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June 16, 2006

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Ms. Patricia Van Gerpen
South Dakota Public Utilities Commission
Capitol Building, 1st Floor
500 East Capitol Avenue
Pierre, SD 57501-5070

RE: Docket Nos. TC 06-036 through 042

Dear Ms. Van Gerpen:

Enclosed for filing, please find an original and eleven copies of the Motion Seeking Order Requiring Payment of Interim Compensation and the Brief in Support of Motion in the above matters. As indicated above, these documents have been filed electronically as well as sent via US mail. If you have any questions or concerns regarding these documents, please do not hesitate to contact me.

Best regards.

Sincerely,

CUTLER & DONAHOE, LLP



Meredith A. Moore

For the Firm

MAM/jlh

Enclosures/Attachments

cc (via email): Talbot Wieczorek
Stephen B. Rowell
Rolayne Wiest
Sara Greff

Prior to the entry of the *T-Mobile Order* by the FCC, there were ongoing disputes between ILECs and CMRS providers regarding the requirement of an ILEC to provide transport and termination during the interconnection agreement negotiation process, and the ability of an ILEC to obtain interim compensation pending the approval of a final interconnection agreement by a state commission. *T-Mobile Order* at ¶9. In the *T-Mobile Order*, the FCC decided that interim compensation arrangements are created once a request for negotiation on an interconnection arrangement is made by either a CMRS carrier or a local exchange carrier.

The FCC adopted “new rules permitting incumbent LECs to invoke the section 252 process ***and establish interim compensation arrangements, which are triggered by a request for negotiation from either carrier.***” (emphasis added) *T-Mobile Order* at footnote 57. The FCC further reasoned:

In recognition that the establishment of interconnection arrangements may take more than 160 days, [footnote omitted] we also establish interim compensation requirements under section 20.11 consistent with those already provided in section 51.715 of the Commission’s rules. [footnote omitted] Interim compensation requirements are necessary for all the reasons the Commission articulated in *Local Competition First Report and Order*.

T-Mobile Order at ¶16.

As a consequence of the *T-Mobile Order*, the FCC amended 47 C.F.R. § 20.11 by adding sub-section (f) thereto, consisting of the following language:

(f) An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission. *Once a request for interconnection is made, the interim transport and termination pricing described in § 51.715 of this chapter shall apply.* (emphasis added)

Clearly, the *T-Mobile Order* and the associated rule changes provide for the payment of interim compensation when a request interconnection negotiations has been made. WWC’s

claims set forth in paragraph 26 of the Response are contrary to the *T-Mobile Order* and the FCC's Rules. Once a request for interconnection negotiations is made (as WWC did in its letters to the Golden West Companies dated October 21, 2005, *see* Exhibit C to each Petition and Response at ¶ 6) and traffic is exchanged between the parties (clearly undisputed in these matters), payment of interim compensation is required.

II. WWC incorrectly asserts a notice requirement.

WWC's request for interconnection negotiations triggers WWC's obligation to pay interim compensation. WWC incorrectly asserts in the Response that a "timely request for interim compensation" must be made by the Golden West Companies before interim compensation is paid. Response at ¶ 26. This assertion is in direct conflict with the *T-Mobile Order* (*see especially* footnote 57 thereof) and 47 C.F.R. § 20.11(f). The Commission must address this incorrect and extralegal assertion to assure that appropriate compensation is paid to the Golden West Companies during the negotiation and arbitration period.

III. Precautionary and non-waiver notice to WWC for compensation.

The Golden West Companies have demonstrated above that no additional notice or request for interim compensation is necessary to create entitlement by the Golden West Companies to receive compensation from WWC for the transport and termination of WWC traffic commencing January 1, 2006. The rate for such interim compensation for each of the Golden West Companies is set forth in Exhibit A to the Motion. WWC has received notice that compensation is due to the Golden West Companies for traffic terminated by WWC to the networks of the Golden West Companies.

Nonetheless, in light of WWC's claim regarding the Golden West Companies' alleged non-entitlement to interim compensation based upon a failure to request same which was first

made by WWC on May 30, 2006, and as an additional precaution against any possible continuation of such a claim by WWC, and expressly without waiving the legal positions of the Golden West Companies set forth in the Motion and this Brief, or as may be advanced in the future, the Golden West Companies hereby provide additional notice to WWC that interim compensation is due to and is claimed by the Golden West Companies for traffic originated on WWC's network and terminated to the Golden West Companies' networks.

IV. Expedited entry of an Order requiring payment of interim compensation is requested by the Golden West Companies.

It is important that the Commission address this issue on an expedited basis because the parties are now and will continue to exchange traffic. The Commission should require WWC to pay interim compensation consistent with the requirements of the *T-Mobile Order*.

To this end, the Commission should order the parties to pay interim compensation at the Section 51.715(b)(3) rates set forth in Exhibit A to the Motion for transport and termination of telecommunications traffic from January 1, 2006 to the date on which the Commission approves the parties' executed interconnection agreements. The final reciprocal compensation rate approved by the Commission should be used to make any necessary true-up adjustments to interim compensation in accordance with 47 C.F.R. § 51.715(d).

DATED this 16th day of June 2006.

Respectfully submitted,

Armour Independent Telephone Company, Bridgewater-
Canistota Telephone Company, Golden West
Telecommunications Cooperative, Inc., Kadoka
Telephone Company, Sioux Valley Telephone
Company, Union Telephone Company, and Vivian
Telephone Company (collectively the "Golden West
Companies")

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CERTIFICATE OF SERVICE

On this 16th day of June, 2006, true and correct copies of the foregoing were transmitted to Talbot Wiczorek, of Gunderson, Palmer, Goodsell & Nelson, LLP, 440 Rushmore Road, Rapid City, SD 57701 via email to tjw@gpgnlaw.com and to Stephen B. Rowell, Mailstop 1269 B5-F11-C, One Allied Drive, Little Rock, AR 72202, legal counsel for WWC License L.L.C. via email at Stephen.B.Rowell@alltel.com, Rolayne Wiest of the South Dakota Public Utilities Commission via email at Rolayne.Wiest@state.sd.us and Sara Greff of the South Dakota Public Utilities Commission via email at Sara.Greff@state.sd.us, by email.

Meredith A Moore
One of the Attorneys for Plaintiffs

ATTACHMENT A

(See following pages)

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

In the Matter of)	
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
T-Mobile <i>et al.</i> Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs)	
)	
)	

DECLARATORY RULING AND REPORT AND ORDER

Adopted: February 17, 2005

Released: February 24, 2005

By the Commission:

INTRODUCTION

1. On September 6, 2002, T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners jointly filed a petition for declaratory ruling asking the Commission to reaffirm “that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic.”¹ The petitioners maintain that these tariffs are unlawful because they: (1) bypass the negotiation and arbitration procedures established in sections 251 and 252 of the Act;² (2) do not provide for reciprocal compensation to commercial mobile radio service (CMRS) providers;³ and (3) contain rates that do not comport with the Total Element Long-Run Incremental Cost (TELRIC) pricing methodology as required by the Commission’s rules.⁴ The Commission incorporated the T-Mobile Petition into this proceeding and sought comment on the issues raised therein.⁵ For the reasons discussed below, we deny the T-Mobile Petition, but amend the

¹See *T-Mobile USA, Inc. et al. Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariffs*, CC Docket Nos. 01-92, 95-185, 96-98, Petition of T-Mobile, *et al.* at 1 (filed Sept. 6, 2002) (T-Mobile Petition). Specifically, petitioners request that the Commission declare that the incumbent LEC wireless termination tariffs, as well as the refusal to negotiate interconnection agreements, conflict with sections 251 and 252 of the Act and the Commission’s rules, and clarify that an incumbent local exchange carrier (LEC) engages in bad faith by unilaterally filing wireless termination tariffs without first negotiating in good faith with CMRS providers. *Id.* at 14.

²47 U.S.C. §§ 251, 252.

³47 C.F.R. §§ 51.701-17.

⁴See T-Mobile Petition at 5-6, 9-10. See also 47 C.F.R. § 51.705.

⁵See *Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, CC Docket No. 01-92, Public Notice, 17 FCC Rcd 19046 (2002). Comments were filed on October 18, 2002 and replies were filed on November 1, 2002. Comments and replies filed in response to this petition will be identified as “T-Mobile Comments” and “T-Mobile Reply,” and are listed in Appendix C.

