# EXHIBIT 1

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Title 47: Telecommunication

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## PART 69—ACCESS CHARGES

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**Contents**

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AUTHORITY: 47 U.S.C. 154, 201, 202, 203, 205, 218, 220, 254, 403.

SOURCE: 48 FR 10358, Mar. 11, 1983, unless otherwise noted.

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## Subpart A—General

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### §69.1 Application of access charges.

(a) This part establishes rules for access charges for interstate or foreign access services provided by telephone companies on or after January 1, 1984.

(b) Except as provided in §69.1(c), charges for such access service shall be computed, assessed, and collected and revenues from such charges shall be distributed as provided in this part. Access service tariffs shall be filed and supported as provided under part 61 of this chapter, except as modified herein.

(c) The following provisions of this part shall apply to telephone companies subject to price cap regulation only to the extent that application of such provisions is necessary to develop the nationwide average carrier common line charge, for purposes of reporting pursuant to §§43.21 and 43.22 of this chapter, and for computing initial charges for new rate elements: §§69.3(f), 69.106(b), 69.106(f), 69.106(g), 69.109(b), 69.110(d), 69.111(c), 69.111(g)(1), 69.111(g)(2), 69.111(g)(3), 69.111(l), 69.112(d), 69.114(b), 69.114(d), 69.125(b)(2), 69.301 through 69.310, and 69.401 through 69.412. The computation of rates pursuant to these provisions by telephone companies subject to price cap regulation shall be governed by the price cap rules set forth in part 61 of this chapter and other applicable Commission rules and orders.

(d) To the extent any provision contained in 47 CFR part 51 subparts H and J conflict with any provision of this part, the 47 CFR part 51 provision supersedes the provision of this part.

[48 FR 10358, Mar. 11, 1983, as amended at 55 FR 42385, Oct. 19, 1990; 58 FR 41189, Aug. 3, 1993; 62 FR 40463, July 29, 1997; 76 FR 73882, Nov. 29, 2011]

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### §69.2 Definitions.

For purposes of the part:

(a) *Access minutes* or *Access minutes of use* is that usage of exchange facilities in interstate or foreign service for the purpose of calculating chargeable usage. On the originating end of an interstate or foreign call, usage is to be measured from the time the originating end user's call is delivered by the telephone company and acknowledged as received by the interexchange carrier's facilities connected with the originating exchange. On the terminating end of an interstate or foreign call, usage is to be measured from the time the call is received by the end user in the terminating exchange. Timing of usage at both the originating and terminating end of an interstate or foreign call shall terminate when the calling or called party disconnects, whichever event is recognized first in the originating and terminating end exchanges, as applicable.

(b) *Access service* includes services and facilities provided for the origination or termination of any interstate or foreign telecommunication.

(c) *Annual revenue requirement* means the sum of the return component and the expense component.

(d) *Association* means the telephone company association described in subpart G of this part.

(e) *Big Three Expenses* are the combined expense groups comprising: Plant Specific Operations Expense, Accounts 6110, 6120, 6210, 6220, 6230, 6310 and 6410; Plant Nonspecific Operations Expenses, Accounts 6510, 6530 and 6540, and Customer Operations Expenses, Accounts 6610 and 6620.

(f) *Big Three Expense Factors* are the ratios of the sum of Big Three Expenses apportioned to each element or category to the combined Big Three Expenses.

(g) *Cable and wire facilities* includes all equipment or facilities that are described as cable and wire facilities in the *Separations Manual* and included in Account 2410.

(h) *Carrier cable and wire facilities* means all cable and wire facilities that are not subscriber line cable and wire facilities.

(i) *Central Office Equipment* or *COE* includes all equipment or facilities that are described as Central Office Equipment in the *Separations Manual* and included in Accounts 2210, 2220 and 2230.

(j) *Corporate operations expenses* are included in General and Administrative Expenses (Account 6720).

(k) *Customer operations expenses* include Marketing and Services expenses in Accounts 6610 and 6620, respectively.

(l) *Direct expense* means expenses that are attributable to a particular category or categories of tangible investment described in subpart D of this part and includes:

(1) Plant Specific Operations expenses in Accounts 6110, 6120, 6210, 6220, 6230, 6310 and 6410; and

(2) Plant Nonspecific Operations Expenses in Accounts 6510, 6530, 6540 and 6560.

(m) *End user* means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an “end user” when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an “end user” if all resale transmissions offered by such reseller originate on the premises of such reseller.

(n) *Entry switch* means the telephone company switch in which a transport line or trunk terminates.

(o) *Expense component* means the total expenses and income charges for an annual period that are attributable to a particular element or category.

(p) *Expenses* include allowable expenses in the Uniform System of Accounts, part 32, apportioned to interstate or international services pursuant to the *Separations Manual* and allowable income charges apportioned to interstate and international services pursuant to the *Separations Manual.*

(q) *General support facilities* include buildings, land, vehicles, aircraft, work equipment, furniture, office equipment and general purpose computers as described in the *Separations Manual* and included in Account 2110.

(r) *Information origination/termination equipment* includes all equipment or facilities that are described as information origination/termination equipment in the *Separations Manual* and in Account 2310 except information origination/termination equipment that is used by telephone companies in their own operations.

(s) *Interexchange* or the *interexchange category* includes services or facilities provided as an integral part of interstate or foreign telecommunications that is not described as “access service” for purposes of this part.

(t) *Level I Contributors.* Telephone companies that are not association Common Line tariff participants, file their own Common Line tariffs effective April 1, 1989, and had a lower than average Common Line revenue requirement per minute of use in 1988 and thus were net contributors (*i.e.,* had a negative net balance) to the association Common Line pool in 1988.

(u) *Level I Receivers.* Telephone companies that are not association Common Line tariff participants, file their own Common Line tariffs effective April 1, 1989, and had a higher than average Common Line revenue requirement per minute of use in 1988 and thus were net receivers (*i.e.,* had a positive net balance) from the association Common Line Pool in 1988.

(v) *Level II Contributors.* A telephone company or group of affiliated telephone companies with fewer than 300,000 access lines and less than $150 million in annual operating revenues that is not an association Common Line tariff participant, that files its own Common Line tariff effective July 1, 1990, and that had a lower than average Common Line revenue requirement per minute of use in 1988 and thus was a net contributor (*i.e.*, had a negative net balance) to the association Common Line pool in 1988.

(w) *Level II Receivers.* A telephone company or group of affiliated telephone companies with fewer than 300,000 access lines and less than $150 million in annual operating revenues that is not an association Common Line tariff participant, that files its own Common Line tariff effective July 1, 1990, and that had a higher than average Common Line revenue requirement per minute of use in 1988 and thus was a net receiver (*i.e.*, had a positive net balance) from the association Common Line pool in 1988.

(x) *Line* or *Trunk* includes, but is not limited to, transmission media such as radio, satellite, wire, cable and fiber optic cable means of transmission.

(y) [Reserved]

(z) *Net investment* means allowable original cost investment in Accounts 2001 through 2003, 1220 and the investments in nonaffiliated companies included in Account 1410, that has been apportioned to interstate and foreign services pursuant to the Separations Manual from which depreciation, amortization and other reserves attributable to such investment that has been apportioned to interstate and foreign services pursuant to the Separations Manual have been subtracted and to which working capital that is attributable to interstate and foreign services has been added.

(aa) *Operating taxes* include all taxes in Account 7200;

(bb) *Origination* of a service that is switched in a Class 4 switch or an interexchange switch that performs an equivalent function ends when the transmission enters such switch and *termination* of such a service begins when the transmission leaves such a switch, except that;

(1) Switching in a Class 4 switch or transmission between Class 4 switches that is not deemed to be interexchange for purposes of the Modified Final Judgement entered August 24, 1982, in *United States v Western Electric Co.,* D.C. Civil Action No. 82-0192, will be “origination” or “termination” for purposes of this part; and

(2) *Origination* and *Termination* does not include the use of any part of a line, trunk or switch that is not owned or leased by a telephone company.

(cc) *Origination* of any service other than a service that is switched in a Class 4 switch or a switch that performs an equivalent function ends and “termination” of any such service begins at a point of demarcation that corresponds with the point of demarcation that is used for a service that is switched in a Class 4 switch or a switch that performs an equivalent function.

(dd) *Private line* means a line that is used exclusively for an interexchange service other than MTS, WATS or an MTS-WATS equivalent service, including a line that is used at the closed end of an FX WATS or CCSA service or any service that is substantially equivalent to a CCSA service.

(ee) *Public telephone* is a telephone provided by a telephone company through which an end user may originate interstate or foreign telecommunications for which he pays with coins or by credit card, collect or third number billing procedures.

(ff) *Return component* means net investment attributable to a particular element or category multiplied by the authorized annual rate of return.

(gg) *Subscriber line cable and wire facilities* means all lines or trunks on the subscriber side of a Class 5 or end office switch, including lines or trunks that do not terminate in such a switch, except lines or trunks that connect an interexchange carrier.

(hh) *Telephone company* or *Local exchange carrier* as used in this part means an incumbent local exchange carrier as defined in section 251(h)(1) of the 1934 Act as amended by the 1996 Act.

(ii) *Transitional support* (TRS) means funds provided by telephone companies that are not association Common Line tariff participants, but were net contributors to the association Common Line pool in 1988, to telephone companies that are not association Common Line tariff participants and were net receivers from the association Common Line pool in 1988.

(jj) *Unit of capacity* means the capability to transmit one conversation.

(kk) *WATS access line* means a line or trunk that is used exclusively for WATS service.

(ll) *Equal access investment and equal access expenses* mean equal access investment and expenses as defined for purposes of the part 36 separations rules.

(mm) *Basic service elements* are optional unbundled features that enhanced service providers may require or find useful in the provision of enhanced services, as defined in Amendments of part 69 of the Commission's rules relating to the Creation of Access Charge Subelements for Open Network Architecture, Report and Order, 6 FCC Rcd ____, CC Docket No. 89-79, FCC 91-186 (1991).

(nn) *Dedicated signalling transport* means transport of out-of-band signalling information between an interexchange carrier or other person's common channel signalling network and a telephone company's signalling transport point on facilities dedicated to the use of a single customer.

(oo) *Direct-trunked transport* means transport on circuits dedicated to the use of a single interexchange carrier or other person, without switching at the tandem,

(1) Between the serving wire center and the end office, or

(2) Between two customer-designated telephone company offices.

(pp) *End office* means the telephone company office from which the end user receives exchange service.

(qq) *Entrance facilities* means transport from the interexchange carrier or other person's point of demarcation to the serving wire center.

(rr) *Serving wire center* means the telephone company central office designated by the telephone company to serve the geographic area in which the interexchange carrier or other person's point of demarcation is located.

(ss) *Tandem-switched transport* means transport of traffic that is switched at a tandem switch—

(1) Between the serving wire center and the end office, or

(2) Between the telephone company office containing the tandem switching equipment, as described in §36.124 of this chapter, and the end office.

Tandem-switched transport between a serving wire center and an end office consists of circuits dedicated to the use of a single interexchange carrier or other person from the serving wire center to the tandem (although this dedicated link will not exist if the serving wire center and the tandem are located in the same place) and circuits used in common by multiple interexchange carriers or other persons from the tandem to the end office.

(tt) [Reserved]

(uu) *Price cap regulation* means the method of regulation of dominant carriers provided in §§61.41 through 61.49 of this chapter.

(vv) *Signalling for tandem switching* means the carrier identification code (CIC) and the OZZ code, or equivalent information needed to perform tandem switching functions. The CIC identifies the interexchange carrier and the OZZ identifies the interexchange carrier trunk to which traffic should be routed.

(ww) *Interstate common line support (ICLS)* means funds that are provided pursuant to §54.901 of this chapter.

[52 FR 37309, Oct. 6, 1987]

Editorial Note: For Federal Register citations affecting §69.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

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**§69.3 Filing of access service tariffs.**

(a) Except as provided in paragraphs (g) and (h) of this section, a tariff for access service shall be filed with this Commission for a two-year period. Such tariffs shall be filed with a scheduled effective date of July 1. Such tariff filings shall be limited to rate level changes.

(b) The requirements imposed by paragraph (a) of this section shall not preclude the filing of revisions to those annual tariffs that will become effective on dates other than July 1.

(c) Any access service tariff filing, the filing of any petitions for rejection, investigation or suspension and the filing of any responses to such petitions shall comply with the applicable rules of this Commission relating to tariff filings.

(d) The association shall file a tariff as agent for all telephone companies that participate in an association tariff.

(e) A telephone company or group of telephone companies may file a tariff that is not an association tariff. Such a tariff may cross-reference the association tariff for some access elements and include separately computed charges of such company or companies for other elements. Any such tariff must comply with the requirements hereinafter provided:

(1) Such a tariff must cross reference association charges for the Carrier Common Line and End User Common Line element or elements if such company or companies participate in the pooling of revenues and revenue requirements for such elements.

(2) Such a tariff that cross-references an association charge for any end user access element must cross-reference association charges for all end user access elements;

(3) Such a tariff that cross-references an association charge for any carrier's carrier access element other than the Carrier Common Line element must cross-reference association charges for all carrier's carrier access charges other than the Carrier Common Line element;

(4) Except for charges subject to price cap regulation as that term is defined in §61.3(v) of this chapter, any charge in such a tariff that is not an association charge must be computed to reflect the combined investment and expenses of all companies that participate in such a charge;

(5) A telephone company or companies that elect to file such a tariff for 1984 access charges shall notify AT&T on or before the 40th day after the release of the Commission order adopting this part;

(6) Except as provided in paragraph (e)(12) of this section, a telephone company or companies that elect to file such a tariff shall notify the association not later than March 1 of the year the tariff becomes effective, if such company or companies did not file such a tariff in the preceding biennial period or cross-reference association charges in such preceding period that will be cross-referenced in the new tariff. A telephone company or companies that elect to file such a tariff not in the biennial period shall file its tariff to become effective July 1 for a period of one year. Thereafter, such telephone company or companies must file its tariff pursuant to paragraphs (f)(1) or (f)(2) of this section.

(7) Such a tariff shall not contain charges for any access elements that are disaggregated or deaveraged within a study area that is used for purposes of jurisdictional separations, except as otherwise provided in this chapter.

(8) Such a tariff shall not contain charges included in the billing and collection category.

(9) Except as provided in paragraph (e)(12) of this section, a telephone company or group of affiliated telephone companies that elects to file its own Carrier Common Line tariff pursuant to paragraph (a) of this section shall notify the association not later than March 1 of the year the tariff becomes effective that it will no longer participate in the association tariff. A telephone company or group of affiliated telephone companies that elects to file its own Carrier Common Line tariff for one of its study areas shall file its own Carrier Common Line tariff(s) for all of its study areas.

(10) Any data supporting a tariff that is not an association tariff shall be consistent with any data that the filing carrier submitted to the association.

(11) Any changes in Association common line tariff participation and Long Term and Transitional Support resulting from the merger or acquisition of telephone properties are to be made effective on the next annual access tariff filing effective date following consummation of the merger or acquisition transaction, in accordance with the provisions of §69.3(e)(9).

(12)(i) A local exchange carrier, or a group of affiliated carriers in which at least one carrier is engaging in access stimulation, as that term is defined in §61.3(bbb) of this chapter, shall file its own access tariffs within forty-five (45) days of commencing access stimulation, as that term is defined in §61.3(bbb) of this chapter, or within forty-five (45) days of December 29, 2011 if the local exchange carrier on that date is engaged in access stimulation, as that term is defined in §61.3(bbb) of this chapter.

(ii) Notwithstanding paragraphs (e)(6) and (e)(9) of this section, a local exchange carrier, or a group of affiliated carriers in which at least one carrier is engaging in access stimulation, as that term is defined in §61.3(bbb) of this chapter, must withdraw from all interstate access tariffs issued by the association within forty-five (45) days of engaging in access stimulation, as that term is defined in §61.3(bbb) of this chapter, or within forty-five (45) days of December 29, 2011 if the local exchange carrier on that date is engaged in access stimulation, as that term is defined in §61.3(bbb) of this chapter.

(iii) Any such carrier(s) shall notify the association when it begins access stimulation, or on December 29, 2011 if it is engaged in access stimulation, as that term is defined in §61.3(bbb) of this chapter, on that date, of its intent to leave the association tariffs within forty-five (45) days.

(f)(1) A tariff for access service provided by a telephone company that is required to file an access tariff pursuant to §61.38 of this Chapter shall be filed for a biennial period and with a scheduled effective date of July 1 of any even numbered year.

(2) A tariff for access service provided by a telephone company that may file an access tariff pursuant to §61.39 of this Chapter shall be filed for a biennial period and with a scheduled effective date of July 1 of any odd numbered year. Any such telephone company that does not elect to file an access tariff pursuant to the §61.39 procedures, and does not participate in the Association tariff, and does not elect to become subject to price cap regulation, must file an access tariff pursuant to §61.38 for a biennial period and with a scheduled effective date of July 1 of any even numbered year.

(3) For purposes of computing charges for access elements other than Common Line elements to be effective on July 1 of any even-numbered year, the association may compute rate changes based upon statistical methods which represent a reasonable equivalent to the cost support information otherwise required under part 61 of this chapter.

(g) The following rules apply to telephone company participation in the Association common line pool for telephone companies involved in a merger or acquisition.

(1) Notwithstanding the requirements of §69.3(e)(9), any Association common line tariff participant that is party to a merger or acquisition may continue to participate in the Association common line tariff.

(2) Notwithstanding the requirements of §69.3(e)(9), any Association common line tariff participant that is party to a merger or acquisition may include other telephone properties involved in the transaction in the Association common line tariff, provided that the net addition of common lines to the Association common line tariff resulting from the transaction in not greater than 50,000, and provided further that, if any common lines involved in a merger or acquisition are returned to the Association common line tariff, all of the common lines involved in the merger or acquisition must be returned to the Association common line tariff.

(3) Telephone companies involved in mergers or acquisitions that wish to have more than 50,000 common lines reenter the Association common line pool must request a waiver of §69.3(e)(9). If the telephone company has met all other legal obligations, the waiver request will be deemed granted on the sixty-first (61st) day from the date of public notice inviting comment on the requested waiver unless:

(i) The merger or acquisition involves one or more partial study areas;

(ii) The waiver includes a request for confidentiality of some or all of the materials supporting the request;

(iii) The waiver includes a request to return only a portion of the telephone properties involved in the transaction to the Association common line tariff;

(iv) The Commission rejects the waiver request prior to the expiration of the sixty-day period;

(v) The Commission requests additional time or information to process the waiver application prior to the expiration of the sixty-day period; or

(vi) A party, in a timely manner, opposes a waiver request or seeks conditional approval of the waiver in response to our public notice of the waiver request.

(h) Local exchange carriers subject to price cap regulation as that term is defined in §61.3(ee) of this chapter, shall file with this Commission a price cap tariff for access service for an annual period. Such tariffs shall be filed to meet the notice requirements of §61.58 of this chapter, with a scheduled effective date of July 1. Such tariff filings shall be limited to changes in the Price Cap Indexes, rate level changes (with corresponding adjustments to the affected Actual Price Indexes and Service Band Indexes), and the incorporation of new services into the affected indexes as required by §61.49 of this chapter.

(i) The following rules apply to the withdrawal from Association tariffs under the provision of paragraph (e)(6) or (e)(9) of this section or both by telephone companies electing to file price cap tariffs pursuant to paragraph (h) of this section.

(1) In addition to the withdrawal provisions of paragraphs (e)(6) and (e)(9) of this section, a telephone company or group of affiliated companies that participates in one or more association tariffs during the current tariff year and that elects to file price cap tariffs or optional incentive regulation tariffs effective July 1 of the following tariff year shall notify the association by March 1 of the following tariff year that it is withdrawing from association tariffs, subject to the terms of this section, to participate in price cap regulation or optional incentive regulation.

(2) The Association shall maintain records of such withdrawals sufficient to discharge its obligations under these Rules and to detect efforts by such companies or their affiliates to rejoin any Association tariffs in violation of the provisions of paragraph (i)(4) of this section.

(3) Notwithstanding the provisions of paragraphs (e) (3), (6), and (9) of this section, in the event a telephone company withdraws from all Association tariffs for the purpose of filing price cap tariffs or optional incentive plan tariffs, such company shall exclude from such withdrawal all “average schedule” affiliates and all affiliates so excluded shall be specified in the withdrawal. However, such company may include one or more “average schedule” affiliates in price cap regulation or optional incentive plan regulation provided that each price cap or optional incentive plan affiliate relinquishes “average schedule” status and withdraws from all Association tariffs and any tariff filed pursuant to §61.39(b)(2) of this chapter. See generally §§69.605(c), 61.39(b) of this chapter; MTS and WATS Market Structure: Average Schedule Companies, Report and Order, 103 FCC 2d 1026-1027 (1986).

(4) If a telephone company elects to withdraw from Association tariffs and thereafter becomes subject to price cap regulation as that term is defined in §61.3(v) of this chapter, neither such telephone company nor any of its withdrawing affiliates shall thereafter be permitted to participate in any Association tariffs.

(j) [Reserved]

(47 U.S.C. 154 (i) and (j), 201, 202, 203, 205, 218 and 403 and 5 U.S.C. 553)

[48 FR 10358, Mar. 11, 1983]

Editorial Note: For Federal Register citations affecting §69.3, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

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**§69.4 Charges to be filed.**

(a) The end user charges for access service filed with this Commission shall include charges for the End User Common Line element, and for line port costs in excess of basic, analog service.

(b) Except as provided in paragraphs (c), (e), and (h) of this section, and in §69.118, the carrier's carrier charges for access service filed with this Commission shall include charges for each of the following elements:

(1) [Reserved]

(2) Carrier common line, provided that after June 30, 2003, non-price cap local exchange carriers may not assess a carrier common line charge;

(3) Local switching;

(4) Information;

(5) Tandem-switched transport;

(6) Direct-trunked transport;

(7) Special access; and

(8) Line information database;

(9) Entrance facilities.

(c) [Reserved]

(d) Recovery of Contributions to the Universal Service Support Mechanisms by Incumbent Local Exchange Carriers.

(1) [Reserved]

(2)(i) Local exchange carriers may recover their contributions to the universal service support mechanisms only through explicit, interstate, end-user charges assessed pursuant to either §69.131 or §69.158 that are equitable and nondiscriminatory.

(ii) Local exchange carriers may not recover any of their contributions to the universal service support mechanisms through access charges imposed on interexchange carriers.

(e) The carrier's carrier charges for access service filed with this Commission by the telephone companies specified in §64.1401(a) of this chapter shall include an element for connection charges for expanded interconnection. The carrier's carrier charges for access service filed with this Commission by the telephone companies not specified in §64.1401(a) of this chapter may include an element for connection charges for expanded interconnection.

(f) [Reserved]

(g) Local exchange carriers may establish appropriate rate elements for a new service, within the meaning of §61.3(x) of this chapter, in any tariff filing.

(h) In addition to the charges specified in paragraph (b) of this section, the carrier's carrier charges for access service filed with this Commission by price cap local exchange carriers shall include charges for each of the following elements:

(1) Presubscribed interexchange carrier;

(2) Per-minute residual interconnection;

(3) Dedicated local switching trunk port;

(4) Shared local switching trunk pork;

(5) Dedicated tandem switching trunk port;

(6) [Reserved]

(7) Multiplexers associated with tandem switching.

(i) Paragraphs (b) and (h) of this section are not applicable to a price cap local exchange carrier to the extent that it has been granted the pricing flexibility in §69.727(b)(1).

(j) In addition to the charges specified in paragraph (b) of this section, the carrier's carrier charges for access service filed with this Commission by non-price cap local exchange carriers may include charges for each of the following elements:

(1) Dedicated local switching trunk port;

(2) Shared local switching trunk port;

(3) Dedicated tandem switching trunk port;

(4) Multiplexers associated with tandem switching;

(5) DS1/voice grade multiplexers associated with analog switches; and

(6) Per-message call setup.

(k) A non-price cap incumbent local exchange carrier may include a charge for the Consumer Broadband-Only Loop.

[48 FR 43017, Sept. 21, 1983]

Editorial Note: For Federal Register citations affecting §69.4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.fdsys.gov.*

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### §69.5 Persons to be assessed.

(a) End user charges shall be computed and assessed upon public end users, and upon providers of public telephones, as defined in this subpart, and as provided in subpart B of this part.

(b) Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.

(c) Special access surcharges shall be assessed upon users of exchange facilities that interconnect these facilities with means of interstate or foreign telecommunications to the extent that carrier's carrier charges are not assessed upon such interconnected usage. As an interim measure pending the development of techniques accurately to measure such interconnected use and to assess such charges on a reasonable and non-discriminatory basis, telephone companies shall assess special access surcharges upon the closed ends of private line services and WATS services pursuant to the provisions of §69.115 of this part.

(d) [Reserved]

(47 U.S.C. 154 (i) and (j), 201, 202, 203, 205, 218 and 403 and 5 U.S.C. 553)

[48 FR 43017, Sept. 21, 1983, as amended at 51 FR 10840, Mar. 31, 1986; 51 FR 33752, Sept. 23, 1986; 52 FR 21540, June 8, 1987; 54 FR 50624, Dec. 8, 1989; 61 FR 65364, Dec. 12, 1996; 64 FR 60359, Nov. 5, 1999]

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## Subpart B—Computation of Charges

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### §69.101 General.

Except as provided in §69.1 and subpart C of this part, charges for each access element shall be computed and assessed as provided in this subpart.

[55 FR 42386, Oct. 19, 1990]

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**§69.104 End user common line for non-price cap incumbent local exchange carriers.**

(a) This section is applicable only to incumbent local exchange carriers that are not subject to price cap regulation as that term is defined in §61.3(ee) of this chapter. A charge that is expressed in dollars and cents per line per month shall be assessed upon end users that subscribe to local exchange telephone service or Centrex service to the extent they do not pay carrier common line charges. A charge that is expressed in dollars and cents per line per month shall be assessed upon providers of public telephones. Such charges shall be assessed for each line between the premises of an end user, or public telephone location, and a Class 5 office that is or may be used for local exchange service transmissions.

(b) Charges to multi-line subscribers shall be computed by multiplying a single line rate by the number of lines used by such subscriber.

(c) Until December 31, 2001, except as provided in paragraphs (d) through (h) of this section, the single-line rate or charge shall be computed by dividing one-twelfth of the projected annual revenue requirement for the End User Common Line element by the projected average number of local exchange service subscriber lines in use during such annual period.

(d)(1) Until December 31, 2001, if the monthly charge computed in accordance with paragraph (c) of this section exceeds $6, the charge for each local exchange service subscriber line, except a residential line, a single-line business line, or a line used for Centrex-CO service that was in place or on order as of July 27, 1983, shall be $6.

(2) Until December 31, 2001, the charge for each subscriber line associated with a public telephone shall be equal to the monthly charge computed in accordance with paragraph (d)(1) of this section.

(e) Until December 31, 2001, the monthly charge for each residential and single-line business local exchange service subscriber shall be the charge computed in accordance with paragraph (c) of this section, or $3.50, whichever is lower.

(f) Except as provided in §54.403 of this chapter, the charge for each residential local exchange service subscriber line shall be the same as the charge for each single-line business local exchange service subscriber line.

(g) A line shall be deemed to be a residential line if the subscriber pays a rate for such line that is described as a residential rate in the local exchange service tariff.

(h) A line shall be deemed to be a single line business line if the subscriber pays a rate that is not described as a residential rate in the local exchange service tariff and does not obtain more than one such line from a particular telephone company.

(i) The End User Common Line charge for each multi-party subscriber shall be assessed as if such subscriber had subscribed to single-party service.

(j)-(l) [Reserved]

(m) No charge shall be assessed for any WATS access line.

(n)(1) Except as provided in paragraphs (r) and (s) of this section, the maximum monthly charge for each residential or single-line business local exchange service subscriber line shall be the lesser of:

(i) One-twelfth of the projected annual revenue requirement for the End User Common Line element divided by the projected average number of local exchange service subscriber lines in use during such annual period; or

(ii) $6.50.

(2) In the event that GDP-PI exceeds 6.5% or is less than 0%, the maximum monthly charge in paragraph (n)(1)(ii) of this section will be adjusted in the same manner as the adjustment in §69.152(d)(2).

(o)(1) Except as provided in paragraphs (r) and (s) of this section, the maximum monthly End User Common Line Charge for multi-line business lines will be the lesser of:

(i) $9.20; or

(ii) One-twelfth of the projected annual revenue requirement for the End User Common Line element divided by the projected average number of local exchange service subscriber lines in use during such annual period;

(2) In the event that GDP-PI is greater than 6.5% or is less than 0%, the maximum monthly charge in paragraph (o)(1)(i) of this section will be adjusted in the same manner as the adjustment in §69.152(k)(2).

(p) Beginning January 1, 2002, non-price cap local exchange carriers shall assess:

(1) No more than one End User Common Line charge as calculated under the applicable method under paragraph (n) of this section for Basic Rate Interface integrated services digital network (ISDN) service.

(2) No more than five End User Common Line charges as calculated under paragraph (o) of this section for Primary Rate Interface ISDN service.

(q) In the event a non-price cap local exchange carrier charges less than the maximum End User Common Line charge for any subscriber lines, the carrier may not recover the difference between the amount collected and the maximum from carrier common line charges, Interstate Common Line Support, or Long Term Support.

(r) *End User Common Line charge deaveraging.* Beginning on January 1, 2002, non-price cap local exchange carriers may geographically deaverage End User Common Line charges subject to the following conditions.

(1) In order for a non-price cap local exchange carrier to be allowed to deaverage End User Common Line charges within a study area, the non-price cap local exchange carrier must have:

(i) State commission-approved geographically deaveraged rates for UNE loops within that study area; or

(ii) A universal service support disaggregation plan established pursuant to §54.315 of this chapter.

(2) All geographic deaveraging of End User Common Line charges by customer class within a study area must be according to the state commission-approved UNE loop zone, or the universal service support disaggregation plan established pursuant to §54.315 of this chapter.

(3) Within a given zone, Multi-line Business End User Common Line rates cannot fall below Residential and Single-Line Business rates.

(4) For any given class of customer in any given zone, the End User Common Line Charge in that zone must be greater than or equal to the End User Common Line charge in the zone with the next lower cost per line.

(5) A non-price cap local exchange carrier shall not receive more through deaveraged End User Common Line charges than it would have received if it had not deaveraged its End User Common Line charges.

(6) *Maximum charge.* The maximum zone deaveraged End User Common Line Charge that may be charged in any zone is the applicable cap specified in paragraphs (n) or (o) of this section.

(7) *Voluntary Reductions.* A “Voluntary Reduction” is one in which the non-price cap local exchange carrier charges End User Common Line rates below the maximum charges specified in paragraphs (n)(1) or (o)(1) of this section other than through offset of net increases in End User Common Line charge revenues or through increases in other zone deaveraged End User Common Line charges.

(s) End User Common Line Charges for incumbent local exchange carriers not subject to price cap regulation that elect model-based support pursuant to §54.311 of this chapter or Alaska Plan support pursuant to §54.306 of this chapter are limited as follows:

(1) The maximum charge a non-price cap local exchange carrier that elects model-based support pursuant to §54.311 of this chapter or Alaska Plan support pursuant to §54.306 of this chapter may assess for each residential or single-line business local exchange service subscriber line is the rate in effect on the last day of the month preceding the month for which model-based support or Alaska Plan support, as applicable, is first provided.

(2) The maximum charge a non-price cap local exchange carrier that elects model-based support pursuant to §54.311 of this chapter or Alaska Plan support pursuant to §54.306 of this chapter may assess for each multi-line business local exchange service subscriber line is the rate in effect on the last day of the month preceding the month for which model-based support or Alaska Plan support, as applicable, is first provided.

[48 FR 10358, Mar. 11, 1983, as amended at 48 FR 43018, Sept. 21, 1983; 52 FR 21540, June 8, 1987; 53 FR 28395, July 28, 1988; 61 FR 65364, Dec. 12, 1996; 62 FR 31933, June 11, 1997; 62 FR 32962, June 17, 1997; 66 FR 59730, Nov. 30, 2001; 81 FR 24345, Apr. 25, 2016; 81 FR 69716, Oct. 7, 2016]

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**§69.105 Carrier common line for non-price cap local exchange carriers.**

(a) This section is applicable only to local exchange carriers that are not subject to price cap regulation as that term is defined in §61.3(ee) of this chapter. Until June 30, 2003, a charge that is expressed in dollars and cents per line per access minute of use shall be assessed upon all interexchange carriers that use local exchange common line facilities for the provision of interstate or foreign telecommunications services, except that the charge shall not be assessed upon interexchange carriers to the extent they resell MTS or MTS-type services of other common carriers (OCCs).

(b)(1) For purposes of this section and §69.113:

(i) A carrier or other person shall be deemed to receive premium access if access is provided through a local exchange switch that has the capability to provide access for an MTS-WATS equivalent service that is substantially equivalent to the access provided for MTS or WATS, except that access provided for an MTS-WATS equivalent service that does not use such capability shall not be deemed to be premium access until six months after the carrier that provides such MTS-WATS equivalent service receives actual notice that such equivalent access is or will be available at such switch;

(ii) The term *open end* of a call describes the origination or termination of a call that utilizes exchange carrier common line plant (a call can have no, one, or two open ends); and

(iii) All open end minutes on calls with one open end (e.g., an 800 or FX call) shall be treated as terminating minutes.

(2) For association Carrier Common Line tariff participants:

(i) The premium originating Carrier Common Line charge shall be one cent per minute, except as described in §69.105(b)(3), and

(ii) The premium terminating Carrier Common Line charge shall be computed as follows:

(A) For each telephone company subject to price cap regulation, multiply the company's proposed premium originating rate by a number equal to the sum of the premium originating base period minutes and a number equal to 0.45 multiplied by the non-premium originating base period minutes of that telephone company;

(B) For each telephone company subject to price cap regulation, multiply the company's proposed premium terminating rate by a number equal to the sum of the premium terminating base period minutes and a number equal to 0.45 multiplied by the non-premium terminating base period minutes of that telephone company;

(C) Sum the numbers computed in paragraphs (b)(2)(ii) (A) and (B) of this section for all companies subject to price cap regulation;

(D) From the number computed in paragraph (b)(2)(ii)(C) of this section, subtract a number equal to one cent times the sum of the premium originating base period minutes and a number equal to 0.45 multiplied by the non-premium originating base period minutes of all telephone companies subject to price cap regulation, and;

(E) Divide the number computed in paragraph (b)(2)(ii)(D) of this section by the sum of the premium terminating base period minutes and a number equal to 0.45 multiplied by the non-premium terminating base period minutes of all telephone companies subject to price cap regulation.

(3) If the calculations described in §69.105(b)(2) result in a per minute charge on premium terminating minutes that is less than once cent, both the originating and terminating premium charges for the association CCL tariff participants shall be computed by dividing the number computed in paragraph (b)(2)(ii)(C) of this section by a number equal to the sum of the premium originating and terminating base period minutes and a number equal to 0.45 multiplied by the sum of the non-premium originating and terminating base period minutes of all telephone companies subject to price cap regulation.

(4) The Carrier Common Line charges of telephone companies that are not association Carrier Common Line tariff participants shall be computed at the level of Carrier Common Line access element aggregation selected by such telephone companies pursuant to §69.3(e)(7). For each such Carrier Common Line access element tariff—

(i) The premium originating Carrier Common Line charge shall be one cent per minute, and

(ii) The premium terminating Carrier Common Line charge shall be computed by subtracting the projected revenues generated by the originating Carrier Common Line charges (both premium and non-premium) from the Carrier Common Line revenue requirement for the companies participating in that tariff, and dividing the remainder by the sum of the projected premium terminating minutes and a number equal to .45 multiplied by the projected non-premium terminating minutes for such companies.

(5) If the calculations described in §69.105(b)(4) result in a per minute charge on premium terminating minutes that is less than one cent, both the originating and terminating premium charges for the companies participating in said Carrier Common Line tariff shall be computed by dividing the projected Carrier Common Line revenue requirement for such companies by the sum of the projected premium minutes and a number equal to .45 multiplied by the projected non-premium minutes for such companies.

(6) Telephone companies that are not association Carrier Common Line tariff participants shall submit to the Commission and to the association whatever data the Commission shall determine are necessary to calculate the charges described in this section.

(c) Any interexchange carrier shall receive a credit for Carrier Common Line charges to the extent that it resells services for which these charges have already been assessed (e.g., MTS or MTS-type service of other common carriers).

(d) From July 1, 2002, to June 30, 2003, the carrier common line charge calculations pursuant to this section shall be limited to an amount equal to the number of projected residential and single-line business lines multiplied by the difference between the residential and single-line business End User Common Line rate cap and the lesser of $6.50 or the non-price cap local exchange carrier's average cost per line.

[51 FR 10841, Mar. 31, 1986, as amended at 52 FR 21541, June 8, 1987; 54 FR 6293, Feb. 9, 1989; 55 FR 42386, Oct. 19, 1990; 56 FR 21618, May 10, 1991; 62 FR 31933, June 11, 1997; 66 FR 59731, Nov. 30, 2001]

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**§69.106 Local switching.**

(a) Except as provided in §69.118, charges that are expressed in dollars and cents per access minute of use shall be assessed by local exchange carriers that are not subject to price cap regulation upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign services.

(b) The per minute charge described in paragraph (a) of this section shall be computed by dividing the projected annual revenue requirement for the Local Switching element, excluding any local switching support received by the carrier pursuant to §54.301 of this chapter, by the projected annual access minutes of use for all interstate or foreign services that use local exchange switching facilities.

(c) If end users of an interstate or foreign service that uses local switching facilities pay message unit charges for such calls in a particular exchange, a credit shall be deducted from the Local Switching element charges to such carrier for access service in such exchange. The per minute credit for each such exchange shall be multiplied by the monthly access minutes for such service to compute the monthly credit to such a carrier.

(d) If all local exchange subscribers in such exchange pay message unit charges, the per minute credit described in paragraph (c) of this section shall be computed by dividing total message unit charges to all subscribers in a particular exchange in a representative month by the total minutes of use that were measured for purposes of computing message unit charges in such month.

(e) If some local exchange subscribers pay message unit charges and some do not, a per minute credit described in paragraph (c) of this section shall be computed by multiplying a credit computed pursuant to paragraph (d) of this section by a factor that is equal to total minutes measured in such month for purposes of computing message unit charges divided by the total local exchange minutes in such month.

(f) Except as provided in §69.118, price cap local exchange carriers shall establish rate elements for local switching as follows:

(1) Price cap local exchange carriers shall separate from the projected annual revenues for the Local Switching element those costs projected to be incurred for ports (including cards and DS1/voice-grade multiplexers required to access end offices equipped with analog switches) on the trunk side of the local switch. Price cap local exchange carriers shall further identify costs incurred for dedicated trunk ports separately from costs incurred for shared trunk ports.

(i) Price cap local exchange carriers shall recover dedicated trunk port costs identified pursuant to paragraph (f)(1) of this section through flat-rated charges expressed in dollars and cents per trunk port and assessed upon the purchaser of the dedicated trunk terminating at the port.

(ii) Price cap local exchange carriers shall recover shared trunk port costs identified pursuant to paragraph (f)(1) of this section through charges assessed upon purchasers of shared transport. This charge shall be expressed in dollars and cents per access minute of use. The charge shall be computed by dividing the projected costs of the shared ports by the historical annual access minutes of use calculated for purposes of recovery of common transport costs in §69.111(c).

(2) Price cap local exchange carriers shall recover the projected annual revenues for the Local Switching element that are not recovered in paragraph (f)(1) of this section through charges that are expressed in dollars and cents per access minute of use and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign services. The maximum charge shall be computed by dividing the projected remainder of the annual revenues for the Local Switching element by the historical annual access minutes of use for all interstate or foreign services that use local exchange switching facilities.

(g) A local exchange carrier may recover signaling costs associated with call setup through a call setup charge imposed upon all interstate interexchange carriers that use that local exchange carrier's facilities to originate or terminate interstate interexchange or foreign services. This charge must be expressed as dollars and cents per call attempt and may be assessed on originating calls handed off to the interexchange carrier's point of presence and on terminating calls received from an interexchange carrier's point of presence, whether or not that call is completed at the called location. Local exchange carriers may not recover through this charge any costs recovered through other rate elements.

(h) Except as provided in §69.118, non-price cap local exchange carriers may establish rate elements for local switching as follows:

(1) Non-price cap local exchange carriers may separate from the projected annual revenue requirement for the Local Switching element those costs projected to be incurred for ports (including cards and DS1/voice-grade multiplexers required to access end offices equipped with analog switches) on the trunk side of the local switch. Non-price cap local exchange carriers electing to assess these charges shall further identify costs incurred for dedicated trunk ports separately from costs incurred for shared trunk ports.

(i) Non-price cap local exchange carriers electing to assess trunk port charges shall recover dedicated trunk port costs identified pursuant to paragraph (h)(1) of this section through flat-rated charges expressed in dollars and cents per trunk port and assessed upon the purchaser of the dedicated trunk terminating at the port.

(ii) Non-price cap local exchange carriers electing to assess trunk port charges shall recover shared trunk port costs identified pursuant to paragraph (h)(1) of this section through charges assessed upon purchasers of shared transport. This charge shall be expressed in dollars and cents per access minute of use. The charge shall be computed by dividing the projected costs of the shared ports by the historical annual access minutes of use calculated for purposes of recovery of common transport costs in §69.111(c).

(2) Non-price cap local exchange carriers shall recover the projected annual revenue requirement for the Local Switching element that are not recovered in paragraph (h)(1) of this section through charges that are expressed in dollars and cents per access minute of use and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign services. The maximum charge shall be computed by dividing the projected remainder of the annual revenue requirement for the Local Switching element by the historical annual access minutes of use for all interstate or foreign services that use local exchange switching facilities.

[52 FR 37310, Oct. 6, 1987, as amended at 56 FR 33881, July 24, 1991; 62 FR 31933, June 11, 1997; 62 FR 40463, July 29, 1997; 66 FR 59731, Nov. 30, 2001]

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**§69.108 Transport rate benchmark.**

(a) For transport charges computed in accordance with this subpart, the DS3-to-DS1 benchmark ratio shall be calculated as follows: the telephone company shall calculate the ratio of:

(1) The total charge for a 1.609 km (1 mi) channel termination, 16.09 km (10 mi) of interoffice transmission, and one DS3 multiplexer using the telephone company's DS3 special access rates to;

(2) The total charge for a 1.609 km (1 mi) channel termination plus 16.09 km (10 mi) of interoffice transmission using the telephone company's DS1 special access rates.

(b) Initial transport rates will generally be presumed reasonable if they are based on special access rates with a DS3-to-DS1 benchmark ratio of 9.6 to 1 or higher.

(c) If a telephone company's initial transport rates are based on special access rates with a DS3-to-DS1 benchmark ratio of less than 9.6 to 1, those initial transport rates will generally be suspended and investigated absent a substantial cause showing by the telephone company. Alternatively, the telephone company may adjust its initial transport rates so that the DS3-to-DS1 ratio calculated as described in paragraph (a) of this section of those rates is 9.6 or higher. In that case, initial transport rates that depart from existing special access rates effective on September 1, 1992 so as to be consistent with the benchmark will be presumed reasonable only so long as the ratio of revenue recovered through the interconnection charge to the revenue recovered through facilities-based charges is the same as it would be if the telephone company's existing special access rates effective on September 1, 1992 were used.

[58 FR 41189, Aug. 3, 1993, as amended at 58 FR 44952, Aug. 25, 1993; 58 FR 45267, Aug. 27, 1993]

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**§69.109 Information.**

(a) A charge shall be assessed upon all interexchange carriers that are connected to assistance boards through interexchange directory assistance trunks.

(b) Except as provided in §69.118, if such connections are maintained exclusively by carriers that offer MTS, the projected annual revenue requirement for the Information element shall be divided by 12 to compute the monthly assessment to such carriers.

(c) If such connections are provided to additional carriers, charges shall be established that reflect the relative use of such directory assistance service by such interexchange carriers.

[48 FR 10358, Mar. 11, 1983, as amended at 56 FR 33881, July 24, 1991]

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**§69.110 Entrance facilities.**

(a) A flat-rated entrance facilities charge expressed in dollars and cents per unit of capacity shall be assessed upon all interexchange carriers and other persons that use telephone company facilities between the interexchange carrier or other person's point of demarcation and the serving wire center.

(b)(1) For telephone companies subject to price cap regulation, initial entrance facilities charges based on special access channel termination rates for equivalent voice grade, DS1, and DS3 services as of September 1, 1992, adjusted for changes in the price cap index calculated for the July 1, 1993 annual filing for telephone companies subject to price cap regulation, generally shall be presumed reasonable if the benchmark defined in §69.108 is satisfied. Entrance facilities charges may be distance-sensitive. Distance shall be measured as airline kilometers between the point of demarcation and the serving wire center.

(2) For telephone companies not subject to price cap regulation, entrance facilities charges based on special access channel termination rates for equivalent voice grade, DS1, and DS3 services generally shall be presumed reasonable if the benchmark defined in §69.108 is satisfied. Entrance facilities charges may be distance-sensitive. Distance shall be measured as airline kilometers between the point of demarcation and the serving wire center.

(c) If the telephone company employs distance-sensitive rates:

(1) A distance-sensitive component shall be assessed for use of the transmission facilities, including any intermediate transmission circuit equipment between the end points of the entrance facilities; and

(2) A nondistance-sensitive component shall be assessed for use of the circuit equipment at the ends of the transmission links.

(d) Telephone companies shall apply only their shortest term special access rates in setting entrance facilities charges.

(e) Except as provided in paragraphs (f), (g), and (h) of this section, and subpart H of this part, telephone companies shall not offer entrance facilities based on term discounts or volume discounts for multiple DS3s or any other service with higher volume than DS3.

