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January 6, 1997

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Re: FPSC Docket No. 950137-TP

Dear Mrs. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Brief of the Evidence, which we ask that you file in the above captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies of BellSouth's Brief have been served to the parties shown on the attached Certificate of Service.

Thank you for your attention to this matter.

Sincerely yours,

Thomas B. Alexander
(BW)

Thomas B. Alexander

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Enclosures

cc: All Parties of Record
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Florida Docket #95-0737-TP

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**ORIGINAL
FILE COPY**

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into Temporary Local)
Telephone Number Portability Solution to)
Implement Competition in Local Exchange)
Markets)
_____)

Docket No. 950737-TP
Filed: January 6, 1997

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COMMUNICATIONS REPORTING

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STATEMENT OF THE CASE

This docket was originally established by the Commission on June 29, 1995, to investigate the appropriate temporary local number portability solution in order to comply with the mandate in revised Section 364.16(4), Florida Statutes, of having temporary number portability in place by January 1, 1996. Through the auspices of the Commission, a Number Portability Standards Group was established and several industry workshops were held. Subsequently, on August 30, 1995, the parties to this Docket executed a Stipulation and Agreement to address some, but not all of the issues identified in this Docket, including the agreement that remote call forwarding (RCF) would be the mechanism to provide temporary number portability. On October 3, 1995, the Commission issued Order No. PSC 95-124-AS-TP, in which it approved the parties' Stipulation and Agreement. On October 20, 1995, the Commission conducted a full evidentiary hearing on the remaining issues to be decided in this Docket, including the appropriate cost recovery mechanism to be used for RCF. BellSouth, GTE, and Sprint each submitted cost studies supporting their positions with regard to the cost recovery issue.

On December 28, 1995, the Commission issued Order No. PSC-95-1604-FOF-TP in which the Commission established the price¹ and the cost recovery mechanism² for remote call forwarding as the temporary number portability solution.

¹ In Order No. PSC-95-1604-FOF-TP, the Commission established the rate for temporary number portability through remote call forwarding at \$1.00 per line per month for one path. Additional paths were set at \$0.50 per month per path. Finally, a nonrecurring charge of \$10.00 was included. FPSC Docket No. 950737-TP, Order No. PSC-95-1604-FOF-TP, page 17, issued December 28, 1995.

On February 8, 1996, the Telecommunications Act of 1996³ became effective. Included among the myriad of changes brought about by the Act is the requirement that all telecommunications companies share, on a “competitively neutral” basis, in the cost of providing number portability.⁴ Congress also authorized the Federal Communications Commission (“FCC”) to determine the method of cost recovery for number portability. BellSouth contends that the Act only authorized the FCC to determine cost recovery for permanent or long-term number portability.

On July 2, 1996, the FCC released its First Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 95-116 (“First Report and Order”). The First Report and Order contained the FCC’s guidelines for cost recovery of interim or temporary number portability as well as certain rules for implementing long-term number portability and it sought further comment on cost recovery for long-term number portability.

On August 26, 1996, BellSouth filed its Petition for Reconsideration or Clarification of the FCC’s First Report and Order. Included among the points asserted by BellSouth, was a challenge to the FCC’s interim number portability cost recovery guidelines or principles.⁵

² Order No. PSC-95-1604-FOF-TP also reflects, as did the parties’ Stipulation adopted by the Commission, that the company receiving the ported number will pay the company providing the ported number a monthly fee. Id at page 15.

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 to be codified at 47 U.S.C. §§151 et seq. (1996). The Communications Act of 1934, as amended, including the 1996 Act amendments codified at 47 U.S.C. §151 et seq., is referred to herein as the “Act”.

⁴ Section 251(e)(2).

⁵ A complete copy of BellSouth’s Petition for Reconsideration or Clarification filed with the FCC was attached as an Exhibit to BellSouth witness, Mr. Varner’s, testimony and was admitted into the evidence of this proceeding as Hearing Exhibit No. 14 (Tr. p. 250).

On September 4, 1996, the Prehearing Officer issued a Order Establishing Procedure (Order No. PSC-96-1121-PCO-TP), which set the hearing in this matter for November 25, 1996. A Prehearing Conference was held on November 14, 1996 and subsequently, on November 19, 1996, the Prehearing Officer issued a Prehearing Order (Order No. PSC-96-1377-PHO-TP) setting forth the three (3) issues to be considered at the hearing of this docket.

During the hearing of this docket, direct testimony was presented by BellSouth Telecommunications, Inc.'s witness, Alphonso J. Varner, a Senior Director for Regulatory Policy & Planning for the nine-state BellSouth region. Other parties⁶ whose witnesses presented direct testimony were GTE, Sprint-United/Centel, MFS, Time Warner, MCI, AT&T, AT&T Wireless, and FCTA. Rebuttal testimony was filed by all parties except the witnesses for AT&T Wireless and GTE. The hearing produced a transcript of 401 pages and 17 exhibits.

