

Before the
Federal Communications Commission
Washington, D.C. 20554

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

**FOURTH MEMORANDUM OPINION AND
ORDER ON RECONSIDERATION**

Adopted: June 23, 1999

Released: July 16, 1999

By the Commission: Commissioner Furchtgott-Roth issuing a separate statement.

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I. INTRODUCTION

1. On June 27, 1996, the Commission adopted the *First Report and Order and Further Notice of Proposed Rulemaking*¹ in this docket, which implemented the provisions of section 251 of the Communications Act of 1934, as amended, that relate to telephone number portability.² Specifically, section 251(b)(2) requires that all local exchange carriers (LECs) provide, "to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."³ Section 251(e)(2) provides that "the costs of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."⁴ The 1996 Act defines "number portability" as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."⁵ In the *First Report and Order*, the Commission determined, among other things, that it has authority under section 251 to promulgate rules regarding long-term and currently available (or "interim") number portability,⁶ as well as to establish cost recovery methods for each.⁷

2. Twenty-two parties filed petitions for reconsideration or clarification of the *First Report and Order*. Nineteen parties filed oppositions to or comments on the petitions, and 16 parties filed reply comments.⁸ The petitions raise a broad range of issues. On March 6, 1997, the Commission

¹ *In re Telephone Number Portability*, CC Docket No. 95-116, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352 (1996) (*First Report and Order*).

² Section 251 was added by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act or Act).

³ 47 U.S.C. § 251(b)(2).

⁴ 47 U.S.C. § 251(e)(2).

⁵ 47 U.S.C. § 153(30). This "service provider portability" differs from "location portability," which is the ability to keep the same telephone number when moving to a new location, and from "service portability," which is the ability to keep the same telephone number when subscribing to new services. In light of the statutory definition, section 251(b)(2) requires service provider portability but not location or service portability.

⁶ Long term number portability refers to the provision of number portability in a manner that complies with the performance criteria set forth in section 52.23 of the Commission's rules. 47 C.F.R. § 52.23. In contrast, currently available number portability refers to the provision of number portability via methods "such as Remote Call Forwarding (RCF), Flexible Direct Inward Dialing (DID), or other comparable and technically feasible arrangements that allows one local exchange carrier to transfer telephone numbers from its network to the network of another telecommunications carrier, but does not comply with" the Commission's performance criteria. 47 C.F.R. § 52.21(q).

⁷ *First Report and Order*, 11 FCC Rcd at 8409.

⁸ A complete list of petitioners and commenting parties is attached as Appendix A. Telecommunications Resellers Association filed comments and U S WEST filed reply comments beyond our comment deadlines, and both filed motions to accept their respective late filings. We grant both motions. See 47 C.F.R. § 1.3 (stating that "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown").

adopted a *First Memorandum Opinion and Order on Reconsideration* in this proceeding, addressing a number of these issues.⁹ A *Second Memorandum Opinion and Order on Reconsideration* clarified that all LECs must discontinue using interim number portability in areas where a long-term number portability method has been implemented.¹⁰ The item also clarified that Remote Call Forwarding (RCF) and Flexible Direct Inward Dialing (DID) are not the exclusive methods of providing interim number portability that LECs are obligated to provide on a transitional basis. Instead, LECs may implement any technically feasible method of interim number portability comparable to RCF and DID.¹¹ The Commission also held that a LEC is required to implement the specific method of interim number portability requested by a competing carrier, provided that provision of the requested method is not unduly burdensome.¹² A *Third Memorandum Opinion and Order on Reconsideration* denied a petition for reconsideration that sought modification to the long-term number portability deployment schedule.¹³ In its *Third Report and Order* on number portability, the Commission adopted rules governing recovery of the costs of long-term number portability.¹⁴

3. In this *Fourth Memorandum Opinion and Order on Reconsideration*, we address issues raised by petitioners relating to cost recovery for interim number portability. First, we affirm our conclusion that the Commission has the authority to establish cost recovery guidelines for interim

⁹ *In re Telephone Number Portability*, CC Docket 95-116, *First Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd 7236 (1997) (*First Order on Reconsideration*). The *First Order on Reconsideration* addressed three primary issues. First, the Commission concluded that Query on Release is not an acceptable long-term number portability method because it would result in an impairment of service quality when switching from one carrier to another and thus violates the performance criteria established in the *First Report and Order*. Second, the Commission extended the long-term number portability implementation schedule for wireline carriers, clarified the requirements imposed thereunder, and addressed issues related to rural LECs and certain other parties. Third, the Commission affirmed and clarified the long-term number portability implementation schedules for wireless carriers.

¹⁰ *In re Telephone Number Portability*, CC Docket 95-116, *Second Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 21,204 (1998) (*Second Order on Reconsideration*). The *Second Order on Reconsideration* addressed several additional issues. The item adopted a proposal regarding the long-term number portability database administration. The item declined to adopt various proposals regarding long-term number portability performance criteria. The item also declined to address location portability issues. The item affirmed the Commission's earlier conclusion that interexchange carriers (IXCs) are not required to make their assigned 500 and 900 numbers portable, but declined to rule on the Commission's authority to require all other carriers to offer 500 and 900 number portability. Finally, the item clarified several issues relating to wireless carriers' provision of long-term number portability.

¹¹ *Second Order on Reconsideration*, 13 FCC Rcd at 21,212-17.

¹² *Id.*

¹³ *In re Telephone Number Portability*, CC Docket No. 95-116, *Third Memorandum Opinion and Order on Reconsideration*, 13 FCC Rcd 16,090 (1998) (*Third Memorandum Opinion and Order on Reconsideration*).

¹⁴ *In re Telephone Number Portability*, CC Docket No. 95-116, *Third Report and Order*, 13 FCC Rcd 11,701 (1998) (*Third Report and Order*). The *Third Report and Order* was published in the Federal Register on June 29, 1998 [63 FR 35,150] and became effective on July 29, 1998. See *infra* ¶ 8 for a discussion of the *Second Report and Order*. Petitions for reconsideration of the *Third Report and Order* are pending.

number portability. Second, we reject claims that the cost recovery guidelines for interim number portability set forth in the *First Report and Order* are arbitrary and capricious, or constitute an unconstitutional taking. We deny the request that these cost recovery guidelines be applied retroactively. We also affirm our earlier decision to adopt general cost recovery guidelines for interim number portability while allowing states flexibility to continue using a variety of cost recovery approaches that are consistent with our guidelines. Finally, we clarify issues relating to terminating access charges, modification of billing systems, and the competitive neutrality of certain cost recovery allocators, as each of these issues relates to interim number portability.

II. BACKGROUND

4. In the *First Report and Order*, the Commission exercised its authority to prescribe requirements governing the LECs' duty to provide number portability. After determining that section 251(b)(2) requires LECs to provide number portability in the short term, the Commission prescribed that such number portability be provided through Remote Call Forwarding (RCF), Flexible Direct Inward Dialing (DID), or other comparable methods.¹⁵ The Commission based this finding on its conclusion that section 251(b)(2), by referring to the provision of number portability "to the extent technically feasible," creates a dynamic requirement that allows for changes in the methods by which a LEC provides the required number portability.¹⁶ Accordingly, the Commission concluded that because RCF, DID, and other comparable measures currently are technically feasible number portability methods, section 251(b)(2) requires LECs to provide number portability through such methods. The Commission stated that, upon receipt of a specific request from another telecommunications carrier, a LEC must provide number portability through such measures as soon as reasonably possible, until such time as the LEC implements a long-term database method for number portability in that area.¹⁷

5. In light of its finding that the Communications Act requires LECs to provide interim number portability, the Commission also determined that it must adopt cost recovery principles for interim number portability measures pursuant to section 251(e)(2).¹⁸ The Commission concluded that section 251(e)(2) "gives us specific authority to prescribe pricing principles that ensure that the costs of establishing number portability are allocated on a 'competitively neutral' basis."¹⁹ Applying section 251(e)(2) to interim number portability, the Commission concluded that it should adopt guidelines that the states must follow in mandating cost recovery mechanisms for interim number portability measures.²⁰

6. Section 251(e)(2) requires that "the costs of establishing number administration and number

¹⁵ *First Report and Order*, 11 FCC Rcd at 8409.

¹⁶ *Id.*

¹⁷ *Id.* at 8409, 8411.

¹⁸ *Id.* at 8415.

¹⁹ *Id.* at 8417.

²⁰ *Id.* at 8417.

portability be borne by all telecommunications carriers on a competitively neutral basis."²¹ In the *First Report and Order*, the Commission determined that the costs of currently available (referred to here as interim) number portability are those "incremental costs incurred by a LEC to transfer numbers initially and subsequently forward calls to new service providers."²² The Commission also determined that for purposes of interim number portability, the phrase "all telecommunications carriers" was to be read literally, and included "any provider of telecommunications services," including incumbent LECs, new LECs, commercial mobile radio service (CMRS) providers, and IXCs.²³

7. The Commission also set forth two criteria with which any cost recovery method must comply in order to be considered competitively neutral. First, "a 'competitively neutral' cost recovery mechanism should not give one service provider an appreciable, incremental cost advantage over another service provider, when competing for a specific subscriber."²⁴ Second, the cost recovery mechanism "should not have a disparate effect on the ability of competing service providers to earn normal returns on their investments."²⁵ In the *First Report and Order*, the Commission provided some examples of methods currently in use that would comply with these criteria. Such methods include, but are not limited to: allocating incremental costs based on (a) the number of ported numbers, (b) the number of active telephone numbers, (c) the number of active telephone lines, (d) gross telecommunications revenues net of charges paid to other carriers; and (e) each carrier bearing its own costs.²⁶ The Commission further stated that requiring new entrants to bear all of the costs of interim number portability, measured on the basis of incremental costs, would not comply with the statutory requirements of section 251(e)(2).²⁷ In setting forth these criteria, however, the Commission left to the states the determination of the specific cost recovery mechanism to be utilized.²⁸

8. In August, 1997, the Commission adopted a *Second Report and Order*.²⁹ The *Second Report and Order* addresses recommendations of the North American Numbering Council (NANC)

²¹ 47 U.S.C. § 251(e)(2).

²² *First Report and Order*, 11 FCC Rcd at 8418.

²³ *Id.* at 8419.

²⁴ *Id.* at 8420.

²⁵ *Id.* at 8421.

²⁶ *Id.* at 8422.

²⁷ *Id.* at 8422-23.

²⁸ *Id.* at 8417.