(f) Except in the situations set forth in paragraphs (g) and (h) of this section, telephone companies may offer term and volume discounts in entrance facilities charges within each study area used for the purpose of jurisdictional separations, in which interconnectors have taken either:

(1) At least 100 DS1-equivalent cross-connects for the transmission of switched traffic (as described in §69.121(a)(1) of this chapter) in offices in the study area that the telephone company has assigned to the lowest priced density pricing zone (zone 1) under an approved density pricing zone plan as described in §§61.38(b)(4) and 61.49(k) of this chapter; or

(2) An average of at least 25 DS1-equivalent cross-connects for the transmission of switched traffic per office assigned to the lowest priced density pricing zone (zone 1).

(g) In study areas in which the telephone company has implemented density zone pricing, but no offices have been assigned to the lowest price density pricing zone (zone 1), telephone companies may offer term and volume discounts in entrance facilities charges within the study area when interconnectors have taken at least 5 DS1-equivalent cross-connects for the transmission of switched traffic (as described in §69.121(a)(1) of this chapter) in offices in the study area.

(h) In study areas in which the telephone company has not implemented density zone pricing, telephone companies may offer term and volume discounts in entrance facilities charges when interconnectors have taken at least 100 DS1-equivalent cross-connects for the transmission of switched traffic (as described in §69.121(a)(1) of this chapter) in offices in the study area.

[57 FR 54720, Nov. 20, 1992, as amended at 58 FR 41190, 41191, Aug. 3, 1993; 58 FR 44950, Aug. 25, 1993; 58 FR 48763, Sept. 17, 1993; 59 FR 10304, Mar. 4, 1994; 60 FR 50121, Sept. 28, 1995; 64 FR 51267, Sept. 22, 1999]

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**§69.111 Tandem-switched transport and tandem charge.**

(a)(1) Through June 30, 1998, except as provided in paragraph (l) of this section, tandem-switched transport shall consist of two rate elements, a transmission charge and a tandem switching charge.

(2) Beginning July 1, 1998, except as provided in paragraph (l) of this section, tandem-switched transport shall consist of three rate elements as follows:

(i) A per-minute charge for transport of traffic over common transport facilities between the incumbent local exchange carrier's end office and the tandem switching office. This charge shall be expressed in dollars and cents per access minute of use and shall be assessed upon all purchasers of common transport facilities between the local exchange carrier's end office and the tandem switching office.

(ii) A per-minute tandem switching charge. This tandem switching charge shall be set in accordance with paragraph (g) of this section, excluding multiplexer and dedicated port costs recovered in accordance with paragraph (l) of this section, and shall be assessed upon all interexchange carriers and other persons that use incumbent local exchange carrier tandem switching facilities.

(iii) A flat-rated charge for transport of traffic over dedicated transport facilities between the serving wire center and the tandem switching office. This charge shall be assessed as a charge for dedicated transport facilities provisioned between the serving wire center and the tandem switching office in accordance with §69.112.

(b) [Reserved]

(c)(1) Until June 30, 1998:

(i) Except in study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(1) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, geographically averaged on a study-area-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.

(ii) In study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(1) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, averaged on a zone-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.

(2) Beginning July 1, 1998:

(i) Except in study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(2)(i) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, geographically averaged on a study-area-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.

(ii) In study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(2)(i) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, averaged on a zone-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.

(d)(1) Through June 30, 1998, the tandem-switched transport transmission charges may be distance-sensitive. Distance shall be measured as airline distance between the serving wire center and the end office, unless the customer has ordered tandem-switched transport between the tandem office and the end office, in which case distance shall be measured as airline distance between the tandem office and the end office.

(2) Beginning July 1, 1998, the per-minute charge for transport of traffic over common transport facilities described in paragraph (a)(2)(i) of this section may be distance-sensitive. Distance shall be measured as airline distance between the tandem switching office and the end office.

(e)(1) Through June 30, 1998, if the telephone company employs distance-sensitive rates:

(i) A distance-sensitive component shall be assessed for use of the transmission facilities, including intermediate transmission circuit equipment between the end points of the interoffice circuit; and

(ii) A non-distance-sensitive component shall be assessed for use of the circuit equipment at the ends of the interoffice transmission links.

(2) Beginning July 1, 1998, if the telephone company employs distance-sensitive rates for transport of traffic over common transport facilities, as described in paragraph (a)(2)(i) of this section:

(i) A distance-sensitive component shall be assessed for use of the common transport facilities, including intermediate transmission circuit equipment between the end office and tandem switching office; and

(ii) A non-distance-sensitive component shall be assessed for use of the circuit equipment at the ends of the interoffice transmission links.

(f) [Reserved]

(g)(1) The tandem switching charge imposed pursuant to paragraphs (a)(1) or (a)(2)(ii) of this section, as applicable, shall be set to recover twenty percent of the annual part 69 interstate tandem revenue requirement plus one third of the portion of the tandem switching revenue requirement being recovered through the interconnection charge recovered by §§69.124, 69.153, and 69.155, excluding multiplexer and dedicated port costs recovered in accordance with paragraph (l) of this section.

(2) Beginning January 1, 1999, the tandem switching charge imposed pursuant to paragraph (a)(2)(ii) of this section shall be set to recover the amount prescribed in paragraph (g)(1) of this section plus one half of the remaining portion of the tandem switching revenue requirement then being recovered through the interconnection charge recovered by §§69.124, 69.153, and 69.155, excluding multiplexer and dedicated port costs recovered in accordance with paragraph (l) of this section.

(3) Beginning January 1, 2000, the tandem switching charge imposed pursuant to paragraph (a)(2)(ii) of this section shall be set to recover the entire interstate tandem switching revenue requirement, including that portion formerly recovered through the interconnection charge recovered in §§69.124, 69.153, and 69.155, and excluding multiplexer and dedicated port costs recovered in accordance with paragraph (l) of this section.

(4) A local exchange carrier that is subject to price cap regulation as that term is defined in §61.3(x) of this chapter shall calculate its tandem switching revenue requirement as used in this paragraph by dividing the tandem switching revenue requirement that was included in the original interconnection charge by the original interconnection charge, and then multiplying this result by the annual revenues recovered through the interconnection charge, described in §69.124, as of June 30, 1997. A local exchange carrier that is subject to price cap regulation as that term is defined in §61.3(x) of this chapter shall then make downward exogenous adjustments to the service band index for the interconnection charge service category (defined in §61.42(e)(2)(vi) of this chapter) and corresponding upward adjustments to the service band index for the tandem-switched transport service category (defined in §61.42(e)(2)(v) of this chapter) at the times and in the amounts prescribed in paragraphs (g)(1) through (g)(3) of this section .

(h) All telephone companies shall provide tandem-switched transport service.

(i) Except in the situations set forth in paragraphs (j) and (k) of this section, telephone companies may offer term and volume discounts in tandem-switched transport charges within each study area used for the purpose of jurisdictional separations, in which interconnectors have taken either:

(1) At least 100 DS1-equivalent cross-connects for the transmission of switched traffic (as described in §69.121(a)(1) of this chapter) in offices in the study area that the telephone company has assigned to the lowest priced density pricing zone (zone 1) under an approved density pricing zone plan as described in §§61.38(b)(4) and 61.49(k) of this chapter; or

(2) An average of at least 25 DS1-equivalent cross-connects for the transmission of switched traffic per office assigned to the lowest priced density pricing zone (zone 1).

(j) In study areas in which the telephone company has implemented density zone pricing, but no offices have been assigned to the lowest priced density pricing zone (zone 1), telephone companies may offer term and volume discounts in tandem-switched transport charges within the study area when interconnectors have taken at least 5 DS1-equivalent cross-connects for the transmission of switched traffic (as described in §69.121(a)(1) of this chapter) in offices in the study area.

(k) In study areas in which the telephone company has not implemented density zone pricing, telephone companies may offer term and volume discounts in tandem-switched transport charges when interconnectors have taken at least 100 DS1-equivalent cross-connects for the transmission of switched traffic (as described in §69.121(a)(1) of this chapter) in offices in the study area.

(l) In addition to the charges described in this section, price cap local exchange carriers shall establish separate charges for multiplexers and dedicated trunk ports used in conjunction with the tandem switch as follows:

(1) Local exchange carriers must establish a traffic-sensitive charge for DS3/DS1 multiplexers used on the end office side of the tandem switch, assessed on purchasers of common transport to the tandem switch. This charge must be expressed in dollars and cents per access minute of use. The maximum charge shall be calculated by dividing the total costs of the multiplexers on the end office-side of the tandem switch by the annual access minutes of use calculated for purposes of recovery of common transport costs in paragraph (c) of this section. A similar charge shall be assessed for DS1/voice-grade multiplexing provided on the end-office side of analog tandem switches.

(2)(i) Local exchange carriers must establish a flat-rated charge for dedicated DS3/DS1 multiplexing on the serving wire center side of the tandem switch provided in conjunction with dedicated DS3 transport service from the serving wire center to the tandem switch. This charge shall be assessed on interexchange carriers purchasing tandem-switched transport in proportion to the number of DS3 trunks provisioned for that interexchange carrier between the serving wire center and the tandem-switch.

(ii) Local exchange carriers must establish a flat-rated charge for dedicated DS1/voice-grade multiplexing provided on the serving wire center side of analog tandem switches. This charge may be assessed on interexchange carriers purchasing tandem-switched transport in proportion to the interexchange carrier's transport capacity on the serving wire center side of the tandem.

(3) Price cap local exchange carriers may recover the costs of dedicated trunk ports on the serving wire center side of the tandem switch only through flat-rated charges expressed in dollars and cents per trunk port and assessed upon the purchaser of the dedicated trunk terminating at the port.

(m) In addition to the charges described in this section, non-price cap local exchange carriers may establish separate charges for multiplexers and dedicated trunk ports used in conjunction with the tandem switch as follows:

(1)(i) Non-price cap local exchange carriers may establish a flat-rated charge for dedicated DS3/DS1 multiplexing on the serving wire center side of the tandem switch provided in conjunction with dedicated DS3 transport service from the serving wire center to the tandem switch. This charge shall be assessed on interexchange carriers purchasing tandem-switched transport in proportion to the number of DS3 trunks provisioned for that interexchange carrier between the serving wire center and the tandem switch.

(ii) Non-price cap local exchange carriers may establish a flat-rated charge for dedicated DS1/voice-grade multiplexing provided on the serving wire center side of analog tandem switches. This charge may be assessed on interexchange carriers purchasing tandem-switched transport in proportion to the interexchange carrier's transport capacity on the serving wire center side of the tandem.

(2) Non-price cap local exchange carriers may recover the costs of dedicated trunk ports on the serving wire center side of the tandem switch through flat-rated charges expressed in dollars and cents per trunk port and assessed upon the purchaser of the dedicated trunk terminating at the port.

[57 FR 54720, Nov. 20, 1992, as amended at 58 FR 41190, Aug. 3, 1993; 58 FR 48764, Sept. 17, 1993; 60 FR 50121, Sept. 28, 1995; 62 FR 31933, June 11, 1997; 62 FR 40463, July 29, 1997; 62 FR 56132, Oct. 29, 1997; 64 FR 46594, Aug. 26, 1999; 66 FR 59732, Nov. 30, 2001]

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**§69.112 Direct-trunked transport.**

(a) A flat-rated direct-trunked transport charge expressed in dollars and cents per unit of capacity shall be assessed upon all interexchange carriers and other persons that use telephone company direct-trunked transport facilities.

(b)(1) For telephone companies subject to price cap regulation, initial direct-trunked transport charges based on the interoffice charges for equivalent voice grade, DS1, and DS3 special access services as of September 1, 1992, adjusted for changes in the price cap index calculated for the July 1, 1993 annual filing for telephone companies subject to price cap regulation, generally shall be presumed reasonable if the benchmark defined in §69.108 is satisfied. Direct-trunked transport charges may be distance-sensitive. Distance shall be measured as airline kilometers between customer-designated points.

(2) For telephone companies not subject to price cap regulation, initial direct-trunked transport charges based on the interoffice charges for equivalent voice grade, DS1, and DS3 special access services generally shall be presumed reasonable if the benchmark defined in §69.108 is satisfied. Direct-trunked transport charges may be distance-sensitive. Distance shall be measured as airline kilometers between customer-designated points.

(c) If the telephone company employs distance-sensitive rates:

(1) A distance-sensitive component shall be assessed for use of the transmission facilities, including intermediate transmission circuit equipment, between the end points of the circuit; and

(2) A nondistance-sensitive component shall be assessed for use of the circuit equipment at the ends of the transmission links.

(d) Telephone companies shall apply only their shortest term special access rates in setting direct-trunked transport rates.

(e) Except as provided in pagagraphs (f), (g), and (h) of this section, telephone companies shall not offer direct-trunked transport rates based on term discounts or volume discounts for multiple DS3s or any other service with higher volume than DS3.

(f) Except in the situations set forth in paragraphs (g) and (h) of this section, telephone companies may offer term and volume discounts in direct-trunked transport charges within each study area used for the purpose of jurisdictional separations, in which interconnectors have taken either:

(1) At least 100 DS1-equivalent cross-connects for the transmission of switched traffic (as described in §69.121(a)(1)) in offices in the study area that the telephone company has assigned to the lowest priced density pricing zone (zone 1) under an approved density pricing zone plan as described in §§61.38(b)(4) and 61.49(k) of this section; or

(2) An average of at least 25 DS1-equivalent cross-connects for the transmission of switched traffic per office assigned to the lowest priced density pricing zone (zone 1).

(g) In study areas in which the telephone company has implemented density zone pricing, but no offices have been assigned to the lowest priced density pricing zone (zone 1), telephone companies may offer term and volume discounts in direct-trunked transport charges within the study area when interconnectors have taken at least 5 DS1-equivalent cross-connects for the transmission of switched traffic (as described in §69.121(a)(1) of this chapter) in offices in the study area.

(h) In study areas in which the telephone company has not implemented density zone pricing, telephone companies may offer term and volume discounts in direct-trunked transport charges when interconnectors have taken at least 100 DS1-equivalent cross-connects for the transmission of switched traffic (as described in §69.121(a)(1) of this chapter) in offices in the study area.

(i) Centralized equal access providers as described in Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 92-442, 7 FCC Rcd 7002 (1992), are not required to provide direct-trunked transport service. Telephone companies that do not have measurement and billing capabilities at their end offices are not required to provide direct-trunked transport services at those end offices without measurement and billing capabilities. Telephone companies that are not classified as Class A companies under §32.11 of this chapter are required to provide direct-trunked transport service upon request. All other telephone companies shall provide a direct-trunked transport service.

[57 FR 54720, Nov. 20, 1992, as amended at 58 FR 41190, Aug. 3, 1993; 58 FR 44950, Aug. 25, 1993; 58 FR 48764, Sept. 17, 1993; 60 FR 50121, Sept. 28, 1995]

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**§69.113 Non-premium charges for MTS-WATS equivalent services.**

(a) Charges that are computed in accordance with this section shall be assessed upon interexchange carriers or other persons that receive access that is not deemed to be premium access as this term in defined in §69.105(b)(1) in lieu of carrier charges that are computed in accordance with §§69.105, 69.106, 69.118, 69.124, and 69.127.

(b) The non-premium charge for the Carrier Common Line element shall be computed by multiplying the premium charge for such element by .45.

(c) For telephone companies that are not subject to price cap regulation as that term is defined in §61.3(x) of this chapter, the non-premium charge for the Local Switching element shall be computed by multiplying a hypothetical premium charge for such element by .45. The hypothetical premium charge for such element shall be computed by dividing the annual revenue requirement for each element by the sum of the projected access minutes for such period and a number that is computed by multiplying the projected non-premium minutes for such element for such period by .45. For telephone companies that are price cap carriers, the non-premium charge for the Local Switching element shall be computed by multiplying the premium charge for such element by .45. Though June 30, 1993, the non-premium charge shall be computed by multiplying the LS2 charge for such element by .45.

(d) The non-premium charge or charges for the interconnection charge element shall be computed by multiplying the corresponding premium charge or charges by .45.

(e) The non-premium charge for any BSEs in local switching shall be computed by multiplying the premium charge for the corresponding BSEs by .45.

[54 FR 6293, Feb. 9, 1989, as amended at 55 FR 42386, Oct. 19, 1990; 55 FR 50559, Dec. 7, 1990; 56 FR 33881, July 24, 1991; 57 FR 54721, Nov. 20, 1992; 59 FR 10304, Mar. 4, 1994; 64 FR 46594, Aug. 26, 1999]

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**§69.114 Special access.**

(a) Appropriate subelements shall be established for the use of equipment or facilities that are assigned to the Special Access element for purposes of apportioning net investment, or that are equivalent to such equipment or facilities for companies subject to price cap regulation as that term is defined in §61.3(x) of this chapter.

(b) Charges for all subelements shall be designed to produce total annual revenue that is equal to the projected annual revenue requirement for the Special Access element.

(c) Charges for an individual element shall be assessed upon all interexchange carriers that use the equipment or facilities that are included within such subelement.

(d) Charges for individual subelements shall be designed to reflect cost differences among subelements in a manner that complies with applicable Commission rules or decisions.

[48 FR 10358, Mar. 11, 1983, as amended at 48 FR 43019, Sept. 21, 1983. Redesignated at 54 FR 6293, Feb. 9, 1989, as amended at 55 FR 42386, Oct. 19, 1990; 64 FR 46594, Aug. 26, 1999]

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**§69.115 Special access surcharges.**

(a) Pending the development of techniques accurately to measure usage of exchange facilities that are interconnected by users with means of interstate or foreign telecommunications, a surcharge that is expressed in dollars and cents per line termination per month shall be assessed upon users that subscribe to private line services or WATS services that are not exempt from assessment pursuant to paragraph (e) of this section.

(b) Except as provided in paragraph (f) of this section, such surcharge shall be computed to reflect a reasonable approximation of the carrier usage charges which, assuming non-premium interconnection, would have been paid for average interstate or foreign usage of common lines, end office facilities, and transport facilities, attributable to each Special Access line termination which is not exempt from assessment pursuant to paragraph (e) of this section.

(c) If the association, carrier or carriers that file the tariff are unable to estimate such average usage for a period ending May 31, 1985, the surcharge for such period shall be twenty-five dollars ($25) per line termination per month. As of June 30, 2000, these rates will remain and be capped at the current levels until June 30, 2005.

(d) A telephone company may propose reasonable and nondiscriminatory end user surcharges, to be filed in its federal access tariffs and to be applied to the use of exchange facilities which are interconected by users with means of interstate or foreign telecommunication which are not provided by the telephone company, and which are not exempt from assessment pursuant to paragraph (e) of this section. Telephone companies which wish to avail themselves of this option must undertake to use reasonable efforts to identify such means of interstate or foreign telecommunication, and to assess end user surcharges in a reasonable and nondiscriminatory manner.

(e) No special access surcharges shall be assessed for any of the following terminations:

(1) The open end termination in a telephone company switch of an FX line, including CCSA and CCSA-equivalent ONALs;

(2) Any termination of an analog channel that is used for radio or television program transmission;

(3) Any termination of a line that is used for telex service;

(4) Any termination of a line that by nature of its operating characteristics could not make use of common lines; and

(5) Any termination of a line that is subject to carrier usage charges pursuant to §69.5.

(6) Any termination of a line that the customer certifies to the exchange carrier is not connected to a PBX or other device capable of interconnecting a local exchange subscriber line with the private line or WATS access line.

(f) The maximum special access surcharge a non-price cap local exchange carrier that elects model-based support pursuant to §54.311 of this chapter or Alaska Plan support pursuant to §54.306 of this chapter may assess is the rate in effect on the last day of the month preceding the month for which model-based support or Alaska Plan support, as applicable, is first provided.

(47 U.S.C. 154 (i) and (j), 201, 202, 203, 205, 218 and 403 and 5 U.S.C. 553)

[48 FR 43019, Sept. 21, 1983, as amended at 49 FR 7829, Mar. 2, 1984; 51 FR 10841, Mar. 31, 1986; 52 FR 8259, Mar. 17, 1987; 65 FR 38701, June 21, 2000; 81 FR 24345, Apr. 25, 2016; 81 FR 69716, Oct. 7, 2016]

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### §69.118 Traffic sensitive switched services.

Notwithstanding §§69.4(b), 69.106, 69.109, 69.110, 69.111, 69.112, and 69.124, telephone companies subject to the BOC ONA Order, 4 FCC Rcd 1 (1988) shall, and other telephone companies may, establish approved Basic Service Elements as provided in Amendments of part 69 of the Commission's rules relating to the Creation of Access Charge Subelements for Open Network Architecture, Report and Order, 6 FCC Rcd 4524 (1991) and 800 data base subelements, as provided in Provision of Access for 800 Service, 8 FCC Rcd ____, CC Docket 86-10, FCC 93-53 (1993). Moreover, all customers that use basic 800 database service shall be assessed a charge that is expressed in dollars and cents per query. Telephone companies shall take into account revenues from the relevant Basic Service Element or Elements and 800 Database Service Elements in computing rates for the Local Switching, Entrance Facilities, Tandem-Switched Transport, Direct-Trunked Transport, Interconnection Charge, and/or Information elements.

[58 FR 7868, Feb. 10, 1993]

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### §69.119 Basic service element expedited approval process.

The rules for filing comments and reply comments on requests for expedited approval of new basic service elements are those indicated in §1.45 of the rules, except as specified otherwise.

[56 FR 33881, July 24, 1991]

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### §69.120 Line information database.

(a) A charge that is expressed in dollars and cents per query shall be assessed upon all carriers that access validation information from a local exchange carrier database to recover the costs of:

(1) The transmission facilities between the local exchange carrier's signalling transfer point and the database; and

(2) The signalling transfer point facilities dedicated to the termination of the transmission facilities connecting the database to the exchange carrier's signalling network.

(b) A charge that is expressed in dollars and cents per query shall be assessed upon all carriers that access validation information from a local exchange carrier line information database to recover the costs of the database.

[57 FR 24380, June 9, 1992]

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**§69.121 Connection charges for expanded interconnection.**

(a) Appropriate connection charge subelements shall be established for the use of equipment and facilities that are associated with offerings of expanded interconnection for special access and switched transport services, as defined in part 64, subpart N of this chapter. To the extent that the same equipment and facilities are used to provide expanded interconnection for both special access and switched transport, the same connection charge subelements shall be used.

(1) A cross-connect subelement shall be established for charges associated with the cross-connect cable and associated facilities connecting the equipment owned by or dedicated to the use of the interconnector with the telephone company's equipment and facilities used to provide interstate special or switched access services. Charges for the cross-connect subelement shall not be deaveraged within a study area that is used for purposes of jurisdictional separations.

(2) Charges for subelements associated with physical collocation or virtual collocation, other than the subelement described in paragraph (a)(1) of this section and subelements recovering the cost of the virtual collocation equipment described in §64.1401(e)(1) of this chapter, may reasonably differ in different central offices, notwithstanding §69.3(e)(7).

(b) Connection charge subelements shall be computed based upon the costs associated with the equipment and facilities that are included in such subelements, including no more than a just and reasonable portion of the telephone company's overhead costs.

(c) Connection charge subelements shall be assessed upon all interconnectors that use the equipment or facilities that are included in such subelements.

[57 FR 54332, Nov. 18, 1992, as amended at 58 FR 48764, Sept. 17, 1993; 59 FR 38930, Aug. 1, 1994]

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**§69.123 Density pricing zones for special access and switched transport.**

(a)(1) Incumbent local exchange carriers not subject to price cap regulation may establish any number of density zones within a study area that is used for purposes of jurisdictional separations, provided that each zone, except the highest-cost zone, accounts for at least 15 percent of that carrier's special access and transport revenues within that study area, calculated pursuant to the methodology set forth in §69.725.

(2) Such a system of pricing zones shall be designed to reasonably reflect cost-related characteristics, such as the density of total interstate traffic in central offices located in the respective zones.

(3) Non-price cap incumbent local exchange carriers may establish only one set of density pricing zones within each study area, to be used for the pricing of both special and switched access pursuant to paragraphs (c) and (d) of this section.

(b)(1) Incumbent local exchange carriers subject to price cap regulation may establish any number of density zones within a study area that is used for purposes of jurisdictional separations, provided that each zone, except the highest-cost zone, accounts for at least 15 percent of that carrier's trunking basket revenues within that study area, calculated pursuant to the methodology set forth in §69.725.

(2) Price cap incumbent local exchange carriers may establish only one set of density pricing zones within each study area, to be used for the pricing of all services within the trunking basket for which zone density pricing is permitted.

(3) An access service subelement for which zone density pricing is permitted shall be deemed to be offered in the zone that contains the telephone company location from which the service is provided.

(4) An access service subelement for which zone density pricing is permitted which is provided to a customer between telephone company locations shall be deemed to be offered in the highest priced zone that contains one of the locations between which the service is offered.

(c) Notwithstanding §69.3(e)(7), in study areas in which a telephone company offers a cross-connect, as described in §69.121(a)(1), for the transmission of interstate special access traffic, telephone companies may charge rates for special access sub-elements of DS1, DS3, and such other special access services as the Commission may designate, that differ depending on the zone in which the service is offered, provided that the charges for any such service shall not be deaveraged within any such zone.

(1) A special access service subelement shall be deemed to be offered in the zone that contains the telephone company location from which the service is provided.

(2) A special access service subelement provided to a customer between telephone company locations shall be deemed to be offered in the highest priced zone that contains one of the locations between which the service is offered.

(d) Notwithstanding §69.3(e)(7), in study areas in which a telephone company offers a cross-connect, as described in §69.121(a)(1), for the transmission of interstate switched traffic, or is using collocated facilities to interconnect with telephone company interstate switched transport services, telephone companies may charge rates for sub-elements of direct-trunked transport, tandem-switched transport, entrance facilities, and dedicated signaling transport that differ depending on the zone in which the service is offered, provided that the charge for any such service shall not be deaveraged within any such zone.

(1) A switched transport service subelement shall be deemed to be offered in the zone that contains the telephone company location from which the service is provided.

(2) A switched transport service subelement provided to a customer between telephone company locations shall be deemed to be offered in the highest priced zone that contains either of the locations between which the service is offered.

(e)(1) Telephone companies not subject to price cap regulation may charge a rate for each service in the highest priced zone that exceeds the rate for the same service in the lowest priced zone by no more than fifteen percent of the rate for the service in the lowest priced zone during the period from the date that the zones are initially established through the following June 30. The difference between the rates for any such service in the highest priced zone and the lowest priced zone in a study area, measured as a percentage of the rate for the service in the lowest priced zone, may increase by no more than an additional fifteen percentage points in each succeeding year, measured from the rate differential in effect on the last day of the preceding tariff year.

(2) Notwithstanding §69.3(e)(7), incumbent local exchange carriers subject to price cap regulation may charge different rates for services in different zones pursuant to §61.47(f) of this chapter, provided that the charges for any such service are not deaveraged within any such zone.

(f)(1) An incumbent local exchange carrier that establishes density pricing zones under this section must reallocate additional amounts recovered under the interconnection charge prescribed in §69.124 of this subpart to facilities-based transport rates, to reflect the higher costs of serving lower density areas. Each incumbent local exchange carrier must reallocate costs from the interexchange charge each time it increases the ratio between the prices in its lowest-cost zone and any other zone in that study area.

(2) Any incumbent local exchange carrier that has already deaveraged its rates on January 1, 1998 must reallocate an amount equivalent to that described in paragraph (f)(1) of this section from the interconnection charge prescribed in §69.124 to its transport services.

(3) Price cap local exchange carriers shall reassign to direct-trunked transport and tandem-switched transport categories or subcategories interconnection charge amounts reallocated under paragraph (f)(1) or (f)(2) of this section in a manner that reflects the way density pricing zones are being implemented by the incumbent local exchange carrier.

[57 FR 54333, Nov. 18, 1992, as amended at 58 FR 48764, Sept. 17, 1993; 62 FR 31935, June 11, 1997; 64 FR 51267, Sept. 22, 1999; 69 FR 25336, May 6, 2004]

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### §69.124 Interconnection charge.

(a) Until December 31, 2001, local exchange carriers not subject to price cap regulation shall assess an interconnection charge expressed in dollars and cents per access minute upon all interexchange carriers and upon all other persons using the telephone company switched access network.

(b) If the use made of the local exchange carrier's switched access network includes the local switch, but not local transport, the interconnection charge assessed pursuant to paragraph (a) of this section shall be computed by subtracting entrance facilities, tandem-switched transport, direct-trunked transport, and dedicated signalling transport revenues, as well as any interconnection charge revenues that the local exchange carrier anticipates will be reassigned to other, facilities-based rate elements in the future, from the part 69 transport revenue requirement, and dividing by the total interstate local switching minutes.

(c) If the use made of the local exchange carrier's switched access network includes local transport, the interconnection charge to be assessed pursuant to paragraph (a) of this section shall be computed by dividing any interconnection charge revenues that the local exchange carrier anticipates will be reassigned to other, facilities-based rate elements in the future by the total interstate local transport minutes, and adding thereto the per minute amount calculated pursuant to paragraph (b) of this section.

[62 FR 66030, Dec. 17, 1997, as amended at 66 FR 59732, Nov. 30, 2001]

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### §69.125 Dedicated signalling transport.

(a) Dedicated signalling transport shall consist of two elements, a signalling link charge and a signalling transfer point (STP) port termination charge.

(b)(1) A flat-rated signalling link charge expressed in dollars and cents per unit of capacity shall be assessed upon all interexchange carriers and other persons that use facilities between an interexchange carrier or other person's common channel signalling network and a telephone company signalling transfer point or equivalent facilities offered by a telephone company. Signalling link charges may be distance-sensitive. Distance shall be measured as airline kilometers between the signalling point of interconnection of the interexchange carrier's or other person's common channel signalling network and the telephone company's signalling transfer point.

(2) Signalling link rates will generally be presumed reasonable if they are based on the interoffice charges for equivalent special access services. Telephone companies that have, before February 18, 1993, tariffed a signalling link service for signalling transport between the interexchange carrier's or other person's common channel signalling network and the telephone company's STP are permitted to use the rates that are in place.

(c) A flat-rated STP port termination charge expressed in dollars and cents per port shall be assessed upon all interexchange carriers and other persons that use dedicated signalling transport.

[57 FR 54721, Nov. 20, 1992, as amended at 58 FR 41191, Aug. 3, 1993; 58 FR 44950, Aug. 25, 1993; 62 FR 31935, June 11, 1997]

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### §69.128 Billing name and address.

Appropriate subelements shall be established for the use of equipment or facilities that are associated with offerings of billing name and address.

[58 FR 36145, July 6, 1993]

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### §69.129 Signalling for tandem switching.

A charge that is expressed in dollars and cents shall be assessed upon the purchasing entity by a local telephone company for provision of signalling for tandem switching.

[59 FR 32930, June 27, 1994]

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### §69.130 Line port costs in excess of basic analog service.

(a) To the extent that the costs of ISDN line ports, and line ports associated with other services, exceed the costs of a line port used for basic, analog service, non-price cap local exchange carriers may recover the difference through a separate monthly end-user charge, provided that no portion of such excess cost may be recovered through other common line access charges, or through Connect America Fund Broadband Loop Support.

(b) The maximum charge a non-price cap local exchange carrier that elects model-based support pursuant to §54.311 of this chapter or Alaska Plan support pursuant to §54.306 of this chapter may assess is the rate in effect on the last day of the month preceding the month for which model-based support or Alaska Plan support, as applicable, is first provided.

[81 FR 24345, Apr. 25, 2016, amended at 81 FR 69716, Oct. 7, 2016]

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### §69.131 Universal service end user charges.

To the extent the company makes contributions to the Universal Service Support Mechanisms pursuant to §§54.706 and 54.709 of this chapter and the non-price cap local exchange carrier seeks to recover some or all of the amount of such contribution, the non-price cap local exchange carrier shall recover those contributions through a charge to end users other than Lifeline users. The charge to recover these contributions is not part of any other element established pursuant to part 69. Such a charge may be assessed on a per-line basis or as a percentage of interstate retail revenues, and at the option of the local exchange carrier it may be combined for billing purposes with other end user retail rate elements. A non-price cap local exchange carrier opting to assess the Universal Service end-user rate element on a per-line basis may apply that charge using the "equivalency" relationships established for the multi-line business PICC for Primary Rate ISDN service, as per §69.153(d), and for Centrex lines, as per §69.153(e).

[66 FR 59732, Nov. 30, 2001]

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### §69.132 End user Consumer Broadband-Only Loop charge for non-price cap incumbent local exchange carriers.

(a) This section is applicable only to incumbent local exchange carriers that are not subject to price cap regulation as that term is defined in §61.3(ee) of this chapter.

(b) A charge that is expressed in dollars and cents per line per month may be assessed upon end users that subscribe to Consumer Broadband-Only Loop service. Such charge shall be assessed for each line without regulated local exchange voice service provided by a rate-of-return incumbent local exchange carrier to a customer, for use in connection with fixed Broadband Internet access service, as defined in §8.2 of this chapter.

(c) For carriers not electing model-based support pursuant to §54.311 of this chapter or Alaska Plan support pursuant to §54.306 of this chapter, the single-line rate or charge shall be computed by dividing one-twelfth of the projected annual revenue requirement for the Consumer Broadband-Only Loop category (net of the projected annual Connect America Fund Broadband Loop Support attributable to consumer broadband-only loops) by the projected average number of consumer broadband-only service lines in use during such annual period.

(d) The maximum monthly per line charge for each Consumer Broadband-Only Loop provided by a non-price cap local exchange carrier that elects model-based support pursuant to §54.311 of this chapter or Alaska Plan support pursuant to §54.306 of this chapter shall be $42.

[48 FR 10358, Mar. 11, 1983, as amended at 81 FR 24345, Apr. 25, 2016; 81 FR 69716, Oct. 7, 2016]

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## Subpart C—Computation of Charges for Price Cap Local Exchange Carriers

SOURCE: 62 FR 31935, June 11, 1997, unless otherwise noted.

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### §69.151 Applicability.

This subpart shall apply only to telephone companies subject to the price cap regulations set forth in part 61 of this chapter.

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### §69.152 End user common line for price cap local exchange carriers.

(a) A charge that is expressed in dollars and cents per line per month shall be assessed upon end users that subscribe to local exchange telephone service or Centrex service to the extent they do not pay carrier common line charges. A charge that is expressed in dollars and cents per line per month shall be assessed upon providers of public telephones. Such charge shall be assessed for each line between the premises of an end user, or public telephone location, and a Class 5 office that is or may be used for local exchange service transmissions.

(b) [Reserved]

(c) The charge for each subscriber line associated with a public telephone shall be equal to the monthly charge computed in accordance with paragraph (k) of this section.

(d)(1) Beginning July 1, 2000, in a study area that does not have deaveraged End User Common Line Charges, the maximum monthly charge for each primary residential or single-line business local exchange service subscriber line shall be the lesser of:

(i) The Average Price Cap CMT Revenue per Line month as defined in §61.3(d) of this chapter; or

(ii) The following:

(A) On July 1, 2000, $4.35.

(B) On July 1, 2001, $5.00.

(C) On July 1, 2002, $6.00.

(D) On July 1, 2003, $6.50.

(2) In the event that GDP-PI exceeds 6.5% or is less than 0%, the maximum monthly charge in paragraph (d)(1)(ii) of this section and the cap will be adjusted pursuant to §61.45(b)(1)(iii) of this chapter.

(e)(1) Beginning July 1, 2000, in a study area that does not have deaveraged End User Common Line Charges, the maximum monthly charge for each non-primary residential local exchange service subscriber line shall be the lesser of:

(i) $7.00; or

(ii) The greater of:

(A) The rate as of June 30, 2000 less reductions needed to ensure over recovery of CMT Revenues does not occur; or

(B) The Average Price Cap CMT Revenue per Line month as defined in §61.3(d) of this chapter.

(2) In the event that GDP-PI is greater than 6.5% or is less than 0%, the maximum monthly charge in paragraph (e)(1)(i) of this section and the cap will be adjusted pursuant to §61.45(b)(1)(iii) of this chapter.

(3) Where the local exchange carrier provides a residential line to another carrier so that the other carrier may resell that residential line to a residence that already receives a primary residential line, the local exchange carrier may collect the non-primary residential charge described in paragraph (e) of this section from the other carrier.

(f) The charge for each primary residential local exchange service subscriber line shall be the same as the charge for each single-line business local exchange service subscriber line.

(g) A line shall be deemed to be a residential subscriber line if the subscriber pays a rate for such line that is described as a residential rate in the local exchange service tariff.

(h) Effective July 1, 1999, only one of the residential subscriber lines a price cap local exchange carrier provides to a location shall be deemed to be a primary residential line.

(1) Effective July 1, 1999, for purposes of §69.152(h) of this chapter, “residential subscriber line” includes residential lines that a price cap local exchange carrier provides to a competitive local exchange carrier that resells the line and on which the price cap local exchange carrier may assess access charges.

(2) Effective July 1, 1999, if a customer subscribes to residential lines from a price cap local exchange carrier and at least one reseller of the price cap local exchange carrier's lines, the line sold by the price cap local exchange carrier shall be the primary line, except that if a resold price cap LEC line is already the primary line, the resold line will remain the primary line should a price cap local exchange carrier subsequently sell an additional line to that residence.

(i) A line shall be deemed to be a single-line business subscriber line if the subscriber pays a rate that is not described as a residential rate in the local exchange service tariff and does not obtain more than one such line from a particular telephone company.

(j) No charge shall be assessed for any WATS access line.

(k)(1) Beginning on July 1, 2000, for any study area that does not have deaveraged End User Common Line charges and in the absence of voluntary reductions, the maximum monthly End User Common Line Charge for multi-line business lines will be the lesser of:

(i) $9.20; or

(ii) The greater of:

(A) The rate as of June 30, 2000, less reductions needed to ensure over recovery of CMT Revenues does not occur; or

(B) The Average Price Cap CMT Revenue per Line month as defined in §61.3(d) of this chapter.

Note to paragraph (k)(1): Except when the local exchange carrier reduces the rate through voluntary reductions, the multi-line business End User Common Line charge will be frozen until the study area's multi-line business PICC and CCL charge are eliminated.

(2) In the event that GDP-PI is greater than 6.5% or is less than 0%, the maximum monthly charge in paragraph (k)(1)(i) of this section and the cap will be adjusted pursuant to §61.45(b)(1)(iii) of this chapter.

(l)(1) Beginning January 1, 1998, local exchange carrier shall assess no more than one End User Common Line charge as calculated under the applicable method under paragraph (e) of this section for Basic Rate Interface integrated services digital network (ISDN) service.

(2) Local exchange carriers shall assess no more than five End User Common Line charges as calculated under paragraph (k) of this section for Primary Rate Interface ISDN service.

(m) In the event the local exchange carrier charges less than the maximum End User Common Line charge for any subscriber lines, the local exchange carrier may not recover the difference between the amount collected and the maximum from carrier common line charges or PICCs.

(n)-(p) [Reserved]

(q) *End User Common Line Charge De-Averaging.* Beginning on July 1, 2000, local exchange carriers may geographically deaverage End User Common Line charges subject to the following conditions:

(1) In order for a price cap local exchange carrier to be allowed to de-average End User Common Line charges within a study area, the price cap local exchange carrier must have state Commission approved geographically deaveraged rates for UNE loops within that study area. Except where a LEC geographically deaverages through voluntary reductions, before a price cap local exchange carrier may geographically deaverage its End User Common Line rates, its Originating and Terminating CCL and Multi-line Business PICC rates in that study area must equal $0.00.

(2) All geographic deaveraging of End User Common Line charges by customer class within a study area must be according to the state commission-approved UNE loop zone. Solely for the purposes of determining interstate subscriber line charges and the interstate access universal service support described in §§54.806 and 54.807 of this chapter, a price cap local exchange carrier may not have more than four geographic End User Common Line Charge/Universal Service zones absent a review by the Commission. Where a price cap local exchange carrier has more than four state-created UNE zones and the Commission has not approved use of additional zones, the price cap local exchange carrier will determine, at its discretion, which state-created UNE zones to consolidate so that it has no more than four zones for the purpose of determining interstate subscriber line charges and interstate access universal service support.

(3) Within a given zone, Multi-line Business End User Common Line rates cannot fall below Primary Residential and Single-Line Business or Non-Primary Residential End User Common Line charges. Non-Primary End User Common Line charges cannot fall below Primary Residential and Single-Line Business charges.

(4) For any given class of customer in any given zone, the Zone deaveraged End User Common Line Charge in that zone must be greater than or equal to the Zone deaveraged End User Common Line charge in the zone with the next lower Zone Average Revenue Per Line.

(5) The sum of all revenues per month that would be generated from all deaveraged End User Common Line charges in all zones within a study area plus Interstate Access Universal Service Support per Line month (as defined in §54.807 of this chapter) for the applicable customer classes and zones receiving such support multiplied by corresponding base period lines, divided by the number of base period lines in that study area cannot exceed Average Price Cap CMT Revenue per Line month as defined in §61.3(d) of this chapter for that study area. In addition, the sum of revenues per month that would be generated from all deaveraged End User Common Line charges in all End User Common Line charge deaveraging zones within a study area plus revenues per month from all End User Common Line charge, multi-line business PICC and CCL charges from study areas within that study area that have not geographically deaveraged End User Common Line charges plus the sum of all Interstate Access Universal Service Support per Line month (as defined in §54.807 of this chapter) for the applicable customer classes and zones receiving such support, multiplied by the corresponding base period lines for the applicable customer classes and zones within the study area, divided by the number of total base period lines in the study area cannot exceed Average Price Cap CMT Revenue per Line month as defined in §61.3(d) of this chapter for the study area.

(6) *Maximum charge.* The maximum zone deaveraged End User Common Line Charge that may be charged in any zone is the applicable cap specified in §69.152(d)(1), §69.152(e)(1)(i) or §69.152 (k)(1)(i) Zone Average Revenue Per Line is the Average Price Cap CMT Revenue per Line month allocated to a particular state-defined zone used for deaveraging of UNE loop prices. The zone average revenue per line is computed pursuant to §61.3 (zz) of this chapter.

(7) *Minimum charge.* Except where a local exchange carrier chooses to lower the deaveraged End User Common Line charge through voluntary reductions, the minimum zone deaveraged End User Common Line charge in any zone in a study area is at least the Minimum End User Common Line charge. Minimum End User Common Line charge is Zone Average Revenue Per Line for the zone with the lowest Zone Average Revenue Per Line in that study area plus an amount per line calculated to recover the difference between Interstate Access Universal Service Support Per Line (as defined in §54.807 of this chapter) multiplied by base period lines for the applicable customer class and zones receiving such support and Study Area Above Benchmark Revenues, first from Zone 1 until the End User Common Line charges in Zone 1 equal the End User Common Line charges in Zone 2, and then from lines in Zones 1 and 2 equally until the End User Common Line charges in those Zones reach Zone 3 (with all End User Common Line charges subject to the applicable residential and multi-line business lines nominal caps).

(i) For the purposes of this part, “Study Area Above Benchmark Revenues” is the sum of all Zone Above Benchmark Revenues.

(ii) For the purposes of this part, “Zone Above Benchmark Revenues” is calculated as follows:

Zone Above Benchmark Revenues is the sum of Zone Above Benchmark Revenues for Residential and Single-line Business lines and Zone Above Benchmark Revenues for Multi-line Business lines. Zone Above Benchmark Revenues for Residential and Single-line Business lines is, within each zone, (Zone Average Revenue Per Line minus $7.00) multiplied by all eligible telecommunications carrier Base Period Residential and Single-line Business lines times 12. If negative, the Zone Above Benchmark Revenues for Residential and Single-line Business lines for the zone is zero. Zone Above Benchmark Revenues for Multi-line Business lines is, within each zone,

(Zone Average Revenue Per Line minus $9.20) multiplied by all eligible telecommunications carrier zone Base Period Multi-line Business lines times 12. If negative, the Zone Above Benchmark Revenues for Multi-line Business lines for the zone is zero.

(8) *Voluntary Reductions.* A “Voluntary Reduction” is one in which the local exchange carrier reduces prices other than through offset of net increases in End User Common Line charge revenues or Interstate Access Universal Service support received pursuant to §54.807 of this chapter, or through increases in other zone deaveraged End User Common Line charges.

[65 FR 38701, June 21, 2000; 65 FR 57744, Sept. 26, 2000]

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**§69.153 Presubscribed interexchange carrier charge (PICC).**

(a) A charge expressed in dollars and cents per line may be assessed upon the Multi-line business subscriber's presubscribed interexchange carrier to recover revenues totaling Average Price Cap CMT Revenues per Line month times the number of base period lines less revenues recovered through the End User Common Line charge established under §69.152 and Interstate Access Universal Service Support Per Line (as defined in §54.807 of this chapter) multiplied by base period lines for the applicable customer class and zones receiving such support, up to a maximum of $4.31 per line per month. In the event the ceilings on the PICC prevent the PICC from recovering all the residual common line/marketing and residual interconnection charge revenues, the PICC shall recover all residual common line/marketing revenues before it recovers residual interconnection charge revenues.

(b) If an end-user customer does not have a presubscribed interexchange carrier, the local exchange carrier may collect the PICC directly from the end user.

(c) [Reserved]

(d) Local exchange carriers shall assess no more than five PICCs as calculated under paragraph (a) of this section for Primary Rate Interface ISDN service.

(e) The maximum monthly PICC for Centrex lines shall be one-ninth of the maximum charge determined under paragraph (a) of this section, except that if a Centrex customer has fewer than nine lines, the maximum monthly PICC for those lines shall be the maximum charge determined under paragraph (a) of this section divided by the customer's number of Centrex lines.

(f) The PICC shall not be applicable to any payphone lines.

(g)-(h) [Reserved]

[65 FR 38703, June 21, 2000; 65 FR 57744, Sept. 26, 2000, as amended at 68 FR 43329, July 22, 2003]

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**§69.154 Per-minute carrier common line charge.**

(a) Local exchange carriers may recover a per-minute carrier common line charge from interexchange carriers, collected on originating access minutes and calculated using the weighting method set forth in paragraph (c) of this section. The maximum such charge shall be the lower of:

(1) The per-minute rate using base period demand that would recover the maximum allowable carrier common line revenue as defined in §61.46(d) of this chapter; or

(2) The sum of the local switching, carrier common line and interconnection charge charges assessed on originating minutes on December 31, 1997, minus the local switching charges assessed on originating minutes.

