proposed. *See* Third Report and Order, *Telephone Number Portability*, 13 FCC Rcd 11701 (1998). The Commission reversed its tentative decision to assign all network upgrade costs to the non-specifically-recoverable third category of expenses, and instead declared that LECs could recover that portion of switch, OSS,

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[3] *See, e.g.*, Comments of U S WEST at 11; Comments of the United States Telephone Association at 5. At the same time, these commenters argued, these incidental benefits were speculative and certainly did not outweigh the costs of the upgrades themselves; otherwise, the carriers would have made these upgrades even without the LNP mandate. *See* Comments of U S WEST at 11.

[4] *See, e.g.*, Comments of U S WEST at 12; Comments of Ameritech at 8; Comments of Bell Atlantic at 8; Comments of the California Department of Consumer Affairs at 21-24; Comments of GTE at 9-14; Comments of the United States Telephone Association at 18-19; *see also* Reply Comments of Arch Communications at 7; Reply Comments of MobileMedia Communications at 5.

[5] *See, e.g.*, Comments of U S WEST at 5-9; Comments of Bell Atlantic at 3-4; Comments of NYNEX at 10-11 and n.22; *see also* Reply Comments of AirTouch Communications at 10; Reply Comments of Omnipoint Communications at 8-9; Reply Comments of Time Warner Communications at 16 and n.42.

SS7, and AIN upgrade costs "that is demonstrably an incremental cost carriers incur in the provision of long-term number portability." *Id.* ¶ 73.[6] The Commission also accepted that it had to establish an "exclusively federal recovery mechanism" for the costs imposed by the federal LNP mandate. *Id.* ¶ 29. Considering the two federal cost recovery mechanisms available to it, the Commission concluded that incumbent LECs should recover their LNP-caused costs through end-user surcharges and *not* load them into access charges. *See id.* ¶ 135. The Commission delegated the Chief of the Common Carrier Bureau authority to implement these holdings through specific tariff filing guidelines. *See id.* ¶ 75.

Seven months later, the Bureau released an order (the "Bureau Order") purporting to implement the Commission Order but in truth reversing it. Whereas the Commission had held that incumbent LECs could use the LNP surcharge to recover all network and OSS upgrade costs that were "demonstrably . . . incremental" to the LNP mandate, the Bureau limited the LECs to recovering only a portion of their expenses: specifically, that portion of hardware and software expenses reflecting the cost of engineering LNP functionality. *See* Bureau Order ¶¶ 23-24. The Bureau took the costs that incumbent LECs incurred solely to comply with the number portability mandate and subdivided them further into costs that were "eligible" and "ineligible" to be recovered through LNP surcharges — a division that never appeared in the Commission Order because the Commission ruled that surcharges would be the *exclusive* mechanism for recovering these costs. *See id.* ¶¶ 6-19. The Bureau told LECs that they should try to recover these "ineligible" costs (representing the bulk of their LNP-caused upgrade costs) through access

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[6] The Commission still denied *complete* recovery of upgrade costs in recognition of the fact that some of these network expenses yielded incidental non-LNP benefits. *Id.*

charges and possibly even state cost recovery mechanisms. *See id.* ¶¶ 6, 9. Yet the Bureau never once acknowledged that the Commission had specifically forbidden LECs from loading LNP costs into their access charges or shifting them to the state jurisdiction, nor did the Bureau explain exactly how LECs would use these mechanisms, even if they had not been foreclosed.

The effect of the Bureau's unilateral retrenchment from the Commission Order is to declare that incumbent LECs may not recover a significant portion of their costs of establishing number portability, in direct defiance of Congress's will and the Commission's rulings. U S WEST estimates that, as a result of the Bureau Order, it must absorb approximately $ 85 million in LNP costs — reflecting expenses for OSS changes, switch hardware and software upgrades, and signaling system expansion — that the Commission Order had permitted it to recover through LNP surcharges. This amount will increase even further if the Bureau acts to reduce U S WEST's surcharge tariffs once they are filed.

ARGUMENT

I. THE BUREAU UNLAWFULLY EXCEEDED ITS DELEGATED AUTHORITY AND EFFECTED A SUBSTANTIVE POLICY CHANGE WITHOUT NOTICE BY ADOPTING COST RECOVERY RULES THAT DIRECTLY CONTRADICT THE COMMISSION'S INSTRUCTIONS.

