

LECs "have the same opportunity to recover their share of these costs in retail rates as do [new entrants]."<sup>228</sup> In addition, Sprint asserts that the petitioners have offered no evidence supporting their claims of confiscation.<sup>229</sup>

## 2. Discussion

62. We reject the claim that the cost recovery guidelines for interim number portability established in the *First Report and Order* violate the Fifth Amendment's mandate that no private property shall be "taken for public use without just compensation."<sup>230</sup> As discussed below, we conclude that the petitioners' takings claim is premature. More importantly, in examining our cost recovery guidelines in light of criteria articulated by the Supreme Court, we find that the petitioners' takings claim fails on the merits.<sup>231</sup>

63. In the *First Report and Order*, we clearly stated that, although our guidelines govern state allocation of costs of interim number portability, it is the responsibility of the states to adopt specific cost recovery mechanisms.<sup>232</sup> Although petitioners have broadly stated that they believe that incumbent LECs will not receive adequate compensation as a result of the guidelines established in the *First Report and Order*, they have not shown the actual impact of the guidelines based on state orders. We conclude, therefore, that, absent an actual rate order under which the impact of the cost recovery guidelines can be evaluated, the petitioners' takings argument is premature. This conclusion is consistent with *FPC v. Texaco Inc.*, in which the Supreme Court held that,

[a]ny broadside assertion that indirect regulation will be confiscatory is premature. The consequences of indirect regulation can only be viewed in the entirety of the rate of return allowed on investment, and this effect will be unknown until the Commission has applied its scheme in individual cases over a period of time.<sup>233</sup>

64. Assuming *arguendo* that the petitioners' takings claim is not premature, we find it without merit. The Supreme Court has made clear that "government may execute laws or programs that

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<sup>228</sup> AT&T Opposition at 24.

<sup>229</sup> Sprint Opposition at 6-7.

<sup>230</sup> See U.S. Const. amend. V.

<sup>231</sup> In *Lucas v. South Carolina Coastal Council*, the Court recognized two categories of regulatory action which may be considered to be *per se* compensable takings: (1) regulations that compel the property owner to suffer a physical invasion of his property; and (2) regulations which deny all economically beneficial or productive use of land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). No party has suggested that either *per se* situation applies here.

<sup>232</sup> *First Report and Order*, 11 FCC Rcd at 8417.

<sup>233</sup> *FPC v. Texaco Inc.*, 417 U.S. 380, 391-92 (1974).

adversely affect recognized economic values"<sup>234</sup> and that "given the propriety of governmental power to regulate, it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another."<sup>235</sup> In fact, "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."<sup>236</sup> Despite the conclusory assertion of Cincinnati Bell to the contrary,<sup>237</sup> our guidelines will not result in a significant economic impact on incumbent LECs. As noted in the *First Report and Order*, "the capability to provide number portability through interim methods, such as RCF and DID, already exists in most of today's networks, and no additional network upgrades are necessary."<sup>238</sup> We also determined that "[t]he costs of interim number portability are the incremental costs incurred by a LEC to transfer numbers initially and subsequently forward calls to new service providers."<sup>239</sup> The incremental costs associated with the utilization of pre-existing network functionality for purposes of interim number portability are relatively small.<sup>240</sup>

65. In *Duquesne Light Co. v. Barasch*, the Supreme Court rejected a takings claim on the grounds that it was permissible to preclude certain costs from inclusion in an electric utility's rate base because the overall rate was within constitutional requirements.<sup>241</sup> A rate is too low for constitutional purposes, according to the Court, if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired."<sup>242</sup> The Court held:

'It is not the theory, but the impact of the rate order which counts.' . . . The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's property if they are compensated by countervailing factors in some other

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<sup>234</sup> *Penn Central v. City of New York*, 438 U.S. 104, 124 (1978) (*Penn Central*).

<sup>235</sup> *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 222 (1986).

<sup>236</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>237</sup> In its petition, Cincinnati Bell asserts that the Commission's cost recovery guidelines "will have a significant economic impact on LECs." Cincinnati Bell Petition at 3. We note that neither Cincinnati Bell nor any other LEC has provided factual support for this proposition.

<sup>238</sup> *First Report and Order*, 11 FCC Rcd at 8415.

<sup>239</sup> *Id.* at 8418.

<sup>240</sup> *See supra* ¶ 30.

<sup>241</sup> *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

<sup>242</sup> *Id.* at 307 (citing *Covington & Lexington Turnpike Road Co. v. Sanford*, 164 U.S. 578, 597 (1896)).

aspect.<sup>243</sup>

66. In determining that the overall impact of the rate order was not constitutionally objectionable and that the takings clause was not violated, the Court in *Duquesne Light Company* took note of the fact that

[n]o argument has been made that these slightly reduced rates jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital. Nor has it been demonstrated that these rates are inadequate to compensate current equity holders for the risk associated with their investments . . . .<sup>244</sup>

Similarly, no showing has been made that the cost recovery guidelines at issue here will "jeopardize the financial integrity" of incumbent LECs, nor have petitioners demonstrated that the cost recovery guidelines will result in state rate orders that are inadequate to compensate incumbent LEC investors "for the risk associated with their investments."