(b) To the extent that paragraph (a) of this section does not recover from interexchange carriers all permitted carrier common line revenue, the excess may be collected through a per-minute charge on terminating access calculated using the weighting method set forth in paragraph (c) of this section.

(c) For each Carrier Common Line access element tariff, the premium originating Carrier Common Line charge shall be set at a level that recovers revenues allowed under paragraphs (a) and (b) of this section. The non-premium charges shall be equal to .45 multiplied by the premium charges.

[62 FR 31935, June 11, 1997, as amended at 65 FR 38703, June 21, 2000]

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**§69.155 Per-minute residual interconnection charge.**

(a) Local exchange carriers may recover a per-minute residual interconnection charge on originating access. The maximum such charge shall be the lower of:

(1) The per-minute rate that would recover the total annual residual interconnection charge revenues permitted less the portion of the residual interconnection charge allowed to be recovered under §69.153; or

(2) The sum of the local switching, carrier common line and residual interconnection charges assessed on originating minutes on December 31, 1997, minus the local switching charges assessed on originating minutes, less the maximum amount allowed to be recovered under §69.154(a).

(b) To the extent that paragraph (a) of this section prohibits a local exchange carrier from recovering all of the residual interconnection charge revenues permitted, the residual may be collected through a per-minute charge on terminating access.

(c)(1) No portion of the charge assessed pursuant to paragraphs (a) or (b) of this section that recovers revenues that the local exchange carrier anticipates will be reassigned to other, facilities-based rate elements, including the tandem-switching rate element described in §69.111(g), the three-part tandem switched transport rate structure described in §69.111(a)(2), and port and multiplexer charges described in §69.111(l), shall be assessed upon minutes utilizing the local exchange carrier's local switching facilities, but not the local exchange carrier's transport service.

(2) If a local exchange carrier cannot recover its full residual interconnection charge revenues through the PICC mechanism established in §69.153, and will consequently cover a portion of its residual interconnection charge revenues through per-minute charges assessed pursuant to paragraphs (a) and (b) of this section, then the local exchange carrier must allocate its residual interconnection charge revenues subject to the exemption established in paragraph (c)(1) of this section between the PICC and the per-minute residual interconnection charge in the same proportion as other residual interconnection charge revenues are allocated between these two recovery mechanisms.

[62 FR 31938, June 11, 1997; 62 FR 40460, July 29, 1997, as amended at 62 FR 56133, Oct. 29, 1997]

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**§69.156 Marketing expenses.**

Effective July 1, 2000, the marketing expenses formerly allocated to the common line and traffic sensitive baskets, and the switched services within the trunking basket pursuant to §32.6610 of this chapter and §69.403 will now be recovered in the

CMT basket created pursuant to §61.42(d)(1) of this chapter. These marketing expenses will be recovered through the elements outlined in §§69.152, 69.153 and 69.154.

[65 FR 38703, June 21, 2000]

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**§69.157 Line port costs in excess of basic, analog service.**

To the extent that the costs of ISDN line ports, and line ports associated with other services, exceed the costs of a line port used for basic, analog service, local exchange carriers may recover the difference through a separate monthly end-user charge. As of June 30, 2000, these rates will be capped until June 30, 2005.

[65 FR 38704, June 21, 2000; 65 FR 57744, Sept. 26, 2000]

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**§69.158 Universal service end user charges.**

To the extent the company makes contributions to the Universal Service Support Mechanisms pursuant to §§54.706 and 54.709 of this chapter and the local exchange carrier seeks to recover some or all of the amount of such contribution, the local exchange carrier shall recover those contributions through a charge to end users other than Lifeline users. These contributions are not a part of any price cap baskets, and the charge to recover these contributions is not part of any other element established pursuant to part 69. Such a charge may be assessed on a per-line basis or as a percentage of interstate retail revenues, and at the option of the local exchange carrier it may be combined for billing purposes with other end user retail rate elements. A local exchange carrier opting to assess the Universal Service end-user rate element on a per-line basis may apply that charge using the “equivalency” relationships established for the multi-line business PICC for Primary Rate ISDN service, as per §69.153(d), and for Centrex lines, as per §69.153(e).

[65 FR 38704, June 21, 2000; 65 FR 57744, Sept. 26, 2000]

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## Subpart D—Apportionment of Net Investment

Source: 52 FR 37312, Oct. 6, 1987, unless otherwise noted.

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**§69.301 General.**

(a) For purposes of computing annual revenue requirements for access elements net investment as defined in §69.2 (z) shall be apportioned among the interexchange category, the billing and collection category and access elements as provided in this subpart. For purposes of this subpart, local transport includes five elements: entrance facilities, direct-trunked transport, tandem-switched transport, dedicated signaling transport, and the interconnection charge. Expenses shall be apportioned as provided in subpart E of this part.

(b) The End User Common Line and Carrier Common Line elements shall be combined for purposes of this subpart and subpart E of this part. Those elements shall be described collectively as the Common Line element. The Common Line element revenue requirement shall be segregated in accordance with subpart F of this part.

[52 FR 37312, Oct. 6, 1987, as amended at 57 FR 54722, Nov. 20, 1992]

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**§69.302 Net investment.**

(a) Investment in Accounts 2001, 1220 and Class B Rural Telephone Bank Stock booked in Account 1410 shall be apportioned among the interexchange category, billing and collection category and appropriate access elements as provided in §§69.303 through 69.309.

(b) Investment in Accounts 2002, 2003 and to the extent such inclusions are allowed by this Commission, Account 2005 shall be apportioned on the basis of the total investment in Account 2001, Telecommunications Plant in Service.

[52 FR 37312, Oct. 6, 1987, as amended at 54 FR 3456, Jan. 24, 1989; 67 FR 5703, Feb. 6, 2002]

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### §69.303 Information origination/termination equipment (IOT).

Investment in all other IOT shall be apportioned between the Special Access and Common Line elements on the basis of the relative number of equivalent lines in use, as provided herein. Each interstate or foreign Special Access Line, excluding lines designated in §69.115(e), shall be counted as one or more equivalent lines where channels are of higher than voice bandwidth, and the number of equivalent lines shall equal the number of voice capacity analog or digital channels to which the higher capacity is equivalent. Local exchange subscriber lines shall be multiplied by the interstate Subscriber Plant Factor to determine the number of equivalent local exchange subscriber lines.

[52 FR 37312, Oct. 6, 1987, as amended at 62 FR 31938, June 11, 1997]

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### §69.304 Subscriber line cable and wire facilities.

(a) Investment in local exchange subscriber lines shall be assigned to the Common Line element.

(b) Investment in interstate and foreign private lines and interstate WATS access lines shall be assigned to the Special access element.

[52 FR 37312, Oct. 6, 1987, as amended at 62 FR 31938, June 11, 1997]

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### §69.305 Carrier cable and wire facilities (C&WF).

(a) Carrier C&WF that is not used for “origination” or “termination” as defined in §69.2(bb) and §69.2(cc) shall be assigned to the interexchange category.

(b) Carrier C&WF, other than WATS access lines, not assigned pursuant to paragraph (a), (c), or (e) of this section that is used for interexchange services that use switching facilities for origination and termination that are also used for local exchange telephone service shall be apportioned to the local Transport elements.

(c) Carrier C&WF that is used to provide transmission between the local exchange carrier's signalling transfer point and the database shall be assigned to the Line Information Database sub-element at §69.120(a).

(d) All Carrier C&WF that is not apportioned pursuant to paragraphs (a), (b), (c), and (e) of this section shall be assigned to the Special Access element.

(e) Carrier C&WF that is used to provide transmission between the local exchange carrier's signalling transfer point and the local switch shall be assigned to the local switching category.

[52 FR 37312, Oct. 6, 1987, as amended at 57 FR 24380, June 9, 1992; 58 FR 30995, May 28, 1993; 62 FR 31938, June 11, 1997]

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### §69.306 Central office equipment (COE).

(a) The Separations Manual categories shall be used for purposes of apportioning investment in such equipment except that any Central office equipment attributable to local transport shall be assigned to the Transport elements.

(b) COE Category 1 (Operator Systems Equipment) shall be apportioned among the interexchange category and the access elements as follows: Category 1 that is used for intercept services shall be assigned to the Local Switching element. Category 1 that is used for directory assistance shall be assigned to the Information element. Category 1 other than service observation boards that is not assigned to the Information element and is not used for intercept services shall be assigned to the interexchange category. Service observation boards shall be apportioned among the interexchange category, and the Information and Transport access elements based on the remaining combined investment in COE Category 1, Category 2 and Category 3.

(c) COE Category 2 (Tandem Switching Equipment) that is deemed to be exchange equipment for purposes of the Modification of Final Judgment in *United States* v. *Western Electric Co.* shall be assigned to the tandem switching charge subelement and the interconnection charge element. COE Category 2 which is associated with the signal transfer point function shall be assigned to the local switching category. COE Category 2 which is used to provide transmission facilities between the local exchange carrier's signalling transfer point and the database shall be assigned to the Line Information Database subelement at §69.120(a). All other COE Category 2 shall be assigned to the interexchange category.

(d) COE Category 3 (Local Switching Equipment) shall be assigned to the Local Switching element except as provided in paragraph (a) of this section; and that,

(1) For telephone companies subject to price cap regulation set forth in part 61 of this chapter, line-side port costs shall be assigned to the Common Line rate element; and

(2) [Reserved]

(3) Beginning July 1, 2012, a non-price cap local exchange carrier shall assign line-side port costs to the Common Line rate element equal to the amount of line-side port costs it shifted in its 2011 projected Interstate Switched Access Revenue Requirement.

(e) COE Category 4 (Circuit Equipment) shall be apportioned among the interexchange category and the Common Line, Transport, and Special Access elements. COE Category 4 shall be apportioned in the same proportions as the associated Cable and Wireless Facilities; except that any DS1/voice-grade multiplexer investment associated with analog local switches and assigned to the local transport category by this section shall be reallocated to the local switching category.

[52 FR 37312, Oct. 6, 1987, as amended at 57 FR 54722, Nov. 20, 1992; 58 FR 30995, May 28, 1993; 62 FR 31938, June 11, 1997; 66 FR 59732, Nov. 30, 2001; 78 FR 26269, May 6, 2013; 81 FR 24345, Apr. 25, 2016]

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### §69.307 General support facilities.

(a) General purpose computer investment used in the provision of the Line Information Database sub-element at §69.120(b) shall be assigned to that sub-element.

(b) General purpose computer investment used in the provision of the billing name and address element at §69.128 shall be assigned to that element.

(c)(1) Until June 30, 2002, for all local exchange carriers not subject to price cap regulation and for other carriers that acquire all of the billing and collection services that they provide to interexchange carriers from unregulated affiliates through affiliate transactions, from unaffiliated third parties, or from both of these sources, all other General Support Facilities investments shall be apportioned among the interexchange category, the billing and collection category, and Common Line, Local Switching, Information, Transport, and Special Access elements on the basis of Central Office Equipment, Information Origination/Termination Equipment, and Cable and Wire Facilities, combined.

(2) Beginning July 1, 2002, for all local exchange carriers that acquire all of the billing and collection services that they provide to interexchange carriers from unregulated affiliates through affiliate transactions, from unaffiliated third parties, or from both of these sources, all other General Support Facilities investments shall be apportioned among the interexchange category, the billing and collection category, and Common Line, Local Switching, Information, Transport, and Special Access elements on the basis of Central Office Equipment, Information Origination/Termination Equipment, and Cable and Wire Facilities, combined.

(d) For local exchange carriers subject to price cap regulation and not covered by Section 69.307(c), a portion of General purpose computer investment (Account 2124), investment in Land (Account 2111), Buildings (Account 2121), and Office equipment (Account 2123) shall be apportioned to the billing and collection category on the basis of the Big Three Expense Factors allocator, defined in Section 69.2 of this Part, modified to exclude expenses that are apportioned on the basis of allocators that include General Support Facilities investment. The remaining portion of investment in these four accounts together with all other General Support Facilities investments shall be apportioned among the interexchange category, the billing and collection category, and Common Line, Local Switching, Information, Transport, and Special Access Elements on the basis of Central Office Equipment, Information Origination/Termination Equipment, and Cable and Wire Facilities, combined.

(e) Beginning July 1, 2002, for non-price cap local exchange carriers not covered by §69.307(c)(2), a portion of General purpose computer investment shall be apportioned to the billing and collection category on the basis of the Big Three Expense Factors allocator, defined in §69.2, modified to exclude expenses that are apportioned on the basis of allocators that include General Support Facilities investment. The remaining General Support Facilities investments shall be apportioned among the interexchange category, the billing and collection category, and Common Line, Local Switching, Information, Transport, and Special Access Elements on the basis of Central Office Equipment, Information Origination/Termination Equipment, and Cable and Wire Facilities, combined.

[58 FR 30995, May 28, 1993, as amended at 58 FR 36145, July 6, 1993; 62 FR 31939, June 11, 1997; 62 FR 40464, July 29, 1997; 62 FR 65622, Dec. 15, 1997; 66 FR 59732, Nov. 30, 2001]

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### §69.308 [Reserved]

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**§69.309 Other investment.**

Investment that is not apportioned pursuant to §§69.302 through 69.307 shall be apportioned among the interexchange category, the billing and collection category and access elements in the same proportions as the combined investment that is apportioned pursuant to §§69.303 through 69.307.

[62 FR 31939, June 11, 1997]

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**§69.310 Capital leases.**

Capital Leases in Account 2680 shall be directly assigned to the appropriate interexchange category or access elements consistent with the treatment prescribed for similar plant costs or shall be apportioned in the same manner as Account 2001.

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**§69.311 Consumer Broadband-Only Loop investment.**

Link to an amendment published at 83 FR 14189, Apr. 3, 2018.

(a) Each non-price cap local exchange carrier shall remove consumer broadband-only loop investment assigned to the special access category by §§69.301 through 69.310 from the special access category and assign it to the Consumer Broadband-Only Loop category when the tariff charge described in §69.132 of this part becomes effective.

(b) The consumer broadband-only loop investment to be removed from the special access category shall be determined using the following estimation method.

(1) To determine the investment in Common Line facilities as if 100 percent were allocated to the interstate jurisdiction, a carrier shall use 100 percent as the interstate allocator in determining investment and the allocation of investment to the common line category under part 36 of this chapter and this part.

(2) The result of paragraph (b)(1) of this section shall be divided by the number of voice and voice/data lines in the study area to produce an average investment per line.

(3) The average investment per line determined by paragraph (b)(2) of this section shall be multiplied by the number of Consumer Broadband-only Loops in the study area to derive the investment to be shifted from the Special Access category to the Consumer Broadband-only Loop category.

[81 FR 24345, Apr. 25, 2016, as amended at 82 FR 14340, Mar. 20, 2017]

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## Subpart E—Apportionment of Expenses

Source: 52 FR 37313, Oct. 6, 1987, unless otherwise noted.

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**§69.401 Direct expenses.**

(a) Plant Specific Operations Expenses in Accounts 6110 and 6120 shall be apportioned among the interexchange category, the billing and collection category and appropriate access elements on the following basis:

(1) Account 6110—Apportion on the basis of other investment apportioned pursuant to §69.309.

(2) Account 6120—Apportion on the basis of General and Support Facilities investment pursuant to §69.307.

(b) Plant Specific Operations Expenses in Accounts 6210, 6220, and 6230, shall be apportioned among the interexchange category and access elements on the basis of the apportionment of the investment in Accounts 2210, 2220, and 2230, respectively; provided that any expenses associated with DS1/voice-grade multiplexers, to the extent that they are not associated with an analog tandem switch, assigned to the local transport category by this paragraph shall be reallocated to the local switching category; provided further that any expenses associated with common channel signalling included in Account 6210 shall be assigned to the local transport category.

(c) Plant Specific Operations Expenses in Accounts 6310 and 6410 shall be assigned to the appropriate investment category and shall be apportioned among the interexchange category and access elements in the same proportions as the total associated investment.

(d) Plant Non Specific Operations Expenses in Accounts 6510 and 6530 shall be apportioned among the interchange category, the billing and collection category, and access elements in the same proportions as the combined investment in COE, IOT, and C&WF apportioned to each element and category.

(e) Plant Non Specific Operations Expenses in Account 6540 shall be assigned to the interexchange category.

(f) Plant Non Specific Operations Expenses in Account 6560 shall be apportioned among the interexchange category, the billing and collection category, and access elements in the same proportion as the associated investment.

(g) Amortization of embedded customer premises wiring investment shall be deemed to be associated with §69.303(b) IOT investment for purposes of the apportionment described in paragraph (c) of this section.

[52 FR 37313, Oct. 6, 1987, as amended at 62 FR 31939, June 11, 1997]

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**§69.402 Operating taxes (Account 7200).**

(a) Federal income taxes, state and local income taxes, and state and local gross receipts or gross earnings taxes that are collected in lieu of a corporate income tax shall be apportioned among the interexchange category, the billing and collection category and all access elements based on the approximate net taxable income on which the tax is levied (positive or negative) applicable to each element and category.

(b) All other operating taxes shall be apportioned among the interexchange category, the billing and collection category and all access elements in the same manner as the investment apportioned to each element and category pursuant to §69.309 Other Investment.

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**§69.403 Marketing expense (Account 6610).**

Marketing expense shall be apportioned among the interexchange category and all access elements in the same proportions as the combined investment that is apportioned pursuant to §69.309.

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**§69.404 Telephone operator services expenses in Account 6620.**

Telephone Operator Services expenses shall be apportioned among the interexchange category, and the Local Switching and Information elements based on the relative number of weighted standard work seconds. For those companies who contract with another company for the provision of these services, the expenses incurred shall be directly assigned among the interexchange category and the Local Switching and Information elements on the basis of the bill rendered for the services provided.

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**§69.405 Published directory expenses in Account 6620.**

Published Directory expenses shall be assigned to the Information element.

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**§69.406 Local business office expenses in Account 6620.**

(a) Local business office expenses shall be assigned as follows:

(1) End user service order processing expenses attributable to presubscription shall be apportioned among the Common Line, Switching, and Transport elements in the same proportion as the investment apportioned to those elements pursuant to §69.309.

(2) End user service order processing, payment and collection, and billing inquiry expenses attributable to the company's own interstate private line and special access service shall be assigned to the Special Access element.

(3) End user service order processing, payment and collection, and billing inquiry expenses attributable to interstate private line service offered by an interexchange carrier shall be assigned to the billing and collection category.

(4) End user service order processing, payment and collection, and billing inquiry expenses attributable to the company's own interstate message toll service shall be assigned to the interexchange category. End user service order processing, payment and collection, and billing inquiry expenses attributable to interstate message toll service offered by an interexchange carrier shall be assigned to the billing and collection category. End user payment and collection and billing inquiry expenses attributable to End User Common Line access billing shall be assigned to the Common Line element.

(5) End user service order processing, payment and collection, and billing inquiry expenses attributable to TWX service shall be assigned to the Special Access element.

(6) Interexchange carrier service order processing, payment and collection, and billing inquiry expenses attributable to private lines and special access shall be assigned to the Special Access element.

(7) Interexchange carrier service order processing, payment and collection, and billing inquiry expenses attributable to interstate switched access and message toll, shall be apportioned among the Common Line, Local Switching and Transport elements in the same proportion as the investment apportioned to those elements pursuant to §69.309.

(8) Interexchange carrier service order processing, payment and collection, and billing inquiry expenses attributable to billing and collection service shall be assigned to the billing and collection category.

[52 FR 37313, Oct. 6, 1987, as amended at 62 FR 31939, June 11, 1997]

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**§69.407 Revenue accounting expenses in Account 6620.**

(a) Revenue accounting expenses that are attributable to End User Common Line access billings shall be assigned to the Common Line element.

(b) Revenue Accounting Expenses that are attributable to carrier's carrier access billing and collecting expense shall be apportioned among all carrier's carrier access elements except the Common Line element. Such expenses shall be apportioned in the same proportion as the combined investment in COE, C&WF and IOT apportioned to those elements.

(c) Revenue Accounting Expenses allocated to the interstate jurisdiction that are attributable to the provision of billing name and address information shall be assigned to the Billing Name and Address element.

(d) All other Revenue Accounting Expenses shall be assigned to the billing and collection category.

[52 FR 37313, Oct. 6, 1987, as amended at 58 FR 65671, Dec. 16, 1993]

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**§69.408 All other customer services expenses in Account 6620.**

All other customer services expenses shall be apportioned among the Interexchange category, the billing and collection category and all access elements based on the combined expenses in §§69.404 through 69.407.

[52 FR 37313, Oct. 6, 1987, as amended at 54 FR 3456, Jan. 24, 1989]

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**§69.409 Corporate operations expenses (included in Account 6720).**

All corporate operations expenses shall be apportioned among the interexchange category, the billing and collection category and all access elements in accordance with the Big 3 Expense Factor as defined in §69.2(f).

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**§69.411 Other expenses.**

Except as provided in §§69.412, 69.413, and 69.414, expenses that are not apportioned pursuant to §§69.401 through 69.409 shall be apportioned among the interexchange category and all access elements in the same manner as §69.309 Other investment.

[62 FR 31639, June 11, 1997]

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### §69.412 Non participating company payments/receipts.

For telephone companies that are not association Common Line tariff participants, the payment or receipt of funds described in §69.612(a) and (b) shall be apportioned, respectively, as an addition to or a deduction from their common line revenue requirement.

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### §69.413 High cost loop support universal service fund expenses.

Beginning April 1, 1989, expenses allocated to the interstate jurisdiction pursuant to §§54.1310 and 36.641 of this chapter shall be assigned to the Universal Service Fund Element.

[79 FR 39193, July 9, 2014]

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### §69.414 Lifeline assistance expenses.

Expenses allocated to the interstate jurisdiction pursuant to §36.741 shall be assigned to the Carrier Common Line element until March 31, 1989. Beginning April 1, 1989, such expenses shall be assigned to the Lifeline Assistance element.

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### §69.415 Reallocation of certain transport expenses.

(a)-(c) [Reserved]

(d) Beginning July 1, 2012, the amount of the Transport Interconnection Charges to be reallocated to each category shall be equal to the amount of Transport Interconnection Charge costs the non-price cap local exchange carrier was projected to shift to each category in projecting its 2011 Interstate Switched Access Revenue Requirement.

[66 FR 59733, Nov. 30, 2001, as amended at 78 FR 5750, Jan. 28, 2013; 78 FR 26269, May 6, 2013; 81 FR 24346, Apr. 25, 2016]

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### §69.416 Consumer Broadband-Only Loop expenses.

Link to an amendment published at 83 FR 14189, Apr. 3, 2018.

(a) Each non-price cap local exchange carrier shall remove consumer broadband-only loop expenses assigned to the Special Access category by §§69.401 through 69.415 from the special access category and assign them to the Consumer Broadband-Only Loop category when the tariff charge described in §69.132 of this Part becomes effective.

(b) The consumer broadband-only loop expenses to be removed from the special access category shall be determined using the following estimation method.

(1) The expenses assigned to the Common Line category as if the common line expenses were 100 percent interstate shall be determined using the methodology employed in §69.311(b)(1).

(2) The result of paragraph (b)(1) of this section shall be divided by the number of voice and voice/data lines in the study area to produce an average expense per line.

(3) The average expense per line determined by paragraph (b)(2) of this section shall be multiplied by the number of Consumer Broadband-only Loops in the study area to derive the expenses to be shifted from the Special Access category to the Consumer Broadband-only Loop category.

[81 FR 24346, Apr. 25, 2016]

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## Subpart F—Segregation of Common Line Element Revenue Requirement

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### §69.501 General.

(a) [Reserved]

(b) Until December 31, 2001, any portion of the Common Line element annual revenue requirement that is attributable to CPE investment or expense or surrogate CPE investment or expense shall be assigned to the Carrier Common Line element or elements.

(c) Until December 31, 2001, any portion of the Common Line element annual revenue requirement that is attributable to customer premises wiring included in IOT investment or expense shall be assigned to the Carrier Common Line element or elements.

(d) [Reserved]

(e) Until December 31, 2001, any portion of the Common Line element revenue requirement that is not assigned to Carrier Common Line elements pursuant to paragraphs (b) and (c) of this section shall be apportioned between End User Common Line and Carrier Common Line pursuant to §69.502. Such portion of the Common Line element annual revenue requirement shall be described as the base factor portion for purposes of this subpart.

(f) Beginning January 1, 2002, the Common Line element revenue requirement shall be apportioned between End User Common Line and Carrier Common Line pursuant to §69.502. The Common Line element annual revenue requirement shall be described as the base factor portion for purposes of this subpart.

[48 FR 10358, Mar. 11, 1983, as amended at 50 FR 18262, Apr. 30, 1985; 52 FR 21542, June 8, 1987; 52 FR 37314, Oct. 6, 1987; 61 FR 65364, Dec. 12, 1996; 62 FR 31939, June 11, 1997; 66 FR 59733, Nov. 30, 2001]

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**§69.502 Base factor allocation.**

Projected revenues from the following shall be deducted from the base factor portion to determine the amount that is assigned to the Carrier Common Line element:

(a) End User Common Line charges, less any marketing expense revenues recovered through end user common line charges pursuant to §69.156;

(b) Special Access surcharges; and

(c) Beginning July 1, 2002, the portion of per-line support that carriers receive pursuant to §54.901 of this chapter; and

(d) Line port costs in excess of basic analog service pursuant to §69.130.

[62 FR 31939, June 11, 1997, as amended at 62 FR 40464, July 29, 1997; 66 FR 59733, Nov. 30, 2001; 78 FR 5750, Jan. 28, 2013]

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## Subpart G—Exchange Carrier Association

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**§69.601 Exchange carrier association.**

(a) An association shall be established in order to prepare and file access charge tariffs on behalf of all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company for all access elements.

(b) All telephone companies that participate in the distribution of Carrier Common Line revenue requirement, pay long term support to association Common Line tariff participants, or receive payments from the transitional support fund administered by the association shall be deemed to be members of the association.

(c) All data submissions to the association required by this title shall be accompanied by the following certification statement signed by the officer or employee responsible for the overall preparation for the data submission:

Certification

I am (title of certifying officer or employee). I hereby certify that I have overall responsibility for the preparation of all data in the attached data submission for (name of carrier) and that I am authorized to execute this certification. Based on information known to me or provided to me by employees responsible for the preparation of the data in this submission, I hereby certify that the data have been examined and reviewed and are complete, accurate, and consistent with the rules of the Federal Communications Commission.

Date:

Name:________________________________________

Title:________________________________________

(Persons making willful false statements in this data submission can be punished by fine or imprisonment under the provisions of the U.S. Code, Title 18, Section 1001).

[48 FR 10358, Mar. 11, 1983, as amended at 52 FR 21542, June 8, 1987; 60 FR 19530, Apr. 19, 1995]

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**§69.602 Board of directors.**

(a) For purposes of this section, the association membership shall be divided into three subsets:

(1) The first subset shall consist of the telephone companies owned and operated by the seven Regional Bell Holding Companies;

(2) The second subset shall consist of all other telephone companies with annual operating revenues in excess of forty million dollars;

(3) The third subset shall consist of all other telephone companies. All commonly controlled companies shall be deemed to be one company for purposes of this section.

(b) There shall be fifteen directors of the association.

(c) Two directors shall represent the first subset, two directors shall represent the second subset, six directors shall represent the third subset, and five directors shall represent all three subsets.

(d) No director who represents all three subsets shall be a current or former officer or employee of the association or of any association member, or have a business relationship or other interest that could interfere with his or her exercise of independent judgment.

(e) Each subset of the association membership shall select the directors who will represent it through elections in which each member of the subset shall be entitled to one vote for each director position within that subset.

(f) The association membership shall select the directors who will represent all three subsets through an election in which each member of the association shall be entitled to one vote for each director position. No director representing all three subsets may serve for more than six consecutive calendar years without standing for an election in which that director is opposed by at least one other candidate meeting the qualifications in paragraph (d) of this section.

(g) At least one director representing all three subsets shall be a member of each committee of association directors.

(h) For each access element or group of access elements for which voluntary pooling is permitted, there shall be a committee that is responsible for the preparation of charges for the associated access elements that comply with all applicable sections in this part.

[60 FR 19530, Apr. 19, 1995, as amended at 68 FR 46502, Aug. 6, 2003]

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**§69.603 Association functions.**

(a) The Association shall not engage in any activity that is not related to the preparation of access charge tariffs or the collection and distribution of access charge revenues or the operation of a billing and collection pool on an untariffed basis unless such activity is expressly authorized by order of the Commission.

(b) Participation in Commission or court proceedings relating to access charge tariffs, the billing and collection of access charges, the distribution of access charge revenues, or the operation of a billing and collection pool on an untariffed basis shall be deemed to be authorized association activities.

(c)-(e) [Reserved]

(f) The association shall also prepare and file an access charge tariff containing terms and conditions for access service and form for the filing of rate schedules by telephone companies that choose to reference these terms and conditions while filing their own access rates.

(g) The association shall divide the expenses of its operations into two categories. The first category ("Category I Expenses") shall consist of those expenses that are associated with the preparation, defense, and modification of association tariffs, those expenses that are associated with the administration of pooled receipts and distributions of exchange carrier revenues resulting from association tariffs, those expenses that are associated with association functions pursuant to paragraphs (c) through (g) of this section, and those expenses that pertain to Commission proceedings involving this subpart. The second category ("Category II Expenses") shall consist of all other association expenses. Category I Expenses shall be sub-divided into three components in proportion to the revenues associated with each component. The first component ("Category I.A Expenses") shall be in proportion to High Cost Loop Support revenues. The second component ("Category I.B Expenses") shall be in proportion to the sum of the association End User Common Line revenues and the association Special Access Surcharge revenues. Interstate Common Line Support Revenues and Connect America Fund Broadband Loop Support revenues shall be included in the allocation base for Category I.B expenses. The third component ("Category I.C Expenses") shall be in proportion to the revenues from all other association interstate access charges.

(h)(1) The revenue requirement for association tariffs filed pursuant to §69.4(c) shall not include any association expenses other than Category I.A Expenses.

(2) The revenue requirement for association tariffs filed pursuant to §69.4 (a) and (b)(2) shall not include any Association expenses other than Category I.B Expenses.

(3) The revenue requirement for association tariffs filed pursuant to §69.4(b) (1) and (3)-(7) shall not include any association expenses other than Category I.C Expenses.

(4) No distribution to an exchange carrier of High Cost Loop Support revenues shall include adjustments for association expenses other than Category I.A. Expenses.

(5) No distribution to an exchange carrier of revenues from association End User Common Line charges shall include adjustments for association expenses other than Category I.B Expenses. Interstate Common Line Support and Connect America Fund Broadband Loop Support shall be subject to this provision.

(6) No distribution to an exchange carrier of revenues from association interstate access charges other than End User Common Line charges and Special Access Surcharges shall include adjustments for association expenses other than Category I.C Expenses.

(7) The association shall separately identify all Category I.A, I.B and I.C expenses in cost support materials filed with each annual association access tariff filing.

[54 FR 8197, Feb. 27, 1989, as amended at 54 FR 8199, Feb. 27, 1989; 62 FR 41306, Aug. 1, 1997; 63 FR 70578, Dec. 21, 1998; 66 FR 59733, Nov. 30, 2001; 81 FR 24346, Apr. 25, 2016]

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**§69.604 Billing and collection of access charges.**

(a) Telephone companies shall bill and collect all access charges except those charges specified in §§69.116 and 69.117.

(b) All access charges shall be billed monthly.

[51 FR 9012, Mar. 17, 1986, as amended at 52 FR 21543, June 8, 1987]

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**§69.605 Reporting and distribution of pool access revenues.**

(a) Access revenues and cost data shall be reported by participants in association tariffs to the association for computation of monthly pool revenues distributions in accordance with this subpart.

(b) Association expenses incurred during the month that are allowable access charge expenses shall be reimbursed before any other funds are disbursed.

(c) Except as provided in paragraph (b) of this section, payments to average schedule companies that are computed in accordance with §69.606 shall be disbursed before any other funds are disbursed. For purposes of this part, a telephone company that was participating in average schedule settlements on December 1, 1982, shall be deemed to be an average schedule company except that any company that does not join in association tariffs for all access elements shall not be deemed to be an average schedule company.

(d) The residue shall be disbursed to telephone companies that are not average schedule companies in accordance with §§69.607 through 69.610.

(e) The association shall submit a report on or before February 1 of each calendar year describing the association's cost study review process for the preceding calendar year as well as the results of that process. For any revisions to cost study results made or recommended by the association that would change the respective carrier's calculated annual common line or traffic sensitive revenue requirement by ten percent or more, the report shall include the following information:

(1) The name of the carrier;

(2) A detailed description of the revisions;

(3) The amount of the revisions;

(4) The impact of the revisions on the carrier's calculated common line and traffic sensitive revenue requirements; and

(5) The carrier's total annual common line and traffic sensitive revenue requirement.

[48 FR 10358, Mar. 11, 1983, as amended at 51 FR 17027, May 8, 1986; 52 FR 21543, June 8, 1987; 54 FR 11537, Mar. 21, 1989; 60 FR 19530, Apr. 19, 1995]

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### §69.606 Computation of average schedule company payments.

(a) Payments shall be made in accordance with a formula approved or modified by the Commission. Such formula shall be designed to produce disbursements to an average schedule company that simulate the disbursements that would be received pursuant to §69.607 by a company that is representative of average schedule companies.

(b) The association shall submit a proposed revision of the formula for each annual period subsequent to December 31, 1986, or certify that a majority of the directors of the association believe that no revisions are warranted for such period on or before December 31 of the preceding year.

(47 U.S.C. 154 (i) and (j), 201, 202, 203, 205, 218 and 403 and 5 U.S.C. 553)

[48 FR 10358, Mar. 11, 1983, as amended at 50 FR 41356, Oct. 10, 1985; 55 FR 6990, Feb. 28, 1990]

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### §69.607 Disbursement of Carrier Common Line residue.

(a) The association shall compute a monthly net balance for each member telephone company that is not an average schedule company. If such a company has a negative net balance, the association shall bill that amount to such company. If such a company has a positive net balance, the association shall disburse that amount to such company.

(b) The net balance for such a company shall be computed by multiplying a hypothetical net balance for such a company by a factor that is computed by dividing the Carrier Common Line residue by the sum of the hypothetical net balances for such companies.

(c) The hypothetical net balance for each company shall be the sum of the hypothetical net balances for each access element. Such hypothetical net balances shall be computed in accordance with §§69.608 to 69.610.

[48 FR 10358, Mar. 11, 1983, as amended at 51 FR 42237, Nov. 24, 1986]

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### §69.608 Carrier Common Line hypothetical net balance.

The hypothetical net balance shall be equal to a Carrier Common Line revenue requirement for each such company that is computed in accordance with subpart F of this part.

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### §69.609 End User Common Line hypothetical net balances.

(a) If the company does not participate in the association tariff for such element, the hypothetical net balance shall be zero.

(b) If the company does participate in the association tariff for such element, the hypothetical net balance shall be computed by multiplying an amount that is computed by deducting access revenues collected by such company for such element from an End User Common Line revenue requirement for such company that is computed in accordance with subpart F of this part by a factor that is computed by dividing access revenues collected by all such companies for such element by an End User Common Line revenue requirement for all such companies that is computed in accordance with subpart F of this part. For purposes of this calculation, access revenues collected shall include any revenues foregone because of a voluntary reduction made pursuant to §69.104(r)(7).

[48 FR 10358, Mar. 11, 1983, as amended at 66 FR 59733, Nov. 30, 2001]

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**§69.610 Other hypothetical net balances.**

(a) The hypothetical net balance for an access element other than a Common Line element shall be computed as provided in this section.

(b) If the company does not participate in the association tariff for such element, the hypothetical net balance shall be zero.

(c) If the company does participate in the association tariff for such element, the hypothetical net balance shall be computed by deducting access revenues collected for such element from the sum of expense attributable to such element and the element residue apportioned to such company. The element residue shall be apportioned among such companies in the same proportions as the net investment attributable to such element.

(d) The element residue shall be computed by deducting expenses of all participating companies attributable to such element from revenues collected by all participating companies for such element.

[48 FR 10358, Mar. 11, 1983, as amended at 51 FR 42237, Nov. 24, 1986]

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## Subpart H—Pricing Flexibility

Source: 64 FR 51267, Sept. 22, 1999, unless otherwise noted.

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**§69.701 Application of the rules in this subpart.**

The rules in this subpart apply to all incumbent LECs subject to price cap regulation, as defined in §61.3(bb) of this chapter, seeking pricing flexibility on the basis of the development of competition in parts of its service area for switched access services only.

[82 FR 25711, June 2, 2017]

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**§69.703 Definitions.**

For purposes of this subpart:

(a) *Channel terminations.* (1) A channel termination between an IXC POP and a serving wire center is a dedicated channel connecting an IXC POP and a serving wire center, offered for purposes of carrying special access traffic.

(2) A channel termination between a LEC end office and a customer premises is a dedicated channel connecting a LEC end office and a customer premises, offered for purposes of carrying special access traffic.

(b) *Metropolitan Statistical Area (MSA).* This term shall have the definition provided in §22.909(a) of this chapter.

(c) *Interexchange Carrier Point of Presence (IXC POP).* The point of interconnection between an interexchange carrier's network and a local exchange carrier's network.

(d) *Wire center.* For purposes of this subpart, the term “wire center” shall refer to any location at which an incumbent LEC is required to provide expanded interconnection for special access pursuant to §64.1401(a) of this chapter, and any location at which an incumbent LEC is required to provide expanded interconnection for switched transport pursuant to §64.1401(b)(1) of this chapter.

(e) *Study area.* A common carrier's entire service area within a state.

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**§69.705 Procedure.**

Price cap LECs filing petitions for pricing flexibility shall follow the procedures set forth in §1.774 of this chapter.

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**§69.707 Geographic scope of petition.**

(a) *MSA.* (1) A price cap LEC filing a petition for pricing flexibility in an MSA shall include data sufficient to support its petition, as set forth in this subpart, disaggregated by MSA.

(2) A price cap LEC may request pricing flexibility for two or more MSAs in a single petition, provided that it submits supporting data disaggregated by MSA.

(b) *Non-MSA.* (1) A price cap LEC will receive pricing flexibility with respect to those parts of a study area that fall outside of any MSA, provided that it provides data sufficient to support a finding that competitors have collocated in a number of wire centers in that non-MSA region sufficient to satisfy the criteria for the pricing flexibility sought in the petition, as set forth in this subpart, if the region at issue were an MSA.

(2) The petitioner may aggregate data for all the non-MSA regions in a single study area for which it requests pricing flexibility in its petition.

(3) A petitioner may request pricing flexibility in the non-MSA regions of two or more of its study areas, provided that it submits supporting data disaggregated by study area.

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**§69.709 Dedicated transport and special access services other than channel terminations between LEC end offices and customer premises.**

(a) *Scope.* This paragraph governs requests for pricing flexibility with respect to the following services:

(1) Entrance facilities, as described in §69.110.

(2) Transport of traffic over dedicated transport facilities between the serving wire center and the tandem switching office, as described in §69.111(a)(2)(iii).

(3) Direct-trunked transport, as described in §69.112.

(4) Special access services, as described in §69.114, other than channel terminations as defined in §69.703(a)(2) of this part.

(b) *Phase I triggers.* To obtain Phase I pricing flexibility, as specified in §69.727(a) of this part, for the services described in paragraph (a) of this section, a price cap LEC must show that, in the relevant area as described in §69.707 of this part, competitors unaffiliated with the price cap LEC have collocated:

(1) In fifteen percent of the petitioner's wire centers, and that at least one such collocator in each wire center is using transport facilities owned by a transport provider other than the price cap LEC to transport traffic from that wire center; or

(2) In wire centers accounting for 30 percent of the petitioner's revenues from dedicated transport and special access services other than channel terminations between LEC end offices and customer premises, determined as specified in §69.725 of this part, and that at least one such collocator in each wire center is using transport facilities owned by a transport provider other than the price cap LEC to transport traffic from that wire center.

(c) *Phase II triggers.* To obtain Phase II pricing flexibility, as specified in §69.727(b) of this part, for the services described in paragraph (a) of this section, a price cap LEC must show that, in the relevant area as described in §69.707 of this part, competitors unaffiliated with the price cap LEC have collocated:

(1) in 50 percent of the petitioner's wire centers, and that at least one such collocator in each wire center is using transport facilities owned by a transport provider other than the price cap LEC to transport traffic from that wire center; or

(2) in wire centers accounting for 65 percent of the petitioner's revenues from dedicated transport and special access services other than channel terminations between LEC end offices and customer premises, determined as specified in §69.725 of this part, and that at least one such collocator in each wire center is using transport facilities owned by a transport provider other than the price cap LEC to transport traffic from that wire center.

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**§69.711 Channel terminations between LEC end offices and customer premises.**

(a) *Scope.* This paragraph governs requests for pricing flexibility with respect to channel terminations between LEC end offices and customer premises.

(b) *Phase I triggers.* To obtain Phase I pricing flexibility, as specified in §69.727(a) of this part, for channel terminations between LEC end offices and customer premises, a price cap LEC must show that, in the relevant area as described in §69.707 of this part, competitors unaffiliated with the price cap LEC have collocated:

(1) In 50 percent of the petitioner's wire centers, and that at least one such collocator in each wire center is using transport facilities owned by a transport provider other than the price cap LEC to transport traffic from that wire center; or

(2) In wire centers accounting for 65 percent of the petitioner's revenues from channel terminations between LEC end offices and customer premises, determined as specified in §69.725 of this part, and that at least one such collocator in each wire center is using transport facilities owned by a transport provider other than the price cap LEC to transport traffic from that wire center.

(c) *Phase II triggers.* To obtain Phase II pricing flexibility, as specified in §69.727(b) of this part, for channel terminations between LEC end offices and customer premises, a price cap LEC must show that, in the relevant area as described in §69.707, competitors unaffiliated with the price cap LEC have collocated:

(1) In 65 percent of the petitioner's wire centers, and that at least one such collocator in each wire center is using transport facilities owned by a transport provider other than the price cap LEC to transport traffic from that wire center; or

(2) In wire centers accounting for 85 percent of the petitioner's revenues from channel terminations between LEC end offices and customer premises, determined as specified in §69.725, and that at least one such collocator in each wire center is using transport facilities owned by a transport provider other than the price cap LEC to transport traffic from that wire center.

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**§69.713 Common line, traffic-sensitive, and tandem-switched transport services.**

(a) *Scope.* This paragraph governs requests for pricing flexibility with respect to the following services:

(1) Common line services, as described in §§69.152, 69.153, and 69.154.

(2) Services in the traffic-sensitive basket, as described in §61.42(d)(2) of this chapter.

(3) The traffic-sensitive components of tandem-switched transport services, as described in §§69.111(a)(2)(i) and (ii).

(b) *Phase I triggers.* (1) To obtain Phase I pricing flexibility, as specified in §69.727(a), for the services identified in paragraph (a) of this section, a price cap LEC must provide convincing evidence that, in the relevant area as described in §69.707, its unaffiliated competitors, in aggregate, offer service to at least 15 percent of the price cap LEC's customer locations.

(2) For purposes of the showing required by paragraph (b)(1) of this section, the price cap LEC may not rely on service the competitors provide solely by reselling the price cap LEC's services, or provide through unbundled network elements as defined in §51.5 of this chapter, except that the price cap LEC may rely on service the competitors provide through the use of the price cap LEC's unbundled loops.

(c) [Reserved]

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**§§69.714-69.724 [Reserved]**

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**§69.725 Attribution of revenues to particular wire centers.**

If a price cap LEC elects to show, in accordance with §69.709 or §69.711, that competitors have collocated in wire centers accounting for a certain percentage of revenues from the services at issue, the LEC must make the following revenue allocations:

(a) For entrance facilities and channel terminations between an IXC POP and a serving wire center, the petitioner shall attribute all the revenue to the serving wire center.

(b) For channel terminations between a LEC end office and a customer premises, the petitioner shall attribute all the revenue to the LEC end office.

(c) For any dedicated service routed through multiple wire centers, the petitioner shall attribute 50 percent of the revenue to the wire center at each end of the transmission path, unless the petitioner can make a convincing case in its petition that some other allocation would be more representative of the extent of competitive entry in the MSA or the non-MSA parts of the study area at issue.

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**§69.727 Regulatory relief.**

(a) *Phase I relief.* Upon satisfaction of the Phase I triggers specified in §69.709(b), §69.711(b), or §69.713(b) for an MSA or the non-MSA parts of a study area, a price cap LEC will be granted the following regulatory relief in that area for the services specified in §69.709(a), §69.711(a), or §69.713(a), respectively:

(1) Volume and term discounts;

(2) Contract tariff authority, provided that

(i) Contract tariff services are made generally available to all similarly situated customers; and

(ii) The price cap LEC excludes all contract tariff offerings from price cap regulation pursuant to §61.42(f)(1) of this chapter.

(iii) Before the price cap LEC provides a contract tariffed service, under §69.727(a), to one of its long-distance affiliates, as described in section 272 of the Communications Act of 1934, as amended, or §64.1903 of this chapter, the price cap LEC certifies to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer.

(b) *Phase II relief.* Upon satisfaction of the Phase II triggers specified in §69.709(c) or §69.711(c) for an MSA or the non-MSA parts of a study area, a price cap LEC will be granted the following regulatory relief in that area for the services specified in §§69.709(a) or 69.711(a), respectively:

(1) Elimination of the rate structure requirements in subpart B of this part;

(2) Elimination of price cap regulation; and

(3) Filing of tariff revisions on one day's notice, notwithstanding the notice requirements for tariff filings specified in §61.58 of this chapter.

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**§69.729 New services.**

(a) Except for new services subject to paragraph (b) of this section, a price cap LEC may obtain pricing flexibility for a new service that has not been incorporated into a price cap basket by demonstrating in its pricing flexibility petition that the new service would be properly incorporated into one of the price cap baskets and service bands for which the price cap LEC seeks pricing flexibility.