²⁹ *In re Telephone Number Portability*, CC Docket No. 95-116, *Second Report and Order*, 12 FCC Rcd 12,281 (1997) (*Second Report and Order*).

regarding specific aspects of local number portability implementation.³⁰

9. On May 5, 1998, the Commission adopted a *Third Report and Order* that resolved numerous issues regarding the means by which carriers will bear the costs of providing long-term number portability.³¹ The Commission found that section 251(e)(2) expressly and unconditionally grants the Commission authority, and requires the Commission, to ensure that all telecommunications carriers bear the costs of providing number portability for interstate and intrastate calls on a competitively neutral basis.³² In making this finding, the Commission pointed to section 251(e)(2)'s requirement that carriers shall bear the costs of number portability "as determined by the Commission," and noted that section 251(e)(2) does not distinguish between costs incurred in connection with intrastate calls and costs incurred in connection with interstate calls.³³ The Commission concluded that section 251(e)(2) addresses both interstate and intrastate matters and overrides section 2(b)'s reservation of authority to the states over intrastate matters.³⁴ Thus, the Commission determined that section 251(e)(2) authorizes it to provide the distribution and cost recovery mechanism for all the costs of providing long-term number portability. The Commission

³⁰ The *Second Report and Order* adopted ten NANC recommendations, with some modifications. Specifically, it (1) adopted NANC's recommendation that seven regional number portability databases be established coinciding with the boundaries of the seven original Regional Bell Operating Company (RBOC or BOC) regions; (2) adopted NANC's recommendation that Lockheed Martin IMS and Perot Systems, Inc. serve as the regional number portability database administrations; (3) adopted NANC's proposed technical and operational standards for the provision of number portability; (4) required that the carrier immediately preceding the terminating local exchange carrier be responsible for ensuring the number portability databases are queried; (5) permitted LECs to block calls that have not been queried when failure to do so is likely to impair network reliability; (6) directed NANC to submit to the Commission recommendations on the sharing of numbering information between the regional number portability database administrators and the North American Numbering Plan Administrator; (7) directed NANC to develop standards and procedures for the provision of number portability by CMRS providers; (8) adopted on an interim basis NANC's recommendation that the regional limited liability companies manage and oversee the local number portability administrators, subject to review by NANC; (9) directed NANC to provide national-level oversight of local number portability administrators; and (10) adopted NANC's recommendation that the Commission create a committee to oversee number portability deployment in the top 100 Metropolitan Statistical Areas (MSAs). *Second Report and Order*, 12 FCC Rcd 12,281.

³¹ The *Third Report and Order* addressed four primary issues. First, it held that the Commission had exclusive federal jurisdiction over the provision of long-term number portability. Second, the Commission concluded that the costs of long-term number portability include three categories: (1) shared costs; (2) carrier-specific costs directly related to providing number portability; and (3) carrier-specific costs not directly related to number portability. Third, the Commission adopted guidelines on a number of issues regarding cost recovery of long-term number portability regional databases costs. Fourth, the Commission concluded that incumbent LECs subject to rate-of-return or price cap regulation may recover their carrier-specific costs directly related to providing long-term number portability through a federal charge assessed on end-users, and that other telecommunications carriers may recover their carrier-specific costs directly related to providing long-term number portability in any lawful manner. *Third Report and Order*, 13 FCC Rcd 11,701.

³² *Third Report and Order*, 13 FCC Rcd at 11,719-20.

³³ *Id.*

³⁴ *Id.*

further determined 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" if jurisdiction were shared between the states and the Commission.³⁵

III. RECONSIDERATION ISSUES

A. Commission Authority To Require Interim Number Portability

1. Background

10. In the *First Report and Order*, the Commission required LECs to provide interim number portability, based on the 1996 Act's requirement that LECs provide number portability "to the extent technically feasible."³⁶ The Commission based this conclusion on the language of section 251(b)(2), which states that LECs have "[t]he duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."³⁷

11. Several carriers challenge the Commission's finding that the 1996 Act provides authority for the Commission to order LECs to provide interim number portability.³⁸ BellSouth asserts that the phrase "to the extent technically feasible" in section 251(b)(2) is not a dynamic concept but should be strictly construed as a timing device regarding the Commission's long-term number portability implementation schedule.³⁹ BellSouth asserts that any other reading would be an "overbroad" construction of Congress' long-term number portability mandate that would extend Commission jurisdiction to wholly intrastate functionalities.⁴⁰ BellSouth also asserts that interim number portability is not number portability as required by the 1996 Act, because interim number portability is technically inferior to long-term number portability and the Communications Act defines number portability as the ability of consumers to retain existing telecommunications numbers "without impairment of quality."⁴¹ BellSouth also argues that the Commission inappropriately relies on section 271(c)(2)(B)(xi) to compel LEC provision of interim number portability by grafting section 271(c)(2)(B)(xi), which is applicable to BOCs who desire to get into the long distance business, onto

³⁵ *Id.*

³⁶ *First Report and Order*, 11 FCC Rcd at 8409-12.

³⁷ *Id.*

³⁸ *See, e.g.*, BellSouth Petition at 4; SBC Petition at 3-4.

³⁹ BellSouth Reply at 2-3.

⁴⁰ *Id.* at 2-3, and n.8 (citing section 2(b) of the Communications Act).

⁴¹ *Id.* at 5 (citing section 3(30) of the Communications Act).

sections 251(b)(2) and 153(30), which apply to all LECs.⁴² Several other commenters, on the other hand, assert that the Commission's determination that the definition of number portability is a dynamic one is correct, and more closely comports with the statute and the intent of Congress than the interpretation advanced by BellSouth.⁴³

2. Discussion

12. We reaffirm our earlier conclusion that we have authority to require that number portability be implemented "to the extent technically feasible" and that our authority under section 251(b)(2) encompasses all forms of number portability. Section 3(30) of the Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."⁴⁴ This definition is not limited to any one technical method of number portability. Nor is the duty of LECs pursuant to section 251(b)(2), to provide number portability "to the extent technically feasible . . . in accordance with requirements prescribed by the Commission," limited to long-term number portability.⁴⁵ We acknowledge that some ambiguity exists regarding the statutory mandate to require the provision of interim number portability, because, while sections 251(b) and 3(30) refer to the provision of "number portability," section 271(c)(2)(B) refers to both "regulations pursuant to section 251 to require number portability" and "interim number portability" to be provided by BOCs until the Commission issues such regulations.⁴⁶ We find, however, that our earlier interpretation of section 251(b)(2), that is, requiring all LECs to provide number portability to the extent technically feasible, is consistent with, and necessary to effectuate, Congress's goal to promote competition in the provision of local telecommunications

⁴² BellSouth Petition at 7. In order to meet the "competitive checklist," section 271(c)(2)(B)(xi) states that BOCs must provide,

[u]ntil the date by which the Commission issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements After that date, full compliance with such regulation.

47 U.S.C. § 271(c)(2)(B)(xi).

⁴³ Time Warner Comments at 12; AT&T Opposition at 22; MCI Opposition at 2-3.

⁴⁴ See *First Report and Order*, 11 FCC Rcd at 8409-13.

⁴⁵ The Commission has previously interpreted the statutory phrase "technically feasible" to refer solely to technical or operational concerns, rather than economic, space, or site considerations. This definition was upheld by the Eighth Circuit Court of Appeals. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15,499 at 15,602-07 (1996) (*Local Competition Order*), *vacated in part, aff'd in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *reversed in part, aff'd in part and remanded sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999).

⁴⁶ See 47 U.S.C. §§ 251(b)(2), 271(c)(2)(B)(ix), 153(30).

service.⁴⁷ Indeed, prior Commission decisions reflect our understanding of Congress's intent, stated in the *First Report and Order*, that number portability is a dynamic concept that allows for changes in the methods by which LECs provide it.⁴⁸ Thus, we have referred to the fact that number portability methods change over time by calling number portability methods, such as RCF and DID, "currently available number portability,"⁴⁹ "interim number portability,"⁵⁰ and "transitional number portability."⁵¹ Each of these phrases refers to number portability using technology available at that time, and reflects the Commission's ongoing statutory mandate to require number portability "to the extent technically feasible."⁵²

13. Additionally, in placing number portability obligations within section 251, which is concerned overall with the development of competitive local markets, Congress recognized the importance of number portability to the development of local competition. We conclude that, if LECs were able to delay provision of number portability until long-term number portability becomes available, such delay likely would impede the development of local competition.⁵³ Immediate availability of number portability, in contrast, even through currently available methods, will facilitate the development of local competition and, therefore, better serve the intent of the statute. Because the statutory language, like the language in the House bill, requires LECs to provide number portability

⁴⁷ In the *First Report and Order*, the Commission found that

[n]umber portability promotes competition between telecommunications service providers by, among other things, allowing customers to respond to price and service changes without changing their telephone numbers. The resulting competition will benefit all users of telecommunications services. Indeed, competition should foster lower local telephone prices and, consequently, stimulate demand for telecommunications services and increase economic growth.

First Report and Order, 11 FCC Rcd at 8368.

⁴⁸ *First Report and Order*, 11 FCC Rcd at 8409.

⁴⁹ *Id.* at 8415.

⁵⁰ *See Third Report and Order*, 13 FCC Rcd at 11,727.

⁵¹ *See Second Order on Reconsideration*, 13 FCC Rcd at 21,212-17. We consider all of these terms to be synonymous, except when the term "interim number portability" is used in the context of 47 U.S.C. § 271(e)(2)(B)(xi). There it denotes the type of number portability that Bell Operating Companies seeking entry into in-region long distance service must provide until the Commission issues regulations pursuant to section 251. When using the term "interim number portability" in the context of section 251, we refer to the type of number portability that the Commission has specified by rule for use by all LECs until the date, also specified by Commission rule, when all LECs must provide long-term number portability.

⁵² 47 U.S.C. § 251(b)(2).

⁵³ As we noted in the *First Report and Order*, "the record demonstrates that a lack of number portability likely would deter entry by competitive providers of local service because of the value customers place on retaining their telephone numbers." *First Report and Order*, 11 FCC Rcd at 8368. Long-term number portability has been implemented in the top 100 MSAs, but interim number portability is still in use in those MSAs in which long-term number portability has not yet been implemented.

"to the extent technically feasible" and according to requirements prescribed by the Commission, rather than "when technically feasible," we do not believe that this legislative history suggests an intent by Congress to prevent the Commission from requiring LECs to provide "interim," "currently available," or "transitional" number portability until "true" number portability becomes available. Rather, this language suggests an appreciation of the manner in which number portability could be provided at the time of consideration of the 1996 Act, and that the manner of providing number portability would change over time.

14. The Joint Explanatory Statement accompanying the Conference Report to the Telecommunications Act of 1996 notes that section 251 "incorporates provisions from both the Senate bill and the House amendment."⁵⁴ The enacted language of section 251, that LECs have a duty pursuant to section 251(b)(2) to provide number portability "to the extent technically feasible" is identical to that in section 242(a)(4) of the House bill. The report on the House bill indicates that the duty to provide number portability includes both interim and long-term number portability. The House Report explains that the "technically feasible" requirement is important because "the software necessary for 'true' number portability, as opposed to 'interim' number portability (which is an advanced call forwarding feature) . . . is not presently available" and states its expectation that "true" number portability will "be deployed when it is technically feasible."⁵⁵ Because the statutory language, like the language in the House bill, requires LECs to provide number portability "to the extent technically feasible" and according to requirements prescribed by the Commission, rather than "when technically feasible," we do not believe that this legislative history suggests an intent by Congress to prevent the Commission from requiring LECs to provide "interim" number portability until "true" number portability becomes available. As discussed above, this statutory language suggests an appreciation of the manner in which number portability could be provided at the time of consideration of the 1996 Act, and that the manner of providing number portability would change over time. Together with the broad definition of number portability in section 3(30), this language also suggests a Congressional understanding that although "interim" number portability was technically inferior to "true" number portability, both comprise number portability.⁵⁶

15. We find unpersuasive BellSouth's contention that, because Congress considered including a specific reference to interim number portability, but did not adopt it in section 251(b), the lack of such language demonstrates that the Commission is without jurisdiction in this area.⁵⁷ In particular, BellSouth cites to language referring to interim and final number portability set forth in section 261 of Senate Bill 652.⁵⁸ This language was not included in the final version of the legislation. Because the

⁵⁴ H.R. Rep. No. 104-204(I), 104th Cong., 1st Sess. at 121 (1995) (Joint Explanatory Statement).

