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June 10, 2004

Mrs. Blanca S. Bayó
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Tallahassee, FL 32399-0850

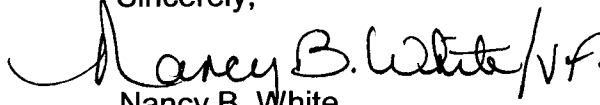
Re: Docket No. 001503-TP (Number Pooling Trials)

Dear Ms. Bayó:

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

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

Sincerely,


Nancy B. White

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey

CERTIFICATE OF SERVICE
Docket No. 001503-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and First Class U. S. Mail this 10th day of June, 2004 to the following:

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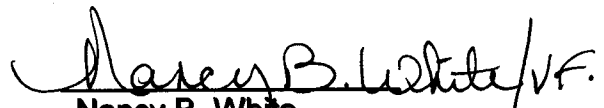
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Nancy B. White

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Cost recovery and) Docket No. 001503-TP
allocation issues for number)
pooling trials in Florida) Filed: June 10, 2004

BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. (“BellSouth”) respectfully submits this brief in support of its positions on the issues identified by the Prehearing Officer in Attachment A to Order No. PSC-04-0056-PCO-TP.

INTRODUCTION AND SUMMARY

BellSouth supports the mechanism for thousand-block number pooling cost recovery described by this Commission in Order No. PSC-03-1096-PAA-TP (Notice of Proposed Agency Action Order Granting in Part BellSouth’s Petition for Cost Recovery). This Commission’s cost recovery proposal is consistent with federal law, specifically section 251(e)(2) of the Telecommunications Act of 1996 (“Telecommunications Act”) and relevant orders of the Federal Communications Commission (“FCC”).

Federal law governs this Commission’s determinations concerning cost recovery for pooling trials. As the FCC noted in Order No. 00-104 (March 31, 2000), section 251(e) of the Telecommunications Act grants the FCC plenary jurisdiction over the North American Numbering Plan (NANP) and related telephone numbering issues. In Order No. 99-249 (September 15, 1999), the FCC conditionally granted delegated authority to this Commission to conduct mandatory thousands-block number pooling trials in Florida. That Order also required the Commission to “determine the method to recover the costs of the pooling trials.” FCC Order No. 99-249 at ¶ 17. In FCC Order No. 01-362 (December 28, 2001), the FCC reiterated that

states such as Florida that have conducted pooling trials must establish cost recovery mechanisms for costs incurred by carriers participating in those trials. That Order, which primarily addressed federal cost recovery for national thousands-block number pooling, also detailed a three-prong test to determine whether number pooling costs can be recovered by carriers.

This Commission carefully followed and applied the FCC's tests for cost recovery in Order No. PSC-03-1096-PAA-TP, the Notice of Proposed Agency Action, and determined that certain of BellSouth's costs in implementing number pooling are the types of extraordinary costs that BellSouth is entitled to recover. Because the proposed mechanism for cost recovery detailed in that Order is consistent with governing federal law, this Commission should enter a Final Order granting BellSouth's petition in part, as described in the Notice of Proposed Agency Action.

STATEMENT OF FACTS

In April of 1999, this Commission filed a petition with the FCC seeking a grant of authority to implement various area code conservation measures within Florida. FCC Order No. 99-249 at ¶ 1. Although the FCC did not approve all of the Commission's requests, the FCC did direct Florida to conduct mandatory thousands-block number pooling trials.¹ *Id.* at ¶ 13. In delegating this authority to Florida, the FCC was careful to note that the delegation was temporary and that Florida was required to follow appropriate federal guidelines. *See* FCC Order 99-249 at ¶¶ 5-7:

¹ As this Commission explained in Order No. PSC-03-1096-PAA-TP, thousands-block number pooling is the process by which telephone companies share a pool of telephone numbers that have the same central office code. Telephone numbers historically were assigned to service providers in blocks of 10,000 numbers. With thousands-block number pooling, phone numbers can be allocated in blocks of 1,000. The 1,000-block allocation conserves numbers and provides for the more efficient use of numbers. Order No. PSC-03-1096-PAA-TP at ¶ 2.

We recognize that the area code situation in Florida is critical, with nine new area codes having been added since 1995, six of which may already be in jeopardy. In light of this extreme situation and in order to empower the Florida Commission to take steps to make number utilization more efficient, we herein grant significant additional authority to the Florida Commission. . . .

Although we grant the Florida Commission interim authority to institute many of the optimization measures in the Petition, we do so subject to the caveat that this grant will be superseded by forthcoming decisions in the *Numbering Resource Optimization Proceeding* that will establish national guidelines, standards, and procedures for numbering optimization. . . .

