Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	
	)	
Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas	)	CCB/CPD File No. 01-19

EIGHTH REPORT AND ORDER AND FIFTH ORDER ON RECONSIDERATION

Adopted: May 13, 2004 **Released: May 18, 2004**

By the Commission: Chairman Powell issuing a statement.

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I. INTRODUCTION

1. As part of its effort to establish a pro-competitive, deregulatory national policy framework for the United States telecommunications industry, the Commission, in the *CLEC Access Reform Order,* adopted a new regulatory regime for interstate switched access services provided by competitive local exchange carriers (competitive LECs) to interexchange carriers (IXCs).[1] Specifically, the Commission limited to a declining benchmark the amounts that competitive LECs may tariff for interstate access services, restricted the interstate access rates of competitive LECs entering new markets to the rates of the competing incumbent local exchange carrier (incumbent LEC), and established a rural exemption permitting qualifying carriers to charge rates above the benchmark for their interstate access services.[2] In this Fifth Order on Reconsideration, we resolve seven petitions for clarification and/or reconsideration of the *CLEC Access Reform Order*.[3] As explained in further detail below, we clarify certain aspects of the *CLEC Access Reform Order* and deny the petitions for reconsideration.[4] We also address and deny a pending petition seeking a temporary waiver of section 61.26(d) of the Commission's rules.[5] In the Eighth Report and Order, we decline to set a separate access rate for originating 8YY traffic

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[1] *See In the Matter of Access Charge Reform*, *Reform of Access Charges Imposed by Competitive Local Exchange Carriers,* CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (*CLEC Access Reform Order*).

[2] *See generally id*.

[3] A complete list of the pleadings filed is contained in Appendix B.

[4] In addition to the petitions for clarification and/or reconsideration, several parties requested that the Commission stay the *CLEC Access Reform Order* pending reconsideration or judicial review. *See* Mpower Communications Corp. and North County Communications, Inc., *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Emergency Petition for Stay of Order, June 18, 2001 (Mpower Petition for Stay); TDS Metrocom, Inc., *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Petition for Stay Pending Reconsideration, June 28, 2001 (TDS Petition for Stay); Letter from Jonathan E. Canis, Counsel to Business Telecom, Inc. *et al*., to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-262 (filed May 25, 2001) (requesting that the Commission stay the effective date of the *CLEC Access Reform Order* on its own motion) (Joint CLEC May 25 *Ex Parte*). After the Commission did not act on the request for a stay, Mpower and North County sought a stay from the D.C. Circuit Court of Appeals. On June 28, 2001, the D.C. Circuit denied the request for a stay. *See Mpower Communications Corp, et al. v. FCC*, No. 01-1280, Order dated June 28, 2001. We now deny as moot the Mpower Petition for Stay.

[5] *See In the Matter of Petition of Z-Tel Communications, Inc. and Z-Tel Communications of Virginia, Inc. for Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Services in Certain Metropolitan Statistical Areas*, filed Aug. 3, 2001 (Z-Tel Waiver Petition).

and allow it to be governed by the same declining benchmark as other competitive LEC interstate access traffic.

II. BACKGROUND

2. In the *CLEC Access Reform Order,* the Commission addressed a variety of issues arising from market disputes between IXCs and competitive LECs over the level of competitive LEC interstate access rates.[6] The Commission observed that competitive LEC access rates varied dramatically, and that access rate disputes between IXCs and competitive LECs created significant financial uncertainty for both groups of carriers.[7] Moreover, the Commission found that carrier disputes appeared likely to threaten network ubiquity, a result that the Commission concluded could have significant public safety ramifications.[8] In order to ensure that competitive LEC access rates are just and reasonable, the Commission sought to eliminate regulatory arbitrage opportunities that previously existed with respect to tariffed competitive LEC access services.[9]

3. The Commission concluded that the market structure for access services prevented competition from effectively disciplining prices.[10] It explained that an IXC has no competitive alternative for access to a particular end-user and, because the IXC pays for access charges and recovers those costs through averaged rates, the end-user has no incentive to avoid high-priced providers for access services.[11] The Commission found that certain competitive LECs used the tariff system to set access rates that were subject neither to negotiation nor to regulation designed to ensure their reasonableness, and then relied on their tariff to demand payment from IXCs for access services that the long distance carriers likely would have declined to purchase at the tariffed rate.[12]

4. To address this market failure, the Commission revised its tariff rules to align tariffed competitive LEC access rates more closely with those of the incumbent LECs.[13] The Commission set a benchmark rate for competitive LEC access rates and concluded that competitive LEC access rates at or below the benchmark would be presumed just and reasonable.[14] Under the rules the Commission adopted, a competitive LEC may not tariff interstate access charges above the higher of (1) the competing incumbent LEC rate, or (2) the benchmark rate or the lowest rate the competitive LEC tariffed for interstate access service within the six months preceding the effective date of the order, whichever is

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6 For a more detailed background, s*ee CLEC Access Reform Order,* 16 FCC Rcd at 9926-30, paras. 8-20.

7 *Id.* at 9931-32, paras. 22-23.

8 *Id.* at 9932-33, para. 24.

9 *See id.* at 9924-25, paras. 2-3. The Commission limited its application of the tariff rules to competitive LEC interstate access services (defined only as interstate switched access services unless otherwise specified to the contrary). *Id.* at 9924, para. 2 & n.2.

10 *Id.* at 9936, para. 32.

11 *Id.* at 9935, para. 31.

12 *Id.* at 9925, para. 2.

13 *See* 47 C.F.R. § 61.26.

14 *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

lower.[15] Competitive LEC access charges above the benchmark (or above the competing incumbent LEC rate, if it is higher) are mandatorily detariffed and may be imposed only pursuant to a negotiated agreement.[16] During the pendency of negotiations, or if the parties cannot agree, the competitive LEC must charge the IXC the appropriate benchmark rate.[17] The Commission also concluded that an IXC would violate section 201(a) of the Act by refusing to complete a call to, or accept a call from, an end-user served by a competitive LEC charging rates at or below the benchmark.[18]

5. In order to avoid too great a disruption for competitive carriers, the Commission implemented the benchmark in a way that allows competitive LEC rates to decrease over time until they reach the rate charged by the competing incumbent LEC.[19] The benchmark was set at 2.5 cents per minute for the first year after the *CLEC Access Reform Order* became effective, and moved to 1.8 and 1.2 cents per minute in the second and third years, respectively.[20] At the end of the third year, the rate will parallel the access rate charged by the competing incumbent LEC.[21] Additionally, the Commission ruled that competitive LECs may tariff the benchmark rate only for service in the Metropolitan Statistical Areas (MSAs) where they were serving customers on June 20, 2001, the effective date of the new rules.[22] In those MSAs where a competitive LEC initiates service after the effective date of the order, it may not tariff a rate higher than the applicable incumbent LEC rate (the "CLEC new markets rule").[23]

6. The Commission also adopted a rural exemption to the benchmark regime. The exemption is available for a competitive LEC that competes with a non-rural incumbent LEC, where no portion of the competitive LEC's service area falls within: (1) any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or (2) an urbanized area, as defined by the Census Bureau.[24] If a competitive LEC originates traffic from or terminates traffic to end-users located within either of these two types of areas, the carrier is ineligible for the rural exemption to the benchmark rule.[25] In recognition of the substantially higher loop costs incurred by competitive LECs in rural areas, competitive LECs qualifying for the rural exemption are permitted to tariff rates up to the highest rate band in the National Exchange Carriers Association (NECA) tariff, minus the NECA tariff's carrier common line (CCL) charge.[26]

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15 47 C.F.R. § 61.26(b).

16 *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

17 *Id.*

18 *Id.* at 9960-61, para. 94.

19 *Id.* at 9944-45, para. 52.

20 47 C.F.R. § 61.26(c).

21 *Id.*

22 *CLEC Access Reform Order*, 16 FCC Rcd at 9947, para. 58.

23 47 C.F.R. § 61.26(d).

24 47 C.F.R. § 61.26(a)(6), (e).

25 *Id. See also CLEC Access Reform Order*, 16 FCC Rcd at 9954, para. 76.

26 47 C.F.R. § 62.26(e).

7. Seven parties petitioned for reconsideration or clarification of the *CLEC Access Reform Order,* and various parties filed oppositions, comments, and replies.[27] The petitioners challenge the validity of the CLEC new markets rule, the structure of the benchmark, and the transition period.[28] Further, the petitioners seek clarification regarding what access rates apply when more than one incumbent LEC operates within the competitive LEC's service area.[29] Another petitioner asks the Commission to clarify that a competitive LEC may charge only the portion of the benchmark rate that reflects the access services actually provided.[30] Several petitioners also challenge various aspects of the rural exemption. These challenges include arguments to expand the scope of the rural exemption, to make the rural benchmark available to competitive LECs entering new areas, and to add the carrier common line (CCL) charge as well as the multi-line business pre-subscribed interexchange carrier charge (PICC) to the rural exemption rate.[31] Finally, certain petitioners request clarification or reconsideration regarding several other issues, including requirements under sections 201(a), 202(a), 203(c), and 214 of the Communications Act.[32]

8. In a Further Notice of Proposed Rulemaking that accompanied the *CLEC Access Reform Order*, the Commission sought additional comment on whether access rates for originating toll-free, or 8YY, traffic should immediately be moved to the competing incumbent LEC rate, rather than following the declining benchmark over three years.[33] As discussed in more detail below, several parties commented on this issue.

9. For the reasons discussed below, we deny petitions for reconsideration of the *CLEC Access Reform Order* but address several issues raised in petitions for clarification. Specifically, we clarify that a competitive LEC is entitled to charge the full benchmark rate if it provides an IXC with access to the competitive LEC's own end-users. We also find that the rate a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions, and we amend our rules in accordance with this finding. We further clarify that any PICC imposed by a competitive LEC qualifying for the rural exemption may be assessed in addition to the rural benchmark rate if and only to the extent that the competing incumbent LEC charges a PICC. In addition, we identify permissible ways in which competitive LECs may structure their rates if they serve a geographic area with more than one incumbent LEC. We also clarify the source of our authority to impose IXC interconnection obligations under section

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[27] *See* Appendix B for a complete list of pleadings filed. Both competitive LECs and IXCs have sought review of the *CLEC Access Reform Order* in the D.C. Circuit. *See AT&T Corp. v. FCC*, Case No. 01-1244 (filed May 31, 2001); *Sprint Corp. v. FCC*, Case No. 01-1263 (filed June 11, 2001); *Mpower Communications Corp. & North County Communications, Inc. v. FCC*, Case No. 01-1280 (filed June 22, 2001). The cases were consolidated and the court is holding the petitions for review in abeyance pending the Commission's completion of this reconsideration proceeding. *See AT&T Corp. v. FCC*, Case Nos. 01-1244, 01-1263, and 01-1280, Order (D.C. Cir. Jan. 8, 2002)(granting the Commission's motion to hold the appeals in abeyance).

[28] *See* Focal Petition at 2-6; TDS Petition at 7-9; Time Warner Petition at 2-9.

[29] *See* TelePacific Petition at 1-3.

[30] *See* Qwest Petition at 2-4.

[31] *See* MCLEC Petition at 2-14; RICA Petition at 3-12**.**

[32] *See* Qwest Petition at 4-6; RICA Petition at 12-15; RICA Reply at 8-9.

[33] *See CLEC Access Reform Order*, 16 FCC Rcd at 9962-64, paras. 99-104.

201(a) and we deny a pending petition for waiver of the CLEC new markets rule. Finally, we decline to set a separate access rate for originating 8YY traffic and allow it to be governed by the same declining benchmark as other competitive LEC interstate access traffic.

III. ORDER ON RECONSIDERATION

A. Accounting for Services Still Provided by the Incumbent LEC

10. Qwest asks the Commission to clarify the rules to ensure that a competitive LEC charges only the portion of the competing incumbent LEC rate that reflects the services that the carrier actually provides.[34] Qwest emphasizes that the competitive LEC's tariffed rate should exclude the amounts paid for access services necessary to connect an IXC to an end-user that are not provided by the competitive LEC.[35] Thus, when one or more of the services necessary to originate or terminate an interexchange call is provided by a carrier other than the competitive LEC, Qwest suggests that the benchmark rate should be correspondingly reduced.[36] For instance, Qwest argues that where the incumbent LEC still provides tandem switching, the IXC should have to pay that charge to the incumbent LEC only, and not to both the incumbent LEC and the competitive LEC.[37]

11. ALTS opposes the requested clarification, arguing that Qwest's characterization of the services Qwest receives and for which it pays is incorrect.[38] According to ALTS, IXCs that exchange traffic with competitive LECs through the incumbent LEC tandem receive a service from both the incumbent LEC and the competitive LEC, and, accordingly, it is appropriate for both the competitive LEC and the incumbent LEC to bill such IXCs.[39] ALTS asserts that an IXC can avoid paying for incumbent LEC services by interconnecting directly with a competitive LEC, thereby bypassing the incumbent LEC network altogether.[40]

12. ASCENT and Focal center their opposition on the administrative burden they allege would result from Qwest's proposed clarification.[41] ASCENT argues that, as a policy matter, the Commission left competitive LECs with maximum flexibility to structure their charges as long as they did not "exceed a benchmark ultimately reflective of incumbent LEC charges," and that removing an access

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34 Qwest Petition at 2-4.

35 *Id.* at 2.

36 *Id.* at 3.

37 *Id.*

38 ALTS Comments at 12.

39 *Id. See also* ASCENT Reply at 4-5.

40 ALTS Comments at 12. *See also* Letter from Richard M. Rindler, Counsel for US LEC Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, filed Aug. 25, 2003 at 5-6 (US LEC Aug. 25 *Ex Parte* Letter).

41 *See, e.g.*, Focal Comments at 7 (asserting that Qwest's request would "vitiate the benchmark as a simple, easy-to-administer guide identifying when CLEC access charges will be presumed reasonable").

component from competitive LEC rates would be inconsistent with the Commission's intent.[42] Similarly, Focal argues that requiring the change advocated by Qwest "would essentially transform the benchmark from an overall measure of the reasonableness of a CLECs' rates that affords CLECs flexibility in setting rate structures, to a rate and rate structure prescription."[43] Z-Tel interprets Qwest's request as a requirement that competitive LECs mirror incumbent LEC access tariff elements, and it argues that such a requirement would be inappropriate because this may not accurately reflect how a competitive LEC's costs are incurred.[44] Z-Tel further argues that, particularly for UNE-P providers, Qwest's proposal may prevent competitive LECs from recovering their costs. Z-Tel explains that, because the per-minute and per-port components of UNE rates are determined by state commissions, and not necessarily in conjunction with this Commission's review of the same incumbent LEC's interstate tariff, it is possible that the cost of providing a minute of access over the UNE platform could exceed the per-minute interstate access rate for the same incumbent LEC.[45]

13. We deny Qwest's request for clarification that the full benchmark rate is not available in situations when a competitive LEC does not provide the entire connection between the end-user and the IXC. Under section 61.26(b) of the Commission's rules, a competitive LEC's tariffed rate for "its interstate switched exchange access services" cannot exceed the benchmark.[46] Under section 61.26(a)(3), the term interstate switched exchange access services "shall include the functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching."[47] The rate elements identified in section 61.26(a)(3) reflect those services needed to originate or terminate a call to a LEC's end-user. When a competitive LEC originates or terminates traffic to its own end-users, it is providing the functional equivalent of those services, even if the call is routed from the competitive LEC to the IXC through an incumbent LEC tandem. Consequently, because there may be situations when a competitive LEC does not provide the entire connection between the end-user and the IXC, but is nevertheless providing the functional equivalent of the incumbent LEC's interstate exchange access services, we deny Qwest's petition.[48]

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[42] ASCENT Comments at 4. *See also* US LEC Aug. 25 *Ex Parte* Letter at 4, 6 (stating that the Commission's intent was to maintain rate structure flexibility for competitive LECs and to require only that the competing LEC's rate not exceed the benchmark).

[43] Focal Comments at 7.

[44] Z-Tel Opposition at 6.

[45] *Id.* at 6.

[46] 47 C.F.R. § 61.26(b).

[47] 47 C.F.R. § 61.26(a)(3).

[48] IXCs argue that paragraph 55 of the *CLEC Access Reform Order* could be read to suggest that the Commission intended the benchmark to be available only when the competitive LEC provided the full connection between the IXC and the end-user. *See* AT&T Opposition at 19; Letter from Robert J. Aamoth and Jennifer M. Kashatus, Counsel for ITC DeltaCom Communications, Inc. to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, at 2 (filed Sept. 11, 2003). We find that this is not the best reading of paragraph 55. When read in conjunction with the definition contained in section 61.26(a)(3), we think the two lists of elements described in paragraph 55 were intended to illustrate what might be (continued….)

14. Although we deny Qwest's petition, we also reject the argument made by some competitive LECs that they should be permitted to charge the full benchmark rate when they provide any component of the interstate switched access services used in connecting an end-user to an IXC.[49] The approach advocated by these competitive LECs, in which rates are not tethered to the provision of particular services, would be an invitation to abuse because it would enable multiple competitive LECs to impose the full benchmark rate on a single call. It also would enable competitive LECs to discriminate among IXCs by providing varying levels of service for the same price.[50] As the Supreme Court clearly has stated, rates "do not exist in isolation. They have meaning only when one knows the services to which they are attached."[51]

15. Through pleadings in this proceeding, as well as a petition for declaratory ruling filed by US LEC,[52] the Commission is aware that there have been a number of disputes regarding the appropriate compensation to be paid by IXCs when a competitive LEC handles interexchange traffic that is not originated or terminated by the competitive LEC's own end-users. Because neither the *CLEC Access Reform Order* nor other applicable precedent addressed the appropriate rate in this scenario, we now conclude that the benchmark rate established in the *CLEC Access Reform Order* is available only when a competitive LEC provides an IXC with access to the competitive LEC's own end-users. As explained above, a competitive LEC that provides access to its own end-users is providing the functional equivalent of the services associated with the rate elements listed in section 61.26(a)(3) and therefore is entitled to the full benchmark rate.

16. Some competitive LECs argue that they should be entitled to collect the full benchmark rate, even when they do not serve the end-user, if they enter into a joint billing arrangement with the carrier that does serve the end-user.[53] We acknowledge that there are situations where a competitive LEC

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considered the "functional equivalent" of incumbent LEC access services, rather than mandating the provision of a particular set of services.

[49] US LEC, for example, argues that a competitive LEC may charge the maximum benchmark rate even where that competitive LEC provides only some portion of the transport component of the switched access service, leaving other carriers to provide the bulk of the service, including (i) the connection between the caller and the local switch, (ii) end office switching, as well as, possibly, (iii) additional tandem-switched transport. *See* Letter from Patrick J. Donovan, Counsel for US LEC Corp., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92 (filed April 29, 2003); *see also* TelePacific Sept. 25 *Ex Parte* Letter at 3 (arguing that the *CLEC Access Reform Order* permits competitive LECs to charge the benchmark rate for the access services they provide to IXCs regardless of the access functions or rate structure).

