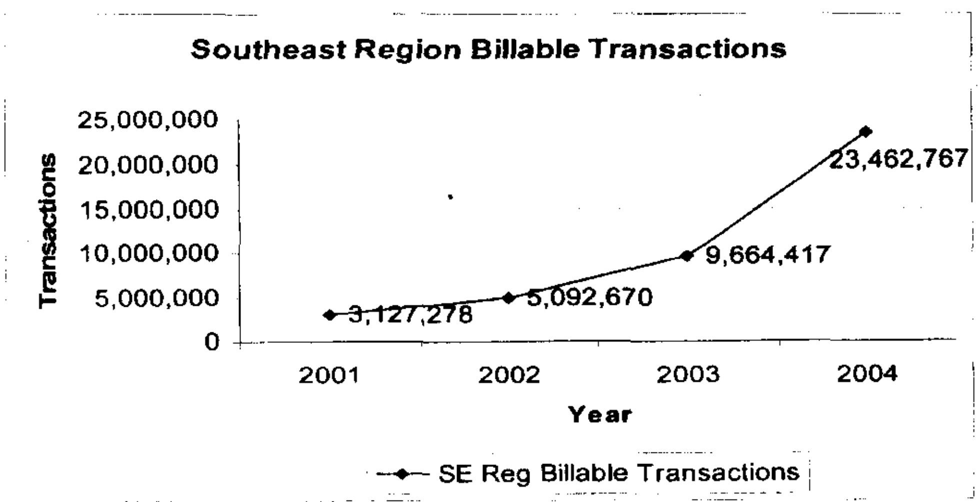
remained relatively constant over the past three years, BellSouth's payments to NeuStar to cover its allocated portion of the shared LNP and pooling costs have risen from $1.4 million in 2001 to $6.1 million in 2004 – a greater than four-fold increase. Thus, the Commission's finding that a provider's allocated shared costs will only increase as its revenues increase fails to account for the <u>total</u> costs imposed upon a provider.

As Chart A shows below, the number of billable transactions in the Southeast region tripled between 2001 and 2003, increasing from 3.1 million to 9.7 million. Moreover, in one year alone between 2003 and 2004, the number of billable transactions climbed nearly 150 percent from 9.7 million to 23.5 million.[67]

CHART A



This dramatic rise in the volume of billable transactions in the Southeast region is attributable primarily to increased porting and pooling activities, especially since the introduction of wireless LNP in 2003. Billable transactions caused by <u>wireless intramodal porting</u> are outpacing billable transactions generated from intermodal porting. According to data requested

[67] This data was compiled from BellSouth's monthly bills from NeuStar, which show the total billable transactions for the Southeast region.

from NeuStar, approximately 57% of the total billable transactions in the Southeast region involved only wireless carriers. In comparison, only 39% of the total billable transactions in the Southeast region were wireline intramodal transactions.

This trend of growing wireless transactions is consistent with the Commission's most recent report on telephone number utilization. According to the Commission, in the first year after wireless LNP commenced, "wireless customers [ ] moved more than 11 million telephone numbers to new carriers."[68] Compare this figure with the approximately seven million telephone numbers ported by wireline customers to new providers over this same one-year period (November 2003-December 2004).[69]

The increased porting and pooling activities in the Southeast region translate into higher total shared costs for the region, even though the rate charged for each billable transaction has declined each of the past three years. As illustrated in Chart B below, between 2001 and 2004, the total shared costs for the Southeast region increased more than five times from $4.8 million to $25.4 million. Also, in 2004 alone, total shared LNP and pooling costs for the Southeast region were approximately $25.4 million – nearly double the 2003 regional costs ($14.5 million).[70]