Thus, while we grant authority below to the Florida Commission to engage in various matters related to administration of the NANP in Florida, we require the Florida Commission to abide by the same general requirements that this Commission has imposed on the numbering administrator.

(Footnotes omitted).²

The FCC also required the Florida Commission to determine the method to recover the costs of the pooling trial, reasoning:

The Florida Commission must also determine how carrier-specific costs directly related to pooling administration should be recovered. The Commission [FCC] has tentatively concluded that thousands-block number pooling is a numbering administration function, and that section 251(e)(2) authorizes the Commission to provide the distribution and recovery mechanisms for the interstate and intrastate costs of number pooling. We conclude that inasmuch as we are hereby delegating numbering administration authority to the Florida Commission, the Florida Commission must abide by the same statute applicable to this Commission, and therefore, ensure that costs of number pooling are recovered in a competitively neutral manner.

Id. at ¶ 17 (emphasis supplied) (footnotes omitted).

After receiving delegated authority from the FCC, this Commission “has taken an aggressive approach to number conservation policies, in particular number pooling, which is providing great benefits.” Order No. PSC-03-1096-PAA-TP at 3. Thousands-block number pooling was ordered by this Commission on March 16, 2000. *See* Order No. PSC-00-0543-

² The FCC also directed the Florida Commission to conduct its pooling trials in accordance with industry-adopted thousands-block pooling guidelines. FCC Order No. 99-249 at ¶ 13.

PAA-TP. Numerous carriers protested the Order, but ultimately filed an Offer of Settlement with this Commission, which addressed the need for number pooling cost recovery. *See* Joint Petitioners' Offer of Settlement to Resolve the Number Pooling Implementation Protest of Order No. PSC-00-0543-PAA-TP (attached to Order No. PSC-00-1046-PAA-TP, May 30, 2000). The Offer of Settlement proposed that this Commission open a docket to address cost recovery associated with number pooling, an offer that was accepted by this Commission in Order No. PSC-00-1046-PAA-TP. The Commission stated:

[O]n March 31, 1999,³ the FCC issued a Report and Order and Further Notice of Proposed Rule Making regarding Number Resource Optimization. FCC Order 00-104. In this Order, the FCC addressed issues pertaining to cost recovery and required state commissions to resolve this issue on a competitively neutral basis. In addition, the FCC identified the types of costs that should be attributed to the implementation of number pooling. The Offer of Settlement states that as long as we acknowledge an obligation to review the issues pertaining to cost recovery, the Joint Petitioners would be able to start pooling trials in Florida. Thus, we acknowledge the FCC's rules and orders requiring the Commission to resolve any matters related to cost recovery under the federal law and agree to open a docket to address this issue. We emphasize that this procedure would have been followed regardless of the Offer of Settlement.

Order No. PSC-00-1046-PAA-TP at 15 (emphasis supplied).

The FCC continued to emphasize in orders subsequent to the 1999 delegation of authority to Florida that "states conducting their own pooling trials must develop their own cost recovery scheme for the joint and carrier-specific costs of implementing and administering pooling" and that "[c]osts incurred by carriers to implement state-mandated thousands-block number pooling are intrastate costs and should be attributed solely to the state jurisdiction." FCC Order No. 00-104 at ¶¶ 171 and 197.

The Commission opened this docket (No. 001503-TP) on September 29, 2000, to address number pooling cost recovery. A workshop was held on December 12, 2000, and post

³ The correct date is March 21, 2000, not 1999.

workshop comments were filed. *See* PSC-03-1096-PAA-TP at 6 (summarizing workshop comments). Meanwhile, the FCC continued to gather data relating to establishment of a federal mechanism for thousands-block number pooling cost recovery, and this Commission submitted comments to the FCC as part of that process. *Id.* One argument of this Commission in its comments was that the FCC should give state commissions the option to defer state-mandated thousands-block number pooling cost recovery until national thousands-block number pooling could be implemented and a federal cost recovery mechanism could be put in place. *Id.*

The FCC rejected the Commission's suggestion in FCC Order No. 01-362, emphasizing again that states that have conducted pooling trials must establish cost recovery mechanisms for costs incurred by carriers participating in those trials. FCC Order No. 01-362 at ¶ 25. The FCC also rejected this Commission's argument that state costs should be combined with national costs and that all thousands-block number pooling costs should be recovered in the federal jurisdiction. *Id.* at ¶ 28. The FCC reasoned:

Development and implementation of state cost recovery is necessary to ensure that carriers recover the costs of advance implementation of thousands-block number pooling attributable to the state jurisdiction. These individual recovery schemes will transition to the national cost recovery plan, on a forward-looking basis, when the latter becomes effective. Some commentators complain that no states have established cost recovery mechanisms at the state level and that states generally have been reluctant to do so. Some argue that state costs should be folded into national costs and all thousands-block number pooling costs should be recovered in the federal jurisdiction.

