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April 11, 2006

Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S. W.
Washington, DC 20554

In the Matters of:
Petition of AT&T Inc. For Waiver to Treat Certain
Local Number Portability Costs as Exogenous Costs
Under 47 C.F.R. § 52.33(a)(1)
CC Docket No. 95-116

Petition of SBC Communications Inc. For
Forbearance Under 47 U.S.C. § 160(c) From the
Application of the Five-year Recovery Period for
Local Number Portability Costs Under 47 C.F.R. §
52.33(a)(1)
CC Docket No. 95-116

Petition of SBC Communications Inc. For
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Application of the Five-year Recovery Period for
Local Number Portability Costs Under 47 C.F.R. §
52.33(a)(1)
CC Docket No. 95-116

Dear Ms. Dortch:

Enclosed for filing please find Reply Comments of the National Association of
Consumer Advocates in the above-referenced matter.

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If you have any questions, please feel free to contact me.

Sincerely yours,

A handwritten signature in black ink that reads "Barrett C. Sheridan". The signature is written in a cursive style with a large, prominent initial "B".

Barrett C. Sheridan
Assistant Consumer Advocate

Enclosure

cc: Deena Shetler
Margaret Dailey
*81265

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

In the Matters of	:	
	:	
Petition of AT&T Inc.	:	
For Waiver to Treat Certain	:	CC Docket No. 95-116
Local Number Portability Costs as	:	
Exogenous Costs	:	
Under 47 C.F.R. § 52.33(a)(1)	:	
Petition of SBC Communications Inc.	:	
For Forbearance Under 47 U.S.C. § 160(c)	:	CC Docket No. 95-116
From the Application of the Five-year	:	
Recovery Period for Local Number	:	
Portability Costs Under	:	
47 C.F.R. § 52.33(a)(1)	:	
Petition of SBC Communications Inc.	:	
For Forbearance Under 47 U.S.C. § 160(c)	:	CC Docket No. 95-116
From the Application of the Five-year	:	
Recovery Period for Local Number	:	
Portability Costs Under	:	
47 C.F.R. § 52.33(a)(1)	:	

I hereby certify that I have this day served a true copy of the foregoing document, National Association of State Utility Consumer Advocates Reply Comments, upon parties of record in this proceeding.

Dated this 11th day of April, 2006.

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Respectfully submitted,

A handwritten signature in black ink that reads "Barrett C. Sheridan". The signature is written in a cursive style with a large, stylized initial 'B'.

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	:	

**REPLY COMMENTS OF THE
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Dated: April 11, 2006
88308.doc

I. INTRODUCTION

Pursuant to Section 1.415(c) of the Federal Communications Commission's ("FCC" or "Commission") Rules,¹ the National Association of State Utility Consumer Advocates ("NASUCA")² hereby submits these reply comments in this proceeding.

Before the FCC are three separate petitions requesting relief based on the same set of facts. On February 8, 2005, SBC Communications Inc. ("SBC") filed two alternative petitions seeking recovery of costs of implementing long-term number portability ("LNP") which SBC alleged Pacific Bell, Southwestern Bell Telephone Company ("SWTB") and Ameritech Operating Companies ("Ameritech") had under-recovered. One SBC petition requested a waiver of Section 52.33(a)(1) which fixed the period for recovery of costs of implementing long-term number portability at 5 years. ("Waiver Petition"). Alternatively, SBC petitioned for forbearance from adherence to the 5-year recovery period fixed by Section 52.33(a)(1). ("Forbearance Petition"). On March 31, 2006, AT&T Inc., successor to SBC, filed a petition requesting recovery of the same costs as exogenous events. ("Exogenous Cost Petition"; collectively "AT&T Petitions"). These Forbearance and Waiver Petitions have been opposed by the Michigan Public Service Commission ("Michigan PSC")³ and the California Public Utility Commission ("California PUC").⁴ The CPUC filed Comments in opposition to the Exogenous Cost Petition, both on the merits and citing a want of due process imposed by the short comment

¹ 47 C.F.R. § 1.415(c).

