BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into temporary local telephone number portability solution to implement competition in local exchange telephone markets.	DOCKET NO. 950737-TP ORDER NO. PSC-97-0476-FOF-TP ISSUED: April 24, 1997

The following Commissioners participated in the disposition of this matter:

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FINAL ORDER
ON COST RECOVERY MECHANISM FOR
PROVIDING INTERIM NUMBER PORTABILITY SOLUTIONS
AND ORDER GRANTING MOTION FOR EXTENSION OF TIME

BY THE COMMISSION:

I. BACKGROUND

We established this docket to investigate the appropriate temporary local number portability solution to comply with the revised Section 364.16(4), Florida Statutes, which required that temporary number portability be in place by January 1, 1996. Section 364.16(4), Florida Statutes, states:

> Each local exchange provider, except small local exchange telecommunications companies under rate of return regulation, shall provide

> a temporary means of achieving telephone number portability.

This section also states:

> If the parties are unable to successfully negotiate the prices, terms, and conditions of a temporary number portability solution, the commission shall establish a temporary number portability solution by no later than January 1, 1996.

Further, this section states:

> In the event the parties are unable to satisfactorily negotiate the prices, terms, and conditions, either party may petition the commission and the commission shall, after opportunity for a hearing, set the rates, terms, and conditions. The prices and rates shall not be below cost.

By Order No. PSC-95-1214-AS-TP, issued October 3, 1995, we approved the parties' agreement and stipulation for remote call forwarding (RCF) as the solution to provide temporary number portability. In addition, the parties agreed to continue to negotiate on other mechanisms, such as flexible direct inward dialing (DID), if so desired.

The parties, however, were unable to negotiate a rate or cost recovery mechanism. By Order No. PSC-95-1604-FOF-TP, issued on December 28, 1995, we established the rate and the cost recovery mechanism for RCF as the temporary number portability solution. This order established the rate to be charged for RCF at $1.00 per line per month for one path. Additional paths were set at $.50 per month per path. A non-recurring charge of $10.00 was also included.

Subsequently, on February 8, 1996 Congress enacted the Telecommunications Act of 1996 (the Act), 47 U.S.C. §251 *et seq.* The Act established various criteria for implementation of local competition. One of those criteria is number portability. Unlike Chapter 364, Florida Statutes, Section 3(30) of the Act specifically defines number portability as:

> ...the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without

> impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.

Section 251(b)(1) of the Act requires all local exchange carriers (LECs) to provide to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission (the FCC). This requirement is inconsistent with Section 364.16(4), Florida Statutes, which only requires LECs who have opted for price regulation to provide number portability.

The Act also provides guidance on cost recovery. Section 251(e)(2) states:

> The costs 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 FCC).

On July 2, 1996, the FCC issued its First Report and Order in the Matter of Telephone Number Portability in CC Docket No. 95-116 (FCC Order No. 96-286). The order provided the FCC interpretation of the Act and established its requirements for the provision of number portability.

The FCC's Order requires all LECs to provide interim number portability through Remote Call Forwarding (RCF), Direct Inward Dialing (DID), and other comparable methods because they are the only solutions that currently are technically feasible. See FCC Order No. 96-286, ¶ 6 and 110. We note that although commercial mobile radio service (CMRS) carriers do not have to provide interim number portability, CMRS carriers can request interim number portability from a local exchange carrier. See FCC Order No. 96-286, ¶ 152.

The FCC's Order also discusses cost recovery for temporary number portability. The FCC identifies three areas to be addressed in order to establish standards for number portability cost recovery. First, the meaning of "number portability costs" must be determined. Second, the phrase "all telecommunications carriers" must be interpreted. Third, the phrase "competitively neutral" must be defined. See FCC Order No. 96-286, ¶ 128.

In determining the meaning of number portability costs, the FCC states that the costs of currently available number portability are the incremental costs incurred by a LEC to transfer numbers

initially and subsequently forward calls to new service providers. See FCC Order No. 96-286, ¶ 129.

The FCC interprets the Act literally in its attempt to define the phrase "all telecommunications carriers." The FCC states that the phrase would include any provider of telecommunications service. Section 3 of the Act defines "telecommunications service" as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used. The FCC also indicates in its order that the states may require all telecommunications carriers, including incumbent LECs, new LECs, CMRS carriers, and interexchange carriers (IXCs), to share the costs incurred in the provision of currently available number portability solutions. The FCC's Order further provides that state commissions may apportion the incremental costs of currently available measures among relevant carriers by using competitively neutral allocators, such as gross telecommunications revenues, number of lines, or number of active telephone numbers. See FCC Order No. 96-286, ¶ 130.