Commission's rules on a prospective basis to prohibit the use of tariffs to impose intercarrier compensation obligations with respect to non-access CMRS traffic.⁶

BACKGROUND

Prior to the 1996 Act, the Commission established rules governing LEC interconnection with CMRS providers.⁷ Pursuant to its authority under section 201(a) of the Act, the Commission adopted rules requiring mutual compensation for the exchange of traffic between LECs and CMRS providers.⁸ In particular, the rules required the originating carrier, whether LEC or CMRS provider, to pay reasonable compensation to the terminating carrier in connection with traffic that terminates on the latter's network facilities.⁹ In a subsequent Notice of Proposed Rulemaking, the Commission explored whether it should retain the current system of negotiated agreements or adopt tariffing requirements.¹⁰ The Commission issued another Notice of Proposed Rulemaking in 1996 to examine further its policies related to interconnection between CMRS providers and LECs, including compensation arrangements.¹¹ To date, the Commission has not issued a decision directly addressing these issues.

In the *Local Competition First Report and Order*, the Commission determined that section 251(b)(5) obligates LECs to establish reciprocal compensation arrangements for the exchange of intraMTA traffic between LECs and CMRS providers.¹² The Commission stated that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area (MTA)¹³ is subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges.¹⁴ The Commission reasoned that, because wireless license territories are federally authorized and vary in size, the largest FCC-authorized wireless license territory, *i.e.*, the MTA, would be the most appropriate local service area for CMRS traffic for purposes of reciprocal compensation under section 251(b)(5).¹⁵ Thus, section 51.701(b)(2) of the Commission's rules defines telecommunications traffic

⁶In this item, the term "non-access traffic" refers to traffic not subject to the interstate or intrastate access charge regimes, including traffic subject to section 251(b)(5) of the Act and ISP-bound traffic.

⁷See generally *Implementation of Sections 3(n) and 332 of the Communications Act and Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) (*CMRS Second Report and Order*) (subsequent history omitted).

⁸See 47 C.F.R. § 20.11.

⁹*CMRS Second Report and Order*, 9 FCC Rcd at 1498, para. 232 (adopting 47 C.F.R. § 20.11).

¹⁰See *Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, RM-8012, Notice of Proposed Rulemaking and Notice of Inquiry, 9 FCC Rcd 5408, 5455-57, paras. 113-20 (1994) (*CMRS 1994 Notice*).

¹¹See *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, and Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket Nos. 95-185, 94-54, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5058-64, paras. 82-95 (1996) (*CMRS 1996 Notice*).

¹²*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, 16016, para. 1041 (adopting section 51.703(a) of the Commission's rules) (*Local Competition First Report and Order*) (subsequent history omitted).

¹³The definition of an MTA can be found in section 24.202(a) of the Commission's rules. 47 C.F.R. § 24.202(a).

¹⁴*Local Competition First Report and Order*, 11 FCC Rcd at 16014, para. 1036.

¹⁵*Id.*

exchanged between a LEC and a CMRS provider that is subject to reciprocal compensation as traffic “that, at the beginning of the call, originates and terminates within the same Major Trading Area.”¹⁶

Although section 251(b)(5) and the Commission’s reciprocal compensation rules reference an “arrangement” between LECs and other telecommunications carriers, including CMRS providers, they do not explicitly address the type of arrangement necessary to trigger the payment of reciprocal compensation or the applicable compensation regime, if any, when carriers exchange traffic without making prior arrangements with each other.¹⁷ As a result, carrier disputes exist as to whether and how reciprocal compensation payment obligations arise in the absence of an agreement or other arrangement between the originating and terminating carriers.¹⁸

In 2001, the Commission adopted the *Intercarrier Compensation NPRM* in this proceeding, which initiated a comprehensive review of interconnection compensation issues, including interconnection compensation arrangements between LECs and CMRS providers.¹⁹ As the Commission recognized in the *Intercarrier Compensation NPRM*, CMRS providers typically interconnect indirectly with smaller LECs via a Bell Operating Company (BOC) tandem.²⁰ In this scenario, a CMRS provider delivers the call to a BOC tandem, which in turn delivers the call to the terminating LEC. The indirect nature of the interconnection enables the CMRS provider and LEC to exchange traffic even if there is no interconnection agreement or other compensation arrangement between the parties.²¹ In the *Intercarrier Compensation NPRM*, the Commission asked commenters to address the appropriate regulatory framework governing interconnection, including compensation arrangements, between LECs and CMRS providers.²² Specifically, the Commission requested comment on how interconnection between LECs and CMRS providers would “work” within the existing regulatory frameworks under sections 251 and 252 and section 332 of the Act.²³

The practice of exchanging traffic in the absence of an interconnection agreement or other compensation arrangement has led to numerous disputes between LECs and CMRS providers as to the applicable intercarrier compensation regime. For instance, many CMRS providers argue that intraMTA

¹⁶47 C.F.R. § 51.701(b)(2).

¹⁷47 U.S.C. § 251(b)(5); 47 C.F.R. § 51.703(a).

¹⁸*See, e.g.*, T-Mobile Petition at 1 (asking the Commission to find that wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for transport and termination under the Act).

¹⁹*See generally Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9637-44, paras. 78-96 (2001) (*Intercarrier Compensation NPRM*). Pleadings filed in response to the *Intercarrier Compensation NPRM* are referred to simply as “Comments” and “Reply” respectively, and are listed in Appendix B.

²⁰*See Intercarrier Compensation NPRM*, 16 FCC Rcd at 9643, para. 91 n.148. *See also* Nextel Comments at 10-11; Triton PCS Comments at 13; MSTG Reply at 2. *See also* T-Mobile Petition at 2.

²¹*See* Alliance of Incumbent Rural Independent Telephone and Independent Alliance Reply at 6-7; MITG Reply at 6; MSTG Reply at 7.

²²*Intercarrier Compensation NPRM*, 16 FCC Rcd at 9642, paras. 89-90.

²³*Id.* at 9642, para. 89. The Commission discussed the merits and drawbacks of the negotiation process contained in sections 251 and 252 in the context of interconnection with CMRS providers. *Id.* at 9642, para. 89. The Commission also sought comment on how the various interconnection provisions of the Act should be applied to CMRS providers. *See id.* at 9641, para. 86.

traffic routed from a CMRS provider through a BOC tandem to another LEC is subject to the reciprocal compensation regime because it originates and terminates in the same MTA.²⁴ Some LECs, however, contend that this traffic is more properly subject to access charges because it originates outside the local calling area of the LEC, is being carried by a toll provider, *i.e.*, the BOC, and is routed to the LEC via access facilities.²⁵ When a LEC seeks payment of access charges from a BOC in these circumstances, the BOC often refuses to pay such charges on the basis that (1) it is merely transiting traffic subject to reciprocal compensation, and (2) the originating carrier is responsible for the reciprocal compensation due.²⁶

As a result of these disputes, the LECs have sought assistance from state commissions, requesting that they be compensated for terminating this traffic. Some LECs have asked state commissions to require the BOCs to continue paying for termination.²⁷ For instance, in Tennessee, a number of small LECs filed a petition asking the Tennessee Regulatory Authority to direct BellSouth to maintain all existing settlement arrangements and mechanisms currently in effect.²⁸ More recently, a LEC in Iowa threatened to block wireless originated traffic routed through a Qwest tandem unless Qwest agreed to pay the LEC tariffed access charges.²⁹ The state commission in Iowa granted injunctive relief preventing the LEC from blocking the traffic at issue.³⁰ Although settlements have been reached in some cases,³¹ many

²⁴*See, e.g.*, ALLTEL Reply at 10; AT&T Wireless Reply at 27; CTIA Reply at 11; Nextel Reply at 2, 8; VoiceStream Reply at 33. Some CMRS providers view the status quo as an implicit bill-and-keep arrangement, because they are also uncompensated for incumbent LEC traffic that they terminate. *See, e.g.*, T-Mobile Petition at 3 & n. 8. Typically, small incumbent LECs route their traffic to CMRS providers via an interexchange carrier (IXC), and assert that the traffic is therefore inter-exchange toll traffic for which the terminating carrier receives access charges from the IXC, rather than reciprocal compensation. The Commission has established, however, that an IXC has no obligation to pay a CMRS provider access charges unless it has a contractual obligation to do so. *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, 13196, para. 8 (2002), *petitions for review dismissed, AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003). As a consequence, most traffic sent to CMRS providers from small incumbent LECs is terminated without compensation.

²⁵*See, e.g.*, MECA Comments at 37.