² NASUCA is a voluntary association of 45 advocate offices in 42 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio. Rev. Code Ch. 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers, but are not created by state law or do not have statewide authority.

³ Michigan PSC Comments dated March 24, 2005, in reply to both the Waiver and Forbearance Petitions.

⁴ California PUC Comments filed March 24, 2005 and Reply Comments filed April 11, 2005, in reply to both the Waiver and Forbearance Petitions.

period.⁵ NASUCA joins these Commenters in opposing AT&T's request for relief on any of the theories presented.

Not only are the interests of customers of Pacific Bell, SWTB, and Ameritech at issue, but Verizon has filed comments and communicated in *ex partes* to the FCC that Verizon also experienced an under-recovery.⁶ Verizon has requested in comments permission to recover LNP costs.⁷ AT&T requests recovery of some \$211 million, Verizon some \$100 million.⁸

The issues raised in the AT&T Petitions involve questions of policy and fairness to consumers nationwide. Regional Bell Operating Carriers ("RBOCS") had an incentive to open their local markets to competition as a precondition to eligibility to enter the long distance market under Section 271 of the Telecom Act. Number portability was a tool to facilitate competition.

AT&T's proposal that today's consumers should pay for alleged errors made by ILECs in projecting the level of access lines in 1999 at the start of the five-year surcharge period would be unfair and illegal. If the FCC's decision to allow ILECs the option of a five-year end user charge did not satisfy the "competitively neutral" statutory requirements of Section 251, the time to contest that decision is past. NASUCA submits that today's local exchange consumers should not be required to make the AT&T incumbent local exchange carriers ("ILECs"), or any other ILEC, whole for LNP costs under-recovered as a result of ILEC filings made long ago.

⁵ The California PUC Comments filed April 7, 2006 in response to the AT&T Exogenous Cost Petition. ("California PSC Exogenous Cost Comments").

⁶ Verizon Comments filed comments on March 24, 2005 in reply to the AT&T Waiver and Forbearance Petitions. ("Verizon March 2005 Comments"). In those Comments, Verizon requested leave to seek recovery of LNP costs incurred by Verizon ILECs. Verizon March 2005 Comments at 1. Verizon has engaged in *ex partes* as recently as March 31, 2006 with FCC Staff.

⁷ Verizon requested leave to seek recovery of LNP costs incurred by Verizon ILECs. *See* Verizon March 2005 Comments at 1. Verizon has engaged in *ex partes* as recently as March 31, 2006 with FCC Staff.

⁸ Verizon Jan. 25, 2006 Ex Parte presentation at 9.

NASUCA opposes AT&T's novel request for exogenous cost recovery of LNP costs. The short seven-day period allotted for comments and four-day period for reply comments⁹ falls woefully short of due process requirements, as succinctly stated by the California PUC.¹⁰ AT&T's Exogenous Cost Petition should be denied on the merits because the FCC has provided ILECs with an opportunity to recover those specific LNP costs through a levelized, five-year end-user charge.¹¹ This was the mechanism that the FCC determined would fulfill the requirements of Section 251(e)(2) which required costs to be borne by all telecommunications carriers on a competitively neutral basis.¹² Contrary to AT&T's position, the competitive neutrality principle does not justify its claim that consumers must make AT&T whole for under-recovered costs. The FCC explicitly determined that Section 251(e)(2) did not guarantee cost recovery.¹³

The FCC provided ILECs with a reasonable opportunity to recover their costs of implementing LNP. AT&T should not be allowed to "second guess" the reasonableness of the rates charged by the three AT&T ILECs based on allegations of inaccuracies in access line projections employed to set the five-year end user charge.