⁵⁵ *Id.* at 72.

⁵⁶ *Id.*

⁵⁷ *See* BellSouth Reply at 3, n.8.

⁵⁸ Section 261 of Senate Bill 652 distinguished between interim and final number portability as follows:

Section 261(a): Interim Number Portability. -- In connection with any interconnection agreement reached under section 251 of this Act, a local exchange carrier shall make available interim telecommunications number portability, upon request, beginning on the date of enactment of the Telecommunications Act of

legislative history provides no explanation for the deletion of this language, it is subject to various interpretations, and we are not persuaded that BellSouth's is the most reasonable among them.⁵⁹ The Joint Explanatory Statement of the Conference Report states that all differences between the Senate Bill, the House Amendment, and the substitute reached in conference are noted therein "except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clerical changes."⁶⁰ Because the Joint Explanatory Statement does not address the omission of section 261 of the Senate Bill from the final legislation, the more logical inference from the quoted statement is that Congress regarded the change as an inconsequential modification rather than a significant alteration. This view is supported by two additional facts noted above: first, the statement in the Joint Explanatory Statement that section 251 "incorporates provisions from both the Senate Bill and the House Amendment;" and second, the statements from the House Report suggesting that the Commission's authority to prescribe requirements for number portability extends both to interim number portability, which is being provided now, and to long-term number portability, which will "be deployed when it is technically feasible."⁶¹

16. This reading of the term "number portability" to include all forms of number portability, whether interim or long-term, also is more consistent than BellSouth's reading with Congress' goal of fostering competition in the local exchange marketplace. Congress recognized that number portability is essential to meaningful competition in the provision of local exchange services,⁶² and the record in this proceeding demonstrates that customers are reluctant to switch carriers if doing so requires that they give up their current telephone numbers.⁶³ Nor is this view inconsistent with the distinction between "interim number portability" and "section 251 number portability" referenced in section 271(c)(2)(B)(ix). The legislative history of the 1996 Act does not explain why Congress decided to refer specifically to interim number portability only in section 271(c)(2)(B)(ix). In the absence of such an explanation, and given the broad definition of number portability in section 3(30) and the legislative history described above, it seems unlikely that Congress's reference to interim number

1995.

Section 261(b): Final Number Portability. -- In connection with any interconnection agreement reached under section 251 of this Act, a local exchange carrier shall make available final telecommunications number portability, upon request, when the Commission determines that final telecommunications number portability is technically feasible.

⁵⁹ See *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *Rastelli v. Warnder*, 782 F.2d 17, 23 (2d Cir. 1986); *Drummond Coal v. Watt*, 735 F.2d 469, 474 (11th Cir. 1984); see also *Local Competition Order*, 11 FCC Rcd 15,499 at n.155.

⁶⁰ H.R. Rep. No. 104-204(I), 104th Cong., 1st Sess. at 113 (1995) (Joint Explanatory Statement).

⁶¹ *Id.*

⁶² *Id.* ("the ability to change service providers is only meaningful if a customer can retain his or her local telephone number"); see also S. Rep. No. 104-23, 104th Cong., 1st Sess. at 19-20 (1995) ("the minimum requirements [for interconnection set forth in new section 251(b), including number portability] are necessary for opening the local exchange market to competition").

⁶³ See *First Report and Order*, 11 FCC Rcd at 8367-68.

portability in section 271(c)(2)(B)(ix) was intended to narrow the concept of number portability as used elsewhere in the statute. Consistent with its purposes of increasing the competitiveness of local markets, Congress may have decided to impose a specific Congressional mandate to provide interim number portability on BOCs seeking to demonstrate that they had met the local competition requirements necessary for entry into long distance, prior to issuance of section 251(b) regulations, while otherwise permitting the Commission to determine the scope and timing of number portability for all LECs pursuant to section 251(b)(2).

17. Contrary to BellSouth's assertion, in the *First Report and Order*, we did not rely on section 271(c)(2)(B)(xi) as the basis for requiring all LECs to provide interim number portability. Rather, we merely referred to section 271(c)(2)(B)(xi) as offering further support for our interpretation of section 251(b)(2).⁶⁴ In addition, we explained that our interpretation of section 251(b)(2) would prevent a BOC seeking interLATA authorization, pursuant to section 271 of the Act,⁶⁵ from being able to avoid providing number portability during the time between the adoption of the Commission's number portability rules and the implementation of long-term number portability measures.⁶⁶ Under BellSouth's interpretation, a BOC could refuse to offer interim number portability from the time of the adoption of the *First Report and Order* until the actual implementation of long-term number portability, yet still be in compliance with the number portability checklist requirement set forth in section 271. We believe that a more logical interpretation of these sections is that, in providing for both types of number portability, Congress did not intend for there to be such a time lag but instead required the provision of interim number portability until long-term number portability is in place. This interpretation is supported by the last sentence in section 271(c)(2)(B)(xi), which requires "full compliance" with the Commission's section 251 portability regulations after such regulations are issued.

B. Commission Authority To Establish Cost Recovery Guidelines For Interim Number Portability

1. Background

18. In the *First Report and Order*, we asserted jurisdiction over interim number portability and established cost recovery guidelines for interim number portability measures for the states to implement.⁶⁷ Several commenters assert that the Commission lacks authority to promulgate cost recovery guidelines for interim number portability.⁶⁸ These parties contend that section 251(e)(2),

⁶⁴ *Id.* at 8410. Section 271 sets forth a "competitive checklist" that a BOC must meet in order to provide in-region interLATA services. Among other things, section 271 requires that a BOC seeking to enter the in-region interLATA market must: (1) provide interim number portability through RCF, DID, or other comparable arrangements "until the date by which the Commission issues regulations pursuant to section 251," and then (2) comply with the Commission's number portability regulations. See 47 U.S.C. § 271(c)(2)(B)(xi).

⁶⁵ See 47 U.S.C. § 271.

⁶⁶ *First Report and Order*, 11 FCC Rcd at 8410.

⁶⁷ *Id.*

⁶⁸ BellSouth Petition at 3-7; Bell Atlantic Petition at 12, n.18; SBC Petition at 3-6.

which governs cost recovery for number portability, applies only to long-term number portability.⁶⁹ Noting that section 251(e)(2) refers to the "cost of establishing telecommunications numbering administration arrangements and number portability," Bell Atlantic argues that because interim number portability is an adaptation of existing services, there is nothing to "establish."⁷⁰ To the extent the Commission bases its authority to order LECs to provide interim number portability on Communications Act provisions other than those added by the 1996 Act, BellSouth maintains that the Commission lacks authority to depart from cost-causative pricing principles.⁷¹ Other parties argue that interim number portability is an intrastate service and that the Commission lacks jurisdiction to adopt cost recovery guidelines absent an explicit grant of authority over intrastate matters.⁷² Bell Atlantic asserts that the legislative history of the 1996 Act demonstrates that Congress intended that interim number portability compensation be subject to negotiated interconnection agreements.⁷³ CTIA and Bell Atlantic NYNEX contend that states may adopt inconsistent state policies regarding number portability of CMRS carriers and urge the Commission to preempt all state number portability requirements.⁷⁴

19. Several parties support the Commission's jurisdictional authority, arguing that section 251(e)(2) extends the Commission's statutory authority over the establishment of cost recovery rules to both interim and long-term number portability.⁷⁵ Sprint argues that the Commission should reject proposals to leave interim cost recovery to carrier negotiations because incumbent carriers have little incentive to negotiate.⁷⁶

2. Discussion

20. We uphold our earlier decision and affirm our authority to establish cost recovery guidelines for interim number portability measures.⁷⁷ As discussed below, our interpretation of the statute finds support in the language of the 1996 Act, is consistent with the 1996 Act's underlying goals, and is consistent with the conclusions reached in the *Third Report and Order*.

⁶⁹ Bell Atlantic Petition at 11-12; SBC Petition at 3-4; NYNEX Opposition and Comments at 4-5; PacTel Comments at 4-5; GTE Reply at 6-7.

⁷⁰ Bell Atlantic Petition at 12.

⁷¹ BellSouth Petition at 4, n.7; BellSouth Opposition at 2; BellSouth Reply at 3, n.9.

⁷² Bell Atlantic Petition at 12, n.18; BellSouth Reply at 3.

⁷³ Bell Atlantic Reply at 10 (citing S. Rep. No. 230, 104th Cong., 1st Sess. at 51 (1995)).

⁷⁴ See Bell Atlantic NYNEX Petition at 10-12; CTIA Comments at 3-4.

⁷⁵ AT&T Opposition at 22; MCI Opposition at 3; Sprint Opposition at 8; Time Warner Comments at 2 and 11.

⁷⁶ Sprint Opposition at 9-10.

⁷⁷ See *First Report and Order*, 11 FCC Rcd at 8410.

21. We find that sections 251(b)(2) and 251(e)(2) grant the Commission explicit authority over, respectively, the provision of and the recovery of costs associated with number portability.⁷⁸ We find that our authority under section 251(e)(2), as with section 251(b)(2), is not limited to long-term number portability, since the statutory definition of number portability draws no distinction between interim and long-term number portability. Section 3(30) of the Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."⁷⁹ This definition is not limited to one technical method of providing number portability. Similarly, sections 251(b)(2) and 251(e)(2) refer only to the provision and cost recovery of "number portability," but do not limit the term "number portability" to long-term measures. As discussed above, given the broad definition of number portability in section 3(30), it seems unlikely that Congress's reference to interim number portability in section 271(c)(2)(B)(ix) was intended to narrow the concept of number portability as used elsewhere in the statute, such as in sections 251(b)(2) and 251(e)(2). In addition, we find that our interpretation of section 251(b)(2), requiring all LECs to provide interim number portability, is consistent with, and necessary to effectuate Congress's goal to promote competition in the provision of local telecommunications service.⁸⁰

22. We also note that our conclusion that the Commission has statutory authority over interim number portability, regardless of whether it is characterized as an intrastate or interstate service, and the establishment of cost recovery rules for interim number portability, is consistent with our holdings in the *Third Report and Order*. In that order, we concluded that section 251(e)(2)'s express and unconditional grant of authority to the Commission grants us the authority to ensure that carriers bear the costs of providing number portability on a competitively neutral basis for both interstate and intrastate calls.⁸¹ Section 251(e)(2) states that carriers shall bear the costs of number portability "as determined by the Commission," and does not distinguish between costs incurred in connection with intrastate calls and costs incurred in connection with interstate calls. Thus, we conclude for interim number portability, as we did in the *Third Report and Order* for long-term number portability,⁸² that section 251(e)(2) addresses both interstate and intrastate matters and overrides the reservation of authority to the states over intrastate matters contained in section 2(b).⁸³

⁷⁸ 47 U.S.C. §§ 251(b)(2), (e)(2).