67. Having already provisioned their switches with enough capacity to carry all of their customers' incoming and outgoing calls, incumbent LECs should incur no additional costs with respect to switch capacity when losing customers and using RCF to provide number portability. Although RCF will require additional switch capacity -- and an increase in transport costs -- to process incoming calls, this effect is offset by the fact that the incumbent LEC will no longer handle the outgoing calls originated by the ported customer. As a result, little or no change in the level of incumbent LEC switching and transport costs per ported number should occur. We conclude, therefore, that the additional incremental costs of interim number portability to incumbent LECs will be extremely small. Additionally, incumbent LECs may be able to recover some portion of their costs from other carriers through state-mandated cost recovery mechanisms. In light of the fact that revenues for all incumbent LECs have been reported to be in excess of \$103 billion per year,<sup>245</sup> and the additional incremental costs of interim number portability will likely be a *de minimis* percentage of this total,<sup>246</sup> we find that such costs are not significant for purposes of a Fifth Amendment takings claim. Additionally, as discussed above, 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

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<sup>243</sup> *Duquesne Light Co.*, 488 U.S. at 313 (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)). See also *FPC v. Texaco Inc.*, 417 U.S. 380, 391-92 (1974) (stating that "[a]ll that is protected against, in a constitutional sense, is that the rates . . . be higher than a confiscatory level . . . [w]hether any rate is confiscatory . . . can only be judged by the result reached, not the method employed.") (footnotes omitted)).

<sup>244</sup> *Duquesne Light Co.*, 488 U.S. at 310.

<sup>245</sup> Federal Communications Commission, Statistics of Communications Common Carriers, 1997/1998 Edition, Table 2.9.

<sup>246</sup> As previously indicated, to the extent that RCF is used to provide interim number portability, and the capability for RCF already exists in the incumbent LEC network, only the short-run incremental costs of RCF (*i.e.*, switching and transport) are properly attributable to interim number portability. See *supra* ¶ 30.

carrier has a variety of ways it may seek relief.<sup>247</sup>

68. Moreover, as the Supreme Court has stated, "[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."<sup>248</sup> Based on the extensive public debate that preceded enactment of the 1996 Act, it cannot be said that investors lacked adequate notice of possible changes to the Communications Act, including the number portability requirement at issue here. Indeed, while courts have readily found that a taking has occurred when interference with property rights can be characterized as a physical invasion or permanent appropriation, such a finding has not been reached when the challenged interference arises from a public program adjusting the benefits and burdens of economic life to promote the common good.<sup>249</sup> Our number portability cost recovery guidelines, which are designed to facilitate local telephone competition and thereby benefit all consumers of telecommunications services,<sup>250</sup> falls squarely into the latter category. In short, the petitioners have failed to demonstrate that the Commission's cost recovery guidelines violate the Fifth and Fourteenth Amendments.

#### **F. Retroactive Application of Cost Recovery Guidelines for Interim Number Portability**

##### **1. Background**

69. ACSI asks the Commission to allow new entrants to recover retroactively number portability costs paid to incumbent LECs in excess of that required pursuant to the guidelines set forth in the *First Report and Order*.<sup>251</sup> Specifically, ACSI requests that the Commission provide for a true-up of rates paid in excess of those required pursuant to the *First Report and Order* as far back as February 8, 1996, the date the 1996 Act became effective, or the date number portability was first provided to the new entrant, whichever is later.<sup>252</sup> In the alternative, ACSI proposes that the Commission's cost recovery guidelines be applied as of the effective date of the *First Report and Order*, regardless of when a state adopts a specific cost recovery mechanism.<sup>253</sup>

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<sup>247</sup> See *supra* ¶ 31.

<sup>248</sup> *Connolly*, 475 U.S. at 227 (citing *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) (additional citations omitted)).

<sup>249</sup> See *Connolly*, 475 U.S. at 225; *Penn Central*, 438 U.S. at 124, 133 (acknowledging that the statute at issue "has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.' Legislation designed to promote the general welfare commonly burdens some more than others.").

<sup>250</sup> *First Report and Order*, 11 FCC Rcd at 8366-68.

<sup>251</sup> ACSI Petition at 2, 6-7.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 5.