This Brief is submitted in accordance with the post-hearing procedures of Rule 25-22.056, Florida Administrative Code. The statement of each issue is followed immediately by a summary of BellSouth's position on that issue and a discussion of the basis for that position. Each summary of BellSouth's position is labeled accordingly and marked by an asterisk.

⁶ The parties to this docket are as follows: BellSouth Telecommunications, Inc. ("BellSouth" or the "Company"); AT&T Communications of the Southern States, Inc. ("AT&T"); AT&T Wireless Services of Florida, Inc. ("AT&T Wireless"); BellSouth Mobility, Inc. ("BMI"); Intermedia Communications of Florida, Inc. ("ICI"); Florida Cable Telecommunications Association, Inc. ("FCTA"); GTE Florida Incorporated ("GTE"); MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively "MCI"); MFS Communications Company, Inc. ("MFS"); Time Warner AxS of Florida, L.P. d/b/a Time Warner Communications and Digital Media Partners (collectively "Time Warner"); United Telephone Company of Florida and Central Telephone Company of Florida (collectively "Sprint-United/Centel").

STATEMENT OF BASIC POSITION

The issues involved in this proceeding are interrelated and arise from the fact that subsequent to this Commission's Order No. PSC-95-1604-FOF-TP being issued on December 28, 1995, the FCC issued its First Report and Order and Further Notice of Proposed Rulemaking in The Matter of Telephone Number Portability in CC Docket No. 95-116 on July 2, 1996. Of necessity, both the Telecommunications Act of 1996 and Section 364.16(4), Florida Statutes, must also be considered.

BellSouth respectfully submits that the FCC's authority to address cost recovery only applies to permanent or long-term number portability as defined in Section 251(e)(2) of the Act, and not to temporary or interim number portability. Thus, any attempt by the FCC to address cost recovery for interim number portability, in BellSouth's opinion, is unlawful. Additionally, BellSouth submits that the FCC's principles or guidelines for establishing cost recovery for interim number portability would require the incumbent Local Exchange Carrier (LEC) to price interim number portability at confiscatory levels in violation of the Fifth and Fourteenth Amendments to the Constitutions of the United States and of Florida.

BellSouth, along with other incumbent LECs, Alternative LECs and the Florida Commission previously participated in hearings in this Docket in 1995 that established a pricing structure for interim number portability in Florida. This structure is based on the premise that the cost of interim number portability should be recovered from the companies who make use of these arrangements. BellSouth submits that the price of such services should recover the full cost of providing the service and contribute to

recovering the joint and common costs of the firm. Furthermore, Section 364.16(4), Florida Statutes, requires that the rates for temporary number portability shall not be set below cost. BellSouth respectfully submits that the Florida Public Service Commission's ("FPSC") Order No. PSC-95-1604-FOF-TP should be maintained until such time as the solution for permanent number portability can be implemented even though such Order appears to be inconsistent with the FCC's First Report and Order in CC Docket No. 95-116 issued on July 2, 1996.

As an alternative, BellSouth submits that each LEC be required to track and record their costs of providing interim number portability until such time as the recovery mechanism for long-term number portability becomes effective. Under this alternative approach, the costs incurred by each company providing interim number portability, including appropriate interest, will be recovered using the same long-term or permanent number portability cost recovery mechanism ultimately approved by the FCC.

Finally, BellSouth also submits that, if the FPSC were to make changes to the rates established in its Order No. PSC-95-1604-FOF-TP, then the FPSC should not retroactively apply the FCC's decision to this proceeding. BellSouth respectfully submits that if such actions were taken by the FPSC, then they could be in violation of the retroactive rate making principles covered in the Florida Statutes (Section 366.06(2), Florida Statutes).

ISSUE NO. 1: Is Order No. PSC-95-1604-FOF-TP inconsistent with the Federal Communications Commission's First Report & Order and Further Notice of Proposed Rulemaking in the Matter of Telephone Number Portability in CC Docket No. 95-116?

* **POSITION:** Although the pricing structure established by Order No. PSC-95-1604-FOF-TP appears to be inconsistent with the FCC's First Report and Order, BellSouth submits that the FCC's cost recovery principles for interim number portability are unlawful and confiscatory. BellSouth submits that Order No. PSC-95-1604-FOF-TP established the appropriate cost recovery mechanism for temporary number portability in Florida.

In response to this specific issue, BellSouth's witness, Alphonso J. Varner, testified that "[y]es, the pricing structure [in Order No. PSC-95-1604-FOF-TP] appears to be inconsistent with the FCC's guidelines." (Tr. p. 106). However, Mr. Varner went on to explain that "BellSouth believes that the FCC's cost recovery provisions for interim number portability are unlawful and confiscatory." (Id.).