When the Commission adopts an order and delegates the task of implementing it to a bureau, the bureau must carry out the Commission's instructions. The bureau does not have delegated authority to rewrite the order, and any bureau action that conflicts with the order must be invalidated as *ultra vires*. "Abuse of discretion in an administrative law setting involving the delegation of powers by the administrative agency occurs when that agency (the Delegator) has allowed the delegated person (the Delegatee) to act beyond the scope of the authority delegated."

Gulf South Pipeline Co. v. FERC, 876 F.2d 431, 433 (5th Cir. 1989). *See also* Mem. Op. and Order, *Responsible Accounting Officer Letter 20*, 11 FCC Rcd 2957, ¶ 25 (1996) (Common Carrier Bureau interpretive letter "exceeded the Bureau's delegated authority to the extent that" it contradicted Commission rules). Moreover, bureau action that deviates from the Commission's instructions or policies constitutes a substantive rulemaking undertaken without adequate notice in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 553; Report and Order, *Responsible Accounting Officer Letter 20*, 12 FCC Rcd 2321, ¶ 28 (1997) (Common Carrier Bureau "did not have the delegated authority to amend" Commission rules in an interpretive letter; amendment requires "proper notice and comment").

The Bureau Order here is unlawful for exactly these reasons. The Commission ruled in unmistakable terms that (1) *all* network upgrade costs that are the demonstrably incremental consequence of the LNP mandate should be recoverable (less some offset for the incidental benefits these upgrades yield); (2) LNP costs may not be recovered through access charges; and (3) *all* costs attributable to the federal portability mandate must be recovered through federal mechanisms. The Bureau Order reverses all three rulings.

A. Whereas the Commission Provided for Recovery of All Network Upgrade Costs "Demonstrably Incremental" to the LNP Mandate, the Bureau Order Decrees a Substantial Portion of These Upgrade Costs To Be Unrecoverable.

The Commission Order held that Congress's goals are best achieved "by recognizing that providing number portability will cause some carriers . . . to incur costs that they would not ordinarily have incurred in providing telecommunications service." Commission Order ¶ 73. In particular, the Commission acknowledged that carriers' "costs of establishing

number portability" include their substantial "costs associated with . . . the initial physical upgrading of the public switched telephone network." *Id.* ¶ 38; *see also id.* ¶ 8. The Commission therefore reversed its tentative decision not to permit carriers to recover any part of their network upgrade costs, *see* FNPRM ¶¶ 227-28, and declared instead that it would "consider as carrier-specific costs directly related to the provision of number portability that portion of a carrier's joint costs that is demonstrably an incremental cost carriers incur in the provision of long-term number portability." Commission Order ¶ 73. "Joint costs," in turn, are defined as "costs for software generics, switch hardware, and OSS, SS7 or AIN upgrades." *Id.* To be sure, the Commission found it inappropriate to attribute the *entire* cost of a network upgrade to the LNP mandate when the upgrade also yields some incidental network benefits; the Commission's solution, however, was to exclude "some portion of such upgrade costs" to reflect these benefits, not to exclude the cost altogether. *Id.*

The Bureau Order does an about-face from these rulings. Whereas the Commission held that carriers should recover the "costs that they would not ordinarily have incurred in providing telecommunications service" and, in particular, all costs that are "demonstrably . . . incremental" to the LNP mandate, *id.*, the Bureau declared just the opposite: "Several LECs argue that all costs that would not have been incurred but for portability should be included as eligible LNP costs. . . . We disagree." Bureau Order ¶ 12. *See also* Bureau Order ¶ 8 ("Many of the resulting [network] costs would not have been incurred *but for* telephone number portability. While some of these costs are *for the provision of* telephone number portability, others are incurred because of the impact of portability on existing systems [*i.e.*, OSS] for providing repair and maintenance services, 911 services, service ordering, and other

network functions.") (emphasis in original). And whereas the Commission properly included the "costs associated with . . . the initial physical upgrading of the public switched telephone network" in its definition of the "costs of establishing number portability," Commission Order ¶ 38, the Bureau actually drew a sharp line between "network upgrade costs" and "the costs of providing local number portability itself." *See* Bureau Order ¶ 9 ("LECs must distinguish the costs of providing local number portability itself, recoverable through the federal charges provided in the *Third Report and Order*, from general network upgrade costs recoverable through the price caps and rate-of-return mechanisms.").