We decline to revisit the Commission's prior determination on this issue. We expressly reject SBC's proposal to include its state pooling costs in the federal recovery mechanism; we believe that the entire nation should not be required to bear costs incurred for the benefit of a particular state. . . .

We now direct states that have exercised delegated authority and implemented thousands-block number pooling to likewise commence cost recovery procedures for these state-specific costs. We agree with BellSouth that any state that has ordered implementation of pooling in advance of the national rollout is required to implement a cost recovery scheme.

Id. at ¶¶ 26, 27, and 28 (emphasis supplied) (footnotes omitted).

This Commission issued an order on April 5, 2002, stating that carriers would have the opportunity to seek recovery of costs associated with state-mandated pooling trials. *See* Order No. PSC-020-0466-PAA-TP. On August 5, 2002, BellSouth filed its Petition for Cost Recovery of its carrier-specific costs in the amount of \$3,506,844. On September 30, 2002, Sprint Florida, Inc. (“Sprint”) filed a petition for recovery of its carrier-specific costs in the amount of \$1,515,000. *See* PSC-03-1270-PAA-TP. The Commission entered its Notice of Proposed Agency Action Order Granting In Part BellSouth’s Petition for Cost Recovery on October 2, 2003. The Commission’s Notice of Proposed Agency Action Order Approving Sprint’s Petition for Cost Recovery was entered on November 10, 2003.⁴

The Office of Public Counsel (OPC) filed its protest of Order No. PSC-03-1096-PAA-TP on October 22, 2003. OPC filed its protest of Order No. PSC-03-1270-PAA-TP on November 26, 2003. Pursuant to the request of OPC, the protests were scheduled for an administrative hearing pursuant to section 120.57(1), Florida Statutes, on May 24 and 25, 2004. *See* Order No. PSC-04-0395-PCO-TP at 1-2.

The Commission issued an Order Establishing Procedure in this docket on January 20, 2004, which included a list of tentative issues at Attachment A. *See* Order No. PSC-04-0056-PCO-TP. On February 4, 2004, BellSouth, Sprint, and OPC filed a Joint Stipulation of the Record and Notice of Intent by BellSouth stipulating to the documents to be included in the

⁴ The Notices of Proposed Agency Action disallowed salaried labor costs sought to be recovered by both BellSouth and by Sprint based on a determination that those costs did not meet one prong of the FCC’s three-prong test for cost recovery articulated in FCC Order No. 01-362. The Commission found that BellSouth should be allowed to recover \$2,970,762 in carrier-specific costs and that Sprint should be allowed to recover \$627,734 in carrier-specific costs. *See* PSC-03-1096-PAA-TP at 19 and PSC-03-1270-PAA-TP at 17-18.

record in this docket. These parties also filed a Joint Motion to Amend Procedural Schedule requesting that this docket be treated in accordance with section 120.57(2), Florida Statutes, and that scheduled filing dates, prehearing, and hearing dates be eliminated. In response to those motions, the Commission entered an order on April 14, 2004, agreeing that development of a record through a hearing is unnecessary and directing that briefs addressing the issues identified in Attachment A to Order No. PSC-04-0056-PCO-TP be filed by June 10, 2004. See Order No. PSC-04-0395-PCO-TP.

ISSUES AND POSITIONS

BellSouth addresses each issue identified in Attachment A to Order No. PSC-04-0056-PCO-TP in succinct position statements. As the issues are somewhat interrelated, BellSouth puts forth its Argument on these issues in a separate section of this brief.

Issue 1: May BellSouth and Sprint recover costs for state-mandated number pooling via a mechanism separate and apart from and in addition to the rate and revenue increases to basic and non-basic service implemented since January 1, 2000?

Position: Yes. The FCC delegated to this Commission the authority to conduct mandatory thousands-block number pooling trials in Florida and required that this Commission establish cost recovery mechanisms for costs incurred by carriers participating in such trials. Cost-recovery for state-mandated pooling is authorized by section 251(e)(2) of the Telecommunications Act of 1996, FCC Order No. 99-249, FCC Order No. 00-104, and FCC Order No. 01-362. This Commission is required to follow federal law in permitting cost recovery because section 364.051, Florida Statutes, is superseded by applicable federal law on the subject.

Issue 2: What is the basis of authority under which the Florida Public Service Commission allowed BellSouth and Sprint to recover the costs of number pooling and to do so through a separate end-user charge?