The Telecommunications Act of 1996 clearly distinguishes between permanent number portability and interim number portability. For example, in Section 251(b)(2) of the Act, Congress imposes the duty on all LECs to provide number portability, and then in Section 251(e)(2) of the Act, the FCC is granted the authority to prescribe cost recovery principles to ensure that the costs of number portability are borne by all telecommunications carriers on a competitively neutral basis. The Act does not refer to interim number portability until Section 271. As the Commission is aware, Section 271 contains the 14 point checklist that an incumbent LEC must meet in order to provide in-region interLATA services. Section 271(c)(2)(B)(xiv) allows the use of interim number portability methods, such as Remote Call Forwarding ("RCF") and Direct Inward Dialing ("DID"), until the FCC issues rules pursuant to Section 251 of the Act.

See Section 271(c)(2)(B)(xi). As Mr. Varner testified, Congress clearly differentiates between number portability ("permanent number portability") and temporary or interim number portability, and intended for the FCC to address cost

recovery of only long-term number portability. (Tr. pp. 106-107). Mr. Varner also noted, that the FCC itself makes the distinction between permanent number portability and interim number portability when it states in its First Report and Order that *interim* methods, such as DID and RCF, do not meet its performance criteria for number portability. (Tr. p. 107). Despite the FCC's strained efforts in its First Report and Order to reach the conclusion that it can determine interim number portability cost recovery, there is nothing in the Act that alters the grant of exclusive jurisdiction to the States with respect to setting prices for intrastate functionalities in the Communications Act of 1934. See, 47 U.S. §§151,2(b). As BellSouth also argued in its Petition for Reconsideration or Clarification filed with the FCC⁷, Section 251(b)(2) of the Act imposes the duty on all LECs to provide "number portability" (i.e. permanent or long-term), not "interim telecommunications number portability" (i.e. the FCC's "transitional measures").

BellSouth submits, and as Mr. Varner testified, that the FCC's authority to address cost recovery only applies to permanent number portability as defined in Section 251(e)(2) of the Act, and not to interim number portability as defined in Section 271(c)(2)(B)(xiv) of the Act. Thus, BellSouth contends that any attempt by the FCC to address cost recovery for interim number portability is unlawful. (Tr. p. 107).

BellSouth also contends that the FCC's cost recovery guidelines for interim number portability measures such as RCF and DID do not permit LECs such as BellSouth to fully recover their costs of providing intrastate services. In drafting its

⁷ BellSouth filed its Petition for Reconsider or Clarification with the FCC in CC Docket No. 95-116 on August 26, 1996. As noted in BellSouth witness, Mr. Varner's testimony, a copy of BellSouth's Petition for Reconsideration was attached as Exhibit No. AJV-1 (Tr. p. 104) which was marked as Hearing Exhibit 14 (Tr. p. 97) and admitted into the record (Tr. p. 250) of this proceeding.

guidelines, the FCC impermissably departed from its own historical application of “cost causer” principles⁸ when it set its guidelines for cost recovery for interim number portability. As BellSouth argued in its Petition for Reconsideration filed with the FCC, there is simply no express or implied Congressional directive to the FCC, in the Act or in its legislative history, to “depart from cost causation principles, if necessary.”⁹

The FCC states in its First Report and Order that the incremental payment made by a new entrant for winning a customer that ports his number cannot put the new entrant in an appreciable cost disadvantage relative to any other company that could serve that customer. The FCC reasons that the incremental payment made by a new entrant for winning a customer would have to be “close to zero”, to approximate the incremental number portability costs borne by the incumbent LEC if it retains the customer. (Tr. pp. 107-108). As BellSouth witness Varner noted the FCC is ordering the incumbent LEC to subsidize new entrants by stating that the cost to the new entrant for interim number portability will have to be close to zero. Thus, the FCC has directed States to require LECs to provide intrastate services at a price “close to zero” apparently without regard to the actual costs incurred by the incumbent LEC, and at confiscatory levels in violation of the Fifth and Fourteenth Amendments¹⁰ to the United States Constitution, as well as the Florida Constitution, Article 1, Section 9, that

⁸ In paragraph 131 of the FCC’s First Report and Order in CC Docket No. 95-116, the FCC stated: “Ordinarily the Commission follows cost causation principles, under which the purchaser of a service would be required to pay at least the incremental cost incurred in providing that service.”

⁹ For further details of BellSouth’s Petition for Reconsideration or Clarification filed with the FCC, See, Hearing Exhibit No. 14 (Tr. p. 250).

¹⁰ U. S. Const. Amend. V, applicable to the States through the Fourteenth Amendment, provides in relevant part: “Nor shall private property be taken for public use without just compensation”.

proscribes confiscation of BellSouth's property without just compensation.¹¹ The FCC's guidelines for cost recovery for interim number portability would require incumbent LECs such as BellSouth to provide intrastate services below cost (i.e. at a price "close to zero") and amounts to a taking without just compensation in violation of the Takings Clauses of the United States and Florida Constitutions.