The Bureau's specific cost-recovery rules effectively gut the Commission Order. While the Commission held that the "costs for software generics, switch hardware, and OSS, SS7 or AIN upgrades" deployed as a result of the LNP mandate are recoverable (less some offset for incidental network benefits yielded), Commission Order ¶ 73, the Bureau ruled that carriers must exclude virtually all of the cost of *any* network upgrade or OSS change that can be used for *any* function in addition to LNP. Ignoring the carriers' actual out-of-pocket investments, the Bureau Order requires incumbent LECs to "subtract the costs of an [upgrade] without the telephone number portability functionality from the total costs of that item with the telephone number portability functionality." Bureau Order ¶ 23. The effect of this is to limit incumbent LECs to recovering the that portion of hardware and software costs reflecting the cost of engineering actual LNP functionality. The Bureau Order simply decrees that "[a]ll other costs" of the upgrade "support non-portability services and must be considered general network upgrade costs"; this is so "*even though these costs may not have been incurred absent telephone number portability*." *Id.* ¶ 24 (emphasis added). The Bureau Order likewise denies incumbent LECs

recovery of their costs (lost time value of money, lost depreciation) of accelerating network upgrades solely to meet the Commission's LNP timetable, except for the acceleration costs attributable to that slice of costs incurred in engineering LNP functionality. *Id.* ¶ 30 This last holding is patently absurd: It is meaningless to talk about "accelerating" the costs of deploying LNP functionality because that functionality would never have been deployed *at all* absent the Commission's mandate.

The Bureau Order's reversal from the Commission Order is an unlawful exercise in *ultra vires* rulemaking. It also violates the Commission's statutory obligation to adopt a "competitively neutral" framework for cost recovery. 47 U.S.C. § 251(e)(2). The Commission acknowledged that its LNP mandate requires incumbent LECs to spend far more to implement LNP than any other group of carriers; however, it held that the incumbents' ability to recover these costs from a broader base of end users prevents this absolute cost disparity from being a competitive disadvantage. *See* Commission Order ¶ 137. The Bureau has deeply undercut this rationale by forcing incumbents to shift hundreds of millions of dollars in implementation costs out of the LNP surcharge and into access charges (where they become yet another inefficient and uncollectible cross subsidy) or onto the backs of state regulators. As Part II, *infra*, explains, this has the effect of making the shifted costs unrecoverable, and indeed the Bureau has made no effort to explain how these mechanisms would work even if they were not directly foreclosed by the Commission. The Bureau Order thus saddles incumbent LECs with a disproportionate share of LNP implementation costs while denying them the ability to recover these costs, thereby

putting the incumbents at a specific cost disadvantage vis-à-vis their competitors. This result is not "competitively neutral," as the Commission has construed the statutory term.[7]

Moreover, the Bureau Order rests on faulty economic logic. The Bureau took the uncontroversial proposition that an LNP-forced network or OSS upgrade might yield some side benefits and used it to justify excluding virtually the entire cost of the upgrade. Bureau Order ¶ 11. *See also id.* ¶ 29 (putting the burden on the incumbent LEC to "demonstrate that all avoided costs and incremental revenues made possible by the upgrade will not cover the costs of the upgrade"). But this is demonstrably incorrect. It is obvious that the incidental network benefits yielded by these upgrades do not balance or outweigh their costs; otherwise the LECs would have deployed them *even in the absence of the LNP mandate.* The fact that the upgrades at issue were deployed only in response to the Commission's portability mandate indicates that their costs outweigh any non-portability benefits they may afford. Although the Bureau Order appears to blame the LECs for not having deployed these upgrades earlier,[8] the carriers' reluctance to deploy upgrades whose benefits did not justify their costs was simply economically rational — indeed, from the ratepayer's point of view, it was downright prudent. As U S WEST

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[7] *See* Commission Order ¶ 53 ("competitive neutrality" requires that any cost recovery scheme "not give one service provider an appreciable, incremental cost advantage over another service provider" and "not disparately affect the ability of competing service providers to earn a normal return"); *id.* ¶57 ("competitive neutrality" means that "number portability costs should not disproportionately burden one carrier over another").