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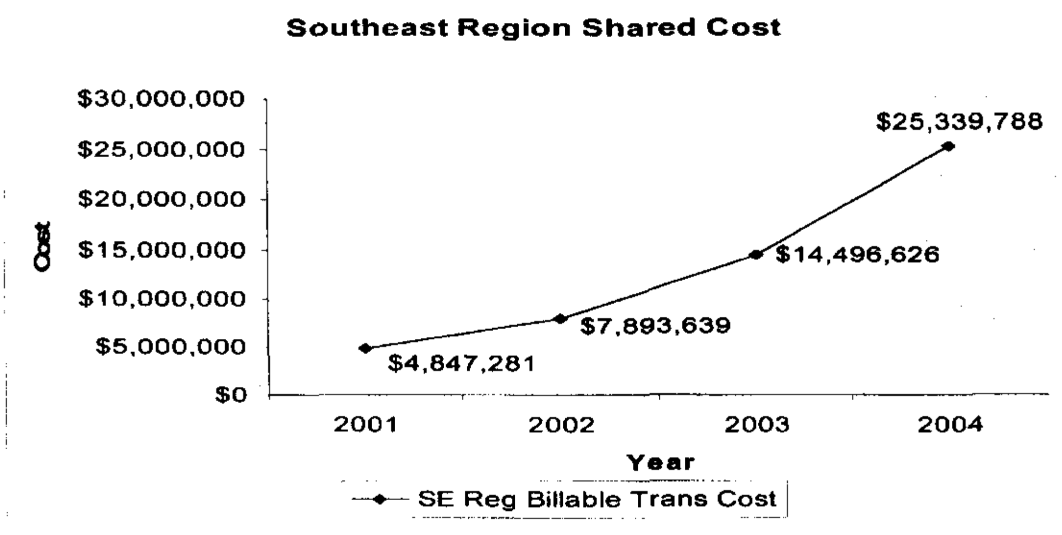
68 *Supra* note 37.

69 *Supra* note 37.

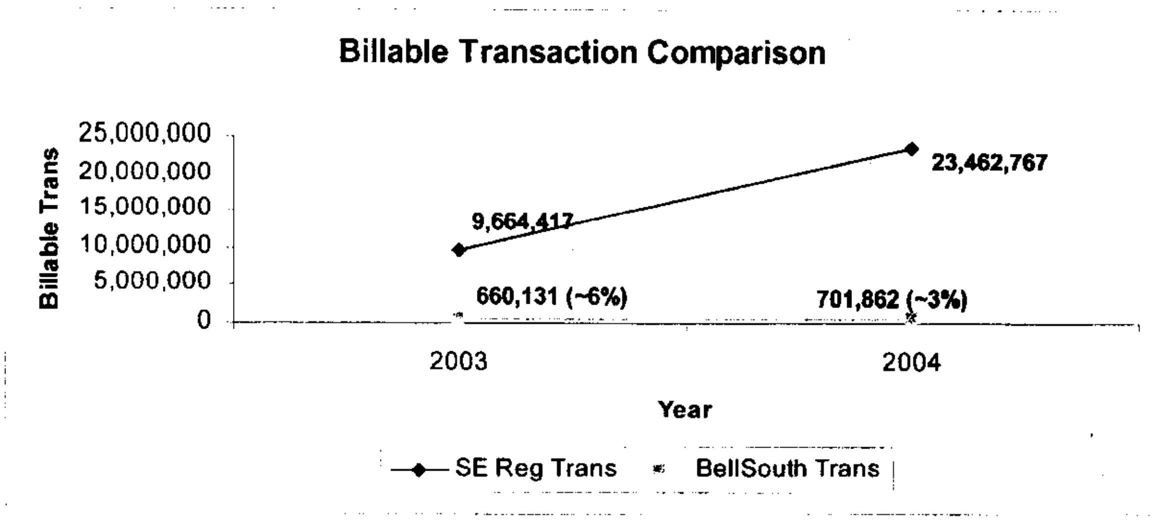
70 Chart A *supra* p. 20.

CHART B



Notwithstanding the significant rise in the total number of billable transactions (and therefore in the total shared costs) for the Southeast region over the last several years, the percentage of billable transactions generated by BellSouth have actually declined. In 2003, BellSouth was responsible for six percent of the total billable transactions for the Southeast region. This figure dropped to less than three percent in 2004. (*See* Chart C below.) Despite this decline in the percentage of billable transactions generated by BellSouth, the Company paid more than 20 percent of the shared LNP and pooling costs attributable to the Southeast region.

CHART C



An analysis of monthly data for 2005 (Chart D below) shows that the upward trend in the volume of billable transactions in the Southeast region is continuing. For the first nine months of 2005, the total number of billable transactions in the Southeast region is 23.9 million. This figure is not only more than double the region's 9.7 million billable transactions for the entire 2003 year but also has already exceeded the 23.5 million billable transactions generated for the entire 2004 year. During this same period (January-September 2005), BellSouth generated approximately two percent of the total number of billable transactions for the Southeast region. Nevertheless, it paid more than 20 percent of the total shared costs for its region.