(b) Notwithstanding paragraph (a) of this section, a price cap LEC must demonstrate satisfaction of the triggers in §69.711(b) to be granted pricing flexibility for any new service that falls within the definition of a “channel termination between a LEC end office and a customer premises” as specified in §69.703(a)(2).

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**§69.731 Low-end adjustment mechanism.**

(a) Any price cap LEC obtaining Phase I or Phase II pricing flexibility for any service in any MSA in its service region, or for the non-MSA portion of any study area in its service region, shall be prohibited from making any low-end adjustment pursuant to §61.45(d)(1)(vii) of this chapter in all or part of its service region.

(b) Any affiliate of any price cap LEC obtaining Phase I or Phase II pricing flexibility for any service in any MSA in its service region shall be prohibited from making any low-end adjustment pursuant to §61.45(d)(1)(vii) of this chapter in all or part of its service region.

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## Subpart I—Business Data Services

SOURCE: 82 FR 25711, June 2, 2017, unless otherwise noted.

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### §69.801 Definitions.

(a) *Business data services.* The dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections.

(b) *Competitive market test.* The competitive market test is defined in §69.803.

(c) *County.* A county or county equivalent as defined in §10.10 of this chapter. County-equivalents include parishes, boroughs, independent cities, census areas, the District of Columbia, and various entities in the territories.

(d) *End user channel termination.* A dedicated channel connecting a local exchange carrier end office and a customer premises, offered for purposes of carrying special access traffic.

(e) *Grandfathered market.* A county that does not satisfy the competitive market test set forth in §69.803 for which a price cap local exchange carrier obtained Phase II relief pursuant to §69.711(c).

(f) *Market deemed competitive.* A county that satisfies the competitive market test set forth in §69.803.

(g) *Market deemed non-competitive.* A county that does not satisfy the competitive market test set forth in §69.803.

(h) *Non-disclosure agreement.* A non-disclosure agreement is a contract, contractual provision, or tariff provision wherein a party agrees not to disclose certain information shared by the other party.

(i) *Special access data collection.* The special access data collection refers to the data and other information the Commission collected from business data services providers and purchasers pursuant to its December 18, 2012 Report and Order in WC Docket 05-25.

(j) *Transport* includes interoffice facilities, channel terminations between the serving wire center and point of presence, and all special access services that are described in §69.114 other than end user channel terminations.

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### §69.803 Competitive market test.

(a) The competitive market test is used to determine which counties served by a price cap local exchange carrier, as defined in §61.3(bb) of this chapter, are deemed competitive and therefore warrant relief from price cap regulation and detariffing of DS1 and DS3 end user channel terminations, and certain other business data services, sold by such carriers.

(b) *Initial test.* A county is deemed competitive in the initial competitive market test if:

(1) Either 50 percent of the locations with business data services demand within the county are within one half mile of a location served by a competitive provider based on data from the special access data collection, or 75 percent of the census blocks within the county are reported to have broadband connection availability by a cable operator based on Form 477 data as of December 2016. Lists of counties deemed competitive, non-competitive or grandfathered by the initial competitive market test are published on the Commission's Web site.

(2) The DS1 and DS3 end user channel terminations sold by price cap local exchange carriers in counties deemed competitive are no longer subject to price cap regulation and are detariffed according to §61.201.

(c) *Subsequent tests.* The results of the initial competitive market test will be updated every three years following the effective date of the initial test.

(1) A county will be deemed competitive in a subsequent competitive market test if 75 percent of the census blocks within the county are reported to have broadband connection availability by a cable operator based on Form 477 data as of the date of

the most recent collection.

(2) No later than three years following the effective date of the previous test, the Wireline Competition Bureau will conclude a subsequent test and will publish a revised list of counties deemed competitive at the conclusion of the test.

(3) A county deemed competitive in the competitive market test will retain its status in subsequent tests.

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**§69.805 Prohibition on certain non-disclosure agreement conditions.**

(a) In markets deemed non-competitive, buyers and sellers of business data services shall not enter into a tariff, contract-based tariff, or commercial agreement, including but not limited to master service agreement, that contains a non-disclosure agreement as defined in §69.801(g), that restricts or prohibits disclosure of information to the Commission, or requires a prior request or legal compulsion by the Commission to effect such disclosure.

(b) Confidential information subject to a protective order as defined in §0.461 of this chapter in effect as of the effective date of a tariff, contract-based tariff, or commercial agreement must be submitted pursuant to the terms of that protective order or otherwise pursuant to the Commission's rules regarding submission of confidential data in §§0.457(d) and 0.459.

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**§69.807 Regulatory relief.**

(a) Price cap local exchange carrier transport and end user channel terminations in markets deemed competitive and in grandfathered markets for a price cap carrier that was granted Phase II pricing flexibility prior to June 2017 are granted the following regulatory relief:

(1) Elimination of the rate structure requirements in subpart B of this part;

(2) Elimination of price cap regulation; and

(3) Elimination of tariffing requirements as specified in §61.201 of this chapter.

(b) Price cap local exchange carrier end user channel terminations in markets deemed non-competitive are granted the following regulatory relief:

(1) Ability to offer volume and term discounts;

(2) Ability to enter into contract-based tariffs, provided that:

(i) Contract-based tariff services are made generally available to all similarly situated customers;

(ii) The price cap local exchange carrier excludes all contract-based tariff offerings from price cap regulation pursuant to §61.42(f) of this chapter;

(3) Ability to file tariff revisions on at least one day's notice, notwithstanding the notice requirements for tariff filings specified in §61.58 of this chapter.

(c) A price cap local exchange carrier that was granted Phase II pricing flexibility prior to June 2017 in a grandfathered market must retain its business data services rates at levels no higher than those in effect as of April 20, 2017, pending the detariffing of those services pursuant to §61.201 of this chapter.

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**§69.809 Low-end adjustment mechanism.**

(a) Any price cap local exchange carrier or any affiliate of any price cap local exchange carrier that had obtained Phase II pricing flexibility under §69.709 or §69.711 for any service in any MSA in its service region, or for the non-MSA portion of any study area in its service region, shall be prohibited from making any low-end adjustment pursuant to §61.45(d)(1)(vii) of this chapter in all or part of its service region.

(b) Any price cap local exchange carrier or any affiliate of any price cap local exchange carrier that exercises the regulatory relief pursuant to §69.807 in any part of its service region shall be prohibited from making any low-end adjustment pursuant to §61.45(d)(1)(vii) of this chapter in all or part of its service region.

(c) Any price cap local exchange carrier or any affiliate of any price cap local exchange carrier that exercises the option to use generally accepted accounting principles rather than the uniform system of accounts pursuant to §32.11(g) of this chapter shall be prohibited from making any low-end adjustment pursuant to §61.45(d)(1)(vii) of this chapter in all or part of its service region.

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# EXHIBIT 2

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR data is current as of April 16, 2018



Title 47: Telecommunication

## PART 61—TARIFFS

Contents

(a) Except as otherwise provided in paragraphs (b) through (e) of this section, or by Commission order, carriers that are nondominant in the provision of international and interstate, domestic interexchange services shall not file tariffs for such services.

(b) Carriers that are nondominant in the provision of international and domestic, interstate, interexchange services are permitted to file tariffs for dial-around 1 + services. For the purposes of this paragraph, dial-around 1 + calls are those calls made by accessing the interexchange carrier through the use of that carrier's carrier access code.

(c) Carriers that are nondominant in the provision of international and domestic, interstate, interexchange services are permitted to file a tariff for such services applicable to those customers who contact the local exchange carrier to designate an interexchange carrier or to initiate a change with respect to their primary interexchange carrier. Such tariff will enable the interexchange carrier to provide service to the customer until the interexchange carrier and the customer consummate a written agreement, but in no event shall the interexchange carrier provide service to its customer pursuant to such tariff for more than 45 days.

(d) Carriers that are nondominant in the provision of international inbound collect calls to the United States are permitted to file a tariff for such services.

(e) Carriers that are nondominant in the provision of "on-demand" Mobile Satellite Services are permitted to file a tariff for such services applicable to those customers that have not entered into pre-existing service contracts designating a specific provider for such services.

[66 FR 16881, Mar. 28, 2001]

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**§61.20 Method of filing publications.**

(a) All issuing carriers that file tariffs shall file all tariff publications and associated documents, such as transmittal letters, requests for special permission, and supporting information, electronically in accordance with the requirements set forth in §§61.13 through 61.17.

(b) In addition, all tariff publications requiring fees as set forth in part 1, subpart G of this chapter, shall be submitted electronically if practicable in accordance with §1.1105 of this chapter along with the electronic submission of the payment online form. Petitions which must be filed in hard copy format should be submitted according to the procedures set forth on the web page of the FCC's Office of the Secretary, *https://www.fcc.gov/secretary.*

[76 FR 43211, July 20, 2011, as amended at 83 FR 2557, Jan, 18. 2018]

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**§61.25 References to other instruments.**

In addition to the cross-references permitted pursuant to §61.74, a non-dominant carrier may cross-reference in its tariff publication only the rate provisions of another carrier's FCC tariff publication, provided that the following conditions are met:

(a) The tariff being cross-referenced must be on file with the Commission and in effect;

(b) The issuing carrier must specifically identify in its tariff the cross-referenced tariff by Carrier Name and FCC Tariff Number;

(c) The issuing carrier must specifically identify in its tariff the rates being cross-referenced so as to leave no doubt as to the exact rates that will apply, including but not limited to any applicable credits, discounts, promotions; and

(d) The issuing carrier must keep its cross-references current.

[64 FR 46588, Aug. 26, 1999]

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**§61.26 Tariffing of competitive interstate switched exchange access services.**

(a) *Definitions.* For purposes of this section, the following definitions shall apply:

(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.

(3) *Switched exchange access services* shall include:

(i) 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;

(ii) The termination of interexchange telecommunications traffic to any end user, either directly or via contractual or other arrangements with an affiliated or unaffiliated provider of interconnected VoIP service, as defined in 47 U.S.C. 153(25), or a non-interconnected VoIP service, as defined in 47 U.S.C. 153(36), that does not itself seek to collect reciprocal compensation charges prescribed by this subpart for that traffic, regardless of the specific functions provided or facilities used.

(4) *Non-rural ILEC* shall mean an incumbent local exchange carrier that is not a *rural telephone company* under 47 U.S.C. 153(44).

(5) The *rate* for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.

(6) *Rural CLEC* shall mean a CLEC that does not serve (*i.e.,* terminate traffic to or originate traffic from) any end users located within either:

(i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(ii) An urbanized area, as defined by the Census Bureau.

(b) Except as provided in paragraphs (c), (e), and (g) of this section, a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of:

(1) The rate charged for such services by the competing ILEC or

(2) The lower of:

(i) The benchmark rate described in paragraph (c) of this section or

(ii) In the case of interstate switched exchange access service, the lowest rate that the CLEC has tariffed for its interstate exchange access services, within the six months preceding June 20, 2001.

(c) The benchmark rate for a CLEC's switched exchange access services will be the rate charged for similar services by the competing ILEC. If an ILEC to which a CLEC benchmarks its rates, pursuant to this section, lowers the rate to which a CLEC benchmarks, the CLEC must revise its rates to the lower level within 15 days of the effective date of the lowered ILEC rate.

(d) Except as provided in paragraph (g) of this section, and notwithstanding paragraphs (b) and (c) of this section, in the event that, after June 20, 2001, a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, the CLEC shall not file a tariff for its exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC.

(e) Rural exemption. Except as provided in paragraph (g) of this section, and 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 that NECA rate, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge. Beginning July 1, 2013, all CLEC reciprocal compensation rates for intrastate switched exchange access services subject to this subpart also shall be no higher than that NECA rate.

(f) If a CLEC provides some portion of the 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, except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may, to the extent permitted by §51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

(g) Notwithstanding paragraphs (b) through (e) of this section:

(1) A CLEC engaging in access stimulation, as that term is defined in §61.3(bbb), shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the price cap LEC with the lowest switched access rates in the state.

(2) A CLEC engaging in access stimulation, as that term is defined in §61.3(bbb), shall file revised interstate switched access tariffs within forty-five (45) days of commencing access stimulation, as that term is defined in §61.3(bbb), or within forty-five (45) days of [date] if the CLEC on that date is engaged in access stimulation, as that term is defined in §61.3(bbb).

[76 FR 73881, Nov. 29, 2011, as amended at 77 FR 20553, Apr. 5, 2012]

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## Subpart D—General Tariff Rules for International Dominant Carriers

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### §61.28 International dominant carrier tariff filing requirements.

(a) Any carrier classified as dominant for the provision of particular international communications services on a particular route for any reason other than a foreign carrier affiliation under §63.10 of this chapter shall file tariffs for those services pursuant to the notice and cost support requirements for tariff filings of dominant domestic carriers, as set forth in subpart E of this part.

(b) Other than the notice and cost support requirements set forth in paragraph (a) of this section, all tariff filing requirements applicable to all carriers classified as dominant for the provision of particular international communications services on a particular route for any reason other than a foreign carrier affiliation pursuant to §63.10 of this chapter are set forth in subpart C of this part.

[66 FR 16881, Mar. 28, 2001]

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## Subpart E—General Rules for Dominant Carriers

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### §61.31 Scope.

The rules in this subpart apply to all dominant carriers.

[64 FR 46588, Aug. 26, 1999]

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### §61.38 Supporting information to be submitted with letters of transmittal.

(a) *Scope.* This section applies to dominant carriers whose gross annual revenues exceed $500,000 for the most recent 12 month period of operations or are estimated to exceed $500,000 for a representative 12 month period. Incumbent Local Exchange Carriers serving 50,000 or fewer access lines in a given study area that are described as subset 3 carriers in §69.602 of this chapter may submit Access Tariff filings for that study area pursuant to either this section or §61.39. However, the Commission may require any issuing carrier to submit such information as may be necessary for a review of a tariff filing. This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in §61.42 (d), (e), and (g).

(b) *Explanation and data supporting either changes or new tariff offerings.* The material to be submitted for a tariff change which affects rates or charges or for a tariff offering a new service, must include an explanation of the changed or new matter, the reasons for the filing, the basis of ratemaking employed, and economic information to support the changed or new matter.

(1) For a tariff change the issuing carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A cost of service study for all elements for the most recent 12 month period;

(ii) A study containing a projection of costs for a representative 12 month period;

# EXHIBIT 3

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

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Access Charge Reform | ) | CC Docket No. 96-262 |
| | ) | |
| Price Cap Performance Review for Local Exchange Carriers | ) ) | CC Docket No. 94-1 |
| | ) | |
| Transport Rate Structure | ) | CC Docket No. 91-213 |

# SECOND ORDER ON RECONSIDERATION AND MEMORANDUM OPINION AND ORDER

**Adopted: October 8, 1997** **Released: October 9, 1997**

By the Commission:

## I. INTRODUCTION

1. On May 7, 1997, we adopted the *First Report and Order* for Access Charge Reform.[1] In response to petitions from various parties, we take this opportunity to revise or clarify certain of our actions. This Second Order on Reconsideration addresses certain issues raised in Petitions for Reconsideration that need consideration prior to the January 1, 1998 implementation of rules adopted in the *First Report and Order*. This Order also corrects certain errors made in the *First Report and Order*. Issues raised in the petitions for reconsideration that are not addressed here will be resolved in a future order on reconsideration.

## II. SUMMARY

2. This Order first examines issues related to the presubscribed interexchange carrier charge (PICC) that the *First Report and Order* adopted. Sprint has petitioned for reconsideration of certain implementation issues that it states need to be addressed prior to January 1, 1998. In response to Sprint's petition, we implement the following changes in this Order: (1) incumbent LECs must inform interexchange carriers (IXCs), on a customer-by-customer basis, how many PICCs, and what kind of PICCs, are being assessed on each of their presubscribed customers; and (2) the PICC should be levied on the interstate interLATA presubscribed interexchange carrier (PIC) where a LATA encompasses territory in more than one state.

3. In response to Sprint's Petition, we also clarify that PICCs are calculated by dividing projected common line revenues permitted under our rules, not base period common line revenues, by projected loops. In addition, we grant Petitions by USTA, ICA, and the County of Los Angeles that

[1] Access Charge Reform, *et. al.*, CC Docket No. 96-262, *et. al.*, First Report and Order, FCC 97-158, (rel. May 16, 1997) (*First Report and Order*); *see also* Access Charge Reform, *et. al.*, CC Docket No. 96-262, *et. al.*, Errata (rel. June 4, 1997) (*Access Charge Errata*); Access Charge Reform, *et. al.*, Order on Reconsideration, 12 FCC Rcd 10119 (1997) (*Access Charge Sua Sponte Reconsideration Order*).

Centrex lines be assessed PICCs using a line-to-trunk equivalency ratio. Further, we clarify that the TIC exemption for access customers using competitive transport providers only applies to that portion of the residual per-minute TIC that is related to transport facilities.

4. NECA has asked for the Commission to set the NECA carrier common line (CCL) rates at levels that will recover the difference between common line revenue requirements and revenues recovered through subscriber line charges (SLCs), special access surcharges, and universal service payments equivalent to current long term support (LTS) payments. We grant a waiver that will permit NECA to calculate the CCL rate in the manner it has requested. We also clarify which of the rules adopted in the *First Report and Order* apply to rate of return LECs. Lastly, we amend our rules to correct clerical errors made in the *First Report and Order*.

## III. PRESUBSCRIBED INTEREXCHANGE CARRIER CHARGE

### A. Implementation Issues

#### 1. Background

5. In the *First Report and Order*, we adopted common line rate structure modifications that will permit price cap LECs to shift gradually from a cost-recovery mechanism that recovers a significant portion of non-traffic sensitive common line costs through per-minute CCL charges to one that recovers these costs through flat-rated charges. The cost-recovery mechanism we adopted retains the current $3.50 ceiling on the SLC for primary residential and single-line business lines and increases the SLC ceilings on other lines to permit LECs to recover a greater amount of the common line costs through flat-rated charges assessed on the end user. To the extent that SLC ceilings prevent price cap LECs from recovering their allowed common line revenues from end users, LECs will recover the shortfall, subject to a maximum charge, through a presubscribed interexchange carrier charge (PICC), a flat, per-line charge assessed on the end-user's presubscribed interexchange carrier.

6. The PICC, which over time will shift revenue recovery from the per-minute CCL charges to a flat-rated charge assessed on IXCs, was designed to allow price cap LECs to recover the difference between revenues collected through the SLCs and the total revenue permitted for the common line basket. In order to provide price cap LECs and IXCs with adequate time to adjust to the new rate structure, we adopted an approach that will gradually phase in the PICC over time. Specifically, effective January 1, 1998, we capped PICCs for primary residential and single-line business lines at $0.53 per month for the first year.[2] Beginning January 1, 1999, the ceiling on the monthly PICC on primary residential and single-line business lines will be adjusted for inflation and will increase by $0.50 per year until it equals the monthly per-line common line revenues and residual interconnection charge revenues permitted under our price cap rules, less the maximum SLC charge allowed under our rules.[3]

7. In addition, to the extent that the SLC ceilings on all lines and the PICC ceilings on primary residential and single-line business lines prevent recovery of the full common line revenues permitted by our price cap rules, the new rate structure we adopted for price cap LECs permits these carriers to recover the shortfall through PICCs assessed on non-primary residential and multi-line

[2] *First Report and Order* at ¶ 94.

[3] *See* 47 C.F.R. § 69.153(c)(1).

business lines.[4] For the first year, the ceiling on the PICC will be $1.50 per month for non-primary residential lines and $2.75 per month for multi-line business lines.[5]

8. Beginning January 1, 1999, the PICC ceilings for price cap non-primary residential and multi-line business lines will be adjusted for inflation and will increase by a maximum of $1.00 and $1.50 per year, respectively, until incumbent LECs can recover all of their permitted common line revenues through a combination of flat-rated SLCs and PICCs.[6] As the PICC ceilings on primary residential and single-line business lines increase, the residual per-minute CCL charge will decrease until it is eliminated. After the residual per-minute CCL charge is eliminated and the PICC ceilings for primary residential and single-line business lines increase, price cap LECs will reduce their PICCs on non-primary residential and multi-line business lines by a corresponding amount.[7] Reductions will be targeted first to the PICCs on multi-line business lines until the PICCs for those lines are equal to the PICCs for non-primary residential lines. Thereafter, price cap LECs will apply the annual reductions to both classes of customers equally until the combined SLCs and PICCs for primary residential and single-line business lines recover the full average per-line common line revenues permitted under our price cap rules, and the additional PICCs on non-primary residential and multi-line business lines no longer recover common line revenues.[8]

### 2. Sprint's Petition for Reconsideration

9. On July 11, 1997 Sprint filed a Petition for Expedited Reconsideration and Clarification in which it requests that the Commission reconsider certain implementation issues related to the PICCs adopted in the *First Report and Order*. Sprint argues that these issues need to be resolved prior to January 1, 1998, the effective date of the PICCs. Specifically, Sprint requests that the Commission require LECs to provide IXCs with customer-specific billing information that specifies the number and type(s) of PICCs LECs will be assessing for each of the IXCs' presubscribed customers.[9] Sprint asserts that because LECs will be assessing IXCs different PICCs for primary and non-primary residential lines, IXCs may choose to develop different residential rates for these lines. Sprint argues that IXCs will therefore need the customer-specific PICC information in order to develop separate toll rates for calls originated on these lines.

10. In addition, Sprint contends that in a typical multi-line business configuration IXCs are unable to determine how many multi-line business lines are presubscribed to them.[10] For example, Sprint states that typically a multi-line business customer may use a special access facility, connecting its PBX with the IXC's point of presence (POP), to handle all of its outgoing long distance calls. In

[4] *First Report and Order* at ¶ 99.

[5] *Id.*

[6] *Id.* at ¶ 101.

[7] *Id.* at ¶ 102.

[8] *Id.*

[9] Sprint Petition for Reconsideration at 3.

[10] *Id.*

addition, the customer may subscribe to local lines that connect the PBX to the LEC end office. Although these local lines carry no outgoing long distance traffic, they may be presubscribed to a particular IXC and will be assessed PICCs. According to Sprint, unless the LECs provide customer-specific PICC information, IXCs are unable to know how many of these local lines exist or how many PICCs are being assessed for these lines. Sprint is concerned that some IXCs may try to persuade their high-volume customers to presubscribe their local business lines that are not used for long distance traffic to another IXC so as to shift the PICC costs to their competitors.[11] Sprint argues that in order to respond adequately to such practices, IXCs need access to customer-by-customer PICC data so that they have the ability to pass through the PICCs directly to their customers if they so choose.[12]

11. In its petition, Sprint seeks guidance from the Commission on how LECs should assess PICCs where a LATA encompasses territory in more than one state, and a customer has one IXC handling intraLATA interstate calls and another IXC handling interLATA interstate calls.[13] Sprint suggests that the PICC should be assessed on the interLATA interstate carrier.[14]

### 3. Comments

12. MCI and CompTel agree with Sprint that LECs should be required to provide information to IXCs about PICCs for each presubscribed customer.[15] CompTel argues that without this information, IXCs will not be able to verify the access bills they receive from LECs and will not be able to determine accurately the amount that will be passed through to their customers.[16]

13. USTA opposes the proposal to require LECs to provide customer-specific PICC data, arguing that it is unduly burdensome and unnecessary.[17] Bell Atlantic argues that there is already a process in place that allows LECs to provide the necessary information to resolve billing inquiries and that any disputes that arise can be resolved, if necessary, through the Commission's complaint process.[18] Bell Atlantic agrees with Sprint that the PICC should be assessed on the line presubscribed to the interLATA interstate carrier.[19]

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[11] *Id.*

[12] *Id.* at 4.

[13] *Id.* at 4.

[14] *Id.*

[15] MCI Comments at 7; CompTel Comments at 16.

[16] *Id.*

[17] USTA Comments at 4.

[18] Bell Atlantic Comments at 19 n.55.

[19] Bell Atlantic Comments at 18 n.52.

### 4. Replies

14. GTE opposes any proposal that LECs provide customer-by-customer PICC data. GTE states that IXCs can obtain this information from its own customers and that when discrepancies arise, IXCs can resolve problems through normal billing reconciliation processes.[20]

15. Sprint argues that the fact that USTA opposes a request for PICC information supports Sprint's position that the Commission needs to issue a directive to avoid lengthy and burdensome disputes between hundreds of IXCs and LECs.[21]

### 5. Discussion

16. We grant Sprint's request that LECs be required to provide IXCs with customer-specific information about the number and type(s) of PICCs they are assessing for each of the IXC's presubscribed customers. We agree with Sprint that this measure is necessary to provide IXCs the opportunity to develop a rate structure that recovers these costs in a cost-causative manner.[22] One of the primary goals of our *First Report and Order* was to develop a cost-recovery mechanism that permits carriers to recover their costs in a manner that reflects the way in which those costs are incurred. If an IXC were to receive a bill for the aggregate amount of the PICCs assessed on its presubscribed lines and did not have access to information that indicates for which lines the LEC is assessing a primary or non-primary residential PICC, the IXC would be unable to develop residential rates that accurately reflect the underlying costs of providing service over those lines. Similarly, in a multi-line business configuration, without information about the number of local business lines that are presubscribed to a particular IXC and the amount of PICCs being charged for which lines, the IXC will not be able to recover the costs of serving its customers in an efficient manner. We therefore conclude that LECs must provide IXCs with information about how many and what type of PICCs they are charging IXCs for each customer.

17. We conclude that there is insufficient evidence in the record to support arguments that providing customer-specific PICC data to IXCs will be overly burdensome and that discrepancies can be resolved through normal billing reconciliation processes. In order to bill IXCs the proper amount, LECs will presumably have to create a database for purposes of determining how many lines are presubscribed to each IXC and what type of PICC is being assessed for each of those lines. We conclude that LECs must provide this information to the IXCs to enable them to develop rate structures that will recover these costs efficiently.

18. We also grant Sprint's request to clarify how LECs assess PICCs in situations where a customer for a particular line has one presubscribed carrier for interstate intraLATA calls and another for interstate interLATA calls. Dividing the PICC between two IXCs based on actual calling patterns would create an unnecessary administrative burden that would outweigh any minimal benefit. Moreover, LATA boundaries that cross state lines are the exception rather than the rule, and interstate calls within a LATA thus represent only a small portion of interstate traffic. We therefore conclude that in such cases, the PICC shall be assessed on the interstate interLATA carrier.

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[20] GTE Reply at 8.

[21] Sprint Reply at 3.

[22] Sprint Reply at 2.

## B. PICC Calculation

### 1. Background

19. In its petition for reconsideration, Sprint argues that the Commission's formula for calculating PICCs will not allow sufficient recovery of loop costs, because the formula relies on base period revenues divided by the projected number of loops in use for such annual period.[23] Sprint contends that such a formula would force PICCs downward because revenues determined on a base period would not adequately reflect revenue growth commensurate with projected growth in loops.[24] In turn, Sprint argues, under-recovery of loop costs through flat-rated PICCs will necessitate greater reliance on usage charges to recover non-traffic-sensitive costs, undermining the Commission's efforts to align access charges with the manner in which costs are incurred.[25] Bell Atlantic, GTE and USTA indicate a similar concern in their comments.[26] U S West indicates that it would have the same concern if it shared Sprint's interpretation of the PICC rule. U S West, however, does not interpret the rule as requiring the use of base period revenues and projected loops.[27]

### 2. Discussion

20. We clarify in this Order that the rule describing the formula for calculating PICCs relies on projected revenues and projected loop counts. The use of projected revenues and projected loop counts is applicable to PICC calculations conducted under sections 69.153(c) and 69.153(d) of our rules. We note that the rule setting forth the method of calculating SLCs expressly incorporates projected revenues and projected loop numbers.[28] Although the PICC rule does not expressly state that projected revenues are to be used in the formula, the rule has been designed to use projected revenues rather that revenues derived from a base period.[29] Accordingly, there is no "mismatch" caused by dividing projected loops by base period revenues. We will, however, amend our rules to state explicitly that the projected revenues must be used to conduct the PICC calculation.

21. In our *First Report and Order*, we adopted section 69.153(c)(1) in which we directed incumbent LECs to calculate the maximum monthly PICC for primary residential subscriber lines and single-line business lines by using "one twelfth of the sum of annual common line revenues and residual interconnection charge revenues permitted under our price cap rules divided by the projected

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[23] Sprint Petition at 6.

[24] *Id.*

[25] *Id.*

[26] Bell Atlantic Comments at 23; GTE Comments at 7; USTA Comments at 4-5.

[27] U S West Comments at 13.

[28] 47 C.F.R. § 69.152(b).

[29] 47 C.F.R. § 69.153(c)(1) describes the monthly PICC for primary residential subscriber lines and single line business subscriber lines as the lower of: "(1) One twelfth of the sum of annual common line revenues and residual interconnection charge revenues permitted under our price cap rules divided by the projected average number of local exchange service subscriber lines in use during such annual period, minus $3.50; or (2) $0.53 . . . ."

average number of local exchange service subscriber lines in use during such annual period, minus \$3.50." On further consideration of section 69.153(c)(1), we recognize that, as written, this rule may not permit an incumbent LEC to recover its residual interconnection charge revenues from primary residential and single-line business lines when its maximum primary residential and single-line business SLC is less than \$3.50. On our own motion, therefore, we take this opportunity to reconsider this issue and revise section 69.153(c)(1). We replace the phrase "minus \$3.50" with the phrase "minus the maximum subscriber line charge computed pursuant to section 69.152(d)(2)."

22. In the *First Report and Order*, we also adopted section 69.153(d)(2)(i), which instructs incumbent LECs how to calculate the maximum monthly PICC for multi-line business lines when the maximum charge for the non-primary residential PICC is at its cap. The rule was intended to provide that the calculation be performed by taking "[o]ne twelfth of the annual common line, residual interconnection charge, and § 69.156(a) marketing expense revenues permitted," less the maximum amounts permitted to be recovered through the SLC, the other PICCs, and other marketing expense recovery mechanisms. In crafting the language of the rule, however, we identified the maximum amount permitted to be recovered from the non-primary residential PICC as section 69.153(d)(1)(i) instead of section 69.153(d)(1). We correct this error to take into account the fact that the cap on the non-primary residential PICC limits the amount that charge can recover.

## C. Application of PICCs to Centrex Lines

### 1. Background

23. The *First Report and Order* requires that the PICC recover common line revenues not recovered from the SLC and other common line charges, and that the PICC be applied on the same basis as the SLC. Centrex arrangements are charged more SLCs than are similarly-sized PBX arrangements.[30] Consequently, the *First Report and Order* requires that Centrex arrangements be assessed a greater number of PICCs than are similarly-sized PBX arrangements.

### 2. Petitions

24. USTA, ICA, and the County of Los Angeles (Los Angeles) assert that the number of PICCs that are assessed on Centrex arrangements should equal the number of PICCs assessed on similarly-sized PBX arrangements.[31] They contend that the revenues recovered from Centrex arrangements by the PICC are unrelated to the costs of providing Centrex service.[32] They argue that Centrex customers currently pay one SLC per line, which recovers the full interstate portion of common line costs used to provide Centrex service.[33] They further contend that the disproportionate level of PICC Centrex charges unfairly subjects Centrex systems to anticompetitive and arbitrary

[30] MTS and WATS Market Structure, Memorandum Opinion and Order, 97 F.C.C.2d 682, 698-701 (1983) (*MTS and WATS Market Structure Order*).

[31] USTA Petition at 2-4; ICA Petition at 2-5; Los Angeles Petition at 1-11.

[32] USTA Petition at 2; ICA Petition at 3.

[33] USTA Petition at 3; Los Angeles Petition at 8.

charges, which is contrary to the clear intent of Congress that subsidies be explicit and cost-based.[34] They observe that while a Centrex customer with 70 lines is equivalent to a PBX customer with 13 trunks and to a single digital PBX service,[35] the IXC serving the Centrex customer would be assessed $192.50 per month, while the IXC serving the PBX customer would only be assessed $35.75 per month and the IXC serving the digital PBX customer would be assessed $13.75 per month.[36] ICA claims that a 2,500-line Centrex system is equivalent to a 150-trunk PBX system.[37] Los Angeles notes that the annual interstate billing levels for its 86,000 access lines could increase as much as $4.6 million, including $2.8 million in PICCs, as the result of the rules adopted in the *First Report and Order*, even though Los Angeles currently pays only about $1 million in annual interstate billing.[38]

25. ICA notes that most heavy users of Centrex services are under long-term contracts with their Centrex service provider, thereby preventing them from switching to a PBX system to avoid the additional PICCs. Even where the contract has expired, ICA contends that it can take up to several years to put a major Centrex system up for bid and fully transition to a PBX.[39] Los Angeles asserts that with respect to long distance service, local governments will be treated as pariahs by IXCs.[40]

26. ICA observes that the Commission's rules appear to apply to lines that are toll restricted, thereby penalizing customers that attempt to control costs and reduce the possibility of toll fraud. According to ICA, many Centrex customers require that a portion of their Centrex lines be toll restricted. ICA argues that toll-restricted Centrex lines should not be subject to any PICCs.[41]

27. Petitioners propose that LECs be permitted to reflect trunk equivalency. They propose that the PICC on Centrex lines be assessed using a line-to-trunk equivalency ratio.[42] Such ratios are already set forth in intrastate tariffs.[43] In the absence of an intrastate tariff, the LECs could develop such a ratio,[44] or there could be agreed upon industry relationships between the Centrex lines and

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[34] ICA Petition at 3; USTA Petition at 3.

[35] Digital PBX service uses an ISDN line as the PBX trunk.

[36] USTA Petition at 3; ICA Petition at 4; Los Angeles Petition at 6.

[37] ICA Petition at 4.

[38] Los Angeles Petition at 2. 67,000 of the County's 86,000 access lines are Centrex. Los Angeles Petition at 4.

[39] ICA Petition at 2.

[40] Los Angeles Petition at 6.

[41] ICA Petition at 3-4.

[42] USTA Petition at 3-4; ICA Petition at 4-5; Los Angeles Petition at 10.

[43] ICA Petition at 5; USTA Petition at 4.

[44] USTA Petition at 4.

trunks.[45] USTA also suggests that LECs should be permitted to count Network Access Registers (NARs) for purposes of assessing the PICC on Centrex customers.[46] USTA contends that NARs are equivalent to PBX trunks since one NAR provides one link to the switch.[47] In an *ex parte* filing, USTA has indicated that in order to address the complexity and verification problems of using individual state tariffs or individual company ratios, the Commission should adopt a uniform line-to-trunk equivalency ratio of 9 to 1.[48]

### 3. Comments

28. Most commenting parties support petitioners.[49] New York City notes that its mayoral agencies alone comprise approximately 73,100 Centrex lines and non-mayoral agencies use at least an additional 1,776 Centrex lines.[50] New York City estimates that it could save over 2 million dollars annually if the Commission adopted a line-to-trunk equivalency ration of at least 8 to 1.[51] Similarly, Boston University argues that without trunk-to-line equivalency, it potentially will have to pay at least an additional $600,000 to cover the new PICCs.[52] Boston University suggests that the Commission should at least permit a limited form of grandfathering for Centrex customers who are locked into bona fide long-term contract tariffs.[53]

29. AT&T, Teleport, and Time Warner oppose the petitions.[54] AT&T argues that because Centrex uses more of the LEC's lines than a PBX arrangement does, the disparity between Centrex and PBX arrangements is consistent with the principles of cost-causation.[55] AT&T also argues that given that LECs have historically offset the SLC in the intrastate jurisdiction by providing "credits" on customers' Centrex bills, there is no reason to think that they could not provide similar credits to offset

[45] ICA Petition at 5.

[46] USTA Petition at 4.

[47] USTA Petition at 4.

[48] Letter from Frank McKennedy, Director, Legal and Regulatory Affairs, United States Telephone Association, to William F. Caton, Acting Secretary, Federal Communications Commission, Sept. 25, 1997 (*USTA September 25 Letter*) at 2.

[49] *See* U S West Comments at 4; SNET Comments at 2; Bell Atlantic Comments at 14-16; Ad Hoc Comments at 9-11; Ameritech Comments at 2; GTE Comments at 19-20; API Comments at 9-10; National Centrex Users Group Comments at 1-3; City of New York Department of Information Technology and Telecommunications (New York City) Comments at 5-7. We grant New York City's Motion to File Late Comments.

[50] New York City Comments at 5-6.

[51] New York City Comments at 6.

[52] Boston University Comments at 3.

[53] Boston University Comments at 4.

[54] AT&T Comments at 12-13; Teleport Comments at 1-3; Time Warner Comments at 7-9.

[55] AT&T Comments at 13.

the new multi-line business PICC.[56] Teleport notes that even though Centrex users pay more in SLCs than do users of PBX, Centrex has remained marketable, and the new PICCs are less burdensome than are the SLCs.[57] Moreover, although the Commission temporarily assessed a lower SLC on Centrex lines when the SLC was first implemented to reduce the possibility that users would move to PBX service before state commissions had an opportunity to adjust intrastate rate structures, Centrex is presently largely deregulated in the intrastate jurisdiction, so that there is no need to create a transition plan.[58]

30. Time Warner contends that the PICCs on Centrex lines perform the same function as other multi-line PICCs, *i.e.*, to recover common line and other revenue shortfalls. Granting the petitions would threaten to undermine the scheme for recovering costs not otherwise recovered from common line charges.[59] Time Warner argues that the *First Report and Order* announced that multi-line business customers would have to shoulder a disproportionate share of costs during a transition period, and the fact that some customers temporarily shoulder a greater proportion of the burden than others is "a readily accepted, and necessary, aspect of reform."[60] Time Warner also claims that the application of the multi-line PICC to Centrex access lines is consistent with the Commission's treatment of integrated services digital network (ISDN) lines. In the *First Report and Order*, the Commission determined that Primary Rate Interface (PRI) ISDN service should be subject to a SLC rate equal to five times the incumbent LEC's average per-line common line costs, and that Basic Rate Interface (BRI) ISDN service should be subject to a SLC based on the incumbent LEC's average per-line costs. The Commission maintained that five-to-one ratio in its application of the PICC to ISDN services.[61]

**4. Discussion**

31. We grant the petitions of USTA, ICA, and Los Angeles that the PICC be assessed on Centrex lines using a line-to-trunk equivalency ratio. For the reasons discussed below, we adopt USTA's proposal to use a uniform 9:1 ratio. In large part, the multi-line business PICC is not a cost-based charge, but a contribution, "for a limited period, to the recovery of common line costs that incumbent LECs incur to serve single-line customers."[62] It is therefore reasonable to consider non-cost factors in determining how to assess the PICC. We conclude that with respect to the PICC, Centrex customers should be treated similarly to PBX customers, because the two arrangements are functionally equivalent.

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[56] AT&T Comments at 13.

[57] Teleport Comments at 3.

[58] Teleport Comments at 3.

[59] Time Warner Comments at 7.

[60] Time Warner Comments at 8.

[61] Time Warner Comments at 8-9.

[62] *First Report and Order* at ¶ 101.

32. A business customer with a large number of lines often chooses to connect its users with each other and with other telephone customers in one of two ways: Centrex or PBX. While a Centrex customer receives service from the central office switches of the LEC, a PBX arrangement is not directly supported by the central office switch, but is connected to the central office switch via trunks.[63] Even though calls made to other customers must travel to the LEC's central office under either approach, the Centrex arrangement requires that internal calls also travel to and from the central office. Centrex service usually requires a loop facility from the central office to the customer's location for each working Centrex telephone number. The PBX arrangement enables the PBX customer to concentrate usage from multiple lines to a few trunks. Also, while a Centrex customer does not purchase the Centrex equipment and does not house it, PBX arrangements require the customer to obtain and provide space for PBX switches at the customer's premises.

33. Petitioners state that Centrex and PBX arrangements are functionally equivalent, and opposing parties do not dispute this assertion. We do not wish to encourage a large customer to choose one of these arrangements, PBX, over another, Centrex, simply because, as a result of its IXC being charged substantially more PICCs, *i.e.*, non-cost-related charges, for Centrex service, the PBX service becomes cheaper.

34. In addition, many Centrex users are government, education, and health care facilities.[64] We note that more than 25 percent (18,640) of Los Angeles's 67,000 Centrex lines, which do not include Los Angeles County public schools are used by health care facilities. Without using a line-to-trunk equivalency ratio, Los Angeles could be required to pay an additional $2.8 million annually in PICCs, if its presubscribed IXC passes these charges through.[65] New York could see the implementation of the PICC increase its rates by over $2.4 million annually, if these charges are passed through by its IXC. Boston University, with its 10,000 Centrex lines, faces a potential increase of $330,000 per year in PICCs. By granting the petitions for relief, we ensure that all multi-line business customers shoulder a similar portion of the PICC contribution, irrespective of whether they use Centrex or PBX arrangements.

35. Centrex arrangements are charged SLCs on a per-line basis, even though this difference results in a higher rate than equivalent PBX arrangements have to pay. That differential is due to the additional common line costs that Centrex lines incur. Historically, the Commission has declined to apply a trunk equivalency ratio for Centrex services, under the rationale that "[i]f Centrex uses more lines, then Centrex necessarily creates more line costs."[66] Unlike the SLC, in most instances, the

[63] A PBX trunk is the circuit, equivalent to a local loop, which connects the PBX with the LEC's central office.

[64] Los Angeles Petition at 6; New York City Comments at 6; National Centrex Users Group Comments at 2; Boston University Comments at 1; Letter from Anthony Alessi, Director, Federal Relations, Ameritech, to William Caton, Acting Secretary, Federal Communications Commission, Sept. 17, 1997 (*Ameritech September 17 Letter*) at 3.

[65] This figure is based on a $2.75 PICC being assessed. SBC projects a lower PICC in California. *See* Letter from Jay Bennett, Director, Federal Regulatory, SBC Communications, Inc., to William Caton, Acting Secretary, Federal Communications Commission, Aug. 12, 1997.

[66] *MTS and WATS Market Structure Order*, 97 F.C.C.2d at 700.

multi-line business PICC will not recover loop costs of multi-line businesses.[67] Instead, it will contribute to the recovery of the cost of single-line business and residential loops, which have lower SLC and PICC caps. Centrex and PBX are functionally equivalent in most respects. Taking these factors into consideration, it would be inequitable to require Centrex users to cause its presubscribed IXC to bear a significantly larger PICC contribution than do similarly-sized PBX users.

36. Therefore, we will limit the PICC charges that may be assessed on IXCs serving Centrex customers on a line-to-trunk equivalency basis, except where the multi-line business SLC ceiling does not permit the recovery of all interstate-allocated loop costs from the end user. In those instances, a somewhat greater PICC -- one that includes the difference between the per-line loop cost and the multi-line business SLC cap -- will be assessed on Centrex lines. Thus, for example, if on January 1, 1998, in a particular region the loop cost is $9.40, and the maximum permitted multi-line business PICC is being assessed, *i.e.*, $2.75, each Centrex line would be assessed a $0.71 PICC, which is equal to one-ninth of $2.75 plus the difference between the $9.40 loop cost and the $9.00 SLC.

37. In determining the appropriate line-to-trunk equivalency ratio, we consider several factors. First, we observe that many states, but not all, already have trunk equivalency tables for their intrastate tariffs. USTA has indicated that although these tables are similar, they are not identical.[68] For example, USTA states that a Centrex customer with 70 lines is equivalent to a PBX customer with 13 trunks,[69] while Ameritech states that in Illinois, the equivalency tariff for 70 Centrex lines is 8 PBX trunks.[70] Adopting the trunk equivalency ratios set out in intrastate tariffs would result in different equivalency ratios being used in different states and would not provide a trunk equivalency ratio for many states. Because the trunk equivalency ratio we adopt today is for an interstate charge, a national standard for trunk equivalency ratio is appropriate.

38. We also desire administrative ease in calculating trunk equivalency. Adoption of a single ratio would simplify the assessment of PICCs on Centrex lines by eliminating the use of multiple ratios from multiple tables or state tariffs. IXCs would have the benefit of knowing that they will be assessed a set fraction of the PICC for each Centrex line that is presubscribed to their service, even when Centrex customers have lines presubscribed to different IXCs. Therefore, we have elected to adopt a single trunk equivalency ratio for establishing PICC charges for all Centrex lines. USTA suggested a ratio of nine (9) Centrex lines to one (1) PBX trunk. It bases its recommendation on the average of the weighted average trunk equivalency ratios or relationship between NARs and Centrex lines that are employed in several jurisdictions.[71] Applying a 9:1 ratio would result in a maximum PICC on Centrex lines of approximately $0.30 per line in 1998 for the overwhelming majority of Centrex lines. We note that the ratio under some state tariffs can approach 18 to 1 for certain Centrex

[67] *First Report and Order* at ¶ 39 (noting that the $9.00 SLC will permit incumbent price cap LECs to recover their average common line revenues from 99 percent of their non-primary residential and multi-line business lines).

[68] *USTA September 25 Letter* at 2.

[69] USTA Petition at 3. *See also USTA September 25 Letter* at 8.

[70] *Ameritech September 17 Letter* at 4.

[71] *USTA September 25 Letter* at 2.

customers.[72] Reducing the PICC from up to \$2.75 to less than \$0.31 achieves the goal of spreading the PICC contribution more equitably among multi-line business customers. Using a more complicated approach to establish equivalency may only add a marginal benefit, increasing or reducing PICCs by less than \$0.16, and does not outweigh the additional administrative costs. We adopt the 9:1 ratio proposed by USTA, finding it to be reasonable and administratively simple.

39. Time Warner is correct in observing that our treatment of Centrex arrangements differs from how we addressed ISDN service in the *First Report and Order*. There, we set the SLC for PRI ISDN to be up to five times the amount assessed multi-line business subscribers, because that figure reflects the ratio of non-traffic sensitive loop costs associated with PRI ISDN service to non-traffic sensitive costs associated with other multi-line business loops.[73] We also elected to permit incumbent LECs to assess up to five PICCs on PRI ISDN service because "prohibiting incumbent LECs from charging as many as five PICCs for PRI ISDN service could prevent them from recovering the common line costs associated with providing PRI ISDN service in cases where the common line costs exceed the SLC ceiling."[74]

40. In both our treatment of ISDN lines and Centrex lines, our goal is to establish an equitable sharing of the multi-line business PICC. Prior to the adoption of the *First Report and Order*, we had no rules relating to the PICC. We had no evidence to the contrary that the assessment of five PICCs for PRI ISDN was inappropriate, so we elected to be consistent as between SLC and PICC assessment. Previously, however, ISDN lines could be charged up to 24 SLCs.[75] The adjustment from 24 SLCs to five SLCs and five PICCs does not create undue hardship on ISDN subscribers, and the *First Report and Order* should reduce their overall rates.