70. Several incumbent LECs oppose ACSI's request.<sup>254</sup> Bell Atlantic and BellSouth argue that Congress did not intend that cost recovery rules for interim number portability be applied retroactively, and that recognized principles of administrative law and state statutes do not allow for retroactive application of these Commission guidelines.<sup>255</sup> BellSouth also argues that retroactive application of rates to interim arrangements that have already been negotiated would improperly take away or impair vested rights acquired under existing law.<sup>256</sup>

## 2. Discussion

71. We deny ACSI's request that our cost recovery rules for interim number portability be applied to number portability provided prior to the adoption and effective date of those rules. In section 251(e)(2) of the Act, Congress required that "the cost of establishing . . . number portability shall be borne by all telecommunications carriers on a competitively neutral basis *as determined by the Commission.*"<sup>257</sup> The plain language of this section demonstrates that, while establishing the parameters on how number portability costs are to be allocated (*i.e.*, on a competitively neutral basis) and who should pay such costs (*i.e.*, all telecommunications carriers), Congress intended that specific cost recovery rules were to be established by the Commission at some point in time following the enactment of the 1996 Act.<sup>258</sup> We reject ACSI's argument that, because the number portability provision became effective on February 8, 1996, ACSI is merely seeking to have the Commission give effect to this pre-existing requirement. Section 251(e)(2) is not self-executing, but is dependent on Commission action. We see no basis in the record for applying the rules adopted pursuant to section 251(e) retroactively as requested by ACSI.

72. Our cost recovery guidelines for interim number portability became effective August 26, 1996,<sup>259</sup> however, and we agree that it may be appropriate for states to provide a true-up of interim number portability costs from that date through the effective date of a state-approved cost recovery program.<sup>260</sup> To provide the states with the flexibility during the interim period to continue using a

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<sup>254</sup> Bell Atlantic Opposition at 2; BellSouth Opposition at 3-4; *see also* NYNEX Opposition at 6.

<sup>255</sup> Bell Atlantic Opposition at 1-2; BellSouth Opposition at 2-5.

<sup>256</sup> BellSouth Opposition at 3-4; *see also* NYNEX Opposition at 6.

<sup>257</sup> 47 U.S.C. § 251(e)(2) (emphasis added).

<sup>258</sup> Pursuant to section 251(d)(1) of the Act, the Commission was required to complete all actions necessary to establish regulations to implement section 251 within six months of the date of enactment of the 1996 Act. The Commission's *First Report and Order*, implementing section 251(e)(2) cost recovery for interim number portability, which was adopted June 27, 1996, met this statutory deadline.

<sup>259</sup> The *First Report and Order* was published in the Federal Register on July 25, 1996, and the rules and requirements set forth therein became effective August 26, 1996. *See* 61 FR 38,605 (July 25, 1996).

<sup>260</sup> ACSI Reply at 5.

variety of cost recovery approaches, we did not adopt a fixed cost recovery mechanism.<sup>261</sup> Instead, we adopted guidelines for the states to follow in mandating cost recovery for interim number portability.<sup>262</sup> We recognize, however, that a significant period of time may have elapsed before each state adopted a cost recovery mechanism for interim number portability. Thus, absent a true-up from the effective date of our *First Report and Order*, the benefits of a competitively neutral cost recovery mechanism for interim number portability may be lost for many new entrants if they have been paying cost recovery amounts in excess of what would be allowed under the competitive guidelines of the *First Report and Order*.<sup>263</sup> We strongly encourage states to review their cost recovery mechanisms. Consistent with our competitive neutrality principles, we encourage states to adopt a true-up of amounts paid for interim number portability between August 26, 1996 and the date the state-approved cost recovery program takes effect, to the extent such amounts exceed what would have been paid under the state-approved plan, had it been in effect.

## G. Terminating Access Charges

### 1. Background

73. In the *First Report and Order*, we stated that terminating access charges for calls forwarded from an incumbent LEC to a competing provider through the use of a interim number portability method should be shared between the incumbent LEC, which is the donor switch,<sup>264</sup> and the terminating switch carrier.<sup>265</sup> We stated that the "overarching principle" in such billing arrangements was that carriers were to share in the access revenues for a ported call, because neither the incumbent LEC forwarding carrier nor the terminating carrier provides all the facilities used to terminate a ported call.<sup>266</sup> We also held that incumbent LECs and new entrants should assess their terminating access charges on IXCs through meet-point billing arrangements.<sup>267</sup>

74. MCI asserts that, regardless of what type of billing arrangement is adopted, IXCs should not be charged increased access charges as a result of the additional call routing and associated costs

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<sup>261</sup> *First Report and Order*, 11 FCC Rcd at 8417.

<sup>262</sup> *Id.*

<sup>263</sup> We note that several state arbitration decisions have adopted a true-up approach pending the adoption of a state-approved cost recovery mechanism. See, e.g., Pennsylvania Arbitration Decision, dated Oct. 10, 1996 (Docket No. A-310125, F0002) at 24; Order of the Virginia State Corporation Commission setting proxy Prices and Resolving Interim Number Portability, dated Nov. 8, 1996 (Case Nos. PUC960100, 103, 104, 105, 113).

<sup>264</sup> A "donor" switch is the end office switch to which the called telephone number was originally assigned.