⁷⁹ 47 U.S.C. § 153(30).

⁸⁰ See *supra* nn. 47-48.

⁸¹ *Third Report and Order*, 13 FCC Rcd at 11,719-20.

⁸² *Id.*

⁸³ 47 U.S.C. § 152(b). See *Iowa Utils. Bd. v. FCC*, 120 F.3d at 792, 794 and n.10, 795 and n.12, 802 and n.23, 806 (stating that "the FCC is specifically authorized to issue regulations under subsections 251(b)(2) [and] ... 251(e)"). See also *First Report and Order*, 11 FCC Rcd at 8417 (explaining that the number portability proceeding need not reach the issue whether section 251 gives the Commission general pricing authority because the statute grants the Commission the express authority to set competitively neutral pricing principles for number portability). See also *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15,499 at 15,548 and n.155 (1996) (*Local Competition*

23. We also are not persuaded by the argument that the Commission lacks jurisdiction over cost recovery for interim number portability measures because the states have historically regulated the retail provision of RCF and DID. The states' regulation of rates for these services when provided on a retail basis does not preclude an express Congressional grant of authority to this Commission under section 251(e)(2) to regulate the cost recovery for interim number portability. As noted above, section 251(e)(2) states that carriers shall bear the costs of number portability "as determined by the Commission," and does not distinguish between costs incurred in connection with intrastate calls and costs incurred in connection with interstate calls.⁸⁴

24. We disagree with Bell Atlantic's claim that, because section 251(e)(2) refers to the costs of "establishing" number portability and there is nothing to "establish" with respect to interim number portability, the Commission is without authority to adopt cost recovery guidelines for the provision of interim number portability.⁸⁵ In arguing that there is nothing to "establish" regarding interim number portability, Bell Atlantic defines the term "establish" narrowly, *i.e.*, limiting the meaning of "establish" to physically upgrading the public switched telephone network or creating databases necessary for customers to retain their telephone numbers when switching carriers. We find that this interpretation is overly restrictive. To give full effect to the pro-competitive objectives of the 1996 Act, we conclude that the term "establish," as it relates to interim number portability, should be read more broadly. Although the functionalities necessary to provide interim number portability already exist in most public switched telephone networks, additional actions are necessary to implement interim number portability in a manner useful to new entrants. Interim number portability requires a LEC to transfer numbers initially and subsequently forward calls to new service providers using RCF, DID, or other comparable measures.⁸⁶ The actions required to establish interim number portability and the associated costs vary according to where the call originates in a carrier's network.⁸⁷ The provision of interim number portability results in switching and transport costs, and may include some small non-recurring costs, such as administrative costs.⁸⁸ Because additional actions are required by LECs in the provision of interim number portability, we find that the process of transferring numbers and subsequently forwarding calls is what "establishes" (*i.e.*, "creates" or "brings into existence") interim number portability for use by new entrants.⁸⁹

Order), vacated in part, *aff'd in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part, aff'd in part and remanded sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. at 730 (holding that "the FCC has rulemaking authority to carry out 'the provisions of this Act,' which include §§ 251-252, added by the Telecommunications Act of 1996").

⁸⁴ See *supra* ¶¶ 9, 21.

⁸⁵ See Bell Atlantic Petition at 12; Bell Atlantic Reply at 10.

⁸⁶ See *Third Report and Order*, 13 FCC Rcd at 11,728-29; *First Report and Order*, 11 FCC Rcd at 8417-18.

⁸⁷ See *First Report and Order*, 11 FCC Rcd at 8417-18.

⁸⁸ *Id.*

⁸⁹ The term "establish" is commonly defined as "to found or create" or "to bring into existence." See *The American Heritage Dictionary of the English Language* (1980). See also *Webster's Ninth New Collegiate Dictionary* (1984).

25. In addition to disagreeing with Bell Atlantic's narrow interpretation of the term "establish" in section 251(e)(2), we also find that it would be contrary to Congressional intent to conclude that the Commission's authority to impose a competitively neutral cost recovery mechanism is limited to long-term number portability. Congress imposed a number portability requirement on all LECs, and directed the Commission to adopt a competitively neutral cost recovery mechanism, in order to give new entrants a realistic opportunity to compete against incumbent LECs for local exchange customers.⁹⁰ Mandating a number portability requirement without ensuring a competitively neutral cost recovery mechanism could significantly handicap the ability of new entrants to win customers, whether the method of porting numbers is long-term or interim. In the *First Report and Order*, we concluded that, because interim number portability costs will be small and incurred for a relatively short period, requiring carriers to bear their own costs would meet our competitive neutrality guidelines.⁹¹ We specifically prohibited incumbent LECs from shifting all of their costs onto new entrants, however.⁹² Such a direct cost shift from an incumbent LEC to a new entrant could act as a competitive barrier to the new entrant. Because both carriers would be competing for the same customer, the new provider may be forced to charge higher prices due to its need to recover the incumbent LEC's incremental costs of number portability, while the customer would face no additional charges if it stayed with the incumbent LEC.⁹³ Despite the fact that such incremental costs are small, shifting all of an incumbent LEC's costs of interim number portability may materially disadvantage new entrants in competing for customers.⁹⁴ As we stated in the *First Report and Order*, imposing the full incremental cost of interim number portability solely on new entrants would place them at an "appreciable, incremental cost disadvantage relative to another service provider when competing for the same customer" and would, therefore, violate the first criteria of the competitive neutrality mandate.⁹⁵ Thus, we conclude that Bell Atlantic's interpretation -- that the Commission has authority under 251(e)(2) to impose a competitively neutral cost recovery mechanism for long-term number portability, but lacks such authority over interim number portability -- will not promote competition. For this reason, among others, we reject Bell Atlantic's interpretation of section 251(e)(2) as contrary to Congressional intent.

26. We similarly are not persuaded by Bell Atlantic's claim that cost recovery for interim number portability must be subject to negotiation between carriers, and that the Commission therefore lacks authority to establish cost recovery guidelines.⁹⁶ Bell Atlantic's argument is based on language in the Senate Report discussing section 261 of Senate Bill 652, which states that interconnection agreements reached under section 251 must, if requested, provide for interim number portability,

⁹⁰ 47 U.S.C. § 251(e).

⁹¹ See *First Report and Order*, 11 FCC Rcd at 8420-22.

⁹² *Id.*

⁹³ *Id.* at 8428; *Third Report and Order*, 13 FCC Rcd at 11,726-27.

⁹⁴ *First Report and Order*, 11 FCC Rcd at 8421.

⁹⁵ *Id.* at 8423.

⁹⁶ Bell Atlantic Reply at 10.

including the method by which it will be provided, and the amount of compensation.⁹⁷ As discussed above, section 261, as it appeared in Senate Bill 652, distinguished between interim and final number portability, but was ultimately dropped from the final version of the 1996 Act. We find unpersuasive Bell Atlantic's interpretation of the legislative history.⁹⁸

27. We reject BellSouth's assertion that we lack authority to depart from cost-causative pricing principles. As we explained in the *Third Report and Order*, Congress imposed a number portability requirement on all LECs, and directed the Commission to adopt a competitively neutral cost recovery mechanism, in order to give new entrants a realistic opportunity to compete against incumbent LECs for local exchange customers.⁹⁹ A cost causative basis for pricing number portability could defeat the purpose for which number portability was mandated.¹⁰⁰ Mandating a number portability requirement without ensuring a competitively neutral cost recovery mechanism could significantly handicap the ability of new entrants to win customers, whether the method of porting numbers is long-term or interim, because they could be forced to bear all incremental costs of number portability and pass those costs onto customers in the form of higher prices.¹⁰¹

28. Finally, we reject BellSouth's contention that we based our jurisdiction to order interim number portability on pre-1996 Act provisions and are therefore precluded from relying on 251(e)(2) for jurisdiction to determine cost recovery for such interim measures. To the contrary, in the *First Report and Order* we concluded only that sections 1 and 202 of the Communications Act provide a pre-existing and independent basis for our jurisdiction to require the provision of interim number portability methods.¹⁰² We did not rely solely on sections 1 and 202 as a basis for jurisdiction,¹⁰³ and hereby clarify that, although we find that sections 1 and 202 provide an additional statutory basis on which the Commission may require interim number portability, we have independent authority to do

⁹⁷ The Senate Report states:

Subsection 261(a) requires that . . . interconnection agreements reached under section 251 must, if requested, provide for interim number portability The method of providing interim number portability and the amount of compensation, if any, for providing such service is subject to the negotiated interconnection agreement, pursuant to section 251.

S. Rep. No. 230, 104th Cong., 1st Sess. at 51 (1995).

⁹⁸ See *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940) ("[t]o explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative uncertainties"); accord, *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47-48 (1950); *Brennan V. Midwestern United Life Insurance*, 259 F. Supp. 673 (1966); *Women Involved in Farm Economics v. USDA*, 682 F. Supp. 599 (1988).

⁹⁹ *Third Report and Order*, 13 FCC Rcd at 11,726-29.

¹⁰⁰ *First Report and Order*, 11 FCC Rcd at 8419-20.

¹⁰¹ See *First Report and Order*, 11 FCC Rcd at 8423.

¹⁰² *Id.* at 8410.

¹⁰³ *Id.* at 8411.

so by virtue of sections 251(b)(2) and 251(e)(2) of the Act.¹⁰⁴

29. We reiterate our earlier finding, as discussed above, that section 251(e)(2) addresses both interstate and intrastate matters, and overrides section 2(b)'s reservation of authority to the states over intrastate matters.¹⁰⁵ Although we assert federal jurisdiction over interim number portability and affirm our authority to establish cost recovery guidelines for interim number portability measures, we deny requests that we generally preempt state number portability cost recovery policies.¹⁰⁶ Instead, we affirm our earlier conclusion that states may continue to utilize various cost recovery mechanisms as long as they meet the Commission's competitive neutrality guidelines.¹⁰⁷ We note that this cost recovery approach is different than the one adopted in the *Third Report and Order* for long-term number portability cost recovery, in which we adopted an exclusively federal cost recovery mechanism. We note that in the *Third Report and Order*, we found 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, but did not interpret the statute to require the adoption of an exclusively federal recovery mechanism for all forms of number portability.¹⁰⁸ Instead, an exclusively federal cost recovery mechanism for long-term number portability was adopted for several policy reasons that are inapplicable to interim number portability. We determined in the *Third Report and Order* that an exclusively federal cost 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."¹⁰⁹ Additionally, an exclusively federal cost recovery mechanism for long-term number portability obviates the need for state allocation of the shared costs of the regional database, a task that would likely be complicated by the database's multistate nature.¹¹⁰

30. Although we have determined that the Commission's authority to provide the distribution and recovery mechanism for all number portability costs extends to long-term and interim number portability, we do not find it necessary to establish an exclusively federal recovery mechanism for interim number portability. Instead, we will continue to permit states to provide for cost recovery in accord with the competitive neutrality standards adopted in the *First Report and Order*, and elaborated here, for the following reasons. First, we believe that adopting an exclusively federal cost recovery mechanism would be very disruptive to existing interim number portability cost recovery. States have been providing for interim number portability cost recovery since 1996.¹¹¹ Also, cost recovery for

¹⁰⁴ 47 U.S.C. §§ 153(30), 251(b)(2), and 251(e)(2).