41. Time Warner also argues that imposing the PICC on Centrex on a per-line basis is part of the Commission's access charge transition to a more cost-causative rate structure. Although the multi-line PICC is part of our transition, this alone does not justify requiring Centrex customers to make a greater contribution toward recovery of the loop cost of residential customers than do PBX customers. Teleport's assertion that petitioners are exaggerating the impact of the PICC on Centrex users, because the amount of the charge is substantially less than the SLC, ignores the fact that the SLC recovers the additional costs imposed by Centrex customers, while the PICC does not.

42. We deny ICA's petition that we not assess PICCs on toll-restricted Centrex lines. Although the PICC is assessed upon IXCs for all lines that are presubscribed to an IXC, the PICC is not a charge based on toll usage or on the ability to place toll calls. The Commission anticipated that some lines might not be used for long distance when it adopted a rule allowing PICCs to be assessed directly upon end users for any line not presubscribed to an IXC.[76] The fact that toll-restricted

[72] *Ameritech September 17 Letter* at 3.

[73] *First Report and Order* at ¶ 116.

[74] *First Report and Order* at ¶ 118.

[75] *First Report and Order* at ¶¶ 111-12.

[76] *See First Report and Order* at ¶ 92.

Centrex lines incur no long-distance charges is, therefore, irrelevant.[77] Also, costs for these lines are assigned to the interstate jurisdiction by separations, regardless of whether the lines are toll-restricted.

## IV. TRANSPORT

### A. TIC Exemption

#### 1. Background

43. The Commission created the TIC originally as a residual charge to ensure that its adoption of the 1992 interim transport rate structure was revenue-neutral for the incumbent LECs. As such, the Commission required that the TIC be assessed on a per-minute basis on all interstate access customers that interconnect with the LEC switched access network.[78] A portion of the TIC represented the 80 percent of the costs of the tandem switch remaining after the Commission set the tandem-switching rate to recover only 20 percent of the tandem-switching revenue requirement. The rest of the revenues collected from the TIC represented costs previously recovered through transport charges that could not, at that time, be associated definitively with specific facilities or services related to transport. The Commission stated in the *First Transport Order* that, in addition to tandem-switching costs, the TIC likely recovered: (a) costs more appropriately recovered through other rate elements; (b) costs that more properly belong in the intrastate jurisdiction, but that the Part 36 jurisdictional separations rules allocate to the interstate jurisdiction; (c) costs of facilities that were then in place, but not needed for transport under the more efficient transport rate structure being adopted; and (d) costs of not-fully-depreciated copper plant that was nevertheless being replaced by less expensive fiber optic facilities.[79] The Commission also cited assertions by parties to that proceeding that the TIC also recovered (e) general support facilities (GSF) and central office equipment (COE) maintenance expenses and GSF investment that were overallocated to the transport category;[80] and (f) additional costs that the Commission had not then identified.[81]

44. In reviewing the Commission's interim transport rate structure, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) found that the just and reasonable rates required by Sections 201 and 202 of the Communications Act[82] must ordinarily be cost-based, absent a

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[77] We note that the Commission is presently considering whether to waive the PICC for toll-restricted Lifeline users and recover that revenue through Universal Service. Federal-State Joint Board on Universal Service, *et. al.*, CC Docket No. 96-45, *et. al.*, Second Further Notice of Proposed Rulemaking, FCC 97-317 (rel. Sept. 4, 1997). Multi-line businesses, however, are not eligible for Lifeline service.

[78] Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7038 (1992) ("*First Transport Order*").

[79] *First Transport Order* at 7046.

[80] *First Transport Order* at 7063-64.

[81] *Id.* at 7066.

[82] 47 U.S.C. §§ 201-202.

clear explanation of the Commission's reasons for a departure from cost-based ratemaking.[83] The D.C. Circuit, therefore, directed the Commission to develop a cost-based alternative to the TIC, or to provide a reasoned explanation for its departure from the principles of cost-based ratemaking.[84]

45. In the *First Report and Order*, we reformed the TIC and set forth a plan that will eliminate per-minute TIC charges over the next few years. We initially identified TIC amounts that could be associated with particular network facilities and directed incumbent LECs to reallocate these TIC amounts to access rate elements more closely corresponding to those network facilities. These LECs will perform the required reallocations in access tariffs filed to become effective January 1, 1998, with some exceptions. For example, the portion of tandem-switching costs that the Commission initially allocated to the TIC will be reallocated to the tandem-switching rate element in three approximately equal steps concluding January 1, 2000. In addition, the costs of the incumbent LECs' tandem-switched transport transmission facilities that are not recovered from tandem-switched transport users under the unitary rate structure will be recovered through the TIC until July 1, 1998.

46. For price cap LECs, the "residual TIC," consisting of amounts that the LEC has not reallocated as described above, will be recovered through per-line PICCs, to the extent possible while remaining within the PICC caps. Residual TIC amounts that the price cap LEC cannot recover through PICCs will be recovered through a per-minute TIC on originating access, up to a cap, with any remainder recovered from per-minute charges assessed on terminating access.

47. In the *First Report and Order*, we recognized that the per-minute TIC, because it is assessed on all transport minutes carried on facilities that interconnect with the incumbent LEC's local switch, may give the incumbent LEC a competitive advantage in the transport market. We therefore provided a TIC exemption for switched minutes carried by competitive access providers (CAPs) that interconnect with the incumbent LEC switched access network at the end office, stating that, "if the incumbent LEC's transport rates are kept artificially low and the difference is recovered through the TIC, competitors of the incumbent LEC pay some of the incumbent LEC's transport costs."[85] This TIC exemption is scheduled to take effect on January 1, 1998.[86]

### 2. Petitions for Reconsideration and Petitions for Stay

#### a. AT&T and Teleport

48. On reconsideration, AT&T and Teleport request that we permit the per-minute residual TIC exemption for switched minutes carried by CAPs that interconnect with the incumbent LEC switched access network at the end office to take effect immediately, rather than on January 1, 1998.[87] According to Teleport, the Commission, having recognized that the imposition of TIC charges on CAP-transported minutes is "inconsistent with the pro-competitive goals of the 1996 Act," should not

[83] *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996) ("*CompTel*").

[84] *Id.* at 533.

[85] *First Report and Order* at ¶ 240.

[86] *Access Charge Errata* at ¶ 4 (adding new para. 461 to the *First Report and Order*).

[87] Teleport Petition at 2-4; AT&T Petition at 10-12.

permit the practice to continue throughout the balance of calendar 1997.[88] In their comments, MCI, Hyperion, TRA, and Time Warner support this request.[89]

49. Bell Atlantic and GTE oppose this request, arguing that the TIC exemption effectively disallows costs that the incumbent LECs will continue to incur. In support of this argument, Bell Atlantic and GTE contend that the incumbent LECs will be unable to impose TIC charges in areas where they face transport competitors. Because the Commission's rules permitting reallocation of facilities-related TIC amounts to other rate elements do not take effect until January 1, 1998, Bell Atlantic and GTE argue that it would be inappropriate to permit the TIC exemption to take effect at an earlier date.[90] Bell Atlantic maintains that the relief that AT&T and Teleport seek would produce an unjustified windfall to them and other CAPs.[91] Bell Atlantic and GTE propose that we instead revise the rule to prevent the TIC exemption from taking effect at any time.[92]

### b. RCN

50. RCN argues that the TIC exemption contained in the *First Report and Order* preserves the incumbent LECs' competitive advantage because it exempts CAP-transported minutes only from the "residual" TIC. In making this argument, RCN interprets the term "residual TIC" to include only non-facilities-related TIC amounts. Under RCN's interpretation, the "residual TIC" would not include facilities-related TIC amounts that will remain in the TIC until they are reallocated as late as January, 2000.[93] MCI indicates in its comments that it shares RCN's concern and requests that the Commission clarify that the TIC exemption for CAP-transported minutes applies to the per-minute TIC in its entirety.[94]

### c. U S West and NYNEX Petitions for Stay

51. NYNEX and U S West separately have filed petitions requesting that the Commission stay the effectiveness, pending appeal, of 47 C.F.R. § 69.155(c), the rule we adopted in the *First Report and Order* prohibiting local exchange carriers from assessing the per-minute residual TIC on traffic

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[88] Teleport Petition at 3-4.

[89] Time Warner Comments at 15-16; MCI Comments at 15; TRA Comments at 15; Hyperion Comments at 2-4.

[90] Bell Atlantic Comments at 7; GTE Comments at 13.

[91] Bell Atlantic Comments at 7-8 (*citing* NYNEX Petition for Stay Pending Judicial Review, filed July 23, 1997 ("NYNEX Stay Petition")). Bell Atlantic and NYNEX completed their merger after NYNEX filed its Petition for Stay, but before the pleading cycle closed in this proceeding. *See* Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, File No. NSD-L-96-10, Memorandum Opinion and Order, FCC 97-286 (rel. Aug. 14, 1997).

[92] Bell Atlantic Comments at 7; GTE Comments at 13. *See also* USTA Comments at 7-8.

[93] RCN Petition at 8-9.

[94] MCI Comments at 13-14.

that uses the LEC's local switching services, but that does not use the LEC's local transport services.[95] NYNEX and U S West argue that such a stay is warranted because they are likely to prevail on the merits of their respective appeals and that the balance of equities favors a stay.[96] NYNEX and U S West further argue that the rule should be stayed in its entirety, to allow them to recover the entire per-minute TIC, without regard for the transport provider. In the alternative, however, NYNEX requests a partial stay to allow it to so recover the non-facilities-related portion of the TIC.

52. Procedurally, NYNEX maintains that the Commission failed to offer an adequate opportunity for public comment on the residual TIC exemption, in that the Commission's *Access Charge Reform* NPRM failed to provide adequate notice of the TIC exemption[97] and that the Commission improperly relied on a CompTel/Teleport *ex parte* presentation made three weeks before the Order was adopted.[98] Several commenters counter that the Commission's NPRM in this proceeding gave adequate notice, and that the TIC exemption is a "logical outgrowth" of the NPRM.[99]

53. Substantively, NYNEX argues that the Commission's decision to prohibit assessment of the residual TIC on minutes that use CAP transport networks is inconsistent with the Commission's findings that a large portion of the TIC is not related to any specific transport or other facilities.[100] In opposition, several parties argue that the TIC exemption is consistent with the Commission's finding that the TIC creates a competitive advantage for the incumbent LEC and with the Commission's reliance on a market-based approach to access reform.[101] MCI argues that the Commission's inability to identify every dollar in the TIC is caused by NYNEX's and other incumbent LECs' own failures to explain their claim that these costs have been incurred and to justify their recovery.[102] WorldCom asserts that, because the TIC can be traced to the incumbent LECs' transport-related costs, the Commission properly placed the burden on incumbent LECs to recover the TIC only from their own transport customers.[103] Teleport asserts that the TIC keeps incumbent LEC transport rates artificially low, not only to the extent that TIC amounts are related to specific transport facilities, but also to the

[95] NYNEX Petition for Stay; U S West Petition for Partial Stay Pending Judicial Review, filed August 14, 1997 ("U S West Petition for Stay").

[96] NYNEX Petition for Stay at 8-9; U S West Petition for Stay at 6.

[97] NYNEX Petition for Stay at 18-19.

[98] NYNEX Petition for Stay, *Errata*, filed July 24, 1997, at 19.

[99] MCI Comments on NYNEX Petition for Stay at 4-5; Teleport Comments on NYNEX Petition for Stay at 11-14; WorldCom Comments on NYNEX Petition for Stay at 9; LBC Comments on NYNEX Petition for Stay at 2; Time Warner Comments on NYNEX Petition for Stay at 13-17.

[100] NYNEX Petition for Stay at 10-11.

[101] LBC Comments on NYNEX Petition for Stay at 2; WorldCom Comments on NYNEX Petition for Stay at 3-4; Time Warner Comments at 8-9.

[102] MCI Comments on NYNEX Petition for Stay at 7.

[103] WorldCom Comments on NYNEX Petition for Stay at 5-6.

extent that the TIC compels competitors to pay TIC charges, thereby allowing LECs to establish transport rates that do not fully recover their costs, whatever the source.[104]

54. NYNEX also argues that the Commission has failed to explain why it is reasonable for the LEC to recover both service-related and non-service-related TIC amounts from PICCs, but neither component from the per-minute residual TIC.[105] Several commenters counter that the Commission's application of cost-causation principles to conclude that CAPs should not be responsible for TIC charges for traffic that does not traverse LEC transport facilities is consistent with the Commission's other decisions reached in the *First Report and Order*.[106] Time Warner argues, however, that, if the recovery of residual TIC revenues through PICCs, but not through per-minute charges is inconsistent with the Commission's approach to the residual TIC, the solution should be to amend the rule to prevent the imposition of any residual TIC amounts, whether through PICCs or through per-minute charges, where a CAP provides the transport service.[107]

55. NYNEX also argues that the use of price cap X-factor reductions to decrease the per-minute TIC will effectively reallocate the per-minute residual TIC to other rate elements as the per-minute TIC is reduced to the exclusion of all other rate elements. According to NYNEX, the residual TIC is completely excluded only to the extent that the X-factor targeting has not reallocated it to a permitted rate element. NYNEX argues that the Commission has not offered a justification for disallowing TIC recovery only during this transition period.[108] In opposition, Teleport argues that the Commission's stated justification -- that per-minute charges assessed on all switched access minutes, including those of CAPs, adversely affects the development of competition -- is adequate.[109]

56. NYNEX argues that the CAP TIC exemption is arbitrary in that it will have a disproportionately harsh effect on NYNEX, and that this non-uniform impact will hinder the development of "full and fair" competition.[110] Similarly, U S West argues that, by making it difficult or impossible for it to collect the per-minute TIC, the TIC exemption is contrary to the Commission's decision not to disallow any portion of the current TIC.[111] Many commenters counter, however, that the mere allegation of a disproportionate impact is legally irrelevant and does not justify the stay.[112]

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[104] Teleport Comments on NYNEX Petition for Stay at 7-8.

[105] NYNEX Petition for Stay at 11-12; *see also* SWBT Comments on NYNEX Petition for Stay at 1-2.

[106] *E.g.*, Teleport Comments on NYNEX Petition for Stay at 9.

[107] Time Warner Comments on NYNEX Petition for Stay at 10.

[108] NYNEX Petition for Stay at 12.

[109] Teleport Comments on NYNEX Petition for Stay at 9.

[110] NYNEX Petition for Stay at 13-14, 17.

[111] U S West Petition for Stay at 10.

[112] LBC Comments on NYNEX Petition for Stay at 2; WorldCom Comments on NYNEX Petition for Stay at 7-8; MCI Comments on NYNEX Petition for Stay at 9; Time Warner Comments on NYNEX Petition for Stay at 11.

Several commenters state that, instead, the imposition of per-minute TIC charges on CAP transport minutes inhibited competition because (1) it made it easier for incumbent LECs to underprice their own transport services because transport revenues could be partially collected from a charge that would be subject to less competition; (2) it guaranteed the incumbent LEC a revenue stream not available to competitors; and (3) it required nascent competitive entrants to transfer revenues to their largest competitors.[113] These commenters argue that the LECs' loss of their unfair competitive advantage, therefore, will promote, rather than hinder, competition.

57. NYNEX also argues that the TIC exemption contradicts the Commission's conclusion that access reform, in itself, should not produce overall rate reductions because the price cap LECs' per-minute TIC revenues are likely to be less than those calculated in the restructure. As a result, the price cap LECs will be unable to collect the full amount of revenues from per-minute residual TIC rates or PICCs that will be included in their January 1, 1998, tariff revisions.[114] In opposition, several parties argue that NYNEX should not be guaranteed TIC revenues, but should be pressured by competition to reduce the disparity between its prices and those of its competitors.[115] MCI cites the fact that NYNEX itself submitted a plan that would have eliminated 80 percent of the TIC[116] and states that the Commission's decision to preclude imposition of TIC charges where such charges would impair the development of competition is consistent with the Commission's other actions designed to promote competition and eliminate the TIC as quickly as possible through price cap reductions and competitive pressures.[117]

58. NYNEX and U S West argue that an exemption for the service-related portion of the TIC is inconsistent with the Commission's continued reliance on subsidization of tandem-switching rates by direct-trunked transport customers until December 31, 1999.[118] Several commenters counter that the TIC exemption is the only course consistent with the Commission's approach to fostering competition and with the *CompTel* remand's directive to adopt a cost-causative transport rate structure.[119] Time Warner further argues that the appropriate remedy would be to allow incumbent LECs to petition the

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113 WorldCom Comments on NYNEX Petition for Stay at 4; Teleport Comments on NYNEX Petition for Stay at 11.

114 NYNEX Petition for Stay at 14-15.

115 Teleport Comments on NYNEX Petition for Stay at 10; Time Warner Comments on NYNEX Petition for Stay at 11-12.

116 MCI Comments on NYNEX Petition for Stay at 2.

117 MCI Comments on NYNEX Petition for Stay at 8 ("If competition will prevent NYNEX from recovering inefficient costs, this is not an unexpected harm, it is precisely the goal the Commission adopted, and explained, for all incumbent LECs").

118 NYNEX Petition for Stay at 15-16; U S West Petition for Stay at 7.

119 WorldCom Comments on NYNEX Petition for Stay at 6-7; Teleport Comments on NYNEX Petition for Stay at 10; MCI Comments on NYNEX Petition for Stay at 8-9.

Commission for permission to make a faster transition to cost-based tandem-switching rates than the *First Report and Order* timetable permits.[120]

59. U S West argues that, after January 1, 1998, the TIC will consist of implicit tandem switching and universal service support subsidies (including the higher costs of providing rural transport) and that the TIC exemption results in a collection system for this subsidy that is non-sustainable, discriminatory, and inequitable.[121] MCI counters that, because both of these categories of costs are transport-related, the Commission correctly provided a TIC exemption for CAP-provided transport.[122] MCI states that revenue-neutrality was not a Commission goal in this proceeding; rather, the introduction of competition can be expected to place downward pressure on prices.[123] Furthermore, several commenters argue that, because local transport, whether rural or otherwise, has never been a service eligible for universal service support, U S West's argument that the TIC contains implicit universal service subsidies is inaccurate.[124] Several commenters also contend that the Commission's established remedy, zone-based deaveraging of transport rates, provides U S West with an adequate opportunity to recover TIC amounts related to the higher costs of rural transport.[125]

### 3. Discussion

60. We decline to modify the effective date of 47 C.F.R. § 69.155(c) as AT&T and Teleport request. Although some of the Commission's actions to reform the interstate access charge system took effect in access tariffs filed to become effective July 1, 1997, the majority of the Commission's rate structure changes take effect on January 1, 1998, or later. Because the TIC exemption at issue here is one part of our larger effort to reform the system of interstate access charges to preserve and promote competition, we believe that the rule should take effect on January 1, 1998, at the same time as many of our other rules relating to the transport rate structure. Incumbent LEC access tariffs filed to become effective on that date will reallocate many of the currently-identified facilities-related TIC amounts to other rate elements. In addition, on January 1, 1998, for the first time, the incumbent LECs will begin collecting remaining TIC amounts from PICCs assessed to IXCs on a flat-rate, per-line basis. Because a portion of the TIC, including some facilities-related TIC amounts, will be allocated to PICCs on January 1, 1998, we conclude that the extent of the exemption we adopt here will not be evident until these tariff revisions take effect. Thus, we conclude that the exemption should take effect only in concurrence with the implementation of the PICC.

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[120] Time Warner Comments on NYNEX Petition for Stay at 12-13.

[121] U S West Petition for Stay at 7-10.

[122] MCI Comments on U S West Petition for Stay at 4.

[123] *Id.* at 6.

[124] *Id.* at 9; LBC Comments on U S West Petition for Stay at 3; Teleport Comments on U S West Petition for Stay at 7.

[125] MCI Comments on U S West Petition for Stay at 10; Teleport Comments on U S West Petition for Stay at 8.

61. We agree with RCN and MCI that we should clarify the extent of the TIC exemption described in the *First Report and Order*.[126] In addition, in response to concerns raised in NYNEX's and U S West's petitions for stay, we reconsider on our own motion[127] our adoption of the TIC exemption provided in the *First Report and Order*. Upon further consideration, we conclude that the TIC exemption provided in the *First Report and Order* could provide an unjustified windfall to competitive providers of local transport. Because the non-facilities-related portion of the residual TIC does not relate to the use of the incumbent LEC's interstate transport facilities, we need not exempt competitors from paying this portion of the TIC in order to prevent them from paying for the incumbent LEC's transport when that transport is not used. Therefore, incumbent LECs may continue, after January 1, 1998, to assess upon all local switching traffic that portion of their per-minute TIC charges that they do not anticipate will be reallocated in the future to facilities-based rate elements. This is the only portion of the per-minute TIC, however, that may be assessed upon traffic that uses the incumbent LEC's local switching services, but that does not use the incumbent LEC's local transport services. Under this rule, interexchange traffic that is switched at the incumbent LEC's local switch, but that is not transported on the incumbent LEC's local transport network, will be subject to the per-minute TIC, less the portion of the per-minute TIC attributable to incumbent LEC tandem-switching and tandem-switched transport transmission costs that have not yet been reallocated to facilities-based rate elements. In access tariff revisions filed to become effective January 1, 1998, incumbent LECs must show all such facilities-related amounts that they anticipate will be reallocated in the future, including appropriate documentation, and calculate separate per-minute TIC charges for those minutes that use the incumbent LEC's local transport facilities and those that do not.

62. In remanding the interim rate structure, the D.C. Circuit instructed the Commission to "move expeditiously . . . to a cost-based alternative to the [TIC], or to provide a reasoned explanation of why a departure from cost-based ratemaking is necessary and desirable in this context."[128] For our rate structure to be "cost-based," costs must be recovered (1) only from the party that causes the costs to be incurred; and (2) in the manner in which the costs are incurred (*e.g.*, non-traffic-sensitive costs should be recovered on a non-traffic sensitive basis).[129]

63. Our *First Report and Order* identified certain costs within the TIC that more properly should be recovered through other access rate elements. These costs include additional trunking costs left unrecovered by rates set assuming a uniform loading of 9000 minutes of use per month on shared trunks, rather than rates set using actual traffic levels, as well as misallocated costs of central office equipment maintenance. In addition, we identified costs related to multiplexing, SS7 signalling, and

[126] *First Report and Order* at ¶ 240.

[127] 47 C.F.R. § 1.108. Under long-established Commission practice, the filing of a petition for reconsideration tolls the thirty day period our rules provide for *sua sponte* reconsideration. *E.g.*, *Central Fla. Enters., Inc. v. FCC*, 598 F.2d 37, 48 n.51 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979), *and cert. denied* 460 U.S. 1084 (1983); *Radio Americana, Inc.* 44 F.C.C. 2506, 2510 (1961).

[128] *CompTel*, 87 F.3d at 532.

[129] Our discussion here focusses on the development of a cost based rate *structure*, but does not address the separate question concerning the development of cost-based rate *levels*. *See, e.g.*, 47 U.S.C. § 252(d)(1)(A)(i) (requiring that rates for interconnection and unbundled network elements be cost-based); *First Report and Order* at ¶ 263 (concluding that a primarily market-based approach to reforming access charges and controlling rate levels would better serve the public interest than prescriptive action to set rate levels at forward-looking economic cost).

host/remote trunking that are currently recovered through the TIC.[130] LECs must reallocate all of these costs to facilities-based rate elements in access tariffs filed to become effective January 1, 1998. In addition, one third of the 80 percent of the costs of the tandem switch currently assigned to the TIC will be reallocated to the tandem switching rate element on that date.

64. After January 1, 1998, the costs contained in the TIC that the Commission has identified as facilities-related will have two primary sources. The majority of the facilities-related TIC will consist of the portion of the incumbent LEC's tandem-switching costs not yet reallocated to the tandem-switching rate element. These costs will be reallocated to the tandem-switching rate element in two additional installments in tariffs filed to become effective on January 1, 1999, and January 1, 2000. In addition, from January 1, 1998, until July 1, 1998, the TIC will also recover the costs of tandem-switched transport transmission facilities that are not recovered by the incumbent LEC from tandem-switched transport customers electing the unitary rate structure. These TIC amounts are also facilities-related. In the *First Report and Order*, we directed incumbent LECs to remove costs from the TIC "equal to the additional revenues realized from the new tandem-switched transport rates . . . implemented in accordance with the [final transport] rate structure."[131] Because the three-part rate structure will not take effect until July 1, 1998, we require incumbent LECs to estimate in their tariffs filed to become effective January 1, 1998, the amount by which their tandem-switched transport transmission revenues will increase under the three-part rate structure. This amount, currently contained in the TIC, is facilities-related and therefore subject to the exemption described in this order.

65. Neither the tandem-switching costs nor the tandem-switched transport transmission costs contained in the TIC relate to facilities used by purchasers of competitive alternatives to the incumbent LEC's transport facilities. The D.C. Circuit remanded the interim transport rate structure to the Commission in part because that rate structure did not recover the costs of the tandem switch in a cost-causative manner. Our *First Report and Order*, in reallocating these costs, remedies this situation as expeditiously as possible while minimizing the potential for rate shock that otherwise might accompany such a shift. Because these costs are incurred on behalf of the incumbent LEC's own transport operation, however, it would be inconsistent with the principles of cost-causation to prolong the recovery of these costs from users of competing transport facilities.

66. Our approach to access reform relies first on increasing market-based pressures as competition develops to place downward pressure on access charge levels. We conclude that, for this approach to succeed, we should develop a rate structure that permits maximum competitive pressure on each incumbent LEC revenue stream, absent compelling public policy reasons to the contrary. It would impair the effectiveness of our market-based approach for us to insulate a significant portion of the costs of the incumbent LEC's transport facilities from competition by mandating recovery of these costs from incumbent LEC competitors.

67. We recognize that, during the two-year transition period, our rules will continue to prohibit the incumbent LEC from allocating the full, embedded cost of the tandem switch to the tandem-switching rate element. The effect of our three-step reallocation process will be to permit a continued subsidy of the incumbent LEC's tandem switch by users of the incumbent LEC's direct-

[130] *First Report and Order* at ¶¶ 210-223.

[131] *First Report and Order* at ¶ 222. Targeted X-factor TIC reductions will not eliminate this component of the facilities-related TIC because these reductions only apply to non-facilities-related per-minute TIC amounts. *First Report and Order* at ¶¶ 235-238.

trunked transport facilities and minimize any rate shock for tandem-switched transport customers.[132] Because the incumbent LEC's competitors offering transport services will not be subject to this subsidy, they may enjoy a slight competitive advantage over the incumbent LEC.

68. We find, however, that the competitive benefits to be gained from recovering these costs only from the incumbent's customers and not from customers using competitive transport providers outweigh any potential dangers resulting from the small, temporary asymmetry caused by the TIC exemption we provide here. Even though the full costs of the incumbent LEC's tandem switch will not be borne by the users of the tandem switch until January, 2000, the effects of the TIC exemption will be reduced substantially before that time as the incumbent LEC collects an increasing proportion of the tandem-switching costs remaining in the TIC through PICCs. As discussed below, we continue to permit the incumbent LEC to assess the full PICC on each of its loops, without regard for the type or provider of the transport the IXC uses to transport the minutes generated by that loop from the end office to the IXC's facilities. As the portion of the incumbent LEC's tandem-switching costs that is recovered through the per-minute TIC decreases, any potential adverse effects of this small asymmetry will rapidly decrease. In contrast, if we were to mandate recovery of this portion of the incumbent LEC's tandem-switching costs from all customers using the incumbent LEC's local switching facilities, without regard for whether they make use of the incumbent LEC's transport facilities, we would insulate this revenue from much of the pressure we anticipate will develop as competitors enter the local service and access markets. The resulting delay in competitive entry would be harmful to consumers, who will benefit most from increased competition.

69. We revise the TIC exemption contained in our *First Report and Order*, however, to permit the incumbent LEC to impose the remaining non-transport costs assigned to the TIC on all minutes switched by the incumbent LEC at its end office, without regard for whether those minutes are carried on incumbent LEC or competitive transport facilities. In contrast to the portion of the incumbent LEC's tandem-switched transport costs that will remain in the TIC after January 1, 1998, we did not find in the *First Report and Order* that the remainder of the TIC could be associated definitively with particular interstate facilities on the record before us. Instead, we stated that a portion of these TIC amounts may result from the operation of the jurisdictional separations process, which allocates the costs of private line and switched services differently between the state and interstate jurisdictions, despite the fact that these two types of services use comparable facilities.[133] As a result, we recognized in the *First Report and Order* the possibility that rates for direct-trunked transport and tandem-switched transport transmission facilities may not recover the full amount of the costs of switched facilities the separations process allocates to the interstate jurisdiction.[134]

70. We have recently begun a broad re-examination of the jurisdictional separations process that may eventually correct this problem.[135] In the meantime, however, we are unable to associate

[132] Users of the incumbent LEC's direct-trunked transport facilities, however, often use incumbent LEC tandem-switched transport facilities for overflow traffic at peak calling hours. These users, therefore, receive a portion of the benefits of the tandem switching subsidy.

[133] *First Report and Order* at ¶ 225.

[134] *Id.*

[135] Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, CC Docket No. 80-286, Notice of Proposed Rulemaking, FCC 97-354 (rel. Oct. 7, 1997).

these TIC amounts with any particular interstate facilities. Instead, to the extent that this portion of the TIC may result in part from overallocation of costs to the interstate jurisdiction, thereby lowering intrastate rates, this portion of the TIC may be a form of implicit universal service support.[136] As such, it would be inequitable to mandate recovery of this portion of the per-minute TIC only from the incumbent LEC's transport customers. Because these amounts do not appear to be any more closely related to the incumbent LEC's interstate transport facilities than they are to any other interstate facilities of the incumbent, it is appropriate for all of the incumbent LEC's access customers, and not just its transport customers, to pay a share of this portion of the per-minute TIC. In the *First Report and Order*, we stated our commitment to minimize the potential of the per-minute TIC artificially to suppress demand for interstate toll services.[137] Because the non-facilities-related TIC is composed of amounts that have not been demonstrated to reflect usage-sensitive costs, it does have this undesirable effect. We have therefore required that it be eliminated expeditiously through targeting of the X-factor reductions to the interconnection charge service category and through conversion of the residual TIC to a flat-rated charge.[138]

71. In addition, we stated in the *First Report and Order* that a portion of the costs remaining in the TIC may result from our use of special access rates to develop initial geographically-averaged direct-trunked transport and tandem-switched transport transmission rates. We agreed in the *First Report and Order* that, while the use of such rates appears to have been appropriate in urban areas, these rates may not fully recover the higher costs of transport in less densely populated rural areas.[139] Because we are unable to quantify these cost differences, and because it is likely that the cost differential varies greatly across LECs and across study areas served by the same LEC, we did not mandate any immediate reallocation of costs from the TIC to rural transport rates. Instead, we expect that, as competition develops, the incumbent LECs will come under increasing pressure to deaverage transport rates under our existing deaveraging rules. We observe that, as with the costs discussed in the previous paragraph, recovery of rural transport costs through the TIC supports a conclusion that at least a portion of the non-facilities-related TIC may be related to the provision of universal service.[140]

72. We also here clarify that the "residual TIC" that the incumbent LEC should recover from PICCs includes all TIC amounts that have not been reassigned to other facilities-based rate elements,

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[136] In the *Local Competition Order*, we permitted incumbent LECs to recover, for a limited period, of a charge equal to 75 percent of the TIC assessed on all interstate minutes traversing the incumbent LECs' local switches for which the interconnecting carriers pay unbundled local switching element charges. We permitted this charge based on our finding that the TIC, in part, consisted of contributions toward universal service. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15862-69 (1996), *aff'd sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

[137] *First Report and Order* at ¶ 233.

[138] *Id.*

[139] *First Report and Order* at ¶ 226.

[140] U S West Petition for Stay at 8. In the NPRM in this proceeding, we sought comment on how universal service support received under the new universal service support mechanisms should be allocated to reduce interstate rates and stated that "[s]ome of those support amounts may reduce the amount that would otherwise be recovered through the TIC." Access Charge Reform, *et. al.*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21402 (1996) (NPRM).

including the portion of the incumbent LEC's tandem switching costs that have not been reassigned to the tandem-switching rate element in tariffs filed to become effective on January 1, 1998, and January 1, 1999. We direct price cap LECs that will recover only a portion of their residual TIC from PICCs to allocate non-facilities-related TIC amounts and facilities-related TIC amounts between PICCs and per-minute charges on a *pro rata* basis. The incumbent LECs must reallocate the full amount of the costs of their tandem switch to the tandem switching rate element in installments on January 1, 1998, 1999, and 2000, whether they are then contained in per-minute charges or in PICCs.

73. Accordingly, we revise the TIC exemption contained in our *First Report and Order* to permit the incumbent LEC, in tariffs filed to become effective January 1, 1998, to impose that portion of the per-minute TIC that is not expected to be reassigned to particular facilities on a cost-causative basis on all transport minutes switched at its end office, without regard for whether those minutes are carried on incumbent LEC or competitive transport facilities. Per-minute TIC amounts that the LEC expects to reallocate to facilities-based rate elements, in contrast, may be assessed only on minutes transported on the incumbent LEC's own transport facilities.

74. TIC amounts that a price cap LEC will recover through PICC charges may be assessed to an IXC for a particular loop without regard for the type or provider of the transport the IXC uses to transport the minutes generated by that loop from the end office to the IXC's facilities. Although certain price cap LECs will recover a portion of the costs of their tandem-switching facilities during the transition through PICCs from IXCs that do not use the price cap LEC's transport facilities to transport all of the minutes generated on a particular loop, the administrative difficulties associated with calculating partial PICCs in this context outweigh the benefits to be gained from doing so. If an IXC were to use a combination of competitive- and incumbent LEC-provided transport facilities between an end office and its serving wire center, it would be needlessly complicated to determine the portion of the minutes generated on each loop that were carried on competitive transport links. Furthermore, unlike the per-minute TIC, the flat-rated PICC will not substantially alter the incremental cost of additional transport minutes transported over competitive transport facilities. Thus, even if an IXC pays a full PICC, this payment will not affect the IXC's decision whether to purchase additional transport minutes from the incumbent LEC or a competitive transport provider. As a flat-rated charge, the PICC will not artificially suppress demand for interstate toll telecommunications services.

75. In addition, the PICC is subject to competitive pressures, whether or not it recovers TIC amounts for traffic transported by the incumbent LEC's competitors. If the end user chooses an alternate provider of local service, the incumbent LEC will no longer recover any portion of the PICC for that loop. Thus, we conclude that the dangers associated with the recovery of the full PICC without regard for the transport provider are far more attenuated than the dangers that would be associated with recovery of facilities-related costs from per-minute TIC charges levied on competitive transport minutes.

76. We deny the petitions filed by U S West and NYNEX requesting a stay of the per-minute TIC exemption rule.[141] The practical effect of our revisions to the TIC exemption, however, will be to provide a substantial portion of the relief sought in the stay petitions. In light of these revisions, we believe that the petitioners are unlikely to succeed on the merits on review, that they will not suffer irreparable injury absent a stay, that a stay would cause substantial harm to the incumbent LECs' competitors, and that the public interest is best served by the TIC exemption described here. With respect to the portion of the TIC related to the costs of the incumbent LEC's interstate transport facilities, we conclude that there are sound policy reasons underlying our decision to maintain this exemption and, consequently, we find against the petitioners here.

77. We conclude that NYNEX's objections to the sufficiency of our notice are without merit. The NPRM in this proceeding provided adequate notice of the TIC exemption we ultimately adopted. Our NPRM in this proceeding stated that "to the extent that any portion of the TIC should properly be included in LEC transport rates, other than the TIC, the TIC provides the LECs with a competitive advantage for their interstate transport services because incumbent LEC transport rates are priced below cost while the LECs' competitors using expanded interconnection must pay a share of incumbent LEC transport costs through the TIC . . . . Our goal in this proceeding is to establish a mechanism to phase out the TIC in a manner that fosters competition and responds to the [*CompTel*] court's remand."[142] We went on to state, in the section of the NPRM entitled "Possible Revisions to the TIC," that "our goals are to move towards significantly more cost-based access rates and competition in the access and interexchange markets. The development of a competitive access market will be distorted by the assessment of the TIC as a surcharge on local switching. The TIC therefore will be unsustainable."[143] We sought comment on the extent to which various approaches to reducing the TIC would "achieve the goals of this proceeding" and asked parties to "address the relative merits of each [approach], or of other approaches that they may suggest."[144] We conclude therefore that, beyond reasonable question, our NPRM provided adequate notice of "the terms or substance of the proposed rule or a description of the subjects and issues involved."[145]

78. In any event, courts require only that the rule, as adopted, constitute a "logical outgrowth" of the proposed rule.[146] To satisfy this standard, courts ask "whether 'the purposes of notice and

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[141] In determining whether to stay the effectiveness of one of its rules or orders, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Under that test, petitioners must demonstrate that: (1) they are likely to succeed on the merits on review; (2) they would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest. We find that neither NYNEX nor U S West has satisfied any of the four factors for granting a stay. In light of the substantial relief we have granted above, however, we provide only a brief analysis here of the petitioners' arguments.

[142] NPRM, 11 FCC Rcd at 21402.

[143] NPRM, 11 FCC Rcd at 21407.

[144] NPRM, 11 FCC Rcd at 21409.

[145] 5 U.S.C. § 553(b)(3).

[146] *E.g.*, *National Mining Ass'n v. Mine Safety and Health Admin.*, 116 F.3d 520, 531 (D.C. Cir. 1997).

comment have been adequately served.'"[147] Factors to be considered include "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule;"[148] and whether "the notice given affords 'exposure to diverse public comment,' 'fairness to affected parties,' and 'an opportunity to develop evidence in the record.'"[149] We conclude that the NPRM language quoted above more than adequately meets this standard. The NPRM in this proceeding discussed possible revisions to the TIC rate element for nine full pages, sought comment on four specific TIC-reduction options, and invited commenters to suggest alternate approaches.[150] The NPRM in this proceeding discussed expressly the anti-competitive problems associated with the payment of TIC charges by competitive providers of transport services, stated that the TIC would be "unsustainable" in that form, and sought comment on approaches to reform that would "achieve the goals of this proceeding," among which was the adoption of a transport rate structure that would foster competition. In such circumstances, we conclude that commenters should have anticipated that the Commission might eventually adopt a TIC exemption for competitive transport providers,[151] that our NPRM afforded adequate notice of the Commission's eventual adoption of such an exemption, and that we provided an adequate opportunity for diverse public comment.

79. In response to the NPRM, several commenters, in their initial comments, proposed TIC exemptions for competitive transport. WorldCom, for example, argued that, "the Commission should restructure the TIC rate element . . . in a manner that maximizes competitive pressure on the charge. As local and full-service competition begin[s] to emerge, competitive carriers should be able to avoid the TIC to the extent that they win customers away from incumbent LECs. This will create competitive pressure for the LECs to reduce their TIC rate levels, without necessitating any prescriptive action by the Commission."[152] The fact that several commenters raised this solution in their comments, and in subsequent *ex parte* filings, supports our conclusion that the NPRM adequately raised this issue.

80. We also conclude that NYNEX's claims of irreparable harm are without merit. Although the TIC exemption may impact some incumbent LECs differently from others, the same can be said for virtually all of the rules we adopt, simply because of differences in the circumstances and business

[147] *National Mining Ass'n v. Mine Safety and Health Admin.*, 116 F.3d at 531 (*quoting American Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994) and *Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991)).

[148] *American Water Works Ass'n v. EPA*, 40 F.3d at 1274.

[149] *National Mining Ass'n v. Mine Safety and Health Admin.*, 116 F.3d at 531 (*quoting Association of Am. Railroads v. DOT*, 38 F.3d 582, 589 (D.C. Cir. 1994) and *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

[150] NPRM, 11 FCC Rcd at 21402-09.

[151] *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d at 549.

[152] Access Charge Reform, *et. al.*, CC Docket No. 96-262, *et. al*, Comments of WorldCom, filed January 29, 1997, at 65. *See also id.* at 60-64 (opposing TIC-recovery mechanisms that would have shielded the TIC revenue stream from competitive pressures because such mechanisms would, *inter alia*, eliminate market-based downward pressures access rates, impede competitive entry, harm consumers, and provide incumbent LECs with an unjustified revenue-entitlement).

climate facing each LEC. Our focus in the context of a stay petition must be on individualized allegations of irreparable harm. We find that neither petitioner has met that standard with respect to the TIC exemption we provide in this Order. Mere financial or economic losses do not, in and of themselves, constitute irreparable harm.[153] In addition, because this portion of the per-minute TIC is likely to be relatively small, in relation to the remainder of the TIC and other transport charges, the incumbent LECs are unlikely to suffer large-scale competitive losses as a result of the exemption, as modified here. In any event, we have long held that "revenues and customers lost to competition which can be regained through competition are not irreparable."[154]

81. In contrast, continued subsidy of the incumbent LECs' tandem switching facilities by competitors is incompatible with the development of competition in the local market. Without an exemption permitting new entrants to cease subsidizing incumbent LEC transport facilities, the incumbent LEC's revenue stream from facilities-related, per-minute TIC charges would be insulated from competition. These new entrants, having already shouldered financial burdens in seeking to compete with the established monopoly incumbent LEC, should not be required in addition to subsidize the facilities of the incumbent LEC against whom they compete. Such a result would cause continued harm to these new entrants, and would further delay the public interest benefits of competition. Thus, we conclude that the petitioners have failed to satisfy either of the last two factors we must consider in evaluating their stay petitions. Accordingly, we deny the stay petitions.

### B. Deaveraged Tandem-Switched Transport Transmission Rates

82. We also take this opportunity to amend the language of section 69.111(c)(1) to specify the manner in which minutes are to be determined through June 30, 1998, in calculating tandem-switched transport transmission rates when an incumbent LEC has deaveraged rates by density zone. Section 69.111(c)(2), which applies after July 1, 1998, includes such language. The *First Report and Order* did not intend to take away the ability of incumbent LECs to deaverage transport transmission rates if they have met the requisite qualifications. Finally, we amend the references to section 69.124 in section 69.111 to refer to section 69.123.

## V. RATE-OF-RETURN LECs

83. In the *First Report and Order*, we took steps to adopt, *inter alia*, a cost-based transport rate structure and to comply with the D.C. Circuit's *CompTel* remand.[155] As acknowledged in the *First Report and Order*, the *CompTel* remand applied to rate-of-return LECs as well as price cap LECs.[156]

84. Upon further consideration, we recognize that, absent clarification, some language in the *First Report and Order* may be ambiguous in delineating which of our decisions applied to all

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[153] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir 1985).

[154] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Order, 11 FCC Rcd 11754, 11756-57 (1996) (*quoting Central & S. Motor Freight Tariff Ass'n v. United States*, 757 F.2d 301, 309 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1019 (1985)) (denying stay of certain provisions of the *Local Competition Order*).

[155] *Comptel*, 87 F.3d 522.

[156] *First Report and Order* at ¶ 335.

incumbent LECs, including rate-of-return LECs. For example, in Section III.C. of the *First Report and Order*, we directed "all incumbent LECs to discontinue the unitary rate structure option for the transmission component of tandem-switched transport, effective July 1, 1998."[157] In contrast to this language, we stated at paragraph 335 in the *First Report and Order* that we had restricted "application of the rules we adopt in this proceeding to the incumbent price cap LECs, with [three] limited exceptions," for: (1) "universal service support to the interstate revenue requirement for all incumbent LECs in Section VI.D;" (2) "the changes to the TIC that we adopt[ed] in Section III.D . . . will also apply to rate-of-return incumbent LECs;" and (3) "in Section VI.A . . . our exclusion of unbundled network elements from Part 69 access charges applies to all incumbent LECs."

85. We take this opportunity to clarify that, with two limited exceptions, the decisions made in Section III.C of the *First Report and Order* relating to the rate structure and rate levels for entrance facilities, direct-trunked transport, and tandem-switched transport apply to all incumbent LECs, including rate-of-return LECs.[158] The two exceptions are that we did not create for rate-of-return LECs separate rate elements for dedicated ports at the tandem switch and for multiplexers at the tandem switch.[159] Thus, for example, rate-of-return LECs must discontinue the unitary rate structure option for tandem-switched transport no later than July 1, 1998, when all incumbent LECs must use only the three-part rate structure for cost recovery.[160] These transport modifications that are applicable to rate-of-return LECS are in addition to those decisions made in Sections III.D, VI.A, and VI.D that also apply to rate-of-return LECs.[161]

## VI. MEMORANDUM OPINION AND ORDER

86. The National Exchange Carrier Association, Inc. (NECA) asserts in its reconsideration petition that the Commission should revise on reconsideration the rule provisions governing calculation of NECA carrier common line (CCL) rates, without waiting for the conclusion of a separate proceeding on access charge reform for rate-of-return LECs. In the alternative, NECA requests that the Commission issue an order waiving section 69.105(b)(2)-(3) for NECA's pool, so as to allow NECA to reflect revised long term support (LTS) formula amounts in its CCL tariff rates effective January 1, 1998.[162] No party opposed or supported NECA's petition for reconsideration or waiver of the rule. We have decided to waive the specified rule provisions at this time, and make appropriate rule revisions in the separate proceeding.

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[157] *First Report and Order* at ¶ 175.

[158] NPRM, 11 FCC Rcd at 21380-81.

[159] In tariffs filed to become effective January 1, 1998, rate-of-return LECs must reallocate the costs of these trunk ports and multiplexers from the TIC to other, currently-existing rate elements. *Access Charge* Sua Sponte *Reconsideration Order*, 12 FCC Rcd at 10122-23.