[50] Although unreasonable discrimination often takes the form of different pricing for the same service, the Supreme Court has made clear that providing different levels of service for the same tariffed price may be equally unreasonable. *See AT&T v. Central Office Telephone*, 524 U.S. 214, 223 (1998) ("An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.").

[51] *Id.*

[52] *See Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, CC Docket No. 01-92, Public Notice, DA 02-2436 (rel. Sept. 30, 2002) (seeking comment on a petition for declaratory ruling filed by US LEC).

[53] *See, e.g.,* White Paper on CMRS/CLEC Intercarrier Compensation, attached to Letter from Kathryn A. Zachem, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, at 5-6 (filed Jan. 16, 2004) (Verizon Wireless White Paper); Letter from Patrick J. Donovan, Counsel for US LEC Corp., to Marlene H. Dortch, Secretary, Federal Communications (continued….)

may bill an IXC on behalf of itself and another carrier for jointly provided access services pursuant to meet point billing methods.[54] We note, however, that the validity of these joint billing arrangements is premised on each carrier that is party to the arrangement billing only what it is entitled to collect from the IXC for the service it provides.[55] In cases where the carrier serving the end-user had no independent right to collect from the IXC, industry billing guidelines do not, and cannot, bestow on a LEC the right to collect charges on behalf of that carrier. For example, the Commission has held that a CMRS carrier is entitled to collect access charges from an IXC only pursuant to a contract with that IXC.[56] If a CMRS carrier has no contract with an IXC, it follows that a competitive LEC has no right to collect access charges for the portion of the service provided by the CMRS provider.[57]

17. Because of the many disputes related to the rates charged by competitive LECs when they act as intermediate carriers, we conclude that it is necessary to adopt a new rule to address these situations. Specifically, we find that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.[58] We conclude that regulation of these rates is necessary for the all the reasons

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Commission, CC Docket Nos. 96-262 and 01-92, filed Aug. 25, 2003 at 6-7 (stating that US LEC may utilize meet point billing arrangements with the CMRS provider to jointly provision access service to the wireless end-user and that it is entitled to the benchmark rate).

[54] *See In the Matter of Access Billing Requirements for Joint Service Provision*, CC Docket No. 87-579, Phase II, Order, 65 Rad. Reg. 2d 650, paras. 2-5 (1988), *applications for review denied,* 4 FCC Rcd 7914 (1989). Indeed, the industry has developed standards, *i.e.*, the Multiple Exchange Carrier Access Billing Standard ("MECAB"), to govern meet point billing arrangements, and the Commission has required LECs to follow the MECAB standards. *See, e.g.*, *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket No. 87-579, Memorandum Opinion and Order, 3 FCC Rcd 13, 16-17, paras. 29-31 (1987) (subsequent history omitted).

[55] *See, e.g.*, *In the Matter of Access Billing Requirements for Joint Service Provision*, CC Docket No. 87-579, Phase II, Order, 65 Rad. Reg. 2d 650, para. 87 (1988) ("We therefore conclude that those LECs whose current tariff provisions would allow a LEC to impose [termination] charges if that LEC is an intermediate, non-terminating carrier are required to modify their tariff provisions to preclude such charges in these circumstances.").

[56] *See Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192 (2002) (*Sprint/AT&T Declaratory Ruling*), *petitions for review dismissed*, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003).

[57] We reject the argument made by Verizon Wireless that the *Sprint/AT&T Declaratory Ruling* does not limit the ability of a CMRS provider to collect access charges from an IXC if the CMRS provider has a contract with an intermediate competitive LEC. *See* Verizon Wireless White Paper at 21. We will not interpret our rules or prior orders in a manner that allows CMRS carriers to do indirectly that which we have held they may not do directly. *See Sprint/AT&T Declaratory Ruling*, 17 FCC Rcd at 13198, para. 12 ("There being no authority under the Commission's rules or a tariff for Sprint PCS unilaterally to impose access charges on AT&T, Sprint PCS is entitled to collect access charges in this case only to the extent that a contract imposes a payment obligation."). Moreover, we also reject the argument by Verizon Wireless that IXCs taking service under certain competitive LEC tariffs are somehow bound by these competitive LEC/CMRS agreements. *See* Verizon Wireless White Paper at 22. Indeed, except in limited circumstances, the Commission's rules specifically prohibit cross-referencing other documents within a tariff. *See* 47 C.F.R. § 61.74(a).

[58] We note that competitive LECs continue to have flexibility in determining the access rate elements and rate structure for the elements and services they provide consistent with the *CLEC Access Reform Order*. *See CLEC Access Reform Order*, 16 FCC Rcd at 9946, para. 55. For this reason, we reject concerns expressed by some commenters that this constraint would require competitive LECs to adopt the incumbent LEC rate structure. *See,* (continued….)

that we identified in the *CLEC Access Reform Order*. Specifically, as competitive LECs and CMRS providers concede,[59] an IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power. This new rule regarding rates that may be charged when a competitive LEC is an intermediate carrier will apply on a prospective basis.[60]

18. Neither the *CLEC Access Reform Order* nor the *Sprint/AT&T Declaratory Ruling* addressed the appropriate rate a competitive LEC may charge when it is not serving the end-user; therefore, during the time between the effective date of *CLEC Access Reform Order* and the effective date of this reconsideration order, general pricing principles must govern any dispute over the appropriate competitive LEC rate. As a rule, access rates, like all other tariffed rates, must be just and reasonable under section 201(b) of the Act, and access tariffs, like all other tariffs, must clearly identify each of the services offered and the associated rates, terms, and conditions.[61] In this case, the Commission established only a single rate for each year of the transition period and did not state that this rate was available only if a competitive LEC served the end-user on a particular call. Accordingly, prior to this order on reconsideration, it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff.[62]

19. We reject the argument that Qwest's petition provides no basis for any change to the currently effective transitional benchmark rates. In an *ex parte* filing, US LEC argues that Qwest's request for clarification applies only to the final benchmark rates, as distinct from the transitional benchmark rates.[63] US LEC suggests that any clarification must be so limited and may apply only to the final benchmark rates at the competing incumbent LEC rate.[64] We disagree. The language and the arguments made in the petition suggest that Qwest's request is not limited in the manner suggested by US LEC. Although the petition requests that the Commission clarify the meaning of the "competing ILEC rate," it contains several statements that could apply equally to the transitional benchmark rates.[65] The

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e.g., Focal Comments at 6-7; Z-Tel Opposition at 3-6. *See also* US LEC Aug. 25 *Ex Parte* Letter at 2-3 (positing a number of arguments against imposing incumbent LEC rate structures on competitive LECs).

[59] *See* Verizon Wireless White Paper at 19 n.58 ("CMRS carriers wield as much 'monopoly power' here as CLECs do in the situations described in the [*CLEC Access Reform Order*].").

[60] *See, e.g.*, 5 U.S.C. § 551(4); *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 471-72 (1988).

[61] 47 U.S.C. § 201(b). *See also* 47 C.F.R. § 61.2(a).

[62] *See ITC DeltaCom Communications, Inc. v. US LEC Corp. et al.*, No. 3:02-CV-116-JTC (N.D. Ga. March 15, 2004) (holding that an IXC has no duty to pay a competitive LEC for transiting wireless toll-free calls where the terms of the competitive LEC's tariff cover only access to the competitive LEC's own end-users or transport of traffic that originates or terminates through a LEC switching system).

[63] See US LEC Aug. 25 *Ex Parte* Letter at 7.

[64] *Id.*

[65] For instance, Qwest requests that the competing LEC's "tariffed rate should exclude the amounts paid for access service that are . . . not provided by the competitive LEC." Qwest Petition at 2. In addition, even if Qwest intended its request to apply solely to the final benchmark rates, as US LEC suggests, we believe that clarifying the application of the transitional benchmark rates is a logical outgrowth of Qwest's proposal. *See City of* (continued….)

arguments presented by Qwest to support its request are equally applicable to the transitional benchmark rates. Therefore, we find no reason why the Commission is prevented from clarifying the application of the transition benchmark rates or amending its rules prospectively, as set forth above.

20. Finally, we address a request by NewSouth Communications, Inc. that we clarify the meaning of the term "competing ILEC rate" as it applies to a competitive LEC that originates or terminates calls to its end-users after the three-year transition period ends on June 21, 2004.[66] NewSouth argues that a competitive LEC should be permitted to charge for all of the competing incumbent LEC access elements (including tandem switching and end office switching) if its switch serves a geographic area comparable to the competing incumbent LEC's tandem switch.[67] AT&T and MCI oppose NewSouth's request and assert that a competitive LEC may assess access charges on IXCs only for those access services that the competitive LEC actually provides.[68]

21. We agree with NewSouth that clarification of this issue is necessary to avoid litigation and uncertainty, but we decline to adopt NewSouth's proposal. A primary objective of the *CLEC Access Reform Order* is to ensure that competitive LEC access charges are more closely aligned with incumbent LEC access rates.[69] As noted by AT&T and MCI, our long-standing policy with respect to incumbent LECs is that they should charge only for those services that they provide.[70] Under this policy, if an incumbent LEC switch is capable of performing both tandem and end office functions, the applicable

(Continued from previous page)
Stoughton v. United States EPA, 858 F.2d 747, 751 (D.C. Cir. 1988) (holding that an agency may make changes to a proposed rule if the changes are a logical outgrowth of a proposal and previous comments). In order for a final rule to be a logical outgrowth of a proposal, the agency must have provided proper notice of the initial proposal. *See Sprint Corp. v. FCC*, 315 F.3d at 376. Because Qwest's petition was properly noticed in the context of a rulemaking proceeding, the logical outgrowth analysis may be applied. *See Access Charge Reform*, CC Docket No. 96-262, Public Notice, Report No. 2490 (rel. June 29, 2001), 66 Fed. Reg. 35628 (2001).

66 *See* Letter from Jake E. Jennings, Senior Vice President, Regulatory Affairs and Carrier Relations, NewSouth Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262, at Attach. (filed Mar. 2, 2004) (attaching Letters from Jake E. Jennings, Senior Vice President, Regulatory Affairs and Carrier Relations, NewSouth Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 1 (filed Feb. 27, 2004).

67 *Id.* at 1-2. NewSouth states that this is the standard that is applied pursuant to our reciprocal compensation rules for purposes of determining whether a competitive LEC may charge the tandem interconnection rate. *See* 47 C.F.R. § 51.711(a)(3).

68 *See* Letter from Peter H. Jacoby, General Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262, at 2-4 (filed Mar. 30, 2004) (AT&T Mar. 30 *Ex Parte* Letter); Letter from Henry G. Hultquist, MCI, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262, at 2-3 (filed Mar. 22, 2004)(MCI Mar. 22 *Ex Parte* Letter). For example, they state that that the functions performed by a competitive LEC switch when it subtends an incumbent LEC tandem are the same as those performed by an incumbent LEC end office, and therefore the competitive LEC should not be permitted to charge for tandem switching. *See* AT&T Mar. 30 *Ex Parte* Letter at 3; MCI Mar. 22 *Ex Parte* Letter at 2.

69 *CLEC Access Charge Order*, 16 FCC Rcd at 9925, para. 3.

70 *See* AT&T Mar. 30 *Ex Parte* Letter at 3 (citing *Bell Atlantic Telephone Companies*, 6 FCC Rcd 4794 (1991)); MCI Mar. 22 *Ex Parte* Letter at 2 (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, 14 FCC Rcd 556 (1998)).

switching rate should reflect only the function(s) actually provided to the IXC.[71] We believe that a similar policy should apply to competitive LECs. Accordingly, we clarify that the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers. Competitive LECs also have, and always had, the ability to charge for common transport when they provide it, including when they subtend an incumbent LEC tandem switch. Competitive LECs that impose such charges should calculate the rate in a manner that reasonably approximates the competing incumbent LEC rate.[72]

B. The CLEC New Markets Rule

1. Modifications to the CLEC New Markets Rule

22. As noted above, under the "CLEC new markets rule," competitive LECs may not tariff a rate higher than the competing incumbent LEC rate in those MSAs where the competitive LEC initiated service after the effective date of the *CLEC Access Reform Order*.[73] Several competitive LECs request reconsideration of this rule so that they may charge the same, declining benchmark rates in new markets that they do in markets served before June 20, 2001.[74] Alternatively, Time Warner requests that competitive LECs be permitted to charge the declining benchmark rates in those markets that they entered within a year of the order's effective date.[75] Focal argues that, at a minimum, the Commission should modify the CLEC new markets rule so that a competitive LEC that has "already invested or signed contracts" in a market could charge the benchmark rate, and would be restricted to the prevailing incumbent LEC rate only where "it had made no investments or had no customers prior to June 20, 2001."[76] Focal further argues that the Commission's adoption of the June 20, 2001 effective date was arbitrary and capricious, because the date does not address the impact on competitive LEC investment and imposes a "flash cut" reduction in rates on those that have already made substantial investment.[77]

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[71] *See, e.g.*, Ameritech Operating Companies, Tariff FCC No. 2, § 6.8.2(D)(4)(c) ("The Tandem Switching rate will not apply to access minutes that originate or terminate at the end office part of a Class 4/5 switch."); Verizon Tariff FCC No. 14, § 4.5.2(H)(2)(f) ("The Tandem Switching rate also will not apply to access minutes that originate or terminate at the end office part of a Class 4/5 switch.").

[72] *See* Letter from Jake E. Jennings, Senior Vice President, Regulatory Affairs and Carrier Relations, NewSouth Communications, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-262 and 01-92, at 1 (filed May 6, 2004).

[73] *CLEC Access Reform Order*, 16 FCC Rcd at 9947, para. 58. *See* 47 C.F.R. § 61.26(d).

[74] *See* Focal Petition at 10-11; TDS Petition at 18-19; Time Warner Petition at 2; Focal Reply at 2-3. *See also* Letter from Lawrence Sarjeant, Vice President Regulatory Affairs and General Counsel, United States Telecom Association, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 96-262 at 2-3 (filed Nov. 20, 2001) (permitting competitive LECs entering new markets to obtain the benchmark rate will promote buildout, which, in turn, will promote the "redundant telecommunications facilities that are essential to ensuring that effective communications are available for homeland security") (USTA Nov. 20 *Ex Parte* Letter).

[75] *See* Time Warner Petition at 2, 5-7; *see also* Focal Comments at 2; Focal Reply at 3 n.10.

[76] Focal Petition at 10-11. *See also* ALTS Comments at 2 (Commission should rescind rule for carriers that have begun investing or implementing their business plan in a market); Time Warner Comments at 4 (supporting the relief requested by Focal); ASCENT Reply at 8 (supporting the relief requested by Focal and Time Warner).

[77] Focal Comments at 4. *See also* Focal Petition at 7-8.

23. The competitive LECs argue that they make substantial investments when entering a new market long before they actually turn up the first customer, and that these investments are made in the expectation of receiving rates that are sufficient to pay off their investments.[78] As a result, they contend, it causes as much financial disruption to flash-cut to the competing incumbent LEC rate in new markets as it would to make such a change in an existing market.[79] In addition, competitive LECs assert that they develop their strategies, business plans, and product mixes well in advance of market entry, and, accordingly, they need the benefit of the declining, transitional benchmark to adjust their business plans for new markets as well as existing markets.[80] Focal argues that competitive LECs entering new markets will now have to compete not only against incumbent LECs who have substantial advantages with their economies of scope and scale, but also against other competitive LECs that entered the market before the new rules were adopted and therefore are entitled to the higher access rates.[81] ALTS contends that, as a practical matter, many of its members have billing systems that cannot bill separately by MSA, but instead bill on a statewide basis, making it difficult to implement the new markets rule.[82] Z-Tel argues that the new markets rule uniquely affects carriers using the unbundled network element (UNE) platform, because, before the implementation of the rule, their customers' location had no significance; such carriers could market throughout the area of the competing incumbent LEC, without regard to where particular customers were located. Under the new rule, however, a newly acquired customer that is otherwise identical to existing customers will bring a lower access rate if it falls outside of an MSA where the competitive LEC providing service over the UNE platform already provided service.[83] TDS contends that it is irrational to discriminate between carriers that have and have not begun serving customers by a certain date.[84]

24. We decline to change the rule as the petitioners request. In adopting the benchmark system for competitive LEC access charges, the Commission intended to limit the subsidy flowing from IXCs and the long distance market to competitive LECs and their end-users, and to do so with a bright line mechanism that is objective and easy to enforce. The CLEC new markets rule eliminates, as of a specific date, the subsidy flowing from the interexchange market to competitive LECs entering new markets.[85] Modifying the rule as the competitive LECs suggest could substantially increase the amount

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78 *See, e.g.*, Focal Petition at 7-8; Time Warner Petition at 6-7.

79 *See* ALTS Comments at 4; ASCENT Comments at 8-9; Focal Comments at 4; Time Warner Comments at 4-5; USTA Nov. 20 *Ex Parte* Letter at 2.

80 *See* Focal Petition at 8-9; TDS Petition at 18-19; Time Warner Petition at 2, 4, 6-7; ALTS Comments at 4-5; ASCENT Comments at 9; Focal Comments at 4; Z-Tel Opposition at 10-11; ASCENT Reply Comments at 8. Time Warner contends that the "critical point" of its petition is that "Time Warner must rely on the same market research and experience when making adjustments to both geographic markets it currently serves and geographic markets Time Warner plans to enter in the future." Time Warner Petition at 5.

81 Focal Petition at 9-10.

82 ALTS Comments at 6. *See also* Joint CLEC May 25 *Ex Parte* at 2-3 (stating that, as currently configured, competitive LEC billing systems are incapable of billing different rates on an MSA-specific basis).

83 Z-Tel Opposition at 10.

84 TDS Petition at 18. *See also* ASCENT Reply at 10.

85 AT&T Opposition at 7. AT&T argues that artificial subsidies to increase a customer base will only increase the "disruption" and "dislocation" that ultimately results from inefficient competitive LEC entry. *Id*. *See also* WorldCom Opposition at 2.

by which IXCs subsidize competitors in the local-service market and would create ongoing incentives for economically inefficient entry in new markets.[86]

25. We also decline to modify the rules so that a competitive LEC may tariff the benchmark rate in markets that it had merely planned to enter, but where it was not actually serving customers, before the effective date of our rules. Given the numerous different competitive LEC business plans and market entry strategies, we can conceive of no reliable, objective means of determining whether a competitive LEC has made sufficient investment in a particular market to justify tariffing the benchmark rate, nor have competitive LEC commenters suggested one.[87] In addition to continuing the subsidy flow to competitive LEC operations, the rule that the competitive LECs request would be susceptible to abuse, and difficult and time-consuming for this Commission to enforce.