CHART D

Month	SE Region Billable Transactions	BellSouth Billable Transactions	Percentage of BellSouth Billable Transactions
Jan-2005	2,220,016	21,727	0.98%
Feb-2005	2,258,973	40,313	1.78%
Mar-2005	2,903,119	157,368	5.42%
Apr-2005	2,245,699	36,533	1.63%
May-2005	3,499,222	29,492	0.84%
June-2005	2,228,669	37,308	1.67%
July 2005	3,012,840	57,833	1.92%
August-2005	2,425,750	54,505	2.25%
Sept-2005	3,081,875	54,909	1.78%
TOTAL	23,876,163	489,988	2.05%

Data that the Commission did not have when it adopted its LNP cost recovery rules almost eight years ago is now available.[71] While neither the Commission nor the industry could have predicted with accuracy how dramatically the communications marketplace would change and how much shared LNP and pooling costs would increase,[72] the time has come to re-evaluate the current distribution mechanism to account for these market realities. Indeed, the Commission must consider the effect that porting by wireless providers has had, and will

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[71] If necessary, the Commission can request data from NeuStar regarding actual shared LNP and pooling costs and the number of billable transactions generated on a regional basis.

[72] Even BellSouth underestimated the number of billable transactions that would be attributable to wireless LNP. In its cost study submitted to the Commission in 2004 for the recovery of costs incurred to implement wireless LNP, BellSouth estimated that the regional shared LNP costs allocated to it would be more than $7 million over a five-year period (2003 - 2008). This $7 million figure was derived based upon projected billable transactions over this same five-year period. Less than one year after BellSouth's end-user charge for wireless LNP ended (October 2004), BellSouth had already spent more than the $7 million dollars included in its cost study to cover its allocated share of the industry costs for the Southeast region. Consequently, the Commission need not be concerned with the possibility of any double recovery of costs should the Commission establish a new distribution mechanism as requested herein.

continue to have, on shared LNP database costs. In addition, the Commission also should examine the effects of porting and pooling by alternative service providers, including VoIP providers. The number of billable transactions will likely continue to increase as new providers begin to participate in porting and pooling, thereby leading to higher shared costs across the nation.[73] As such, it is critical that the Commission revisit its method of distributing the shared LNP and pooling costs among providers to ensure a "competitively neutral" distribution mechanism.

IV. THE COMMISSION HAS NOT ONLY THE LEGAL AUTHORITY BUT ALSO A LEGAL OBLIGATION TO ADOPT A NEW "COMPETITIVELY NEUTRAL" DISTRIBUTION METHOD FOR SHARED LNP AND POOLING COSTS.

The Commission has clear authority to replace the current method of allocating shared LNP and pooling costs based upon carrier revenue with a usage-based mechanism that meets the competitive neutrality mandate in Section 251(e)(2). As stated above, the Commission has interpreted "competitive neutrality" to mean that a cost distribution or recovery mechanism: "(1) must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) must not disparately affect the ability of competing service providers to earn a normal return."[74]

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73 BellSouth recently opposed a request for the Commission to allow NANC Change Order 400 to be included in the upcoming software release 3.3. (Number Portability Management Center ("NPAC") Release 3.3). One of the reasons BellSouth opposed inclusion of this Change Order in the upcoming release was the likelihood that it would lead to an increase in the volume of billable transactions, thereby increasing the costs to BellSouth, even though BellSouth's share of regional revenues and billable transactions would have remained relatively constant.

74 *Third Report and Order*, 13 FCC Rcd at 11731-32, ¶ 53; *see also Numbering Resource Optimization*, CC Docket No. 99-200, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd at 7664-65, ¶ 199.

The Commission's interpretation of competitive neutrality was an agency-created standard, not one established by Congress. As the Commission points out, Congress provided little guidance regarding the meaning of Section 251(e)(2) and the phrase "competitively neutral."[75] Given the "ambiguous scope of the [statutory] language,"[76] the Commission used its discretion to adopt its own interpretation of the term "competitively neutral" and concluded that a revenue-based allocation mechanism met this standard. Likewise, the Commission has full discretion to adopt a different cost distribution methodology that satisfies the statute based upon current market conditions.