[160] *First Report and Order* at ¶ 175.

[161] In both Sections III.C. and III.D. of the *First Report and Order*, we explained that incumbent LECs must reallocate in three annual steps tandem switching revenues from the TIC to the tandem-switching rate element, excluding signalling and dedicated port costs allocated elsewhere in last May's order. This decision applies to rate-of-return LECs as well as price cap LECs.

[162] NECA Reconsideration Petition at 6.

87. Section 69.105(b) currently sets the NECA CCL tariff at the average of price-cap LECs' CCL charges. Prior to January 1, 1998, LTS is a variable amount, based on the difference between the revenues earned from charging a nationwide average CCL rate and the NECA pool CCL revenue requirement. In the *Universal Service Order*, we substituted federal universal service support payments for previously-received recovery from the interstate access charge system through LTS.[163] The rule revisions in the *First Report and Order* removed LTS amounts from price cap LEC CCL calculations, but postponed making conforming revisions in Section 69.105(b) to the CCL rate calculation for NECA tariff participants.[164]

88. Section 1.3 of our rules empowers the Commission to grant waivers of its rules if good cause is shown.[165] In this situation, NECA must demonstrate that special circumstances justify a departure from the general rule and that such a deviation will serve the public interest.[166] We conclude that NECA has demonstrated that continued application of Section 69.105(b)(2)-(3) would be contrary to the public interest in these circumstances. As we stated in the *Universal Service Order*, the "elimination of price-cap [incumbent LECs'] LTS obligations will allow their CCL charges to fall, but there is no corresponding reason for a reduction in the NECA CCL tariff. Yet under our current rules, the NECA CCL charge would fall simply because of our regulatory changes to price-cap [incumbent LECs'] LTS payment obligations. We must therefore establish a new method to set the NECA CCL tariff."[167]

89. Because changes in the recovery of LTS amounts and price-cap carrier CCL rate computations as adopted in the *First Report and Order* and *Universal Service Order* are scheduled to become effective on January 1, 1998,[168] grant of the waiver will allow NECA to conform its rates to

[163] Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd 8776, 9164 (1997) (*Universal Service Order*). "[A]lthough we remove the LTS system from the access charge regime, . . . we enable rural LECs to continue to receive payments comparable to LTS from the new universal service support mechanisms . . . ." *Id.* at 9165.

[164] *First Report and Order* at ¶¶ 375-77. We justified the delay in making revisions to the NECA CCL calculations due to a failure to receive any comments as to how the NECA CCL rate calculation rules should be adjusted. According to NECA, however, notice and comment are unnecessary for a ministerial change to the CCL rate calculation rule in order to conform that rule to policy decisions made in the *Universal Service Order* and the *First Report and Order*.

[165] 47 C.F.R. § 1.3.

[166] *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[167] *Universal Service Order*, 12 FCC Rcd at 9170; *see also id.* at 9164, 9165-66, 9169.

[168] Prior to January 1, 1998, LTS is a carrier's total common line revenue requirement less revenues received from SLCs and CCL charges. *Universal Service Order*, 12 FCC Rcd at 8942 ("[B]eginning in 1998, rural carriers will recover from the new universal service support mechanisms LTS at a level sufficient to protect their customers from the effects of abrupt increases in the NECA CCL rates"). Rural and non-rural carriers that received LTS in 1997 will receive support from the new universal service mechanisms in 1998 that equals the 1997 LTS funding amount, adjusted by the percentage of change from 1995 to 1996 of the nationwide average loop cost. *Id.* at 8927, 8942; *see also* 47 C.F.R. § 54.303.

decisions reached in the *Universal Service Order* by reflecting revised LTS formula amounts in its CCL tariff rates effective January 1, 1998. We therefore waive Section 69.105(b)(2)-(3) for the calculation of NECA's CCL pool rate that will become effective January 1, 1998,[169] on the condition that NECA must compute the Carrier Common Line charge as follows:

> (a) From the NECA pool aggregate Carrier Common Line revenue requirement amount, subtract: (1) aggregate End User Common Line charges; (2) aggregate Special Access Surcharges; and (3) the portion of per-line support that NECA CCL pool participants receive, in the aggregate, pursuant to 47 C.F.R. § 54.303.[170]
>
> (b) The premium originating Carrier Common Line charge must be one cent per minute, except as described herein at (d), and
>
> (c) The premium terminating Carrier Common Line charge must be computed by subtracting the projected revenues generated by the originating Carrier Common Line charges (both premium and non-premium) from the number calculated in (a) above, and dividing the remainder by the sum of the projected premium terminating minutes and a number equal to 0.45 multiplied by the projected non-premium terminating minutes, except as described herein at (d).
>
> (d) If the calculations described in (c) above result in a per minute charge on premium terminating minutes that is less than one cent, both the originating and terminating premium charges for the NECA CCL pool participants must be computed by dividing the number calculated pursuant to (a) above by the sum of the premium minutes and a number equal to 0.45 multiplied by the non-premium minutes for the NECA CCL pool participants.

This NECA CCL charge calculation will reflect that now the CCL charge, rather than LTS, is a residual amount.

## VII. FINAL REGULATORY FLEXIBILITY ANALYSIS

90. In the *First Report and Order*, we conducted a Final Regulatory Flexibility Analysis as required by Section 603 of the Regulatory Flexibility Act, as amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).[171] The changes we adopt in this Order do not affect that analysis.

## VIII. FINAL PAPERWORK REDUCTION ANALYSIS

91. We have required incumbent price cap LECs to provide IXCs with customer-specific data that specifies the number and type(s) of PICCs being assessed on each line. This requirement constitutes a new "collection of information," within the meaning of the Paperwork Reduction Act of 1995, 44 U.S.C. §§ 3501-3520. Implementation of this requirement will be subject to approval by the Office of Management and Budget as prescribed by the Paperwork Reduction Act. The Commission

[169] At this time we anticipate that Section 69.105(b)(2)-(3) will be revised in time for tariff filings effective July 1, 1998. We are not revising this rule now because it is likely that the rule would need to be changed again in the near future if we decide to adopt a PICC and make other common line changes in the separate access reform proceeding for rate-of-return LECs.

[170] 47 C.F.R. § 69.502.

[171] *First Report and Order* at ¶¶ 419-440.

has requested emergency approval of this requirement to ensure that it may be effective on January 1, 1998.

## IX. ORDERING CLAUSES

92. Accordingly, IT IS ORDERED, pursuant to Sections 1-4, 201-205, 251, 254, 303, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-205, 251, 254, 303, and 405, and pursuant to section 1.108 of the Commission's rules, 47 C.F.R. § 1.108 that this Order on Reconsideration IS ADOPTED.

93. IT IS FURTHER ORDERED that section 69.153(g) of the Commission's rules, 47 C.F.R. §§ 69.153(g) IS AMENDED as set forth in the appendix.

94. IT IS FURTHER ORDERED that sections 69.4, 69.111(c)(1), 69.153(c)(1), 69.153(d)(1)(i), 69.153(d)(2)(i), and 69.155(c) of the Commission's rules, 47 C.F.R. §§ 69.4, 69.111(c)(1), 69.153(c)(1), 69.153(d)(1)(i), 69.153(d)(2)(i), and 69.155(c) ARE AMENDED as set forth in the appendix.

95. IT IS FURTHER ORDERED, pursuant to 47 U.S.C. § 154(i) and 47 C.F.R. § 1.3, that NECA's request for waiver of Section 69.105(b)(2)-(3) of the Commissions rules, 47 C.F.R. § 69.105(b)(2)-(3) IS GRANTED subject to the limitations and conditions described herein.

96. IT IS FURTHER ORDERED that the information collections contained in these rules become effective January 1, 1998, following OMB approval, unless a notice is published in the Federal Register stating otherwise.

97. IT IS FURTHER ORDERED that, except as otherwise specified herein, the policies and rules adopted here shall be effective January 1, 1998.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

## APPENDIX -- Final Rules

## AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

**Part 69 -- ACCESS CHARGES**

1. The authority citation for Part 69 continues to read as follows:

Authority: 47 U.S.C. §§ 154(i) and (j), 201, 202, 203, 205, 218, 254, and 403.

2. Section 69.4 is amended by removing paragraph (h)(6), and revising paragraph (a) to read as follows:

**§ 69.4 Charges to be filed.**

(a) The end user charges for access service filed with this Commission shall include charges for the End User Common Line element, and for line port costs in excess of basic, analog service.

* * * * *

3. Section 69.111 is amended by revising paragraph (c) to read as follows:

**§ 69.111 Tandem-Switched Transport and Tandem Charge.**

* * * * *

(c)(1) Until June 30, 1998:

(i) Except in study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(1) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, geographically averaged on a study-area-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.

(ii) In study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(1) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, averaged on a zone-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.

(2) Beginning July 1, 1998:

(i) Except in study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(2)(i) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, geographically averaged on a study-area-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.

(ii) In study areas where the incumbent local exchange carrier has implemented density pricing zones as described in section 69.123, per-minute common transport charges described in paragraph (a)(2)(i) of this section shall be presumed reasonable if the incumbent local exchange carrier bases the charges on a weighted per-minute equivalent of direct-trunked transport DS1 and DS3 rates that reflects the relative number of DS1 and DS3 circuits used in the tandem to end office links (or a surrogate based on the proportion of copper and fiber facilities in the interoffice network), calculated using the total actual voice-grade minutes of use, averaged on a zone-wide basis, that the incumbent local exchange carrier experiences based on the prior year's annual use. Tandem-switched transport transmission charges that are not presumed reasonable shall be suspended and investigated absent a substantial cause showing by the incumbent local exchange carrier.

* * * * *

4. Section 69.124 is revised to read as follows:

**§ 69.124 Interconnection charge.**

(a) Local exchange carriers not subject to price cap regulation shall assess an interconnection charge expressed in dollars and cents per access minute upon all interexchange carriers and upon all other persons using the telephone company switched access network.

(b) If the use made of the local exchange carrier's switched access network includes the local switch, but not local transport, the interconnection charge assessed pursuant to paragraph (a) shall be computed by subtracting entrance facilities, tandem-switched transport, direct-trunked transport, and dedicated signalling transport revenues, as well as any interconnection charge revenues that the local exchange carrier anticipates will be reassigned to other, facilities-based rate elements in the future, from the Part 69 transport revenue requirement, and dividing by the total interstate local switching minutes.

(c) If the use made of the local exchange carrier's switched access network includes local transport, the interconnection charge to be assessed pursuant to paragraph (a) shall be computed by dividing any interconnection charge revenues that the local exchange carrier anticipates will be reassigned to other, facilities-based rate elements in the future by the total interstate local transport minutes, and adding thereto the per minute amount calculated pursuant to paragraph (b).

5. Section 69.153 is amended by revising paragraphs (c)(1) and (d), and adding paragraph (g) to read as follows:

**§ 69.153 Presubscribed interexchange carrier charge (PICC).**

* * * * *

(c) The maximum monthly PICC for primary residential subscriber lines and single-line business subscriber lines shall be the lower of:

(1) One twelfth of the sum of projected annual common line revenues and residual interconnection charge revenues permitted under our price cap rules divided by the projected average number of local exchange service subscriber lines in use during such annual period, minus the maximum subscriber line charge calculated pursuant to § 69.152(d)(2); or

* * * * *

(d) To the extent that a local exchange carrier cannot recover its full common line revenues, residual interconnection charge revenues, and those marketing expense revenues described in § 69.156(a) permitted under price cap regulation through the recovery mechanisms established in §§ 69.152, 69.153(c), and 69.156(b) and (c), the local exchange carrier may assess a PICC on multi-line business subscriber lines and non-primary residential subscriber lines.

(1) The maximum monthly PICC for non-primary residential subscriber lines shall be the lower of:

(i) One twelfth of the projected annual common line, residual interconnection charge, and § 69.156(a) marketing expense revenues permitted under our price cap rules, less the maximum amounts permitted to be recovered through the recovery mechanisms under §§ 69.152, 69.153(c), and 69.156(b) and (c), divided by the total number of projected non-primary residential and multi-line business subscriber lines in use during such annual period; or

* * * * *

(2) If the maximum monthly PICC for non-primary residential subscriber lines is determined using paragraph (d)(1)(i) of this section, the maximum monthly PICC for multi-line business subscriber lines shall equal the maximum monthly PICC of non-primary residential subscriber lines. Otherwise, the maximum monthly PICC for multi-line business lines shall be the lower of:

(i) One twelfth of the projected annual common line, residual interconnection charge, and § 69.156(a) marketing expense revenues permitted under parts 61 and 69 of our rules, less the maximum amounts permitted to be recovered through the recovery mechanisms under §§ 69.152, 69.153(c) and (d)(1), and 69.156 (b) and (c), divided by the total number of projected multi-line business subscriber lines in use during such annual period; or

* * * * *

(g)(1) The maximum monthly PICC for Centrex lines shall be one-ninth of the maximum charge determined under paragraph (d)(2) of this section, except that if a Centrex customer has fewer than nine lines, the maximum monthly PICC for those lines shall be the maximum charge determined under paragraph (d)(2) of this section divided by the customer's number of Centrex lines.

(2) In the event the monthly loop costs for a multi-line business line, as defined in § 69.152(b)(1), exceed the maximum permitted End User Common Line charge, as set in § 69.152(b)(3), the maximum monthly PICC for a Centrex line determined under paragraph (g)(1) of this section shall be increased by the difference between the monthly loop costs defined in § 69.152(b)(1) and the maximum permitted End User Common Line charge set in § 69.152(b)(3). In no event, however, shall the PICC for a Centrex line exceed the maximum established under paragraph (d)(2) of this section.

6. Section 69.155(c) is revised to read as follows:

**§ 69.155 Per-minute residual interconnection charge.**

* * * * *

(c)(1) No portion of the charge assessed pursuant to paragraphs (a) or (b) of this section that recovers revenues that the local exchange carrier anticipates will be reassigned to other, facilities-based rate elements, including the tandem-switching rate element described in § 69.111(g), the three-part tandem switched transport rate structure described in § 69.111(a)(2), and port and multiplexer charges described in § 69.111(l), shall be assessed upon minutes utilizing the local exchange carrier's local switching facilities, but not the local exchange carrier's transport service.

(2) If a local exchange carrier cannot recover its full residual interconnection charge revenues through the PICC mechanism established in § 69.153, and will consequently recover a portion of its residual interconnection charge revenues through per-minute charges assessed pursuant to paragraphs (a) and (b) of this section, then the local exchange carrier must allocate its residual interconnection charge revenues subject to the exemption established in paragraph (c)(1) of this section between the PICC and the per-minute residual interconnection charge in the same proportion as other residual interconnection charge revenues are allocated between these two recovery mechanisms.

# EXHIBIT 4

**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 | ) | |
| | ) | |

# SEVENTH REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

**Adopted:** April 26, 2001 **Released:** April 27, 2001

Comment date: [30 days after publication in the Federal Register]
Reply Comment date: [60 days after publication in the Federal Register]

By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a separate statement.

Paragraph

## I. INTRODUCTION

1. With this order, we continue our efforts to establish a "pro-competitive, deregulatory national policy framework" for the United States' telecommunications industry by addressing a number of interrelated issues concerning competitive local exchange carrier (CLEC) charges for interstate switched access services and the obligations of interexchange carriers (IXCs) to exchange access traffic with CLECs.[1] Parties on both sides of these issues have requested Commission involvement in shaping a resolution to what the IXCs view as the CLECs' abuse of our tariff rules to impose excessive access charges and what the CLECs view as the IXCs' unreasonable demands for lower access charges and threats to reject CLEC access traffic.

2. By this order, we seek to ensure, by the least intrusive means possible, that CLEC access charges are just and reasonable. Specifically, we limit the application of our tariff rules to CLEC access services[2] in order to prevent use of the regulatory process to impose excessive

[1] In addressing these issues, the Commission has requested and received comments in several proceedings: *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order & Notice*); *Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services*, CC Docket Nos. 96-262 and 97-146, Public Notice, 15 FCC Rcd 10181 (Comm. Carr. Bur. 2000) (*Mandatory Detariffing Public Notice*); *Common Carrier Bureau Seeks Comment on the Request for Emergency Temporary Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision*, CC Docket No. 96-262, Public Notice, DA-00-1067, 2000 WL 217601 (Comm. Carr. Bur., rel. May 15, 2000) (*Emergency Petition Public Notice*); *Common Carrier Bureau Seeks Comment on Issues Relating to CLEC Access Charge Reform*, CC Docket No. 96-262, Public Notice, 15 FCC Rcd 24102 (2000) (*Safe Harbor Public Notice*). Below, we refer to a comment or reply comment to the *Pricing Flexibility Order & Notice* as Comment or Reply Comment, respectively. A comment or reply comment to the *Mandatory Detariffing Public Notice* is identified as Detariffing Comment or Detariffing Reply Comment, respectively. We refer to a comment or reply comment to the *Emergency Petition Public Notice* as Emerg. Pet. Comment or Emerg. Pet. Reply Comment, respectively. A comment or reply comment to the *Safe Harbor Public Notice* is identified as Safe Harbor Comment or Safe Harbor Reply Comment, respectively. Appendix A includes a list of parties filing comments in each of these proceedings.

[2] In this order, we use the term "access services" to refer only to interstate switched access services, unless we specifically indicate to the contrary.

access charges on IXCs and their customers. Previously, certain CLECs have used the tariff system to set access rates that were subject neither to negotiation nor to regulation designed to ensure their reasonableness. These CLECs have 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.

3. Our goal in this process is ultimately to eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services. We accomplish this goal by revising our tariff rules more closely to align tariffed CLEC access rates with those of the incumbent LECs. Under the detariffing regime we adopt, CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff. Above the benchmark, CLEC access services will be mandatorily detariffed, so CLECs must negotiate higher rates with the IXCs. During the pendency of negotiations, or if the parties cannot agree, the CLEC must charge the IXC the appropriate benchmark rate. We also adopt a rural exemption to our benchmark scheme, recognizing that a higher level of access charges is justified for certain CLECs serving truly rural areas.

4. To avoid too great a disruption for competitive carriers, we implement the benchmark in a way that will cause CLEC rates to decrease over time until they reach the rate charged by the incumbent LEC. This mechanism will mimic the operation of the marketplace as competitive LECs will no longer be operating in the access market with tariffed rates well above the prevailing market price. We are optimistic that this approach will provide a bright line rule that permits a simple determination as to whether CLEC access charges are just and reasonable and, at the same time, will enable both sellers and purchasers of CLEC access services to avail themselves of the convenience of a tariffed service offering. In addition, this approach maintains the ability of CLECs to negotiate access service arrangements with IXCs at any mutually agreed upon rate. Naturally, the CLECs also retain the option of recovering from their end users any additional costs that they may experience.

5. The regulatory forbearance that we undertake today continues our move to market-based solutions by encouraging CLECs to negotiate rates outside of the tariff safe harbor where they see fit. We also make clear that an IXC's refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor, when the IXC serves ILEC end users in the same area, generally constitutes a violation of the duty of all common carriers to provide service upon reasonable request.

6. Our order today is designed to spur more efficient local competition and to avoid disrupting the development of competition in the local telecommunications market currently taking root. We intend to allow CLECs a period of flexibility during which they can conform their business models to the market paradigm that we adopt herein. In addition, these rules should continue to ensure the ubiquity of a fully interconnected telecommunications network that consumers have come to expect. Finally, by ensuring that CLECs do not shift an unjust portion of their costs to interexchange carriers, our actions should help continue the downward trend in long-distance rates for end users.

7. We stress, however, that the mechanism set out below is a transitional one; it is not designed as a permanent solution to the issues surrounding CLEC access charges. Rather, we view the mechanism we adopt today as a means of moving the marketplace for access services

closer to a competitive model. Because our tariff benchmark is tied to the incumbent LEC rate, we will re-examine these rates at the close of the period specified in the *CALLS Order*.[3] Through a separate notice of proposed rulemaking that we issue today, we also evaluate the access charge scheme as part of a broader review of inter-carrier compensation.[4]

## II. BACKGROUND

8. Competitive entrants into the exchange access market have historically been subject to our tariff rules, but have been largely free of the other regulations applicable to incumbent LECs.[5] Incumbent LECs, on the other hand, are closely regulated in their ratemaking to ensure that their interstate access charges are just and reasonable.[6] In recent years, the Commission has repeatedly examined access rates, attempting to make them more economically rational. Some of the overarching goals the Commission has pursued in this effort include the promotion of competition, aligning access rate structures more closely with the manner in which costs are incurred, the removal of subsidies from access rates and deregulation as competition develops.[7] The result of the Commission's efforts has been a steady reduction in access charges and in long distance rates which, in turn, has dramatically increased consumer usage of long distance service.

9. Although the access charge debate previously has focused primarily on dominant carriers, as CLEC market share has increased, a correspondingly greater interest in the rates of competitive carriers has developed. As a result, CLEC access charges recently have been the subject of several Commission proceedings and the filings of several parties.

10. The *Access Reform NPRM*: In the *Access Reform NPRM*, the Commission sought comment on whether CLECs can exercise market power with regard to terminating access services and whether and how the Commission should regulate those services.[8] The Commission noted the differences between the originating and terminating access markets. For example, with *originating* access, the Commission recognized that the calling party chooses the service

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[3] *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (*CALLS Order*).

[4] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Dkt. Nos. 01-92, 99-68, 96-98, FCC 01-132 (rel. April 27, 2001) (*Intercarrier Compensation NPRM*).

[5] *See Tariff Filing Requirements for Non-Dominant Common Carriers*, CC Dkt. No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754 (1993) (CLECs are non-dominant carriers because they have not been previously declared dominant), *vacated and remanded in part on other grounds, Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995); *on remand*, 10 FCC Rcd 13653 (1995).

[6] *See infra* note 93.

[7] *See Access Charge Reform*, CC Docket 96-262, First Report and Order, 12 FCC Rcd 15982 (*Access Charge Reform Order*), *aff'd sub. nom. Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998); *Pricing Flexibility Order & Notice*, 14 FCC Rcd 14221; *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (*CALLS Order*).

[8] *Access Charge Reform*, CC Docket 96-262, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21476 (1996) (*Access Reform NPRM*).

provider and decides whether to place a call, and it has the ultimate obligation to pay for the call.[9] The calling party also is the customer of the IXC that purchases the originating access service.[10] The Commission tentatively concluded, that, as long as IXCs could influence the calling party's choice of the access provider, a LEC's ability to charge excessive originating access rates would be limited, because IXCs likely would create incentives for their end users to move to competing, less expensive access providers.[11] On the other hand, the Commission recognized that, with *terminating* access, the called party chooses the access service provider, while the decision to make the call and the ultimate responsibility to pay for the call reside with the calling party, and the calling party's IXC must pay for the terminating access service.[12] Because of this disjunction implicit in terminating access, neither the party placing a long distance call, nor that party's IXC, can easily influence the called party's choice of service provider.[13] The Commission noted that this may give CLECs the incentive to charge excessive rates for terminating access service.[14]

11. The Commission also noted an additional complication for an IXC faced with high CLEC access rates. Not only does the calling party not choose the terminating LEC, but section 254(g) requires IXCs to spread the cost of terminating access rates among all of its end users.[15] Accordingly, the Commission tentatively concluded in the *Access Reform NPRM* that terminating access may remain a bottleneck controlled by whichever LEC provides terminating access to a particular customer, even if competitors have entered the market.[16] The Commission also opined, however, that excessive terminating access charges might encourage IXCs to enter the access market themselves.[17]

[9] *Id.* at 21472.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 21476.

[13] *Id.*

[14] *Id.*

[15] *See* 47 U.S.C. § 254(g). *See also Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 (1996) (requiring IXCs to integrate and average the rates they charge for service).

[16] *Access Reform NPRM*, 11 FCC Rcd at 21476.

[17] *See id. at* 21477. The Commission also sought comment on whether it should treat CLEC originating "open end" minutes, such as originating access for 800 service, as terminating minutes for access charge purposes. *Id.* "The term open end of a call describes the origination or termination of a call that utilizes exchange carrier common line plant (a call can have no, one, or two open ends.)" 47 C.F.R. § 69.105(b)(1)(ii). The Commission noted that, in some cases, such as 800 and 888 service, the called party, which pays for the call, is unable to influence the calling party's choice of provider for originating access services. *Access Reform NPRM*, 11 FCC Rcd at 21477.

12. The *Hyperion Order*: In the *Hyperion Order*, the Commission established permissive detariffing for non-incumbent LEC providers of interstate exchange access services.[18] The Commission also sought comment on mandatory detariffing for CLEC interstate access services.[19] The Commission did not take further action, however, because the District of Columbia Circuit Court of Appeals stayed the Commission's mandatory detariffing order for IXCs. Later, after the D.C. Circuit upheld the Commission's IXC mandatory detariffing order,[20] the Commission issued a public notice to refresh the record on the issue of mandatory detariffing for CLEC access services.[21]

13. The *Access Reform Order*: In the *Access Reform Order*, the Commission declined to adopt regulations governing CLEC terminating access charges, or to address the issue of CLEC originating access charges.[22] Based on the available record, the Commission decided to continue to refrain from regulating the rates charged by non-incumbent LECs for terminating access service.[23] Although an IXC must use the CLEC serving an end user to terminate a call, the Commission found that the record did not indicate that CLECs previously had charged excessive terminating access rates or that CLECs distinguished between originating and terminating access in their service offerings.[24] As a result, the Commission concluded that CLECs did not appear to have structured their service offerings in ways designed to exercise market power over terminating access.

14. The Commission further observed that, as CLECs attempted to expand their market presence, the rates of incumbent LECs or other potential competitors should constrain the CLECs' terminating access rates.[25] The Commission found that access customers likely would take competitive steps to avoid paying unreasonable terminating access charges.[26] Thus, it explained that a call recipient might switch to another local carrier in response to incentives offered by an IXC.[27]

[18] *See Hyperion Telecommunications, Inc. Petition for Forbearance*, Memorandum Opinion and Order, 12 FCC Rcd 8596 (1997) (*Hyperion Order*) (granting petitions seeking permissive detariffing for provision of interstate exchange access services by providers other than the incumbent LEC).

[19] *Hyperion Order*, 12 FCC Rcd at 8613.

[20] *MCI WorldCom, Inc. v. Federal Communications Commission*, 209 F.3d 760 (D.C. Cir. 2000).

[21] *Mandatory Detariffing Public Notice*, 15 FCC Rcd 10181.

[22] *Access Charge Reform Order*, 12 FCC Rcd at 15982.

[23] *Id.* at 16140.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 16140-41.

[27] *Id.* at 16141.

15. Although the Commission declined to adopt regulations governing the provision of CLEC terminating access, it noted that it could address the reasonableness of CLEC terminating access rates in individual instances through the section 208 process for the adjudication of complaints.[28] Moreover, the Commission stated that it would be sensitive to indications that the terminating access rates of CLECs were unreasonable, and it committed to revisit the issue of CLEC access rates if there were sufficient indications that CLECs were imposing unreasonable terminating access charges.[29]

16. Complaint Proceedings: The Commission addressed issues related to competitive carriers' access services in three different section 208 complaint proceedings.[30] On July 16, 1999, in *MGC v. AT&T*, the Commission ruled that AT&T was liable to MGC for originating access charges at MGC's tariffed rate because AT&T had failed to take the necessary steps to terminate its access service arrangement with MGC.[31] On June 9, 2000, in *Sprint v. MGC*, the Commission rejected the argument that a CLEC's access rates are *per se* unjust and unreasonable – and therefore violative of section 201(b) – because they exceed the rates charged by incumbent LECs in the CLEC's region.[32] Finally, on March 13, 2001, in *Total Tel. v. AT&T*,[33] the Commission ruled that a competitive access provider's rates for terminating access were the product of a sham arrangement to inflate its rates and to pass on a portion of the inflated rate to the carrier's single end user. Accordingly, we ruled in that proceeding that AT&T did not violate sections 201(a), 202(a), 214(a) or 251(a) of the Act[34] when it declined the access provider's terminating access service and blocked traffic bound for the access provider's single end-user customer.

17. *Pricing Flexibility Order and Further Notice of Proposed Rulemaking*: In August of 1999, the Commission issued its *Pricing Flexibility Order and Notice*, which, *inter alia*, denied AT&T's petition for a declaratory ruling that IXCs may refuse to purchase CLECs' tariffed switched access service.[35] The Commission noted that, in the *Access Charge Reform Order*, it may have overestimated the ability of the marketplace to constrain CLEC access rates.[36] In particular, the Commission noted that AT&T's Petition for Declaratory Ruling, the comments provided in support of it, and the decision in *MGC v. AT&T* suggested the need to revisit the

[28] *Id. See generally* 47 C.F.R. §§ 1.720-1.735 (Commission rules governing formal complaints); 47 U.S.C. § 208.

[29] *Access Charge Reform Order*, 12 FCC Rcd at 16141.

[30] The Commission currently has before it several additional complaint proceedings. *See infra* note 56.

[31] *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999).

[32] *Sprint Communications Company, L.P. v. MGC Communications, Inc.*, 15 FCC Rcd 14027 (2000).

[33] *Total Tel. v. AT&T*, FCC 01-84, File No. E-97-003 (rel. Mar. 13, 2001) (*Total Tel. Order*).

[34] 47 U.S.C. §§ 201(a), 202(a), 214(a), 251(a).

[35] *Pricing Flexibility Order & Notice*, 14 FCC Rcd 14221.

[36] *Id.* at 14339.

issue of CLEC access rates.[37] Accordingly, the Commission initiated the current rulemaking proceeding to examine CLEC originating and terminating access rates, and it sought comment on regulatory and market-based solutions to ensure that CLEC rates for interstate access are just and reasonable.[38]

18. The Commission again invited comment on, *inter alia*, whether CLECs possess market power over IXCs that need to terminate long distance calls, whether mandatory detariffing of CLEC interstate access services would provide a market-based deterrent to excessive terminating access charges, and whether rates could be constrained by establishing a benchmark for CLEC access charges that would be presumed reasonable.[39] We acknowledged that CLEC access rates may, in fact, be higher due to the CLECs' high start-up costs for building new networks, their small geographical service areas, and the limited number of subscribers over which CLECs can distribute costs.[40] We also recognized, however, that IXCs currently spread their access costs among all their end users and that requiring IXCs to bear a CLEC's higher start-up costs may impose unfair burdens on IXC customers that pay rates reflecting these CLEC costs even though many of the IXC customers may not subscribe to those CLECs.[41]

19. The *CALLS Order*: During the course of the debate over CLEC 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).[42] The *CALLS Order* resolved major outstanding issues concerning access charges of price-cap ILECs 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.[43] The adoption of the *CALLS Order* moved the Commission a step closer to its access charge reform goals for dominant carriers. The *CALLS Order* is interim in nature, covering a five-year period[44]; its reforms became effective on July 1, 2000.

20. Emergency Petitions: In February and May 2000, we received two declaratory ruling petitions asking that we prohibit AT&T from withdrawing its interexchange services from customers of CLECs pending the outcome of the rulemaking proceedings relating to CLEC access charges. We subsequently sought comment on these petitions.[45]

[37] *Id.* at 14340.

[38] *Id.* at 14340.

[39] *Id.* at 14340-45.

[40] *Id.* at 14343.

[41] *Id.*

[42] *CALLS Order*, 15 FCC Rcd 12962.

[43] *Id.* at 12974-76.

[44] *Id.* at 12977.

[45] *Emergency Petition Public Notice*, DA-00-1067, 2000 WL 217601.

## III. CLEC SWITCHED ACCESS SERVICES

### A. Overview

21. Congress and the Commission have adopted policies designed to encourage competition for local exchange and exchange access services. Although competition for access services existed to some extent prior to 1996, the 1996 Act created new opportunities for competing access providers by opening the local exchange market to competition.[46] As a result, competition for local exchange and exchange access service is taking root: between 1996 and 1999, the number of competitive LECs increased from 94 to 349.[47] During their development, CLECs have been largely unregulated in the manner that they set their access rates. We note, however, that section 201 gives us the authority to ensure that CLEC rates are just and reasonable.[48]

22. Our review of the record reveals that CLEC access rates vary quite dramatically and, on the average, are well above the rates that ILECs charge for similar service. Sprint, WorldCom and AT&T have submitted information on the CLEC access charges for which they have been billed. These data sets reveal a strikingly broad range of rates. Some competitive LECs charge at or even below 1 cent per minute; indeed, it appears that many CLECs are charging approximately the ILEC access rate.[49] On the other hand, certain CLECs are charging above 9 cents per minute and the weighted average of CLEC access rates falls above 4 cents per minute.[50] AT&T estimates that approximately 100 CLECs have tariffed rates above 2.5 cents per minute and 60 have per-minute rates above 5.0 cents.[51] AT&T further asserts that, in 2000, it was billed for $106 million in CLEC access charges, representing a premium of $92 million over what the competing ILECs would have billed for the same number of minutes of service.[52] While we have questions about AT&T's calculation of this premium,[53] there can be little question that CLECs are adding dramatically to the overall level of access charges that IXCs are paying. We are concerned that the higher CLEC rates may shift an inappropriate share of the carriers' costs onto the IXCs and, through them, the long distance market in general.

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[46] *See, e.g.*, 47 U.S.C. § 251.

[47] Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. 9.6 (Dec. 2000).

[48] *See generally Access Reform NPRM*, 11 FCC Rcd at 21474-76; *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, First Report & Order, 85 FCC 2d 1, ¶¶ 88-96 (1980).

[49] *See* AT&T Safe Harbor Comments at 7.

[50] *See infra* paragraphs 48-49

[51] *See* AT&T Safe Harbor Comments at 7.

[52] AT&T Safe Harbor Comments, Appendix A.

[53] For example, it is unclear whether AT&T's calculation of the competing ILEC rate includes certain flat-rated elements.

23. Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECs to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate.[54] AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable.[55] We see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts.[56] And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute. This uncertainty, in turn, poses a significant threat to the continued development of local-service competition, and it may dampen CLEC innovation and the development of new product offerings.[57]

24. Additionally, IXCs have threatened to stop delivering traffic to, or accepting it from, certain CLECs that they view as over-priced. Thus, AT&T has notified a number of CLECs that it refused to exchange originating or terminating traffic.[58] In some instances, AT&T has terminated its relationship with CLECs and is blocking traffic, thus raising various consumer and service quality issues.[59] These practices threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network and could result in consumer confusion.[60] Once one or more IXCs refuse to do business with a CLEC, it will become impossible for that CLEC's end users to reach, or receive calls from, some parties outside of the local calling area. If such refusals to exchange traffic were to become a routine bargaining tool,

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[54] Buckeye Comments at 3; Sprint Reply Comments at 28-30; Allegiance Comments at 18-19; MGC Comments at 7. In performing these calculations, Sprint appears typically to have used the rate of the competing ILEC as the just and reasonable rate.

[55] *See, e.g., Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 682 (E.D. Va. 2000).

[56] *See Advamtel, LLC v. AT&T Corp.*, CIV. A. No. 00-643-A (E.D. Va., Alexandria Div., complaint filed Apr. 17, 2000); *Advamtel, LLC v. Sprint Communications.*, CIV. A. No. 00-1074-A (E.D. Va., Alexandria Div., complaint filed Apr. 17, 2000); *Total Telecomm. Servs., Inc. v. AT&T Corp.*, FCC 01-84, File No. E-97-003 (rel. Mar. 13, 2001); *Time Warner Telecom, Inc. v. Sprint Communications Company, L.P.*, File No. EB-00-MD-004 (complaint filed Mar. 16, 2000); *U.S. TelePacific Corp. v. AT&T Corp.*, File No. EB-00-MD-010 (complaint filed June 16, 2000); *AT&T Corp. v. Business Telecom, Inc.*, File No. EB-01-MD-001 (complaint filed Jan. 16, 2001); *Sprint Communications Company, L.P. v. Business Telecom, Inc.*, File No. EB-01-MD-002 (complaint filed Jan. 16, 2001).

[57] MTA Emerg. Pet. Comments at 4; Minnesota CLEC Consortium Request for Emergency Relief, CC Dkt. No. 96-262, at 3 (filed May 5, 2000).

[58] *See* RICA Request for Emergency Relief, CC Dkt. No. 96-262, at 2-3 (filed Feb. 18, 2000); Minnesota CLEC Consortium Request for Emergency Relief at 2-3; Buckeye Emerg. Pet. Comments at 1-3; MTA Emerg. Pet. Comments at 3-4.

[59] *See Advamtel*, 118 F. Supp. 2d at 682; RICA Comments at 4-7, 12-13. *Cf.* Sprint Comments at 24-25; CCG Comments at 5.

[60] MTA Emerg. Pet. Comments at 4; Minnesota CLEC Consortium Request for Emergency Relief at 3.

callers might never be assured that their calls would go through. We are particularly concerned with preventing such a degradation of the country's telecommunications network. It is not difficult to foresee instances in which the failure of a call to go through would represent a serious problem, and, in certain circumstances, it could be life-threatening. Accordingly, the public interest demands a resolution to this set of problems.

25. Given the state of the marketplace for CLEC access services, and our judgment that more serious developments could loom in the future if we do not take action, we are persuaded of the need to revisit these issues in a global fashion. Previously, the Commission refrained from involving itself in a general examination of the reasonableness of CLEC access rates, ruling instead that any unreasonable rates could be addressed through the section 208 complaint process. However, this regime has often failed to keep CLEC access rates within a zone of reasonableness. It now appears that the best means of proceeding is to restructure and partially deregulate the environment in which CLECs provide access service, providing a bright-line rule that will facilitate effective enforcement. Additionally, the record indicates that numerous questions about the reasonableness of CLEC rates exist in the industry. Several parties have already filed with the Commission informal complaints raising this issue in order to preserve their claims from lapse.[61] We are concerned that a flood of unreasonable-rate complaints could overtax the Commission's resources to deal with such proceedings in a manner that is timely and efficient yet gives each complaint the attention it deserves.

### B. The Structure of the Access Service Market

26. The commenters present two dramatically different views of the problem of CLEC access charges. IXC purchasers of CLEC access services contend that CLECs have tariffed switched access rates at unjust and unreasonable levels.[62] They assert that it is an anomaly for a "competitive" provider to enter a market by charging well in excess of the rate charged by the market's incumbent and that such entry could not be maintained in a competitive market.[63] The IXCs argue that high access charges allow CLECs unfairly to shift their operational expenses and their network build-out expenses to IXCs and, through them, to long distance ratepayers generally.[64] Moreover, IXC commenters complain that these unreasonable rates are unilaterally imposed through tariffs, rather than through negotiation with a willing purchaser.[65] Furthermore, the IXCs complain that many CLECs take the position that IXCs may

[61] *See, e.g., AT&T v. CFW Communications Company*, File No. EB-01-MDIC-0003 (informal complaint filed Jan. 16, 2001); *AT&T v. Commonwealth Telephone*, File No. EB-01-MDIC-0004 (informal complaint filed Jan. 16, 2001); *Sprint v. e.spire Communications, Inc.*, File No. EB-01-MDIC-0015 (informal complaint filed Jan 12, 2001).

[62] AT&T Comments at 28 (numerous CLECs tariff rates at "supracompetitive" levels); Sprint Comments at 14-15; Cable & Wireless Comments at 2. *But see* MCI WorldCom Comments at 18 ("there is no evidence in the record to demonstrate that unreasonably high CLEC access charges are ubiquitous or even widespread").

[63] *See, e.g.*, Sprint Comments at 19 (CLECs "cannot expect to enter a market, of their own free will, as competitors and yet attempt to recover their start-up costs from customers").

[64] Sprint Comments at 16 ("The level of charges some CLECs are seeking to collect could easily undermine the basis for current long distance rates.").

[65] *See, e.g.*, AT&T Comments at 28.

not refuse CLEC access services.[66] Thus, the IXC commenters see themselves as unwilling consumers of the CLECs' access services.[67]

27. By contrast, CLECs assert that their rates are justified by their substantial network development costs and their significantly higher per-unit cost of providing service that arises from the smaller customer base over which they may spread their operational costs.[68] They argue that ILECs were for many years protected monopoly providers of local exchange and exchange access services; during that time, they funded the build-out of their networks through rates imposed on captive customers and through access rates that were dramatically higher than they are today.[69] Defending their filing of tariffs for access service, CLEC commenters assert that the section 208 complaint process provides IXCs an adequate remedy against unjust and unreasonable rates.[70]

28. Tariffs require IXCs to pay the published rate for tariffed CLEC access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable.[71] It appears that certain CLECs have availed themselves of this rule and have refused to enter meaningful negotiations on access rates, choosing instead simply to file a tariff and bind IXCs receiving their access service to the rates therein.[72] CLEC use of this strategy raises questions about the extent to which CLECs truly are subject to competition in their provision of access service. The Commission has previously noted the unique difficulties presented by the case of terminating access, where the called party is the one that chooses the access provider, but it neither pays for terminating access service, nor does it pay for, or choose to place, the call.[73] It further complicates the case of terminating access that an IXC may have no prior relationship with a CLEC, but may incur access charges simply for delivering a call to the

[66] *See* AT&T Reply Comments at 31 (noting CLEC "claims that IXCs are obligated to pay CLECs' exorbitant access charges simply by virtue of the fact that their networks receive traffic from, or terminate traffic to, the CLECs' end users"); AT&T Public Notice Comments at 6 (citing to *Advamtel* case).

[67] AT&T Reply Comments at 31 ("[I]t is not technically feasible without time-consuming and costly development ... to identify and then selectively block calling over their networks from or to end users served by CLECs.").

[68] *See, e.g.,* ALTS Comments at 3-4; CCG Comments at 9 ("As brand new entities, CLECs have substantially higher costs and serve a smaller customer base than their ILEC counterparts."); Allegiance Comments at 13, 20; McLeod Comments at 3; RICA Comments at 15-16.

[69] *See, e.g.,* Focal Comments at 17 ("Incumbent LECs ... benefit from their historical monopolies and decades of rate of return regulation, and thus already have ubiquitous telecommunications networks in place.").

[70] *See, e.g.,* Cox Comments at 3;

[71] *See Hyperion Order*, 12 FCC Rcd 8596, 8608-8611, ¶¶ 23-29 (1997). *Cf. Advamtel*, 118 F. Supp. 2d at 687 (concluding that parties are precluded from negotiating separate agreements that affect the rate for services once a tariff has been filed with the Commission).

[72] *See, e.g.* AT&T Safe Harbor Comments at 3; Allegiance Comments at 4 ("customers of a tariffed service are required to pay tariffed charges until they obtain a ruling in a Section 208 complaint proceeding that the tariffed charges are unlawful"); RCN Comments at 10-11.

[73] *See Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338.

access provider's customer.[74] In these circumstances, providers of terminating access may be particularly insulated from the effects of competition in the market for access services. The party that actually chooses the terminating access provider does not also pay the provider's access charges and therefore has no incentive to select a provider with low rates.[75] Indeed, end users may have the incentive to choose a CLEC with the highest access rates because greater access revenues likely permit CLECs to offer lower rates to their end users.[76]

29. The record does not indicate that a significant number of CLECs charge markedly higher rates for terminating than they do for originating access. It thus appears that CLEC originating access service may also be subject to little competitive pressure, notwithstanding the fact that the IXCs typically have a relationship with the local exchange provider in order to be included on the LEC's list of presubscribed IXCs.

30. Sprint and AT&T persuasively characterize both the terminating and the originating access markets as consisting of a series of bottleneck monopolies over access to each individual end user.[77] Thus, once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user.

31. On further consideration, it appears that the CLECs' ability to impose excessive access charges is attributable to two separate factors. First, although the end user chooses her access provider, she does not pay that provider's access charges. Rather, the access charges are paid by the caller's IXC, which has little practical means of affecting the caller's choice of access provider (and even less opportunity to affect the called party's choice of provider) and thus cannot easily avoid the expensive ones. Second, the Commission has interpreted section 254(g) to require IXCs geographically to average their rates and thereby to spread the cost of both originating and terminating access over all their end users. Consequently, IXCs have little or no ability to create incentives for their customers to choose CLECs with low access charges.[78] Since the IXCs are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, the party causing the costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs.

[74] Toll free calling and casual calling (dial around, credit card, etc.) may also result in an IXC paying access charges despite the fact that there is no pre-existing relationship between an IXC and the calling party's access provider.

[75] *See Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338. *Cf.* AT&T Safe Harbor Comments at 2 ("recipient of a traditional long distance call does not pay for the cost of that call; hence, end users are indifferent to the terminating access rates of the CLEC they select as a service provider, and that carrier can raise terminating access rates without impairing demand for its local service").

[76] *See, e.g.*, Sprint Comments at 17 (suggesting that some CLECs may provide local service free of charge to customers that generate significant access traffic).

[77] *See* Sprint Comments at 17-18; AT&T Safe Harbor Public Notice Comments at 2-3; NY PSC Comments at 2; Alaska Comments at 5; Wisconsin PSC Comments at 3-5; Sprint Reply Comments at 9-12.

[78] *See* AT&T Safe Harbor Comments at 2. *See also* 47 U.S.C. § 254(g).

Accordingly, CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider.

32. The Commission previously projected that, at least in the case of originating access service, IXCs would likely enter marketing alliances with LECs offering low-priced access service and would thereby be able to exert downward pressure on CLEC access rates.[79] The Commission even raised the prospect that IXCs would themselves choose to enter the local service market as a means of exerting downward pressure on terminating rates. However, neither of these eventualities has come to pass, at least not to an extent that has resulted in effective downward competitive pressure on CLEC access rates. We now acknowledge that the market for access services does not appear to be *structured* in a manner that allows competition to discipline rates.[80]

33. We are concerned that, in this environment, permitting CLECs to tariff any rate that they choose may allow some CLECs inappropriately to shift onto the long distance market in general a substantial portion of the CLECs' start-up and network build-out costs. Such cost shifting is inconsistent with the competitive market that we seek to encourage for access service.[81] Rather, it may promote economically inefficient entry into the local markets and may distort the long distance market. While we seek to promote competition among local-service providers, we also seek to eliminate from our rules opportunities for arbitrage and incentives for inefficient market entry.