¹⁰⁵ See *supra* ¶¶ 22, 23.

¹⁰⁶ See Bell Atlantic NYNEX Petition at 10-12; CTIA Comments at 3-4.

¹⁰⁷ *First Report and Order*, 11 FCC Rcd at 8417.

¹⁰⁸ *Third Report and Order*, 13 FCC Rcd at 11,719-20.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *First Report and Order*, 11 FCC Rcd at 8415-17.

interim number portability has been determined through existing interconnection agreements, as incumbent LECs are required by section 251(c) to provide for interim number portability in their interconnection agreements.¹¹² Second, we believe that disruption of existing cost recovery mechanisms is not warranted because interim number portability will remain in place for a very limited period of time. Interim number portability was replaced by long-term number portability in switches in the 100 largest MSAs by the end of 1998, and will be replaced subsequently in other switches in which a *bona fide* request to provide number portability is received.¹¹³ Third, we believe that a cost allocation method that requires LECs to bear their own costs of interim number portability is competitively neutral, as individual carrier's costs will be small and no shared costs or database costs must be allocated.¹¹⁴ As previously indicated, to the extent that RCF, DID and other comparable methods are used to provide currently available number portability, and the capability for currently available number portability already exists in the incumbent LEC network, only the short-run incremental costs are properly attributed to interim number portability.¹¹⁵ Interim number portability requires little infrastructure investment.¹¹⁶ Having already provisioned their switches with enough capacity to carry all of their respective customers' incoming and outgoing calls, we do not expect incumbent LECs to incur additional costs with respect to switch capacity when a customer chooses to port its number to a new service provider and the incumbent LEC must forward calls using interim number portability methods.¹¹⁷ Although interim number portability requires an increased use of the incumbent LECs' switch capacity -- and an increase in transport costs -- to process incoming calls, this effect is offset by the fact that the incumbent LECs will no longer handle the outgoing calls originated by the ported customer. As a result, we expect little or no change in the level of incumbent LECs switching and transport costs per ported number.¹¹⁸

31. As stated in the *First Report and Order*, if a carrier believes that a LEC's pricing provisions for number portability violate the Commission's competitive neutrality guidelines or violate a state-mandated cost recovery mechanism, a carrier may be able to seek relief from its state

¹¹² 47 U.S.C. § 251(c). We note that federal courts have upheld the interim number portability cost recovery guidelines established in the *First Report and Order*. See, e.g., *Southwestern Bell Telephone v. AT&T*, 1998 WL 657717*4 (D.Tex.1998); see also *U S WEST Communications v. MFS Intelnet*, 35 F. Supp. 2d 1221, 1236 (D.Or. 1998).

¹¹³ See *First Order on Reconsideration*, 12 FCC Rcd at 7283, 7326-27, 7347.

¹¹⁴ *First Report and Order*, 11 FCC Rcd at 8422.

¹¹⁵ See *First Report and Order*, 11 FCC Rcd at 8418; see also *Third Report and Order*, 13 FCC Rcd at 11,740 ("[b]ecause carrier-specific costs directly related to providing number portability only include costs carriers incur specifically in the provision of number portability, carriers may not use general overhead loading factors in calculating such costs.")

¹¹⁶ *Third Report and Order*, 13 FCC Rcd at 11,726-29; *First Report and Order*, 11 FCC Rcd at 8415.

¹¹⁷ *Third Report and Order*, 13 FCC Rcd at 11,726-29; *First Report and Order*, 11 FCC Rcd at 8415.

¹¹⁸ *First Report and Order*, 11 FCC Rcd at 8418.

commission.¹¹⁹ If the carrier is not able to obtain relief in this way, or if a state has not yet adopted a cost recovery mechanism for cost recovery of interim number portability measures, a carrier may be able to bring action against the LEC in federal district court pursuant to section 207 for damages or file a section 208 complaint with this Commission against another carrier alleging a violation of the Act or the Commission's rules.¹²⁰ Alternatively, if a carrier believes that a state has not properly applied the statute or our rules, or if a state's cost recovery mechanism is not competitively neutral because it improperly burdens new entrants with interim number portability costs, the carrier may file a request for declaratory ruling with the Commission or otherwise seek court review of the state cost recovery mechanism.¹²¹

C. Cost Recovery Guidelines

1. Background

32. In the *First Report and Order*, the Commission established two criteria with which any cost recovery method must comply in order to be considered competitively neutral.¹²² First, "a 'competitively neutral' cost recovery mechanism should not give one service provider an appreciable, incremental cost advantage over another service provider, when competing for a specific subscriber."¹²³ Second, the cost recovery mechanism "should not have a disparate effect on the ability of competing service providers to earn normal returns on their investments."¹²⁴ In setting forth these criteria, however, we left to the states the determination of the exact cost recovery mechanism to be utilized.¹²⁵

33. Several carriers have challenged our cost recovery guidelines. BellSouth asserts that the cost recovery guidelines established in the *First Report and Order* are arbitrary, capricious, and clear error.¹²⁶ Specifically, BellSouth claims that, in establishing its competitively neutral guidelines, the Commission departed from traditional cost causation principles "without any meaningful explanation."¹²⁷ BellSouth also argues that the guidelines adopted by the Commission are not

¹¹⁹ *Id.* at 8423.

¹²⁰ *See First Report and Order*, 11 FCC Rcd at 8423; *see also* 47 U.S.C. § 252(e)(6).

¹²¹ *See* 47 C.F.R. § 1.2.

¹²² *See supra* ¶ 7.

¹²³ *First Report and Order*, 11 FCC Rcd at 8420.

¹²⁴ *Id.* at 8421.

¹²⁵ *Id.* at 8417.

¹²⁶ BellSouth Petition at 7-10.

¹²⁷ *Id.* at 7.

competitively neutral and are "vague and ambiguous."¹²⁸ Additionally, BellSouth submits that it is not competitively neutral for the Commission to adopt measures for transitional number portability in order to create an incentive for earlier implementation of long-term number portability.¹²⁹ Bell Atlantic asserts that the Commission does not explain how the denial of the ability to recover incremental costs could be competitively neutral.¹³⁰ AirTouch argues that it is not competitively neutral to require carriers that do not serve customers with ported numbers to share in the costs of interim number portability.¹³¹ GTE asks the Commission to reconsider and expand its definition of competitive neutrality by adding a third criterion, which would require that "a cost recovery mechanism must not influence a customer's selection of his or her service provider."¹³² Several carriers assert that the Commission should not interfere with existing state-mandated interim number portability cost recovery mechanisms.¹³³

34. Other commenters oppose these arguments and support the Commission's earlier conclusions.¹³⁴ Several carriers support the Commission's requirement that the costs of interim number portability be borne by all carriers on a competitively neutral basis.¹³⁵ ACSI asserts that the implementation of interim methods of number portability on a competitively neutral basis, as envisioned by the *First Report and Order*, is necessary to support the emergence of local competition.¹³⁶ ACSI also argues that since long-term number portability is not yet available, and will not be in some areas until July 1999, the need for a competitively neutral cost recovery mechanism for interim number portability is especially severe.¹³⁷

¹²⁸ *Id.* at 8-10.

¹²⁹ *Id.* at 8.

¹³⁰ Bell Atlantic Petition at 13-14.

¹³¹ AirTouch Petition at 3-4; *see also* Springwich Cellular Limited Partnership and SNET Cellular, Inc. *Ex Parte* filed Feb. 14, 1996 (SCLP/SCI *Ex Parte*).

¹³² GTE Petition at 12.

¹³³ Bell Atlantic Petition at 11; BellSouth Petition at 3; SBC Petition at 3-6.

¹³⁴ *See, e.g.*, MCI Reply at 9-10; ACSI Reply at 4.

¹³⁵ AT&T Opposition at 23; MCI Opposition at 5-6; TRA Comments at 7.

¹³⁶ ACSI Reply at 4.

¹³⁷ *Id.* As noted above, since the time of the filing of the petitions for reconsideration of the *First Report and Order*, long-term number portability has been implemented in the top 100 MSAs.

3. Discussion

35. We reject the claims of those carriers that assert that our cost recovery guidelines are arbitrary, capricious, or plain error. Number portability promotes competition by allowing customers to switch carriers easily without having to change their telephone numbers.¹³⁸ In the *First Report and Order*, we explained that the Commission departed from cost causation principles with respect to interim number portability because, "[d]epending on the technology used, to price number portability on a cost causative basis could defeat the purpose for which it was mandated."¹³⁹ As we stated in the *Third Report and Order*, pricing number portability on a cost-causative basis could defeat Congress's purpose of removing barriers to local competition because the nature of the costs involved with some number portability solutions might make it economically infeasible for some carriers to compete for a customer serviced by another carrier.¹⁴⁰ If it is assumed that the customer who ports his or her number is the cost causer, and all of the costs associated with forwarding a call are placed on the customer who switches carriers, customers who want to retain their telephone numbers could be deterred from switching carriers due to increased costs. This result is wholly contrary to the pro-competitive intent of sections 251(b)(2) and 252(e)(2) regarding the provision of number portability.

36. Additional economic and policy considerations also support our decision not to follow strict principles of cost causation in this specific context by imposing all interim number portability costs on new entrants. First, all customers benefit from number portability because number portability promotes competition, lower prices, increased choices, and greater innovation. In addition, other customers will benefit to the extent that they need not search for a customer's new number when that customer switches carriers. Since number portability generates an externality from which all customers benefit, the porting customers should not pay the full economic costs.¹⁴¹ Moreover, as discussed in the *First Report and Order* and *Third Report and Order*, if the costs are placed entirely on one carrier or group of carriers, "the new entrant's share of the cost [could be] so large, relative to its expected profits, that the entrant would decide not to enter."¹⁴² Preventing new, efficient entrants from offering service because of costs associated with number portability would directly contravene one of the 1996 Act's primary purposes, namely to encourage competition in the local exchange market. In sum, we reject BellSouth's claim that our decision to depart from traditional cost causation principles is arbitrary and capricious.

37. Furthermore, we agree with MCI that the costs of number portability should not be viewed narrowly as simply costs of entry, but more broadly as costs of creating a competitive

¹³⁸ *First Report and Order*, 11 FCC Rcd at 8368.