"An agency is free to modify its interpretation of an ambiguous statutory provision when other reasonable interpretations may exist, provided that it acknowledges its change of course and provides a rational basis for its shift in policy."[77] Just last year, in a proceeding in which the Commission was re-examining its rules implementing one of the Section 272 separate affiliate requirements ("operate independently"), the Commission concluded that a re-evaluation was "particularly appropriate where, as here, [it had] gained more experience over time and new

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[75] *Third Report and Order*, 13 FCC Rcd at 11723, ¶ 35. The Commission points out that "[w]ith respect to number portability, the conference agreement states only that '[t]he costs for numbering administration and number portability shall be borne by all providers on a competitively neutral basis.'" *Id.* at 11723, n.131 (citing Senate Conference Report No. 104-230, at 122).

[76] *Id.* at 11725, ¶ 39.

[77] *Section 272(b)(1)'s "Operate Independently" Requirement for Section 272 Affiliates, et al.*, WC Docket No. 03-228, *et al.*, *Report and Order in WC Docket No. 03-228, Memorandum Opinion and Order in CC Docket Nos. 96-149, 98-141, 01-337*, 19 FCC Rcd 5102, 5108, ¶ 8 (2004) (citing 5 U.S.C. § 553; 47 U.S.C. § 201(b); *AT&T Corp v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1972)). (explaining that an agency may change its rules so long as it supplies a reasoned analysis that prior policies and standards are being deliberately changed).

ways of achieving regulatory goals ha[d been] developed."[78] The Commission further explained that its decision to reconsider its rules was based upon "eight years of experience in implementing the 1996 Act . . ., [its] additional experience with monitoring section 272 affiliates, and more generally, the growth of competition in all telecommunications markets."[79]

BellSouth submits that some of the same reasons articulated above are sufficient justification for the Commission to revisit its rules regarding the distribution of costs for LNP and pooling. As demonstrated above in Sections II. and III., eight years of successful LNP activity, increased participation in thousands-block number pooling, the maturation of the CLEC industry, increased competition in the local services market, escalating shared LNP and pooling costs, and asymmetric cost burdens weigh heavily in favor of re-examining the Commission's cost distribution rules.

Accordingly, the Commission should immediately initiate a rulemaking proceeding to consider a new method for distributing shared LNP and pooling costs. As demonstrated below, a usage-based mechanism that assesses a provider a portion of the shared LNP and pooling costs based upon that provider's use of the regional databases best meets the statutory mandate of competitive neutrality.

V. THE CURRENT METHOD OF DISTRIBUTING SHARED LNP AND POOLING COSTS BASED UPON A REVENUE ALLOCATOR IS NOT "COMPETITIVELY NEUTRAL" IN TODAY'S ENVIRONMENT AND SHOULD BE REPLACED WITH A USAGE-BASED MECHANISM.

BellSouth submits that the Commission's current method of allocating shared LNP and pooling costs based upon a carrier's end-user revenues is an outdated mechanism that no longer

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78 *Id.*

79 *Id.*

meets the statute's requirement of competitive neutrality as interpreted by the Commission. Accordingly, the Commission is obligated to modify the existing cost distribution methodology.

The current allocation mechanism is not "competitively neutral" because it results in asymmetric cost burdens. The Commission previously concluded "that number portability costs should not disproportionately burden one carrier over another."[80] The existing mechanism, however, fails this test. Escalating shared LNP and pooling costs are adversely affecting BellSouth's ability to compete effectively in the marketplace by significantly increasing its expenses. As demonstrated above, BellSouth, which generated approximately six percent and less than three percent of the billable transactions in 2003 and 2004, respectively, paid more than 20 percent of the shared LNP and pooling costs for both of those years.

The current system therefore requires BellSouth to pay an overwhelmingly large percentage of shared regional costs, even though it is responsible for only a small percentage of the billable transactions attributable to its region. Rising LNP and pooling expenses are negatively affecting BellSouth's ability to compete for subscribers and earn a normal return. This outcome places a disproportionate burden upon BellSouth by requiring it to absorb costs for which it receives no benefit. To eliminate this disparity and achieve competitive neutrality, the Commission should adopt a usage-based mechanism.

One of the grounds for adopting the current revenue-based allocation system was the Commission's belief that the second prong of its test (to ensure that LNP and pooling costs do not disparately affect a carrier's ability to earn a normal return) addressed the "concern that the overall costs of number portability [should] not handicap certain carriers."[81] BellSouth (and

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80 *Third Report and Order*, 13 FCC Rcd at 11733, ¶ 57.