<sup>265</sup> *First Report and Order*, 11 FCC Rcd at 8424.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

necessary to terminate a call to a ported number under interim number portability measures.<sup>268</sup> MCI argues that such additional routing costs should be treated as the incremental costs of interim number portability, should be treated in a competitively neutral manner, and should not all be imposed on IXCs.<sup>269</sup> MCI also asks that we clarify which specific costs involved in the routing of a call to a ported number would be subject to such a cost allocation method.<sup>270</sup> GTE, on the other hand, argues that any additional switching and transport costs incurred as a result of the porting of numbers via interim number portability are the costs of access, not number portability, and should be borne by the IXC as part of access payments assessed by the LECs.<sup>271</sup> Bell Atlantic agrees with GTE's proposal with some modifications and also asks us to clarify that, to prevent double recovery on the part of the terminating switch carrier, new entrants receiving a portion of access charges from IXCs for terminating calls may not also impose terminating charges on the incumbent LEC.<sup>272</sup>

## 2. Discussion

75. IXCs currently pay LECs access charges for terminating calls on LEC switches. In a competitive local exchange market, an IXC terminating a call to a long distance customer that has ported his or her number to a new entrant will terminate the call to the incumbent LEC's switch, which then will forward it to the new entrant's switch utilizing interim number portability measures. Under this scenario, incumbent LECs and new entrants both provide facilities used to terminate calls to ported numbers using interim number portability. In the *First Report and Order*, we required both forwarding and terminating carriers to assess charges on IXCs for terminating access through meet-point billing arrangements.<sup>273</sup> In requiring that these revenues be shared, we left to the carriers whether "each issues a bill for access on a ported call, or whether one of them issues a bill to the IXCs covering all of the transferred calls and shares the correct portion of the revenues with the other carriers involved."<sup>274</sup> We further provided that, if carriers determine it more efficient to issue individual bills, the forwarding carrier must "provide the terminating carrier with the necessary information to permit the terminating carrier to issue a bill."<sup>275</sup>

76. In forwarding a call to a ported number, local exchange carriers may incur additional costs that are specific to number portability. Contrary to GTE's argument, we find that these additional costs should not be included in the access charges paid by IXCs for terminating long-

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<sup>268</sup> MCI Petition at 3-4.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> GTE Opposition at 19.

<sup>272</sup> Bell Atlantic Opposition at 2.

<sup>273</sup> *First Report and Order*, 11 FCC Rcd at 8424.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

distance calls. We agree with MCI that any additional routing and transport costs that are a result of interim number portability are incremental costs of providing number portability. Such costs may be recovered through a local number portability cost recovery mechanism, or borne by the local exchange carrier that forwards the call, as determined by the state, on a competitively neutral basis.<sup>276</sup> Because of their status as telecommunications carriers, IXCs may be required to contribute to the costs of interim number portability through the cost recovery mechanism adopted by state commissions. We also agree with Bell Atlantic, and clarify, that, to prevent double recovery on the part of the terminating switch carrier, new entrants receiving a portion of access charges from IXCs for terminating calls may not also impose terminating charges on the incumbent LEC.<sup>277</sup>

77. As discussed in the *First Report and Order*, carriers may incur incremental costs for forwarding calls when utilizing interim number portability.<sup>278</sup> MCI requests that we clarify what is included in these incremental costs and, thus, what should be shared by all carriers on a competitively neutral basis.<sup>279</sup> The incremental costs of providing number portability via RCF, DID, or other comparable technically feasible measures are the costs that the forwarding carrier incurs in forwarding the call that it would not incur if it did not forward the call.<sup>280</sup> As mentioned in the *First Report and Order*, such costs may differ depending on where the call originates within the network, and on the type of technology utilized to forward the call.<sup>281</sup> For this reason, we decline to list each potential additional cost that may be incurred and who should be allowed to bill for those incremental costs.

78. Finally, in response to a Bell Atlantic request, we note that we have "not foreclose[d] arrangements in which one exchange carrier bills the entire amount [of access charges] and remits the other exchange carrier its share."<sup>282</sup> The *First Report and Order* does not require that the carrier that owns the donor switch and the carrier that owns the terminating switch each issue a separate bill to the IXC. The *First Report and Order* states that "it is up to the carriers whether they each issue a bill for

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<sup>276</sup> We have previously found that requiring carriers to bear their own interim number portability costs is one method that meets our competitive neutrality guidelines. See *First Report and Order*, 11 FCC Rcd at 8422. See also *supra* ¶ 49.

<sup>277</sup> Bell Atlantic Opposition at 2.

<sup>278</sup> *First Report and Order*, 11 FCC Rcd at 8418.

<sup>279</sup> MCI Petition at 1.

<sup>280</sup> As noted above, incumbent LECs have, presumably, already provisioned their switches with enough capacity to carry all of their customers' incoming and outgoing calls. In addition, incumbent LECs that are offering call forwarding already have provisioned their switches with the capability to provide interim number portability. Thus, if an incumbent LEC loses a customer, in the short run it incurs no incremental costs relating to switch capacity. While the incumbent LEC incurs the additional costs of providing call forwarding on incoming calls, these costs are offset by the fact that the incumbent LEC no longer handles calls that are originated by the ported customer. See *supra* ¶ 67.