In its determination of the meaning of the phrase "competitively neutral", the FCC establishes two criteria for cost recovery mechanisms. First, the incremental payment made by a new entrant for winning a customer that ports his number cannot put the new entrant at an appreciable cost disadvantage relative to any other carrier that could serve that customer. See FCC Order No. 96-286, ¶ 132. Second, a cost recovery mechanism should not have a disparate effect on the ability of competing service providers to earn normal returns on their investment. See FCC Order No. 96-286, ¶ 135.

The FCC's Order identified various cost recovery mechanisms that comply with the competitively neutral criteria discussed above. These options will be addressed in greater detail within the body of this Order. Notably, the FCC's Order specifically states that imposing the full incremental cost of number portability solely on new entrants would contravene the statutory mandate that all carriers share the cost of number portability. See FCC Order No. 96-286, ¶ 140.

We initiated this proceeding to review the impact of the FCC's Order on the cost recovery mechanism set forth in Order No. PSC-95-1604-FOF-TP. On November 25, 1996, we conducted an evidentiary hearing on this issue.

In recent arbitration proceedings conducted pursuant to the Act, we have addressed various interim number portability

solutions. (See Order Nos. PSC-96-1579-FOF-TP and PSC-97-0064-FOF-TP in Docket Nos. 960833-TP/960846-TP and 960847-TP/960980-TP.) In those orders, we required the incumbent local exchange carriers (ILECs) to offer multiple interim number portability solutions to the alternative local exchange carriers (ALECs) participating in those proceedings. We determined in those orders that it was inappropriate to establish a cost recovery mechanism that did not involve all telecommunications carriers, and we required the ILECs to track their costs for providing interim solutions addressed until completion of this generic review of interim number portability cost recovery. We determined in the previous arbitration orders that the cost recovery mechanism established in this Order shall be applied to the arbitrated interim number portability solutions.

Having considered the evidence presented, the briefs of the parties, and recommendations of our staff, we set forth our decision below.

II. ORDER NO. PSC-95-1604-FOF-TP AND THE FCC'S FIRST REPORT AND ORDER IN CC DOCKET NO. 95-116

In our determination of the proper cost recovery mechanism for interim number portability solutions, the first issue that we must address is the inconsistency between Order No. PSC-95-1604-FOF-TP and the FCC's First Report and Order in CC Docket No. 95-116. All parties, except GTE Florida (GTEFL), agree that our Order is inconsistent with the FCC's Order. Aside from GTEFL and BellSouth Telecommunications, Inc. (BST), all parties agree that the orders are inconsistent due to the fact that the cost recovery mechanism that we ordered does not require that the cost be borne across all carriers in a competitively neutral manner consistent with Paragraph 126 of the FCC's Order as required by Section 251(e)(2) of the Act. Our reciprocal compensation recovery mechanism would force the new entrant to bear all the costs, which is inconsistent with the FCC's requirement at Paragraph 138 of its Order. Further, a majority of the parties believe that the cost recovery mechanism that we adopted would allow ILECs to charge new entrants a rate equal to or greater than the ILECs' incremental cost of providing the portability service.

Several parties argue that the FCC's competitive neutrality requirement in Paragraphs 126 and 131 of the FCC's Order effectively rejects the notion that the cost-causer should pay for the entire cost of interim number portability (INP), because INP is a network function rather than a service. MCI witness Kistner argues it is competition that is the true cost-causer. In its

brief, Time Warner argues further that "INP is required to bridge the gap between incipient competition and the transfer of number administration and ownership to a neutral third party." Time Warner also notes that the costs to the ILECs are de minimis on a cost of service basis.

Although BST in its brief agrees that the two orders are inconsistent, BST agrees with GTEFL that the FCC has misinterpreted the Act by requiring the cost of interim number portability to be borne by or spread across all telecommunications carriers. BST witness Varner argues that the ILEC will be forced to bear most of the incremental cost of interim number portability. Further, witness Varner argues that the INP cost recovery provisions from the FCC's Order will not allow the ILEC to recover its costs and earn a normal return, a violation of the FCC's own requirements for competitive neutrality.

As a result, BST argues in its brief that the FCC's cost recovery provisions for interim number portability are confiscatory and unlawful under the Takings Clauses of the United States and Florida Constitutions by authorizing INP rates below BST's cost, "close to zero". BST contends that its position is further supported by Section 364.16(4), Florida Statutes, which requires that "the prices and rates shall not be below cost" for interim and permanent number portability.

Finally, BST argues in its brief that the FCC lacks authority under the Act to preempt the states through its INP guidelines. BST believes that the Act directs the FCC to set requirements for permanent number portability and not for temporary portability. On the other hand, BST does believe that the FCC Order clearly directs the states to follow the FCC's INP cost recovery guidelines. BST witness Varner states that since there has been no stay of the FCC's Order, the FCC's Order is currently in effect.