Waiver of the five-year period, either through forbearance or a grant of waiver, should be rejected. The FCC has extended the time for decision on the AT&T Forbearance Petition. The FCC should affirmatively reject the AT&T Forbearance Petition for the general reasons set forth

⁹ Comments were due Friday, April 7, 2006. However, only the comments of consumer Wayne Cassell were posted on April 7, 2006. The Comments of the CPUC and Verizon were not posted until the open of business on Monday, April 10 – 1 day before the Reply Comment deadline.

¹⁰ California PUC Exogenous Cost Comments at 1-7. The California PUC raises due process concerns based on the short comment period and the absence of supporting information and data in the AT&T Exogenous Petition.

¹¹ See 47 C.F.R. § 52.33.

¹² In the Matter of Telephone Number Portability, Third Report and Order, CC Docket No. 95-116., ¶¶ 4, 59 (rel. May 12, 1998)(“*Cost Recovery Order*”).

¹³ *Id.*, ¶ 59.

by the Michigan PSC,¹⁴ the California PUC,¹⁵ and in these Reply Comments. AT&T has not met the standard for forbearance. Nor is Waiver available where the AT&T ILECs seek to avoid the consequences of business decisions made in 1999, when ILECs were offered the opportunity to recover from end-users the costs of LNP implementation. The FCC determined that its “rules will satisfy section 251(e)(2) so long as that carrier’s ability to compete for subscribers is not significantly affected.”¹⁶ With regard to the end-user charge, the FCC has explained that any ILEC seeking to change the charge would have to “show that the end-user charge was not reasonable based on the information available at the time it was initially set.”¹⁷ Waiver of the five-year period for recovery would be inconsistent with the policy decisions and standards fixed by the FCC in the *Cost Recovery Order*.

II. LNP COSTS ARE NOT ELIGIBLE FOR EXOGENOUS COST RECOVERY

NASUCA joins the California PUC in opposing grant of the AT&T Exogenous Cost Petition. The costs at issue are not eligible for recovery through an adjustment to price cap rates for exogenous costs. The FCC established a recovery mechanism that “allows incumbent LECS a reasonable opportunity to receive just compensation for their carrier specific costs directly related to long-term number portability through monthly number-portability charges and intercarrier charges for query services.” The FCC established through Section 52.33 “Recovery of carrier-specific costs directly related to providing long-term number portability” a mechanism for recovery of costs incurred by the AT&T ILECs.¹⁸ The FCC also made clear that its LNP

¹⁴ Michigan PSC Comments filed March 24, 2005.

¹⁵ The California PUC comments filed March 24, 2005, April 11, 2005, and April 7, 2006 have stated that the California Public Utility Commission “cannot support” the various AT&T Petitions, based in part on an absence of verifiable supporting data.

¹⁶ *Id.*

¹⁷ *Id.*, ¶ 144.

¹⁸ 47 C.F.R. § 52.33.

regulations did not guarantee cost recovery by either ILECs or competitive carriers.¹⁹ AT&T's Exogenous Cost Petition seeks a level of recovery in excess of what the FCC led other carriers to expect.

NASUCA acknowledges that the FCC's price cap regulations do allow for adjustments for exogenous cost changes ... "limited to those cost changes that the Commission shall permit or require by rule, rule waiver, or declaratory ruling."²⁰ AT&T claims that its LNP costs fit in the category of "(vi) Such tax law changes and other extraordinary cost changes as the Commission shall permit or require be treated as exogenous by rule, rule waiver, or declaratory ruling...."²¹ Although AT&T's petition is framed as requesting "waiver of Section 61.45(d)," NASUCA reads the whole AT&T Petition as requesting an affirmative FCC order which would allow for recovery of these LNP costs through the end user line charge ("EUCL"). The FCC should deny AT&T's Petition because the costs do not qualify for price cap recovery as exogenous costs.