81 *Id.* at 11732, ¶ 55.

other providers) that do not generate significant billable transactions, yet have a larger allocation percentage based upon their revenues, are significantly handicapped by escalating shared costs. BellSouth's increased LNP and pooling expenses are not accompanied by increased revenue from winning new subscribers or increased use of the regional database. BellSouth's revenues have remained flat over the last several years, and the billable transactions generated by it have been declining. Nevertheless, BellSouth's payments to cover its portion of the shared industry costs have risen significantly.

This market reality demonstrates that the Commission's assumptions regarding the relationship between a carrier's revenues and its allocated share of LNP and pooling costs have some significant gaps. For instance, the Commission's finding that a provider's allocated portion of the shared costs will vary directly in proportion with its end-user telecommunications revenues[82] fails to account for the total costs imposed upon a provider. Despite flat revenues and a declining percentage of billable transactions, BellSouth's payments to NeuStar to cover its allocated portion of the Southeast region's LNP and pooling costs quadrupled between 2001 and 2004, rising from $1.4 million to $6.1 million.

BellSouth submits that, under today's market conditions, a usage-based mechanism is the most "competitively neutral" method for distributing shared costs, even under the Commission's two-part test. First, a usage-based mechanism will not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber.[83] As explained in Section III. above, the Commission's underlying basis for declining to adopt a usage-based cost distribution mechanism at the outset of LNP was its

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[82] *Id.* at 11755-56, ¶ 107.

[83] *Id.* at 11731-32, ¶ 53.

concern that CLECs, as new entrants, would somehow be disadvantaged by having to incur more port charges because they would be winning customers away from ILECs.[84] However, by the Commission's own admission, there was no evidence in the record to show that a usage-based mechanism would harm competition or impede a CLEC's ability to compete for subscribers. Rather, the Commission's decision not to adopt a usage-based mechanism was out of an abundance of caution, given that LNP was in its infancy.[85] As the market realities of today demonstrate, the local service market is fully competitive and neither CLECs nor any other competitors need the protection provided by the Commission's allocation mechanism, particularly given the significant influx of wireless porting activity. Moreover, the incremental cost of porting a number and incurring a billable transaction fee is minimal and in no way constitutes a barrier to competition as the Commission originally thought.

Second, a usage-based mechanism will not disparately affect the ability of competing service providers to earn a normal return.[86] The current system of allocating shared costs based upon telecommunications revenues has adversely affected BellSouth's ability to earn a normal return by driving up its LNP and pooling expenses with no corresponding benefit. Tying a provider's LNP and pooling contributions to its share of regional revenues instead of its use of the regional databases creates asymmetric cost burdens on providers (such as BellSouth), which have a larger percentage of regional revenues but generate a smaller percentage of porting and pooling transactions. Under a usage-based system, the provider winning the customer would gain additional revenue and pay a minimal transaction fee for updating the regional database to

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84 *Id.* at 11745, ¶ 88.

85 *See* text *supra* pp. 16-18.

86 *Third Report and Order*, 13 FCC Rcd at 11731-32, ¶ 53.

facilitate a port or pool a telephone number. This type of "cost causer" mechanism is more appropriately aligned with a competitive marketplace and will not hinder a provider's ability to earn a normal return.

The following example shows the significant cost differences under the current allocation mechanism and the proposed usage-based system. Assume that BellSouth's allocated share of the LNP and pooling costs for the Southeast region is 20 percent, and that the rate of a billable transaction is $1.08. For the first three quarters of 2005, BellSouth would have been responsible for paying $5.2 million[87] of the total $25.8 million in shared industry costs for the Southeast region. Under the proposed usage-based mechanism, however, BellSouth would have paid $529,187[88] based on the number of billable transactions it generated during this nine-month period. As this example illustrates, BellSouth would be required to pay 10 times more under the current allocation mechanism than under a usage-based system, despite being responsible for generating only two percent of the billable transactions in the Southeast region. Such an outcome is inequitable on its face.

A usage-based mechanism will eliminate the inequities experienced under the existing system. The current revenue-based mechanism essentially requires BellSouth to pay millions of dollars to subsidize the porting and pooling costs of other providers. This approach places a disproportionate burden upon BellSouth by requiring it to absorb costs for which it is neither responsible nor receives any benefit.

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87 This figure was derived from the following formula: 23,876,163 total billable transactions for Southeast region X $1.08 X 20% = $5,157,251. *See* Chart D *supra* p. 24.

88 This figure was derived from the following formula: 489,988 BellSouth-generated billable transactions X $1.08 = $529,187. *See* Chart D *supra* p. 24.

