



State of New Jersey  
DIVISION OF THE RATEPAYER ADVOCATE  
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JON S. CORZINE  
Governor

SEEMA M. SINGH, Esq.  
Ratepayer Advocate  
and Director

April 10, 2006

**VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
E 9300 Hampton Drive  
Capital Heights, MD 20743

**RE: In the Matter of Petition of AT&T Inc. for Waiver of the Commission's Rules to Treat Certain Local Number Portability Costs as Exogenous Costs under Section 61.45(d)  
CC Docket No. 95-116**

**In the Matter of Telephone Portability; Petition of SBC Communications, Inc. for Forbearance under 47 U.S.C. § 160(c) from the Application of the Five-Year Recovery Period for Local Number Portability Costs under 47 C.F.R. § 52.33(a)(1);  
Petition of SBC Communications, Inc. for a Waiver Of the Five-Year Recovery Period for Local Number Portability Costs under 47 C.F.R. § 52.33(a)(1).  
CC Docket No. 95-116**

Dear Secretary Dortch:

Enclosed, please find Comments/Reply Comments and *Ex Parte* on behalf of the New Jersey Division of the Ratepayer Advocate in the above-captioned matters.

Very truly yours,

SEEMA M. SINGH, Esq.  
RATEPAYER ADVOCATE

By: Christopher J. White  
Christopher J. White, Esq.  
Deputy Ratepayer Advocate

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
)  
Petition of AT&T Inc. for Waiver of the )  
Commission's Rules to Treat Certain ) CC Docket No. 95-116  
Local Number Portability Costs as Exogenous )  
Costs under Section 61.45(d) )

In the Matter of )  
)  
Telephone Portability; Petition of SBC )  
Communications, Inc. for Forbearance under ) CC Docket No. 95-116  
47 U.S.C. § 160(c) from the Application of the )  
Five-Year Recovery Period for Local Number )  
Portability Costs under 47 C.F.R. § 52.33(a)(1); )  
Petition of SBC Communications, Inc. for a )  
Waiver Of the Five-Year Recovery Period for )  
Local Number Portability Costs under )  
47 C.F.R. § 52.33(a)(1). )

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**COMMENTS/REPLY COMMENTS AND *EX PARTE* OF THE  
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE**

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*On the Comments:*

Christopher J. White, Esq.  
Deputy Ratepayer Advocate

Date: April 10, 2006

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**COMMENTS/REPLY COMMENTS AND *EX PARTE* OF THE  
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE**

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**I. INTRODUCTION**

In response to the Public Notice released on March 31, 2006 and in response to the Public Notice released on February 22, 2005<sup>1</sup> the New Jersey Division of the Ratepayer Advocate (“Ratepayer Advocate”) hereby submits its comment/reply comment

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<sup>1/</sup> See Public Notice, DA-06-778, dated March 31, 2006, establishing pleading cycle with Comments due on April 7, 2006 and reply comments due on April 11, 2006; and Public Notice, DA 05-463, dated February 22, 2005 establishing a pleading cycle for “SBC Petitions to Forbear From Enforcing, Or, Alternatively, to Waive the Commission’s Five-Year LNP Cost Recovery Rule. The Ratepayer Advocate asks that the portion of the comments addressing DA 05-463 be considered as *ex parte* comments.

as to DA 06-778 and *ex parte* comments, as to DA 05-463 regarding the AT&T, Inc.'s (formally SBC Communications, Inc.)("SBC") petitions asking for forbearance/waiver from Section 52.33(a)(1) of the Federal Communications Commission's ("FCC" or "Commission") rules and a waiver from Section 61.45(d) of the Commission rules related to the recovery of local number Portability ("LNP") costs.

**FORBEARANCE REQUEST (DA 05-463) *EX PARTE***

The request for waiver and forbearance filed by SBC (now AT&T) is without merit and should be denied. The alleged under recovery of LNP costs is otherwise due to the failure of the SBC to monitor its cost recovery during the five year period established by the FCC. As a result, neither the waiver request nor the forbearance requests are in the public interest or in the interest of consumers. Notwithstanding the fact that the forbearance petition is without merit and should be denied by the Commission based on the reasons discussed above, the Ratepayer Advocate renews the arguments and incorporates those arguments attached hereto with respect to the constitutional infirmities associated with the Commission's forbearance authority. Specifically any exercise of the forbearance authority contained in Section 10 of the Act violates separation of powers, equal protection, 10<sup>th</sup> Amendment, and 11<sup>th</sup> Amendment as outlined in detail in our Ex Parte filing dated December 7, 2004 in the UNE Remand proceeding (CC Docket No. 01-338 and WC Docket No. 04-313).

**WAIVER REQUEST (DA 06-778)**

The request for waiver filed by AT&T should be denied as well. As an initial matter, the Ratepayer Advocate notes its objection to the short comment cycle on AT&T's filing. The period for comments set by the FCC denies fundamental due

process.<sup>2</sup> The relief sought is also barred by the two year statute of limitations set forth in 47 U.S.C. § 415(a). The five year recovery period ended on January 31, 2004 and therefore, the statute of limitations expired on January 31, 2006. As a matter of law, this precludes any grant of the waiver request. In addition, the requested relief is not warranted under the facts and the law as an exogenous event and the waiver request is tantamount to retroactive ratemaking, at the expenses of ratepayers.

## **II. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING.**

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings.