[8] *See id.* ¶ 27 ("That some LECs have delayed making upgrades to their networks, for which a recovery mechanism has already been provided, does not authorize them to recover those costs now through the federal LNP charges."). As the text explains, a LEC that declines to deploy a newly marketed network upgrade whose benefits do not justify its costs is not guilty of "delay" or neglect of its network; it is simply avoiding a wasteful purchase.

and other commenters noted from the beginning, the economically proper way to calculate the costs directly attributable to the provision of LNP would have been to (1) take the cost of network upgrades that would not have been deployed absent the LNP mandate, (2) add the extra costs of accelerating the deployment of otherwise-planned upgrades *solely* to meet the Commission's timetable, and (3) subtract the value of the incidental non-portability network benefits that those upgrades yield. The Bureau took none of these steps; instead, it simply excluded these upgrade costs altogether without justification.

B. The Bureau Order Requires Incumbent LECs To Use Cost Recovery Mechanisms That the Commission Has Expressly Forbidden.

The Bureau Order exerts much effort trying to distinguish which carrier costs attributable to the LNP mandate are "eligible" for recovery through the federal surcharge and which are not. Bureau Order ¶¶ 6-19. But the Bureau created this concept of an "eligible" LNP cost out of whole cloth: The modifier "eligible" does not appear once in the sections of the Commission Order where the Bureau purports to find it. *Compare* Bureau Order ¶ 6 n.18 *with* Commission Order ¶¶ 72-74. The simple reason is that the Commission ruled that *all* LNP-caused costs must be recovered through the federal surcharge; it never contemplated that there would be some class of costs that were directly attributable to the portability mandate and yet somehow "ineligible" for recovery through the LNP surcharge.

The Bureau compounded its error by relegating this nether-class of LNP costs to recovery mechanisms that the Commission specifically declared off-limits. The Bureau directed incumbent LECs to recover their "ineligible" LNP costs — again, costs that the Bureau concedes may not have been incurred but for the portability mandate, Bureau Order ¶ 8 — from "ordinary

price caps or rate-of-return cost recovery." *Id.* ¶ 6. In other words, the Bureau expects LECs to load these costs into access charges. Moreover, the Bureau suggests that these costs will be treated as "general network upgrades" for cost recovery purposes, which may mean that it intends to send these costs through separations and shift a substantial portion of them to the state jurisdiction. The Commission, however, has expressly foreclosed both these options.

1. The Bureau Order directs incumbent LECs to recover LNP costs through access charges, in direct contradiction to the Commission's ruling and interpretation of the Telecommunications Act.

The Bureau's decision to force a substantial portion of carriers' LNP-caused network upgrade costs into access charges cannot be squared with the Commission Order. The Commission barred this source of recovery outright: "Because number portability is not an access-related service and IXCs will incur their own costs for the querying of long-distance calls, we will not allow LECs to recover long-term number portability costs in interstate access charges." Commission Order ¶ 135. The Commission held further that recovering LNP costs through access charges would not be "competitively neutral" (and therefore in violation of section 251(e)(2) of the Telecommunications Act) because it might cause some carriers to double-pay for number portability. *Id.* The Bureau has acted unlawfully by relegating carriers to a cost recovery mechanism that the Commission specifically foreclosed and held to be inconsistent with the Telecommunications Act.

2. The Bureau Order ignores the Commission's ruling that costs attributable to the federal portability mandate must be recovered through an "exclusively federal" mechanism.

Although the Bureau Order does not explicitly address the jurisdictional treatment of "ineligible" costs, it does suggest that the costs carriers bear to increase the capacity of their networks to handle the huge new volumes of LNP database inquiries are merely "ordinary costs of doing business in this new environment, and, thus, represent general network upgrades." *Id.* ¶ 9. This may express an intent to pass these LNP costs through separations to state recovery mechanisms, as is done for most "ordinary costs of doing business" and "general network upgrades." But this, too, is an option directly foreclosed by the Commission Order and contrary to law. The Commission must clarify that any costs incurred as a result of the federal LNP mandate must be recovered only within the federal jurisdiction.