In their briefs, both BST and GTEFL interpret the Act to only grant the FCC authority to issue rules implementing permanent number portability. In contrast, Time Warner argues in its brief that this lack of specification indicates that Congress intended the FCC's requirements for a cost recovery mechanism to apply to both interim and permanent number portability solutions. Time Warner also adds that the provision of number portability with a technologically deficient interim solution should not change the appropriate cost recovery mechanism.

In contrast to BST, GTEFL does not believe that the guidelines for INP cost recovery mechanisms in the FCC's Order are intended to preempt Florida's established state tariffs or orders regarding

INP. GTEFL supports its interpretation of the FCC's Order in its brief with the following:

> States are also free, if they so choose, to require that tariffs for the provision of currently available number portability measures be filed by the carriers. FCC Order No. 96-286, ¶ 127.

GTEFL believes that, to the extent a state commission has already required tariffs, the state commission has complied with the FCC's Order. GTEFL also notes that nothing in the FCC's Order expressly preempts the states with regards to INP. GTEFL witness Menard, however, did agree that portions of this Commission's Order are inconsistent with the FCC's Order. GTEFL, nevertheless, contends that this Commission's Order should be maintained largely because it meets the economic feasibility test of the FCC Order's competitive neutrality requirement.

GTEFL also argues in its brief that the FCC's proposed action constitutes a taking under the Florida and United States Constitutions and violates Section 364.16(4), Florida Statutes, which requires that an ILEC be allowed to recover its costs for INP. GTEFL states that the FCC's Order authorizes an unlawful taking and is internally inconsistent. GTEFL maintains that we should follow the clear directive of the state statute that rates for interim portability not be below costs. As a result, GTEFL argues that we should maintain our Order No. PSC-95-1604-FOF-TP, which follows the state statutory mandate and provides a fair return to the ILEC for interim number portability services.

Finally, GTEFL argues in its brief that we must read the Act and the FCC Order in such a way as to avoid constitutional infirmity. GTEFL believes that the Act and the FCC's Order can be read to authorize our Order No. PSC-95-1604-FOF-TP. By affirming our Order as consistent with the FCC Order, GTEFL believes that we would avoid any constitutional problems arising from other cost recovery mechanisms suggested by other parties and the FCC. GTEFL contends that our Order satisfies all federal and state legal authorities and should be left in place.

Upon consideration, it appears that the Act preempts the states regarding the provision of and cost recovery for interim and permanent number portability. Sections 251(b)(2) and 251(e)(2) of the Act grant the FCC express authority to implement number portability to the extent technically feasible with costs borne by all carriers in a manner that is competitively neutral. The FCC's interpretation of "technically feasible" encompasses those methods

currently available, interim number portability, and those methods available in the long term, permanent number portability. The Act simply states that the FCC shall determine requirements for "number portability", including its provision and cost recovery mechanism. Thus we believe that the plain meaning of the words in the Act demonstrates that Congress intended for the FCC alone to establish the requirements for number portability, both temporary and permanent.

Preemption is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Fidelity Federal Savings and Loan Association v. de la Cuesta, 458 U.S. 141, 152-153 (1982) Preemption occurs implicitly when Congress manifests its intent to occupy an entire field of regulation, or through conflict between state and federal law, when it is either impossible to comply with both, or when state law stands as an obstacle to the accomplishment of the full congressional objectives. Louisiana Public Service Commission v. FCC, 476 U.S. 355, 368-369 (1986)

Section 364.16(4), Florida Statutes, requires that the rates and prices for number portability not be below cost to the service provider. Order No. PSC-95-1604-FOF-TP, implementing state law, requires that companies pay a uniform monthly charge for each ported number. The FCC's Order in Paragraphs 133, 134, and 138, however, expressly rejects this type of reciprocal compensation mechanism. The FCC's Order in Paragraph 136 permits an INP cost recovery mechanism that requires carriers to pay for their own costs. Since the ILECs will incur the majority of the costs of providing INP, such a mechanism would effectively make the rates or prices below costs from an ILEC's perspective. Thus, the FCC Order conflicts with both Order No. PSC-95-1604-FOF-TP and Section 364.16, Florida Statutes. Because Congress' intent is clear that the FCC should establish the requirements for number portability, and because Section 364.16, Florida Statutes, and our Order No. 95-1604-FOF-TP conflict with the FCC's Order establishing those requirements, we believe that the Act and thereby the FCC's Order preempt Section 364.16(4), Florida Statutes, and Order No. PSC-95-1604-FOF-TP.