26. Further, we are not persuaded by claims that the new markets rule is technically difficult to implement due to competitive LEC billing system limitations. The competitive LECs contend that their access billing systems make it to impossible to comply with the new markets rule because access billing software is designed to bill on a statewide basis, rather than on an MSA basis.[88] The petitions filed by RICA and MCLEC suggest otherwise, however. These commenters argue that tariffing different access rates for different areas is not a significant burden.[89] Although the new markets rule may require some changes to current competitive LEC billing systems, RICA maintains that the changes required to track access by customer location for billing purposes "would not be significant."[90] To the extent that such changes are necessary, competitive LECs serving new markets in a state can assess whether changes to the billing system are worth the investment during the transition period to the competing incumbent LEC rate. Alternatively, the competitive LEC could determine that it is more cost-effective to move all access customers within a state to a rate at or below the incumbent LEC rate prior to expiration of the transition period.[91] Thus, we are not convinced that the new markets rule is impossible to implement, as some parties contend.[92]

27. The Commission strives to provide regulatory certainty, but changes to the regulatory landscape are as inevitable as other changes to the marketplace, and businesses are ultimately responsible

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86 *See* AT&T Opposition at 9-10.

87 Accordingly, we agree with commenters suggesting that Focal's proposal of allowing higher rates where the competitive LEC had made investments or signed customers is "amorphous" and "unworkable." *See, e.g.*, AT&T Opposition at 10.

88 *See* ALTS Comments at 6; Z-Tel Comments at 10. *See also* Joint CLEC May 25 *Ex Parte* at 2-3 (attaching the declarations of several competitive LECs describing billing system limitations).

89 *See* MCLEC Petition at 7; RICA Petition at 10-11. MCLEC further observes that section 61.26(b) already establishes a high probability that competitive LECs will have more than one access rate since that rule permits them to charge the higher of two different access rates that are likely to vary between areas. MCLEC Petition at 7 (discussing 47 C.F.R. § 61.26(b)).

90 RICA Petition at 11.

91 For this reason, we are not convinced that the purported inability to bill on an MSA-basis prevents a competitive LEC from serving any particular market. *See* Z-Tel Petition for Waiver at 9. Indeed, nothing precludes a competitive LEC from implementing a uniform set of access rates at or below the level of the competing incumbent LEC rate.

92 *See* ALTS Comments at 6; Joint CLEC May 25 *Ex Parte* at 2-3.

for adjusting their business plans to take account of such changes.[93] There was no reason for competitive LECs to make investment decisions on the assumption that the status quo would remain unchanged, given the concerns expressed by the Commission about competitive LEC rates and the possible need to constrain those rates.[94] The Commission had signaled as early as the *Fifth Report and Order* on access reform that it believed that competitive LEC access rates were excessive in some instances, and competitive LECs had no reasonable expectation of being able, indefinitely, to charge higher rates than carriers with whom they compete. [95] Indeed, the Commission expressly sought comment on whether incumbent LEC access rates should serve as a benchmark to evaluate the reasonableness of competitive LEC access charges.[96]

28. Moreover, we find that allegations of competitive harm resulting from the CLEC new markets rule do not undermine the reasons for adopting the rule. Z-Tel argues that the new markets rule uniquely affects carriers using the unbundled network element (UNE) platform because the rule "ignores the statewide nature of UNE Platform market entry."[97] TDS contends that it is irrational to discriminate between carriers that have and have not begun serving customers by a certain date.[98] Focal argues that it will be at a competitive disadvantage when it enters a new market because it will face competition from incumbent LECs with historical advantages and from competitive LECs that are permitted to charge the higher, benchmark rate.[99]

29. As an initial matter, at the conclusion of the transition period, all competitive LECs will be subject to a benchmark rate equal to the competing incumbent LEC rate.[100] To the extent that a competitive LEC enters a new market during the transition period, it may charge the same access rates as its primary competitor, *i.e.,* the incumbent LEC. In setting the benchmark level, the Commission sought to "mimic the actions of a competitive marketplace, in which new entrants typically price their product at or below the level of the incumbent provider."[101] As to competition among competitive LECs (UNE

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93 *See* Sprint Opposition at 4-5 (arguing that, since 1997, competitive LECs were on notice that attempts to charge access rates that exceeded incumbent LEC access rates may be subject to regulatory action). *See also* AT&T Opposition at 7-8.

94 *See In the Matter of Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14340, 14344, paras. 238, 247 (1999) (subsequent history omitted) (*Access Charge Further Notice*). The Commission observed that it may have "overestimated the ability of the marketplace to constrain CLEC access rates. In particular, IXCs allege that a substantial number of CLECs impose switched access charges that are significantly higher than those charged by the incumbent LECs with which they compete, suggesting that the Commission may need to revisit the issue of CLEC access rates." *Id.* at 14340, para. 238.

95 *Id.* at 14340, para. 238.

96 *Id.* at 14344, para. 247.

97 Z-Tel Opposition at 10.

98 TDS Petition at 18. *See also* ASCENT Reply at 10.

99 Focal Petition at 9-10.

100 *See* 47 U.S.C. § 61.26(c)(establishing declining benchmark rates over a three-year transition period ending June 21, 2004). *See also supra* para. 5 (discussing the declining benchmark rates).

101 *CLEC Access Reform Order*, 16 FCC Rcd at 9941, para. 45.

platform providers or otherwise) in a particular market during the transition period, the CLEC new markets rule appropriately distinguishes between those competitive LECs that serve end-users and those that do not. The Commission's rules assure that the former are provided a transition period to adjust existing customer relationships; no such transition is needed for carriers that have no customers. We believe that the benefits of limiting application of the transition to a competitive LEC's existing markets outweigh any potential competitive harm resulting from the CLEC new markets rule.

30. Finally, some commenters request clarification that the rural exemption rate is available for competitive LECs entering new MSAs.[102] That is, the new market rule does not apply if the competitive LEC would otherwise qualify for the rural exemption.[103] We agree that this is the correct interpretation of the Commission's order. The rural exemption rate is a substitute for the incumbent LEC rate that would otherwise be used as the benchmark rate. In adopting the rural exemption, the Commission recognized that rural competitive LECs experience higher costs, particularly loop costs, and may lack the lower cost urban operations that non-rural incumbent LECs use to subsidize rural operations.[104] Thus, it is appropriate that the rural exemption apply when a competitive LEC enters a new MSA. Based on our clarification here, we amend rule 61.26 (e) accordingly to read "Notwithstanding paragraphs (b) through (d) of this section…."[105]

2. APA Compliance

31. ALTS and Focal argue that the Commission violated the Administrative Procedure Act (APA) because it did not provide notice that it was considering a different rule for new markets and did not provide any opportunity for parties to comment on it.[106] We disagree. The Commission specifically sought comment on the competing incumbent LEC rate as a benchmark.[107] In the *Further Notice of Proposed Rulemaking* immediately preceding the *CLEC Access Reform Order,* the Commission reminded interested parties that the Commission had "invited parties to address whether the incumbent LEC's terminating access charges should serve as a benchmark to evaluate the reasonableness of CLEC's terminating rates,"[108] and repeated its request for comment on this proposal. The Commission also reiterated that it was still considering a rule "that a CLEC's terminating access charges might be presumptively just and reasonable if they were less than or equal to the terminating access charges of the

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102 *See* 47 C.F.R. § 61.26(d), (e).

103 *See* MCLEC Petition at 11-13; RICA Petition at 11-12.

104 *See CLEC Access Reform Order*, 16 FCC Rcd at 9950, para. 66.

105 *See* Appendix A for final rules. This clarification requires us to note a typographical error in subsection (e) of 47 C.F.R. § 61.26 as printed. We note that the text of subsection (e), as released, referenced "paragraphs (b) through (c)" not "paragraphs (b) through (3)," which is the text found in the C.F.R. *See CLEC Access Reform Order*, 16 FCC Rcd at App. B. Due to an transcription error, the reference to subsection (c) in the final rules incorrectly appears in the C.F.R. as subsection (3). Because we amend rule 61.26 herein, the error is now moot.

106 ALTS Comments at 2-3; Focal Petition at 2-6. *See also* Joint CLEC May 25 *Ex Parte* at 3-5 (arguing that adoption of the CLEC new markets rule constitutes a violation of the APA in that the Commission did not provide adequate notice and comment).

107 *Access Charge Further Notice*, 14 FCC Rcd at 14344-45, paras. 247-48.

108 *Id.* at 14344, para. 247 (citing *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Notice of Proposed Rulemaking, Third Report and Order and Notice of Inquiry, 11 FCC Rcd 21354, 21476, para. 280 (1996)).

incumbent LEC with which the CLEC competes."[109] Several commenters supported this proposal, arguing that the Commission should immediately set competitive LEC tariffed rates at or near the incumbent LEC rate.[110] The Commission also asked whether these proposals should apply to originating access rates, as well as whether the benchmark "should vary depending on various criteria," and, if so, "what criteria" the Commission should consider in determining the applicable benchmark.[111]

32. As the record indicates, it should have been apparent to any interested party that the Commission was contemplating a benchmark at the competing incumbent LEC rate for at least some markets. That the Commission ultimately decided to adopt a transition mechanism for some parties does not in any way render the notice provided to parties defective.[112] The request for comments on incumbent LEC-based and other benchmarks was sufficient to "adequately frame the subjects for discussion,"[113] providing affected parties a fair opportunity to express their views. Thus, ALTS and Focal could have anticipated that the new markets rule might be adopted based on proposals to set competitive LEC tariffed rates immediately at the incumbent LEC rate,[114] and thus could have commented meaningfully on it.[115]

C. Rural Exemption

33. As explained above, the rural exemption to the benchmark scheme is available for a competitive LEC competing with a non-rural incumbent LEC.[116] The exemption is not available, however, if any portion of the competitive LEC's service area falls within a non-rural area.[117] Qualifying

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109 *Id*.

110 *CLEC Access Reform Order,* 16 FCC Rcd at 9937, para. 36 and n. 87 (citing comments of Sprint, AT&T, and WorldCom supporting use of competing incumbent LEC rate as benchmark).

111 *Access Charge Further Notice*, 14 FCC Rcd at 14345, para. 248.

112 *See, e.g., Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 226-28 (D.C. Cir. 1967) (holding that failure by the Commission to mention "grandfather rights" in a Notice of Inquiry is not a fatal defect under the APA).

113 *Connecticut Light & Power Co. v. Nuclear Regulatory Commn.*, 673 F.2d 525, 533 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982).

114 *See* AT&T Opposition at 7-8; Sprint Opposition at 4.

115 *See, e.g., Small Refiner Lead Phase – Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 548-49 (D.C. Cir. 1983) (holding that, in determining whether adequate notice was given, the court will consider whether a party "should have anticipated that a requirement might be imposed"). Accordingly, competitive LECs received adequate notice that this was a possibility. *See American Medical Ass'n v. United States,* 887 F.2d 760, 766-69 (7th Cir. 1989) (notice of final IRS rule providing three methods of allocating revenues sufficient where proposed rule enumerated seven factors to be considered in allocating revenues, as the final rule was "contained" in the proposed version and merely eliminated some of the alternative calculation methods).

116 *See* 47 C.F.R. § 61.26(e).

117 47 C.F.R. § 61.26(a)(6) (defining a non-rural area as any incorporated place of 50,000 inhabitants or more, based on the most recently available populations statistics of the Census Bureau or any urbanized area, as defined by the Census Bureau). We note that SouthEast Telephone, Inc. (SouthEast) recently requested a waiver of section 61.26(a)(6) of the Commission's rules to permit it to serve customers in metropolitan locations and maintain its eligibility for the rural exemption. *See Pleading Cycle Established For Petition of SouthEast Telephone, Inc. for Waiver of CLEC Access Charge Rules*, CC Docket No. 96-262, Public Notice, DA 04-936 (rel. April 2, 2004). Our decision here is made without prejudice to SouthEast's waiver request. That petition will be (continued….)

competitive LECs may tariff rates up to the highest NECA rate band minus the NECA tariff's CCL charge if the competing incumbent LEC is subject to CALLS access rates.[118] Petitioners challenge all of these aspects of the exemption. That is, they seek to broaden the applicability of the exemption to competitive LECs competing with any price cap LEC and to competitive LECs serving non-rural areas to the extent they serve rural end-users. They also request that the Commission incorporate the CCL in the rural exemption rate, and seek clarification on the application of the multi-line business PICC. As explained in more detail below, we decline to make any of these changes to the rural exemption, and we clarify the application of the PICC under the rural exemption.

1. Status of Competing Carrier

34. Commenters argue that the rural exemption should apply to competitive LECs that serve an otherwise qualifying rural area, if they compete with *any price cap LEC*, rather than, as it is currently structured, applying only to competitive LECs competing with non-rural incumbent LECs.[119] The petitioners argue that many price cap LECs, although they may qualify as rural, still have substantial, relatively dense population areas with which to subsidize the more diffuse, rural portions of their service areas.[120] Consequently, they argue, it is unfair to tie a rural competitive LEC's access rates to those of a rural price cap LEC that serves relatively dense population areas and has economies of scale not available to rural competitive LECs.[121] This requested rule change would enable those competitive LECs competing with rural price cap LECs to charge NECA rates rather than the CALLS access rates applicable to their price cap LEC competitors.

35. We decline to expand the rural exemption as requested. The rural exemption was intended to prevent rural competitive LECs with high loop costs from being tied to a competing incumbent's access rate that reflects the incumbent's ability to subsidize high-cost, rural operations with

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addressed separately under the Commission's well-established waiver standards. *See Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[118] 47 C.F.R. § 61.26(e). During the course of the debate over competitive LEC access charges, the Commission adopted an integrated interstate access reform and universal service proposal put forth by the members of the Coalition for Affordable Local and Long Distance Service (CALLS). *See In the Matter of Access Charge Reform,* CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (*CALLS Order*), *aff'd in part, rev'd in part, and remanded in part, Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *In the Matter of Access Charge Reform,* CC Docket No. 96-262, Order on Remand, FCC 03-164 (rel. July 10, 2003) (providing further analysis and explanation of the Commission's decision in the *CALLS Order*). The *CALLS Order* resolved major outstanding issues concerning access charges of price cap incumbent LECs by determining the appropriate level of interstate access charges and by converting implicit subsidies in interstate access charges into explicit, portable, and sufficient universal service support. *Id.* at 12974-76. The *CALLS Order* is interim in nature, covering a five-year period, beginning in July of 2000. *Id.* at 12977.

[119] *See* RICA Petition at 7-8; RICA Reply at 1-4; *see also* MCLEC Petition at 9-10; MCLEC Reply at 4-5. MCLEC further notes that the definitions of rural competitive LEC and rural telephone companies do not line up properly, noting that a rural competitive LEC competing with a rural incumbent LEC can still face a competitor with substantially greater resources and economies of scale. MCLEC Reply at 4.

[120] See MCLEC Petition at 9-11; RICA Petition at 8. RICA contends that rural price cap incumbent LECs, as mid-sized companies serving third and fourth tier cities, still experience economies of scale not available to the rural competitive LECs. RICA Petition at 8.

[121] *See* MCLEC Petition at 10; RICA Petition at 8.

more concentrated, low-cost urban operations.[122] The Commission also sought, however, to keep the exemption as narrow as possible to minimize the strain it placed on the interexchange market. We agree that IXCs and their customers should not subsidize entry of rural competitive LECs that are unable to compete by charging lower prices or persuading end-users to pay higher rates.[123] Moreover, the petitioners seeking to expand the rural exemption make only generalized assertions about the ability of rural price cap carriers to subsidize their high cost operations without providing specific evidence on the question. Indeed, at least one price cap incumbent LEC challenges the underlying assumptions of the petitioners, noting that it has no urban areas to subsidize its rural areas and has a very diffuse service area.[124] AT&T concurs, arguing that rural incumbent LECs do not have the same ability as non-rural incumbent LECs to subsidize their access rates in rural areas by averaging their access rates across state-wide study areas that include lower cost urban and suburban areas.[125] There is inadequate evidence in the record that rate-averaging by rural price cap incumbent LECs creates a sufficient subsidy flowing to the higher cost portions of the incumbent LEC service areas to justify such an expansion of the rural exemption.

2. Location of Competitive LEC End-Users

36. Rural competitive LECs also contend that the rural exemption should apply to the extent that end-users are located in rural areas, arguing that a single end-user in a non-rural area should not entirely disqualify a competitive LEC from charging the NECA rate.[126] They state that the presence of some non-rural customers does not change the higher loop costs that rural competitive LECs continue to face in serving their rural end-users.[127] They also assert that the rule's current structure will increase litigation and administration costs because, for the IXCs, so much rides on finding even a single competitive LEC end-user that is located in a non-rural area.[128] ALTS argues that, without such an expansion, the exemption is virtually worthless because, according to ALTS, almost no competitive LECs serve exclusively rural areas.[129]

37. We decline to broaden the application of the rural exemption in this manner. The exemption was designed as a narrow exception to the otherwise market-based rule that ties competitive LEC rates to those of their incumbent competitors in the access market. In adopting the rural exemption, the Commission emphasized the need for administrative simplicity, and noted that it would apply only to a small number of carriers serving a small portion of the nation's access lines.[130] Accordingly, we agree

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122 *CLEC Access Reform Order*, 16 FCC Rcd at 9949-50, para. 64.

123 *See* Sprint Opposition at 7-8; *see also* WorldCom Opposition at 3.

124 Iowa Telecom Opposition at 2, 5-8. Alternatively, Iowa Telecom argues that it should be permitted to charge the NECA rates. Iowa Telecom Opposition at 9.

125 AT&T Opposition at 11.

126 MCLEC Petition at 3-4; RICA Petition at 10-11; ALTS Comments at 10; MCLEC Reply at 1-3.

127 MCLEC Petition at 3-4; ALTS Comments at 10; MCLEC Reply at 2.

128 MCLEC Petition at 5-7.

129 ALTS Comments at 10.

130 *See CLEC Access Reform Order*, 16 FCC Rcd at 9951, 9954, paras. 68, 75.

with IXCs that this rule change would improperly broaden the application of the rural exemption.[131] The purpose of the exemption was to encourage competitive entry in truly rural markets. If a competitive LEC chooses to serve more concentrated, non-rural areas, in order to offset the cost of serving high-cost, rural customers, it should not also receive the subsidy of charging NECA rates for access to its rural end-users.

3. Exclusion of CCL Charge

38. Rural competitive LECs also request that we reverse the portion of the rural exemption rule that excludes the CCL charge from the NECA rate that they may charge if the competing incumbent LEC is subject to CALLS access charges.[132] They contend that their costs, particularly loop costs, are significantly higher than those of the price cap LECs with which they typically compete, and that they should therefore be permitted to charge the CCL portion of the NECA rate.[133] RICA emphasizes that the Commission's *MAG Order*[134] has resulted in a significant reduction in interstate access revenue for rural

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[131] *See* AT&T Opposition at 12 ("If a rural CLEC can also go outside its rural area and sign up customers in lower cost urban and suburban areas, it too can average its cost of serving high-cost rural areas with the lower cost of serving urban and suburban areas, and there is no need for the rural exemption."); Sprint Opposition at 8 ("There is no reason to let a CLEC have the best of both worlds: competing in urban areas against an ILEC whose urban retail rates and access charges are affected by its rural operations, while being allowed to charge above-ILEC access charges in the rural portions of the ILEC's territory.") *See also* WorldCom Opposition at 3 ("The Commission's goal should be to contract, not expand, the number of end-users for which CLECs may impose access rates higher than those of their primary competitor, the ILEC. … Moreover, if the CLEC overwhelmingly serves customers in rural areas, it can seek waiver of the Commission's rules.").