Government action that requires a property owner to allow a utility to dedicate a portion of its property to use and transit by others constitutes a taking for Fifth Amendment purposes. "Such public access would deprive petitioner of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'." See, Dolan v. City of Tigard, 114 S.Ct. 2309, 2316 (1994); 129 L.E. 2d 304, 316 (1994), *quoting*, Kaiser Aetna v. U. S. 444 U. S. 164, 176 (1979). Thus, even a small government-mandated physical intrusion into one's property for the purpose of carrying public utility traffic constitutes a taking. See, Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419, 424-426 (1982); on remand, 446 N.E. 2d 428 (N.Y. 1983); Accord, Lucas v. South Carolina Coastal Counsel, 112 S.Ct. 2886, 2893 (1992). The degree of the intrusion is immaterial. "[R]egulations that compel the property owner to suffer a physical 'invasion' of his property" constitutes a taking "no matter how minute the intrusion". Lucas, 112 S.Ct. at 2893. Since BellSouth has and will invest in physical plant in order to provide remote call forwarding as well as other types of interim number portability such as DID, this physical plant is measurably occupied when BellSouth provides RCF to an Alternative

¹¹ A public service commission's regulation regime is subject to the Takings Clause of the Constitution. See, Duquesne Light Co. v. Barasch, 488 U. S. 299, 308 (1989).

LEC for interim number portability purposes, and BellSouth is thus denied the ability to use this physical plant for any other purpose, a taking clearly occurs. See, Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441-1444(D.C. Cir. 1994).

In Duquesne Light Company v. Barasch, 488 U.S. 299 (1989), the U. S. Supreme Court set forth the “guiding principle” of Takings Clause law respecting public utility regulation as follows:

[T]he Constitution protects utilities from being limited to a charge for their property serving the public which is so “unjust” as to be confiscatory. . . [i]f the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments. . . .¹²

In addition to the FCC’s First Report and Order unlawfully preempting State authority to establish prices for intrastate services such as RCF and the “guidelines” that expressly prohibit the payment by Alternative Local Exchange Companies (ALEC) cost-causers for payment of an amount that is not “close to zero”, the FCC’s Order would have the effect of abrogating and impairing LEC contracts. As BellSouth witness Varner noted, although rates for interim number portability solutions that are “not close to zero” have been negotiated by BellSouth with other companies, have been examined, deemed appropriate, and have been approved by the Florida Public Service Commission, the FCC’s Order would undo the work by the state commissions and disrupt and threaten the ability of companies to establish mutually negotiated contracts with other companies. (Tr. p. 104). Oddly enough, in Paragraph 123, the FCC expressly stated that “[s]everal states have adopted different cost recovery

¹² Duquesne Light Co. , 488 U.S. at 307-308.

mechanisms. For example, in Florida, carriers have negotiated appropriate rates for currently available measures.” FCC Order, CC Docket No. 95-116, at ¶123 (emphasis added). On the one hand, the FCC clearly notes with approval the work of this Commission in approving agreements of carriers with regard to providing interim number portability, while on the other hand, it establishes “guidelines” which negate the work of this Commission by essentially requiring LECs to provide interim number portability at prices “close to zero” (i.e. below cost and essentially for free).

Additionally, the FCC’s First Report and Order’s “guidelines” that would require the price for interim number portability to be “close to zero” is clearly contrary to the express wording of Section 364.16(4), Florida Statutes, regarding the provision of interim and permanent number portability in Florida. Section 364.16(4) clearly and expressly requires that “[t]he prices and rates shall not be below cost.” As Mr. Varner testified and as this Commission has recognized, there are very definite costs associated with providing interim number portability. (Tr. p. 106). In fact, this Commission stated in Order No. PSC-95-1604-FOF-TP that, “[w]e find that the costs for Remote Call Forwarding (RCF) include service implementation costs, central office equipment and software costs, and interoffice networking costs.”¹³ As Mr. Varner also notes, the FCC’s Order has other conflicting and erroneous positions. The FCC states that an interim cost recovery mechanism must not have a disparate effect on the ability of service providers to earn a “normal” return on their investment. The FCC never defines “normal” return, but by ordering BellSouth to provide interim number portability

¹³ FPSC Docket No. 950737-TP, Order No. PSC-95-1604-FOF-TP, page 15, issued December 28, 1995.

well below cost, it is unclear to BellSouth how it can earn a “normal” return on its investment. (Tr. p. 109).

BellSouth contends that the FCC exceeded its authority and unlawfully preempted state commissions when it established its “guidelines” for cost recovery for interim number portability. Further, as described hereinabove, BellSouth contends that the interim number portability “guidelines” established by the FCC in its First Report and Order in CC Docket No. 95-116 are unlawful and confiscatory.

ISSUE NO. 2: What is the appropriate cost recovery mechanism for temporary number portability?