As it does here, preemption of a state law requirement can occur through the promulgation of federal regulations authorized by an act of Congress. See Fidelity Federal Savings, 458 U.S. at 153; Time Warner Cable v. Doyle, 66 F.3d 867, 875 (7th Cir. 1995) The statutorily authorized regulation of a federal agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof. See Time Warner, 66 F.3d at 875-876; City of New York v. FCC, 486 U.S. 57, 64 (1988). We find that

the federal regulations here, the FCC's Order authorized by the Act, preempt Section 364.16, Florida Statutes, and our Order.

Given our determination that the Act and the FCC Order preempt Florida laws and regulations with regard to INP, the remaining issue is whether we can adopt a new cost recovery mechanism for INP. We find that we can and should. First, we have the authority and the mandate to establish a temporary number portability solution under Section 364.16(4), Florida Statutes. Second, although we find preemption has occurred, the FCC's number portability order does not completely occupy the field with regard to temporary number portability. Further, Paragraph 127 of the FCC's Order specifies guidelines or criteria for adopting an INP cost recovery mechanism. We therefore have the discretion and also the responsibility to establish what that cost recovery mechanism will be. Accordingly, we may adopt any cost recovery mechanism, as long as it is consistent with the INP guidelines provided by the FCC's Order.

Although we agree that portions of our Order are consistent with the FCC's Order, we do not believe that our Order complies with the competitive neutrality requirement of Paragraph 126 in the FCC's Order, mandating that the cost of interim number portability be borne by all carriers. This conclusion is based on the fact that our Order would require new entrants to bear the entire cost of INP. Paragraphs 133, 134, and 138 of the FCC Order expressly reject this type of cost recovery mechanism.

GTEFL, however, believes the FCC's Order and our Order can and should be read to be consistent. GTEFL supports its position to maintain the FPSC's Order and current tariff rates by utilizing parts of the FCC's Order out of context. For example, GTEFL cites Paragraph 137 of the FCC Order to support the reciprocal compensation cost recovery mechanism required by the FPSC's Order. Paragraph 137, however, has a limited application in the FCC's Order to the preceding paragraphs which describe pooling mechanisms. These mechanisms are entirely different from the cost recovery mechanism established in Order No. PSC-95-1604-FOF-TP.

Based on the foregoing, we find that Order No. PSC-95-1604-FOF-TP is inconsistent with the FCC's First Report and Order and Further Notice of Proposed Rulemaking in the Matter of Telephone Number Portability, CC Docket No. 95-116.

III. APPROPRIATE COST RECOVERY MECHANISM FOR TEMPORARY NUMBER PORTABILITY

Before we discuss our determination of the appropriate cost recovery mechanism in this proceeding, we will identify what interim number portability solutions that will be addressed in this Order. We note that we have required local exchange carriers to provide various INP solutions through Order No. PSC-95-1214-FOF-TP, Order No. PSC-96-1579-FOF-TP, and Order No. PSC-97-0064-FOF-TP. As noted before, we approved RCF as a temporary solution in an earlier proceeding in this docket. We also have approved other temporary solutions in various arbitration proceedings. Those solutions are direct inward dialing, route index portability hub, direct number route index, and local exchange routing guide (LERG) reassignment to the NXX level.

There are three different methods by which interim number portability options can be established for telecommunications carriers: negotiated solutions and rates pursuant to Section 252(a)(1), solutions and rates set by us prior to the issuance of the Act or FCC Order, and solutions and rates set in an arbitration proceeding.

In their briefs, BMI and ICI state without any evidentiary support that we should uphold existing negotiated agreements regarding cost recovery for INP solutions. The Act, however, provides clear direction on this issue. We find that this Order should only be applied to the solutions and rates established in our arbitration decisions. We exclude application of this Order to the solutions and rates established in negotiated agreements based on Section 252(a)(1) of the Act. We believe that the rates contained in the negotiated agreements should remain unaffected, unless a carrier seeks to utilize Section 252(i) of the Act. Section 252(a)(1) states:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251.

This section of the Act allows the incumbent LECs and other telecommunications carriers to negotiate whatever terms they deem appropriate regardless of the requirements of 47 U.S.C. §251(b) and (c). Although we are required to approve each negotiated

agreement, the standards used for approval of the elements of the agreement only require that it does not discriminate against a telecommunications carrier not a party to the agreement, and is consistent with the public interest. See 47 U.S.C. §252(e)(2)(a)(i) and (ii). Therefore, based on our interpretation of section 252(a)(1), we shall not require that the interim number portability solutions and rates offered in a negotiated agreement include the cost recovery mechanism adopted in this Order.