¹³⁹ *Id.* at 8419-20.

¹⁴⁰ *Third Report and Order*, 13 FCC Rcd at 11,726-27.

¹⁴¹ *Id.* at 11,726-29.

¹⁴² *First Report and Order*, 11 FCC Rcd at 8421; *Third Report and Order*, 13 FCC Rcd at 11,726-29.

environment that will benefit all consumers.¹⁴³ In the *Third Report and Order*, the Commission concluded that applying principles of competitive neutrality to long-term number portability cost recovery would ensure that the cost of number portability does not undermine the goal of the 1996 Act to "promote a competitive environment" for the provision of local communications services.¹⁴⁴ Similarly, we conclude that requiring incumbent LECs to share in the costs of providing both interim and long-term number portability is in the public interest and will contribute to the development of competition in the local exchange market.

38. BellSouth asserts that the cost recovery guidelines for interim number portability are "vague and ambiguous," and leave important terms undefined.¹⁴⁵ Specifically, BellSouth complains that the Commission failed to define the phrases "appreciable cost advantage" and "normal return."¹⁴⁶ As applied to our cost recovery guidelines, we clarify that, when we used the phrase "appreciable cost advantage" we meant a difference in costs that, if reflected in retail prices, would cause a not insignificant number of customers to change, or decline to change, carriers. We also find that a "normal return" in economic terms is the return sufficient to assure confidence in the financial integrity of the company so as to maintain its credit and attract capital.¹⁴⁷ Normal return in this context does not guarantee that all firms will be profitable and, hence, remain in the industry. Rather, this concept means that number portability costs imposed on a particular carrier should not be so significant, by themselves, as to drive existing carriers out of the market or make continued operations unprofitable, or deter the entry of carriers that, but for the number portability costs, would have entered the market.

39. We find no merit to BellSouth's suggestion that the Commission's definition of, and criteria for, competitive neutrality, are novel or unprecedented.¹⁴⁸ The "competitively neutral" principles established in the *First Report and Order* were drawn from well-accepted principles of economic theory.¹⁴⁹ To be competitive, a firm must be able to offer a particular customer a service/price package which that customer finds comparable to that offered by other carriers, and it must be able to do so while earning a normal rate of return. In making business decisions, firms are concerned with both the short-run and the long-run. In the short-run, firms are concerned with their ability to compete, while in the long-run firms are concerned with remaining in the market. The first criterion of the competitive neutrality test addresses the short-run concern, in that carriers cannot compete effectively if one carrier has an appreciable, incremental cost advantage over other carriers. The second criterion addresses the concern that the cost recovery mechanism should not have a

¹⁴³ See MCI Opposition at 5-6.

¹⁴⁴ *Third Report and Order*, 13 FCC Rcd at 11,731.

¹⁴⁵ BellSouth Petition at 9-10.

¹⁴⁶ *Id.* at 10.

¹⁴⁷ See *FPC v. Hope Natural Gas Company*, 320 U.S. 591, 603 (1944).

¹⁴⁸ See BellSouth Petition at 10.

¹⁴⁹ See generally Robert H. Frank, *Microeconomics and Behavior*, Mc-Graw Hill, Inc., 1991, ch. 11.

disparate effect on the ability of competing service providers to earn normal returns on their investments.¹⁵⁰

40. We also reject arguments that the methods currently suggested in the *First Report and Order* fail to meet the second criterion of competitive neutrality,¹⁵¹ which states that "[the allocation mechanism] should not have a disparate effect on the ability of competing service providers to earn normal returns on their investments."¹⁵² As applied to interim number portability, the methods for allocating the costs of interim number portability suggested in the *First Report and Order*, including allocation according to a carrier's number of active lines or number of active telephone numbers, meet the criteria established for competitive neutrality. Given the relatively small incremental costs of interim number portability, we conclude that using either the number of telephone lines or the number of active telephone numbers as the basis for allocation also meets the second criterion. Gaining a customer results in either an additional line or active telephone number for that carrier, which increases the relative amount that carrier has to pay. Although that carrier's costs for number portability go up relative to other carriers, it also receives the corresponding revenues generated by the new customer. One characteristic of these rules is that the costs allocated to particular carriers increase with the size of the carrier so that smaller carriers will not be driven from the market.

41. In creating the competitive neutrality criteria, we also were guided by the 1996 Act's pro-competitive objectives. As noted in the *First Report and Order*, "the Act envisions that removing legal and regulatory barriers to entry and reducing economic impediments to entry will enable competitors to enter markets freely, encourage technological development, and ensure that a firm's prowess in satisfying consumer demand will determine its success or failure in the marketplace."¹⁵³ Number portability and competitively neutral cost recovery are necessary to fulfill the purpose and intent of the 1996 Act.¹⁵⁴

¹⁵⁰ *First Report and Order*, 11 FCC Rcd at 8421-22 (explaining that the shared costs of number portability should be assessed on a proportional basis, so that these shared costs are not so large as to discourage new entrants from entering the market or forcing new entrants out of the market). We note that equal access is an example of a one-time network investment that was necessary to level the access field in order for competition to flourish. The Commission determined that the costs of these network improvements were more than offset by increased competition and substantial long-term benefits to consumers. See *Third Report and Order*, 13 FCC Rcd at 11,773-74; *In re MTS and WATS Market Structure Phase III: Establishment of Physical Connections and Through Routes among Carriers*, CC Docket No. 78-72, *Report and Order*, 100 FCC 2d 860 (1985).

¹⁵¹ AirTouch Petition at 16; GTE Petition at 11-12.

¹⁵² *First Report and Order*, 11 FCC Rcd at 8421.

¹⁵³ *Id.* at 8354.

¹⁵⁴ See *First Report and Order*, 11 FCC Rcd at 8419-20 ("Congress mandated the use of number portability so that customers could change carriers with as little difficulty as possible . . . [A competitively neutral cost recovery mechanism is critical to ensure] that Congress's intent [is] not thwarted by a cost recovery mechanism that makes it economically infeasible for some carriers to utilize number portability when competing for customers served by other carriers.").

42. We also reject BellSouth's argument that it is arbitrary and capricious to use transitional measures as an incentive to adopt long-term number portability as quickly as possible. As discussed above, we find that we have jurisdiction over number portability, and that number portability is a dynamic, not static, concept. Section 271 of the Act explicitly states that BOCs must provide "interim telecommunications number portability" until "the date by which the Commission issues regulations pursuant to section 251 to require number portability." Additionally, as we stated in the *First Report and Order*, requiring incumbent LECs to share in the cost of interim number portability under section 251 provides some incentive for them to transition to long-term number portability with reasonable speed, rather than taking the maximum allowable time.¹⁵⁵ While the costs of long-term number portability will be greater than those of interim number portability, carriers will be able to recover their costs through two separate federally-tariffed charges, an end-user charge and a query services charge.¹⁵⁶

43. We disagree with those commenters that assert that the Commission is interfering with existing state-mandated interim number portability cost recovery mechanisms.¹⁵⁷ As we stated in the *First Report and Order*, we provide flexibility for the states to determine their own cost allocation mechanisms, subject to the guidelines set forth in the *First Report and Order*.¹⁵⁸ If a state previously determined its cost allocation scheme without taking section 251(e)(2) into account, that state must now ensure that its method comports with the language in the 1996 Act and our implementing regulations.

44. We disagree with AirTouch's assertion that carriers that do not serve customers with ported numbers, such as wireless carriers, should not be required to share in the cost of number portability because such carriers do not benefit from number portability.¹⁵⁹ Similarly, we deny the request of SCLP and SCI that the Commission specifically exempt all CMRS providers from contributing to the costs of interim number portability.¹⁶⁰ In rejecting these arguments, we look to section 251(e)(2) of the Act, which plainly requires that the costs of establishing number portability be borne by "all telecommunications carriers on a competitively neutral basis as determined by the

¹⁵⁵ *Id.* at 8417.

¹⁵⁶ See *Third Report and Order*, 13 FCC Rcd at 11,740. We note that many incumbent LECs, including BellSouth, filed tariffs to recover their long-term number portability costs through these two federal charges. See, e.g., *In re Long-Term Number Portability Tariff Filing of BellSouth Telecommunications, Inc.*, CC Docket No. 99-35, *Reconsideration of Decision to Suspend and Investigate Tariff Filing of BellSouth Telecommunications, Inc.*, DA 99-1157 (rel. June 14, 1999).

¹⁵⁷ See Bell Atlantic Petition at 11; BellSouth Petition at 3; SBC Petition at 3-6.

¹⁵⁸ See *First Report and Order*, 11 FCC Rcd at 8417.

¹⁵⁹ AirTouch Petition at 3; SCLP/SCI *Ex Parte*.

¹⁶⁰ SCLP/SCI *Ex Parte*.

Commission."¹⁶¹ We have exercised our statutory mandate by articulating criteria for states to use in adopting cost recovery mechanisms.¹⁶² As the states develop cost recovery mechanisms pursuant to the statutory mandate, carriers will bear their own costs or states may allocate costs in a competitively neutral fashion on all telecommunications carriers that does not unduly burden any particular carrier or group of carriers. Additionally, as discussed above, if wireless carriers believe that a state's cost recovery mechanism is not competitively neutral or imposes an unfair burden, such carriers have a variety of remedies available to them.¹⁶³

45. We find no merit in SCLP and SCI's claim that requiring CMRS providers to contribute to number portability would have a "disparate effect" on their ability to earn a normal rate of return. These carriers have failed to present any evidence to support their claim that contributing to the costs of interim number portability would have such an effect. As noted in the *First Report and Order*, a disparate effect may be said to exist when a "new entrant's share of the [interim number portability] costs may be so large, relative to its expected profits, that the entrant would decide not to enter the market."¹⁶⁴ With respect to existing carriers, we clarify that a disparate effect under our definition would exist if that carrier or class of carriers would be driven from the market, while other carriers would not, as a result of number portability costs.¹⁶⁵ These carriers' unsupported allegations that contributing to the costs of interim number portability would have a disparate effect are insufficient to support their request for a blanket exemption for all CMRS carriers.

46. We also disagree with SCLP and SCI's assertion that our *First Report and Order* demonstrates an intent that the costs of interim number portability be placed on non-cost causers only where necessary to preserve competitive neutrality.¹⁶⁶ In making this claim, SCLP and SCI rely on the word "relevant" in the Commission's statement that "states may apportion the incremental costs of interim measures among *relevant* carriers by using competitively neutral allocators."¹⁶⁷ In using the term "relevant carriers," we intended to reflect that differing cost recovery mechanisms, all of which

¹⁶¹ 47 U.S.C. § 251(e)(2). This interpretation is consistent with the *Third Report and Order*, wherein the Commission concluded that the provisions of section 3 of the Act, when read together, define "all telecommunications carriers" as all persons or entities other than aggregators that charge to transmit information for the public without changing the form or content of the information, regardless of the facilities they use. Applying the statutory definition to section 251(e)(2), the Commission concluded that the way all telecommunications carriers bear the costs of providing number portability -- including incumbent LECs, competitive LECs, CMRS providers, IXCs, and resellers -- must be competitively neutral as determined by the Commission. *Third Report and Order*, 13 FCC Rcd at 11,726.