²⁶*See* Letter from Glenn Reynolds, Vice President, Federal Regulatory, BellSouth Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (filed May 16, 2003) (attaching Letter from Glenn Reynolds, Vice President, Federal Regulatory, BellSouth Corporation, to William Maher, Chief, Wireline Competition Bureau, Federal Communications Commission, CC Docket No. 01-92 at 1-2 (filed May 15, 2003) (stating that LECs are obligated to accept calls from carriers who have chosen to interconnect indirectly through a third party transiting company and must recognize that the compensation due them for local calls from other carriers is the responsibility of the originating carrier) (BellSouth May 16 *Ex Parte* Letter).

²⁷*See* Letter from Elaine Critides, Verizon Wireless, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at Attach. (filed Apr. 16, 2003) (attaching various state filings and cases addressing this issue) (Verizon Wireless April 16 *Ex Parte* Letter).

²⁸*See* Verizon Wireless April 16 *Ex Parte* Letter (attaching *General Docket Addressing Rural Universal Service*, Docket No. 00-00523, Petition for Emergency Relief and Request for Standstill Order By the Tennessee Rural Independent Coalition, at 1 (Tenn. Reg. Auth. Apr. 3, 2003)). Similar petitions were filed by LECs in Georgia, Mississippi, North Carolina, and Kentucky. *See* Verizon Wireless April 16 *Ex Parte* Letter, at Attach.

²⁹*See Qwest Corp. v. East Buchanan Telephone Cooperative*, Docket No. FCU-04-42, Temporary Injunction, at 1-2, 4 (Iowa Dept. of Util. Bd. Aug. 13, 2004).

³⁰*See Qwest Corp. v. East Buchanan Telephone Cooperative*, Docket Nos. FCU-04-42 and FCU-04-43, Order Granting Injunctive Relief, at 9 (Iowa Dept. of Util. Bd. Dec. 23, 2004)

of these disputes remain unresolved. As a result of these disputes, many LECs have filed wireless termination tariffs with state commissions in an attempt to be compensated for traffic that originates with CMRS providers.³² Typically, these tariffs apply only in the situation where there is no interconnection agreement or reciprocal compensation arrangement between the parties.³³

On September 6, 2002, T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners jointly filed a petition for declaratory ruling, which the Commission incorporated into this proceeding.³⁴ The petitioners and other CMRS providers claim that, by filing these tariffs, the incumbent LECs are acting in bad faith by attempting to preempt the negotiation process contemplated by the Act and the Commission's rules.³⁵ The incumbent LECs respond that, in the absence of an agreement or other arrangement, wireless termination tariffs are the only mechanism by which they can obtain compensation for terminating this traffic.³⁶ They claim that they are provided no meaningful opportunity to bargain and no technical ability to stop the flow of this incoming traffic.³⁷ Further, they emphasize that the establishment of these tariffs in no way precludes CMRS providers from exercising

³¹See, e.g., *Investigation of Duties and Obligations of Telecommunications Carriers with Respect to the Transport and Termination of CMRS Traffic*, Docket No. P-100, SUB 151, Order Granting Relief From Billing Obligations, at 1 (North Carolina Util. Comm. Dec. 12, 2003) (relieving BellSouth of its billing obligations due to settlements reached between the parties).

³²See, e.g., MITG Reply at 6; T-Mobile Petition at 4-5. Many state commissions allowed these tariffs to go into effect, while other state commissions initiated investigations into these tariffs seeking further justification of the rates and terms contained therein. See Letter from Laura S. Gallagher, Counsel to Nextel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 2-3 (filed Dec. 10, 2003). See also Letter from Laura S. Gallagher, Counsel to Nextel Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at Attach. (filed Aug. 14, 2003) (attaching an amended *ex parte* with conflicting state decisions considering the lawfulness of wireless termination tariffs filed by CenturyTel).

³³See, e.g., Letter from Bryan T. McCartney, Counsel for the Missouri Small Telephone Company Group, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 3-4 (filed Aug. 17, 2004) (explaining that the wireless termination tariffs at issue in Missouri apply only in the absence of an agreement and are expressly subordinate to approved agreements under the Act) (MSTG Aug. 17 *Ex Parte* Letter).

³⁴T-Mobile Petition at 1.

³⁵See, e.g., T-Mobile Petition at 8-9; AT&T Wireless T-Mobile Comments at 4-6; CTIA T-Mobile Comments at 4-5; Cingular Wireless T-Mobile Comments at 3-4; Verizon Wireless T-Mobile Comments at 2-3. *But see* Alliance of Incumbent Rural Independent Telephone Companies T-Mobile Comments at 5 (claiming that it is the CMRS providers that have elected to bypass the negotiation process by establishing indirect interconnection with incumbent LECs without any agreement to do so).

³⁶See, e.g., Frontier and Citizens T-Mobile Comments at 7; ICORE T-Mobile Comments at 7; Michigan Rural Incumbent Local Exchange Carriers T-Mobile Comments at 3; Minnesota Independent Coalition T-Mobile Comments at 1-2; NTCA T-Mobile Comments at 2-3; Rural Iowa Independent Telephone Association T-Mobile Comments at 6. The incumbent LECs dispute the existence of a *de facto* bill-and-keep arrangement. See, e.g., Alliance of Incumbent Rural Independent Telephone Companies T-Mobile Comments at 10-12; Fred Williamson T-Mobile Comments at 2; Frontier and Citizens T-Mobile Comments at 5; Rural Iowa Independent Telephone Association T-Mobile Comments at 3.

³⁷See, e.g., Alliance of Incumbent Rural Independent Telephone Companies T-Mobile Comments at 12; Frontier and Citizens T-Mobile Comments at 7.

their right to pursue interconnection with them under the Act, and that such tariffs apply only in the absence of an agreement or other arrangement.³⁸

DISCUSSION

In light of existing carrier disputes, we find it necessary to clarify the type of arrangements necessary to trigger payment obligations. Because the existing rules do not explicitly preclude tariffed compensation arrangements, we find that incumbent LECs were not prohibited from filing state termination tariffs and CMRS providers were obligated to accept the terms of applicable state tariffs. Going forward, however, we amend our rules to make clear our preference for contractual arrangements by prohibiting LECs from imposing compensation obligations for non-access CMRS traffic pursuant to tariff.³⁹ In addition, we amend our rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act.

Our finding that tariffed arrangements were permitted under the existing rules is based on the fact that neither the Commission's reciprocal compensation rules, nor the section 20.11 mutual compensation rules adopted prior to the 1996 Act, specify the types of arrangements that trigger a compensation obligation. Because the existing compensation rules are silent as to the type of arrangement necessary to trigger payment obligations, we find that it would not have been unlawful for incumbent LECs to assess transport and termination charges based upon a state tariff.⁴⁰ Prior to the 1996 Act, the Commission specifically declined to preempt state regulation of LEC intrastate interconnection rates applicable to CMRS providers⁴¹ and it acknowledged that the intrastate portions of interconnection arrangements are

³⁸See, e.g., Alliance of Incumbent Rural Independent Telephone Companies T-Mobile Comments at 5-6, 8-9; Michigan Rural Incumbent Local Exchange Carriers T-Mobile Comments 4; Minnesota Independent Coalition T-Mobile Comments at 2; MITG T-Mobile Comments at 7-10; MSTG T-Mobile Comments at 2-3, 6. The CMRS providers respond that, once such tariffs are in effect, the incumbent LEC has little incentive to cooperate in good faith negotiations. See, e.g., Cingular Wireless T-Mobile Comments at 6. The incumbent LECs counter with the fact that many CMRS providers reached agreements with LECs after the wireless termination tariffs were filed and argue that these tariffs provide an appropriate incentive to pursue negotiations. See MSTG Aug. 17 *Ex Parte* Letter at 4.

³⁹This new rule applies only to non-access traffic as defined in note 6 above.

⁴⁰Although a tariffed arrangement would not be unlawful *per se* under the current rules, we make no findings regarding specific obligations of any customer of any carrier to pay any tariffed charges. A complaint requesting that we make such findings would not state a cause of action for which the Commission can grant relief. See *Illinois Bell Tel. Co. v. AT&T*, File Nos. E-89-41 through E-89-61, Order, 4 FCC Rcd 5268, 5270, para. 18 (“The complaints do not allege that AT&T, in its role as a carrier, acted or failed to act in contravention of the Communications Act . . . Rather, they allege conditionally that AT&T may have failed to pay the lawful charge for service. Such allegations do not state a cause of action under the complaint procedures and are properly dismissed.”), *recon. denied*, 4 FCC Rcd 7759 at 7760, ¶ 4 (1989) (“BOCs may not bring a complaint against AT&T in its capacity as a customer.”).