- * **POSITION:** Order No. PSC-95-1604-FOF-TP should be maintained until the solution for permanent number portability is implemented. The Commission’s Order is consistent with Section 364.16(4), Florida Statutes. Alternatively, each carrier should track and record its costs and then recover those by using the same permanent number portability cost recovery mechanism approved by the FCC.

BellSouth contends that this Commission, after full evidentiary hearings, including the submission of cost studies by incumbent LECs such as BellSouth, GTE, and Sprint-United/Centel, established an appropriate pricing structure for the recovery of interim number portability costs in Florida. This structure is based on the premise that the costs of interim number portability should be recovered from the companies who make use of these arrangements. A pricing principle that the FCC has historically adhered to, with the exception of its “interpretation” of Section 252(e)(2) of the Act. With regard to the FCC’s interpretation of the “competitively neutral” standard contained in the Act, the FCC stated: “[w]e emphasize, however, that this statutory mandate constitutes a rare exception to the general principle long recognized by the [Federal

Communications] Commission, that the cost-causer should pay for the costs that he or she incurs.”¹⁴ As noted earlier, BellSouth contends that there is simply no express or even implied Congressional directive to the FCC, in the Act or in its legislative history, to “depart from cost causation principles” with respect to number portability. As also noted earlier, BellSouth contends that the FCC was only given authority under the Act to implement rules concerning cost recovery for permanent number portability, not for “interim telecommunications number portability”.

BellSouth contends that the price for interim number portability using such intrastate services as remote call forwarding should recover the full cost of providing the service and contribute to the joint and common costs of the firm. This Commission’s Order, Order No. PSC-95-1604-FOF-TP, follows cost causation principles when it provided “that the company receiving the ported number will pay the company providing the ported number” and established rates for remote call forwarding for interim number portability.¹⁵ Thus, BellSouth respectfully urges the Commission to maintain the cost recovery/pricing structure it established in Order No. PSC-95-1604-FOF-TP until such time as the solution for permanent number portability can be implemented.

Moreover, as this Commission noted in Order No. PSC-95-1604-FOF-TP: “Chapter 364.16(4), Florida Statutes, requires that the rates for temporary number portability not be below costs. This statutory provision imposes a responsibility on us to reasonably insure that the rate is above cost.”¹⁶ Without question, the FCC’s

¹⁴ FCC’s First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-166 at paragraph 131.

¹⁵ FPSC Docket No. 950737-TP, Order No. PSC-95-1604-FOF-TP, page 15, issued December 28, 1995.

¹⁶ FPSC Docket No. 950737-TP, Order No. PSC-95-1604-FOF-TP, page 17, issued December 28, 1995.

interpretation of the Act as set forth in its First Report and Order which directs state commissions to require LECs to provide intrastate services such as RCF at a price “close to zero” violates Florida law. BellSouth contends that the FCC’s First Report and Order, in which the FCC purports to “interpret” the Act as imposing a statutory mandate that it abandon its historical “cost causation principles” with respect to interim number portability is simply a jurisdictional grab by the FCC to preempt the state commissions from carrying out their duties of establishing prices for intrastate services such as RCF. This Commission should maintain its Order of December 28, 1995 in this proceeding until such time as the solution for permanent number portability can be implemented. By doing so, the Commission will continue to comply with the Florida Statutes which expressly require that this Commission establish prices and rates for temporary number portability which are not below cost. Section 364.16(4), Florida Statutes.

Importantly, and as BellSouth’s witness, Mr. Varner, noted: “[w]hat we really have here is a set of very conflicting situations.” (Tr. p. 124). The reason that we have these conflicting situations is that on the one hand, Congress passed The Telecommunications Act of 1996 which contains a very clear and concise statement of the FCC’s authority over long-term or permanent number portability. On the other hand, we have the FCC’s First Report and Order which at best can be called confusing and contradictory within itself and, at least with respect to cost recovery for interim number portability, is a clear jurisdictional grab to preempt state commissions over their traditional authority to establish rates for the provision of intrastate services. (Id.) Additionally, we have a Florida Statute (Section 364.16(4)) which is likewise a very

clear statement of the responsibility this Commission has to ensure that the cost of number portability, for both interim and permanent, shall not be below cost. (Tr. p. 124).

Additionally, and as this Commission is well aware, BellSouth filed a Petition for Reconsideration or Clarification of the FCC's First Report and Order in CC Docket No. 95-116 on August 26, 1996. A copy of BellSouth's Petition for Reconsideration filed with the FCC was admitted into the record of this proceeding. See, Hearing Exhibit No. 14. (Tr. p. 250). In addition to BellSouth, various other parties have pursued petitions for reconsideration of the FCC's First Report and Order in CC Docket No. 95-116. BellSouth contends that this Commission's Order regarding cost recovery for interim number portability, Order No. PSC-95-1604-FOF-TP, is consistent with both the Telecommunications Act of 1996 and Section 364.16(4), Florida Statutes, and thus, should be maintained until the solution for permanent number portability can be implemented. As Mr. Varner noted, this Commission has now heard testimony and been presented with evidence regarding the appropriate cost recovery mechanism for interim number portability for a second time. (Tr. p. 125). Given the clear errors, in BellSouth's opinion, the FCC made in interpreting its obligations under The Telecommunications Act of 1996 with respect to interim number portability, and the uncertainty that remains as a result of challenges to that decision, BellSouth respectfully submits that the Commission should simply continue to maintain its Order No. PSC-95-1604-FOF-TP. Hopefully, this will avoid the Commission having to conduct a third hearing regarding cost recovery for interim number portability. (Id.)