Position: Cost-recovery for state-mandated pooling is authorized by section 251(e)(2) of the Telecommunications Act of 1996, FCC Order No. 99-249, FCC Order No. 00-104, and FCC Order No. 01-362. All customers benefit from extending the life of area codes; therefore, all customers should share in the costs of number pooling. The FCC mandates the recovery of extraordinary costs associated with number pooling trials, and a separate end-user charge is authorized by FCC precedent. In addition, as noted by this Commission in its Notice of

Proposed Agency Action, sections 364.01(4)(a) and 364.16(4), Florida Statutes, generally provide this Commission with authority to carry out the FCC's delegated authority.

Issue 3: Is the manner by which the Florida Public Service Commission allowed BellSouth and Sprint to recover the costs of number pooling consistent with FCC policy and decisions?

Position: Yes. This Commission followed the requirements of FCC Order No. 01-362 and other FCC orders in establishing its proposed cost-recovery mechanism. Specifically, the Commission permitted recovery of only those costs that would not have been incurred "but for" number pooling and that were incurred "for the provision of" number pooling. Additionally, only "new" costs were deemed eligible for recovery. The Commission abided by the FCC's interpretations in Order No. 01-362 of the "but for" and "for the provision of" tests, as well as the FCC's interpretation of what constitutes "new" costs. Moreover, the end-user charge proposed by this Commission is consistent with FCC precedent.

ARGUMENT

I. Federal law governs this Commission's determination of cost recovery for pooling trials.

Congress has made clear that it intends for the FCC to have exclusive jurisdiction to administer telecommunications numbering with the purpose of making such numbers available on an equitable basis and to conserve numbering resources. 47 U.S.C. § 251(e)(1). The Telecommunications Act also provides that the FCC has exclusive authority concerning the costs of numbering administration arrangements. 47 U.S.C. § 251(e)(2). The statute states that the "cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the [FCC]." *Id.*

Congress unquestionably has power under the United States Constitution to preempt state law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (citations omitted) (finding that Massachusetts' Burma law was an obstacle to the accomplishment of Congress' full objectives in conducting business with Burma). Even without an express provision for

preemption, the United States Supreme Court has found that state law must yield to a congressional act in at least two circumstances:

When Congress intends federal law to “occupy the field,” state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute. [The court] will find preemption where it is impossible for a private party to comply with both state and federal law, and where “under the circumstances of [a] particular case, [challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objections of Congress.” What is a sufficient obstacle is a matter of judgment to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”

Crosby, 530 U.S. at 372 (internal citations omitted); *See also Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (stating that the question of whether Federal law supercedes state law depends upon whether the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

A. Federal law has preempted the field of administration of telecommunications numbering, but the FCC may delegate authority to states.

The Supreme Court has stated that “the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities.” *FERC v. Miss.*, 456 U.S. 742, 764 (1982). Although the FCC is given “exclusive jurisdiction” concerning telecommunications numbering, section 251(e)(1) of the Telecommunications Act provides that the FCC may delegate authority to state commissions to administer telephone numbering.⁵

⁵ Section 251 (e)(1) states:

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

Congress has authorized the FCC to delegate its authority under section 251(e) and establish requirements for continued state activity in the otherwise preempted field of number pooling. The FCC has allowed various states, including Florida, to administer their own regulatory programs, structured to meet their own particular needs, regarding number pooling and cost recovery. *Cf. FERC v. Mississippi*, 456 U.S. at 769 (Court found that Titles I and III of the Public Utility Regulatory Policies Act established requirements for continued state activity in an otherwise pre-emptible field).

B. The Florida PSC has state legislative authority to request and accept delegation of authority regarding number pooling trials.

As noted in the Statement of Facts, in 1999 this Commission petitioned the FCC for certain authority relating to area code conservation. Recognizing the critical need for number conservation, the FCC delegated limited authority to the Florida Commission to conduct mandatory thousands-block number pooling trials in Florida. FCC Order No. 99-249 at ¶ 13. The FCC also required that the Florida Commission determine a method to recover the costs of the number pooling trials. *Id.* at ¶ 17. Thus, pursuant to the Telecommunications Act and Order No. FCC 99-249, the Florida Commission has been delegated authority to act under federal law regarding those telephone numbering issues delineated in FCC Order No. 99-249.

Florida Statutes provide this Commission with general authority over telephone numbering policies, and provide a basis for the Commission to request delegation from the FCC. As this Commission stated in its Notice of Proposed Agency Action relating to BellSouth's cost recovery:

[T]he state law authority over numbering policies is granted through Sections 364.01(4)(a), and 364.16(14), *[sic]* Florida Statutes. Section 364.01(4)(a) provides:

The Commission shall exercise its exclusive jurisdiction in order to:

(a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.

Having an adequate supply of numbers available for the provision of telecommunications service is essential to ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.