In the Exogenous Cost Petition, AT&T acknowledges that the FCC provided carriers with a method to recover LNP costs distinct from treating LNP costs as a price cap service, *i.e.* recovery through "a new end user charge for the recovery of LNP implementation costs."²² Nonetheless, AT&T alleges that such LNP costs enjoy a dual identity as exogenous costs because "[t]he Commission ... never repudiated its tentative conclusion [in the First LNP Report] that such costs are exogenous costs."²³ This slender reed of a theory does not support grant of AT&T's Petition. The question of exogenous event treatment of LNP implementation

¹⁹ *Cost Recovery Order*, ¶ 59.

²⁰ 47 C.F.R. § 61.45(d) Adjustments to the PCI for Local Exchange Carriers.

²¹ AT&T Exogenous Cost Petition at 10.

²² AT&T Exogenous Event Petition at 12.

²³ *Id.*, referring to *First Report and Order*, ¶ 230.

costs was reviewed in the *Cost Recovery Order*.²⁴ The FCC opted instead to “allow but not require incumbent LECs subject to rate-of-return or price-cap regulation to recover their carrier-specific costs directly related to providing number portability through a federal charge assessed to end-users.”²⁵ That LNP implementation costs should be recovered separate and apart from price cap rates was not an omission but rather the core decision of the FCC’s *Cost Recovery Order*.²⁶

AT&T’s discussion of LNP costs as costs beyond its control does not justify exogenous cost recovery. AT&T should not be permitted to first achieve rate recovery through an end-user charge allowed by Section 52.33 specifically for recovery of LNP costs, and second, recovery of the same category of costs as exogenous costs. The costs of implementing long-term number portability were imposed by statute, but Section 251(e)(2) also required the FCC to act to assure that such costs were borne by telecommunications carriers on a competitively neutral basis. The FCC discharged its obligation under Section 251(e)(2) and expressly provided ILECs with an opportunity to recover their carrier-specific number portability costs through the levelized end-user charge.

AT&T states that it meets the second part of a test for exogenous cost recovery because the costs not recovered through the five-year end-user charge for LNP are not recognized in the price cap formula.²⁷ As explained above, the FCC did not intend for LNP implementation costs to be recovered through price cap rates as an exogenous cost.

Even if the FCC considers AT&T’s petition on the merits, AT&T’s bare claims that “growth in wireless and broadband services, a corresponding decrease in second lines, an

²⁴ *Cost Recovery Order*, ¶¶ 133, 134. AT&T opposed exogenous treatment if it would increase access charges paid by IXC’s.

²⁵ *Cost Recovery Order*, ¶ 135.

²⁶ *Cost Recovery Order*, ¶ 135.

²⁷ AT&T Exogenous Cost Petition at 11-13.

increase in competition generally, the bursting of the high-tech bubble, and a downturn in the overall economy”²⁸ clearly involve complex economic questions. AT&T has offered no verification or support in its claims other than to chart changes in access line growth.²⁹ The question of whether or not the changes wrought by the Telecom Act, in general, and number portability, specifically, affected GDP-PI cannot be resolved based on AT&T’s pleading. NASUCA submits that the FCC should not resolve the complicated questions of cost recovery and fairness to consumers in AT&T’s favor based on such a thin record. AT&T has not met its burden of persuading that such costs qualify for exogenous cost treatment and so its petition must be denied.

In summary, the LNP costs identified by AT&T are not eligible for recovery as exogenous costs. The FCC established a separate and specific cost recovery mechanism for ILECs to collect these costs from end-users. Although the costs were incurred to implement number portability as required by federal statute, the FCC did not guarantee ILECs subject to price cap regulation or competitive LECs dollar-for-dollar cost recovery. The FCC should deny AT&T’s request for a rule, order, or declaratory order which would allow AT&T a second method to recover costs of LNP implementation.