Although BellSouth firmly believes that the Commission should continue to maintain its current Order regarding cost recovery for interim number portability in this docket, BellSouth recognizes that the Commission may feel compelled to modify its current Order in light of the FCC's "interpretation" of the Act in its First Report and Order. Thus, in the alternative, BellSouth has proposed that each carrier be required to track and record their costs of providing interim number portability. (Tr. p. 122). As Mr. Varner described this alternative proposal, "[w]hen the cost recovery mechanism for long-term number portability becomes effective, the costs incurred by each company of providing interim number portability, including adjustments for interest, will be recovered using the same long-term number portability cost recovery mechanism approved by the FCC." (Id.) As Mr. Varner further described, "the recording and tracking of costs for interim number portability would be a simple monthly calculation of the number of customers who are porting telephone numbers, times the current interim number portability rate ordered by the Florida PSC." (Id.) Further, when the mechanism for long-term number portability cost recovery becomes effective, the costs of interim number portability, including appropriate interest, would then be allocated back to each carrier using the FCC approved long-term number portability cost recovery mechanism. (Id.) Finally, if this Commission's Order No. PSC-95-1604-FOF-TP is perceived to be inconsistent with the cost recovery mechanism for long-term number portability, then at that time, the Florida Commission would still have the option of modifying its Order. (Id.)

Interestingly, BellSouth is not the only party to urge the Commission to continue to maintain its current Order. As reflected in the Prehearing Order (Order No. PSC-96-1377-PHO-TP) entered in this docket on November 19, 1996, InterMedia also continues to support the stipulation signed by the parties and approved by the Commission in this docket. Order No. PSC-96-1377-PHO-TP at p. 11. Likewise, GTE also takes the position that the existing tariffs, based upon Order No. PSC-95-1604-FOF-TP, should remain in place. (Tr. pp. 164-165). Also of interest, Sprint-United/Centel, although it set forth its own cost recovery proposal, admitted that if the Commission did not adopt Sprint's proposal and Sprint were given the alternative choices of the BellSouth alternative proposal or the ALEC proposal that each company pay its own costs, Sprint indicated that they would rather "go with the BellSouth proposal". (Tr. pp. 340-341).

Finally, a number of the other parties, primarily the alternative local exchange carriers have recommended that each carrier should pay its own costs. In other words, each carrier should absorb the cost of interim number portability on its own without the ability to recover those costs from the company utilizing RCF for interim number portability. For example, AT&T Wireless (Tr. p. 22); AT&T (Tr. pp. 33-34); MCI (Tr. p. 194); MFS (Tr. pp. 260-261); Time Warner (Tr. pp. 360-362); and FCTA (Tr. pp. 383-384 & 387) all have recommended that the Commission adopt a cost recovery mechanism for interim number portability that requires each carrier to pay for its own costs of currently available number portability or as some parties have referred to it a "bill and keep" arrangement. Although each party supporting a cost absorption or "bill

and keep” type cost recovery mechanism has relied upon the FCC’s First Report and Order for support, BellSouth contends that this type arrangement violates the Takings Clause of both the United States and Florida Constitutions as well as Section 364.16(4), Florida Statutes. BellSouth has already set forth its arguments regarding the lack of constitutional muster for such a proposal earlier herein¹⁷ and will not repeat those arguments here.

Adopting the concept of each carrier absorbing its own costs or a “bill and keep” arrangement violates Section 364.16(4) which requires that the prices and rates for temporary number portability shall not be below costs. One of the fundamental problems with the “bill and keep” arrangement is that it contains no recovery for the costs associated with providing RCF as an interim number portability arrangement. These parties have couched their justification for such a mechanism as being “competitively neutral” because it recognizes that both incumbent LECs and ALECs will incur costs to forward calls to another carrier’s network via interim number portability methods. (Tr. p. 194). The problem with this argument is that there’s neither evidence in this record that the number of RCF services for interim number portability purposes would be equal or in “balance” between an incumbent and a ALEC nor that each carrier’s costs to provide RCF will be equal. To the contrary, even the FCC in its First Report and Order recognizes that “the costs of providing number portability in the immediate term are incurred solely by the carrier providing the forwarding service.”¹⁸ The FCC also stated that “we note that, initially, the costs of providing currently

¹⁷ See Brief at pp. 8 through 10, *infra*.