34. We decline to conclude, in this order, that CLEC access rates, across the board, are unreasonable. Nevertheless, there is ample evidence that the combination of the market's failure to constrain CLEC access rates, our geographic rate averaging rules for IXCs, the absence of effective limits on CLEC rates and the tariff system create an arbitrage opportunity for CLECs to charge unreasonable access rates.[82] Thus, we conclude that some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services.

### C. Tariff Benchmark Mechanism

35. We have previously sought comment on a variety of solutions to the problems connected with CLEC access charges, including mandatory detariffing of CLEC switched access

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[79] *Access Charge Reform Order*, 12 FCC Rcd at 16141.

[80] *See generally* J. Acton & S. Besen, *An Economic Analysis of CLEC Access Pricing*, Charles River Associates, Cambridge, MA, 1999; R. Crandall & L. Waverman, *Talk Is Cheap*, The Brookings Institution, Washington, DC 1995.

[81] Parenthetically, we note that the drafters of the 1996 Act anticipated the high costs associated with facilities-based entry into local markets and, thus, adopted market opening provisions, such as section 251's mandate that incumbent local exchange carriers make available access to unbundled network elements, that promote market entry by competitors. 47 U.S.C. § 251(c).

[82] For instance, in *Total Tel. v. AT&T*, the Commission recently addressed a case in which a purportedly competitive access provider had tariffed rates that were in excess of $0.05 per minute. *Total Tel.*, FCC 01-84, File No. E-97-003.

services and setting a benchmark to constrain CLEC switched access charges.[83] A substantial majority of commenters, including CLECs, IXCs, and ILECs, strongly oppose the mandatory detariffing option.[84] They urge that it would cause both CLECs and IXCs to incur substantial and unnecessary negotiation costs simply to exchange traffic.[85] They further contend that these costs would create a significant barrier to entry for competitors seeking to enter the local market and would at least marginally drive up end-user rates for both local and long distance service.[86]

36. Apart from their opposition to mandatory detariffing, however, the two sides of the debate have been largely unable to agree about how CLECs should set rates for their switched access services. Certain IXCs assert that the Commission should immediately set CLEC tariffed rates at or near the rates of the ILEC operating in the CLEC's service territory.[87] On the other hand, citing their high start-up costs and greater per-minute cost of providing service, many CLECs have argued that they should be permitted to tariff rates at whatever level, in their view, is necessary to recover their costs.[88]

37. We decline to immediately move CLEC access rates to the rate of the competing ILEC.[89] CLECs have, in the past, set their rates without having to conform to the regulatory standards imposed on ILECs, and this Commission has twice ruled, in essence, that a CLEC's rate is not per se unreasonable merely because it exceeds the ILEC rate.[90] Accordingly, we are reluctant to flash-cut CLEC access rates to the level of the competing ILEC; a more gradual transition is appropriate so that the affected carriers will have the opportunity to adjust their business models. On the other hand, we are equally reluctant to permit CLECs to continue to tariff the access rates they charge IXCs at the level they see fit, without any guidelines to ensure their reasonableness. We find persuasive IXC arguments that it is highly unusual for a competitor to enter a market at a price dramatically above the price charged by the incumbent, absent a differentiated service offering.

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[83] *Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338-49, ¶¶ 239-257; *Mandatory Detariffing Public Notice*, 15 FCC Rcd 10181; *Safe Harbor Public Notice*, 15 FCC Rcd 24102.

[84] *See, e.g.*, ALTS Comments at 35-36; RCN Comments at 12; AT&T Comments at 29-30; ALLTEL Comments at 7; USTA Comments at 24. *Accord* Sprint Comments at 25-27.

[85] *See, e.g.*, ALTS Comments at 35-36; AT&T Comments at 29-30; CCG Comments at 6; USTA Comments at 24.

[86] *See, e.g.*, CCG Comments at 6; CTSI Comments at 16-18.

[87] Sprint Comments at 20. *See also* AT&T Safe Harbor Comments at 15 ("the Commission should mandatorily detariff all CLEC switched access rates that exceed the ILECs' rates in the same service area"). *Cf.* WorldCom Safe Harbor Comments at 3-5.

[88] *See, e.g.*, CCG Comments at 7-12; CoreComm Comments at 3-4; RCN Comments at 5 n.8.

[89] *See* Sprint Comments at 21 (advocating that we "set an absolute ceiling on what CLECs can charge IXCs"). *See also* WorldCom Safe Harbor Comments at 4-5; WorldCom Reply Comments at 20.

[90] *See Sprint Communications Co. v. MGC Communications, Inc.*, 15 FCC Rcd 14027 (2000); *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999).

38. In analyzing the problems surrounding CLEC access charges, it is important to recognize that, in their provision of access services, competitive carriers actually serve two distinct customer groups. The first is the IXCs, which purchase access service as an input for the long distance service that they provide to their end-user customers. As we discuss above, IXCs are subject to the monopoly power that CLECs wield over access to their end users. However, an equally important group of customers for access services is the end users who benefit from the ability, provided by access service, to place and receive long distance calls. In regulating ILEC access rates, this Commission has recognized the benefit that end users receive from access service and has concluded that it justifies the ILECs' imposition of the subscriber line charge (SLC) on end users.[91] The noteworthy aspect of this second group of access consumers, or beneficiaries, is that, unlike IXCs, they have competitive alternatives in the market in which they purchase CLEC access service: In any market where a CLEC operates, there is, by definition, at least one alternative provider – the ILEC.

39. The notion of these two, parallel markets for access service sheds light on the dilemma presented by CLEC access charges. It leads us to conclude that, in keeping with their competitive, unregulated character, CLECs should be permitted to set the combined level of their access charges, for all the consumers of the service, as they please. If, as they contend, their per-unit costs are higher than those of the ILECs, we will not stand in the way of their recovering those costs. Given the unique nature of the market in which the IXCs purchase CLEC access, however, we conclude that it is necessary to constrain the extent to which CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access customers – and, through them, the long distance market generally. On the other hand, we continue to abstain entirely from regulating the market in which end-user customers purchase access service. Accordingly, CLECs remain free to recover from their end users any greater costs that they incur in providing either originating or terminating access services. When a CLEC attempts to recover additional amounts from its own end user, that customer receives correct price signals and can decide whether he should find an alternative provider for access (and likely local exchange) service. This approach brings market discipline and accurate price signals to bear on the end user's choice of access providers.

40. Under the regime we adopt in this order, CLECs will be restricted only in the manner that they recover their costs from those access-service consumers that have no competitive alternative. We implement this restriction on the CLEC's exercise of their monopoly power by establishing a benchmark level at which CLEC access rates will be conclusively presumed to be just and reasonable and at (or below) which they may therefore be tariffed. Above the benchmark, CLECs will be mandatorily detariffed. CLECs that seek to charge to IXCs rates that are in excess of this benchmark may do so, but only outside of the regulated tariff process. A substantial number of commenters on both sides of the issue have suggested this safe harbor approach.[92] Given the historical disagreement among CLECs and IXCs on this issue, we find their joint support for this solution to be particularly persuasive. In

[91] *See, e.g., CALLS Order*, 15 FCC Rcd at 13000, ¶ 95.

[92] *See, e.g.*, WorldCom Safe Harbor Comments at 1-5; AT&T Safe Harbor Comments at 4-5; ALTS Safe Harbor Comments at 4-6; Minnesota CLEC Safe Harbor Comments at 2-6; CompTel Comments at 2-3; OPASTCO Safe Harbor Comments at 2. *But see* USTA Safe Harbor Comments at 4.

addition to enjoying their support, the benchmark approach has several virtues that recommend it.

41. First, a benchmark provides a bright line rule that permits a simple determination of whether a CLEC's access rates are just and reasonable. Such a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of "reasonableness." Historically, ILEC access charges have been the product of an extensive regulatory process by which an incumbent's costs are subject to detailed accounting requirements, divided into regulated and non-regulated portions, and separated between the interstate and intrastate jurisdictions. Once the regulated, interstate portion of an ILEC's costs is identified, our access charge rules specify in detail the rate structure under which an incumbent may recover those costs.[93] This process has yielded presumptively just and reasonable access rates for ILECs. Recently, the Commission has attempted to move away from such extensive regulation of ILECs. With the *CALLS Order*, we solved some of the most vexing problems relating to ILEC access rates, reducing the subsidies implicit in access rates and establishing target rates to which the participating LECs will move over the five years following the order. Given our attempts to reduce the regulatory burden on ILECs, we are especially reluctant to impose similar legacy regulation on new competitive carriers. We note that no CLEC has suggested that we adopt such a heavily regulatory approach to setting their access rates.[94]

42. Second, by permitting CLECs to file access tariffs at or below a benchmark rate, our interim approach continues to allow the carriers on both sides of the access transaction to enjoy the convenience of a tariffed service. As noted above, both IXCs and CLECs assert that their transaction costs would rise substantially if they were required to negotiate the terms on which they exchange access traffic.[95] Moreover, several commenters argue that the failure of some of these negotiations likely would lead to disruptions in the exchange of access traffic,

[93] First, an incumbent LEC must keep its books in accordance with Uniform System of Accounts set forth in Part 32 of the Commission rules. *See* 47 C.F.R. §§ 32.1 - 32.9000. Second, Part 64 of the Commission's rules divides an incumbent's costs between those associated with regulated telecommunications services and those associated with non-regulated activities. *See* 47 C.F.R. §§ 64.901 - 64.904. Third, our Part 36 separations rules determine the fraction of the incumbent LEC's regulated costs, expenses and investment that should be allocated to the interstate jurisdiction. *See* 47 C.F.R. §§ 36.1 - 36.741. After the total amount of regulated, interstate cost is identified, the access charge and price cap rules translate these interstate costs into charges for the specific interstate access services and rate elements. Part 69 specifies in detail the rate structure for recovering these costs. *See* 47 C.F.R. §§ 69.1 - 69.731. These rules tell the incumbent LECs the precise manner in which they may assess interstate access charges on interexchange carriers and end users. Additionally, the Commission regulates the rate levels incumbents may charge for their access services, requiring them to comply with either the rate-of-return or the price-cap regulations. *Compare* 47 C.F.R. §§ 65.1 - 65.830 (relating to rate of return that certain non-price-cap ILECs may earn on interstate access service) *with CALLS Order*, 15 FCC Rcd at 12962, ¶¶ 151-84 (adopting rate level components for price-cap carriers). Finally, Part 61 requires incumbent LECs to publish their rates in tariffs, and the rules restrict how and when incumbents may change their rates. *See* 47 C.F.R. §§ 61.1 - 61.193.

[94] *See, e.g.*, ALTS Reply Comments at 6 ("CLECs are unanimous in rejecting any need for further rate regulation of their industry"). *See also* Cox Safe Harbor Reply Comments at 6 (noting difficulty of applying traditional ILEC regulation to CLECs).

[95] *See, e.g.*, ALTS Comments at 35-36; AT&T Comments at 29-30; ASCENT Detariffing Comments at 1-7.

which would, in turn, threaten the ubiquity of the public switched network.[96] We question whether the consequences of mandatory detariffing would be as drastic as some of the commenters contend.[97] Nevertheless, we recognize the attraction of a tariffed regime because it permits CLECs to file the terms on which they will provide service and to know that, absent some contrary, negotiated agreement, any IXC that receives access service is bound to pay the tariffed rates.[98] Similarly, IXCs will know that, whatever the source or destination of their access traffic, they will be assured a rate that either is within the benchmark zone of reasonableness or is one to which they have agreed in negotiations.

43. Third, adopting a benchmark for tariffed rates allows CLECs the flexibility to obtain additional revenues from alternative sources. They may obtain higher rates through negotiation. If a particular CLEC provides a superior quality of access service, or if it has a particularly desirable subscriber base, one or more IXCs may be willing to pay rates above the benchmark in order to receive that CLEC's switched access service. Similarly, CLECs retain the flexibility to charge their end users higher rates for the access service to which they subscribe. Here again, if the CLEC provides a superior product, the end user likely will be willing to pay for it; however, if a CLEC attempts to impose an unreasonable surcharge on its customer, the customer receives accurate price signals and may be motivated to find an alternative provider.

44. We conclude that the benchmark we adopt will address persistent concern over the reasonableness of CLEC access charges and will provide critical stability for both the long distance and exchange access markets. In structuring the benchmark mechanism, we have taken into account a broad variety of competing factors, including: (1) the need to constrain access rates with an eye toward continuing the downward trend in long distance prices, (2) the importance of having new entrants' rates move toward and ultimately meet those of market incumbents, (3) the need to avoid too severe of a disruption in the CLEC sector of the industry, and (4) the extreme difficulty of establishing a "reasonable" CLEC access rate given the historical lack of regulation on the process of CLEC ratemaking. We conclude that our benchmark system, with its conclusive presumption of reasonableness, provides the best solution to the difficult problems associated with how CLECs set their access charges. We are optimistic that it will serve as a reasonable response, pending our more complete review of intercarrier compensation issues,[99] to the many competing pressures and priorities that surround CLEC access charges.

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[96] *See, e.g.*, Global Crossing Detariffing Comments at 7; Minnesota CLEC Detariffing Comments at 6; Time Warner Detariffing Comments at 7. *Cf.* Sprint Comments at 20.

[97] For example, we expect that stock contracts, broadly acceptable to both IXCs and CLECs, would quickly develop. Similarly, given all carriers' business incentives to maintain traffic flow, we question whether anything beyond minor customer inconvenience would develop. Moreover, the increased transaction costs of negotiation would likely be substantially offset by reduced regulatory and litigation costs associated with justifying tariffed rates.

[98] *See supra* note 71.

[99] *See Intercarrier Compensation NPRM*, FCC 01-132.

### D. Level and Structure of the Tariff Benchmark

45. Our orders addressing ILEC access charges have consistently stated our preference to rely on market forces as a means of reducing access charges. Thus, in setting the level of our benchmark, we seek, to the extent possible, 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. We conclude that the benchmark rate, above which a CLEC may not tariff, should eventually be equivalent to the switched access rate of the incumbent provider operating in the CLEC's service area.[100] We do not, however, immediately set the benchmark rate at the competing ILEC rate because such a flash cut likely would be unduly detrimental to the competitive carriers that have not previously been held to the regulatory standards imposed on ILECs. Our benchmark mechanism, with certain exceptions, will permit CLECs initially to tariff rates for their switched access service of up to 2.5 cents per minute, or the rate charged by the competing incumbent LEC, whichever is higher.[101] For those carriers competing with ILECs that have tariffed rates below the benchmark (generally, the Bell operating companies), the benchmark rate will decline over the course of three years until it reaches the competing ILEC's rate. For at least one additional year, CLECs will be permitted to continue to tariff this rate, even if we decide to move other access traffic to a bill-and-keep regime. We also adopt rules to ensure that no CLEC avails itself of our benchmark scheme to *increase* its access rates,[102] and we adopt a separate benchmark for certain firms operating in rural areas.[103]

46. In determining the initial level for the safe harbor rates which may be imposed by tariff, we use current CLEC rates as a starting point for analysis because, as noted above, we lack an established framework for translating CLEC costs into access rates.[104] Current CLEC rates provide a useful analytical tool since, in most instances, they were set unilaterally by the individual CLECs. Thus, there should be no concern that the current rates provide an inadequate return to the carrier that tariffed them. Additionally, we note that precedent exists for setting rates by some means other than reviewing the costs of each individual industry participant.[105]

[100] We refer to this rate as the "competing ILEC rate."

[101] Appendix B sets out the new rule 61.46 that we adopt to effectuate the benchmark for CLEC access rates.

[102] *See infra* paragraph 57.

[103] *See infra* paragraphs 64-87.

[104] Moreover, CLEC commenters have not submitted, in this proceeding, any data to justify their rates. Rather, these commenters have relied upon generalized assertions that their rates are justified by higher costs.

[105] In the *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968), the Court noted that "administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class; it has been thought to be sufficient if the agency has before it representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties." Recognizing the need for "more expeditious administrative methods," the Court further stated that "rate-making agencies are not bound to the service of any single regulatory formula; they are permitted . . . 'to make the pragmatic adjustments which may be called for by particular circumstances.'" *Id.* at 776-77 (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)). *See also FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) (agency is not required "to adhere rigidly to a cost-based determination of rates, much less to one that bases each producer's rates on his own costs" (internal quotation omitted)); *Farmers Union Central Exchange, Inc. v. FERC*, (continued....)

47. Our understanding of current CLEC access rates is based on several sources. We have anecdotal information about a few CLECs' access charges through the complaint proceedings initiated at the Commission. At the time it filed its complaint against AT&T, MGC was charging slightly in excess of 8.5 cents per minute.[106] Similarly, in *U.S. TelePacific v. AT&T*[107] the CLEC was charging approximately 7.45 cents per minute for switched access. In addition, AT&T, WorldCom and Sprint submitted information regarding what they have been charged for CLEC access service and how many minutes of service this represents. The Association for Local Telecommunications Services (ALTS) also filed summary statistics on CLEC access rates based on a survey of its members. Each of these data sources has its limitations[108]; nonetheless, we believe that the information submitted by AT&T, WorldCom, and Sprint, provides the best, most comprehensive information available on CLEC access rates. In particular, we believe that by analyzing the IXC data on actual amounts billed and actual minutes of use, we can calculate composite access rates and largely avoid the problems that arise from the fact that CLEC rate structures vary widely and that many rely, in part, on flat-rated, or distance-sensitive, charges.[109]

48. Taken together, the IXC submissions include usable data on switched access rates for over 70 CLECs. The carriers' submissions show a range of 0.4 cents to 9.5 cents per minute for CLEC-provided switched access service.[110] From the underlying, individual CLEC data, we are able to determine the average, weighted by minutes of use, for tariffed access rates.[111] Table 1 indicates that, while there is minor variation between the weighted averages for each IXC's data, they are notably similar. Indeed, given the wide *range* of tariffed CLEC rates, we conclude that these averages are similar enough to give us an accurate view of current tariffed CLEC access rates.

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734 F.2d 1486, 1501 (D.C. Cir. 1984); *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 309 (1963) ("Court has never held that the individual company cost-of-service method is a *sine qua non*" of rate regulation); *American Public Gas Association v. Federal Power Commission*, 576 F.2d 1016, 1037 (D.C. Cir. 1977) (approving economic modeling as basis for ratemaking). As noted elsewhere, we do not set rates in this order. We only limit the rates that CLECs may impose through the tariff system.

[106] *MGC v. AT&T*, 14 FCC Rcd at 11647, n.4.

[107] File No. EB-00-MD-010.

[108] For example, Sprint does not provide minute-of-use data for those CLECs that charge less than or equal to the corresponding ILEC rate. Similarly, AT&T and WorldCom appear not to have submitted *any* data for CLECs that charge less than or equal to the corresponding ILEC rate. Finally, the estimates submitted by ALTS are of questionable value, because they have not submitted the underlying data, they have not indicated whether they calculated a weighted or unweighted average, nor have they indicated how they selected the 32 CLECs in their sample from among their approximately 200 CLEC members.

[109] We consider the "composite rate" to be the amount billed for a given period divided by the minutes of use. Thus, flat rated elements or per mile charges are translated into a per minute rate for purposes of this analysis.

[110] Estimates for this range exclude outlying observations that appear to be clearly inaccurate. For example, certain data points yielded a composite per-minute access rate in excess of 25 cents.

[111] The averages are weighted by overall minutes of use. We were able to calculate weighted averages based on the data filed by AT&T, WorldCom, and Sprint.

Table 1

| DATA SOURCE | WEIGHTED AVERAGE |
|---|---|
| AT&T | 4.33 cents/min |
| Sprint | 3.48 cents/min |
| WorldCom | 4.16 cents/min |

49. This data provides some guidance for our choice of an initial benchmark level. It is important that the benchmark, though within this range, also move CLEC access charges appreciably closer to the competing ILEC rate. The record indicates that many CLECs have tariffed rates that are less than or equal to the competing ILEC rate, although these rates are not reflected in the usable data submitted by AT&T, WorldCom, and Sprint.[112] Indeed, AT&T asserts that over 80% of the CLECs from which it receives access bills charge rates at or below those of the competing ILEC.[113] Accordingly, setting the initial benchmark toward the lower end of the range appears to be justified. Based on our review of the universe and concentration of tariffed access rates being charged to these three IXCs, we conclude that – again, subject to certain exceptions that we discuss below – our safe harbor for CLEC tariffed access rates will begin at 2.5 cents. This rate is within the current range of rates, but represents an appreciable reduction in the tariffed rate for many CLECs.

50. We draw additional support for this initial benchmark level from a consensus solution submitted by parties on both sides of the present dispute. In comments to the *Safe Harbor Public Notice*, the Association for Local Telecommunications Services (ALTS) filed a proposed resolution, negotiated with WorldCom, suggesting, in relevant part, that a benchmark of 2.5 cents per minute for CLEC tariffed access rates would be a reasonable one in at least some markets.[114] WorldCom described the parties' proposal as a "good faith attempt to reach a compromise among competing interests" and stated that it was "consistent with sound public policy and merits serious consideration."[115] ALTS's web site states that it represents over "200

[112] We note, for example, that Sprint submitted data on the amounts billed by CLECs that, according to Sprint, charge less than or equal to the ILEC rate. Sprint Safe Harbor Comments at Appendix 1. However, because Sprint has not provided the Commission with corresponding actual minutes of use data, it is impossible to calculate composite rates for these carriers, let alone confirm Sprint's contention that these carriers charge less than or equal to the ILEC rate.

[113] *See* AT&T Safe Harbor Comments at 7.

[114] ALTS Safe Harbor Comments at 4. *See also* ASCENT Safe Harbor Comments at 5 (ALTS proposal has "significant merit" and "may well form a viable basis for Commission action").

[115] WorldCom Safe Harbor Comments at 5. We note that the only portion of the ALTS proposal with which WorldCom specifically disagreed in its comments to the *Safe Harbor Public Notice* was the implementation schedule. *See id.* n.5. It is also noteworthy that ALTS and WorldCom personnel jointly met with Commission staff to discuss their proposal. *See* October 30, 2000 letter of Jonathan Canis, counsel for ALTS, to Magalie Salas, (continued....)

companies that build, own, and operate" competitive, facilities-based networks.[116] We note that many of the CLECs participating in this proceeding are listed as members on ALTS's web site. Accordingly, it appears that this rate is acceptable to a substantial number of CLECs, although it represents a significant reduction in access rates. While ALTS suggests a different timeframe for reducing the safe harbor limit over time, we find its support for the initial rate to be a fair indicator of its reasonableness. Similarly, we note that this rate is significantly below the average tariffed CLEC access rate, as reported by the IXC commenters. We conclude that this joint proposal offers a workable starting point for our benchmark, when combined with the rule that will prevent any CLEC from *increasing* its rates to the benchmark level and from entering new markets above the prevailing ILEC rate.[117]

51. On the effective date of the rules we promulgate today, CLECs will be permitted (subject to a rural exemption discussed below) to tariff their access rates, for those areas where they have previously offered service,[118] at either the benchmark of 2.5 cents per minute, or the rate of the corresponding incumbent carrier in the study area of the relevant end-user customer, whichever is higher. By permitting CLECs to tariff their rates up to the level of the carrier with which they compete, we recognize that some competitive carriers may operate in areas served by incumbent LECs – often rural ones – that our rules already permit to charge access rates above those of the large price-cap ILECs.[119] If operation in these areas justifies higher access rates for the regulated incumbents, we conclude that it justifies equivalent rates for any competitor operating in the area.

52. Over time, our benchmark figure will decrease until it reaches the rate of the ILEC with which a CLEC competes. One year after the effective date of these rules, the benchmark rate will drop from 2.5 to 1.8 cents per minute, or the ILEC rate, whichever is higher. On the second anniversary of the rules' effective date, the rate will drop to 1.2 cents per minute, or the ILEC rate, whichever is higher.[120] Finally, three years after the rules become effective, the

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Secretary, FCC, CC Dkt. No. 96-262. Subsequently, WorldCom has also expressed support for a lower benchmark figure proposed by AT&T and NewSouth Communications. *See* March 22, 2001 letter of Donna Sorgi, WorldCom, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262.

[116] Association for Local Telecommunications Services, http://www.alts.org/frames/aboutalts.htm (visited Mar. 2, 2001).

[117] *See infra* paragraph 57. As additional support for the benchmark framework and the transition mechanism, if not the precise figure, that we adopt, we note that NewSouth Communications and AT&T have both recently expressed support for an initial benchmark figure of 1.2 cents per minute, transitioning to the ILEC rate within one year. *See* March 15, 2001 of Jake Jennings, NewSouth Communications, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262; March 16, 2001 letter of Patrick Merrick, AT&T, to Magalie Salas, Secretary, Federal Communications Commission, CC Dkt. No. 96-262.

[118] *See infra* paragraph 58.

[119] *See Multi-Association Group (MAG) Plan For Regulation of Interstate Services of Non-Price Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Dkt. No. 00-256, Notice of Proposed Rulemaking, FCC 00-448, ¶ 5 (rel. Jan. 5, 2001).

[120] We note that this is the level that AT&T and NewSouth propose as the starting point for the benchmark. *See supra* note 117.

benchmark figure will drop to the switched access rate of the competing ILEC. It will remain at that level through the rule's fourth year. We conclude that such a transition period is appropriate because, as discussed above, we are concerned about the effects of a flash-cut to the ILEC rate.[121] Instead, we are persuaded that CLECs should be allowed an opportunity to adapt to the less tariff-dependent regulatory environment to which we move with this order. We adopt a three-year transition to the ILEC rate both because it appears to allow sufficient time for CLECs to adjust their business models and because it is consistent with several other Commission reform initiatives relating to inter-carrier compensation that are currently under way.[122]

53. In order further to ease CLEC transition to the market paradigm that we adopt today, our rules permit CLECs to tariff, through the fourth year of the rule's effectiveness, a rate equivalent to the benchmark level established three years after the effective date of this order. As previously noted, the Commission is conducting a more general examination of inter-carrier compensation by way of a notice of proposed rulemaking. One of the options under serious consideration in that proceeding is a move to a bill-and-keep regime, under which carriers would recover their costs from end users, rather than from interconnecting carriers. Even if we choose that route in the inter-carrier compensation proceeding, the rules we adopt today would not mandate bill-and-keep for CLEC access tariffs until a full four years after the effective date of this order.

54. By moving CLEC tariffs to the "rate of the competing ILEC" we do not intend to restrict CLECs to tariffing solely the per-minute rate that a particular ILEC charges for its switched, interstate access service. As WorldCom notes, CLECs should not be "deprived of revenue streams available to the incumbent monopolists with which they compete."[123] Rather, by moving CLEC access tariffs to the competing ILEC rate, we intend to permit CLECs to receive revenues equivalent to those the ILECs receive *from IXCs*, whether they are expressed as per-minute or flat-rate charges. For example, CLECs shall be permitted to set their tariffed rates so that they receive revenues equivalent to those that the ILECs receive through the presubscribed interexchange carrier charge (PICC), to the extent that it survives in the wake of our *CALLS Order*.[124] This does not entitle CLECs to build into their tariffed per-minute access rates a component representing the subscriber line charge (SLC) that ILECs impose on their end users,

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[121] *See supra* paragraph 37.

[122] We have chosen a three-year ramp-down period in the recently adopted order governing reciprocal compensation payments for traffic bound for internet service providers. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt No. 96-98, *Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001). The transition period in this item should also bring CLEC rates down to the ILEC rate one year before ILEC rates are set to be reexamined in the *CALLS Order*. *See CALLS Order*, 15 FCC Rcd at 12977, ¶ 35. Lastly, the ramp-down period that we adopt today is consistent with the likely timeframe for the more far-reaching and general examination of inter-carrier compensation mechanisms that we initiated through another recent notice of proposed rulemaking. *See Intercarrier Compensation NPRM*, FCC 01-132 .

[123] WorldCom Safe Harbor Comments at 2.

[124] In the *CALLS Order*, we eliminated the PICC for residential and single-line business users. *See CALLS Order* 15 FCC Rcd at 12991-13004, ¶¶76-104. For multi-line business users, we initially set it at $4.31 per line, subject to additional reductions that will ultimately eliminate it as well. *See id.* at 13004-07, ¶¶ 105-112.

or any other charges that ILECs recover from parties other than the IXCs to which they provide access service.

55. A number of CLEC commenters urge the Commission not to set the benchmark at "the ILEC rate" because they claim that CLECs structure their service offerings differently than ILECs.[125] We seek to preserve the flexibility which CLECs currently enjoy in setting their access rates. Thus, in contrast to our regulation of incumbent LECs, our benchmark rate for CLEC switched access does not require any particular rate elements or rate structure; for example, it does not dictate whether a CLEC must use flat-rate charges or per-minute charges, so long as the composite rate does not exceed the benchmark. Rather it is based on a per-minute cap for all interstate switched access service charges. In this regard, there are certain basic services that make up interstate switched access service offered by most carriers. Switched access service typically entails: (1) a connection between the caller and the local switch, (2) a connection between the LEC switch and the serving wire center (often referred to as "interoffice transport"), and (3) an entrance facility which connects the serving wire center and the long distance company's point of presence. Using traditional ILEC nomenclature, it appears that most CLECs seek compensation for the same basic elements, however precisely named: (1) common line charges; (2) local switching; and (3) transport.[126] The only requirement is that the aggregate charge for these services, however described in their tariffs, cannot exceed our benchmark. In addition, by permitting CLECs to decide whether to tariff within the safe harbor or to negotiate terms for their services, we allow CLECs additional flexibility in setting their rates and the amount that they receive for their access services.

56. We will apply the benchmark for both originating and terminating access charges. That is, it will apply to tariffs for both categories of service, including to toll-free, 8YY traffic, and will decline toward the rate of the competing ILEC for each category of service. We note, however, that shortly before the issuance of this order, AT&T raised questions regarding the application of our benchmark to originating 8YY traffic generated by CLEC customers.[127] Because these issues arose so late in the proceeding, and because of the sparse record on them, we decline to do as AT&T suggests and immediately detariff this category of CLEC services above the rate of the competing ILEC. Instead, in this order, we solicit comment on the issues AT&T has raised so that we may decide them on an adequately developed record.[128]

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[125] CLECs contend that they are using different technologies, different network architectures and different pricing plans that make comparison between CLEC and ILEC rates difficult. *See* BayRing Safe Harbor Comments at 3; Focal & Winstar Safe Harbor Reply Comments at 8.

[126] Thus, the safe harbor rate applies, but is not necessarily limited, to the following specific rate elements and their equivalents: 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.

[127] *See* March 29, 2001 letter of Robert Quinn, AT&T, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262; April 3, 2001 letter of Robert Quinn, AT&T, to Jeff Dygert, Assistant Chief, Common Carrier Bureau, CC Dkt. No. 96-262.

[128] *See infra* paragraphs 98-104. Late in this proceeding, Sprint argued that CLEC toll-free database query charges should also be subject to a tariff benchmark or should be detariffed above the rate of the competing ILEC. *See* April 6, 2001 letter of Richard Juhnke, Sprint, to Magalie Salas, Secretary, Federal Communications Commission, (continued....)

57. Our benchmark mechanism may create the possibility for carriers with lower rates to raise their rates to the benchmark. We seek to avoid this result, which could have the consequence of *increasing* the amount that IXCs pay for some CLECs' access service. This, in turn, would again allow these CLECs to shift a portion of their costs onto the long distance market generally. Accordingly, we further restrict the tariff benchmark that may be charged to a particular IXC by tariff to the lower of: (1) the 2.5 figure, declining as discussed above, or (2) the lowest rate that a CLEC has tariffed for access, during the 6 months immediately preceding the effective date of these rules. Any rate above this level (unless it is still below the competing ILEC's rate) will be conclusively deemed to be unreasonable in any proceeding challenging the rate.[129] By restricting CLECs to no more than the access rates they previously have chosen to tariff, we minimize the opportunities for arbitrage that grow out of the rule we adopt today. Additionally, we expect that our benchmark rule will have no effect on negotiated contracts, under which CLECs have chosen to charge even more favorable access rates to particular IXCs.[130] Rather, these contracts will remain in place and the participating IXCs will continue to be entitled to any lower access rates for which they provide.

58. We also find that it is prudent to permit CLECs to tariff the benchmark rate for their access services only in the markets where they have operations that are actually serving end-user customers on the effective date of these rules. As we note above, the historical ability of CLECs to tariff access rates well above the prevailing ILEC rate may have contributed to economically inefficient market entry by certain CLECs. We intend the declining benchmark scheme to wean competitive carriers off of their dependence on tariffed, supra-ILEC access rates without the disruption of a flash-cut to the prevailing market rate. We therefore think it important to ensure that this transitional mechanism serves that purpose, rather than presenting CLECs with the opportunity to enter additional markets in a potentially inefficient manner through reliance on tariffed access rates above those of the competing ILEC. Accordingly, we

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CC Dkt. No. 96-262. Sprint also mentioned this issue, but only in passing, in its comments to our *Safe Harbor Public Notice. See* Sprint Safe Harbor Reply Comments at 5. Given the dearth of record evidence on this issue, we decline at this time to impose by rule the limit on database query charges that Sprint proposes. We expect, however, that CLECs will not look to this category of tariffed charges to make up for access revenues that the benchmark system denies them.

[129] As set out in the regulations accompanying this order (*see* Appendix B), CLECs may thus tariff rates for switched access service that do not exceed the greater of:

A. The rate of the competing ILEC, or

B. The lower of:

1. The presumptively reasonable benchmark of 2.5 cents per minute, declining as described in paragraph 52 above, or

2. The CLEC's lowest tariffed rate during the six months preceding the effective date of these rules.

[130] *See, e.g., Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *MCI Telecommunications Corp. v. FCC*, 665 F.2d 1300, 1301 (D.C. Cir. 1981) ("The *Sierra-Mobile* doctrine restricts federal agencies from permitting regulatees to unilaterally abrogate their private contracts by filing tariffs altering the terms of those contracts.").

restrict the availability of the transitional benchmark rate to those metropolitan statistical areas (MSAs) in which CLECs are actually serving end users on the effective date of these rules. In MSAs where they begin serving end users *after* the effective date of these rules, we permit CLECs to tariff rates only equivalent to those of the competing ILEC; they will have to achieve rates above this level by negotiation.

59. We recognize that the benchmark we adopt may dramatically reduce the tariffed access rates and revenues of many CLECs, particularly as the benchmark levels transition down over time. We conclude, however, that this reduction is warranted. As discussed above, we are concerned that numerous CLECs have been entering the access-service market at rates well above the prevailing rate charged by the incumbent.[131] Moreover, we are troubled by indications that CLECs are using these high access rates to shift a substantial portion of their start-up costs onto the long distance market and thus onto many subscribers who have chosen an access provider with lower rates. As the CLEC industry's market share continues to grow, this burden would only increase, absent some constraint on rates. We have noted that CLECs' ability to charge rates above the incumbent's appears to be due largely to the configuration of the access-service market and the geographical rate averaging required of the IXCs, both of which prevent market forces from disciplining rates. Our benchmark system will drive CLEC rates down toward the level charged by the ILECs, thereby bringing them toward the model of a competitive market, in which new entrants can successfully enter only at or below the prevailing market price. In so doing, the rules we adopt today reduce the opportunity for strategic use of the tariff system to impose unreasonable rates that are not subject to effective competition.

60. At the same time, we believe that our benchmark mechanism may actually result in increased access revenues for many CLECs. Many IXCs disputing the reasonableness of CLEC access rates have either been paying only the ILEC rate or have refused payment altogether. For these CLECs, our approach should provide greater certainty, and a more reliable stream of revenue, because we conclude that CLEC access rates will be conclusively deemed reasonable if they fall within the safe harbor that we have established. Accordingly, an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to this Commission to determine the reasonableness of the rate. Similarly, because of the conclusive presumption of reasonableness that we will accord to tariffed rates at or below the benchmark, a CLEC with qualifying rates will not be subject to a section 208 complaint challenging its rates.

61. We expect that some IXC participants in this proceeding will find fault with our ruling because it does not immediately reduce CLEC access charges to the rates charged by incumbent LECs. It is true that, for the three-year phase-in period, many tariffed CLEC access rates will continue to exceed the prevailing market price charged by the ILEC. However, by limiting tariffed rates to our benchmark, we have immediately provided IXCs with relief from the substantially higher rates that many CLECs have been tariffing. In addition to the immediate relief on access charges that the benchmark mechanism affords IXCs, it also ensures that CLEC

[131] We do not decide, in this order, whether those rates were reasonable at the time they were being charged. Rather, we conclude, on a prospective basis, that CLEC access rates will be deemed to be reasonable if they fall within the declining safe harbor that we have established.

access rates will continue to decline until they reach the level of the ILEC rates. In setting the benchmark, we have adopted, on a prospective basis and over the long run, the IXCs' argument that the reasonable rate for CLEC access service is the rate that the ILECs are charging for similar service in the market. We decline, however, immediately to drop the CLEC rate to that point.

62. This type of transitional mechanism is vitally important to avoid too great of a dislocation in the CLEC segment of the industry. As noted above, the Commission has taken a broad variety of steps to ensure the development of local competition in keeping with the explicit goals of the 1996 Act. Avoiding unnecessary damage to this growing competition, as likely would result from an immediate transition to the ILEC rate, is consistent with our approach in other proceedings, such as the reform of reciprocal compensation that we recently adopted, in which we have sought to reduce the opportunity for regulatory arbitrage but have nevertheless provided a transition mechanism to prevent too great of a revenue shock to a particular group of carriers.[132] This transition period is necessary to permit CLECs to adjust their business plans and obtain alternative sources for the substantial revenues of which the benchmark will deprive them – revenues on which they have previously relied in formulating their business plans because they were not held to the regulatory standards imposed on ILECs.

63. Again, we emphasize that we adopt this benchmark approach on an *interim* basis. Concurrent with our adoption of this order, we initiate a proceeding in which we will broadly examine various categories of existing intercarrier compensation regimes and seek comment on whether these existing rules lead to efficient usage of, and investment in, network infrastructure, or to the efficient development of competition.[133] In that proceeding, we seek comment on whether alternative rules for access charges might limit the ability of LECs, including CLECs, to exercise market power in their provision of access service.

### E. Safe Harbor Rates for Rural CLECs

64. Limiting CLECs to the higher of the benchmark rate or the access rate of its ILEC competitor could prove rather harsh for some of the small number of CLECs that operate in rural areas.[134] The difficulty would likely arise for those CLECs that operate in a rural area served by a price-cap incumbent with state-wide operations. Our rules require such ILECs to geographically average their access rates.[135] This regulatory requirement causes these "non-rural ILECs"

[132] *See Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131. *See also Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15,982, 16002, FCC 97-158, para. 46 (1997) ("we are concerned that any attempt to move immediately to competitive prices for [certain ILEC access] services would require dramatic cuts in access charges for some carriers. Such an action could result in a substantial decrease in revenue for incumbent LECs, which could prove highly disruptive to business operations, even when new explicit universal support mechanisms are taken into account.").

[133] *See Intercarrier Compensation NPRM*, FCC 01-132.

[134] *See, e.g.*, ALTS Safe Harbor Comments at 5; CTSI Safe Harbor Comments at 9-11; Minnesota CLEC Safe Harbor Comments at 2-7; RICA Safe Harbor Comments at 4-9.

[135] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report & Order, 5 FCC Rcd 6786, 6788 (1990); *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 866 (1995).

effectively to use their low-cost, urban and suburban operations to subsidize their higher cost, rural operations, with the effect that their state-wide averaged access rates recover only a portion of the ILEC's regulated costs for providing access service to the rural portions of its study area. During the course of this proceeding, we became concerned that tying the access rates of rural CLECs to those of such non-rural ILECs could unfairly disadvantage CLECs that lacked urban operations with which they could similarly subsidize their service to rural areas. Accordingly, we sought comment on whether the phenomenon of the non-rural ILEC justified the creation of a "rural exemption" to our benchmark scheme and, if so, how that exemption should be structured.[136]

### 1. Whether to Create a Rural Exemption

65. We conclude that the record supports the creation of a rural exemption to permit rural CLECs competing with non-rural ILECs to charge access rates above those charged by the competing ILEC. First, we note that such a device is consistent with the Commission's obligations, under section 254(d)(3) of the Act and section 706 of the 1996 Act, to encourage the deployment to rural areas of the infrastructure necessary to support advanced telecommunications services and of the services themselves.[137] The record indicates that CLECs often are more likely to deploy in rural areas the new facilities capable of supporting advanced calling features and advanced telecommunications services than are non-rural ILECs, which are more likely first to deploy such facilities in their more concentrated, urban markets.[138] Given the role that CLECs appear likely to play in bringing the benefits of new technologies to rural areas, we are reluctant to limit unnecessarily their spread by restricting them to the access rates of non-rural ILECs.

66. We are persuaded by the CLEC comments indicating that they experience much higher costs, particularly loop costs, when serving a rural area with a diffuse customer base than they do when serving a more concentrated urban or suburban area.[139] The CLECs argue that, lacking the lower-cost urban operations that non-rural ILECs can use to subsidize their rural operations, the CLECs should be permitted to charge more for access service, as do the small rural incumbents that charge the National Exchange Carrier Association (NECA) schedule rates.[140] We note in this regard that a rural exemption will also create parity between the rural CLECs competing with NECA carriers and those competing with non-rural ILECs.

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[136] *Safe Harbor Public Notice*, 15 FCC Rcd 24102, ¶¶ 5-7.

[137] *See* 47 U.S.C. § 254(d)(3); Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153, (1996) (reproduced in the notes under 47 U.S.C. § 157).

[138] *See e.g.*, RICA Safe Harbor Comments at 2.

[139] *Cf.* RICA Safe Harbor Reply Comments at 7.

[140] *See* Minnesota CLEC Safe Harbor Reply Comments at 2; NTCA Safe Harbor Comments at 4-5; BayRing Safe Harbor Comments at 23; BayRing Safe Harbor Reply Comments at 3-4. The National Exchange Carrier Association is a non-stock, not-for-profit association that the FCC established in 1983, *inter alia*, to administer its Access Charge Plan and the associated pools and tariffs. *See* 47 C.F.R. §§ 69.601, *et seq.* NECA files interstate access tariffs for primarily small, rural and high-cost ILECs that participate in its common line or traffic-sensitive pools. NECA has over one thousand members that are either "cost" or "average schedule" companies. Cost (continued....)

67. In adopting the rural exemption, we reject the characterization of the exemption as an implicit subsidy of rural CLEC operations.[141] It is true that an exemption scheme will permit rural CLECs to charge IXCs more for access to their end-user customers than was charged by the non-rural ILECs from whom the CLECs captured their customers. But that does not necessarily justify limiting the rural CLEC to the access rates of the non-rural ILEC. The same increase in access rates would occur if, rather than entering an area as a competitive carrier, a small local-service provider were to purchase a rural exchange and thus become the rural ILEC serving the end users in that exchange.[142] In that event, the IXC's cost for access to the exchange's end users would also increase, as the new ILEC likely would charge either NECA schedule rates or conduct a cost study to support its own access rates, and our rules would permit either outcome. This analysis leads us to conclude that the exemption we adopt today is not properly viewed as an implicit subsidy of rural CLEC operations. Instead, it merely deprives IXCs of the implicit subsidy for access to certain rural customers that has arisen from the fact that non-rural ILECs average their access rates across their state-wide study areas.

68. Our level of comfort in creating a rural exemption is markedly increased by the fact that the record indicates it likely will apply to a small number of carriers serving a tiny portion of the nation's access lines. The Rural Independent Competitive Alliance (RICA) asserts that, fewer than 100,000 access lines are served by carriers falling in the definition that it proffers for a rural CLEC.[143] This number is entirely overwhelmed by the approximately 192 million access lines reported by the Commission in its last report on local telephone competition.[144] Indeed, this figure for rural CLECs' customers amounts to substantially less than one percent of the 12.7 million lines served by CLECs.[145] We acknowledge that the definition for a rural CLEC that we adopt below is somewhat broader than that proposed by RICA.[146] It nevertheless appears likely to encompass only a small number of the overall total of CLEC end users.

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companies submit cost studies to NECA; these studies form the basis for the cost companies' settlements with the NECA pools. For average schedule companies, NECA collects cost information from selected representative members on a periodic basis. It uses this information to generate average schedule rates. These rates, rather than the actual costs of the individual average schedule companies, govern the settlements of these average schedule companies with the NECA pools. The data from the cost companies and the average schedule companies together provide the support for the development of the NECA tariffs.

[141] *See* AT&T Safe Harbor Reply Comments at 12-13.

[142] *Cf.* RICA Safe Harbor Reply Comments at 7. *See also* OPASTCO Safe Harbor Comments at 4 (many rural ILECs pursue an "edge-out" strategy, moving into territory of adjacent ILEC as competitor; arguing that, since these carriers charge NECA rates in their home territories, they should also be permitted to do so in areas they enter competitively).

[143] RICA Safe Harbor Comments at 17.

[144] *See* Industry Analysis Division, FCC, *Local Telephone Competition: Status as of June 30, 2000* at 1 (rel. Dec. 4, 2000) (*Local Telephone Competition*).

[145] *See id.*

[146] Below, we define rural areas as those falling outside of (1) any incorporated place of 50,000 inhabitants or more or (2) an urbanized area defined by the Census Bureau. *See infra* paragraph 76. RICA, on the other hand,
(continued....)

69. We reject AT&T's argument that CLECs must rely solely on the *CALLS Order*'s interstate access support when entering the territories of non-rural ILECs. The *CALLS Order*'s $650 million portable universal service support mechanism represented the amount necessary to compensate participating ILECs for the subsidies that the order removed from their access revenues. This interstate access support mechanism is portable, but that does not necessarily indicate that it fully reflects the costs (above those recovered through ILEC access rates) that a rural CLEC would encounter in serving customers in the high-cost areas for which the subsidy is available. For example, we note that a CLEC entering the territory of a non-rural ILEC likely would not enjoy the economies of scope and scale that the ILEC does in the same territory.