III. THE AT&T PETITIONS FOR WAIVER OR FORBEARANCE FROM THE FIVE-YEAR PERIOD FOR RECOVERY FIXED BY SECTION 52.33 SHOULD BE DENIED

NASUCA opposes grant of the still pending Waiver Petition or Forbearance Petition, as filed by SBC, now AT&T, in February 2005. The FCC extended the time for consideration of the Forbearance Petition by 90 days, by letter issued January 20, 2006. Grant of AT&T’s request

²⁸ AT&T Exogenous Cost Petition at 3.

²⁹ NASUCA notes that the earlier filed AT&T Waiver and Forbearance Petitions included a declaration filed by Mr. John C. Connelly. Mr. Connelly’s declaration was presented in support of the calculation of the AT&T ILECs’ alleged under-recovery of LNP costs.

for relief on either ground would be unfair to consumers and contrary to the public interest. The FCC *Cost Recovery Order* established a “recovery mechanism [which] allows incumbent LECs a reasonable opportunity to receive just compensation for their carrier-specific costs directly related to long-term number portability through monthly number-portability charges....”³⁰ In the *Cost Recovery Order*, the FCC explained that once the end-user charge was fixed by tariff, the carrier could not raise it “unless it can show that the end-user charge was not reasonable based on the information available at the time it was initially set.”³¹ NASUCA agrees with the earlier filed comments filed by the Michigan PSC that neither the AT&T Petition for Waiver nor the Forbearance Petition has met this standard.³²

The *BellSouth* ruling also does not support AT&T’s request for forbearance from or waiver of the five-year period for the LNP end-user charge. At issue in the BellSouth Petition were the costs of implementing intermodal or wireline to wireless number portability. The FCC allowed BellSouth and other carriers to adjust or extend the levelized end-user charge because this category of costs was not known or too speculative to include when the initial charge was set.

In contrast, the information which AT&T claims “was not available” was that access line growth would differ from the individual projections made by the three AT&T ILECs. NASUCA submits that what would have been more surprising is if the projections had been completely accurate.³³ While AT&T speculates that FCC Staff would have rejected ILEC filings which

³⁰ *Cost Recovery Order*, ¶ 149.

³¹ *Id.*, ¶ 144.

³² Michigan PSC Comments at 3. See also the California PUC Comments generally. In the March 24, 2005 Comments, the California PUC stated that it could not verify whether or not SBC’s original estimates of costs and recovery plan were reasonable under this standard. The California PUC still had reservations in April 2005 after SBC answered data replies.

³³ AT&T suggests that the ILECs were compelled by a history of access line increases to project on-going increases or risk rejection of the tariff filings by FCC Staff. This is mere speculation on AT&T’s part.

projected declines in access lines, Verizon has stated in *ex parte* filings that its LNP end-user charge was calculated based on expected declines in access lines.

The FCC's decision to offer ILECs the opportunity to recover LNP costs through a levelized end-user charge over five years was an administrative decision which should not now be challenged. Commenters SBC and others suggested during the number portability rulemaking that the FCC adopt an end-user charge which would be recalculated annually.³⁴ Instead, the FCC chose to offer ILECs the opportunity to file a levelized five-year end user charge. NASUCA submits that such a mechanism held some inherent risk of deviation as to both the speed and completeness of recovery. It is improper for AT&T to now request an extension of the five-year recovery period (which has already expired) based either on a theory of waiver or forbearance so that AT&T may recover costs for which there was no guarantee of recovery. AT&T was limited by the FCC's *Cost Recovery Order* to constructing a levelized charge for recovery of LNP costs based upon the reasonable assumptions made at the time. AT&T cannot now be permitted to attempt to reconcile such a prospective rate mechanism with actual experience.

³⁴ *Cost Recovery Order*, ¶ 128.

IV. CONCLUSION

NASUCA respectfully submits that the FCC should deny each of the pending AT&T Petitions as contrary to the purposes of Section 251, the FCC's *Cost Recovery Order* and regulations, and because they are unsupported and unfair to consumers.

Respectfully submitted,



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