## **III. THE COMMISSION SHOULD DENY AT&T's PETITION (DA 06-778)**

The Ratepayer Advocate submits that AT&T has failed to justify, demonstrate and show good cause for the grant of a waiver

AT&T argues essentially that it failed to recover fully its LNP costs due to factors beyond its control and certain unforeseeable developments. The Ratepayer Advocate submits that AT&T's arguments in support of the waiver are baseless and otherwise barred by the statute of limitations. AT&T is the first to argue that the telecommunications market is competitive and less regulation is appropriate. In competitive markets, errors and omissions by a company should fall upon the company

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<sup>2/</sup> The Ratepayer Advocate notes that the Wireline Competition Bureau on April 10, 2006 in the *Daily Digest* announced the issuance of a protective order for the proceeding. The subject order has a release date of April 7, 2006, despite the first notice occurring in the *Daily Digest*. This further implicates due process concerns over the short comment period since the comment period will close prior to a receipt of any confidential information and prior to a party being able to furnish their acknowledgement of the confidentiality agreement.

and its shareholders not consumers. AT&T simply failed to monitor its cost recovery and take appropriate timely action to remedy the situation. This was not beyond its control or otherwise not foreseeable. AT&T should have and could have sought a waiver prior to the expiration of the five year period. AT&T's failure in this regard precludes the relief now sought after the end of the five year recovery period. The relief requested is also precluded by the two year statute of limitations contained in 47 U.S.C. § 415(a). The grant of this waiver would also implicate the filed rate doctrine to the extent it seeks increases in rates now to recover losses in prior periods. Exogenous costs are generally those costs that are triggered by administrative, legislative or judicial action beyond the control of carriers. However, the facts show that AT&T simply failed to adequately track its cost recovery during the five-year period and request relief prior to expiration of the five year period. The responsibility for the under recovery rests solely upon AT&T and its officers and shareholders. It is simply improper to shift the responsibility on to ratepayers in the first instant and the attempt to have the shortfall recovered under end users common line ("EUCL") charges billed after the end of the five year recovery period is flawed and misplaced.

The Commission may waive its regulations for good cause shown.<sup>3</sup> Even assuming, *arguendo*, that recovery of the LNP shortage through increased EUCL charges fell under the umbrella of exogenous cost changes, AT&T failed to provide empirical evidence to support the claim that current price caps do not result in rates that are either too high or too low. Moreover, it is unclear what effect if any the FCC's current

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<sup>3/</sup> 47 C.F.R. § 1.3

separation freeze,<sup>4</sup> in effect since 2001, has on current price caps and whether any claimed increase in price caps through increased EUCL charges would be offset by benefits resulting from the current separation freeze. AT&T has failed to provide data regarding revenue, allocation and performance under current price caps. The Ratepayer Advocate submits that public policy considerations favor the denial of the petitions. There has been a separation freeze in place for five years. With the numerous and major changes in the telecommunications marketplace (such as the granting of Section 271 authority, the classification of digital subscriber line (“DSL”) and cable modem as informational services, the classification of VoIP as an interstate service, pending proposals to revise intercarrier compensation, and proposed universal service reform), the Federal/state jurisdictional separations process (“separation process”) remains frozen in time. This freeze directly affects and distorts the rate cap regime. This freeze may have already permitted over-recovery for AT&T. Lastly, the proposed treatment also implicates retroactive adjustments which in turn raise the issue of improper retroactive ratemaking.

#### **IV. AT&T Has Failed to Demonstrate Good Cause In Support of a Waiver of Section 61.45(d)**

In general, a waiver request must demonstrate special circumstances warranting a deviation from the general rule, and that such a deviation will serve the public interest.<sup>5</sup>

For the reasons discussed above, AT&T has failed to demonstrate good cause to support

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<sup>4</sup>/ *TR Daily*: “Incumbent local exchange carriers (ILECs) today told the FCC that its request for input on a proposed request for data relating to the jurisdiction separations process didn’t provide enough details on what the Commission planned to ask.” (Monday, May 9, 2005).  
*See:* <http://www.tr.com/online/trd/2005/td050905/index.htm>

<sup>5</sup>/ *Northeast Cellular Telephone Co. v. FCC* 897 F. 2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969)).

the relief requested. Ultimately, AT&T's basis for the relief sought is that they made a mistake in judgment and failed to properly monitor and account for LNP cost recovery. AT&T has failed to establish that "special circumstances" warrant deviation from the Commission's general rules. Similarly, while it is true, that Section 61.45(d) permits exogenous costs adjustments for "extraordinary" reasons, given the dearth of data presented, AT&T has failed to demonstrate "extraordinary" circumstances, let alone sufficient "good cause" to permit recovery of LNP charges through increased EUCL charges, resulting from so called "exogenous events" and price cap recovery mechanisms. Lastly, AT&T has failed to demonstrate how waiver of Section 61.45(d) would serve the public interests. For the foregoing reasons, good cause does not exist to grant a waiver of Section 61.45(d).

## V. CONCLUSION

The Commission should not grant AT&T's request for waiver of Section 61.45(d) (DA 06-778), nor grant forbearance or a waiver to SBC (DA 05-463) for under recovery of LNP costs. To grant any relief would improperly compensate and insulate AT&T/SBC from their lack of judgment. Ultimately, the grant of any relief would cause ratepayers to pay higher rates to compensate for a business error. Such a result is manifestly unjust to ratepayers and contrary to the public interest. Therefore the Ratepayer Advocate urges that the FCC deny all relief.

Respectfully submitted,

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