A LEC's duty to implement number portability and the Commission's obligation to provide for cost recovery are both imposed by federal law. The Telecommunications Act directs all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission." 47 U.S.C. § 251(b)(2). Congress explicitly charged the Commission with responsibility for determining how carriers should bear the costs of complying with this federal mandate, *see id.* § 251(e)(2),[9] and gave the Commission *exclusive* jurisdiction over the North American Numbering Plan, which is directly affected by any LNP regime. *See id.* § 252(e)(1). The Commission, in turn, has appropriately acknowledged

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[9] *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 794 n.10, 802 n.23 (8th Cir. 1997), *cert. granted sub nom. AT&T v. Iowa Utils. Bd.*, 118 S. Ct. 879 (1993) (confirming Commission's role in regulating number portability).

this jurisdictional assignment, Commission Order ¶ 28, and has declared that *all* costs attributable to the federal LNP mandate *must* be recovered within the federal jurisdiction:

> Consequently, we find that section 251(e)(2) authorizes the Commission to provide the distribution and recovery mechanism for *all the costs of providing long-term number portability*. We conclude that an *exclusively federal* recovery mechanism for long-term number portability will enable the Commission to satisfy most directly its competitive neutrality mandate, and will minimize the administrative and enforcement difficulties that might arise were jurisdiction over long-term number portability divided.

Id. ¶ 29 (emphasis added). The Bureau decision to shift any portion of LNP costs to the states directly contradicts this instruction.

The decision to dump LNP costs on the states also runs afoul of longstanding judicial precedent. The Commission and the states are separate sovereigns, and each bears responsibility for ensuring recovery of the costs of services provided under its jurisdiction. Just as federal regulators are forbidden, absent express congressional authorization, from dictating procedures for recovering intrastate costs where intrastate services are separable from federally regulated services,[10] so states cannot prescribe the recovery of interstate costs in place of the Commission.[11] Each regulator must take responsibility for providing recovery of the costs of services provided under its jurisdiction, and neither may depend on the other to make up any

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[10] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986) (forbidding Commission from setting state depreciation rates); *Iowa Utils. Bd.*, 120 F.3d at 796.

[11] *See Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133, 148-49 (1930) (forbidding state from setting local pay telephone rates based on costs and revenues from providing interstate service).

shortfall in its own cost recovery mechanism.[12] The Commission has acknowledged these constraints.[13] The Bureau Order runs directly against these principles to the extent it blithely assumes that state regulators will provide the means for recovering the costs of federally mandated local number portability.

II. IF IMPLEMENTED, THE BUREAU ORDER WOULD TAKE INCUMBENT LECS' PROPERTY WITHOUT EXPRESS CONGRESSIONAL AUTHORIZATION.

Not only have the cost recovery mechanisms to which the Bureau Order would limit incumbent LECs been specifically disallowed by the Commission; they are also demonstrably inadequate. Even if the Commission had not barred U S WEST from loading LNP costs into access charges, for example, U S WEST could not raise its access charges to recover these costs, since U S WEST is subject to price-cap regulation, and neither the Commission nor the Bureau has authorized carriers to treat LNP expenses as exogenous costs. In

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[12] *See Smith*, 282 U.S. at 148-49 (state regulators have "no authority to impose intrastate rates, if as such they would be confiscatory, on the theory that the interstate revenue of the company was too small and could be increased to make good the loss"); *Hawaiian Tel. Co. v. Public Util. Comm'n*, 827 F.2d 1264, 1275 (9th Cir. 1987) (invalidating state separations formula that failed to provide for recovery of all costs assigned to the state's jurisdiction); *NARUC v. FCC*, 737 F.2d 1095, 1113-14 (D.C. Cir. 1984) (confirming Commission's obligation to allow recovery of costs of local telephone plant assigned under *Smith* to federal jurisdiction); *cf. Public Svc. Comm'n v. FCC*, 909 F.2d 1510, 1516 (D.C. Cir. 1990) (permitting Commission to preempt state's unilateral attempt to shift intrastate costs to federal jurisdiction).

[13] *See, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 ¶ 737 n.1756 (1996) (recognizing that, in determining whether LECs are earning an adequate return on their investments, "we may not consider incumbent LECs' revenue derived from services not under our jurisdiction").

addition, strong competition in access services makes it impossible for LECs to raise access charges further in order to add yet another cross-subsidy of local exchange services.