The parties to this proceeding have proposed six methods to recover the cost of providing the INP solutions specified in this Order. The proposals fall into four categories: 1) carriers cover their own costs, 2) pooling mechanism based on telephone numbers, access lines, or revenues, 3) split costs between porting carriers, and 4) Order No. PSC-1604-FOF-TP requirements. We will address each category separately below.

Carriers cover their own costs

MCI witness Kistner states that this option requires all telecommunications carriers to cover the costs that they incur in the provision of any of the various INP options. Most of the parties (new entrants) to this proceeding believe that this method of cost recovery is the best option to implement due to its simplicity. MCI's witness Kistner and AT&T's witness Guedel believe that unlike the other proposed options for cost recovery, this option does not require a complex mechanism for measuring, billing, and reporting requirements, as would be necessary with a pooling mechanism based on revenues, access lines, or telephone numbers. AT&T's witness Guedel believes that the development of a complex pooling mechanism is unnecessary due to the short period INP solutions will be in place.

The ILECs do not support this proposal since initially they would incur the majority of the costs. As stated previously, GTEFL and BST argue in their briefs that this cost recovery mechanism violates the Takings Clause in the U.S and Florida Constitutions, and violates Section 364.16(4), Florida Statutes. We, however, believe that the Act gives the FCC the authority to establish the requirements for number portability. A cost recovery mechanism that requires a carrier to bear its own costs is one of the specific options identified in the FCC's Order. See FCC Order No. 96-286, ¶ 136. We therefore find that this cost recovery mechanism is an option to consider. The proper jurisdiction to address the constitutional challenges that the ILECs raise, however, is a court of law, not this Commission. With regard to violation of Section 364.16(4), Florida Statutes, which requires rates not to be below

cost, we believe that the Act and the FCC's Order together preempt the states in those areas that conflict with state law.

MCI's witness Kistner believes that the ALECs will incur INP associated costs. The only cost that witness Kistner specifically identified is the cost associated with tracking multiple telephone numbers that are assigned to the ALEC's end user. MCI did not provide any specific cost data to support its claim or a specific level of cost. Upon consideration, we note, however, that the administrative cost associated with tracking multiple numbers for a customer will be very minimal.

Pooling mechanism based on access lines, telephone numbers, or revenues

Several parties recommend a pooling mechanism based on access lines, telephone numbers, or revenues. We note, however, that all of the pooling mechanisms proposed have been as an alternative to the parties' primary cost recovery mechanism recommendation. Essentially, the pooling cost recovery mechanisms proposed in this proceeding recover the cost of providing INP by determining the cost incurred in providing INP to carriers and dividing the cost by either access lines, telephone numbers, or revenues. All of the pooling proposals would comply with the FCC's Order.

MCI's witness Kistner and AT&T witness Guedel have identified various problems associated with implementing such mechanisms. For example, if we based a pooling mechanism on revenues, it may become very difficult to determine which revenues to use for carriers such as cable television carriers. The main concern that the parties expressed about a potential pooling mechanism is the necessity, depending on the basis of the pooling mechanism, to collect various types of information, such as telephone number data, cost studies, access line data, and revenue data. Once the data is collected we, in conjunction with the industry, would have to determine the cost of providing each of the INP solutions identified earlier in this Order and establish a mechanism to administer the pool. Most parties to this proceeding believe development of a pooling mechanism is too complicated, considering the short period that the INP solutions will be in place and the limited requests for the INP services.

Upon review, we find that no matter which pooling mechanism is implemented, the ILECs would be required to incur most of the INP costs since they have the majority of the access lines, telephone numbers, and overall revenues. As a result, we will not adopt such an INP cost recovery mechanism.

Split costs between porting carriers

Sprint proposes in its brief that we adopt a cost recovery mechanism that would split the cost of providing INP solutions between the two carriers involved in the porting of the specific telephone number. Sprint proposes that the carrier porting the telephone number will pay 55% while the carrier on the terminating end of the porting will pay 45% of the established rates. Sprint's witness Poag believes its proposal shares the costs of INP on an approximately equal basis and on a per number basis and therefore is competitively neutral. MCI's witness Kistner states, however, that "equal" does not translate to "competitively neutral" when one carrier's share of the market is so substantially greater than that of its competition. Although Sprint is proposing to reduce the recurring rate of its INP solutions, it does not propose to discount the nonrecurring portions of the INP rates.

In its brief, Sprint cites two sections of the FCC's Order to justify its proposed cost recovery mechanism. First, Sprint witness Poag states that the FCC's Order gives the states discretion in establishing how number portability cost will be apportioned among carriers by stating: "[S]tates may require all telecommunications carriers -- including ILECs, ALECs, CMRS providers, and IXCs -- to share the costs incurred in the provision of currently available number portability arrangements." Second, Sprint states that the FCC's Order explains, "[S]tates may apportion the incremental costs of currently available measures among relevant carriers by using competitively neutral allocators such as gross telecommunications revenues, number of lines, or number of active telephone numbers." See FCC Order No. 96-286, ¶ 130.