[132] *See* MCLEC Petition at 13-14; RICA Petition at 5-7. Historically, incumbent LECs have recovered the interstate portion of common line costs through two separate charges -- the subscriber line charge (SLC), a flat-rated charge imposed on end-users, and the carrier common line charge (CCLC), a per-minute charge imposed on IXCs. In the 1997 *Access Charge First Report and Order*, the Commission required price cap LECs to recover a portion of these costs through a new presubscribed interexchange carrier charge (PICC), a flat-rated charge assessed on an end-user's presubscribed IXC. *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982 (1997) (subsequent history omitted). In 2000, the Commission adopted the *CALLS Order*, an integrated access charge and universal service reform plan for price cap carriers, one feature of which was to raise SLC caps over time so as to phase out the PICC and CCLC and require price cap LECs to recover the majority of interstate common line costs from their end-users. *See generally CALLS Order*, 15 FCC Rcd 12962. In 2001, the Commission adopted an access charge and universal service reform plan for rate-of-return carriers. *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket No. 00-256, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation*, CC Docket No. 98-77, *Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 98-166, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001) (*MAG Order*). As part of these reforms, the Commission raised SLC caps to the levels set for price cap carriers, eliminated CCL charges as of July 1, 2003, and replaced any resulting common line revenue shortfall with explicit universal service support. *Id.* Thus rate-of-return LECs recover all of their interstate common line costs through a combination of end-user charges and universal service; they recover none from IXCs.

[133] *See* MCLEC Petition at 13; RICA Petition at 3-5; RICA Reply at 6.

[134] *MAG Order*, 16 FCC Rcd at 19613.
(continued….)

competitive LECs charging the NECA rate, without having the same impact on NECA pool members.[135] MCLEC notes that, although rural competitive LECs can impose multi-line business PICCs, this does not make up for the lost revenue because rural areas have many fewer multi-line businesses than do the areas served by most CALLS incumbent LECs.[136]

39. We decline to revise the rule to allow rural-exemption competitive LECs to charge the CCL portion of the NECA rate.[137] Excluding the NECA tariff's CCL charge when the competitive LEC competes with a CALLS incumbent LEC promotes parity between the competing carriers. The CCL charge, the SLC, and the PICC have been designed to recover common line costs from different sources; the CCL charge from IXCs, the SLC from end-users, and the PICC from multi-line businesses. Most incumbent LECs no longer collect CCL charges.[138] As the Commission previously explained, competitive LECs competing with CALLS incumbent LECs are free to build into their end-user rates a component equivalent to the incumbent LEC's SLC, as well as to assess IXCs a multi-line business PICC.[139] The competitive LEC should not be permitted to double recover common line costs by mirroring the incumbent LEC's SLC and PICC charges and also charging the NECA tariff's CCL charge to IXCs.[140]

(Continued from previous page)

[135] *See* Letter from David Cosson, Counsel for RICA, to Marlene Dortch, Secretary, Office of the Secretary, Federal Communications Commission, CC Docket No. 96-262, at 10 (Jan. 30, 2003). RICA explains that the MAG order reduced the NECA rates by shifting recovery to end-users and to a new universal service support mechanism. *Id.*

[136] MCLEC Petition at 13-14.

[137] We note that, in accordance with the *MAG Order*, the CCL charge was eliminated for rate-of-return carriers as of July 1, 2003, thereby rendering this issue moot on a going forward basis. *See MAG Order*, 16 FCC Rcd at 19642, para. 61 (eliminating the CCL charge when SLC caps are scheduled to reach their maximum levels and the new universal service support mechanism, Interstate Common Line Support (ICLS), is implemented). We amend section 61.26(e) to remove any reference to the CCL. Similarly, we remove any reference to the transport interconnection charge, which also was eliminated. *Id.* at 19656-58, paras. 98-104.

[138] *CLEC Access Reform Order,* 16 FCC Rcd at 9956, para. 81 (explaining that the price cap LECs' CCL charges have been largely eliminated). Price cap LECs make up the CCL revenue by charging higher SLCs and the multi-line business PICC. According to information submitted in the 2003 annual filing, only four price cap LECs continue to collect CCL charges and these charges account for only .01 of one percent of the total common line revenues for the industry. Rate-of-return LECs make up the CCL revenue by charging higher SLCs and through the ICLS.

[139] *Id*.

[140] RICA argues that if the NECA rate drops because cost recovery is shifted to the Universal Service Fund, competitive LECs will need appropriate protection of their revenues. RICA suggests benchmarking the rural competitive LEC rate to the NECA rate plus "the average per minute or per line recovery shifted to the USF" or, alternatively, making rural competitive LECs eligible for USF on the same basis as rural incumbent LECs, rather than on the basis of the incumbent LEC with which the competitive LEC competes. RICA Petition at 9. In establishing a benchmark rate, our intent was more closely to align competitive LEC access rates with those of incumbent LECs. *See CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3. Thus, our *CLEC Access Reform Order* addressed only those charges assessed by incumbent LECs and competitive LECs on IXCs. The Commission's methodology for calculating high-cost universal service support for different eligible telecommunications carriers serving the same areas is being reexamined in a separate proceeding now before the Federal-State Joint Board on Universal Service. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 17 FCC Rcd 22642 (2002); Public Notice, 18 FCC Rcd 1941, 68 FR 10429 (rel. Mar. 5, 2003).

4. Application of PICC

40. RICA asks us to clarify whether PICCs may be tariffed in addition to the rural exemption rate.[141] RICA argues that the *CLEC Access Reform Order* could be interpreted as defining the rural exemption rate as the NECA rate, minus CCL charge, plus some component to account for the multi-line business PICC.[142] Stated differently, RICA seeks clarification as to whether a competitive LEC may impose the multi-line PICC on top of the rural exemption rate.[143] RICA also requests that we clarify whether PICCs may be tariffed when the competing incumbent LEC does not have a PICC.[144] Sprint believes that, under the *CLEC Access Reform Order*, the composite access rate charged by a competitive LEC, including any PICC, may not exceed the rural exemption rate.[145] Thus, Sprint argues that competitive LECs may not assess a multi-line PICC on top of the applicable rural exemption rate, but may assess a PICC as part of the charges that make-up the composite rate.[146]

41. As the Commission stated in its *CLEC Access Reform Order*, rural competitive LECs competing with CALLS incumbent LECs are free to assess IXCs a multi-line PICC charge.[147] Indeed, as discussed above, the ability of rural competitive LECs to assess a multi-line business PICC obviated, in part, the need for a CCL charge because the PICC provided a potential revenue source.[148] The question presented by RICA is whether the PICC, if assessed, must be included in the calculation of the rural exemption rate or whether the PICC may be assessed in addition to the rural exemption rate. We clarify that a PICC may be imposed by a rural competitive LEC in addition to the rural exemption rate if and only to the extent that the competing incumbent LEC assesses a PICC, and we revise section 61.26(e) of the Commission's rules accordingly.[149]

D. Structure of the Benchmark

42. TDS requests that we modify the benchmark scheme to allow competitive LECs to charge higher access rates in lower density markets. TDS argues that UNE loop prices vary dramatically with density zone, and that the benchmark rate should recognize that carriers serving tier 2 and 3 markets have greater loop expenses because of lower customer density, just as the rural exemption recognizes for

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141 RICA Petition at 15-16.

142 RICA notes that subsection (e) of the rule suggests exclusion of the multi-line business PICC, and requests clarification regarding the rule. RICA Petition at 15-16. Section (e) of the rule provides that "a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching and the transport interconnection charge." 47 C.F.R. § 61.26(e).

143 Sprint Opposition at 9.

144 RICA Petition at 15.

145 Sprint Opposition at 9-10.

146 *Id.*

147 *Access Charge Reform Order*, 16 FCC Rcd at 9956, para. 81.

148 *Id.*

149 *See* Appendix A.

rural carriers.[150] TDS further argues that the order fails to take into account the different cost structure of incumbent LECs, their economies of scale, and their protected monopoly status during which they developed much of their customer base.[151]

43. Under TDS's proposal, two sets of access rates, above the 2.5-cent benchmark but below the rural exemption rate, would be available for competitive LECs serving areas of lower density that have already been so identified for such purposes as UNE or access pricing.[152] In support of this proposal, TDS also argues that the CALLS plan resulted in negotiated access rates and revenue flows that do not necessarily coincide with CALLS carrier statewide or individual market costs.[153] TDS contends that, as long as access charge averaging prevails, the largest incumbent LECs cannot charge rates that reflect differences in cost between their urban core markets and their Tier 2 and 3 and residential market segments.[154] TDS seeks a disaggregation of the averaged incumbent LEC benchmark and of a comparable NECA rate to what it contends more closely resembles the rate differentials that a "truly market-driven system would bring about."[155]

44. We decline to adopt this modification to the benchmark system. Instead, we will maintain the current structure of benchmark, which ties the rates of non-rural competitive LECs to the higher of the 2.5-cent benchmark or the rate of the competing incumbent LEC rate. The logic of TDS's multi-tier benchmark system – allowing higher access rates for areas of progressively lower density – may be consistent with the logic of the rural exemption; however, the rural exemption was designed as a limited exception to an otherwise broadly applicable rule that would drive competitive LEC access rates to those of the competing incumbents. As stated earlier, in adopting the rural exemption, the Commission emphasized the need for administrative simplicity, and noted that it would apply only to a small number of carriers serving a small portion of the nation's access lines.[156] We believe that adoption of TDS's proposal would not meet the need for simplicity and narrow application.

45. Additionally, the proxies for density that TDS suggests would be ill-suited to the job. In some cases, access pricing zones are no longer tied to density and may be changed at will by an incumbent's tariff filing.[157] UNE pricing zones are not uniformly implemented across the states and,

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150 TDS Petition at 7-9, 13-15.

151 *Id.* at 11. TDS also contends that it is discriminatory to treat competitive LECs serving smaller markets the same as those competitive LECs that serve national markets and have substantially greater economies of scale and resources. *Id.*

152 TDS Petition at 8-9. TDS first set out this multi-tiered benchmark proposal in its last set of reply comments in the rulemaking. Because of an apparent glitch in the computer docketing system, however, bureau staff did not include these comments in the rulemaking. Based on this failure, TDS seeks reconsideration of the benchmark system. TDS Petition at 6-9. TDS also requested a stay of the *CLEC Access Reform Order* until at least such time as the Commission has issued a decision on the merits in response to its petition for reconsideration. *See* TDS Petition for Stay at iii. Inasmuch as we deny TDS's petition for reconsideration of the *CLEC Access Reform Order*, the petition for stay is denied as moot.

153 TDS Petition at 11; TDS Reply at 5.

154 TDS Reply at 5.

155 *Id.*

156 *See CLEC Access Reform Order*, 16 FCC Rcd at 9951, 9954, paras. 68, 75.

157 *See* 47 C.F.R. § 69.727.

depending on population patterns and state implementation, a particular zone may cover areas of dramatically different density in two states. Finally, the arguments made by TDS rely on the assumption that there has been some regulated determination of competitive LEC costs, including separations and cost allocation, that conclusively establishes that the access costs of competitive LECs are higher than the rates set by the Commission, which is not the case.[158] For these reasons, we reject TDS's proposal to change the existing benchmark structure.

E. Multiple Incumbent LECs in a Service Area

46. TelePacific requests that the Commission clarify what access rate applies when more than one incumbent LEC operates within a competitive LEC's service area.[159] TelePacific notes that, as competitive LECs enter new markets (and as the transitional benchmark declines), they may have to set their access rate at the "competing [incumbent] LEC rate" when there are multiple such rates.[160] TelePacific requests that the Commission prescribe precisely how the "competing [incumbent] LEC rate" should be calculated for those cases when a competitive LEC serves areas covered by two incumbents with differing rates, asserting that it is overly burdensome for competitive LECs to charge different rates for access to end-users falling in different incumbent LEC territories.[161] TelePacific suggests various means of setting this competing incumbent LEC rate,[162] and it argues that, without such clarification, competitive LEC market entry will be delayed or possibly abandoned altogether because of uncertainty about rates and the prospect of IXC refusal to pay, or litigation.[163]

47. By moving competing LEC access rates to the competing incumbent LEC rate, the Commission intended for competitive LECs "to receive revenues equivalent to those the ILECs receive from IXCs."[164] The Commission's rules define the "competing ILEC" as the local exchange carrier "that would provide interstate exchange access service to a particular end user if that end user were not served by the CLEC."[165] Thus, as AT&T correctly observes, there is only one "competing ILEC" and one "competing ILEC rate" for each particular end-user.[166] Accordingly, competitive LECs serving an area with multiple incumbent LECs can qualify for the safe harbor by charging different rates for access to

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158 AT&T notes that TDS has offered no actual cost data to support its assertion that its costs are above the amount it can recover through access charges. AT&T Opposition at 15.

159 TelePacific Petition at 1-3. *See also* ALTS Comments at 6-9 (supporting TelePacific request for clarification); Time Warner Comments at 2-3.

160 TelePacific Petition at 4.

161 TelePacific Petition at 2-3, 5-6; TelePacific Revised Reply at 2-3.

162 TelePacific suggests three ways the Commission could set this rate: (1) simple average of the incumbent LEC rates from the competitive LEC's service area; (2) weighted average based on the number of end-user lines in each of the incumbent LEC territories within the competitive LEC's service area; or (3) weighted average based on the relative traffic volumes statewide. TelePacific Petition at 7-9. *See also* Time Warner Comments at 3; ALTS Comments at 7-8 (advocating use of a straight average approach).

163 TelePacific Revised Reply Comments at 4-5. *See also* ALTS Comments at 7.

164 *CLEC Access Reform Order*, 16 FCC Rcd at 9945, para. 54.

165 47 C.F.R. § 61.26(a)(2).

166 *See* AT&T Opposition at 16.

particular end-users based on the access rate that would have been charged by the incumbent LEC in whose service area that particular end-user resides.[167]

48. The record suggests, however, that some competitive LECs may prefer to charge IXCs a blended access rate when more than one incumbent LEC operates within a competitive LEC's service area.[168] One alternative for competitive LECs is to negotiate a blended access rate with the IXCs. If a competitive LEC charges a blended access rate other than a negotiated rate, such a rate must reasonably approximate the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers. That is, a blended rate is reasonable if it does not result in revenues that exceed those the competing incumbent LECs would receive from IXCs for access to those customers. Although we decline to specify the precise manner in which a competitive LEC must set its access rates when it serves the area of multiple incumbent LECs,[169] we believe that a weighted average calculation based on the number of minutes of use generated by a competitive LEC's end-user customers in different incumbent LEC territories is consistent with this standard.[170] In such cases, the competitive LEC bears the burden of demonstrating that its blended rate approximates the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers.

F. Billing Name Information

49. Qwest contends that an IXC's duty under section 201(a) to accept competitive LEC access traffic should exist only when the competitive LEC provides adequate billing name and address (BNA) information, so that the IXC can properly bill the competitive LEC end-user for the calls made.[171] Qwest argues that, in the absence of adequate BNA information, the IXC should be permitted to refuse to accept (or pay for) competitive LEC access service, because without such information, the IXC cannot collect for the traffic it carries.[172]

50. We decline to condition the IXCs' section 201(a) duty to accept competitive LEC access services on the provision of BNA information that the IXC deems sufficient. The Commission considered the issue of LEC obligations to provide BNA information in the context of an extensive rulemaking proceeding, and determined that, in some cases, LECs are required to provide billing information under tariff.[173] If IXCs believe that the current rules do not provide for adequate BNA

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167 *See id.*

168 For instance, TelePacific states that its billing systems do not identify the competing incumbent LEC relevant to an end-user's access traffic and that developing such a billing system would be costly and difficult. *See* TelePacific Petition at 5-6.

169 Dictating precisely how a competitive LEC must calculate the competing incumbent LEC rate when it serves more than one incumbent LEC area will involve the Commission unnecessarily in the details of competitive LEC rates when, as we stated in the *CLEC Access Reform Order*, we are trying to minimize our regulation of them. *CLEC Access Reform Order*, 16 FCC Rcd at 9939, para. 41.

170 *See* AT&T Opposition at 17.

171 Qwest Petition at 4-6.

172 *Id. See also* AT&T Opposition at 19-20 (agreeing that an IXC must be able to decline to accept competitive LEC access traffic if the competitive LEC fails to provide sufficient BNA information).

173 *See In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Second Report and Order, 6 FCC Rcd 4478 (1993); *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing* (continued….)

information or if IXCs continue to have difficulty obtaining BNA information from competitive LECs, they can seek appropriate relief from the Commission.[174] Moreover, the competitive LECs persuasively argue that Qwest's proposal would encourage IXCs to find inadequacies with competitive LECs' BNA information in order to avoid accepting (and paying for) access service.[175] This could create a loophole in the 201(a) obligation that the Commission imposed and would thereby again endanger the ubiquity of the network, a consideration that substantially animated the *CLEC Access Reform Order.*

G. Other Matters

1. RICA Claims Regarding AT&T Discontinuance of Service.

51. RICA requests a determination regarding whether an IXC's withdrawal from certain service areas or refusal of service to certain carriers' end-users amounts to a violation of section 214.[176] In the *CLEC Access Reform Order*, the Commission concluded that it need not address the applicability of section 214 because it would be a violation of section 201(a) for an IXC to refuse service to a competitive LEC end-user where the competitive LEC has tariffed access rates within the safe harbor.[177] RICA contends that, by not resolving the section 214 issue, the Commission failed to address whether past refusals of AT&T to continue providing service without authority from the Commission violated the Act.[178] RICA also requests enforcement of section 203(c), which requires carriers to comply with their tariffs.[179] RICA contends that AT&T violated its own tariffs by refusing to serve end-users even where access to arrangements were available to them.[180]

52. We decline to address in this order whether past refusals of AT&T to continue providing service without authority from the Commission violate section 214 and section 203(c) of the Act. Whether the prior actions of AT&T violated the Act depends on fact-specific findings that are more

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Information for Joint Use Calling Cards, Petitions for Waiver of Rules Adopted in the BNA Order, CC Docket No. 95-115, Second Order on Reconsideration, 8 FCC Rcd 8798 (1993) (subsequent history omitted); *In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Third Order on Reconsideration, 11 FCC Rcd 6835, 6856, para. 38 (1996) (clarifying that LECs are required to provide BNA information associated with calling card, third party, and collect calls) (subsequent history omitted).

[174] IXCs could seek this relief via a petition for rulemaking or on a case-by-case basis. *See* ALTS Comments at 13 (suggesting that the appropriate remedy for the IXC would be to file a section 208 complaint and seek redress from the Commission on a case-by-case basis).

[175] ALTS, ASCENT, and Z-Tel raise the concern that giving IXCs the option of rejecting competitive LEC access service invites abuse, by creating a danger of unilateral action by IXCs displeased with competitive LEC actions. ALTS Comments at 13-14; ASCENT Comments at 6; Z-Tel Opposition at 7-8; ASCENT Reply at 6-7.

[176] RICA Petition at 12-13 *(*citing RICA, Request for Emergency Temporary Relief Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision, Feb. 18, 2000, at 12). *See also* RICA Reply at 8-9.