Section 364.16(4), Florida Statutes provides:

In order to assure that consumers have access to different local exchange service providers without being disadvantaged, deterred, or inconvenienced by having to give up the consumer's existing local telephone number, all providers of local exchange services must have access to local telephone numbering resources and assignments on equitable terms that include a recognition of the scarcity of such resources and are in accordance with national assignment guidelines.

Section 364.16(4), Florida Statutes, acknowledges the importance of numbering issues. This section provides for local number portability because of the scarcity of numbering resources and the need to protect and make available to all local providers, access to number resources. Thus, it appears clear from this language that we are charged with ensuring the scarce numbering resources in Florida are protected in accordance with the national assignment guidelines.

Order No. PSC-03-1096-PAA-TP at 11. This state statutory authority enables the Commission to act pursuant to the delegated authority from the FCC. *See Ocampo v. Florida Dep't of Health*, 806 So. 2d 633, 634 (Fla. 1st DCA 2002) ("An agency can only do what it is authorized to do by the Legislature.") (internal citations omitted).

C. Because the FCC's delegation requires this Commission to carry out and comply with federal law relating to cost recovery for number pooling, state law relating to price regulation is irrelevant.

The FCC's orders relating to cost recovery for number pooling direct this Commission to permit such recovery based on federal law. *See, e.g.*, FCC Order No. 00-104 (requiring cost recovery to be handled on a competitively neutral basis and identifying the types of costs that

should be attributed to the implementation of number pooling); FCC Order No. 01-362 at ¶ 28 (“In our orders delegating authority to the state commissions to institute thousands-block number pooling trials, we have reminded the states to ensure that the shared costs of thousands-block number pooling are borne and that the carrier-specific costs of thousands-block number pooling are recovered on a competitively neutral basis in accordance with Section 251(e)2 . . . ”). Without the delegation of authority by the FCC, this Commission has no authority to act regarding number pooling. Therefore, the Commission’s actions must be consistent with the delegation or its actions would be ultra vires.

This Commission has also acknowledged that federal law controls decisions concerning number pooling cost recovery. *See* Order No. PSC-00-1046-PAA-TP at 15 (“[W]e acknowledge the FCC’s rules and orders requiring the Commission to resolve any matters related to cost recovery under the federal law and agree to open a docket to address this issue.”).

Because federal law controls, section 364.051 relating to price regulation is irrelevant to this proceeding. With respect to number pooling trials and associated cost recovery, Congress and the FCC have provided authority that preempts section 364.051.⁶ Such preemption does not invalidate the state statute; rather, BellSouth must comply with Florida law unless, as in this case, the federal government has provided authority to the contrary. *See Phillips v. General Finance Corp. of Fla.*, 297 So. 2d 6, 8 (Fla. 1974).

⁶ The end-user charge for number pooling is neither a charge for a basic nor a charge for a non-basic service; rather, it is a charge, as authorized by Congress and the FCC, for the costs associated with implementing a federal program. Nonetheless, because section 364.051 is preempted by federal law in this case, the issue of whether the end-user charge for number pooling would constitute a basic service or non-basic service pursuant to section 364.051 is irrelevant. Likewise, the Florida Supreme Court’s holding in *BellSouth Telecommunications, Inc. v. Jacobs*, 834 So. 3d 855 (Fla. 2002) (addressing the definition of nonbasic service and the procedures that must be followed to increase charges for nonbasic services), is not relevant to this proceeding. *Jacobs* did not involve a situation where a Florida statute was preempted by federal authority. *Id.*

Another reason that section 364.051 is preempted is because application of section 364.051 to these proceedings would frustrate the intent of federal law and the intent of the relevant FCC Orders, which is to allow carriers who participate in number conservation efforts to recover their extraordinary costs. *See Phillips*, 297 So. 2d at 8 (“Where there is conflict with the federal law, the test in determining whether the state law has been superseded by the federal law is whether the state law frustrates the operation of the federal law and prevents the accomplishment of its purpose.”). Reliance on section 364.051 as a basis for preventing the recovery of extraordinary costs, as defined by the FCC in its orders and applied to BellSouth’s petition by this Commission, would frustrate the operation of federal law. Thus, section 364.051 is preempted by federal law and cannot serve as a basis for prohibiting cost recovery.