<sup>281</sup> *First Report and Order*, 11 FCC Rcd at 8418.

<sup>282</sup> Bell Atlantic Opposition at 2.

access on a ported call, or whether one of them issues a bill to the IXC covering all of the transferred calls and shares the correct portion of the revenues with the other carriers involved."<sup>283</sup> Thus, either the carrier that owns the donor switch or the carrier that owns the terminating switch may bill the entire amount of access charges and remit to the other local exchange carrier its share of the invoiced charges. In short, the *First Report and Order* does not prohibit carriers who mutually agree from sending one bill to the IXC and then splitting the access charges appropriately between themselves.

## H. Modification of Billing Systems to Accommodate the Sharing of Access Charges in Meet-Point Billing Type Arrangements

### 1. Background

79. In the *First Report and Order*, we concluded that meet-point billing between neighboring incumbent LECs provides the appropriate model for the proper access billing arrangement for interim number portability.<sup>284</sup> In complying with the Commission's directive that forwarding and terminating carriers share access revenues received from IXCs for ported calls through meet-point billing arrangements, GTE argues that LECs should not be required to modify their billing systems.<sup>285</sup> GTE asserts that existing billing systems and switch software do not have the capability to identify and link the records of the interexchange portion of the calls (from the IXC to the forwarding LEC) with the inter-office portion of the call (from the forwarding LEC to the terminating LEC).<sup>286</sup> Time Warner argues that "the Commission should permit carriers to divide access charge revenues [based on traffic samples or total access charges per line] while interim solutions are deployed."<sup>287</sup> When carriers cannot agree on a specific meet-point arrangement, GTE suggests that the parties look to "mediation or arbitration from the state PUC, informal assistance from the Commission's staff, or other forms of alternative dispute resolution."<sup>288</sup>

### 2. Discussion

80. The *First Report and Order* did not specify whether carriers must modify their billing systems in order to accommodate the requirement that access charges be shared in meet-point billing type arrangements. The *First Report and Order* requires that the forwarding carrier provide "the necessary information to permit the terminating carrier to issue a bill," but does not specify whether

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<sup>283</sup> *First Report and Order*, 11 FCC Rcd at 8424.

<sup>284</sup> *Id.*

<sup>285</sup> GTE Petition at 19-20.

<sup>286</sup> *Id.*

<sup>287</sup> Time Warner Comments at 14; *see also* NYNEX Opposition at 7; USTA Opposition at 9.

<sup>288</sup> GTE Petition at 20.

carriers have to make modifications in their billing systems in order to do so.<sup>289</sup> In general, interim number portability arrangements will be in place for a limited period of time; indeed, long-term number portability currently is available in many areas of the country.<sup>290</sup> We thus agree with GTE and Time Warner that it would not be cost effective to require carriers to modify their billing systems to accommodate interim number portability. We do not require carriers to modify their billing systems to track and record the details of every call. We do require, however, that carriers adopt some method of implementing our requirement to share terminating access revenues, by, for example, providing information about PIU (percent interstate usage), traffic samples, or total access charges per line.

81. If carriers cannot agree on appropriate meet-point billing arrangements, we agree with GTE that this issue may be included in mediation or arbitration before a state commission, or be subject to other dispute resolution processes chosen by the carriers involved.<sup>291</sup> We reject GTE's suggestion, however, that parties seek informal assistance from the Commission as a means of resolving meet-point billing arrangement disputes.<sup>292</sup> Also, if a meet-point billing arrangement dispute arises in the context of an interconnection request made pursuant to section 251, the 1996 Act clearly places the responsibility for arbitration and/or mediation of unresolved issues on the state commissions.<sup>293</sup>

#### IV. SUPPLEMENTAL REGULATORY FLEXIBILITY ANALYSIS

82. As required by the Regulatory Flexibility Act (RFA),<sup>294</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *First Report and Order*. In addition, the Commission sought comments on the proposals included in the Initial Regulatory Flexibility Analysis (IRFA) in the *First Report and Order*. The Commission incorporated a Final Regulatory Flexibility Analysis in the *Third Report and Order*.<sup>295</sup> The supplemental Regulatory Flexibility Analysis in this *Memorandum Opinion and Order* is as follows:

83. Need for and Objectives of Action: The Commission, in compliance with sections 251(b)(2), 251(d)(1), and 251(e)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, adopted rules and procedures in the *Third Report and Order* that are intended to ensure the implementation of telephone number portability with the minimum regulatory

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<sup>289</sup> *First Report and Order*, 11 FCC Rcd at 8424.

<sup>290</sup> *See supra* ¶ 30.

<sup>291</sup> *See* GTE Petition at 20.

<sup>292</sup> *Id.*

<sup>293</sup> *See* 47 U.S.C. § 252.