[177] *CLEC Access Reform Order*, 16 FCC Rcd at 9961, paras. 96-97.

[178] RICA Petition at 12-13.

[179] *Id.* at 13. *See also* 47 U.S.C. § 203(c).

[180] RICA Petition at 12-13.

appropriately handled in the context of an enforcement proceeding.[181] Indeed, RICA appears to acknowledge this in its petition by stating that "enforcement action is…required."[182] To the extent that RICA believes it has been harmed by AT&T's prior actions, it may seek a remedy via our complaint process or the courts.

2. Section 202(a) and 203(c) Violations

53. RICA requests clarification whether competitive LECs that file access tariffs and then also negotiate different rates with certain IXCs violate sections 202(a) or 203(c).[183] RICA contends that these provisions of the Act "historically have been applied to require that a carrier cannot agree to charge a customer at other than its filed tariff rate and that charging different rates to similarly situated customers is unlawful."[184] According to RICA, it appears that, under the *CLEC Access Reform Order*, competitive LECs may charge and enforce tariff rates, but nevertheless negotiate a different rate or regulation with some access customers without violating these Act provisions.[185] RICA also requests a statement that the Commission will not impose forfeitures for violation of these sections in this situation.[186] AT&T argues that there is no need for clarification that competitive LECs can provide access services to IXCs pursuant to intercarrier agreements subject to section 211 of the Act instead of tariffs.[187] Sprint responds that this type of discrimination claim must be decided on a case-by-case basis, and that without a factual record, the Commission cannot opine on this.[188]

54. We deny RICA's request. In this case, we agree with Sprint that any claims in this context concerning violations of section 202(a) or section 203(c) should be decided on a case-by-case basis because such claims depend on fact-specific circumstances. Section 202(a) of the Act makes it unlawful "for any common carrier to make any unjust or unreasonable discrimination in charges, practices, …facilities, or services, … or to make or give any undue or unreasonable preference or advantage to any particular person."[189] Section 203(c) specifies that carriers must apply the rates and

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[181] RICA asks the Commission to conclude that AT&T's refusal to serve competitive LEC customers also violates section 201(b), section 202(a), and possibly section 254(g) of the Act. *See* Letter from Clifford C. Rhode, Counsel for RICA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-262 (filed July 18, 2002) (attaching Letter from David Cosson, Attorney for Rural Independent Competitive Alliance to Jeffrey Dygert, Deputy Division Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, CC Docket No. 96-262 at 3-4 (filed July 18, 2002)). We decline to address whether past refusals of AT&T to continue providing service violates these sections as well because whether the prior actions of AT&T violated these sections of the Act also depends on fact-specific findings that are more appropriately handled in the context of an enforcement proceeding.

[182] RICA Petition at 13.

[183] *See id.* at 13-15. *See also* RICA Reply at 6-8.

[184] RICA Petition at 13-14.

[185] *Id.* at 14. *See also* RICA Reply Comments at 8.

[186] RICA Petition at 13-14.

[187] AT&T Opposition at 13 n. 17. Section 211 of the Act requires carriers to file intercarrier contracts or agreements with the Commission. 47 U.S.C. § 211.

[188] Sprint Opposition at 9.

[189] 47 U.S.C. §202(a).

regulations set forth in their tariffs.[190] In order to determine whether a carrier's conduct violates these provisions of the Act, the Commission must consider certain facts. For instance, in determining whether a carrier is in violation of section 202(a), the Commission applies a three-pronged test, which includes a consideration of whether the services at issue are "like" services.[191] In each case, the Commission should evaluate the unique circumstances and make a determination based on the factual record.

55. RICA responds that, even if more facts are necessary to determine violations under section 202, no such specifics are necessary under section 203, which provides an "absolute command."[192] As an initial matter we note that section 203 does not contain an absolute command, as RICA contends. Section 203 begins by stating that "[n]o carrier, *unless otherwise provided by or under authority of this Act*, shall engage or participate in such communication unless schedules have been filed and published."[193] In the *CLEC Access Reform Order*, the Commission provided, pursuant to its authority under the Act, that competitive LECs may obtain higher rates through negotiation.[194] Further, we can imagine no situation where an IXC would voluntarily negotiate a higher rate for an access service identical to that offered pursuant to tariff. We continue to believe, and there is nothing in the record to the contrary, that an IXC paying a rate in excess of the benchmark likely will receive additional features beyond the tariffed service.[195]

3. Negotiation Requirement

56. TDS complains that the Commission failed to provide a backstop for a competitive LEC in a higher cost market to demonstrate that its costs exceed the incumbent LEC's average charges for the competitive LEC's portion of the incumbent LEC service area.[196] TDS urges the Commission to modify its order to require IXCs to negotiate or submit to arbitration to set cost-based rates in density zones where incumbent LEC UNE and transport charges are already deaveraged because of density-based cost differentials.[197] TDS also urges the Commission to permit competitive LECs to charge higher tariffed rates if they can demonstrate that their costs exceed those of the incumbent LEC.[198] Sprint opposes the arbitration request, arguing that above-benchmark rates, in the absence of an IXC's agreement to pay them, "are simply impermissible" under the rules.[199] Sprint further argues that the competitive LEC

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190 *Id.* §203(c).

191 *See, e.g., MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990); *Allnet Communications Serv., Inc. v. US West, Inc.* 8 FCC Rcd 3017, 3025, para. 38 n. 87 (1993).

192 RICA Reply at 8.

193 47 U.S.C. § 201(c) (emphasis added).

194 *See CLEC Access Reform Order*, 16 FCC Rcd at 9940, para. 43.

195 *See id.* at 9937, para. 37.

196 TDS Petition at 17.

197 *Id.*

198 *Id.*

199 Sprint Opposition at 10-11.

remains able to pass along costs to its end-user customers, and those customers will discipline the market by making their carrier selections accordingly.[200]

57. We reject TDS's requests that we impose a negotiation or arbitration requirement on IXCs and permit competitive LECs to tariff rates above the benchmark if cost-justified. Both of TDS's requests assume incorrectly that the Commission adopted a cost-based approach to competitive LEC access charges in its *CLEC Access Reform Order*.[201] The Commission explicitly declined to apply this sort of regulation to competitive LECs[202] and explained that it was applying a market-based approach.[203] Consistent with this finding, the Commission held that it will assess the reasonableness of competitive LEC access rates by evaluating market factors rather than a particular carrier's costs.[204] The requests by TDS would involve an examination of carrier costs rather than market data to determine competitive LEC access rates. Because such an examination would be contrary to the Commission's market-based approach to competitive LEC access charges, we must reject TDS's requests.

58. Further, contrary to TDS's assertion, the Commission did acknowledge a remedy in the form of end-user charges for competitive LECs that incur higher costs. In the *CLEC Access Reform Order*, the Commission concluded that competitive LEC access service rates above the benchmark should be mandatorily detariffed, which requires competitive LECs to negotiate higher prices with IXCs.[205] If the parties cannot agree, the Commission stated that "the CLEC must charge the IXC the appropriate benchmark rate."[206] The Commission further noted that competitive LECs remain free to recover from their end-users any higher costs that they incur in providing access service.[207] Thus, under the *CLEC Access Reform Order*, the "backstop" for a competitive LEC in a higher cost market is to charge the benchmark rate and recover any additional costs from its end-users. The Commission reasoned that, when a competitive LEC attempts to recover additional amounts from its end-user, the customer receives the correct price signals, which results in market discipline.[208] TDS fails to demonstrate that this rationale is flawed or that this "backstop" is insufficient to cover any costs in excess of the benchmark.

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200 *Id.* at 11.

201 *See* AT&T Opposition at 14-15.

202 *See CLEC Access Reform Order*, 16 FCC Rcd at 9939, para. 41. In particular, we found that a new entrant in a competitive market would not be able to charge a higher rate than the incumbent for the same service. *Id.* at 9937, para. 37.

203 *Id.* at 9941, para. 45 (stating that, in setting the benchmark rate, "we seek, to the extent possible, to mimic the actions of a competitive marketplace").

204 *AT&T v. BTI*, 16 FCC Rcd at 12321-22, paras. 17-21.

205 *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

206 *Id. See also id.* at 9956, para. 82.

207 *Id.* at 9938, para. 39.

208 *Id.*

4. Interconnection Obligations and Section 201

59. In the *CLEC Access Reform Order*, the Commission determined that section 201(a) of the Act places certain limitations on an IXC's ability to refuse competitive LEC access service.[209] Specifically, the Commission concluded that "an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate section 201(a)."[210] The Commission reasoned that, because a competitive LEC's access rates are presumed reasonable if they fall at or below the benchmark, a request by a competitive LEC's end-user is a "reasonable request" for service under section 201(a) if the competitive LEC charges rates at or below the benchmark.[211] Thus, in determining limitations on an IXC's ability to refuse service under section 201(a), the Commission focused on the first clause of section 201(a), which requires common carriers to furnish communication service upon reasonable request therefor.[212]

60. In discussing limitations on an IXC's ability to refuse service under 201(a), the Commission also referenced the second clause of section 201(a), which empowers the Commission, after a hearing and determination of the public interest, to order common carriers to establish physical connections with other carriers, and to establish through routes and charges for certain communications.[213] The Commission did not, however, explicitly rely on this portion of section 201(a) in imposing limitations on an IXC's ability to refuse service. The Commission now finds it necessary to clarify its intent to rely on the second clause of section 201(a) to support such limitations.[214]

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209 *CLEC Access Reform Order*, 16 FCC Rcd at 9960, para. 92. *See* 47 U.S.C. § 201(a). Section 201(a) of the Act states that it is "the duty of every common carrier engaged in interstate or foreign communication … to furnish such communication service upon reasonable request therefor." *Id.* It further requires that common carriers establish physical connections with other carriers where, after the opportunity for a hearing, the Commission has found such action "necessary or desirable in the public interest." *Id.*

210 *CLEC Access Reform Order*, 16 FCC Rcd at 9961, para. 94.

211 *Id.*

212 *Id.*

213 *Id.* at 9960, para. 92 (discussing 47 U.S.C. § 201(a)).

214 On June 14, 2002, the Court of Appeals for the D.C. Circuit vacated a declaratory ruling by the Commission concerning an IXC's obligation to purchase access service from a competitive LEC when an end-user has requested that it provide interexchange service through the competitive LEC. *See AT&T Corp. v. FCC*, 292 F.3d 808, 812-13 (D.C. Cir. 2002), *vacating AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, CCB/CPD No. 01-02, Declaratory Ruling, 16 FCC Rcd 19158 (2001) (*AT&T Declaratory Ruling*). In that declaratory ruling, the Commission found that the first clause of section 201(a) imposes a duty on common carriers to accept reasonable requests for service, and that the request to complete a call using a competitive LEC access service that is tariffed at presumptively reasonable rates satisfies this requirement. *AT&T Declaratory Ruling*, 16 FCC Rcd at 19263-64. AT&T filed a petition for review of this ruling, challenging the Commission's reliance on the first clause of section 201(a) of the Act, and the court granted AT&T's petition. Specifically, the court rejected the notion that a competitive LEC's demand to an IXC for a physical connection or a through route is a request by the competitive LEC's customer for such service under the first clause of section 201(a). *AT&T v. FCC*, 292 F.3d at 812. According to the court, "if the FCC wants to compel AT&T to establish a through route with another carrier, then the FCC must follow the procedures specified in the second clause of [section] 201(a)." *Id.* We now expressly rely on the second clause of 201(a) to support Commission-imposed limitations on an IXC's ability to refuse competitive LEC access service.

61. The second clause of 201(a) provides that the Commission may compel a common carrier to establish a physical connection or a through route after opportunity for hearing if it finds such action necessary or desirable in the public interest.[215] After notice and comment, the Commission found that a limitation on an IXC's ability to refuse service was necessary and desirable in the public interest. [216] In the *CLEC Access Reform Order*, the Commission concluded that a limitation on an IXC's ability to refuse service was necessary in order to protect universal connectivity and universal service – two important policy goals that our rules are designed to promote.[217] The Commission reasoned that "any solution to the current problem that allows IXCs unilaterally and without restriction to refuse to terminate calls or indiscriminately to pick and choose which traffic they will deliver would result in substantial confusion for consumers, would fundamentally disrupt the workings of the public switched telephone network, and would harm universal service."[218] Accordingly, we conclude that our rulemaking procedures combined with our public interest finding in the *CLEC Access Reform Order* support a decision to require an IXC to establish a physical connection or a through route via the acceptance of access service if such service is provided at rates that are just and reasonable in accordance with the Act.[219] In the *CLEC Access Reform Order*, the Commission found that competitive LEC access rates at or below the benchmark are presumptively reasonable.[220] Therefore, we find that an IXC's refusal to accept competitive LEC access service at rates at or below the benchmark would run afoul of the second clause of section 201(a). This obligation may be enforced through a section 208 complaint before the Commission.[221]

5. Z-Tel Petition for Waiver of Section 61.26(d)

62. On August 3, 2001, Z-Tel filed a Petition for Temporary Waiver of Commission Rule 61.26(d), the CLEC new markets rule, as applied to certain MSAs that Z-Tel was capable of serving as of the petition date.[222] Z-Tel requests that the rule be waived for three years to permit it to offer exchange

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215 47 U.S.C. § 201(a).

216 Although section 201(a) requires an opportunity for hearing, our previous use of notice and comment procedures to satisfy the section 201 hearing requirement was expressly confirmed by the U.S. Court of Appeals for the Third Circuit. *See Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1265 (3rd Cir. 1974) (holding that section 201(a) permits procedures less formal and adversarial than an evidentiary hearing because, among other things, courts have come to favor rulemaking over adjudication for the formulation of new policy), *cert. denied*, 422 U.S. 1026 (1974). In the *Access Charge Further Notice*, the Commission explicitly sought comment on an IXC's obligations to accept or deliver traffic from or to a LEC and "whether any statutory or regulatory constraints prevent an IXC from declining a CLEC's access service." *Access Charge Further Notice*, 14 FCC Rcd at 14341-42, paras. 241-42. In response to the *Access Charge Further Notice*, numerous parties commented on whether section 201(a) requires IXCs to accept access traffic. *See CLEC Access Reform Order*, 16 FCC Rcd at 9959, para. 91 (discussing the comments filed on this issue). Thus, the notice and comment procedures were satisfied in this case.

217 *CLEC Access Reform Order*, 16 FCC Rcd at 9960, para 93 (explaining that "the public has come to value and expect the ubiquity of the nation's telecommunications network").

218 *Id.*

219 47 U.S.C. § 201(b).

220 *CLEC Access Reform Order*, 16 FCC Rcd at 9925, para. 3.

221 47 U.S.C. § 208(a).

222 *See generally* Z-Tel Waiver Petition. The petition was docketed and comments were filed on November 2, 2001. *See Z-Tel Files Petition for Waiver of Commission Rule 61.26(d) Pertaining to CLEC Access Services*, (continued….)

access services in the specified MSAs pursuant to its filed interstate access tariff.[223] Z-Tel argues that the public interest would be served if it were allowed to offer this service without requiring it to implement the costly software upgrades that it asserts would be necessary to enable Z-Tel to charge different access rates on an MSA basis.[224]

63. The arguments made by Z-Tel in support of its waiver request are identical to those raised in petitions seeking reconsideration of the CLEC new markets rule, and several parties urge the Commission to grant the relief sought by Z-Tel on an industry-wide basis, as requested in petitions for reconsideration.[225] For example, other competitive LECs argue that it is technically difficult and expensive to comply with the CLEC new markets rule because existing billing systems must be modified to comply with section 61.26(d).[226] Because the arguments made by Z-Tel and other parties in support of a waiver are identical to those considered and rejected here, we deny the petition for waiver.[227] We also deny the petition for the separate reason that Z-Tel failed to demonstrate any special circumstances necessary to support a waiver of the Commission's rules.[228] The fact that other parties have expressed similar industry-wide concerns in the context of the rulemaking proceeding suggests that Z-Tel's circumstances are not unique or special in any respect.[229] For all these reasons, we deny Z-Tel's petition.

(Continued from previous page)
CCB/CPD File No. 01-19, Public Notice, 16 FCC Rcd 18652 (2001). A number of parties filed comments, oppositions, and reply comments. *See* Appendix C for a complete list of pleadings in this docket.

[223] *See* Z-Tel Waiver Petition at 12. Throughout its petition, Z-Tel sometimes refers to "Commission Rule 61.29(d)," rather than 61.26(d). *See, e.g., id*. at 6. Because there is no rule 61.29(d), we assume that Z-Tel intended to reference 61.26(d) throughout its petition.

[224] Z-Tel needed the software upgrade in order to charge the transitional benchmark rate in its existing markets and the competing incumbent LEC rate in its new markets. *Id.* at 8.

[225] *See* ASCENT Waiver Comments at 5; Focal/Pac-West Waiver Comments at 4; ALTS Waiver Reply at 1-2. *See also* ASCENT Waiver Comments at 4 (stating that "[t]he precise issue raised by Z-Tel is presently before the Commission, having been raised by more than one party within the context of reconsideration petitions'); Sprint Waiver Reply at 2 (arguing that Z-Tel's request is a "petition for reconsideration masquerading as a waiver request").

[226] *See* Focal/Pac-West Waiver Comments at 3; ALTS Waiver Reply at 3. We note that, at the time the petition for waiver was filed, Z-Tel estimated that the software modifications and upgrades would be available in mid-2002. *Id.* at 8-9. Given the amount of time that has passed since the petition was filed, we suspect that Z-Tel's request may be moot in any event.

[227] *See supra* discussion section III.B (considering and rejecting arguments to reconsider the CLEC new markets rule).

[228] *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (holding that "a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest"). *See also Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970) (indicating the need for articulation of special circumstances beyond those considered during a regular rulemaking).

[229] *See* ACSENT Waiver Comments at 3 (noting that the dilemma faced by Z-Tel will be faced by numerous competitive LECs).

IV. EIGHTH REPORT AND ORDER

A. Background

64. In the further notice of proposed rulemaking issued with the *CLEC Access Reform Order*, the Commission raised various questions relating to 8YY traffic originating on competitive LEC networks.[230] The Commission sought this information because AT&T had asserted that abuses surrounding competitive LEC-originated 8YY traffic justified immediately capping the access rate for this category of traffic at the rate of the competing incumbent LEC.[231] In particular, AT&T asserted that certain competitive LECs seek out customers that generate high volumes of 8YY traffic and share access revenues with these customers through agreements that provide for payments to the end-user based on the level of 8YY traffic it generates.[232]

65. The Commission requested information about the proportion of competitive LEC originating access traffic that is composed of originating 8YY service and the proportion of competitive LEC end-users that have the type of revenue-sharing agreements that AT&T described.[233] The Commission inquired whether the abuses relating to 8YY traffic that AT&T alleged should be addressed through a general rulemaking, or whether they should be left to the Commission's complaint process.[234] It asked whether competitive LECs noticed different 8YY traffic patterns depending on whether customers had entered revenue-sharing agreements, and it also asked if the access rate for originating 8YY traffic should depend on whether a competitive LEC actually offered revenue-sharing agreements to its customers.[235] The Commission also inquired whether the permitted access charge for a particular competitive LEC's originating 8YY traffic should depend on what other services it provided to its end-users.[236]

66. In response to the *Further Notice,* certain IXCs assert that the Commission would be justified in immediately capping access rates for competitive LEC 8YY traffic at the level of the competing incumbent LEC. According to these IXCs, when access rates are higher, competitive LECs enter into revenue-sharing arrangements that create incentives for the generation of 8YY traffic, which, in turn, imposes additional costs on IXCs and their 8YY subscribers and leads to network blockages that interfere with legitimate 8YY traffic.[237] They assert that competitive LECs often engage in commission schemes with large generators of 8YY traffic (hotels, airports, and college campuses), refunding to those

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230 *See CLEC Access Reform Order*, 16 FCC Rcd at 9961-64, paras. 99-104. The following discussion of issues raised in the further notice assumes that the competitive LEC originates the 8YY traffic from an end-user customer of the competitive LEC. Competitive LEC arrangements to provide access to IXCs with other carriers raise different issues that we address in section III.A.