¹⁸ See, FCC First Report and Order at para. 122.

available number portability [i.e. RCF] will be incurred primarily by the incumbent LEC network because most customers will be forwarding numbers from the incumbent to the new entrants.”¹⁹

Some parties have attempted to cloud this issue with the argument that on a per-customer or pro-rata basis these costs would be similar or “in balance” and that the incumbent LEC and the ALEC would be recovering their costs of providing that service. For example, Time Warner’s witness, Mr. McDaniel, while admitting that the incumbent LEC will be porting more numbers than the ALEC, stated that “the proportionate cost to the incumbent LEC and the ALEC will not be noticeably different.” (Tr. p. 360). Other parties attempted to justify the “cost absorption” or each party bears its own costs arrangement by arguing “that the costs that are caused are caused by public policy and that the costs are essentially caused by all consumers in telecommunications services”. (See, Hearing Exhibit 1, Guedel’s deposition testimony at 31). Thus, AT&T argued that the incumbent LEC should “recover those costs in a manner that is competitively neutral and that they do not recover those costs, in essence, by implementing a barrier to competition that we are trying to eliminate.” (Id.). Some of these parties, therefore, argue that a proposal where each carrier bears its own costs, in their view, is not inconsistent with the Florida Statute which requires interim number portability prices and rates to not be set below cost. (See, Hearing Exhibit 1, Guedel’s deposition testimony at p. 31; and See, Hearing Exhibit 7, Kistner’s deposition testimony at pp. 82-83). Other parties, however, were more frank with their assessment that a “bill and

¹⁹ See, FCC First Report and Order at para. 122.

keep” proposition or each carrier bears its own costs does not comply with the Florida Statute. (See, Hearing Exhibit 8, Poag’s deposition testimony at 53; and See, Hearing Exhibit 4, Minard’s deposition testimony at p. 33). In fact, Sprint’s witness, Mr. Poag admitted that in his lay opinion, Sprint’s proposal of roughly splitting the cost of providing RCF for interim number portability does not comply with the express language contained in the Florida Statute. (See, Hearing Exhibit 8, Poag’s deposition transcript at p. 53).

Additionally, Time-Warner’s witness, Mr. McDaniel, in urging support for the cost absorption approach where each carrier pays its own costs of providing temporary number portability, argued that “[t]his approach also gives the incumbent LECs an incentive to move toward permanent number portability, where more of the costs will be shared, and therefore, recovery will also be shared.” (Tr. p. 357). (emphasis added). Not only does BellSouth strenuously disagree with this proposition, but BellSouth would note that it serves as an admission that under a “each carrier pays its own costs” proposal, Time-Warner admits that more of the costs will be borne by the incumbent LEC than the ALEC. Likewise, the FCC in its First Report and Order at paragraph 125 stated that one of the reasons for its adoption of the “competitively neutral” cost recovery principles for interim number portability was to “create incentives for LECs, both incumbents and new entrants, to implement long-term portability at the earliest possible date” FCC’s First Report and Order at paragraph 125. BellSouth contends that such reasoning is not only unfair, but is totally unnecessary since Section 251(b)(2) already imposes the duty upon all telecommunications carriers “to provide to

the extent technically feasible, [permanent] number portability in accordance with the requirements prescribed by the [Federal Communications] Commission.” Section 251(b)(2). Additionally, the FCC’s First Report and Order has mandated an implementation schedule for long-term or permanent number portability beginning in October, 1997. FCC’s First Report and Order at paragraphs 77-82.

Finally, although the discussion of “meet-point billing” was not a specific issue that this Commission requested the parties to address as a part of this proceeding, but rather, was simply an issue MCI’s witness interjected into the discussion of the appropriate cost recovery mechanism, BellSouth will briefly address that issue here since the Commission indicated that “to the extent that it is encompassed within Issue 2, the parties can advocate it if they feel that evidence can support it, and the parties can respond to it in their briefs.” (Tr. p. 399). BellSouth’s witness, Mr. Varner, testified that meet-point billing for access charges for ported calls should be addressed by the parties in the appropriate interconnection negotiations and/or arbitration proceedings. Thus, it is BellSouth’s position that no action is necessary by the Commission with respect to this issue. (Tr. p. 119). In fact, Mr. Varner testified that MCI and BellSouth have already reached agreement on meet-point billing for access charges associated with ported calls. (Tr. p. 119). Thus, BellSouth respectfully urges the Commission to not consider MCI’s introduction of the meet-point billing arrangements for access charges in this docket as being one for consideration in its final decision.

ISSUE NO. 3: Should there be any retroactive application of the Commission’s decision in this proceeding? If so, what should be the effective date?

- * **POSITION:** No. There should not be any retroactive application of any decision in this proceeding. BellSouth respectfully submits that if such actions were taken by the FPSC, they could be in violation of the retroactive ratemaking principles covered in the Florida Statutes (Section 366.06(2)).