¹⁶² See *First Report and Order*, 11 FCC Rcd at 8417.

¹⁶³ See *supra* ¶ 31.

¹⁶⁴ *First Report and Order*, 11 FCC Rcd at 8421.

¹⁶⁵ *Id.* at 8421.

¹⁶⁶ SCLP/SCI *Ex Parte*, citing *First Report and Order*, 11 FCC Rcd at 8419.

¹⁶⁷ See *First Report and Order*, 11 FCC Rcd at 8419 (emphasis added).

could satisfy our competitively neutral mandate, might encompass all, or a subset of all, telecommunications carriers, depending on the specifics of the cost recovery mechanism. For instance, states may find that the relevant carriers for a cost allocation mechanism may involve some, but not all carriers, such as a mechanism that requires each carrier to bear its own costs.¹⁶⁸

47. In the *First Report and Order*, we concluded that, in choosing the phrase "all telecommunications carriers," Congress intended to include all types of carriers in the cost recovery mechanism because, unlike the requirement to provide number portability which applies solely to local exchange carriers, the requirements relating to number portability cost recovery apply to "all telecommunications carriers on a competitively neutral basis."¹⁶⁹ In drawing this conclusion, we adopted a literal reading of the statutory requirement and of the statutory definition of "telecommunications carriers."¹⁷⁰ While our interpretation prevents an incumbent LEC from recovering its costs entirely from the new entrant, such an incumbent LEC may be able to recover its incremental interim number portability costs via the state-adopted allocation mechanism from "all telecommunications carriers" if a state implements such a cost recovery mechanism. Since the carrier providing the call forwarding itself falls within the category of "all telecommunications carriers," the carrier providing the forwarding is prevented by the statutory language from recovering all of its costs from other carriers. The allocation mechanism designed by the state, however, may allow the carrier incurring the costs to recover some portion of its costs from other carriers. In addition, states could permit incumbent LECs to recover any remaining costs in some other manner, e.g., from end-users.

48. We affirm our finding that a "mechanism that requires each carrier to pay for its own costs of interim number portability measures" is competitively neutral and would constitute an acceptable cost recovery scheme that states could adopt.¹⁷¹ First, no significant capital costs are incurred by the carrier winning the customer or by the carrier losing the customer.¹⁷² Thus, the cost recovery mechanism does not give one service provider an appreciable, incremental advantage over another service provider when competing for the same customer. Second, as discussed above, incumbent LECs should still be able to earn a normal return, as the anticipated costs of interim number portability measures are relatively small. LECs have already provisioned their switches for remote call forwarding (as offered to subscribers on a retail basis), and, therefore, no additional hardware or software costs are associated with interim number portability.¹⁷³ No commenter has argued otherwise in this proceeding.

¹⁶⁸ See *infra* ¶ 48.

¹⁶⁹ 47 U.S.C. § 251(e)(2). The term "telecommunications carrier" is defined in the Act as "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226)." 47 U.S.C. § 153(44).

¹⁷⁰ See *First Report and Order*, 11 FCC Rcd at 8419.

¹⁷¹ *Id.* at 8422.

¹⁷² See *Third Report and Order*, 13 FCC Rcd at 11,728-29.

¹⁷³ *Id.* at 11,728-29.

49. We disagree with BellSouth's argument that "having determined that the costs of [interim number portability] will be incurred solely by the incumbent LECs," it was arbitrary and capricious for the Commission to determine that requiring each carrier to bear its own costs does not operate to the competitive disadvantage of the incumbent LECs.¹⁷⁴ We also disagree with Bell Atlantic's argument that the *First Report and Order* was not competitively neutral because we denied Bell Atlantic the ability to recover incremental costs of interim number portability.¹⁷⁵ As a threshold matter, Bell Atlantic and BellSouth are incorrect when they assert that the Commission determined that the costs of providing interim number portability will be incurred solely by incumbent LECs.¹⁷⁶ Although finding that "initially, the costs of providing interim number portability will be incurred primarily by the incumbent LEC, because the incumbent LECs currently hold the vast majority of numbers in use,"¹⁷⁷ the *First Report and Order* imposed interim number portability requirements on all local exchange carriers.¹⁷⁸ We find that it would be competitively neutral for carriers to pay their own incremental interim number portability costs,¹⁷⁹ that is, to absorb the costs themselves or pass the costs onto their own retail customers. Our competitive neutrality standard, however, prohibits LECs from directly shifting these costs onto new entrants, because the new entrant would be placed at an "appreciable, incremental cost disadvantage relative to another service provider when competing for the same customer."¹⁸⁰ Additionally, we have not foreclosed incumbent LECs from recovering all of their incremental costs of interim number portability, but have permitted each state to adopt a cost recovery mechanism, consistent with our competitive neutrality guidelines.¹⁸¹ The *First Report and Order* does not deny any carrier the right to recover costs, but, rather than adopting a uniform federal cost recovery mechanism, adopts guidelines that states must follow in implementing a cost recovery mechanism.¹⁸² We therefore disagree with Bell Atlantic's claim that carriers are placed at a cost

¹⁷⁴ BellSouth Petition at 9.

¹⁷⁵ Bell Atlantic Petition at 13-14.

¹⁷⁶ BellSouth Petition at 9.

¹⁷⁷ *First Report and Order*, 11 FCC Rcd at 8415-16.

¹⁷⁸ For example, competitive LECs that own their own switches would incur interim number portability costs where the competitive LEC's customer wishes to port its number to another provider before the implementation of long-term local number portability. See *First Report and Order*, 11 FCC Rcd at 8420, n.379.

¹⁷⁹ *First Report and Order*, 11 FCC Rcd at 8423.

¹⁸⁰ *Id.* at 8423.

¹⁸¹ See MTS and WATS Market Structure and Amendment of Part 69 of the Commission's Rules for Recovery of Equal Access Costs, CC Docket No. 78-72, *Report and Order*, 4 FCC Rcd 2104 (1989). We note that incumbent LECs may be able to recover the incremental costs of interim number portability from their end users. See *First Report and Order*, 11 FCC Rcd at 8423.

¹⁸² *First Report and Order*, 11 FCC Rcd at 8417.

disadvantage because they allegedly will not be able to recover the costs of interim number portability.¹⁸³ In any event, whether incumbent LECs incur most of, or virtually all of, the costs of interim number portability initially, we find that it would be competitively neutral for all carriers to bear their own costs of interim number portability because few numbers have been ported and the costs are likely to be small.¹⁸⁴ Such *de minimis* costs should not place any one service provider at a competitive disadvantage in competing for an individual customer.¹⁸⁵

50. We also conclude that the assertion by Bell Atlantic and Cincinnati Bell that new entrants should be required to bear all the costs of interim number portability is not consistent with the pro-competitive intent of sections 251(b)(2), 252(e)(2), and the 1996 Act as a whole. As we stated in the *Third Report and Order*, we have interpreted the Congressional mandate of competitive neutrality to require the Commission to depart from cost-causation principles when necessary to ensure that the cost of number portability borne by each carrier does not significantly affect any carrier's ability to compete with other carriers.¹⁸⁶ In the *First Report and Order*, we concluded that, because interim number portability costs will be small and incurred for a relatively short period, requiring carriers to bear their own costs would meet our competitive neutrality guidelines.¹⁸⁷ We specifically prohibited incumbent LECs from shifting all of their costs onto new entrants, however.¹⁸⁸ Such a direct cost shift from an incumbent LEC to a new entrant could act as a competitive barrier to the new entrant, because both carriers would be competing for the same customer, and the new provider may be forced to charge higher prices due to its need to recover the incumbent LEC's incremental costs of number portability, while the customer would face no additional charges if it stayed with the incumbent LEC.¹⁸⁹ Despite the fact that such incremental costs are small, shifting all of an incumbent LEC's costs of interim number portability to a new entrant could result in a cost so large, "relative to expected profits," that the new entrant would decide not to enter the market.¹⁹⁰ As we stated in the *First Report and Order*, imposing the full incremental cost of interim number portability solely on new entrants would place them at an "appreciable, incremental cost disadvantage relative to another service provider when competing for the same customer" and would, therefore, violate the first criteria

¹⁸³ Bell Atlantic Petition at 13-14.

¹⁸⁴ See *First Report and Order*, 11 FCC Rcd at 8420, n.378 and 8422; see also Local Competition, Industry Analysis Division, Common Carrier Bureau, FCC, Tables 3.3 and 3.4 (Dec. 1998).

¹⁸⁵ See *First Report and Order*, 11 FCC Rcd at 8415-16; see also *Third Report and Order*, 13 FCC Rcd at 11,727-28.

¹⁸⁶ *Third Report and Order*, 13 FCC Rcd at 11,726-27.

¹⁸⁷ See *First Report and Order*, 11 FCC Rcd at 8420-22; see *supra* ¶ 49 for a discussion of how carriers may recover their costs.

¹⁸⁸ See *First Report and Order*, 11 FCC Rcd at 8420-21.

¹⁸⁹ *First Report and Order*, 11 FCC Rcd at 8428; *Third Report and Order*, 13 FCC Rcd at 11,726-27.

¹⁹⁰ *First Report and Order*, 11 FCC Rcd at 8421.

of the competitive neutrality mandate.¹⁹¹

51. We also are not persuaded by BellSouth's contention that the cost allocation mechanisms discussed in the *First Report and Order* guarantee the profitability of the new entrants.¹⁹² Number portability facilitates the development of competition among local providers. Through its competitive neutrality criteria and state-determined cost allocation mechanisms, the *First Report and Order* removes a potential barrier to entry that could otherwise result from high rates or charges that incumbent LECs potentially could impose for interim number portability on new entrants that possess their own switches. It does not, however, guarantee that a new entrant will be profitable or be able to compete successfully in the market.

52. GTE suggests a third criterion, that "a cost recovery mechanism must not influence a customer's selection of his or her service provider."¹⁹³ While we agree with GTE that a cost recovery mechanism should not influence a customer's selection of his or her service provider, this criterion is effectively embodied in the first prong of our competitive neutrality test and, thus, we see no need to revise that test. GTE implies that requiring an incumbent LEC to bear a share of interim number portability costs will force it to increase prices and put it at a competitive disadvantage vis-a-vis new entrants. In fact, for reasons noted earlier, we find that the incremental costs of interim number portability incurred by incumbent LECs will be minimal. In addition, we find no evidence in the record to support GTE's assertion that an incumbent LEC's share of the incremental costs of interim number portability are so substantial, spread among its customer base, that such costs would require an incumbent LEC to raise rates to such an extent as to cause current customers to switch carriers.