231 *Id.* at 9961-62, para. 98.

232 *Id.*

233 *Id.* at 9962-63, para. 100.

234 *Id.* at 9962, para. 99.

235 *Id.* at 9963, paras. 101-102.

236 *Id.* at 9963, para. 103.

237 *See*, *e.g.*, AT&T 8YY Comments at 8-9; Sprint 8YY Comments at 7-8; WorldCom 8YY Comments at 1-3. A complete list of comments and replies is contained in Appendix D.

end-users a portion of the access revenues resulting from this type of traffic.[238] The IXCs contend that this creates the incentive for fraudulent generation of 8YY minutes as a way for end-users to create income for themselves.[239] They argue that captive IXC access customers are forced to bear the competitive LEC's cost of providing a financial incentive for institutional users to take the competitive LEC's service.[240]

67. Other commenters, including competitive LECs, maintain that there is no need to immediately cap access rates for competitive LEC 8YY traffic because the opportunity and incentive for fraudulent generation of 8YY traffic is overstated. Most commenters deny that, as a general matter, revenue-sharing arrangements motivate competitive LEC customers to generate inflated amounts of 8YY traffic.[241] They explain that the benefits of the arrangements do not accrue to the party placing the 8YY calls because a substantial portion of the traffic coming from a large 8YY generator consists of callers dialing around the institution's pre-subscribed interexchange carrier to reach a different long distance provider. For instance, an association of telecommunications professionals in higher education asserts that, on a daily basis, many university students reach the toll provider of their choice through toll-free access numbers.[242] The competitive LECs argue that the same is likely true of callers from hotels.[243] According to the competitive LECs, the calling patterns of students and hotel guests would not be affected by any revenue-sharing arrangement with the university or hotel. They further argue that the rare instances of abuse would be more appropriately dealt with through the Commission's complaint process.[244]

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238 AT&T 8YY Comments at 3; Sprint 8YY Comments at 6.

239 AT&T 8YY Comments at 8; WorldCom 8YY Comments at 2-3. AT&T asserts that on an industry-wide basis, it has been billed over $57 million in excess 8YY access charges, and that even the lower benchmark rates still have enough cushion to make this profitable for competitive LECs. AT&T 8YY Comments at 6. AT&T argues that these commission structures prevent IXCs or incumbent LECs from competing with the competitive LEC for the special access business that would previously have carried 8YY traffic from large generators. *Id.* at 6-7. AT&T contends that customers have financial incentive to inflate their number of 8YY calls because there is no cost and the commissions actually pay them for making the calls. *Id.* at 8. According to AT&T, commissions impose additional costs on all carriers – IXCs must increase their network capacity to handle the fraudulent calls; increased traffic reduces service quality for legitimate 8YY users; and 8YY subscribers must increase their answering capacity to receive calls that are not legitimate. *Id.* at 9.

240 *See* AT&T 8YY Comments at 6-7; Sprint 8YY Reply at 3-4.

241 *See* ACUTA 8YY Comments at 2-3; Focal/US LEC 8YY Comments at 3-4; Time Warner 8YY Comments at 4; TelePacific 8YY Comments at 6; ASCENT 8YY Reply at 3; Focal/US LEC 8YY Reply at 5; Time Warner 8YY Reply at 6. Many commenters also defend revenue-sharing arrangements as legal and legitimate. *See* ALTS 8YY Comments at 3-4; Focal/US LEC 8YY Comments at 5-8; TelePacific 8YY Comments at 5-6; Time Warner 8YY Comments at 3-4.

242 ACUTA 8YY Comments at 2-3 (indicating that, at one member university, approximately 50% of student callers dial around the university's pre-subscribed interexchange carrier, usually using toll-free access numbers).

243 Time Warner 8YY Comments at 5-6 (stating that callers likely are paying at least as much to place their call through a pre-paid or other calling card provider as they would be if they were simply using the pre-subscribed provider of their choice from their home phone).

244 *See* ASCENT 8YY Comments at 5; Focal/US LEC 8YY Comments at 4; MCLEC 8YY Comments at 3; ASCENT 8YY Reply at 2-3; Focal/US 8YY Reply at 14; Time Warner 8YY Reply at 7.

68. AT&T also maintains that competitive LEC access service for outbound 8YY traffic is distinct from other originating access service.[245] According to AT&T, the competitive LECs incur lower costs when they transport 8YY traffic via dedicated facilities.[246] In the case of high-capacity dedicated facilities, AT&T argues that the originating access function is already paid for by the competitive LEC's customer.[247] Further, AT&T argues that the connection between the competitive LEC's local switch and IXC point of presence is the incumbent LEC tandem, and IXCs are billed separately by the incumbent LEC for tandem access and transport charges.[248] Thus, AT&T argues that the appropriate benchmark for competitive LEC access services for outbound 8YY traffic carried over dedicated local access facilities is the incumbent LEC's local end office switching charge.[249] The competitive LECs dispute the rationale offered to support a lower benchmark rate and contend that they provide the functionality necessary to impose the full incumbent LEC switched access rate.[250]

B. Discussion

69. For the reasons explained below, we conclude that it is not necessary immediately to cap competitive LEC access rates for 8YY traffic at the rate of the competing incumbent LEC.[251] Rather, we will permit competitive LECs to continue to charge the previously established, declining benchmark rate to which other competitive LEC access traffic is subject.

70. As the IXCs contend, some competitive LECs may have agreed to share with some customers generating a high volume of 8YY traffic a portion of the access revenues that it receives in connection with the traffic.[252] We are not persuaded, however, that the existence of these arrangements

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[245] AT&T 8YY Comments at 9-10.

[246] AT&T 8YY Comments at 10; AT&T 8YY Reply at 14. AT&T maintains that, where outbound 8YY traffic is carried over dedicated high-capacity facilities for customers that aggregate large volumes of 8YY traffic, the dedicated connection is generally leased by the competitive LEC to the customer. AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

[247] AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

[248] AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

[249] AT&T 8YY Comments at 10; AT&T 8YY Reply at 15.

[250] *See* Focal/US 8YY Reply at 7-10 (disputing that competitive LECs recover the costs of dedicated facilities from high volume customers and that competitive LEC's do not provide tandem switching functionality). *See also* Time Warner 8YY Reply at 7 (stating that it performs the same network functionalities and uses the same technical configuration when it provides service to large generators of 8YY traffic as it uses when providing switched access to other high capacity end-users).

[251] Because we find that IXC allegations of wide-spread fraud or abuse may indeed be overstated, we also reject AT&T's request that we limit 8YY database query charges based on the incumbent LEC charges. *See* AT&T 8YY Reply at 15 n.22.

[252] *See, e.g.*, TelePacific 8YY Comments at 6 (admitting that it and other competitive LECs may offer commissions to aggregators for 8YY traffic routed over their networks). *See also* Focal/US LEC 8YY Comments at 5-6 (stating that revenue sharing arrangements are commonplace in all markets characterized by competition and are quite prevalent in the telecommunications industry).

necessarily leads to the problems that the IXC commenters attribute to them.[253] Specifically, we are not convinced that the commission arrangements that competitive LECs may have entered into with 8YY generators necessarily affect the level of traffic that these customers, typically universities and hotels, generate. The IXCs have failed to demonstrate that commission payments to 8YY generators such as universities or hotels translate effectively into incentives for the individuals who actually use those facilities to place excessive or fraudulent 8YY calls. The commission payments challenged by the IXCs go to the hotel or university itself, not to the students or hotel guests who place the bulk of the 8YY calls from these institutions.[254] Accordingly, it does not appear that these commissions create any incentive for those actually placing the calls artificially to inflate their 8YY traffic.[255] Rather, as the competitive LECs contend, the primary effect of the commission payments appears to be to create a financial incentive for the institutions to switch from the incumbent to a competitive service provider.[256]

71. Furthermore, even if we were persuaded that there was an incentive for 8YY traffic generation, the fact that competitive LEC access rates are now subject to the declining benchmark should eliminate any harm to IXCs from this traffic. As the competitive LECs point out, moving access rates for 8YY traffic to the benchmark rates already denies them much of the revenue with which they might otherwise pay commissions to 8YY generators.[257] Accordingly, we question whether this practice has continued to a significant extent.[258] Moreover, because access rates for 8YY traffic must be at or below the benchmark, inflated minutes of 8YY traffic would appear to benefit rather than burden IXCs. To the extent that IXCs in the future identify what appear to be illegitimate levels of 8YY traffic coming from a particular end-user, they can continue to address these situations on a case-by-case basis, as they have done in the past.[259]

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253 For instance, ALTS notes that a competitive LEC business plan based on some commission is not necessarily less legitimate than one without, citing, as an example, a commission-paying competitive LEC simply willing to have a lower profit margin. ALTS 8YY Comments at 4.

254 *See* ACUTA 8YY Comments at 2; Focal/US LEC 8YY Comments at 3-4; Time Warner 8YY Comments at 4; Focal/US LEC 8YY Reply at 12.

255 ACUTA 8YY Comments at 2-3 (college students dial around for many reasons, including having prepaid cards different from the school's long distance provider or to charge their parents' numbers).

256 ALTS 8YY Comments at 4; Focal/US LEC 8YY Comments at 4.

257 Time Warner 8YY Comments at 5; Time Warner 8YY Reply at 6 n.7. We also decline to find that all revenue-sharing agreements between a competing LEC and its customers based on minutes of use or access revenues generated by the customer are an unjust and unreasonable practice in violation of 201(b) because such a finding is beyond the scope of this proceeding. *See* AT&T 8YY Comments at 14-15. In its *Further Notice*, the Commission posed a number of questions concerning revenue-sharing agreements for the narrow purpose of determining whether such agreements justify immediately limiting competitive LEC access rates for all 8YY traffic to the rate of the competing incumbent LEC. *See CLEC Access Reform Order*, 16 FCC Rcd at 9963, paras. 101-102. The question of whether such arrangements violate the Act is beyond the scope of the *Further Notice*.

258 Additionally, the competitive LECs contend that cell phone use is dramatically reducing the volume of 8YY traffic, since calling card and dial-around traffic accounts for much of the 8YY traffic coming from the traditional generators of this traffic. Focal/US LEC 8YY Reply at 12.

259 Because we conclude that the incentive for fraudulent generation of minutes is not as strong as the IXCs suggest, we reject claims that the complaint process is not a feasible or practical means of addressing potential abuses. *See* AT&T 8YY Comments at 13; AT&T 8YY Reply at 12-14; Sprint 8YY Comments at 8; WorldCom Comments at 2-3. The record suggests that IXC allegations of wide-spread fraud may indeed be overstated. *See* (continued….)

72. We also reject AT&T's request that we adopt a separate competitive LEC access rate for outbound 8YY traffic carried over dedicated local access facilities. We find that the record does not support adoption of a separate lower benchmark rate based on the incumbent LEC local switching rate. To the extent that AT&T is concerned that it is paying two carriers for originating a call, we have addressed that concern by clarifying that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions. When there are no intermediate carriers between the competitive LEC and the end-user, the fact that the end-user may provide some portion of the facilities would seem to be irrelevant. If AT&T believes that any particular competitive LEC rate or practice is unlawful, it may bring a challenge under section 208 of the Act.[260]

V. PROCEDURAL MATTERS

A. Supplemental Final Regulatory Flexibility Act Analysis

73. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[261] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the 1999 *Further Notice of Proposed Rulemaking* (*Notice*) in CC Docket No. 96-262.[262] The Commission sought written public comment on the proposals in that *Notice*, including comment on the IRFA. A Final Regulatory Flexibility analysis was provided in the *Sixth Report and Order,*[263] as well as the *Seventh Report and Order and Further Notice of Proposed Rulemaking (CLEC Access Reform Order)*.[264] This present Supplemental Final Regulatory Flexibility Act Analysis conforms to the RFA.[265] To the extent that any statement in this Supplemental FRFA is perceived as creating ambiguity with respect to Commission rules or statements made in the sections of these orders preceding the Supplemental FRFA, the rules and statement set forth in those preceding sections are controlling.

(Continued from previous page)
Time Warner 8YY Reply Comments at 2-3. *See also* Focal/US LEC 8YY Reply Comments at 6-7 (noting that AT&T makes its case based on a single allegation of fraud by one particular competing LEC); Network Plus 8YY Reply at 2 (stating that the IXCs "failed to produce any real evidence supporting their allegation that a 'wide-spread' problem exists with 8YY access charges"). Thus, the record does not support IXC claims of an industry-wide problem. *See, e.g.,* Sprint 8YY Comments at 8; Sprint 8YY Reply at 4.

260 *See* 47 U.S.C. § 208.

261 *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq*., has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

262 *Access Charge Reform*, CC Docket No. 96-262, *Fifth Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 14221 (1999), 64 Fed. Reg. 51280 (Sept. 22, 1999).

263 *Access Charge Reform*, CC Docket No. 96-262, *Sixth Report and Order,* 15 FCC Rcd 12962 (2000), 65 Fed. Reg. 38684 (June 21, 2000)(*CALLS Order*).

264 *CLEC Access Reform Order,* 16 FCC Rcd 9923, 66 Fed. Reg. 27892 (May 21, 2001).

265 *See* 5 U.S.C. § 604.

1. Need for, and Objectives of, the Rules

74. In the *CLEC Access Reform Order*, the Commission revised its tariff rules more closely to align tariffed competitive LEC access rates with those of incumbent LECs.[266] Specifically, the Commission limited to a declining benchmark the amounts that competitive LECs may tariff for interstate access services; restricted the interstate access rates of competitive LECs entering new markets to the rates of the competing incumbent local exchange carrier (incumbent LEC); and established a rural exemption permitting qualifying carriers to charge rates above the benchmark for their interstate access services.[267] In adopting these rules, the Commission sought to ensure, by the least intrusive means possible, that competitive LEC access charges are just and reasonable.[268] The Commission also sought to reduce existing regulatory arbitrage opportunities, spur efficient local competition, and avoid disrupting the development of competition in the local telecommunications market.[269]

75. With this order, the Commission disposes of seven petitions for reconsideration or clarification of these rules, and a related waiver request. Specifically, the Commission rejects each of the reconsideration requests and related request for waiver, but makes several clarifications. In response to an issue raise by Qwest in a petition for clarification or, in the alternative, reconsideration,[270] the Commission clarifies that the benchmark rate is available only when a competitive LEC provides an IXC with access to the competitive LEC's own end-users.[271] The Commission finds that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions, and we amend the current rules in accordance with this finding.[272] The Commission also clarifies that the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers.[273] The Commission concludes that the regulation of these rates is necessary for all the same reasons the Commission identified in the *CLEC Access Reform Order*.

76. The Commission also responds to a request by RICA to clarify whether PICCs may be tariffed in addition to the rural exemption rate specified in section 61.26(e) of the Commission's rules and

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266 *CLEC Access Reform Order*, 16 FCC Rcd 9965, para. 108.

267 *See generally id*.

268 *Id.* at 9965, para. 107.

269 *Id.*

270 Qwest Petition at 2-4 (asking the Commission to clarify the rules to ensure that a competitive LEC charges only the portion of the competing incumbent LEC rate that reflects the services that the carrier actually provides). *See also supra* para. 10.

271 *See supra* para. 15.

272 *See supra* para. 17 & App. A. The Commission also finds that, prior to this order on reconsideration, it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff. *See supra* para. 18.

273 *See supra* para. 21.

whether PICCs may be tariffed when the competing incumbent LEC does not have a PICC.[274] In this order, the Commission clarifies that any PICC imposed by a competitive LEC qualifying for the rural exemption may be assessed in addition to the rural benchmark rate if and only to the extent that the competing incumbent LEC charges a PICC. In the *CLEC Access Reform Order*, the Commission found that the ability of rural competitive LECs to assess a multi-line business PICC obviated, in part, the need for a CCL charge because the PICC provided a potential revenue source.[275] This clarification will ensure that rural competitive LECs are able to assess a PICC on IXCs as intended by the Commission, but if and only to the extent that the competing incumbent LEC charges a PICC. Further, this clarification is necessary to more closely align tariffed competitive LEC access rates with those of incumbent LECs.

77. In a separate petition for clarification, U.S. TelePacific asks the Commission to clarify and establish a simple methodology by which the benchmark rate will be set where a competitive LEC service area includes territory served by more than a single incumbent LEC.[276] In this order, the Commission confirms that competitive LECs serving an area with multiple incumbent LECs can qualify for the safe harbor by charging different rates for access to particular end-users based on the access rate that would have been charged by the incumbent LEC in whose service area that particular end-user resides.[277] As an alternative method, the Commission will permit a competitive LEC to charge an IXC a blended access rate only if that rate reasonably approximates the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers.[278] By permitting an alternative methodology based on a blended rate, the Commission seeks to ensure that the competitive LEC access rates are just and reasonable, and, at the same time, to minimize the burdens associated with establishing several different rates within a competitive LEC's service area.

2. Legal Basis

78. These orders are adopted pursuant to sections 1-5, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503.

3. Description and Estimate of the Number of Small Entities to which the Rules Will Apply

79. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules adopted herein.[279] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[280] In addition, the term "small business" has the

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274 RICA Petition at 15-16. *See also supra* para. 40 (discussing this request for clarification).

275 *Access Charge Reform Order*, 16 FCC Rcd at 9956, para. 81

276 U.S. TelePacific Petition at 1. *See supra* para. 46.

277 *See supra* para. 47.

278 *See supra* para. 48.

279 5 U.S.C. §§ 603(b)(3), 604(a)(3).

280 *Id*. § 601(6).

same meaning as the term "small business concern" under the Small Business Act.[281] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[282]

80. In this section, we further describe and estimate the number of small entity licensees and regulatees that may also be indirectly affected by rules adopted pursuant to this *Order*. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.[283] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[284] Paging,[285] and Cellular and Other Wireless Telecommunications.[286] Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

81. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (*e.g.*, a wired telecommunications carrier having 1,500 or fewer employees), and "is not dominant in its field of operation."[287] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[288] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

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281 *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

282 15 U.S.C. § 632.