Likewise, the Bureau cannot guarantee that the LNP costs it shifts to the state jurisdiction can ever be recovered. The Commission has no authority to force state regulators to conduct a rate case or accept LNP-driven network upgrades as additions to the rate base. Indeed, the very reason that federal and state regulators are forbidden from unilaterally shifting costs to each other is the danger that these costs will fall through the cracks and go unrecovered. *See Hawaiian Tel. Co. v. Public Util. Comm'n*, 827 F.2d 1264, 1275 (9th Cir. 1987) (where regulator fails to provide recovery of costs assigned to its jurisdiction, there is a risk that "some costs of plant and expenses would not be included in the rate computations of either the PUC or the FCC" and, as a result, carriers "may be deprived of a fair rate of return when interstate and intrastate jurisdictions are both taken into account") (internal punctuation omitted).

Directing carriers to recover their "ineligible" LNP costs through access charges and state processes is therefore equivalent to declaring that these hundreds of millions of dollars can go unrecovered. The Bureau Order would thus confiscate incumbent LECs' property and deny them their Fifth Amendment right to recover their reasonable investment expenses and realize a fair return on their capital dedicated to public service. *See, e.g.*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989). An administrative agency, however, may not take private property without a clear authorization by Congress. *See Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994). Congress provided no such authorization in the Telecommunications Act; on the contrary, Congress directed the Commission to *adopt* a

mechanism by which carriers could recover their costs of implementing number portability. *See* 47 U.S.C. § 251(e)(2).[14] The Bureau Order is therefore unauthorized.

III. THE COMMISSION SHOULD EXPEDITE CONSIDERATION OF THIS APPLICATION.

The Commission ruled that incumbent LECs may levy the end-user LNP surcharge only for a five-year period beginning once they submit their respective tariffs. Commission Order ¶ 142. U S WEST will file its tariff and begin its five-year clock imminently. (U S WEST cannot reasonably delay this filing, since it cannot continue to carry these several hundred million dollars' worth of already-incurred but unrecovered LNP costs forward on its books.) If the Commission (or a court) ultimately determines that U S WEST is entitled to recover the additional $ 85 million in LNP costs that the Bureau Order disallows,[15] U S WEST presumably will have to recover these costs in whatever amount of time remains on the five-year surcharge clock. The more time the Commission takes to consider this application, the shorter the period for recovery, and thus the larger the surcharge needed to recover the full amount. Thus, delaying consideration of this application risks future rate shock. Delay may also make these LNP costs permanently unrecoverable, as increasing local exchange competition will make it impossible for carriers to tack such large surcharges onto customer bills without driving those

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[14] In any event, even if the Act were ambiguous on the subject, it would have to be construed *against* authorizing administrative takings of private property. *See Bell Atlantic*, 24 F.3d at 1445 ("Within the bounds of fair interpretation, statutes will be construed to defeat administrative orders that raise substantial constitutional questions.").

[15] If the Bureau disallows any portion of U S WEST's surcharge tariffs, this unrecovered portion will be even greater.

customers away. Indeed, the very purpose of the investments U S WEST has made in number portability is to make it easier for competitors to win customers away from it.

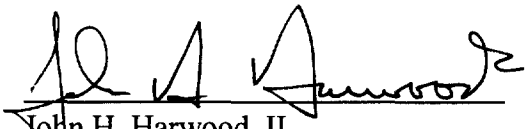
U S WEST therefore respectfully asks the Commission to expedite its consideration of this application to the extent possible. As noted above, U S WEST suggests that the Commission consider expediting the process by issuing a summary decision separate from a statement of reasons, *cf.* 47 C.F.R. § 1.115(g), and by issuing any new cost-recovery rules itself without further proceedings rather than remanding the matter to the Common Carrier Bureau. *See* 47 C.F.R. § 1.115(h)(1)(i).

CONCLUSION

For the foregoing reasons, the Commission should vacate the Bureau Order and permit incumbent LECs to file surcharge tariffs consistent with the Commission Order by declaring that incumbent LECs may use the surcharge to recover all of the network upgrade costs

they incur solely to meet the Commission's portability mandate, including acceleration costs, net the present value of the non-LNP benefits that these upgrades will yield.

Respectfully submitted,



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January 13, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of January, 1999, I caused a true copy of the foregoing Application for Review of U S WEST Communications, Inc. to be served by hand delivery upon the persons listed on the attached service list marked with an asterisk, and by first-class mail upon all other persons listed.

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