⁴¹In the *CMRS Second Report and Order*, the Commission preempted state and local regulations governing the kind of interconnection to which CMRS providers are entitled, but it specifically declined to preempt state regulation of LEC intrastate interconnection rates applicable to CMRS providers. See *CMRS Second Report and Order*, 9 FCC Rcd at 1498, para. 230-31. In the *CMRS 1996 Notice*, however, the Commission requested comment on the possibility of preemption of interconnection rates applied to LEC-CMRS traffic. See *CMRS 1996 Notice*, 11 FCC Rcd at 5072-73, paras. 111-12.

sometimes filed in state tariffs.⁴² Thus, it appears that the Commission was aware of these arrangements and explicitly declined to preempt them at that time.⁴³

We reject arguments that our prior decisions require a different result. The petitioners state that, in 1987 and 1989, the Commission found that an incumbent LEC engages in bad faith when it files unilaterally a CMRS interconnection tariff, and they argue that the Commission should reaffirm that holding here.⁴⁴ We acknowledge that our early decisions addressing CMRS interconnection issues suggest that the Commission intended for these arrangements to be negotiated agreements between the parties and express an expectation that tariffs would be filed only after carriers have negotiated agreements.⁴⁵ These decisions, however, pre-date the reciprocal compensation rules adopted by the Commission pursuant to the 1996 Act. To the extent the Commission was concerned about the use of tariffs because there is unequal bargaining power between CMRS providers and LECs, the 1996 Act introduced a mechanism by which CMRS providers may compel LECs to enter into bilateral interconnection arrangements.⁴⁶ Thus, we do not find that these early decisions are dispositive as to what types of arrangements are necessary to trigger payment obligations under existing rules.⁴⁷

Although section 20.11 and the Commission's reciprocal compensation rules establish default rights to intercarrier compensation, they do not preclude carriers from accepting alternative compensation arrangements. By routing traffic to LECs in the absence of a request to establish reciprocal or mutual compensation, CMRS providers accept the terms of otherwise applicable state tariffs. These tariffs do not prevent CMRS providers from requesting reciprocal or mutual compensation at the rates required by the Commission's rules.⁴⁸ Accordingly, wireless termination tariffs do not violate a CMRS provider's rights to reciprocal or mutual compensation under section 251(b)(5) and section 20.11 of the Commission's rules.⁴⁹

⁴² See *CMRS 1994 Notice*, 9 FCC Rcd at 5451, 5453, paras. 104, 108.

⁴³ In 1996, however, the Commission did preempt state tariffs imposing charges on CMRS providers for LEC-originated traffic. See *Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1042.

⁴⁴ T-Mobile Petition at 8.

⁴⁵ See *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Report No. CL-379, Declaratory Ruling, 2 FCC Rcd 2910, 2916, para. 56 (1987) (stating that "we expect that tariffs reflecting charges to cellular carriers will be filed only after the co-carriers have negotiated agreements on interconnection"); *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services (Cellular Interconnection Proceeding)*, Report No. CL-379, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369, 2370-71, paras. 13-14 (1989).

⁴⁶ See generally 47 U.S.C. §§ 251-252; 47 C.F.R. Part 51. See also *Local Competition First Report and Order*, 11 FCC Rcd at 15574-75, para. 149 (describing how section 252 of the Act provides the incentive to negotiate in good faith).

⁴⁷ See Michigan Rural Incumbent Local Exchange Carriers T-Mobile Comments at 5; Minnesota Independent Coalition T-Mobile Comments at 3.

⁴⁸ Section 20.11 of the Commission rules requires "reasonable compensation," 47 C.F.R. § 20.11, whereas reciprocal compensation rates are established by the state commissions based on forward-looking economic costs, 47 C.F.R. § 1.705.

⁴⁹ Because most wireless termination tariffs are effective only in the absence of a reciprocal compensation arrangement under section 251(b)(5), we need not decide whether such tariffs satisfy the statutory requirements of that section. See Letter from Cheryl A. Tritt, Counsel to T-Mobile USA, Inc., to Marlene H. Dortch, Secretary,

The CMRS providers argue that imposing the terms of interconnection pursuant to a tariff regime is inconsistent with the negotiation processes contained sections 251 and 252 of the Act, and cite the Commission's finding in *Global NAPs*.⁵⁰ In *Global NAPs*, the Commission found that "[u]sing the tariff process to circumvent the section 251 and 252 processes cannot be allowed."⁵¹ The Commission's finding in *Global NAPs* was premised, however, on the fact that the tariff at issue could supersede the terms of a valid interconnection agreement.⁵² Because the wireless termination tariffs at issue here apply only in the absence of an agreement,⁵³ they have not been used to circumvent the processes contained in sections 251 and 252 of the Act.⁵⁴ Moreover, the Commission has determined that interconnection rates imposed via tariff may be permissible so long as the tariff does not supersede or negate the federal provisions under sections 251 and 252.⁵⁵ For all these reasons, we cannot conclude that a tariff filed by

Federal Communications Commission, CC Docket No. 01-92, Attach. at 10-11 (filed July 9, 2004) (arguing that these tariffs do not satisfy a LEC's statutory duty to establish reciprocal compensation arrangements) (T-Mobile July 9 *Ex Parte* Letter).

⁵⁰See Sprint T-Mobile Comments at 8-9; United States Cellular Corp. T-Mobile Comments at 3; Verizon Wireless T-Mobile Comments at 4.

⁵¹See *Bell Atlantic-Delaware, Inc., et al., v. Global NAPs, Inc.*, 15 FCC Rcd 12946, 12959, para 23 (1999) (*Global NAPs*), *recon. denied*, *Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, 15 FCC Rcd 5997 (2000); *Bell Atlantic-Delaware, Inc., v. Global NAPs, Inc.*, 15 FCC Rcd 20665 (2000) (*Global NAPs II*).

⁵²The Commission found *Global NAPs'* tariff unlawful because, *inter alia*, it "purport[ed] to apply the [terms of the] tariff even when a valid interconnection agreement could be in place." *Id.* See also *Global NAPs II*, 15 FCC Rcd at 20671, para. 16 (stating that "[i]f a party to an interconnection proceeding could alter the outcome of the negotiation/mediation/arbitration processes set forth in sections 251 and 252 simply by filing a federal tariff, those processes could become significantly moot.").

⁵³See, e.g., Letter from Brian T. McCartney, Counsel for the Missouri Small Telephone Company Group, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 2-4 (filed Aug. 17, 2004) (stating that the wireless termination tariffs at issue in Missouri apply only in the absence of an agreement under the Act and are expressly subordinate to approved agreements under the Act).

⁵⁴For similar reasons, the court decisions in *Wisconsin Bell v. Ave M. Bie* and *Verizon North v. John G. Strand* do not require that we reach a different conclusion under the existing rules. *Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin v. Ave M Bie, et al. and WorldCom, Inc.*, 340 F.3d 441 (7th Cir. 2003); *Verizon North, Inc. v. John G. Strand*, 309 F.3d 935 (6th Cir. 2002). In *Wisconsin Bell v. Ave M. Bie*, the court was concerned that mandatory state tariffs inappropriately created a parallel process to the section 251/252 negotiation process. *Wisconsin Bell v. Ave M. Bie*, 340 F.3d at 443-44. Similarly, in *Verizon North v. John G. Strand*, the court rejected a state tariff requirement that bypassed and ignored the process for interconnection set out in the Act. *Verizon North v. John G. Strand*, 309 F.3d at 941-44. In this case, however, the wireless termination tariffs are a default mechanism that apply only if no other process is invoked. Moreover, the court's decision *Verizon North Inc. v. John G. Strand* is likewise distinguishable. See *Verizon North Inc. v. John G. Strand* 367 F.3d 577 (6th Cir. 2004). That case involved a tariff filing by a *competitive* carrier that could have initiated the section 252 process, but instead filed a tariff imposing reciprocal compensation charges. *Id.* at 579-83. Although competitors may compel negotiations under section 252, until now incumbent LECs did not have this same ability, as discussed below. Thus, absent these wireless termination tariffs, these carriers may have no other means by which to obtain compensation for terminating this traffic. See *Alma Tel. Co., et al. v. Public Service Commission of the State of Missouri*, 2004 WL 2216600, at *5 (Mo. Ct. App. Oct. 5, 2004) (finding that a group of rural companies had no alternative but to pursue tariff options because CMRS providers could not be compelled to negotiate compensation rates under the federal Act).