283 FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 5.3 (May 2002) (*Trends in Telephone Service*).

284 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in October 2002).

285 *Id*. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

286 *Id*. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

287 5 U.S.C. § 601(3).

288 Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

82. *Wired Telecommunications Carriers*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[289] According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.[290] Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.[291] Thus, under this size standard, the majority of firms can be considered small.

83. *Incumbent Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to incumbent local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[292] According to Commission data,[293] 1,337 carriers reported that they were engaged in the provision of local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted herein.

84. *Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), and "Other Local Exchange Carriers."* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to providers of competitive exchange services or to competitive access providers or to "Other Local Exchange Carriers," all of which are discrete categories under which TRS data are collected. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[294] According to Commission data,[295] 609 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 companies, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees.[296] In addition, 35 carriers reported that they were "Other Local Service Providers." Of the 35 "Other Local Service Providers," an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees.[297] Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, and "Other Local Exchange Carriers" are small entities that may be affected by the rules and policies adopted herein.

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289 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

290 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513310 (issued October 2000).

291 *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

292 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

293 *Trends in Telephone Service* at Table 5.3.

294 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

295 *Trends in Telephone Service* at Table 5.3.

296 *Id.*

297 *Id.*

85. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to interexchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[298] According to Commission data,[299] 261 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of these 261 companies, an estimated 223 have 1,500 or fewer employees and 38 have more than 1,500 employees.[300] Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by the rules and policies adopted herein.

86. *Operator Service Providers (OSPs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to operator service providers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[301] According to Commission data,[302] 23 companies reported that they were engaged in the provision of operator services. Of these 23 companies, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees.[303] Consequently, the Commission estimates that the majority of operator service providers are small entities that may be affected by the rules and policies adopted herein.

87. *Payphone Service Providers (PSPs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to payphone service providers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[304] According to Commission data,[305] 761 companies reported that they were engaged in the provision of payphone services. Of these 761 companies, an estimated 757 have 1,500 or fewer employees and four have more than 1,500 employees.[306] Consequently, the Commission estimates that the majority of payphone service providers are small entities that may be affected by the rules and policies adopted herein.

88. *Prepaid Calling Card Providers.* The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.[307] According to Commission data,[308] 37 companies

298 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

299 *Trends in Telephone Service* at Table 5.3.

300 *Id.*

301 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

302 *Trends in Telephone Service* at Table 5.3.

303 *Id.*

304 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

305 *Trends in Telephone Service* at Table 5.3.

306 *Id*.

307 13 C.F.R. § 121.201, NAICS code 513330 (changed to 517310 in October 2002).

308 *Trends in Telephone Service* at Table 5.3.

reported that they were engaged in the provision of prepaid calling cards. Of these 37 companies, an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees.[309] Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by the rules and policies adopted herein.

89. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to "Other Toll Carriers." This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[310] According to Commission's data,[311] 92 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these 92 companies, an estimated 82 have 1,500 or fewer employees and ten have more than 1,500 employees.[312] Consequently, the Commission estimates that most "Other Toll Carriers" are small entities that may be affected by the rules and policies adopted herein.

90. *Paging*. The SBA has developed a small business size standard for Paging, which consists of all such firms having 1,500 or fewer employees.[313] According to Census Bureau data for 1997, in this category there was a total of 1,320 firms that operated for the entire year.[314] Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional seventeen firms had employment of 1,000 employees or more.[315] Thus, under this size standard, the majority of firms can be considered small.

91. *Cellular and Other Wireless Telecommunications*. The SBA has developed a small business size standard for Cellular and Other Wireless Telecommunication, which consists of all such firms having 1,500 or fewer employees.[316] According to Census Bureau data for 1997, in this category there was a total of 977 firms that operated for the entire year.[317] Of this total, 965 firms had employment

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309 *Id.*

310 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in October 2002).

311 *Trends in Telephone Service* at Table 5.3.

312 *Id*.

313 13 C.F.R. § 121.201, NAICS code 517211 (changed from 513321 in October 2002).

314 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513321 (issued October 2000).

315 *Id*. The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

316 13 C.F.R. § 121.201, NAICS code 517212 (changed from 513322 in October 2002).

317 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (issued October 2000).

of 999 or fewer employees, and an additional twelve firms had employment of 1,000 employees or more.[318] Thus, under this size standard, the majority of firms can be considered small.

92. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of $40 million or less in the three previous calendar years.[319] For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years."[320] These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.[321] No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[322] On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Based on this information, the Commission concludes that the number of small broadband PCS licenses will include the 90 winning C Block bidders, the 93 qualifying bidders in the D, E, and F Block auctions, the 48 winning bidders in the 1999 re-auction, and the 29 winning bidders in the 2001 re-auction, for a total of 260 small entity broadband PCS providers, as defined by the SBA small business size standards and the Commission's auction rules. We note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

93. *Narrowband Personal Communications Services.* To date, two auctions of narrowband personal communications services (PCS) licenses have been conducted. For purposes of the two auctions that have already been held, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission has awarded a total of 41 licenses, out of which 11 were obtained by small businesses. To ensure meaningful participation of small business entities in future auctions, the Commission has adopted a two-tiered small business size

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318 *Id*. The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

319 *See Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 61 FR 33859 (July 1, 1996); *see also* 47 C.F.R. § 24.720(b).

320 *See id*.

321 *See. e.g., Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 59 FR 37566 (July 22, 1994).

322 FCC News, Broadband PCS, D, E and F Block Auction Closes, No. 71744 (rel. January 14, 1997). *See also Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 62 FR 55348 (Oct. 24,1997).

standard in the *Narrowband PCS Second Report and Order*.[323] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards.[324] In the future, the Commission will auction 459 licenses to serve Metropolitan Trading Areas (MTAs) and 408 response channel licenses. There is also one megahertz of narrowband PCS spectrum that has been held in reserve and that the Commission has not yet decided to release for licensing. The Commission cannot predict accurately the number of licenses that will be awarded to small entities in future actions. However, four of the 16 winning bidders in the two previous narrowband PCS auctions were small businesses, as that term was defined under the Commission's Rules. The Commission assumes, for purposes of this analysis, that a large portion of the remaining narrowband PCS licenses will be awarded to small entities. The Commission also assumes that at least some small businesses will acquire narrowband PCS licenses by means of the Commission's partitioning and disaggregation rules.

94. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This standard provides that such a company is small if it employs no more than 1,500 persons.[325] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[326] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[327] If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business size standard.

95. *220 MHz Radio Service – Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is a new service, and is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[328] This small business size standard indicates that a "small business" is

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[323] *Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS*, Docket No. ET 92-100, Docket No. PP 93-253, Second Report and Order and Second Further Notice of Proposed Rulemaking, 65 FR 35875 (June 6, 2000).

[324] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

[325] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[326] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 513322 (issued Oct. 2000).

[327] *Id*. The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[328] *Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, GN Docket No. 93-252, PP Docket No. 93-253, (continued….)

an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[329] A "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small business size standards.[330] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[331] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won licenses in the first 220 MHz auction. The second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[332]

96. *800 MHz and 900 MHz Specialized Mobile Radio Licenses.* The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years, or that had revenues of no more than $3 million in each of the previous calendar years.[333] The SBA has approved these size standards.[334] The Commission awards "small entity" and "very small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz bands to firms that had revenues of no more than $40 million in each of the three previous calendar years, or that had revenues of no more than $15 million in each of the previous calendar years.[335] These bidding credits apply to SMR providers in the 800 MHz and 900 MHz bands that either hold geographic area licenses or have obtained extended implementation authorizations. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR service pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. The Commission assumes, for purposes here, that all of the remaining existing extended implementation authorizations are held by small entities, as that term is defined by the SBA. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz SMR bands. There were 60 winning bidders that qualified as small or very small entities in the 900 MHz SMR auctions. Of the 1,020 licenses won in the 900 MHz auction, bidders qualifying as small or very small entities won 263 licenses. In the 800 MHz auction, 38 of the 524 licenses won were won by small and very small entities. We note that, as

(Continued from previous page)

Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, paras. 291-95 (1997) (*220 MHz Third Report and Order*).

329 *Id*. at 11068-70, para. 291.

330 *See* letter to D. Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

331 *See generally* Public Notice, "220 MHz Service Auction Closes," 14 FCC Rcd 605 (1998).

332 Public Notice, "Phase II 220 MHz Service Spectrum Auction Closes," 14 FCC Rcd 11218 (1999).

333 47 C.F.R. § 90.814(b)(1).

334 *See* Letter from Aida Alvarez, Administration, Small Business Administration to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission (Oct. 27, 1997). *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas Sugrue, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (Aug. 10, 1999).

335 47 C.F.R. § 90.814(b)(1) A request for approval of 800 MHz standards was sent to the SBA on May 13, 1999. The matter remains pending.

a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

97. *Private and Common Carrier Paging.* In the Paging *Third Report and Order*, we developed a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[336] A "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these size standards.[337] An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.[338] Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. At present, there are approximately 24,000 Private-Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 471 carriers reported that they were engaged in the provision of either paging and messaging services or other mobile services.[339] Of those, the Commission estimates that 450 are small, under the SBA business size standard specifying that firms are small if they have 1,500 or fewer employees.[340]

98. *700 MHz Guard Band Licensees.* In the 700 MHz Guard Band Order, we adopted a small business size standard for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[341] A "small business" as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.[342] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13,

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336 *220 MHz Third Report and Order*, 12 FCC Rcd at 11068-70, paras. 291-295, 62 FR 16004 at paras. 291-295 (1997).

337 *See* Letter from Aida Alvarez, Administrator, Small Business Administration to Thomas Sugrue, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission (June 4, 1999).

338 *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems*, WT Docket No. 96-18, PR Docket No. 93-253, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10085, para. 98 (1999).

339 *Trends in Telephone Service* at Table 5.3.

340 *Id*. The SBA size standard is that of Paging, 13 C.F.R. § 121.201, NAICS code 517211.

341 *See Service Rules for the 746-764 MHz Bands, and Revisions to part 27 of the Commission's Rules*, WT Docket No. 99-168, Second Report and Order, 15 FCC Rcd 5299, 5344, para. 108 (2000).

342 *See generally* Public Notice, "220 MHz Service Auction Closes," Report No. WT 98-36 (Wireless Telecommunications Bureau, Oct. 23, 1998).

2001 and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[343]

99. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[344] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (BETRS).[345] The Commission uses the SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[346] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

100. *Air-Ground Radiotelephone Service.* The Commission has not adopted a small business size standard specific to the Air-Ground Radiotelephone Service.[347] We will use SBA's small business size standard applicable to "Cellular and Other Wireless Telecommunications," *i.e.*, an entity employing no more than 1,500 persons.[348] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA small business size standard.

101. *Aviation and Marine Radio Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[349] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million.[350] There

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343 Public Notice, "700 MHz Guard Band Auction Closes," DA 01-478 (rel. Feb. 22, 2001).

344 The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

345 BETRS is defined in §§ 22.757 and 22.759 of the Commission's Rules, 47 C.F.R. §§ 22.757 and 22.759.

346 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

347 The service is defined in § 22.99 of the Commission's Rules, 47 C.F.R. § 22.99.

348 13 C.F.R § 121.201, NAICS codes 513322 (changed to 517212 in October 2002).

349 *Id*. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

350 *Amendment of the Commission's Rules Concerning Maritime Communications*, PR Docket No. 92-257, Third Report and Order and Memorandum Opinion and Order, 13 FCC Rcd 19853 (1998).

are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

102. *Fixed Microwave Services.* Fixed microwave services include common carrier,[351] private operational-fixed,[352] and broadcast auxiliary radio services.[353] At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[354] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are up to 22,015 common carrier fixed licensees and up to 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies adopted herein. We noted, however, that the common carrier microwave fixed licensee category includes some large entities.

103. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[355] There are presently approximately 55 licensees in this service. We are unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for "Cellular and Other Wireless Telecommunications" services.[356] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[357]

104. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction. A "small business" is an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small

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[351] *See* 47 C.F.R. §§ 101 *et seq*. (formerly, Part 21 of the Commission's Rules) for common carrier fixed microwave services (except Multipoint Distribution Service).

[352] Persons eligible under parts 80 and 90 of the Commission's Rules can use Private Operational-Fixed Microwave services. *See* 47 C.F.R. Parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[353] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. This service is available to licensees of broadcast stations and to broadcast and cable network entities. Broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile television pickups, which relay signals from a remote location back to the studio.

[354] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[355] This service is governed by Subpart I of Part 22 of the Commission's Rules. *See* 47 C.F.R. §§ 22.1001-22.1037.

[356] 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

[357] *Id*.

business" is an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small business size standards.[358] The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as "very small business" entities, and one that qualified as a "small business" entity. We conclude that the number of geographic area WCS licensees affected by this analysis includes these eight entities.

105. *39 GHz Service.* The Commission created a special small business size standard for 39 GHz licenses – an entity that has average gross revenues of $40 million or less in the three previous calendar years.[359] An additional size standard for "very small business" is: an entity that, together with affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[360] The SBA has approved these small business size standards.[361] The auction of the 2,173 39 GHz licenses began on April 12, 2000 and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses. Consequently, the Commission estimates that 18 or fewer 39 GHz licensees are small entities that may be affected by the rules and policies adopted herein.

106. *Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and ITFS.* Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[362] In connection with the 1996 MDS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of less than $40 million in the previous three calendar years.[363] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts.[364] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[365] Of this total, 1,180 firms had annual receipts of under $10 million and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category

358 *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Dec. 2, 1998).

359 *See* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, *Report and Order*, 63 FR 6079 (Feb. 6, 1998).

360 *Id.*

361 *See* Letter to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Feb. 4, 1998).

362 *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, MM Docket No. 94-131 and PP Docket No. 93-253, Report and Order, 10 FCC Rcd 9589, 9593 para. 7 (1995).

363 47 C.F.R. § 21.961(b)(1).

364 13 C.F.R. § 121.201, NAICS code 513220 (changed to 517510 in October 2002).

365 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4, NAICS code 513220 (issued October 2000).

are small businesses that may be affected by the rules and policies adopted herein. This SBA small business size standard also appears applicable to ITFS. There are presently 2,032 ITFS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[366] Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

107. *Local Multipoint Distribution Service.* Local Multipoint Distribution Service (LMDS) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[367] The auction of the 1,030 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998 and closed on March 25, 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[368] An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[369] The SBA has approved these small business size standards in the context of LMDS auctions.[370] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses consists of the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers.

108. *218-219 MHz Service.* The first auction of 218-219 MHz spectrum resulted in 170 entities winning licenses for 594 Metropolitan Statistical Area licenses. Of the 594 licenses, 557 were won by entities qualifying as a small business. For that auction, the small business size standard was an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[371] In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we established a small business size standard for a "small business" as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average

366 In addition, the term "small entity" within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

367 *See Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, and to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, CC Docket No. 92-297, Second Report and Order, 12 FCC Rcd 12545 (1997).

368 *Id.*

369 *See id*.

370 *See* Letter to Dan Phythyon, Chief, Wireless Telecommunications Bureau, FCC, from Aida Alvarez, Administrator, SBA (Jan. 6, 1998).

371 *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fourth Report and Order, 59 FR 24947 (May 13, 1994).

annual gross revenues not to exceed $15 million for the preceding three years.[372] A "very small business" is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not to exceed $3 million for the preceding three years.[373] The SBA has approved these size standards.[374] We cannot estimate, however, the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum.

109. *24 GHz – Incumbent Licensees.* This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The applicable SBA small business size standard is that of "Cellular and Other Wireless Telecommunications" companies. This category provides that such a company is small if it employs no more than 1,500 persons.[375] According to Census Bureau data for 1997, there were 977 firms in this category that operated for the entire year.[376] Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.[377] Thus, under this size standard, the great majority of firms can be considered small. These broader census data notwithstanding, we believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[378] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

110. *24 GHz – Future Licensees.* With respect to new applicants in the 24 GHz band, the small business size standard for "small business" is an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not in excess of $15 million.[379] "Very small business" in the 24 GHz band is an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[380] The SBA

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372 *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service*, WT Docket No. 98-169, Report and Order and Memorandum Opinion and Order, 64 FR 59656 (Nov. 3, 1999).

373 *Id*.

374 *See* Letter to Daniel B. Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration (Jan. 6, 1998).

375 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in October 2002).

376 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 513322 (issued Oct. 2000).

377 *Id*. The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

378 Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

379 *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd 16934, 16967 (2000); *see also* 47 C.F.R. § 101.538(a)(2).

380 *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz*, WT Docket No. 99-327, Report and Order, 15 FCC Rcd at 16967; *see also* 47 C.F.R. § 101.538(a)(1).

has approved these small business size standards.[381] These size standards will apply to the future auction, if held.

111. *Internet Service Providers.* While internet service providers (ISPs) are only indirectly affected by our present actions, and ISPs are therefore not formally included within this present IRFA, we have addressed them informally to create a fuller record and to recognize their participation in this proceeding. The SBA has developed a small business size standard for Online Information Services, which consists of all such companies having $21 million or less in annual receipts.[382] According to Census Bureau data for 1997, there were 2,751 firms in this category, total, that operated for the entire year.[383] Of this total, 2,659 firms had annual receipts of $9,999,999 or less, and an additional 67 had receipts of $10 million to $24,999,999.[384] Thus, under this size standard, the great majority of firms can be considered small.

112. *Satellite Service Carriers*. The SBA has developed a size standard for small businesses within the category of Satellite Telecommunications. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.[385] According to Commission data, 31 carriers reported that they were engaged in the provision of satellite services.[386] Of these 31 carriers, an estimated 25 have 1,500 or fewer employees and six, alone or in combination with affiliates, have more than 1,500 employees.[387] Consequently, the Commission estimates that there are 31 or fewer satellite service carriers which are small businesses that may be affected by the rules and policies proposed herein.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

113. In this order, the Commission finds that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions, and we amend the current rules in accordance with this finding. This amendment requires competitive LECs to review the federal tariff of the competing incumbent LEC to determine the rate charged for various functions or services. Under the current rules, after June 21, 2004, review of the competing incumbent LEC's tariff is required to determine the "competing ILEC rate."[388] Therefore, this amendment does not modify the existing compliance requirement.

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381 *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

382 13 C.F.R. § 121.201, NAICS code 514191 (changed to 518111 in October 2002).

383 U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Receipts Size of Firms Subject to Federal Income Tax: 1997," Table 4, NAICS code 514191 (issued October 2000).

384 *Id.*

385 13 CFR § 121.201, NAICS code 513340 (changed to 517410 in October of 2002).

386 *Telephone Trends Report* at Table 5.3.

387 *Id.*

388 47 C.F.R. § 61.26(c).

114. Pursuant to a rule clarification adopted in this order, if a competitive LEC eligible to charge a higher access rate pursuant to the rural exemption chooses to also charge a PICC, the competitive LEC is required to review the federal tariff of the competing incumbent LEC to see if the incumbent LEC for that particular end-user charges a PICC, and if so, the amount of that incumbent LEC's PICC. Under the current rules, review of the competing incumbent LEC's tariff is required to determine the rural exemption amount. Therefore, this clarification does not modify the existing compliance requirement.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

115. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[389]

116. Throughout this order, we seek to further resolve questions and contentious issues that remain with respect to competitive LEC access services. Because there are both small entity IXCs and small entity competitive LECs – often with conflicting interests in this proceeding – we expect that small entities will be affected by the clarifications adopted in this decision. As discussed below, we conclude, based on a consideration both of the steps needed to minimize significant economic impact on small entities and of significant alternatives, that our clarifications best balance the goals of removing opportunities for regulatory arbitrage and minimizing the burdens placed on carriers.