<sup>294</sup> *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>295</sup> *Third Report and Order*, 13 FCC Rcd 11,701 (1998).

and administrative burden on telecommunications carriers. Congress has recognized that number portability will lower barriers to entry and promote competition in the local exchange marketplace. To prevent the cost of number portability from itself becoming a barrier to local competition, section 251(e)(2) requires that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission." The Bureau, pursuant to authority delegated by the Commission in the *Third Report and Order*, issued this *Memorandum Opinion and Order* to address issues relating to cost recovery for interim number portability. Interim number portability utilizes an interim method to allow consumers to change carriers while retaining their telephone numbers before long-term number portability becomes available.

84. Summary of Significant Issues Raised by the Public Response to the FRFA: There were no comments submitted specifically in response to the Regulatory Flexibility Analysis. In the *Third Report and Order*, the Commission adopted rules and regulations to ensure that the way all telecommunications carriers, including small entities, bear the costs of number portability does not significantly affect any carrier's ability to compete with other carriers for customers in the marketplace. This *Memorandum Opinion and Order* addresses issues relating to cost recovery for interim number portability. This *Memorandum Opinion and Order on Reconsideration* affirms the Commission's conclusion that it has the authority to establish cost recovery guidelines for interim number portability. Second, the Commission rejects 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. The *Memorandum Opinion and Order* denies the request that these cost recovery guidelines be applied retroactively. The *Memorandum Opinion and Order* affirms the Commission's 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, the *Memorandum Opinion and Order* clarifies 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.

85. Description and Estimate of Number of Small Businesses to Which Actions Will Apply: The Regulatory Flexibility Act generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act.<sup>296</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>297</sup> According to SBA's regulations, entities engaged in the provision of telephone service may have a maximum of 1,500 employees in order to qualify as a small business concern.<sup>298</sup> This standard also applies in determining whether an entity is a small business for purposes of the RFA.

86. As described in the previous Regulatory Flexibility Analysis contained in the *Third Report*

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<sup>296</sup> See 15 U.S.C. § 632.

<sup>297</sup> *Id.*

<sup>298</sup> See 13 C.F.R. § 121.201.

*and Order*,<sup>299</sup> our rules governing number portability cost recovery apply to all telecommunications carriers, including incumbent LECs, new LEC entrants, and IXCs, as well as cellular, broadband PCS, and covered SMR providers. Small incumbent LECs subject to these rules are either dominant in their field of operations or are independently owned and operated, and, consistent with the Commission's prior practice, are excluded from the definition of "small entities" and "small business concerns."<sup>300</sup> Accordingly, our use of the terms "small entities" and "small businesses" does not encompass small incumbent LECs.<sup>301</sup> Out of an abundance of caution, however, for regulatory flexibility analysis purposes,<sup>302</sup> we will consider small incumbent LECs within this analysis and use the term "small incumbent LECs" to refer to any incumbent LECs that arguably might be defined by the SBA as "small business concerns."

87. Insofar as our rules apply to all telecommunications carriers, they may have an economic impact on a substantial number of small businesses, as well as on small incumbent LECs. The rules may have an impact upon new entrant LECs and small incumbent LECs, as well as cellular, broadband PCS, and covered SMR providers. Based upon data contained in the most recent census and a report by the Commission's Common Carrier Bureau, we estimate that 2,100 small entities could be affected. We have derived this estimate based on the following analysis.

88. According to the 1992 Census of Transportation, Communications, and Utilities, there were approximately 3,469 firms with under 1,000 employees operating under the Standard Industrial Classification (SIC) category 481 -- Telephone. See U.S. Dept. of Commerce, Bureau of the Census, 1992 Census of Transportation, Communications, and Utilities (issued May 1995). Many of these firms are the incumbent LECs and, as noted above, would not satisfy the SBA definition of a small business because of their market dominance. There were approximately 1,350 LECs in 1995. Industry Analysis Division, FCC, Carrier Locator: Interstate Service Providers at Table 1 (Number of Carriers Reporting by Type of Carrier and Type of Revenue) (December 1995). Subtracting this number from the total number of firms leaves approximately 2,119 entities which potentially are small businesses which may be affected. This number contains various categories of carriers, including small incumbent LECs, competitive access providers, cellular carriers, interexchange carriers, mobile service carriers, operator service providers, pay telephone operators, PCS providers, covered SMR providers, and resellers. Some of these carriers, although not dominant, may not meet the other requirement of the definition of a small business because they are not "independently owned and operated."<sup>303</sup> For example, a PCS provider that is affiliated with a long distance company with more

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<sup>299</sup> *Third Report and Order*, 13 FCC Rcd 11,701 (1998).

<sup>300</sup> See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd 15499, 16144-45, 16149-50 (1996) (*Local Competition Order*), *vacated in part, aff'd in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (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. (1998).

<sup>301</sup> *Local Competition Order*, 11 FCC Rcd at 16,150.

<sup>302</sup> See 13 C.F.R. § 121.902(b)(4).

<sup>303</sup> See 15 U.S.C. § 632(a)(1).

than 1,500 employees would not meet the definition of a small business. Another example would be if a cellular provider is affiliated with a dominant LEC. Thus, a reasonable estimate of the number of "small businesses" affected by this *Memorandum Opinion and Order* would be approximately 2,100.

89. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements of the Rules: The *Memorandum Opinion and Order* provides guidance regarding issues relating to cost recovery for interim number portability. This *Memorandum Opinion and Order on Reconsideration* affirms the Commission's conclusion that it has the authority to establish cost recovery guidelines for interim number portability. Second, the Commission rejects 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. The *Memorandum Opinion and Order* denies the request that these cost recovery guidelines be applied retroactively. The *Memorandum Opinion and Order* affirms the Commission's 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.

90. The *Memorandum Opinion and Order* also confirms an earlier Commission decision that a cost recovery mechanism based on a carrier's gross revenues is an acceptable means of allocating costs among carriers. The *Memorandum Opinion and Order* states that no additional recordkeeping will be required for this option of recordkeeping, because a such gross revenue reporting is readily available through such things as tax filings, annual reports and SEC filings, which are developed for other purposes. The *Memorandum Opinion and Order* does not require carriers to adopt any one billing arrangement for sharing costs when they forward calls while utilizing interim number portability. The *Memorandum Opinion and Order* allows carriers to determine the best method of splitting these costs between them, but requires them adopt some method of sharing terminating access revenues. Additionally, the *Memorandum Opinion and Order* affirms the Commission's earlier determination that meet-point billing between neighboring incumbent LECs provides the appropriate model for the proper access billing arrangement for interim number portability, but states that carriers are not required to modify their billing systems to track and record the details of every call.

91. Steps Taken to Minimize Impact on Small Entities Consistent with Stated Objectives: The record in this proceeding indicates that the need for customers to change their telephone numbers when changing local service providers is a barrier to local competition. Requiring number portability, and ensuring that all telecommunications carriers bear the costs of number portability on a competitively neutral basis, will make it easier for competitive providers, many of which may be small entities, to enter the market. The Bureau has attempted to keep regulatory burdens on all local exchange carriers to a minimum to ensure that the public receives the benefits of the expeditious provision of service provider number portability in accordance with the statutory requirements. For example, the *Memorandum Opinion and Order* affirms the Commission's earlier determination that meet-point billing between neighboring incumbent LECs provides the appropriate model for the proper access billing arrangement for interim number portability, but states that carriers are not required to modify their billing systems to track and record the details of every call. Such determination recognizes that number portability will cause some carriers, including small entities, to incur costs that they would not ordinarily have incurred in providing telecommunications services, but attempts to keep such costs to a minimum.

92. Report to Congress: The Commission will send a copy of this *Memorandum Opinion and Order*, including this supplemental RFA, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>304</sup> In addition, the Commission will send a copy of the *Third Report and Order* and this supplemental RFA (or summaries thereof) to the Chief Counsel for Advocacy of the Small Business Administration.<sup>305</sup> A copy of this *Memorandum Opinion and Order* and supplemental RFA (or summaries thereof) will also be published in the Federal Register.<sup>306</sup>

93. Paperwork Reduction Act: This *Memorandum Opinion and Order* provides guidance regarding issues relating to cost recovery for interim number portability. The *Third Report and Order* concluded that carriers may recover the portion of their number portability joint costs that is demonstrably an incremental cost incurred in the provision of number portability.<sup>307</sup> The *Third Report and Order* also requires incumbent LECs that choose to recover their carrier-specific costs directly related to providing number portability to use federally-tariffed end-user charges.<sup>308</sup> The Commission also concluded that carriers may identify only those incremental overheads that they can demonstrate were incurred specifically in the provision of number portability.<sup>309</sup> In this *Memorandum Opinion and Order*, the Commission affirms its earlier decision that it has the authority to establish cost recovery guidelines for interim number portability. Second, the Commission rejects 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. The *Memorandum Opinion and Order* denies the request that these cost recovery guidelines be applied retroactively. The *Memorandum Opinion and Order* affirms the Commission's 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. The *Memorandum Opinion and Order* also confirms an earlier Commission decision that a cost recovery mechanism based on a carrier's gross revenues is an acceptable means of allocation costs among carriers. The *Memorandum Opinion and Order* states that no additional recordkeeping will be required for this option of recordkeeping, because such a gross revenue reporting is readily available through such things as tax filings, annual reports and SEC filings, which are developed for other purposes. The *Memorandum Opinion and Order* does not require carriers to adopt any one billing arrangement for sharing costs when they forward calls while utilizing interim number portability. The *Memorandum Opinion and Order* allows carriers to determine the best method of splitting these costs between them, but requires them adopt some method of sharing terminating access revenues. Additionally, the *Memorandum Opinion and Order* affirms the Commission's earlier determination that meet-point billing between neighboring incumbent LECs provides the appropriate model for the proper access billing arrangement for interim number

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<sup>304</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>305</sup> See 5 U.S.C. § 604(b).

<sup>306</sup> See 5 U.S.C. § 604(b).