As previously discussed, the FCC established two criteria that must be met in order for an INP mechanism to be considered competitively neutral. First, the incremental payment made by a new entrant for winning a customer that ports his number cannot put the new entrant at an appreciable cost disadvantage relative to any other carrier that could serve that customer. See FCC Order No. 96-286, ¶ 132. The FCC's Order further states that the incremental payment by the new entrant if it wins a customer would have to be close to zero to approximate the incremental number portability cost borne by the ILEC. See FCC Order No. 96-286, ¶ 133. It also notes that carriers taking unbundled elements or reselling services do not generate a cost of number portability. Thus, a low incremental payment by a facilities-based carrier is necessary in order not to disadvantage it relative to such resellers. See FCC Order No. 96-286, Footnote 379.

Second, the cost recovery mechanism should not have a disparate effect on the ability of competing service providers to earn normal returns on their investment. See FCC Order No. 96-286, ¶ 135. The example given to clarify this requirement states that if the total costs of currently available number portability solutions are to be divided equally among four competing local exchange carriers, including both the ILEC and three new entrants, within a specific service area, the new entrants' share of the cost may be so large, relative to their expected profits, that they would decide not to enter the market. See FCC Order No. 96-286, ¶ 135.

We agree with Sprint that we have the ability to determine which carriers should be required to participate in the cost recovery mechanism. However, we disagree that the relevant carriers contemplated by the language in the FCC's Order are the carriers involved in porting. We find all LECs to be the relevant carriers when determining which carriers should recover the costs associated with the provision of INP, since all LECs have the ability to request INP solutions and are required to provide INP solutions.

We believe that the FCC's Order considers the size of the carriers and the cost per customer, whether porting or not, in its determination of a competitively neutral cost recovery mechanism. Thus we find that Sprint's proposal would require the ALECs to recover a larger portion of the costs on a per customer basis than Sprint, thus affecting the possible normal return of the ALECs. If that is the case, we find that Sprint's proposal is inconsistent with the competitively neutral requirement in the FCC's Order. Therefore, we shall not consider Sprint's proposal as an appropriate INP cost recovery mechanism.

Requirements of Order No. PSC-95-1604-FOF-TP

Only BST and GTEFL propose in their briefs that we maintain the requirements of Order No. PSC-1604-FOF-TP in this proceeding, although for different reasons. These companies would propose to continue charging the ALECs the full cost of the INP solutions, which is clearly prohibited by the FCC's Order, through the rates established in Order No. PSC-95-1604-FOF-TP. BST believes that the FCC misinterpreted the Act when it applied the requirement of Section 251(e)(2) to INP. Therefore, BST proposes to retain the Order No. PSC-95-1604-FOF-TP requirements and track the costs it incurs in the provision of the INP solutions.

In her testimony, GTEFL witness Menard recommends that we adopt the requirements of Order No. PSC-95-1604-FOF-TP in this

proceeding because GTEFL believes our Order is consistent with the requirements of the FCC's Order.

As mentioned previously, we believe our Order is inconsistent with the FCC's Order. Thus, retaining the requirements of Order No. PSC-95-1604-FOF-TP would be a violation of the FCC's Order and unlawful given the FCC's preemptive authority under the Act. Upon review, we find that the cost recovery mechanism for INP contained in Order No. PSC-95-1604-FOF-TP is inappropriate and shall not be maintained.

Conclusion

We believe that the cost methodology that best meets the FCC's Order is a pooling mechanism based on access lines. Implementation of such a mechanism, however, is too cumbersome and expensive to implement due to the measuring, reporting and billing requirements that would be necessary and given the short time period that the mechanism would be used. To date, only one customer in Florida is using an INP solution. Further, the projected use in the future is uncertain, and we note that the implementation of the permanent number portability solution in Florida commences in the first quarter of 1998. Also, INP is only needed by facilities-based providers since resellers are not required to purchase INP in the provision of resold services. For these reasons, we do not believe that the cost incurred in the provision of INP solutions would warrant the development of a pooling mechanism.

If we require all carriers to absorb their own costs of providing INP, incumbent LECs would incur the majority, if not all, of the INP costs. Such a cost recovery mechanism would be in violation of Section 364.16(4), Florida Statutes. Although we acknowledge federal preemption in this area to a degree, we believe a cost recovery mechanism that complies with both the FCC Order and the Florida Statute is the best solution. It does not appear, however, that such a solution is available at the present time.