In addition, this approach undermines the Commission's original rationale for departing from cost causation principles, "under which the purchaser of a service pays at least the incremental cost of providing that service."[89] According to the Commission, declining to apply the principles of cost causation was necessary "to ensure 'that the cost of number portability borne by each carrier does not affect significantly any carrier's ability compete with other carriers for customers in the marketplace.'"[90] In reality, however, the current system does not achieve this objective. Allocating shared costs based upon telecommunications revenues adversely affects the ability of carriers such as BellSouth to compete effectively by driving up their LNP and pooling expenses with no corresponding benefit. Despite minimal database use, BellSouth is required to subsidize the LNP and pooling costs of other providers. To eliminate this inequity, the Commission should adopt a usage-based mechanism.

In addition to satisfying the Commission's two-part test for competitive neutrality, a usage-based mechanism offers a number of other advantages. First, a usage-based mechanism will encourage efficient use of the regional databases. If a provider is financially responsible for the billable transactions it generates, that provider will be more inclined to use the system efficiently because it will bear the costs. A mechanism that spreads costs among the industry

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89 *Third Report and Order*, 13 FCC Rcd at 11726, ¶ 41. The Commission has previously recognized the value derived from developing regulatory solutions that are consistent with the principles of cost causation (*e.g.*, access charge reform). *See, e.g., Access Charge Reform,*; *Price Cap Performance Review for Local Exchange Carriers,*; *Low-Volume Long Distance Users*; *Federal-State Joint Board on Universal Service*; CC Docket Nos. 96-262, No. 94-1, 99-249 & 96-45, *Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45*, 15 FCC Rcd 12962, 12967, ¶ 12 (2000) ("costs of interstate access should be recovered in the same way that they are incurred"); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*; *Transport Rate Structure and Pricing; End User Common Line Charges*; CC Docket Nos. 96-262, 94-1, 91-213 & 95-72, *First Report and Order*, 12 FCC Rcd 15982, 15998, ¶¶ 35-36 (1997).

90 *Third Report and Order*, 13 FCC Rcd at 11727, ¶ 41 (citing 11 FCC Rcd at 8419-20).

leaves little incentive to minimize billable transactions, especially for providers with low revenue allocation percentages.

Second, a usage-based system is straightforward and easy to administer. A provider's contribution to the shared industry costs for its region would be based upon the number of billable transactions it generates within the source region. NeuStar, as the LNPA/PA, already collects the data on the number of billable transactions generated by each carrier on a regional basis. Any necessary changes to NeuStar's billing system would likely be minimal and could be accomplished through a statement of work request pursuant to the contracts with the NAPM LLC.[91] According to the Commission, "administrative simplicity is a valid objective"[92] for any cost distribution mechanism and should be a consideration.

Third, all shared costs incurred by the industry will continue to be recovered. There will not be any gaps or shortfalls. The costs will simply be distributed based upon an individual provider's use of the regional databases instead of allocated based upon a provider's end-user telecommunications revenues.

In sum, the Commission has a statutory obligation to ensure that all shared LNP and pooling costs are borne by providers in a "competitively neutral" manner. The current mechanism of distributing costs among providers based upon end-user revenue, though perhaps an appropriate mechanism at one point in time, no longer satisfies this mandate. Accordingly, the time has come for the Commission to consider a new mechanism. BellSouth believes that a usage-based system that assesses each provider based upon its use of the regional databases is

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91 The industry would be responsible for paying the expenses incurred to modify NeuStar's billing system under a statement of work request.

92 *Third Report and Order*, 13 FCC Rcd at 11733, ¶ 57.

the best way to ensure that providers bear the costs of LNP and pooling in a "competitively neutral" manner as required by law.

VI. CONCLUSION

For the foregoing reasons, the Commission should initiate a rulemaking proceeding to: (1) eliminate the current revenue-based method of allocating shared industry costs for LNP and pooling among service providers and (2) adopt a usage-based mechanism by which the shared industry costs incurred to operate and manage each regional database would be distributed among service providers based upon each provider's use of the particular database serving the provider's region. This approach satisfies the statutory mandate of competitive neutrality and is more aligned with the marketplace realities that exist today.

Respectfully submitted,

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November 3, 2005

CERTIFICATE OF SERVICE

I do certify that I have this 3rd day of November 2005 served a copy of the foregoing **PETITION FOR RULEMAKING** by hand delivery addressed to the parties listed below.

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