D. Alternative Allocators for Cost Recovery of Interim Number Portability

1. Background

53. In the *First Report and Order*, we provided a list of examples of allocators for interim number portability cost recovery that would meet the Commission's criteria for competitive neutrality.¹⁹⁴ We stated, for example, that a cost allocator based on a carrier's number of active telephone numbers, or a carrier's relative number of presubscribed customers, would meet our competitive neutrality guidelines.¹⁹⁵ Several parties ask the Commission to approve additional allocators, or take exception to cost allocators deemed to be competitively neutral by the Commission

¹⁹¹ *Id.* at 8423.

¹⁹² *See* BellSouth Petition at 8.

¹⁹³ GTE Petition at 12.

¹⁹⁴ *See First Report and Order*, 11 FCC Rcd at 8422.

¹⁹⁵ *Id.* at 8421-22. Section 251(e)(2) requires that an allocator be competitively neutral but specifies no other criteria that must be used in the selection. States, therefore, have the discretion under the statute to choose among several competitively neutral allocation mechanisms other than those allocators given as examples in the *First Report and Order* based upon other valid regulatory goals, such as administrative efficiency.

in the *First Report and Order*. For example, GTE urges the Commission to approve a federally administered cost pooling proposal, which is based on recovering costs from end users, as an acceptable allocator for interim number portability.¹⁹⁶ GTE argues that none of the methods suggested in the *First Report and Order* are "competitively neutral," because they effectively force the incumbent LECs to recover costs through increased rates or burdening shareholders, which violates the second competitively neutral criterion.¹⁹⁷ AirTouch argues that total retail minutes of use is the only competitively neutral allocator; gross revenues, total access lines, and presubscribed lines are not competitively neutral because they fail the Commission's second competitive neutrality criterion.¹⁹⁸ Finally, Cincinnati Bell recommends a mandatory end user surcharge that would be applied to all local exchange customers.¹⁹⁹

2. Discussion

54. In the *First Report and Order*, we provided a non-exhaustive list of examples of allocators for interim number portability cost recovery that would meet the Commission's criteria for competitive neutrality.²⁰⁰ We disagree with GTE's argument that a federally-mandated cost pooling mechanism needs to be implemented. For the reasons discussed in the *First Report and Order*, we believe states should be able to adopt various cost recovery mechanisms based on our competitive neutrality guidelines. We are not, however, precluding states from selecting cost pooling as a cost recovery mechanism, nor are we determining that cost pooling is not competitively neutral for the recovery of interim number portability costs. Although in the *Third Report and Order* we rejected pooling of carriers' long-term number portability costs as a mechanism for recovery of these costs because pooling mechanisms, in general, reduce carrier incentives to provide service efficiently,²⁰¹ states may find that these disadvantages are not as significant when pooling is used as a mechanism for the recovery of interim number portability costs. The incremental costs of implementing long-term number portability are substantial,²⁰² while the incremental costs of interim number portability are relatively small. Because these costs are relatively small, given that incumbent LECs have already

¹⁹⁶ GTE Petition at 13.

¹⁹⁷ *Id.* at 11-12.

¹⁹⁸ AirTouch Petition at 16.

¹⁹⁹ Cincinnati Bell Reply at 3.

²⁰⁰ See *First Report and Order*, 11 FCC Rcd at 8422.

²⁰¹ *Third Report and Order*, 13 FCC Rcd at 11,775-76.

²⁰² See, e.g., Ameritech Long-Term Number Portability Transmittal No. 1186, filed Jan. 16, 1999 with an effective date of Feb. 1, 1999, seeking to recover approximately \$639 million for the implementation of long-term number portability; Pacific Bell Long-Term Number Portability Transmittal No. 2029, filed Jan. 15, 1999 with an effective date of Feb. 1, 1999, seeking to recover approximately \$747 million for the implementation of long-term number portability; Southwestern Bell Telephone Company Long-Term Number Portability Transmittal Nos. 2745 filed Jan. 15, 1999 with an effective date of Feb. 1, 1999, seeking to recover approximately \$625 million for the implementation of long-term number portability.

provisioned their switches with the capacity to provide the services needed for interim number portability, creating incentives for carriers to provide service efficiently may be less of a concern. We are allowing the states to utilize various cost recovery mechanisms, and states will make the decision as to whether they will choose pooling as a recovery mechanism and impose cost accounting and distribution mechanisms on carriers.

55. In clarifying that the list of potential allocators referenced in the *First Report and Order* is not exhaustive, we also affirm that a cost recovery mechanism based on a carriers' gross revenues is an acceptable means of allocating costs among carriers. We disagree with AirTouch's argument that such an allocator should be rejected because it is difficult to determine, treats carriers with different cost structures differently, and is not competitively neutral.²⁰³ Financial measures, including gross revenues, are developed for different uses, such as for tax filings, annual reports, and SEC filings, and are readily available. Additionally, such an allocator does not disparately affect the incremental costs of winning a specific customer or group of customers. A LEC with a small share of the market's revenues would pay a percentage of the incremental costs of interim number portability that is small enough that it will have no appreciable affect on its ability to compete for that customer.²⁰⁴ Accordingly, utilizing a gross revenues allocator does not violate our competitive neutrality guidelines.

56. It appears that carriers' concerns with some of the allocators approved by the Commission are focused on our second criterion, on whether losing a customer affects a firm's "normal return." Losing a customer will necessarily affect a firm's revenues and subsequent return on investment. That is what competition is all about. The *First Report and Order* did not intend to change that. Rather, as stated in the *Third Report and Order*, the second prong of the competitive neutrality test does not guarantee any particular rate of return, but merely states that an allocator should not disparately affect a carrier's ability to earn a normal return.²⁰⁵ For example, in the *First Report and Order*, we stated that, if the total costs of interim number portability were to be divided equally among four competing LECs within a specific service area, the incumbent LEC and three new entrants, the new entrant's share of the cost could be so large, relative to its expected profits, that the new entrant might decide not to enter the market.²⁰⁶ We also stated that allocating costs on an active telephone number basis would meet the second criteria, because it should not give any carrier a cost advantage, relative to its competitors.²⁰⁷

57. In a written *ex parte* presentation to the Commission, AT&T summarized a number of

²⁰³ See AirTouch Petition at 16-17.

²⁰⁴ See *First Report and Order*, 11 FCC Rcd at 8421.

²⁰⁵ See *Third Report and Order*, 13 FCC Rcd at 11,732; see *supra* ¶ 38 for a discussion of the term "normal return."

²⁰⁶ *First Report and Order*, 11 FCC Rcd at 8421.

²⁰⁷ *Id.*

existing state cost recovery mechanisms in effect at that time.²⁰⁸ In one method, cost elements required for interim number portability are attributed to the requesting carrier, which is deemed the cost causer, and must be borne by that entity. This method allocates all incremental costs of interim number portability to the new entrant.²⁰⁹ We have reiterated our earlier conclusion in the *First Report and Order* that a cost recovery mechanism that imposes the entire incremental costs of interim number portability on a facilities-based new entrant violates our competitive neutrality criteria.²¹⁰ New entrants subjected to such a cost recovery mechanism may pursue one of the enforcement options discussed in the *First Report and Order* and reiterated above.²¹¹

58. NYNEX suggests that allocating costs on the basis of total telecommunications retail revenues is competitively neutral and should be permitted as an allocator.²¹² We agree with NYNEX that such an allocation may meet our competitive neutrality guidelines because, as with allocators based on gross telecommunications revenues, it would not give one service provider an appreciable, incremental cost advantage over another service provider.²¹³ Under this allocation method, a LEC with a small share of the market's revenues would pay a percentage of the incremental cost of number portability that will be small enough to have no appreciable affect on its ability to compete for a customer.²¹⁴ We also reiterate our earlier finding that a variety of cost recovery mechanisms and allocation methods comply with our competitive neutrality criteria.²¹⁵

59. In sum, we reaffirm our determination to allow each state to determine the appropriate cost recovery mechanism for its jurisdiction as long as it meets our competitive neutrality criteria.²¹⁶ We recognize that, in the *First Report and Order*, we tentatively concluded that a cost recovery mechanism for interim number portability that assesses charges based on a carrier's gross revenues less charges carriers paid to other carriers would meet our competitive neutrality guidelines,²¹⁷ while in the *Third Report and Order*, we declined to utilize this allocator for long-term number portability cost

²⁰⁸ AT&T *Ex Parte* filed Nov. 26, 1997 (AT&T *Ex Parte*).

²⁰⁹ *Id.* at 5.

²¹⁰ *See First Report and Order*, 11 FCC Rcd at 8423.

²¹¹ *See supra* ¶ 31.

²¹² NYNEX Opposition at 6.

²¹³ *See First Report and Order*, 11 FCC Rcd at 8420.

²¹⁴ *Id.*

²¹⁵ *Id.* at 8421-22.

²¹⁶ *Id.* at 8420.

²¹⁷ *Id.* at 8422.

recovery.²¹⁸ We note, however, that interim number portability and long-term number portability, as implemented pursuant to industry-wide discussions, have very different cost characteristics.²¹⁹ A cost recovery method that is appropriate for one may not be suitable for the other. Thus, although we have established one particular cost recovery mechanism for long-term number portability, we decline to issue an exclusive list of acceptable cost recovery methods for interim number portability from which the states may choose to adopt. Instead, states are free to adopt an appropriate cost recovery method, provided it meets our competitive neutrality criteria.²²⁰ As explained in more detail above,²²¹ if a carrier believes that a LEC's pricing provisions for number portability violate the Commission's competitive neutrality guidelines or violate a state-mandated cost recovery mechanism, it may be able to seek relief from its state commission, this Commission, or an appropriate court.²²²

E. Takings

1. Background

60. Several petitioners claim that our cost recovery guidelines for interim number portability do not ensure adequate compensation and therefore constitute an unlawful taking under the Fifth and Fourteenth Amendments to the Constitution.²²³ Cincinnati Bell further asserts that it cannot recover its costs of interim number portability from the cost causers because the *First Report and Order* prohibits such a result.²²⁴ Nor can it recover these costs elsewhere, such as from its end users, according to Cincinnati Bell, because even if authority for end-user rate increases could be obtained from state regulators, the resultant rate increase would place it at a competitive disadvantage relative to new competitors.²²⁵ Cincinnati Bell asserts that such a result would not be competitively neutral.²²⁶

61. In opposition, MCI states that incumbent LECs "obviously have confused the Commission's articulation of cost allocation principles with end user cost recovery," leading to incorrect assertions that the Commission's rules constitute a taking.²²⁷ AT&T asserts that incumbent

²¹⁸ *Third Report and Order*, 13 FCC Rcd at 11,756-57.

²¹⁹ *See First Report and Order*, 11 FCC Rcd at 8415-8416.

²²⁰ *Id.* at 8420.

²²¹ *See supra* ¶ 31.

²²² *First Report and Order*, 11 FCC Rcd at 8423.

²²³ BellSouth Petition at 2; Cincinnati Bell Petition at 3-4; GTE Petition at 12.

²²⁴ Cincinnati Bell Reply at 2-3.

²²⁵ Cincinnati Bell Reply at 2-3.

²²⁶ Cincinnati Bell Reply at 2-3.

²²⁷ MCI Opposition at 5.