Therefore, upon consideration, we hold that all LECs shall track the costs of providing the INP solutions identified in the body of this Order, until the FCC issues its order implementing a cost recovery mechanism for permanent number portability. Further, all LECs are to track their INP costs with the understanding that these costs are potentially recoverable through the permanent number portability cost recovery mechanism. All LECs shall modify their tariffs to recognize the INP solutions identified in the body of this Order.

We note that by this decision we are not endorsing the FCC's interpretation of the Act. We reserve the right to revisit this decision should a court of law overturn the FCC's Order.

IV. MISCELLANEOUS

A. Retroactive application of this Order

All but three of the parties state that we should not retroactively apply our decision in this proceeding. Time Warner and MFS take no official position, but agree the we could apply our decision retroactively. MCI is the only party that affirmatively requests that we apply our decision retroactively to the effective date of the FCC's Order on interim number portability, July 2, 1996.

Most parties that request that we not apply our decision retroactively offer several justifications. AT&T and FCTA provide no basis for their recommendation. AT&T Wireless offers in its brief the following in support of its position: very few numbers ported to date; the administrative expense of retroactively applying a new system; and the doctrine of retroactive ratemaking. BMI and Intermedia argue in their briefs that we should not retroactively apply our decision, and that our decision should not operate to undermine existing agreements that we previously approved.

In its brief, BST shares the concerns of AT&T Wireless and adds several other justifications for its recommendation. First, BST believes retroactive application of this decision would be prohibited retroactive ratemaking under Florida law. BST notes that Section 366.06(2), Florida Statutes, requires that we establish our rates prospectively and supports this interpretation with the Florida Supreme Court's decision in City of Miami v. Florida Public Service Commission, 208 So.2d 249, 260 (FL 1968). BST also supports its position with the U.S. Supreme Court's decision in Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). BST argues that the Court's holding in the Bowen decision requires that retroactive rule-making authority be expressly conveyed to a governmental agency by Congress. Although the Bowen decision involved a federal agency, the FCC, BST believes a similar rationale should be applied to the FPSC. Since the Act does not grant the FCC express retroactive ratemaking authority, the FCC cannot create rules to implement the Act which would be retroactively applied. BST contends that if the FCC does not have such authority, neither does the FPSC.

GTEFL in its brief offers similar arguments to those of AT&T Wireless and BST. Additionally, GTEFL notes only one customer of an ALEC has been ported to date. Therefore, as AT&T witness Guedel indicates, it would be unnecessary to apply the new rates in the event the our decision required the retroactive application of rates.

Sprint in its brief also cites the lack of numbers ported to date. Sprint adds that the cost of retroactive application of this proceeding's order would be as much or more to implement than already spent on ported numbers.

Both MFS and Time Warner take no position on this issue. They do, however, state that we have the authority to apply our decision in this proceeding retroactively. MFS in its brief states that nothing in the Act or the FCC's Order would prohibit such a retroactive application. MFS also notes nothing in the testimony submitted in this proceeding argues to the contrary. MFS, however, does recognize that we must follow Florida law regarding retroactive ratemaking. MFS also requests that BST tariffs not be left in place where they violate the FCC's Order. Time Warner argues in its brief that it is appropriate to make the effective date of this proceeding the FCC Order's effective date because this proceeding was undertaken at the mandate of the Act and the FCC order. Time Warner concedes that the effective date of the order issued in this proceeding would be appropriate since there has been no porting to date. Such an effective date would also eliminate the concern over retroactive ratemaking.

In contrast to all other parties, MCI recommends in its brief that we apply our decision in this proceeding retroactively to the FCC order's effective date. MCI's proposal would require ILECs to pay full refunds to ALECs of all RCF revenues collected by ILECs from the date of the issuance of the FCC's order to the date of our order in this proceeding. MCI does acknowledge that this amount, based on the numbers ported to date, would be limited.

As previously indicated, we believe that our decision on the cost recovery mechanism for interim number portability has been preempted by the Act and the FCC's Order. As a result, our decision became void. Therefore, it could be argued that if the charges are no longer viable by virtue of the Act and FCC's Order, the concept of unlawful retroactive ratemaking is not applicable. We are also persuaded by Sprint's argument that if we applied this decision retroactively, the costs of retroactive application would be greater than what has already been spent on porting numbers. As discussed above, only one customer of an ALEC has utilized RCF for interim number portability to date.

Upon consideration, we find that our decision in this proceeding shall not be applied retroactively to the effective date of the FCC's Order on interim number portability or any other past date. We shall apply this decision prospectively from the effective date of this Order.