⁵⁵See *Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997) (finding that a Texas state law establishing a default wholesale rate was consistent with sections 251 and 252

an incumbent LEC imposing termination charges on wireless traffic would be unlawful under the existing rules and, thus, we deny the petition for declaratory ruling filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners.⁵⁶

Although we deny the CMRS providers' requested ruling under the current rules, we now take action in this proceeding to amend our rules going forward in order to make clear our preference for contractual arrangements for non-access CMRS traffic. As discussed above, precedent suggests that the Commission intended for compensation arrangements to be negotiated agreements and we find that negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act. Accordingly, we amend section 20.11 of the Commission's rules to prohibit LECs from imposing compensation obligations for non-access traffic pursuant to tariff.⁵⁷ Therefore, such existing wireless termination tariffs shall no longer apply upon the effective date of these amendments to our rules. We take this action pursuant to our plenary authority under sections 201 and 332 of the Act, the latter of which states that "[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service"⁵⁸

We acknowledge that LECs may have had difficulty obtaining compensation from CMRS providers because LECs may not require CMRS providers to negotiate interconnection agreements or submit to arbitration under section 252 of the Act.⁵⁹ In the *Local Competition First Report and Order*, the Commission held that section 251(b)(5) requires LECs to enter into reciprocal compensation

even though the rate was available to carriers without negotiation or arbitration and did not comply with the wholesale rate standard established in section 251 and federal rules because the state law did not interfere with the rights of carriers to seek more favorable rates under the section 251/252 process).

⁵⁶Because we deny the T-Mobile Petition, we need not address the Motions to Dismiss alleging procedural deficiencies. *See, e.g.*, Montana Local Exchange Carriers T-Mobile Comments 3; NTCA T-Mobile Comments at 2. *See also Petition for Declaratory Ruling: Lawfulness of Incumbent Local Exchange Carrier Wireless Termination Tariff*, CC Docket No. 01-92, Montana Local Exchange Carriers Motion to Dismiss, at 2-3 (filed Oct. 18, 2002); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Missouri Independent Telephone Company Group Motion to Dismiss, at 2-3 (filed Aug. 3, 2004). Rather, state tariffs are affected only prospectively under the rule change adopted pursuant to our rulemaking authority.

⁵⁷As discussed below, we also adopt new rules permitting incumbent LECs to invoke the section 252 process and establish interim compensation arrangements, which are triggered by a request for negotiation from either carrier. For this reason, we reject claims that, in the absence of wireless termination tariffs, LECs would be denied compensation for terminating this traffic. *See, e.g.*, Nebraska Rural Independent Companies T-Mobile Comments at 6; NTCA T-Mobile Comments at 7-8; Rural ILEC T-Mobile Comments at 7-8. Under the amended rules, however, in the absence of a request for an interconnection agreement, no compensation is owed for termination.

⁵⁸47 U.S.C. § 332(c)(1)(B). *See Local Competition First Report and Order*, 11 FCC Rcd at 16005, para. 1023 (affirming that "section 332 in tandem with section 201 is a basis for jurisdiction over LEC-CMRS interconnection"). In *Iowa Utils. Bd. v. FCC*, the United States Court of Appeals for the Eighth Circuit held that the Commission has authority to issue rules of special concern to CMRS providers. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n.21 (8th Cir. 1997) (vacating the Commission's pricing rules for lack of jurisdiction except for "the rules of special concern to CMRS providers" based in part upon the authority granted to the Commission in 47 U.S.C. § 332(c)(1)(B)), *vacated and remanded in part on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). *See also Qwest v. FCC*, 252 F.3d 462, 465-66 (D.C. Cir. 2001) (describing the Eighth Circuit's analysis of section 332(c)(1)(B) in *Iowa Utils. Bd. v. FCC* and concluding that an attempt to relitigate the issue was barred by the doctrine of issue preclusion).

⁵⁹*See Ronan/Hot Springs Comments* at 13; *MSTG Reply* at 6-7, 10, 12. *See also TCA Reply* at 4-5 (contending that CMRS providers do not want interconnection agreements with small LECs).

arrangements with all CMRS providers but that it does not explicitly impose reciprocal obligations on CMRS providers.⁶⁰ Thus, the Commission's rules impose certain obligations on LECs, but not on CMRS providers.⁶¹ Moreover, some commenters observe that CMRS providers may lack incentives to engage in negotiations to establish reciprocal compensation arrangements.⁶²

2. In light of our decision to prohibit the use of tariffs to impose termination charges on non-access traffic, we find it necessary to ensure that LECs have the ability to compel negotiations and arbitrations, as CMRS providers may do today. Accordingly, we amend section 20.11 of our rules to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act.⁶³ A CMRS provider receiving such a request must negotiate in good faith and must, if requested, submit to arbitration by the state commission. In recognition that the establishment of interconnection arrangements may take more than 160 days,⁶⁴ we also establish interim compensation requirements under section 20.11 consistent with those already provided in section 51.715 of the Commission's rules.⁶⁵ Interim compensation requirements are necessary for all the reasons the Commission articulated in *Local Competition First Report and Order*.⁶⁶

PROCEDURAL MATTERS

Regulatory Flexibility Analysis

3. A Final Regulatory Flexibility Analysis has been prepared for this Declaratory Ruling and Report and Order and is included in Appendix D.

⁶⁰*Local Competition First Report and Order*, 11 FCC Rcd at 15996-97, paras. 1005, 1008 (holding that CMRS providers will not be classified as LECs and are not subject to the obligations in section 251(b)(5)). *Compare id.* at 16018, para. 1045 (suggesting that CMRS providers will enter into reciprocal compensation arrangements).

⁶¹47 C.F.R. § 51.703(a). There is some uncertainty as to the relationship between the arrangements contemplated in section 20.11 and the section 251/252 agreements contained in the Act. Therefore, the rights of LECs to compel negotiations with CMRS providers are not entirely clear. *Compare* Letter from Brian T. McCartney, counsel for the Missouri Small Telephone Company Group, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 13 (filed Aug. 17, 2004) (stating that the rights of rural incumbent LECs to compel negotiations are not clear) *with* T-Mobile July 9 *Ex Parte* Letter, Attach. at 7, 9, 13 (arguing that LECs can require CMRS providers to negotiate interconnection under sections 201 and 332 of the Act). Further, although CMRS providers may indeed have an existing legal obligation to compensate LECs for the termination of wireless traffic under section 20.11(b)(2) (*see* Letter from Michael F. Altschul, Senior Vice President and General Counsel, CTIA, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, at 1 n.3, 4 (filed Nov. 30, 2004)), the rules fail to specify the mechanism by which LECs may obtain this compensation.

⁶²*See, e.g.*, MSTG Reply at 12, 25; OPASTCO Reply at 4-5. *See also* Frontier and Citizens T-Mobile Comments at 5 (noting that, because CMRS providers are generally net payers of reciprocal compensation, it is in their financial interest to maintain the *status quo* of bill-and-keep).

⁶³*See* Appendix A.

⁶⁴*See* 47 U.S.C. § 252(b)(1).

⁶⁵*See* 47 C.F.R. § 51.715 (establishing interim transport and termination pricing upon request for an interconnection arrangement).

⁶⁶*Local Competition First Report and Order*, 11 FCC Rcd at 16029-30, para. 1065 (finding that interim compensation was necessary to promote competition in the local exchange).

Paperwork Reduction Act Analysis

4. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107- 198, see 44 U.S.C. § 3506(c)(4).

ORDERING CLAUSES

Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1-5, 7, 10, 201-05, 207-09, 214, 218-20, 225-27, 251-54, 256, 271, 303, 332, 403, 405, 502 and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-55, 157, 160, 201-05, 207-09, 214, 218-20, 225-27, 251-54, 256, 271, 303, 332, 403, 405, 502, and 503, and sections 1.1, 1.421 of the Commission's rules, 47 C.F.R. §§ 1.1, 1.421, this Declaratory Ruling and Report and Order in CC Docket No. 01-92 IS ADOPTED, and that Part 20 of the Commission's Rules, 47 C.F.R. Part 20, IS AMENDED as set forth in Appendix A.

IT IS FURTHER ORDERED that the rule revisions adopted in this Declaratory Ruling and Report and Order SHALL BECOME EFFECTIVE thirty (30) days after publication in the Federal Register.