BellSouth contends, for several reasons, that the Commission's decision in this proceeding should not have any retroactive application. First, if the Commission decides that it should maintain its current order (Order No. PSC-95-1604-FOF-TP) then, obviously, there would be no need for any retroactive application. Second, almost all of the parties who were asked at the hearing admitted that they had not used remote call forwarding for interim number portability purposes. For example, AT&T's witness stated that AT&T had not entered the market yet. (Tr. p. 61). MCI's witness in response to a question by GTE's lawyer stated that MCI had not yet taken number portability from GTE. (Tr. p. 229). Thus, given that the record reflects little (if any) usage of remote call forwarding for interim number portability purposes in Florida, the question of retroactive application of any decision by this Commission in this proceeding is essentially a moot point. Third, most of the parties agree that there should not be any retroactive application of the Commission's decision in this proceeding.²⁰ MFS and Time Warner both took the position that it is permissible for the Commission to apply its decision retroactively, however, MFS indicated that the Commission will need to resolve the effect of such action under Florida law and Time Warner stated that if the Commission is concerned about retroactive ratemaking, then the date of the Final Order after this

²⁰ AT&T, BMI, BellSouth, FCTA, GTE, InterMedia, and Sprint-United/Centel, all take the position that there should not be any retroactive application of the Commission's decision in this proceeding. See, Prehearing Order (Order No. PSC-96-1377-PHO-TP) issued November 19, 1996 in this docket.

hearing is a reasonable effective date.²¹ Both the Staff and AT&T Wireless stated that they had no position at this time.²² MCI was the only party to argue that the Commission's decision in this proceeding should be retroactively applied to the release date of the FCC Order (July 2, 1996).²³ However, after questions by Commissioner Kiesling and Chairman Clark, MCI's witness clarified her testimony that her word "should" was not a "must", but simply a recommendation. (Tr. pp. 246-249).

Finally, and perhaps most importantly, BellSouth contends that if the Commission were to apply its decision in this proceeding retroactively, then such action could constitute prohibited retroactive rate-making under Florida law. Specifically, Section 366.06(2), Florida Statutes, essentially requires that whenever the Commission establishes rates, it shall do so prospectively. Section 366.06(2) states, in pertinent part, as follows:

"[T]he commission shall order and hold a public hearing, giving notice to the public and to the public utility, and shall thereafter determine just and reasonable rates to be thereafter charged for such service and promulgate rules and regulations effecting equipment, facilities, and service to be thereafter installed, furnished, and used."

Section 366.06(2), Florida Statutes (emphasis added). See also, Miami v. Florida Public Service Commission, 208 So.2d 249, 260 (FL. 1968)(discussion of statutory prohibition of retroactive ratemaking). Moreover, there is no express power conveyed by Congress to the FCC to promulgate retroactive rules pursuant to the Act. See generally, Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988)(statutory grant

²¹ See, Prehearing Order (Order No. PSC-96-1377-PHO-TP) issued November 19, 1996 in this docket.

²² Id.

²³ Id.

of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms). Since Congress did not instruct the FCC to make any rule promulgated in connection with the Act apply retroactively, the FPSC should not do so here.

As BellSouth witness, Mr. Varner, stated it seems clear that if the Commission were to find that it must reconsider the interim number portability rates it established in its December 28, 1995 decision (Order No. PSC-95-1604-FOF-TP), then any resulting rate adjustments would need to be implemented on a going-forward (or "thereafter") basis. (Tr. p. 111).

CONCLUSION

BellSouth respectfully submits that the Commission's Order No. PSC-95-1604-FOF-TP appropriately established the cost recovery mechanism to be used for temporary or interim number portability in Florida. The FCC's July 2, 1996, First Report and Order on number portability, in BellSouth's opinion, is fundamentally flawed as shown hereinabove in that the guidelines for establishing cost recovery for interim number portability would require the incumbent LEC to price interim number portability at confiscatory levels in violation of the Fifth and Fourteenth Amendments to the Constitutions of the United States and of Florida. Additionally, the pricing proposals submitted by the other parties to this proceeding, reportedly in reliance on the FCC's First Report and Order, would violate Section 364.16(4), Florida Statutes, which requires that the rates for temporary number portability shall not be set below cost.

Finally, BellSouth submits that, if the Commission were to make changes to the cost recovery mechanism or rates established in its Order No. PSC-95-1604-FOF-TP, that the Commission should not retroactively apply the FCC's decision to this proceeding. In BellSouth's opinion, if such actions were taken by the Commission, they could be in violation of the retroactive ratemaking principles covered in the Florida Statutes (Section 366.06(2)).

The Commission should reject the self-serving positions now being taken by the Alternative Local Exchange Companies, based upon the FCC's First Report and Order, and instead, for the reasons set forth hereinabove, the Commission should maintain its Order No. PSC-95-1604-FOF-TP until such time as the solution for permanent number portability can be implemented.

Respectively submitted this sixth day of January, 1997.

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