B. Access charges

MCI's witness Kistner proposes that we should implement meet point billing arrangements for the sharing of terminating access. Witness Kistner proposes to split access charges in the following manner. The forwarding LEC charges the IXC for transport from the IXC point of presence to the end office where the RCF/DID is provided. The terminating LEC charges the IXC for the terminating switching function, common line and residual interconnection charge (RIC).

The FCC's Order provides some guidance on the distribution of access charges on INP solutions. The FCC Order states:

> We decline to require that all of the terminating interstate access charges paid by IXCs on calls forwarded as a result of RCF or other comparable number portability measures be paid to the competing local service provider. On the other hand, we believe that to permit incumbent LECs to retain all terminating access charges would be equally inappropriate. FCC Order No. 96-286, ¶ 140.

In addition to not requiring the ILECs to share terminating access charges, the FCC Order states:

> ...we direct forwarding carriers and terminating carriers to assess on IXCs charges for terminating access through meet-point billing arrangements. FCC Order No. 96-286, ¶ 140.

The ILECs have different positions on the appropriate mechanism to use for sharing of access charges on ported calls. GTEFL's witness Menard believes that the establishment of a distribution mechanism of terminating access charges should be left to the interconnection negotiations. Witness Menard believes ordering such a sharing mechanism would create some very costly billing modifications that may only be in place 12 to 18 months. GTEFL states that what they would suggest, as a sharing mechanism

would be to develop a surrogate (percent local usage) to split the access charges. MCI's witness Kistner indicated that she did not have a problem with use of a surrogate.

On the other hand, Sprint's witness Poag believes MCI's proposal represents a fair distribution of the revenues associated with the underlying cost and believes that is how Sprint will handle meet point billing where number portability is involved.

The FCC's Order focuses on negotiation for establishing the methodology to be used to distribute access charges and does not specifically require us to determine the methodology outside of a negotiation or arbitration proceeding. It is clear that the methodology that will be used by the ILECs will be different. Therefore, we believe it may be difficult to establish an industry standard.

Upon consideration, we shall not establish a specific distribution methodology for access charges with the use of INP solutions. The parties should negotiate the methodology and, if unsuccessful, request arbitration.

C. Sprint's motion to accept late-filed joint brief and posthearing statement

On January 7, 1997, United Telephone Company of Florida and Central Telephone Company of Florida ("Sprint") filed a Motion to Accept Late-Filed Joint Brief and Posthearing Statement. No party filed a response in opposition to the Motion.

In support of the Motion, Sprint states that the Joint brief and Posthearing statement were complete and ready to be delivered to us prior to the close of business on January 6, 1997, but were inadvertently not delivered and filed. Sprint also asserts that no prejudice or advantage will result to any party as a result of the late filing of the Joint Brief and Posthearing Statement. We believe that this extension of time is reasonable and is not prejudicial to the other parties in this proceeding. Upon consideration, we grant Sprint's Motion.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that each and all of the specific findings herein are approved in every respect. It is further

ORDERED that all local exchange carriers shall track the costs of providing the interim local number portability solutions identified within the body of this Order, until the Federal Communications Commission issues its order implementing a cost recovery mechanism for permanent number portability. It is further

ORDERED that all local exchange carriers shall modify their tariffs to recognize the applicable interim local number portability solutions identified within the body of this Order. It is further

ORDERED that the provisions of this Order shall be applied prospectively from the effective date of this Order. It is further

ORDERED that United Telephone Company of Florida and Central Telephone Company of Florida's (Sprint's) Motion to Accept Late-Filed Joint Brief and Posthearing Statement is hereby granted. It is further

ORDERED that this docket shall remain open pending the outcome of the FCC's order implementing a cost recovery mechanism for permanent number portability.

By ORDER of the Florida Public Service Commission, this 24th day of April, 1997.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

WPC

M E M O R A N D U M

APRIL 23, 1997

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (COX) WPC MCB

RE: DOCKET NO. 950737-TP - INVESTIGATION INTO TEMPORARY LOCAL TELEPHONE NUMBER PORTABILITY SOLUTION TO IMPLEMENT COMPETITION IN LOCAL EXCHANGE TELEPHONE MARKETS.

PSC-97-0476-FOF

Attached is an FINAL ORDER ON COST RECOVERY MECHANISM FOR PROVIDING INTERIM NUMBER PORTABILITY SOLUTIONS AND ORDER GRANTING MOTION FOR EXTENSION OF TIME, to be issued in the above-referenced docket. (Number of pages in Order - 22)

WPC/clp
Attachment
cc: Division of Communications
I: 950737fi.wpc

4619 RAR.

4/25/97 - Refaxed

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MCI
Cellular One
MFS.
Time Warner
Andrew Isar
Ame. Communicatio
Ackerman

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PSC/RAR 12(2/91)

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.