II. The Florida Commission followed federal law and FCC orders in authorizing cost recovery through an end-user charge.

In its Order authorizing carriers to file petitions for thousands-block number pooling cost recovery, this Commission clearly announced its intention to follow federal law in determining whether cost recovery would be allowed. *See* Order No. PSC-02-0466-PAA-TP at 8 (“We find that the following criteria, established by the FCC for national pooling cost recovery, shall also be adhered to by carriers petitioning for recovery of state number pooling trial costs” . . .).⁷ In explaining the FCC criteria, this Commission analyzed FCC Order Nos. 00-104, 00-429, and, in particular, 01-362. This Commission noted, as had the FCC in Order No. 01-362 at ¶ 25, that “many of the costs associated with thousands-block number pooling are ordinary costs for which no additional or special recovery is appropriate.” Order No. PSC-02-0466-PAA-TP at 6. For

⁷ This Commission noted that the FCC in Order No. 01-362 invited states to “use the blueprint for cost recovery outlined in Order No. FCC 01-362 and previous orders on national pooling cost recovery.” Order No. PSC-02-0466-PAA-TP at 6.

those extraordinary costs that are recoverable, the Commission stated that the FCC criteria would apply. *Id.* at 8.

A. Recovery is limited to those costs that meet the three-prong test.

The FCC has detailed a three-prong test to determine whether number pooling costs are recoverable:

First, only costs that would not have been incurred “but for” thousands-block number pooling are eligible for recovery. Second, only costs incurred for the provision of thousands-block number pooling are eligible for recovery. Finally, only “new” costs are eligible for recovery. To be eligible for extraordinary recovery, carriers’ thousands-block number pooling shared industry and carrier-specific costs directly related to thousands-block number pooling must satisfy all three of these criteria.

FCC Order No. 01-362 ¶ 43.

Applying this test and other language from FCC Order No. 01-362, this Commission advised carriers that in order to recover costs for thousands-block number pooling, a carrier must demonstrate the following:

- Pooling results in a net cost increase rather than a cost reduction. A carrier’s costs must exceed the costs that would have been incurred had the carrier engaged in area code split, overlay or other numbering relief that would have been required in the absence of pooling.
- Costs were incurred “for the provision of” thousands block number pooling. These must also be costs that would not have been incurred “but for” thousands-block number pooling, which means that only the demonstrably incremental costs of thousands-block number pooling may be recovered.
- Thousands-block number pooling costs are “new” costs in that they had to have been incurred after the implementation of thousands-block number pooling.
- Costs are Florida-specific costs not related to national number pooling.
- Costs are recoverable on a competitively neutral basis.

Order No. PSC-02-0466-PAA-TP at 8-10.

B. The Commission correctly determined that certain BellSouth costs meet the three-prong test.

BellSouth's petition for cost recovery, filed August 5, 2002, included the following statements:

- Costs are associated with state-mandated pooling trials in area codes 305 (Keys region only), 561, 904, and 954;
- Costs included in the petition were not included in the regional study, which relates to national number pooling cost recovery;
- Cost categories include Network Capital and Expenses, Employee Related, and Number Portability Administrative Center (NeuStar) expenses;
- Cost methodology used is the total direct long-run incremental costs plus a reasonable allocation of shared and common costs (covering years 2000, 2001, and 2002); and
- Present Value calculations are based on an 11.25 percent after-tax return rate, which has been used in FCC filings.

Order No. PSC-03-1096-PAA-TP at 14-15; *see also* BellSouth Telecommunications, Inc.'s Petition for Cost Recovery, Cost Development attachment at 1. BellSouth also showed in its petition that it had saved \$416,990 by postponing area code relief through number pooling, and this savings was deducted from the total costs requested, as required by the FCC. *See* BellSouth Telecommunications, Inc.'s Petition for Cost Recovery (attachment entitled Sum of TNP Cost Study Results); Order No. PSC-03-1096-PAA-TP at 15.

In considering the amount of costs to be recovered by BellSouth, this Commission paid close attention to FCC orders relating to the circumstances under which carriers may recover costs for thousands-block number pooling trials. The Commission again referenced the FCC's three-prong test for cost recovery outlined in FCC Order No. 01-362. Order No. PSC-03-1096-PAA-TP at 13. The Commission went on to explain, as it had in Order No. PSC-02-0466-PAA-TP, that the FCC has interpreted the first two criteria, the "but for" test and the "for the provision

of’ test, to mean that only demonstrably incremental costs of thousands-block number pooling may be recovered. *Id.* at 14, citing FCC Order No. 01-362 at ¶ 44. Moreover, the Commission noted that for costs to be “new,” they must be incurred after the implementation of thousands-block number pooling. *Id.*, citing FCC Order No. 01-362 at ¶ 46.

Applying these criteria, the Commission disallowed \$536,082 of BellSouth’s salaried labor costs because they were found not to be “incremental costs” and would have been incurred whether these salaried employees were working on number pooling or on something else. Order No. PSC-03-1096-PAA-TP at 15. The Commission stated:

It is our opinion that BellSouth uses BAC specialists to perform not only duties related to BellSouth’s central offices, but also duties related to NPAC. Since these employees are regular salaried employees of BellSouth, we do not find that BellSouth is entitled for recovery. We find that we need not provide a special cost recovery mechanism for salaried employees. We find that this treatment of the costs is inconsistent with the requirements of the FCC

We find that BellSouth’s salaried labor costs have failed to meet the “but for” prong of the “three prong” test set forth in Order No. FCC 01-362 and incorporated in Order No. PSC-02-0466-PAA-TP.