IT IS FURTHER ORDERED that the Petition for Declaratory Ruling filed by T-Mobile USA, Inc., Western Wireless Corporation, Nextel Communications and Nextel Partners is DENIED as set forth herein.

5. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Declaratory Ruling and Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

AMENDMENT TO THE CODE OF FEDERAL REGULATIONS

For the reasons discussed in the preamble, the Federal Communications Commission amends Part 20 of Title 47 of the Code of Federal Regulation as follows:

1. The authority citation for Part 20 continues to read as follows:

Authority: Secs. 4, 10, 251-254, 303, and 332 of the Communications Act of 1934, as amended; 47 U.S.C. §§ 154, 160, 251-254, 303, and 332, unless otherwise noted.

2. Section 20.11 is amended by adding new paragraphs (e) and (f) to read as follows:

§ 20.11 Interconnection to facilities of local exchange carriers.

* * * * *

(e) Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.

(f) An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. A commercial mobile radio service provider receiving a request for interconnection must negotiate in good faith and must, if requested, submit to arbitration by the state commission. Once a request for interconnection is made, the interim transport and termination pricing described in § 51.715 shall apply.

APPENDIX B

INTERCARRIER COMPENSATION NPRM CC DOCKET NO. 01-92

COMMENTS

ACS of Anchorage, Inc.
Ad Hoc Telecommunications Users Committee (Ad Hoc)
Alaska Telephone Association
Alliance Telecom, Inc.
Allied Personal Communications Industry
ALLTEL Communications Inc.
America Online, Inc. (AOL)
AT&T Corp.
AT&T Wireless Services, Inc.
BellSouth Corp.
Cable & Wireless USA
Cablevision Lightpath, Inc.
California Public Utilities Commission (California Commission)
Cbeyond Communications
Cellular Telecommunications & Internet Association (CTIA)
CenturyTel, Inc.
Competitive Telecommunications Association (CompTel)
Florida Public Service Commission (Florida Commission)
Focal Communications Corp., Pac-West Telecomm, Inc., RCN Telecom Services, Inc., and US LEC Corp. (Focal *et al.*)
General Services Administration (GSA)
Global Crossing Ltd.
Global NAPs Inc.
Guyana Telephone & Telegraph Ltd.
GVNW Consulting, Inc.
Home Telephone Company, Inc.
ICORE Inc.
Illinois Commerce Commission (Illinois Commission)
Independent Telephone & Telecommunications Alliance
Information Technology Association of America
Iowa Utilities Board (Iowa Commission)
ITC's, Inc.
KMC Telecom, Inc.
Level 3 Communications
Maryland Office of the People's Counsel (MD-OPC)
Michigan Exchange Carriers Association, Inc. (MECA)
Mid Missouri Cellular
Minnesota Independent Coalition
Missouri Public Service Commission (Missouri Commission)
Missouri Small Telephone Company Group (MSTG)
Mpower Communications Corp.
National Association of Regulatory Utility Commissioners (NARUC)
National Association of State Utility Consumer Advocates (NASUCA)
National Exchange Carrier Association, Inc. (NECA)

National Telephone Cooperative Association (NTCA)
New York State Department of Public Service (New York Commission)
Nextel Communications, Inc.
North County Communications
National Rural Telecom Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies (NRTA/OPASTCO)
Office of the Public Utility Counsel of Texas (Texas Counsel)
Oklahoma Rural Telephone Coalition
Onvoy, Inc.
Parrish, Blessing & Associates
Personal Communications Industry Association (PCIA)
Public Service Commission of Wisconsin (Wisconsin Commission)
Public Utility Commission of Texas (Texas Commission)
Qwest Communications International Inc.
Regulatory Utility Commission of Alaska (Alaska Commission)
Ronan Telephone Company Consumer Advisory Committee (Ronan Advisory)
Ronan Telephone Company and Hot Springs (Ronan/Hot Springs)
Rural Independent Competitive Alliance (RICA)
Rural Telecommunications Group (RTG)
SBC Communications, Inc.
Singapore Telecommunications Limited
Sprint Corp.
Telecom Consulting Associates, Inc. (TCA)
Time Warner Telecom
Triton PCS License Company, LLC
United States Telecom Association (USTA)
United Utilities, Inc.
Verizon
Verizon Wireless
VoiceStream Wireless Corp.
Western Alliance
WorldCom, Inc.
Z-Tel Communications, Inc.

REPLIES

ACS of Anchorage, Inc.
Ad Hoc Telecommunications Users Committee
Advanced Paging, Inc., A.V. Luttamus Communications, Inc., and NEP, LLC
Allegiance Telecom, Inc.
Alliance of Incumbent Rural Independent Telephone Companies and the Independent Alliance
Allied Personal Communications Industry Association of California
ALLTEL Communications, Inc.
Arch Wireless, Inc.
Association for Local Telecommunications Services (ALTS)
AT&T
AT&T Wireless Services, Inc.
BellSouth Corp.
Cable & Wireless USA
Cablevision Lightpath, Inc.
California Public Utilities Commission (California Commission)

Cellular Telecommunications & Internet Association (CTIA)
Cincinnati Bell Telephone
Cook Telecom, Inc.
District of Columbia Office of the People's Counsel (DC People's Counsel)
e.spire Communications, Inc. and KMC Telecom, Inc. (e.spire and KMC)
Focal Communications Corp., Pac-West Telecomm, Inc., RCN Telecom Services, Inc. and US LEC Corp.
(Focal *et al.*)
General Services Administration (GSA)
Genuity Solutions, Inc.
Global NAPs, Inc.
GVNW Consulting, Inc.
Independent Telephone & Telecommunications Alliance
Information Technology Association of America
Leap Wireless International
Level 3 Communications, LLC
Maryland Office of People's Counsel (MD-OPC)
Midwest Wireless Communications LLC, Midwest Wireless Iowa LLC, and Midwest Wireless Wisconsin
LLC (Midwest)
Missouri Independent Telephone Group (MITG)
Missouri Small Telephone Company Group (MSTG)
National Association of State Utility Consumer Advocates (NASUCA)
National Exchange Carrier Association, Inc. (NECA)
National Rural Telephone Association and Organization for the Promotion and Advancement of Small
Telecommunications Companies (NRTA/OPASTCO)
National Telephone Cooperative Association (NTCA)
Network Services LLC
Nextel Communications, Inc.
North County Communications
Office of the Public Utility Counsel of Texas (Texas Counsel)
Personal Communications Industry Association (PCIA)
Qwest Communications International, Inc.
Ronan Telephone Company Consumer Advisory Committee (Ronan Advisory)
Rural Cellular Association
Rural Independent Competitive Alliance (RICA)
Rural Telecommunications Group (RTG)
SBC Communications, Inc.
Small Business Administration, Office of Advocacy (SBA)
Small Company Group of New York
Sprint Corp.
SureWest Communications
Taylor Communications Group, Inc.
Telecom Consulting Associates, Inc. (TCA)
Time Warner Telecom
Triton PCS License Company, LLC
United States Telecom Association (USTA)
Verizon
Verizon Wireless
VoiceStream Wireless Corp.
WebLink Wireless, Inc.
WorldCom, Inc.

APPENDIX C

**T-MOBILE USA, WESTERN WIRELESS, NEXTEL COMMUNICATIONS
AND NEXTEL PARTNERS PETITION
CC DOCKET NO. 01-92**

COMMENTS

Alliance of Incumbent Rural Independent Telephone Companies
AT&T Corp.
AT&T Wireless Services, Inc.
BellSouth Corp.
Cellular Telecommunication & Internet Association (CTIA)
Cingular Wireless LLC
Fred Williamson & Associates, Inc.
Frontier & Citizens Incumbent Local Exchange Carriers
ICORE, Inc.
John Staurulakis, Inc. (JSI)
Michigan Rural Incumbent Local Exchange Carriers
Minnesota Independent Coalition
Missouri Independent Telephone Company Group (MITG)
Missouri Small Telephone Company Group (MSTG)
Montana Local Exchange Carriers
National Telecommunications Cooperative Association (NTCA)
Nebraska Rural Independent Companies
Oklahoma Rural Telephone Companies
Organization for the Promotion and Advancement of Small Telecommunications Companies
(OPASTCO)
Qwest Communications International, Inc.
Rural Cellular Association and Rural Telecommunications Group
Rural Incumbent Local Exchange Carriers (Rural ILEC)
Rural Iowa Independent Telephone Association
SBC Communications, Inc.
South Dakota Telephone Assoc., et. al.
Sprint Corp.
Telecom Consulting Associates, Inc.
Triton PCS License Company, LLC
United States Cellular Corp.
United States Telecom Association (USTA)
Verizon Wireless
Warinner, Gesigner & Associates, LLC
Warinner, Gesigner & Associates on behalf of KLM Telephone Company, *et al.*