117. In this order, the Commission clarifies that the benchmark rate is available only when a competitive LEC provides an IXC with access to the competitive LEC's own end-users. With this clarification, the Commission will minimize the opportunity for regulatory arbitrage, and ensure that small IXCs continue to pay just and reasonable rates for competitive LEC switched access services. This clarification also ensures that IXCs continue to accept and pay for competitive LEC access services, thereby protecting universal connectivity.

118. In adopting this clarification, the Commission considers and rejects the alternative approach advanced by some competitive LECs, which would permit competitive LECs to charge the full benchmark rates when they provide any component of the interstate switched access services used in connecting an end-user to an IXC.[390] We believe that an approach in which rates are not tethered to the provision of particular services would be an invitation to abuse because it would enable multiple competitive LECs to impose the full benchmark rate on a single call.[391] This outcome would be inconsistent with the Commission's goal to ensure just and reasonable competitive LEC access rates. The approach advanced by competitive LECs also would enable competitive LECs to discriminate among IXCs, including small entities, by providing varying levels of service for the same price.[392] Thus, we

389 5 U.S.C. § 603(c).

390 *See supra* paras. 14-16.

391 *See supra* para. 14.

392 *See supra* para. 14.

believe the clarification provided will minimize the impact that excessive rates and discriminatory behavior may have on IXCs, including any small businesses.

119. The Commission finds that the rate that a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions.[393] We conclude that regulation of these rates is necessary for the all the reasons that we identified in the *CLEC Access Reform Order*.[394] Specifically, an IXC may have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier and it is necessary to constrain the ability of competitive LECs to exercise this monopoly power.[395] At the same time, the Commission declines to require a specific rate structure or rate elements for the services provided by a competitive LEC in an effort to minimize the regulatory burdens on competitive LECs, including small businesses.

120. In addition, the Commission clarifies that the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a competitive LEC passes calls between two other carriers.[396] In providing this clarification, the Commission considers and rejects the proposal advanced by NewSouth because it would allow competitive LECs to charge IXCs, including small entities, for services they may not provide.[397] We find that clarification of the competing incumbent LEC rate is necessary to avoid litigation and uncertainty.[398] Eliminating the uncertainty surrounding the existing rules will benefit both competitive LECs and IXCs, including small businesses, by preventing potential billing disputes.

121. The Commission also clarifies the application of the multi-line business PICC under the rural exemption.[399] Although Sprint advances an alternative interpretation of how the PICC is to be calculated under the rural exemption, that interpretation would deprive competitive LECs, including small entities, of additional revenues taken into account when formulating the rural exemption in the *CLEC Access Reform Order*.[400] Under the clarification provided, a competitive LECs seeking to charge a PICC under the rural exemption must determine whether the competing incumbent LEC charges a PICC and the amount of that PICC. Although this imposes a minimal additional burden on competitive LECs, the

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393 *See supra* para. 17. The Commission also finds that, prior to this order on reconsideration, it would not have been unreasonable for a competitive LEC to charge the tariffed benchmark rate for traffic to or from end-users of other carriers, provided that the carrier serving the end-user did not also charge the IXC and provided that the competitive LEC's charges were otherwise in compliance with and supported by its tariff. *See supra* para. 18. In making this finding, the Commission considers and rejects arguments that prior Commission decisions addressed the appropriate rate a competitive LEC may charge when it is not serving the end-user. *See supra* para. 18. Because prior Commission decisions did not address this issue, this approach balances the interests of competitive LECs and IXCs, including small entities, by resolving disputes based on the services provided.

394 *CLEC Access Reform Order*, 16 FCC Rcd at 9965, para. 107.

395 *See supra* para. 17.

396 *See supra* para. 21.

397 *See supra* para. 20-21.

398 *See supra* para. 21.

399 *See supra* paras. 40-41.

400 *See supra* paras. 40-41.

additional burden is outweighed by the direct benefit of additional access revenues in rural areas in prescribed circumstances.

122. Moreover, in this order, the Commission clarifies what access rate applies when more than one incumbent LEC operates within a competitive LEC's service area.[401] The Commission agrees with competitive LECs that, without such clarification of the current rules, competitive LEC market entry will be delayed or possibly abandoned altogether because of uncertainty about rates and the prospect of IXC refusal to pay, or litigation. Eliminating the uncertainty surrounding the existing rules will benefit both competitive LECs and IXCs, including small businesses, by preventing potential billing disputes.

123. Further, in clarifying the applicable access rate in these circumstances, the Commission determined that it would permit a competitive LEC to charge an IXC a blended access rate if that rate reasonably approximates the rate that an IXC would have paid to the competing incumbent LECs for access to the competitive LEC's customers.[402] The Commission will permit a blended rate in some circumstances because it recognizes that requiring different rates for individual end-users within a service area might be particularly burdensome for small entities. Although the Commission considered specific alternative methods for determining the blended rate, it declines to specify the precise manner in which a competitive LEC must set its access rates when it serves the area of multiple incumbent LECs.[403] Rather, the Commission requires only that the blended access rate reasonably approximate the rate that an IXC would have paid to the competing incumbent LEC for access to the competitive LEC's customers.[404] The adopted approach balances the needs of small entities for flexibility in formulating a blended rate, yet ensures that the blended rate is just and reasonable in accordance with the Act.

124. Overall, we believe that this order best balances the competing goals that we have for our rules governing competitive LEC switched access charges. Neither in *CLEC Access Reform Order* nor in consideration of the petitions for reconsideration and clarification has there been any identification of additional alternatives that would have further limited the impact on all small entities while remaining consistent with Congress' pro-competitive objectives set out in the Act.

6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

125. None.

B. Final Regulatory Flexibility Certifications (FRFC)

126. The RFA requires that a regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[405] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization,"

401 *See supra* paras. 46-48.

402 *See supra* para. 48.

403 *See supra* para. 48.

404 *See supra* para. 48.

405 *Id.* § 605(b).

and "small governmental jurisdiction."[406] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[407] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[408]

1. Fifth Order on Reconsideration

a. Background

127. In this order, the Commission clarifies some rules in ways that are not expected to have a significant economic impact on a substantial number of small entities. Specifically, in addition to the clarifications discussed in the supplemental FRFA above, the Commission clarifies the existing relationship between the CLEC new markets rule and the rural exemption.[409] In particular, petitioners seek confirmation that new market rule does not apply if the competitive LEC would otherwise qualify for the rural exemption.[410] The Commission agrees that this is the correct interpretation of the existing rule and amends rule 61.26(e) to more clearly reflect the Commission's original intent.[411] The Commission also amends rule 61.26(e) to remove references to rate elements that have been eliminated by the Commission.[412] Further, the Commission clarifies the source of its authority to impose interconnection obligations on IXCs under section 201(a).[413]

b. Substantive Information

128. The amendment to section 61.26(e) of the Commission rules simply clarifies and codifies the existing relationship between the CLEC new markets rule and the rural exemption, and removes references to rate elements that have since been eliminated by the Commission. Because there is no change to the meaning or impact of the existing rule, this amendment will have no significant economic impact. Similarly, the Commission's clarification concerning the source of its authority does not change the meaning or impact of the existing rule on large and small entities.

129. Therefore, we certify that these requirements will not have a significant economic impact on a substantial number of small entities.

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406 *Id*. § 601(6).

407 *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such terms which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register."

408 15 U.S.C. § 632.

409 *See supra* para. 30 (discussing the relationship between subsections (d) and (e) of section 61.26 of the Commission's rules).

410 *See* MCLEC Petition at 11-13; RICA Petition at 11-12. *See also supra* para. 30.

411 *See supra* para. 30 & App. A.

412 *See supra* note 137 & App. A.

413 *See supra* paras. 59-61.

2. Eighth Report and Order

a. Background Information

130. In the *Eighth Report and Order*, the Commission declines to set a separate access rate for originating toll-free (8YY) traffic and allows it to be governed by the same declining benchmark that applies to other competitive LEC interstate access traffic.[414] In a further notice of proposed rulemaking issued with the *CLEC Access Reform Order*, the Commission raised questions relating to 8YY traffic originating on competitive LEC networks.[415] The Commission sought this information because AT&T had asserted that abuses surrounding competitive LEC-originated 8YY traffic justified immediately capping the access rate for this category of traffic at the rate of the competing incumbent LEC.[416] The Commission determines that the record does not support IXCs' claims that commission payments to 8YY generators translate effectively into incentives for the individuals who actually use those facilities to place excessive or fraudulent 8YY calls.[417]

b. Substantive Information

131. Because competitive LECs currently charge IXCs the previously established, declining benchmark rate for 8YY traffic, the Commission's decision results in no change to existing competitive LEC access charges for 8YY traffic. Thus, the Commission's decision will have no significant economic impact on competitive LECs or IXCs, large and small.

132. Therefore, we certify that these requirements will not have a significant economic impact on a substantial number of small entities.

C. No Regulatory Flexibility Analysis or Certification Required

133. In the *CLEC Access Reform Order*, the Commission provided an FRFA that conformed to the RFA.[418] In this present order, the Commission denies petitions for reconsideration and a petition for waiver.[419] Because the Commission promulgates no additional or revised final rules in response to petitions for reconsideration or the petition for waiver, our present action on these petitions is not an RFA matter.

D. Final Paperwork Reduction Act Analysis

134. This action contained herein contains no new or modified information collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

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414 *See supra* paras. 69-72.

415 *See CLEC Access Reform Order*, 16 FCC Rcd at 9961-64, paras. 99-104.

416 *Id.* at 9961-62, para. 98.

417 *See supra* para. 70.

418 *Id*. at 9964-71, paras. 106-28.

419 Specifically, the Commission denies petitions for reconsideration filed by Focal Communications, Corp. and US LEC Corp., Qwest Communications International, Inc., TDS Metrocom, Inc., and Time Warner Telecom. The petition for waiver was filed by Z-Tel Communications, Inc.

E. Report to Congress

135. The Commission will send a copy of these orders, including this Supplemental FRFA and FRFCs, in a report to be sent to Congress pursuant to the Congressional Review Act.[420] In addition, the Commission will send a copy of these orders, including the Supplemental FRFA and FRFCs, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of these orders and Supplemental FRFA (or summaries thereof) and FRFCs will also be published in the Federal Register.[421]

VI. ORDERING CLAUSES

136. Accordingly, IS IT ORDERED that, pursuant to the authority contained in sections 1-5, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 214, 218-220, 254, 303(r), 403, 405, 502 and 503, this EIGHTH REPORT AND ORDER AND FIFTH ORDER ON RECONSIDERATION, with all attachments, including revisions to Part 61 of the Commission's rules, 47 C.F.R. Part 61, is hereby ADOPTED.

137. IT IS FURTHER ORDERED that these orders and rule revisions adopted in these orders SHALL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register.

138. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this EIGHTH REPORT AND ORDER AND FIFTH ORDER ON RECONSIDERATION, including the Supplemental Final Regulatory Flexibility Analysis and Final Regulatory Flexibility Certifications, to the Chief Counsel for Advocacy of the Small Business Administration.

139. IT IS FURTHER ORDERED that the Petitions for Reconsideration and Petitions for Clarification filed by Focal Communications Corp. and US LEC Corp., Qwest Communications International, Inc., TDS Metrocom, Inc., and Time Warner Telecom ARE DENIED.

140. IT IS FURTHER ORDERED that the Petition for Clarification filed by U.S. TelePacific Corp. IS DENIED IN PART AND GRANTED IN PART, to the extent discussed herein.

141. IT IS FURTHER ORDERED that the Petitions for Reconsideration and/or Clarification filed by the Minnesota CLEC Consortium and Rural Independent Competitive Alliance ARE DENIED IN PART AND GRANTED IN PART, to the extent discussed herein.

142. IT IS FURTHER ORDERED that the Petition of Z-Tel Communications Inc., for Temporary Waiver of Commission Rule 61.26(d) is DENIED.

143. IT IS FUTHER ORDERED that the Petition of TDS Metrocom, Inc. for Stay Pending Reconsideration is DENIED AS MOOT.

144. IT IS FURTHER ORDERED that the Emergency Petition of Mpower Communications Corp. and North County Communications, Inc. for Stay of Order is DENIED AS MOOT.

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420 *See* 5 U.S.C. § 801(a)(1)(A).

421 *See* 5 U.S.C. § 604(b).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A – Final Rules

AMENDMENT TO THE CODE OF FEDERAL REGULATIONS

For the reasons discussed in the preamble, the Federal Communication Commission amends Part 61 of Title 47 of the Code of Federal Regulations as follows:

1. The authority citation for Part 61 continues to read as follows:

Authority: Secs. 1, 4(i), 4(j), 201-205 and 403 of the Communications Act of 1934, as amended; 47 U.S.C 151, 154(i), 154(j), 201-205 and 403, unless otherwise noted.

2. Section 61.26 is amended by revising paragraphs (a)(1) and (a)(2), revising paragraph (e), and adding a new paragraph (f) as follows:

§ 61.26 Tariffing of competitive interstate switched exchange access services.

(a) * * *
(1) *CLEC* shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of "incumbent local exchange carrier" in 47 U.S.C. 251(h).
(2) *Competing ILEC* shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.

* * *

(e) *Rural exemption*. Notwithstanding paragraphs (b) through (d) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching. In addition to the rate described above, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge.

(f) If a CLEC provides some portion of the interstate switched exchange access services used to send traffic to or from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services.

APPENDIX B

PETITIONS FOR RECONSIDERTATION AND/OR CLARIFICATION
CC DOCKET NO. 96-262

Petitions for Reconsideration and/or Clarification

Focal Communications Corp. and U.S. LEC Corp. (Focal Petition)
Minnesota CLEC Consortium (MCLEC Petition)
Qwest Communications International, Inc. (Qwest Petition)
Rural Independent Competitive Alliance (RICA Petition)
TDS Metrocom, Inc. (TDS Petition)
Time Warner Telecom (Time Warner Petition)
U.S. TelePacific Corp. (TelePacific Petition)

Comments and Oppositions

Association for Local Telecommunications Services (ALTS Comments)
Association of Communications Enterprises (ASCENT Comments)
AT&T Corp. (AT&T Opposition)
Focal Communications Corp. and US LEC Corp. (Focal Comments)
Iowa Telecommunications Services, Inc. (Iowa Telecom Opposition)
Sprint Corporation (Sprint Opposition)
Time Warner Telecom (Time Warner Comments)
WorldCom, Inc. (WorldCom Opposition)
Z-Tel Communications, Inc. (Z-Tel Opposition)

Replies

Association of Communications Enterprises (ASCENT Reply)
Focal Communications Corp. and US LEC Corp. (Focal Reply)
Minnesota CLEC Consortium (MCLEC Reply)
Rural Independent Competitive Alliance (RICA Reply)
TDS Metrocom, Inc. (TDS Reply)
U.S. TelePacific Corp. (TelePacific Revised Reply)

APPENDIX C

PETITION OF Z-TEL FOR TEMPORARY WAIVER, CCB/CPD FILE NO. 01-19

Comments and Oppositions

Association of Communications Enterprises (ASCENT Waiver Comments)
AT&T Corp.(AT&T Waiver Opposition)
Focal Communications Corporation and Pac-West Telecomm, Inc. (Focal/Pac-West Waiver Comments)
IDT Corporation (IDT Waiver Comments)
Sprint Communications Company L.P. (Sprint Waiver Opposition)
TDS Metrocom, Inc. and USLINK, Inc. (TDS/US LINK Waiver Comments)

Replies

Association for Local Telecommunications Services (ALTS Waiver Reply)
Sprint Communications Company L.P. (Sprint Waiver Reply)
Z-Tel Communications, Inc. and Z-Tel Communications of Virginia, Inc. (Z-Tel Waiver Reply)

APPENDIX D

COMMENTS AND REPLY COMMENTS RE ACCESS RATES FOR 8YY TRAFFIC, CC DOCKET NO. 96-262

Comments

Association of Communications Enterprises (ASCENT 8YY Comments)
Association for Local Telecommunications Services (ALTS 8YY Comments)
Association for Telecommunications Professionals in Higher Education (ACUTA 8YY Comments)
AT&T Corp. (AT&T 8YY Comments)
Focal Communications Corp. and US LEC Corp. (Focal/US LEC 8YY Comments)
Minnesota CLEC Consortium (MCLEC 8YY Comments)
Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO 8YY Comments)
Rural Impendent Competitive Alliance (RICA 8YY Comments)
Sprint Corporation (Sprint 8YY Comments)
Time Warner Telecom (Time Warner 8YY Comments)
U.S. TelePacific Corp. (TelePacific 8YY Comments)
WorldCom, Inc. (WorldCom 8YY Comments)
Z-Tel Communications, Inc. (Z-Tel 8YY Comments)

Replies

Association of Communications Enterprises (ASCENT 8YY Reply)
AT&T Corp. (AT&T Reply)
Focal Communications Corp. and US LEC Corp. (Focal/US LEC 8YY Reply)
Network Plus, Inc. (Network Plus 8YY Reply)
Sprint Corporation (Sprint 8YY Reply)
Time Warner Telecom (Time Warner 8YY Reply)
U.S. TelePacific Corp. (TelePacific 8YY Reply)

STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, Eighth Report and Order and Fifth Order on Reconsideration, CC Docket 96-262

Today's Order removes a regulatory quirk that has for too long led carriers into regulatory arbitrage schemes. It represents the culmination of our efforts, begun in 2001, to quiet the financial and regulatory uncertainty for both competitive LECs and inter-exchange carriers (IXCs) in the market for access services. Today, we arrive at our transition to equalized switched access rates by reaffirming our commitment to prevent arbitrage and answer a number of questions that have led to numerous disputes between carriers.

We resolve those petitions and establish a clear regulatory framework for facilities-based competitive LECs going forward. Today's order affirms our prior decision to eliminate uneconomic subsidies to certain carriers, and we reject arguments that the *CLEC Access Reform Order* somehow permits competitive LECs to charge the full benchmark rate when they provide any small piece of interstate switched access services. In so doing, we clarify that on a prospective basis, carriers are permitted to charge the full benchmark rate only to the extent that a CLEC provides an IXC with access to its own end-users. Furthermore, we give meaning to the "competing ILEC rate" that a CLEC must charge for access while preserving CLEC flexibility to structure their access rates in a manner that may vary from the incumbent LEC's rate structure. Doing so will settle the regulatory environment and will allow facilities-based CLECs to use resources for facilities investment instead of litigation. Access rates, like all other tariffed rates, must be just and reasonable under section 201(b) of the Act. Today's action ensures that carriers satisfy that statutory requirement to the benefit of providers who have deployed facilities to serve end user customers.