Id. at 16-17 (emphasis supplied). The Commission also found that the salaried labor costs were not “new” costs and that allowing the costs to be recovered would result in “double recovery” for BellSouth. *Id.* at 18.

The Commission found that \$66,817 of BellSouth’s contracted labor costs did satisfy the FCC criteria for cost recovery, as did BellSouth’s remaining carrier specific costs. Thus, the Commission proposed that BellSouth be permitted to recover \$2,970,762 in costs for state-mandated thousands-block number pooling trials. *Id.* at 19.

This Commission’s order proposing that BellSouth recover \$2,970,762 in costs demonstrates careful adherence to the criteria outlined by the FCC for state-mandated thousands-

block number pooling trials. Consistent with FCC criteria, the Commission determined that certain of BellSouth's costs are of the extraordinary type that carriers are entitled to recover.⁸

C. The recovery of costs through an end-user charge is consistent with FCC orders.

The FCC's Order delegating authority to the Florida Commission to institute thousands-block number pooling trials directed this Commission to the FCC's recently released *Telephone Number Portability Order* [FCC Order No. 98-82] and the *Numbering Resource Optimization Notice* [FCC Order No. 99-122] for guidance as to the categories of costs involved in thousands-block pooling implementation and the appropriate mechanism for cost recovery. FCC Order No. 99-249 at ¶ 17. The FCC later issued Order No. 01-362, which provided further guidance on categories of costs involved in thousands-block number pooling and for which cost recovery must be provided. That order adopted the three-prong test outlined above and followed by this Commission.

The FCC's Order on *Telephone Number Portability* provides the guidance this Commission followed in authorizing a one-time end-user charge to recover extraordinary carrier-specific costs directly related to the number pooling trials. See FCC Order No. 98-82 at ¶ 135 (authorizing end-user charges to recover carrier specific costs directly related to providing number portability). In the *Telephone Number Portability Order*, the FCC noted that consumers are sensitive to end-user charges; however, the FCC concluded that "allowing carriers to recover number portability costs in this manner will best serve the goals of the statute." FCC Order No. 98-82 ¶¶ 10 & 135. The FCC anticipated "that the benefits of number portability, namely the

⁸ Although BellSouth sought recovery of more costs than the Commission proposed be recovered, BellSouth accepts the Commission's application of the FCC criteria.

increased choice and lower prices that result from the competition that number portability helps make possible, will far outweigh the initial costs.” *Id.* at ¶ 10.

The FCC’s rationale in the *Telephone Number Portability Order* is directly applicable to the current proceeding. Allowing BellSouth to recover costs directly related to number pooling trials will best serve the goals of making telecommunications numbers available on an equitable basis and conserving numbering resources. Furthermore, as noted by the FCC, “[c]onsistent with our [the FCC’s] treatment of cost recovery in the *Telephone Number Portability* proceeding, we believe that even those carriers that cannot participate in pooling at this time will benefit from the more efficient use of numbering resources that pooling will facilitate.” FCC Order. No. 99-249 ¶ 17. As this Commission stated:

We agree with the FCC position that all subscribers will benefit from number pooling. Order FCC 01-362 states:

. . . all carriers and subscribers will benefit from national thousands-block number pooling to the extent that it postpones or avoids area code relief and ultimately the replacement of the existing NANP.

Order No. PSC-03-1096-PAA-TP at 19.

D. OPC’s argument that section 364.051 prohibits cost recovery is erroneous.

OPC has argued that section 364.051, Florida Statutes, which sets forth the limited circumstances under which local exchange telecommunications companies may increase their rates, prohibits BellSouth from obtaining cost recovery for its participation in state-mandated pooling trials. *See* Post-workshop comments filed by OPC (“OPC’s Comments”) (February 16, 2001). OPC argues that “[t]here is nothing unique about number pooling costs” and that the costs of conducting number pooling trials should be no exception to the inability of companies to “pass through each of their costs as special surcharges to local rates.” *Id.* OPC contends that if

BellSouth believes that it is not recovering its costs of providing telephone services, BellSouth must comply with section 364.051(4) to request an increase in local rates. *Id.*

OPC's argument is contrary to the FCC's analysis of the extraordinary costs of thousands-block number pooling that the FCC says carriers are entitled to recover. *See* FCC Order No. 01-362 at ¶ 43 (discussing the three-prong test under which carriers may recover extraordinary costs). This Commission cannot simply ignore this controlling federal law on cost recovery as OPC proposes.