<sup>307</sup> *Third Report and Order*, 13 FCC Rcd at 11,740, para. 73.

<sup>308</sup> *Id.* at 11,776.

<sup>309</sup> *Id.* at 11,740.

portability, but states that carriers are not required to modify their billing systems to track and record the details of every call. These information collection requirements are contingent upon approval of the Office of Management and Budget (OMB).

#### V. ORDERING CLAUSES

94. Accordingly, IT IS ORDERED that pursuant to authority contained in sections 1, 2, 4(i), 201-205, 215, 251(b)(2), 251(e)(2), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 201-205, 215, 251(b)(2), 251(e)(2), and 332, and Parts 1, 20 and 52 of the Commission's rules, 47 C.F.R. §§ 1.106, 20, and 52, the Petitions for Reconsideration and/or Clarification ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

95. IT IS FURTHER ORDERED that the Motion to Accept Late-filed Comments of Telecommunications Resellers Association and the Motion to Accept Late-Filed Reply Comments of U S WEST ARE GRANTED.

96. IT IS FURTHER ORDERED that the Commission's Office of Public Affairs Reference Operations Division SHALL SEND a copy of this *Memorandum Opinion and Order* including the supplemental Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

*Magalie Roman Salas*  
Magalie Roman Salas *WRC*  
Secretary

**APPENDIX A - LIST OF PARTIES****Petitions for Reconsideration/Clarification (filed 8/26/96):**

AirTouch Communications, Inc. [AirTouch]  
American Communications Services, Inc. [ACSI]  
American Mobile Telecommunications, Inc. [AMTA]  
Bell Atlantic  
Bell Atlantic NYNEX Mobile, Inc. [BANM]  
BellSouth Corporation and BellSouth Telecommunications, Inc. [BellSouth]  
Cellular Telecommunications Industry Association [CTIA]  
Cincinnati Bell Telephone Company [Cincinnati Bell]  
GTE Service Corporation [GTE]  
John Staurulakis, Inc. [JSI]  
KMC Telecom, Inc. [KMC]  
MCI Telecommunications Corporation and MCIMetro [MCI]  
National Exchange Carrier Association, Inc. [NECA]  
National Telephone Cooperative Association and Organization for the  
Promotion and Advancement of Small Telecommunications Companies  
[NTCA/OPASTCO]  
Nextel Communications, Inc. [Nextel]  
NEXTLINK Communications LLC [NEXTLINK]  
NYNEX Telephone Companies [NYNEX]  
Pacific Telesis Group, Pacific Bell, Nevada Bell, Pacific Bell Mobile Services [PacTel]  
SBC Communications Inc. [SBC]  
United States Telephone Association [USTA]  
U S WEST, Inc. [U S WEST]

**Petitions for Reconsideration/Clarification (late-filed 8/30/96):**

Small Business in Telecommunications, Inc. [SBT]

**Oppositions/Comments to Petitions for Reconsideration (filed 9/27/96):**

ALLTEL Telephone Services Corporation [ALLTEL]  
AT&T Corp. [AT&T]  
Association for Local Telecommunications Services [ALTS]  
Bell Atlantic  
BellSouth  
CTIA  
Cincinnati Bell  
GTE  
IntelCom Group (USA), Inc. [ICG]  
MCI  
NEXTLINK  
NYNEX

RAM Mobile Data USA Limited Partnership [RMD]  
Rural Telecommunications Group [RTG]  
PacTel  
Sprint Corporation [Sprint]  
Time Warner Communications Holdings, Inc. [Time Warner]  
USTA

**Oppositions/Comments to Petitions for Reconsideration (late-filed 9/30/96):**

Telecommunications Resellers Association [TRA]

**Replies (filed 10/7/96):**

Ameritech  
NEXTLINK  
Teleport Communications Group [TCG]  
Rural Cellular Association [RCA]  
NTCA/OPASTCO

**Replies (filed 10/10/96):**

ACSI  
Bell Atlantic  
BellSouth  
Cincinnati Bell  
GTE  
MCI  
NYNEX  
PacTel  
SBC  
USTA  
U S WEST

**SEPARATE STATEMENT OF  
COMMISSIONER HAROLD FURCHTGOTT-ROTH**

*Re: Telephone Number Portability (CC Docket No. 95-116)*

I support today's Order addressing various petitions for reconsideration and/or clarification of the Commission's interim number portability rules. I write separately to express my fervent support for the involvement of the State commissions in determining the method and timing of cost recovery for interim number portability. Given the States' expertise in factors that affect local competition, I find their participation in such matters tremendously valuable. As I have stated previously, I also would have supported this approach in the context of long term number portability where I believe the Commission missed a similar opportunity to benefit from the participation of the States.<sup>310</sup> I encourage the Commission to consult early and often with the States in all other regulatory matters.

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<sup>310</sup> See Separate Statement of Commissioner Harold Furchtgott-Roth, Telephone Number Portability, *Third Report and Order*, 13 FCC Rcd 11,701, CC Docket No. 95-116 (1998).