REPLIES

Alabama Rural Local Exchange Carriers
AT&T Corp.
AT&T Wireless Services, Inc.
Beacon Telecommunications Advisors, LLC
California RTCs
Cellular Telecommunication & Internet Association (CTIA)
Fred Williamson & Associates Inc.
GVNW Consulting, Inc.
Joint CMRS Petitioners
Minnesota Independent Coalition
Missouri Independent Telephone Company Group (MITG)
Missouri Small Telephone Company Group (MSTG)
Montana Local Exchange Carriers
National Exchange Carrier Association, Inc. (NECA)
Nebraska Rural Independent Companies
Oklahoma Rural Telephone Companies
Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
Rural Carriers (TDS Telecommunications Corp. *et al.*)
SBC Communications, Inc.
Supra Telecommunications & Information Systems, Inc.
Triton PCS License Company, LLC
Verizon Wireless

APPENDIX D

FINAL REGULATORY FLEXIBILITY ANALYSIS

6. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁶⁷ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Intercarrier Compensation NPRM* in CC Docket No. 01-92.⁶⁸ The Commission sought written public comment on the proposals in the *Intercarrier Compensation NPRM*, including comment on the issues raised in the IRFA.⁶⁹ Relevant comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁷⁰ To the extent that any statement in this FRFA is perceived as creating ambiguity with respect to Commission rules or statements made in the sections of the order preceding the FRFA, the rules and statements set forth in those preceding sections are controlling.

Need for, and Objectives of, the Rules

7. In the *Intercarrier Compensation NPRM*, the Commission acknowledged a number of problems with the current intercarrier compensation regimes (access charges and reciprocal compensation) and discussed a number of areas where a new approach might be adopted.⁷¹ Among other issues, the Commission asked commenters to address the appropriate regulatory framework governing interconnection, including compensation arrangements, between LECs and CMRS providers.⁷² Subsequently, the Commission received a petition for declaratory ruling filed by CMRS providers (T-Mobile Petition) asking the Commission to find that state wireless termination tariffs are not the proper mechanism for establishing reciprocal compensation arrangements between incumbent LECs and CMRS providers.⁷³ The T-Mobile Petition was incorporated into the Commission's intercarrier compensation rulemaking proceeding, along with the comments, replies, and *ex partes* filed in response to the petition.⁷⁴

8. In this Declaratory Ruling and Report and Order (Order), the Commission denies the T-Mobile Petition because neither the Act nor the existing rules preclude an incumbent LEC's use of tariffed compensation arrangements in the absence of an interconnection agreement or a competitive carrier's request to enter into one. On a prospective basis, however, the Commission amends its rules to prohibit the use of tariffs to impose compensation obligations with respect to non-access CMRS traffic and to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act, and that during the period of negotiation and arbitration, the parties will be entitled to compensation in accordance with the interim rate

⁶⁷5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

⁶⁸*See Intercarrier Compensation NPRM*, 16 FCC Rcd. at 9657-73, paras. 131-81.

⁶⁹*Id.* at 9657, para. 131.

⁷⁰*See* 5 U.S.C. § 604.

⁷¹*Intercarrier Compensation NPRM*, 16 FCC Rcd at 9612, para. 2.

⁷²*Intercarrier Compensation NPRM*, 16 FCC Rcd at 9642, paras. 89-90.

⁷³T-Mobile Petition at 1.

⁷⁴*See Comment Sought on Petitions for Declaratory Ruling Regarding Intercarrier Compensation for Wireless Traffic*, CC Docket No. 01-92, Public Notice, 17 FCC Rcd 19046 (2002).

provisions set forth in section 51.715 of the Commission's rules.⁷⁵ By clarifying these interconnection and compensation obligations, the Commission will resolve a significant carrier dispute pending in the marketplace that has provoked a substantial and increasing amount of litigation, and will facilitate the exchange of traffic between wireline LECs and CMRS providers and encourage the establishment of interconnection and compensation terms through the negotiation and arbitration processes contemplated by the 1996 Act.

Summary of Significant Issues Raised by Public Comments in Response to the IRFA

9. In the IRFA, the Commission noted the numerous problems that had developed under the existing rules governing intercarrier compensation, and it sought comment on whether proposed new approaches would encourage efficient use of, and investment in the telecommunications network, and whether the transition would be administratively feasible.⁷⁶ In response to the *Inter-carrier Compensation NPRM*, the Commission received 75 comments, 62 replies, and numerous *ex parte* submissions. In addition, a number of additional comments, replies, and *ex partes* were submitted in this proceeding in connection with the T-Mobile petition. Those comments expressly addressed to the IRFA raised concerns regarding the more comprehensive reform proposals discussed in the *Inter-carrier Compensation NPRM* rather than the more narrow LEC-CMRS issues addressed in this Order.⁷⁷

10. In connection with the issues we address here, several parties commenting on the T-Mobile Petition expressed concern that striking down tariffs would impose a burden on rural incumbent LECs. They argued that LECs lacked the ability under the law to obtain a compensation agreement with CMRS providers without the inducement to negotiate provided by tariffs, and further asserted that small carriers would be adversely impacted by any obligation to terminate CMRS traffic without compensation.⁷⁸ Conversely, some carriers expressed a concern that the negotiation and arbitration process was an inefficient method of establishing a compensation arrangement between two carriers where the traffic volume between them was small, and argued that non-negotiated arrangements were therefore a better method of imposing compensation obligations.⁷⁹ We address these issues in section E of the FRFA.⁸⁰

Description and Estimate of the Number of Small Entities to Which the Proposed Rules will Apply

11. The RFA directs agencies to provide a description of, and, where feasible, an estimate of

⁷⁵See *supra* para. 16.

⁷⁶*Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9658, paras 134-35.

⁷⁷See, e.g., SBA Reply at 12-14.

⁷⁸See, e.g., ICORE T-Mobile Comments at 7; Michigan ILECs T-Mobile Comments at 3; Montana LECs T-Mobile Comments at 3; NTCA T-Mobile Comments at 3; Rural ILECs T-Mobile Comments at 7-8; TCA T-Mobile Comments at 4.

⁷⁹See, e.g., AT&T Wireless T-Mobile Comments at 3; Triton PCS T-Mobile Comments at 6-7. While most carriers raising this concern have been CMRS providers, some small LECs have also asserted that negotiations are not an efficient method of establishing terms given the amount of traffic at issue. See Montana LECs T-Mobile Comments at 6; TCA T-Mobile Comments at 2. *But see, e.g.*, Rural ILECs T-Mobile Comments at 7 (asserting that volume of traffic is significant in proportion to the total traffic for small incumbent LECs); Frontier & Citizens T-Mobile Comments at 4 (amount of CMRS-to-rural incumbent LEC traffic is significant and growing).

⁸⁰See *infra* paras. 20-21.

the number of small entities that may be affected by rules adopted herein.⁸¹ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁸² In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁸³ A “small business concern” is one that: 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).⁸⁴

12. 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.⁸⁵ The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,⁸⁶ Paging,⁸⁷ and Cellular and Other Wireless Telecommunications.⁸⁸ 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.

13. 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 telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”⁸⁹ 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.⁹⁰ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize

⁸¹5 U.S.C. §§ 604(a)(3).

⁸²5 U.S.C. § 601(6).

⁸³5 U.S.C. § 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 term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

⁸⁴15 U.S.C. § 632.

⁸⁵FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, Table 5.3, page 5-5 (May 2004) (*Trends in Telephone Service*). This source uses data that are current as of October 22, 2003.

⁸⁶13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110.

⁸⁷*Id.* § 121.201, NAICS code 517211.

⁸⁸*Id.* § 121.201, NAICS code 517212.

⁸⁹15 U.S.C. § 632.

⁹⁰Letter 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).

that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

14. *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.⁹¹ According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.⁹² 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.⁹³ Thus, under this size standard, the majority of firms can be considered small.

15. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to 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.⁹⁴ According to Commission data, 1,310 carriers reported that they were incumbent local exchange service providers.⁹⁵ Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees.⁹⁶ In addition, according to Commission data, 563 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.⁹⁷ Of these 563 companies, an estimated 472 have 1,500 or fewer employees and 91 have more than 1,500 employees.⁹⁸ In addition, 37 carriers reported that they were “Other Local Exchange Carriers.”⁹⁹ Of the 37 “Other Local Exchange Carriers,” an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees.¹⁰⁰ Consequently, the Commission estimates that most providers of local exchange service, 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.

16. *Incumbent Local Exchange Carriers (LECs).* We have included small incumbent local exchange carriers 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 telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operations.”¹⁰¹ The

⁹¹13 C.F.R. § 121.201, NAICS code 517110.

⁹²U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 5, NAICS code 517110.

⁹³*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.”

⁹⁴13 C.F.R. § 121.201, NAICS code 517110.

⁹⁵*Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Table 5.3 (May 2004) (*Trends in Telephone Service*).

⁹⁶*Trends in Telephone Service*, Table 5.3.

⁹⁷*Trends in Telephone Service*, Table 5.3.

⁹⁸*Trends in Telephone Service*, Table 5.3.

⁹⁹*Trends in Telephone Service*, Table 5.3.

¹⁰⁰*Trends in Telephone Service*, Table 5.3.

¹⁰¹15 U.S.C. § 632.

SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.¹⁰² We therefore include small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

17. 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.¹⁰³ According to Commission data,¹⁰⁴ 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.

18. *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.¹⁰⁵ According to Commission data,¹⁰⁶ 609 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.¹⁰⁷ 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.¹⁰⁸ 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.

19. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"¹⁰⁹ and "Cellular and Other

¹⁰²Letter 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) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBC regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

¹⁰³13 C.F.R. § 121.201, NAICS code 517110.

¹⁰⁴*Trends in Telephone Service* at Table 5.3.

¹⁰⁵13 C.F.R. § 121.201, NAICS code 517110.

¹⁰⁶*Trends in Telephone Service* at Table 5.3.

¹⁰⁷*Id.*

¹⁰⁸*Id.*

¹⁰⁹13 C.F.R. § 121.201, NAICS code 517211.

Wireless Telecommunications.”¹¹⁰ Under both SBA categories, a wireless business is small if it has 1,500 or fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.¹¹¹ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.¹¹² Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.¹¹³ 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.¹¹⁴ Thus, under this second category and size standard, the great majority of firms can, again, be considered small.

20. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The SBA has developed a small business size standard for “Cellular and Other Wireless Telecommunications” services.¹¹⁵ Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.¹¹⁶ According to the most recent *Trends in Telephone Service* data, 447 carriers reported that they were engaged in the provision of wireless telephony.¹¹⁷ We have estimated that 245 of these are small under the SBA small business size standard.

21. *Cellular Licensees.* The SBA has developed a small business size standard for wireless firms within the broad economic census category “Cellular and Other Wireless Telecommunications.”¹¹⁸ Under this SBA category, a wireless business is small if it has 1,500 or fewer employees. For the census category Cellular and Other Wireless Telecommunications firms, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.¹¹⁹ Of this total, 965 firms

¹¹⁰13 C.F.R. § 121.201, NAICS code 517212.

¹¹¹U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

¹¹²U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). 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 1000 employees or more.”

¹¹³U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

¹¹⁴U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). 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 1000 employees or more.”

¹¹⁵13 C.F.R. § 121.201, NAICS code 517212.

¹¹⁶13 C.F.R. § 121.201, NAICS code 517212.

¹¹⁷FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (May 2004). This source uses data that are current as of October 22, 2003.

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

¹¹⁹U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.¹²⁰ Thus, under this category and size standard, the great majority of firms can be considered small. According to the most recent *Trends in Telephone Service* data, 447 carriers reported that they were engaged in the provision of cellular service, personal communications service, or specialized mobile radio telephony services, which are placed together in the data.¹²¹ We have estimated that 245 of these are small, under the SBA small business size standard.¹²²

Description of Projected Reporting, Record Keeping and Other Compliance Requirements for Small Entities

22. In this Order, the Commission adopts new rules that prohibit incumbent LECs from imposing non-access compensation obligations pursuant to tariff, and permit LECs to compel interconnection and arbitration with CMRS providers.¹²³ Under the new rules, CMRS providers and LECs, including small entities, must engage in interconnection agreement negotiations and, if requested, arbitrations in order to impose compensation obligations for non-access traffic.¹²⁴ The record suggests that many incumbent LECs and CMRS providers, including many small and rural carriers, already participate in interconnection negotiations and the state arbitration process under the current rules. For these carriers, our new rules will not result in any additional compliance requirements. For LECs that have imposed compensation obligations for non-access traffic pursuant to state tariffs, however, the amended rules require that these LECs, including small entities, participate in interconnection negotiations and, if requested, the state arbitration process in order to impose compensation obligations. Conversely, the new rules obligate CMRS providers, including small entities, to participate in a negotiation and arbitration process upon a request by incumbent LECs.

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

23. The RFA requires an agency to describe any significant alternatives that it has considered in developing its 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.”¹²⁵

24. The Commission denies a petition for declaratory ruling filed by CMRS providers asking

¹²⁰U.S. Census Bureau, 1997 Economic Census, Subject Series: “Information,” Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). 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 1000 employees or more.”

¹²¹FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (May 2004). This source uses data that are current as of October 22, 2003.

¹²²FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (May 2004). This source uses data that are current as of October 22, 2003.

¹²³See *supra* paras. 14-16.

¹²⁴See *supra* para. 14 (prohibiting the use of tariffs to impose non-access compensation obligations).

¹²⁵5 U.S.C. § 603(c)(1)-(c)(4).

the Commission to find that state wireless termination tariffs are not the proper mechanism for establishing reciprocal compensation arrangements between LECs and CMRS providers.¹²⁶ The Commission considered and rejected a finding that state wireless termination tariffs are not the proper mechanism for establishing reciprocal compensation arrangements between LECs and CMRS providers because the current rules do not explicitly preclude such arrangements and these tariffs ensure compensation where the rights of incumbent LECs to compel negotiations with CMRS providers are unclear.¹²⁷ On a prospective basis, however, the Commission amends its rule to prohibit the use of tariffs to impose compensation obligations with respect to non-access CMRS traffic and to clarify that an incumbent LEC may request interconnection from a CMRS provider and invoke the negotiation and arbitration procedures set forth in section 252 of the Act.¹²⁸

25. As a general matter, our actions in this Order should benefit all interconnected LECs and CMRS providers, including small entities, by facilitating the exchange of traffic and providing greater regulatory certainty and reduced litigation costs. Further, we directly address the concern of small incumbent LECs that they would be unable to obtain a compensation arrangement without tariffs by providing them with a new right to initiate a section 252 process through which they can obtain a reciprocal compensation arrangement with any CMRS provider.

26. The Commission considered and rejected the possibility of permitting wireless termination tariffs on a prospective basis.¹²⁹ Although establishing contractual arrangements may impose burdens on CMRS providers and LECs, including some small entities, that do not have these arrangements in place, we find that our approach in the Order best balances the needs of incumbent LECs to obtain terminating compensation for wireless traffic and the pro-competitive process and policies reflected in the 1996 Act.¹³⁰ We also note that, during this proceeding, both CMRS providers and rural incumbent LECs have repeatedly emphasized their willingness to engage in a negotiation and arbitration process to establish compensation terms. In the Further Notice of Proposed Rulemaking adopted by the Commission on February 10, 2005, we seek further comment on ways to reduce the burdens of such a process.¹³¹

Report to Congress

27. The Commission will send a copy of the Declaratory Ruling and Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the Declaratory Ruling and Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. In addition, the

¹²⁶T-Mobile Petition at 1.

¹²⁷See *supra* paras. 9-12.

¹²⁸See *supra* paras. 14-16. See also *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9641-42, paras. 86, 89-90 (requesting comment on how interconnection between LECs and CMRS providers would “work” within the existing regulatory frameworks under sections 251 and 252 and section 332 of the Act).

¹²⁹See *supra* para. 14.

¹³⁰In particular, because a LEC may trigger the interim compensation requirements in section 51.715 of the Commission’s rules, 47 C.F.R. § 51.715, simply by requesting interconnection with a CMRS provider, the threshold burden to obtain compensation under the amended rule is minimal.

¹³¹See *FCC Moves to Replace Outmoded Rules Governing Intercarrier Compensation*, CC Docket No. 01-92, News (rel. Feb. 10, 2005).

Declaratory Ruling and Report and Order, including this FRFA - or summaries thereof - will be published in the Federal Register.