This Commission recognized in its Notice of Proposed Agency Action concerning BellSouth's petition that under the federal three-prong test, only BellSouth's extraordinary costs may be recovered, not costs already included in the cost of service. The Commission carefully explained why certain salaried labor costs of BellSouth did not meet the federal tests, and thus, recovery of those costs should not be allowed.

Under the theory put forth by OPC, any FCC-authorized surcharge or cost-recovery mechanism would be subjected to the state-law requirements of section 364.051, regardless of whether federal law occupied the field of regulation. In this case, the FCC has narrowly delegated authority to this Commission to conduct number pooling trials and to provide a mechanism for cost recovery. As noted, this delegation is pursuant to federal law and federal law controls this Commission's action. Section 364.051 is preempted and is irrelevant to these proceedings.

III. This Commission should follow North Carolina's approach to cost recovery.

Other states have recently considered cost recovery petitions for thousands-block number pooling trials. Since this Commission issued Order No. PSC-03-1096-PAA-TP, the North Carolina Utilities Commission has acted on BellSouth's petition for cost recovery (referenced as

pending in Order No. PSC-03-1096-PAA-TP). *See* Docket No. P-100, N.C. Utilities Commission Order dated February 26, 2004 (stating “one-time surcharges recommended by BellSouth which allow for its recovery of costs associated with the implementation of thousands-block number pooling trials in North Carolina should be approved”). The North Carolina Utilities Commission used the FCC’s three-prong test in determining which cost could be recovered, finding as follows:

After careful consideration, the Commission believes that the one-time surcharges recommended by BellSouth which allow for its recovery of costs associated with the implementation of thousands-block number pooling trials in North Carolina should be approved. . . . As reflected in BellSouth’s cost information as filed, expenditures were categorically made for the advancement of switch generics, number pooling software, and number pooling administrative expenses. These costs and expenses must meet the criteria of the ‘LNP-three prong test’ . . . to insure an accurate and reasonable representation of cost directly attributable to the state mandated thousands-block number pooling trials.

Id. at 4-5.

Additionally, in compliance with FCC direction and using the FCC Order on *Telephone Number Portability* as a guide, the North Carolina Commission allowed BellSouth to recover costs through a one-time end user charge. *Id.* at 5.

The North Carolina approach is persuasive because it is a decision that followed FCC Order No. 01-362, which required states to implement a cost recovery mechanism separate from the national mechanism. Moreover, the order specifically references how the parameters of the FCC’s delegation on state pooling trials are satisfied. *Id.*

Decisions of the Michigan Public Service Commission and the Arizona Corporation Commission, on the other hand, are not in compliance with FCC requirements. *See* Case No. U-13086, Mich. Public Service Commission Order, November 20, 2001; Decision No. 63982, Arizona Corporation Commission, August 30, 2001. Both orders precede FCC Order No. 01-

362. Moreover, the orders provide only conclusory statements and no analysis regarding compliance with FCC requirements relating to cost recovery. In both cases, the orders simply conclude that carrier-specific costs are a cost of doing business and that no special cost recovery mechanism is required. Michigan further concludes that it has met the requirements of FCC orders because treating these costs as a cost of doing business is competitively neutral. Mich. Case No. U-13066 at 4 (November 20, 2001).

The Michigan Commission did reconsider its decision after the FCC issued Order No. 01-362, but again the order includes no analysis of how treating the carrier-specific cost as a cost of doing business complies with FCC Order No. 01-362. Mich. Public Service Commission Order, Case No. U-13086 (February 1, 2002). Further, the Michigan Commission seemed to reject the arguments on reconsideration because, according to the order, Petitioners Ameritech Michigan and Verizon were arguing that “any amounts they spend on number pooling” were recoverable without differentiation as to ordinary costs for which the FCC said no additional or specific recovery is appropriate. *Id.* at 2. Rather than attempt to determine which costs were extraordinary pursuant to FCC guidelines, the Michigan Commission simply disallowed them all.

CONCLUSION

This Commission correctly determined in its Notice of Proposed Agency Action that BellSouth may recover all costs for state-mandated thousands-block number pooling trials that meet the FCC’s three-prong test for extraordinary costs. Additionally, the Commission correctly permitted cost recovery through a mechanism separate from the rate and revenue increases to basic and non-basic service implemented since January 1, 2000. This one-time, separate end-user charge proposed by the Commission is consistent with federal law and FCC precedent.

For the reasons expressed, BellSouth respectfully requests that this Commission enter a Final Order granting in part BellSouth's Petition for Cost Recovery as outlined in Order No. PSC-03-1096-PAA-TP.

Respectfully submitted this 10th day of June, 2004.

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