70. We are also skeptical of AT&T's assertions about the incentives that would flow from a rural exemption. First, AT&T argues that the exemption would "create perverse incentives for uneconomic competitive entry by CLECs in any 'rural' areas in which it might be applicable."[147] It appears from the record that both AT&T and Sprint have routinely been paying for CLEC access billed at the rate charged by the competing incumbent. If AT&T were accurate in its projection about higher access rates spurring a rash of uneconomic market entry in rural areas, such uneconomic entry should already have occurred in the territories of the rural incumbent carriers that charge the higher NECA rates. However, the record fails to indicate such a trend. Additionally, we note WorldCom's assertion that geographically variable rates will create the incentive for CLECs to make it appear, through "foreign exchange type offerings," as if their end users were located in rural areas when they are not.[148] Here again, it appears that this incentive already has existed for any CLECs that choose to compete with NECA carriers and that consequently would receive the equivalent of NECA rates from Sprint and AT&T. However, the record discloses no significant attempt by CLECs to collect high charges for access to end users that are actually located outside of the NECA carriers' territory.

71. We are similarly unpersuaded by AT&T's argument that a rural exemption will cause a proliferation of chat line providers in the territories served by rural CLECs. We recognize that AT&T has alleged that, in certain circumstances, it violates the Act for a LEC with relatively high access rates (such as a NECA carrier) to serve a chat line provider as a means of increasing the LEC's access traffic.[149] It appears that the conduct that AT&T challenges in these proceedings grows out of the arbitrage opportunity created by the higher access rates charged by rural NECA carriers. However, we are skeptical that the rural exemption that we create today will add markedly to AT&T's problem in this regard. The FCC recently reported that non-price cap incumbent carriers served in excess of 12 million lines in the U.S.[150] The bulk

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proposes to include within the first portion of the definition only incorporated places of 20,000 inhabitants or more. *See* RICA Safe Harbor Comments at 6.

[147] AT&T Safe Harbor Comments at 13.

[148] WorldCom Safe Harbor Reply Comments at 4.

[149] *See* AT&T Safe Harbor Reply Comments at 16. AT&T has raised these allegations in complaint proceedings that remain pending at the Commission. Our discussion of the issue presented in these proceedings should not be interpreted as prejudging them in any way.

[150] *See* Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. Table 8.2 (Dec. 2000).

of these carriers either charge NECA access rates or something similar. Adding less than one percent to the number of rural lines eligible for higher access rates seems highly unlikely to increase dramatically the arbitrage opportunities involving chat line providers.

72. Furthermore, as we have noted previously, the mechanism that we implement today serves as only a transitional solution to a portion of the much larger question of inter-carrier compensation. We are examining the broader questions of inter-carrier compensation through a notice of proposed rulemaking. Additionally, the Commission currently has before it the Multi-Association Group (MAG) Plan, which has as one of its goals the reduction of rural ILECs' access charges.[151] Below, we tie the rates for rural CLECs to the NECA rates charged by rural ILECs. Accordingly, as our access reform efforts for rate-of-return carriers and our other efforts on inter-carrier compensation bring down the access rates of rural ILECs, any opportunities for arbitrage growing out of the exemption for rural CLECs will also diminish.

73. We thus conclude that the record supports the creation of a rural exemption to the benchmark scheme that we adopt for CLEC access charges. Under this exemption, a CLEC that is operating in a rural area, as defined below, and that is competing against a non-rural ILEC may tariff access rates equivalent to those of NECA carriers. Below we discuss more precisely the CLECs to which this exemption will be available and the access rates that they may impose by tariff.

### 2. Carriers Eligible for Rural Exemption

74. In response to our public notice inquiring about the potential of the rural exemption from our benchmark scheme, we received a variety of suggested structures. CTSI and BayRing assert that the exemption's higher access rates should be available on an end-user-by-end-user basis for all customers living outside of density zone 1 of the nation's top 50 metropolitan statistical areas (MSAs), a standard that would open the exemption to a far broader range of carriers than we think is necessary to promote competitive entrants in truly rural areas.[152] As Sprint notes, this definition of rural would "include metropolitan areas having populations of up to 958,000, and would include such sizable cities as Honolulu, Tucson, Tulsa, Omaha, and Albuquerque."[153] At the other extreme, Sprint argues that the exemption should be available to a CLEC that serves both business and residential customers and that operates exclusively outside of any MSA.[154] As some commenters assert, this definition may be overly exclusive because MSAs typically include the full area of the counties contiguous with the central population

[151] *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, Notice of Proposed Rulemaking, FCC 00-448 (rel. Jan. 5, 2001).

[152] BayRing Safe Harbor Comments at 21-22; CTXI Safe Harbor Comments at 11-14. The Office of Management and Budget defines metropolitan statistical areas. Essentially, they encompass cities with a population of more than 50,000 and all of the adjoining counties. *See* Alternative Approaches to Defining Metropolitan and Nonmetropolitan Areas, 63 Fed. Reg. 70525, 70526 (OMB 1998). Currently, there are 258 MSAs in the country.

[153] Sprint Safe Harbor Reply Comments at 7.

[154] *See* October 11, 2000 letter of Richard Juhnke, Sprint Corp., to Magalie Salas, Secretary, FCC, CC Dkt. No. 96-262.

center, and, especially in the case of larger counties, may therefore include substantial areas that are undeniably rural.

75. Administrative simplicity is an important consideration in our choice of a way to define rural CLECs. Thus, we conclude that the availability of the exemption (and the higher access rates that come with it) should be determined based on the CLEC's entire service area, not on a subscriber-by-subscriber basis. Similarly, we are concerned that the definition rely on objectively available information that will not require extensive calculation or analysis by either carriers or this Commission. For example, many comments suggest that, at bottom, density is the factor that should determine whether an area qualifies as rural; it is the factor that reflects a LEC's loop lengths and, not surprisingly, the number of potential subscribers in an area. The factors of longer loop length and lower concentration of potential subscribers are, in turn, what motivate us to permit higher access rates in rural areas. However, our concern with objectivity leads us to conclude that rural CLECs should not be defined explicitly by the population density in their service areas because density figures for the irregular areas likely to be served by CLECs – areas that typically will not correspond to state or municipal boundaries or to Census Bureau divisions – are not readily available.

76. We conclude that the rural exemption to our benchmark limitation on access charges will be available for a CLEC competing with a non-rural ILEC, where no portion of the CLEC'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.[155] Thus, if any portion of a CLEC's access traffic originates from or terminates to end users located within either of these two types of areas, the carrier will be ineligible for the rural exemption to our benchmark rule. Relying on information that is readily and publicly available, this definition excludes from the exemption those CLECs operating within reasonably dense areas that are not typically considered to be rural. It does not, however, exclude from eligibility entire counties that border high population areas, as would a definition based on MSAs.

77. Sprint has raised the issue of how best to ensure that the rural exemption does not create the potential for abuse and that it is restricted to CLECs that are serving rural end users.[156] Thus, Sprint is concerned about the potential for competitive carriers, with some qualifying end users, creating two separate operating entities so that the one serving rural end users could tariff the higher access rate permitted under the exemption. While we want to forestall that strategy for exploiting our rule, we also realize that certain incumbents with urban (or non-rural) operations may choose to enter adjacent rural markets as a competitive carrier. To the extent that such carriers provide the benefit of competition in rural markets, their non-qualifying incumbent

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[155] An urbanized area "is a continuously built-up area with a population of 50,000 or more. It comprises one or more places – central place(s) – and the adjacent densely settled surrounding area – urban fringe – consisting of other places and nonplace territory." U.S. Bureau of the Census, GEOGRAPHIC AREAS REFERENCE MANUAL at 12-1; available at http://www.census.gov/ftp/pub/geo/www/GARM/Ch12GARM.pdf (visited February 7, 2001). *See also id.* at 12-7 to 12-8 (further discussion of criteria for defining urbanized areas). 405 urbanized areas were defined by the time of the 1990 census. *Id.* at 12-5.

[156] *See* April 6, 2001 letter of Richard Juhnke, Sprint, to Magalie Salas, Secretary, Federal Communications Commission, CC Dkt. No. 96-262.

operations should not operate entirely to deny them the benefit of the rural exemption. Accordingly, we decline Sprint's invitation to examine all of the subsidiary operations of a holding company in order to determine the applicability of the rural exemption. We expect that we will be able to address, on a case-by-case basis, the improper exploitation of our rule – such as a competitive carrier's splitting itself into two subsidiaries to qualify, in part, for the exemption rates where it would not otherwise do so.

78. Our definition for rural CLECs closely resembles the first major division of the Act's definition for rural telephone companies.[157] It departs from the remaining three major divisions of the definition either because they would be administratively burdensome, or because they would be overly inclusive or irrational when applied solely to CLECs.[158] Our definition adopts 50,000, rather than 10,000, as the population cut-off for incorporated places because we are concerned that, without the statute's remaining three portions of the definition as a way for a company to attain rural status, the 10,000-person threshold would be unduly restrictive and deny the exemption to companies operating in areas that would generally be viewed as rural.

79. It is also necessary to discuss briefly the type of carrier with which a CLEC must be competing in order to qualify for the rural exemption. Our intent is that this exemption will permit a CLEC to tariff access rates above the competing ILEC's only when the competing ILEC has broad-based operations that include concentrated, urban areas that allow it to subsidize its rural operations and therefore charge an artificially low rate for access to its rural customers. We conclude that the most effective and objective means of accomplishing this is to allow the rural exemption only to those CLECs that are competing with price-cap ILECs that do not qualify as "rural telephone companies" under the Act's definition.[159] Those CLECs competing with carriers that qualify as rural under the Act's definition are excluded from the rural exemption and are therefore limited, under the rule we announce above, to tariffing access rates equal only to those of the competing ILEC.

### 3. Rate for Exemption Carriers

80. The final question with respect to the rural exemption is what the access service benchmark is for those carriers that qualify. We adopt the NECA tariff for switched access service as the standard that is the most appropriately reflective of the considerations that should go into pricing the access service of rural CLECs. Accordingly, qualifying rural CLECs may tariff rates at the level of those in the NECA access tariff, assuming the highest rate band for

[157] *See* 47 U.S.C. § 153(37)(A).

[158] We do not adopt the portion of the Act's definition that classifies as rural those companies providing service to "fewer than 50,000 access lines," 47 U.S.C. §153(37)(B), because it would permit a CLEC serving 45,000 access lines in downtown Manhattan or Los Angeles to qualify as rural. Because CLECs may not have assigned geographic areas in which they must offer service to all subscribers, the portion of the definition relating to carriers serving study areas with fewer than 100,000 access lines, *id.* § 153(37)(C), simply does not apply to CLECs. Finally, because we decline, for reasons of administrative simplicity, to get into a subscriber-by-subscriber analysis of where a CLEC's end-user customers are located, we decline to adopt that portion of the Act's definition that defines as rural those companies with less than 15 percent of their access lines within a community of more than 50,000 people. *Id.* § 153(37)(D).

[159] 47 U.S.C. § 153(37).

local switching and the transport interconnection charge, *minus* the tariff's carrier common line (CCL) charge if the competing ILEC is subject to our *CALLS Order*. Above this benchmark, rural CLECs will be mandatorily detariffed in their provision of access services.

81. We adopt the NECA access rate because it is tariffed on a regular basis and is routinely updated to reflect factors relevant to pricing rural carriers' access service. We choose the highest rate bands for the two variable rate elements because the opportunity to tariff those rates will most effectively spur the development of local-service competition in the nation's rural markets and because the burden created by choosing the highest rate will be relatively minor, owing to the small number of carriers involved. We deny rural CLECs the NECA tariff's CCL charge when they compete with a *CALLS* ILEC because the price-cap LECs' CCL charge has been largely eliminated through implementation of higher subscriber line charge (SLC) caps and the multi-line business PICC. CLECs competing with *CALLS* ILECs are free to build into their end-user rates a component approximately equivalent to (or slightly below) the ILEC's SLC, as well as assessing IXCs a multi-line business PICC. These potential revenue sources obviate the need for a CCL charge, which NECA carriers use to recover loop costs that cannot be recovered because of their lower SLC caps and the absence of PICCs.

### F. Forbearance Analysis for Rates Above the Benchmark

82. As previously indicated, we conclude that a CLEC must negotiate with an IXC to reach a contractual agreement before it can charge that IXC access rates above the benchmark. During the pendency of these negotiations, or to the extent the parties cannot agree, the CLEC may charge the IXC only the benchmark rate. In order to implement this approach, we adopt mandatory detariffing for access rates in excess of the benchmark. That is, we exercise our statutory authority to forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services priced above our benchmark.[160]

83. Section 10 of the Act requires, *inter alia*, that the Commission forbear from applying any regulation or provision of the Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain statutory conditions are satisfied.[161] Because section 10 permits us to exercise our forbearance

[160] *See* 47 U.S.C. § 160 (forbearance authority); 47 C.F.R. Part 61 (tariff regulations). As modified by the *Hyperion Order*, our tariff rules currently subject CLECs to permissive detariffing and set no pre-determined limits on the level of charges that CLECs may establish by tariff. *See supra* paragraph 12 (discussing *Hyperion Order*). We note that the law is somewhat unclear on which section of the Act requires or permits the filing of interstate access tariffs. In *Lincoln Telephone & Telegraph Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981), the Court of Appeals for the D.C. Circuit stated in dicta that access providers qualified as "connecting carriers" and were therefore exempt from the tariff-filing requirements of section 203(a). Rather, the court opined, the Commission could "exercise the residual authority" of section 4(i) to require tariffing of access services. *Id.* at 1109. In contrast, the court in *Advamtel v. AT&T* appears to have assumed that section 203 supported the tariffing of interstate access services. *See* 118 F. Supp. 2d at 683-84, 688.

[161] 47 U.S.C. § 160. Section 10(a) provides that:

> (a) REGULATORY FLEXIBILITY. – Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers

(continued....)

authority with respect to classes of services, we conduct a forbearance analysis only for those CLEC interstate access services for which the aggregate charges exceed our benchmark. For this class of services, we conclude that the section 10 forbearance criteria are satisfied; accordingly, we must take action pursuant to the terms of this statute.

84. Under the first criterion for forbearance, we examine whether our tariff filing requirements for CLEC interstate access services priced above the benchmark are necessary to ensure that rates for these services are just and reasonable and not unreasonably discriminatory.[162] We conclude they are not. As noted above, CLECs are positioned to wield market power with respect to access service. Requiring CLECs to negotiate with their IXC customers in order to obtain access rates above the benchmark will limit the CLECs' ability to exercise this market power and unilaterally impose rates above the level that we have found to be presumptively reasonable.

85. We are not persuaded by CLEC commenters that contend they will be unable to negotiate agreements with IXCs because IXCs wield significant market power in the purchase of access services. We find these claims of IXC monopsony power unsupported in the record. We note that three major IXCs are purchasers in the market for access services, and numerous smaller players also purchase LEC access services. Moreover, we note that our tariff rules were historically intended to protect purchasers of services from monopoly providers, not to protect sellers from monopsony purchasing power. We conclude that other remedies, like those under

(Continued from previous page)

> or telecommunications services, in any or some of its geographic markets, if the Commission determines that –
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, form or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest."

47 U.S.C. § 160(a). Section 10(b) further provides:

> (b) COMPETITIVE EFFECT TO BE WEIGHED. -- In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

47 U.S.C. § 160(b).

[162] 47 U.S.C. § 160(a)(1).

the antitrust laws, are available to protect CLECs from the exploitation of any monopsony power that IXCs may possess.[163]

86. Under the second forbearance criterion, we must determine whether tariffing of CLEC access charges above the benchmark is necessary to protect consumers.[164] Such tariffing is not necessary to ensure that consumer rates are just and reasonable. To the contrary, requiring negotiation of access rates above the benchmark will provide greater assurance that the rates are just and reasonable and will likely prevent CLECs from using long distance ratepayers to subsidize their operational and build-out expenses. It is possible that the reduction of CLEC access revenue caused by the benchmark scheme will increase the rates CLECs charge their end users. However, all CLEC end users have competitive alternative service providers, in the form of regulated incumbents. We are therefore not concerned that any increase in CLEC end-user rates will unduly harm consumers. To the extent that this provision requires us to examine the effect on the IXC consumers of CLEC access services, mandatory detariffing likely will protect that group by removing the CLEC's ability unilaterally to impose excessive rates through the tariff process.

87. The third forbearance criterion requires that we determine whether mandatory detariffing of CLEC access services priced above the benchmark is consistent with the public interest and, in particular, whether it will promote competitive market conditions.[165] We conclude, as discussed above, that adopting mandatory detariffing for access rates in excess of the safe harbor limit will subject to negotiation between two willing parties any access services offered at a rate above the benchmark. The negotiation-driven approach that we adopt will provide a better mechanism for IXCs to control costs, since they will not be subject to tariffs with unilaterally established rates at excessive levels. In addition, our benchmark system, with its presumption that qualifying rates are reasonable, will provide greater certainty for CLECs that they will receive full compensation for the access services that they provide. By limiting a CLEC's ability to shift its start-up costs onto the long-distance market, our benchmark approach will restrict market entry to the efficient providers. Accordingly, mandatory detariffing of CLEC access services above the benchmark fulfills all three of the criteria for forbearance.

## IV. INTERCONNECTION OBLIGATIONS

88. Although we have created a safe harbor for CLEC access rates, within which they will be presumed to be just and reasonable, the question remains of whether and under what circumstances an IXC can decline to provide service to the end users of a CLEC. In this proceeding, we sought comment on whether either section 201(a) or section 251(a) prohibit an IXC from declining to serve the customers of a CLEC because the IXC believes that the CLEC's access rates are too high. We also sought comment on whether an IXC must first obtain section 214 approval from the Commission before terminating service to CLEC customers.

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[163] *See, e.g., United States v. Griffith*, 334 U.S. 100, 108 (1948); *Sunshine Cellular v. Vanguard Cellular Sys.*, 810 F. Supp. 486, 493-94 (S.D.N.Y. 1992) (denying motion to dismiss monopsony claim with respect to cellular phone roaming services).

[164] 47 U.S.C. § 160(a)(2).

[165] 47 U.S.C. § 160(b).

89. Below, we conclude that section 201(a)'s requirement that a carrier provide communications service upon reasonable request obligates IXCs to serve the end users of a CLEC that is charging rates at or below the benchmark when the IXC is also serving the customers of other LECs in the same geographic area. We are optimistic that our conclusions in this regard will maintain the benefits of a seamless, interconnected public telephone network. Given the structure of the rules that we adopt, we need not address the applicability of section 214.

### A. Interconnection and Sections 201 and 251

90. Section 201(a) of the Communications 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."[166] It also requires that common carriers establish physical connection with other carriers where, after the opportunity for a hearing, the Commission has found such action "necessary or desirable in the public interest."[167] Similarly, section 251(a)(1) of the Communications Act requires all telecommunications carriers to interconnect directly or indirectly with each other.[168]

91. CLECs contend that sections 201(a) and 251(a)(1) require IXCs to accept all originating, and deliver all terminating, access traffic and to comply with all reasonable requests for interconnection.[169] IXCs, on the other hand, contend that a carrier's decision whether to interconnect is a matter of business judgment that is not subject to section 201(a).[170] They further argue that section 251(a)(1) only obligates a carrier physically to interconnect with the facilities of other carriers and does not require the acceptance or delivery of access traffic.[171]

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[166] 47 U.S.C. § 201(a).

[167] Section 201(a) states –

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C. § 201(a).

[168] Section 251(a)(1) states that "[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. §251(a).

[169] Teligent Comments at 3-5; Allegiance Comments at 6; ALTS Comments at 25; Alltel Comments at 5; RCN Comments at 6-8; MGC Comments at 17; Minnesota CLEC Comments at 3-5; Winstar Comments at 6-7; RICA Comments at 7-9; USTA Comments at 21-22.

[170] AT&T Reply Comments at 29-30; Sprint Comments at 24-25; WorldCom Comments at 19.

[171] Sprint Reply Comments at 22-24.

92. We are generally persuaded by the IXCs' arguments. Sections 201(a) and 251(a)(1) do not expressly require IXCs to accept traffic from, and terminate traffic to, all CLECs, regardless of their access rates. In the *Local Competition Order*, the Commission found that a section 251(a)(1) duty to interconnect, directly or indirectly, is central to the Communications Act and achieves important policy objectives.[172] However, the Commission construed the statute to require only the physical linking of networks, not to impose obligations relating to the transport and termination of traffic.[173] Section 201 empowers the Commission, after a hearing and a determination of the public interest, to order the physical connection of networks and to establish routes and charges for certain communications. This also falls short of creating the blanket duty that the CLECs seek to impose on the IXCs to accept all access service, regardless of the rate at which it is offered. Certainly, we have made no finding that the public interest dictates such broad acceptance of access service, whatever its price. Nevertheless, we conclude that section 201(a) places certain limitations on an IXC's ability to refuse CLEC access service.

93. We agree that universal connectivity is an important policy goal that our rules should continue to promote. The public has come to value and expect the ubiquity of the nation's telecommunications network. Accordingly, 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.[174]

94. We therefore conclude 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). That section imposes on common carriers the obligation to furnish communication service "upon reasonable request therefor." As set out above, we will conclusively presume that a CLEC's access rates are reasonable if they fall

[172] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15988-15991 (1996) (*Local Competition Order*). MGC Comments at 17-18.

[173] The Commission's rules implementing section 251(a)(1) define "interconnection" as the "linking of two networks for the mutual exchange of traffic" and state that it "does not include the transport and termination of traffic." 47 C.F.R. § 51.5.

[174] Winstar Comments at 5; OPASTCO Comments at 2-3; Allegiance Comments at 8; MGC Comments at 16-17; Minnesota CLEC Comments at 3-5; RCN Comments at 8; Winstar Comments at 6-7; RICA Comments at 7-9; USTA Comments at 21-22; WorldCom Reply Comments at 14. *See also* ITC Reply Comments at 6-7 (regulatory intervention is necessary when market forces fail to ensure customer expectations of call completion). Even Sprint acknowledges that an IXC's refusal to exchange traffic is undesirable. *See* Sprint Comments at 24.

Incumbent LECs also are generally supportive of the approach we adopt in this Order. For example, SBC argues that an IXC that chooses to serve a geographic area as a common carrier should serve all users inside that area, and should not be allowed to refuse or discontinue service to those served by any LEC with whom the IXC cannot agree upon access rates. *See* SBC Reply Comments at 6. It further contends that all section 201 interconnection obligations must be correspondingly limited if the Commission determines that an IXC has the power to discontinue service. *Id. See also* US West Comments at 26.

at or below the benchmark that we establish herein. When an IXC's end-user customer attempts to place a call either from or to a local access line, that customer makes a request for communication service – from the originating LEC, the IXC and the terminating LEC. When that customer attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a).[175] This obligation may be enforced through a section 208 complaint before the Commission.[176]

### B. Section 214 and Discontinuance of Service

95. Section 214 of the Communications Act and section 63.71 of the Commission's rules govern an IXC's withdrawal of service. Section 214 of the Communications Act provides, in relevant part, that "[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby."[177] In light of the solution we adopt herein, we need not address the application of either section 214 or our rule 63.17.

96. Above, we conclude that it would be a violation of section 201(a) for an IXC to refuse CLEC access service, either terminating or originating, where the CLEC has tariffed access rates within our safe harbor and, in the case of originating access, where the IXC is already providing service to other members in the same geographical area. Since section 201(a) already prohibits such a withdrawal of service, we need not address the question of whether section 214 applies to an IXC that finds itself in that position.

97. The remaining possible scenario to which section 214 might apply is that in which a CLEC wishes to charge access rates above our benchmark and an IXC will not agree to pay them. Under the rules we adopt today, a CLEC must charge the benchmark rate during the pendency of negotiations or if the parties cannot agree to a rate in excess of the benchmark. In either case, since the benchmark rate is conclusively presumed reasonable, an IXC cannot refuse to provide service to an end user served by the CLEC without violating section 201. Here again, we need not address the applicability of section 214.

## V. FURTHER NOTICE OF PROPOSED RULEMAKING

98. Shortly before we issued this item, AT&T asserted, for the first time in this proceeding, that CLEC originating 8YY, toll-free traffic should be subject to a different

[175] Naturally, our decision in this regard does not mean that an IXC would be amenable to suit under section 201(a) if it received a request for service to or from an area of the country that it does not otherwise serve. Thus, for example, this order does not place a section 201(a) obligation on a Bell operating company to accept originating access traffic from one of its in-region states for which it has not yet received section 271 authority to carry interLATA traffic.

[176] 47 U.S.C. 208(a). This section of the statute explicitly states that "[n]o complaint shall . . . be dismissed because of the absence of direct damage to the complainant." *Id.*

[177] 47 U.S.C. § 214.

benchmark scheme than other categories of switched access traffic.[178] AT&T argues that the benchmark for CLEC 8YY traffic should immediately move to the access rate of the competing ILEC and that CLECs should be mandatorily detariffed above that point.[179] In support of this position, AT&T asserts that certain CLECs with higher access charges attempt to obtain as customers end users that typically generate high volumes of 8YY traffic, such as hotels and universities. AT&T further asserts that some CLECs then "install limited, high-capacity facilities designed only to handle 8YY traffic" and "share their access revenues with the customers generating the [8YY] traffic" through agreements that provide for payments to the end user based on the level of 8YY traffic it generates.[180] AT&T contends that such arrangements do not promote the development of local exchange competition. Rather, it argues that these arrangements merely create the incentive for end users artificially to generate heavy 8YY traffic loads, which, in turn generate revenues for CLECs and their end-user customers.[181]

99. Given the paucity of record evidence on this issue, we seek comment generally on AT&T's proposal immediately to benchmark CLEC 8YY access services to the ILEC rate. Is the generation of 8YY traffic in order to collect greater access charges, as AT&T complains, something that the Commission should attempt to address through a rulemaking, or should the IXCs be left to address specific instances of abuse directly with the relevant CLEC, with the aid of the Commission's complaint process where appropriate?[182] In this regard, we note AT&T's assertion that one recent case of apparent abuse, confirmed by WorldCom, arose from the sequential dialing of over 800,000 8YY calls by a single end user.[183] It appears that, even without the rule it now requests, AT&T may, through discussions with the relevant CLEC, have been able to act to prevent payment for improperly generated 8YY access minutes.

100. We seek comment on the magnitude of the potential problem with 8YY traffic that AT&T identifies. AT&T estimates that approximately 30% of its CLEC access traffic is generated by 8YY aggregators that, it speculates, have revenue-sharing agreements with their end-user subscribers.[184] Is this an accurate figure across the industry? How many minutes and what premium over the competing ILEC rate does this represent? More generally, what

[178] *See* March 29, 2001 letter of Robert Quinn, AT&T, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262 (AT&T March 29, 2001 letter); April 3, 2001 letter of Robert Quinn, AT&T, to Jeff Dygert, Assistant Chief, Common Carrier Bureau, CC Dkt. No. 96-262 (AT&T April 3, 2001 letter).

[179] *See* AT&T March 29, 2001 letter at 1-2.

[180] *Id.* at 2.

[181] AT&T April 3, 2001 letter at 2.

[182] As AT&T indicates, the question of the propriety of a CLEC's revenue-sharing agreement is before the Commission in the complaint proceeding styled *U.S. TelePacific Corp v. AT&T*, File No. EB-00-MD-010 (complaint filed June 16, 2000).

[183] *See* Declaration of William J. Taggart III, paragraphs 3-4 (appended to AT&T April 3, 2001 letter).

[184] AT&T April 3, 2001 letter at 2. AT&T estimates that this translates into a premium of approximately $38 million above what it would have paid for similar services at the ILEC rate. *Id.*

proportion of CLEC access traffic is composed of originating 8YY service? What proportion of CLEC end users have 8YY revenue-sharing agreements with their carrier?

101. Are CLECs continuing to offer 8YY revenue-sharing agreements to their new end users, or are they currently available only to end users that negotiated them at some point in the past? Do CLECs notice a difference in the 8YY traffic patterns generated by end users with revenue-sharing agreements, compared to those end users without such agreements? What are the typical terms of a revenue-sharing agreement? Do they provide for payment of a per-minute fee for 8YY traffic, a per-call fee or some other arrangement? What is the magnitude of the fee paid? How, if at all, will the Commission's imposition of the switched-access benchmark affect CLECs' existing revenue-sharing agreements?

102. We are concerned that AT&T's proposed solution to the problem it identifies may paint with too broad of a brush. Does the existence of some CLECs' revenue-sharing agreements justify immediately limiting CLEC tariffed access rates for all 8YY traffic to the rate of the competing ILEC? Should the Commission instead impose such a limitation only on those CLECs that actually offer revenue-sharing agreements to their end users?

103. Additionally, we seek comment on AT&T's assertion that it promotes neither appropriate policy goals nor the development of local exchange competition when a CLEC carries an end user's 8YY traffic without also providing that end user with local exchange service or other types of access service.[185] Would we be justified in immediately tying 8YY access tariffs to the ILEC rate for all CLECs, regardless of the services that they provide to their end users? Or would such a rule be appropriate, if at all, only for those CLECs that carry exclusively their end users' 8YY traffic? How does the presence or absence of revenue-sharing agreements, discussed above, fit into the analysis of whether a CLEC's service offerings support restricting their tariffed 8YY access rates to the competing ILEC's rate?

104. We question whether, at bottom, CLEC 8YY traffic is inherently worthy of lower access charges than are other types of access traffic. A CLEC provides a closely similar service and uses similar or identical facilities, regardless of whether it provides originating 8YY access service, or terminating or originating access service for conventional 1+ calls. Accordingly, we seek comment on whether the presence of certain incentives to generate artificially high levels of 8YY traffic necessarily justifies reducing the tariffed rate for all such traffic immediately to the ILEC rate. Should we instead presume that there exists some "legitimate" level of CLEC 8YY traffic that should be treated as other categories of access traffic and subject to a lower benchmark only the traffic that exceeds this "legitimate" level? If this is an appropriate alternative, how should we define the level at or below which 8YY access traffic may be subject to the higher tariff benchmark that we permit for other categories of CLEC access service? Additionally, we seek comment on any other reasons that CLEC 8YY traffic should be subjected to a different tariff benchmark than are other categories of CLEC access traffic. We also seek comment on whether, if we adopt a different benchmark for 8YY access services, there are any different tariff filing requirements or timetables that we might adopt to account for the resources available to small entities. Commenters should indicate whether and how such provisions would

[185] AT&T April 3, 2001 letter at 2.

be consistent with our goals in this proceeding, including our obligation to ensure just and reasonable rates for interstate access services.

# VI. PROCEDURAL MATTERS

## A. Paperwork Reduction Act

105. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose new or modified reporting and/or recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and/or recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA, and will go into effect upon announcement in the Federal Register of OMB approval.

## B. Final Regulatory Flexibility Analysis

106. As required by the Regulatory Flexibility Act (RFA),[186] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Pricing Flexibility Order and Further Notice*.[187] The Commission sought written comments on the proposals in the *Pricing Flexibility Order and Further Notice*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this order conforms to the RFA, as amended.[188]

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[186] *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) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[187] *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order and Further Notice*).

[188] *See* 5 U.S.C. § 604. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our rules or statements made in preceding sections of this Order, the rules and statements set forth in those preceding sections shall be controlling.

Although we conduct a final regulatory flexibility analysis in this order, we note that we could also certify the rules we adopt will not "have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). CLECs have historically been subject to the just and reasonable rate requirement under section 201(b). However, in the past, the Commission has not adopted specific rules to guide CLECs in tariffing their access rates. In this order, we adopt a rules that will remove any uncertainty regarding the justness and reasonableness of CLECs' tariffed rates. In doing so, we relieve CLECs of the burdens previously associated with challenges to the justness and reasonableness of their tariffed access rates. Furthermore, as we have noted above, many CLECs with tariffed rates above the benchmark have been receiving at most partial payment for their access services. *See supra* paragraph 60. This order's creation of a presumption that rates at or below the tariff benchmark are just and reasonable will facilitate CLECs' attempts to collect their access charges through an action in the appropriate court. This will have a positive economic impact on the CLECs.

Similarly, all IXCs, including small entities, will benefit from reductions, both immediate and over time, in the tariffed access rates charged by CLECs. Moreover, IXCs, including any small businesses, will benefit from increased regulatory certainty about CLEC access rates as a result of this order. We expect that this will reduce the need for these IXCs to take other actions to ensure just and reasonable rates, such as initiating complaint proceedings. Accordingly, we conclude that there will be a positive impact for small IXCs.

### 1. Need for, and Objectives of, the Proposed Action

107. With this order, we address a number of interrelated issues concerning charges for interstate switched access services provided by competitive local exchange carriers (CLECs) and the obligations of interexchange carriers (IXCs) to exchange access traffic with CLECs. In so doing, we seek to ensure, by the least intrusive means possible, that CLEC access charges are just and reasonable. We also seek to reduce regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services. This order is designed to spur more efficient local competition and to avoid disrupting the development of competition in the local telecommunications market.

108. We accomplish these goals by revising our tariff rules more closely to align tariffed CLEC access rates with those of the incumbent LECs. Under the detariffing regime we adopt, CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff. Above the benchmark, CLEC access services will be mandatorily detariffed, so CLECs must negotiate higher rates with the IXCs. However, to avoid too great a disruption for competitive carriers (many of which may fall within the SBA's definition of a small entity), we implement this approach in a way that will cause CLEC tariffs to ramp down over time until they reach the level tariffed by the incumbent LEC. This mechanism will mimic the operation of the marketplace, as competitive LECs ultimately will have tariffed rates at or below the prevailing market price. At the same time, this approach maintains the ability of CLECs to negotiate access service arrangements with IXCs at any mutually agreed upon rate. In this order, we also make clear that an IXC's refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor constitutes a violation of the duty of all common carriers to provide service upon reasonable request.

### 2. Summary of Significant Issues Raised by Public Comment in Response to the IRFA

109. In the *Pricing Flexibility Order and Further Notice*, we sought comment on various, alternative proposals to prevent CLECs from charging unreasonable rates for their switched access services. In the IRFA, we tentatively concluded that the proposed rule changes would have no effect on the administrative burdens of competitive LECs because they would have no additional filing requirement.[189] In response to the Notice, we received comments from more than 40 parties and held a series of ex parte meetings addressing these issues. Among those parties, only ALLTEL and the Rural Independent Competitive Alliance (RICA) commented specifically on the IRFA.[190]

110. We disagree with ALLTEL's contention that the Commission's IRFA was incomplete.[191] ALLTEL argues that the Commission, in the IRFA, did not adequately address: 1)

[189] *See also Safe Harbor Public Notice*, ¶ 11 (inviting further comment on the IRFA that was included in the *Pricing Flexibility Order and Further Notice*). We note that no parties addressed the IRFA in their comments to the *Safe Harbor Public Notice*.

[190] ALLTEL Comments at 3-4; RICA Comments at 18.

[191] ALLTEL Comments at 3-4.

proposals in the Notice that might affect originating access and "open-end" access services; 2) the potential burden on CLECs to modify their tariffs or to eliminate those tariffs and negotiate individual contracts;[192] and 3) potential burdens on other carriers, such as ILECs (which, ALLTEL asserts, might have to modify their tariffs and perform cost studies). To the contrary, for several different reasons, we conclude that the IRFA gave adequate notice of our proposals to address CLEC access service. First, we chose to discuss, in the IRFA, the primary proposals set out in the Notice, though we sought comment in the Notice on a number of variations to those primary proposals. Thus, while the IRFA only expressly mentions proposals to address terminating access, it includes cross-references to the text of the Notice, which discusses all variations of the Commission's proposals.[193] Moreover, we observe that the Notice and the IRFA were sufficient to generate a very sizable record, including comments from many competitive LECs that likely would be considered small businesses under the closest applicable SBA definition. The IRFA provided sufficient information so that the public could react to the Commission's proposals in an informed manner.[194]

111. Second, with respect to the administrative burdens associated with our proposals in the Notice, we have reconsidered our tentative conclusion to adopt mandatory detariffing.[195] We note that many commenters, large and small, oppose the Commission's proposal to adopt mandatory detariffing for all CLEC access services. These commenters, like ALLTEL, argue that while mandatory detariffing would reduce burdens associated with filing tariffs, it would increase administrative burdens overall by imposing greater transaction costs on CLECs and IXCs.[196] Having received these almost unanimous comments, we conclude that we should not adopt our proposal to implement mandatory detariffing, at this time. Rather, we only adopt mandatory detariffing to the extent that a CLEC chooses to charge a rate that exceeds our defined benchmark. Under this approach, CLECs and IXCs – both large and small – will be able to continue to enjoy the benefits of a tariffed service.

112. Similarly, we take into account RICA's assertion that mandatory detariffing, as proposed, might cause particular hardship for CLECs operating in rural areas.[197] Again, we have factored these comments into our decision to adopt a benchmark system, pursuant to which CLECs will continue to be permitted to file tariffs for their switched access services. Thus, we

[192] *See also* RICA Comments at 18 (arguing that the IRFA does not adequately assess the impact of the proposals on small CLECs).

[193] *Pricing Flexibility Order and Notice,* 14 FCC Rcd at 14353.

[194] In considering ALLTEL's argument, we note that many commenters in the proceeding addressed the administrative burdens associated with our proposals. We have taken the opportunity to reconsider our initial conclusions in this order and FRFA. *See infra* paragraphs 119 through 127.

[195] Parenthetically, we believe that our tentative conclusion, in the IRFA, that there would be no effect on CLEC administrative burdens was reasonable, given that the Commission proposed to reduce, not increase, tariff filings. We have, nevertheless, taken ALLTEL's arguments into account, in reconsidering our proposal to adopt mandatory detariffing for all CLEC switched access services.

[196] ALLTEL Comments at 3-4;

[197] RICA Comments at 18-19.

believe that our approach adequately addresses the concerns of these CLEC commenters. Moreover, we restate that our decision to detariff rates above the benchmark was motivated by our conclusion that rates above that level would be excessive (absent an agreement between the parties) and would place an inappropriate burden on IXCs and long distance customers.[198] In this regard, we note that even the small CLECs covered by our RFA analysis are clearly prohibited by the Act and our rules from charging unjust or unreasonable rates.[199] This order is designed to prevent such unjust or unreasonable rates.

113. Finally, we reject ALLTEL's assertion that the proposals in the Notice would place additional regulatory burden on ILECs. The proposals applied solely to CLECs and IXCs and we find ALLTEL's arguments to be unsupported in the record.[200]

114. Although not responding specifically to the IRFA, many parties commented generally on the potential regulatory burdens associated with the Commission's various proposals. In brief, IXC commenters typically sought a mechanism to constrain CLEC access charges.[201] In contrast, CLEC commenters typically sought to preserve their freedom to set access rates as they choose.[202] We note that there are small entities on both sides of this debate. We encourage readers of this FRFA also to consult the complete text of this order, which describes in detail our analysis of the issues.[203]

### 3. Description and Estimate of the Number of Small Entities to Which the Rules Apply

115. 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 proposed rules, if adopted.[204] To estimate the number of small entities that may be affected by the proposed rules, we first consider the statutory definition of "small entity" under the RFA. The RFA generally defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction."[205] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.[206] Under

[198] *See supra* paragraphs 37 - 39.

[199] 47 U.S.C. §§ 201, 202.

[200] *See, e.g., Pricing Flexibility Order and Notice*, 14 FCC Rcd 14221, 14338-49.

[201] *See, e.g.*, Sprint Safe Harbor Comments at 1.

[202] *See, e.g.*, CoreComm Comments at 1.

[203] *See also infra*, paragraphs 119 - 127 (discussing steps taken to minimize significant economic impact on small entities, and significant alternatives considered).

[204] 5 U.S.C. § 603(b)(3).

[205] 5 U.S.C. § 601(6).

[206] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 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 (continued....)

the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA.[207] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.[208]

116. The rules adopted in this order apply to CLECs and IXCs. Neither the Commission nor the SBA has developed a definition of small CLECs or small IXCs. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[209] The most reliable source of information regarding the number of these carriers nationwide of which we are aware appears to be the data that telecommunications carriers file annually in connection with the Commission's universal services requirements.[210] According to our most recent data, 349 companies reported that they were engaged in the provision of either competitive access services or competitive local exchange services (referred to collectively as CLECs) and 204 companies reported that they were engaged in the provision of interexchange services.[211] Among these companies, we estimate that approximately 297 of the CLECs have 1500 or fewer employees and that approximately 163 of the IXCs have 1500 or fewer employees. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are 297 or fewer small CLECs, and 163 or fewer small IXCs that may be affected by the decisions and rules adopted in this order.

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

117. ALLTEL asserts that the Commission's proposals in the Notice "could require CLECs to modify their tariffs or to eliminate those tariffs and negotiate individual contracts."[212] This argument was echoed by other commenters who assert that the Commission's proposal to adopt mandatory detariffing would increase carriers' transaction costs, even though tariff filing

(Continued from previous page)
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 in the Federal Register."

[207] 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

[208] 13 C.F.R. § 121.201.

[209] 13 C.F.R. § 121.210, SIC Code 4813.

[210] *See* Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. 5.3 (Dec. 2000) (*Trends in Telephone Service*); 47 C.F.R. § 54.711 *et seq.*

[211] *Trends in Telephone Service*, Table 5.3

[212] ALLTEL Comments at 4.

requirements would be eliminated.[213] We acknowledge these concerns and have decided not to adopt mandatory detariffing for all CLEC switched access services, at this time.[214]

118. Thus, pursuant to this order, we allow competitive LECs to continue to file tariffs, as long as the rates for those services are within the defined safe harbor. We recognize that many CLECs -- we estimate between 100-150 CLECs -- may be required to re-file their tariffs in order to comply with this order. Given that ALTS, an organization which represents many CLECs, has supported this proposal, we believe that any increased burden will be outweighed by the benefits associated with resolving these issues. Further, we conclude that it is a burden that is justified by the Act's requirement that all rates be just and reasonable. We are optimistic that this approach will provide a bright line rule that permits a simple determination as to whether CLEC access charges are just and reasonable and, at the same time, will enable both sellers and purchasers of CLEC access services to avail themselves of the convenience of a tariffed service offering. Thus, we believe that this approach should minimize reporting and recordkeeping requirements on IXCs and CLECs, including any small entities, while also providing carriers with considerable flexibility.

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

119. Through this order, we seek to resolve contentious issues that have arisen with respect to CLEC switched access services. Because there are both small entity IXCs and small entity CLECs – often with conflicting interests in this proceeding -- we expect that small entities will be affected by any approach that we adopt. As discussed below, we conclude that our approach best balances these goals by removing opportunities for regulatory arbitrage and minimizing the burdens placed on carriers.

120. In this order, we adopt a benchmark approach to CLEC access charges. We find that this approach will minimize the impact of the rules on small entities in several ways. First, it allows small business CLECs to continue to enjoy the convenience of offering a tariffed service, an advantage sought by CLECs, many of which may be relatively new and small businesses. Second, it will enable small IXCs to purchase most access services via tariff, rather than having to negotiate agreements with every CLEC. Finally, our approach ensures that IXCs will continue to accept and pay for CLEC switched access services, as long as the CLEC tariffs rates within the Commission's benchmarks.[215] Many CLECs argued that such an outcome was essential for new, relatively small CLECs to continue to offer services.[216]

121. In this order, we consider and reject several alternatives to the benchmark approach. In particular, we also considered: 1) continuing to rely on market forces to constrain

[213] *See, e.g.,* ALTS Comments at 35 ("mandatory detariffing could be very costly for CLECs").

[214] *See supra* paragraph 42.

[215] We note that many CLECs sought action from the Commission precisely because IXCs threatened to cut off traffic and had stopped paying for CLEC switched access services. *See* RICA Comments at 21.

[216] *See, e.g.,* RICA Comments 18-20.

CLEC switched access charges; 2) adopting a mandatory detariffing policy, which would prohibit CLECs from filing any tariffs for their switched access services; and, 3) subjecting CLECs to the panoply of regulation with which incumbents must comply.

122. Although many CLECs contend that the Commission need not take any particular action with respect to CLEC switched access charges, we disagree.[217] We conclude that our action is compelled by several factors, including: 1) our desire to reduce regulatory arbitrage opportunities and to revise our rules to allow competitive market forces to constrain CLEC access charges; 2) growing evidence that CLEC switched access charges do not appear to be constrained by market forces; 3) significant concerns that allowing IXCs to refuse to exchange traffic without restriction may lead to a decline in the universal connectivity upon which telephone users have come to rely.

123. On the other hand, we do not impose mandatory detariffing for all CLEC switched access services because we believe that our benchmark approach will provide a less drastic alternative for carriers, including small entity CLECs and small entity IXCs.[218] For example, by enabling CLECs to continue to file tariffs within a safe harbor range, we respond to concerns expressed by many CLECs that complete detariffing of CLEC services would cause significantly increased transaction costs. We note, as well, that many IXC commenters supported this solution.[219]

124. We also conclude that our benchmark approach is more desirable than subjecting CLECs to the panoply of ILEC regulation. The Commission has long stated its desire to allow competitive forces to constrain access charges. By adopting a benchmark approach, we continue to allow CLECs to tariff their services, while ensuring IXCs and long distance customers, generally, that CLEC rates will be just and reasonable. We note that no commenter favors subjecting CLECs to dominant carrier regulation.[220]

125. We also adopted a transition mechanism that should minimize the impact of the decision on all carriers, including small entities.[221] While we considered adopting a benchmark that would immediately drop CLEC access rates to that level charged by the competing incumbent LEC, we instead implement the benchmark through a three-year transition. This will allow CLECs, including any small businesses, a period of flexibility during which they can conform their business models to the new market paradigm that we adopt, herein. At the same time, by effecting significant reductions in switched access charges immediately, we will minimize the impact that excessive access rates might have on IXCs, including any small businesses. We believe that this transition should significantly reduce the impact of this order on small businesses.

[217] *See, e.g.*, CoreComm Comments at 1.

[218] *See supra* paragraphs 35 - 44.

[219] *See, e.g.*, WorldCom Safe Harbor Comments at 3-6.

[220] *See, e.g.*, ALTS Reply Comments at 6.

[221] *See supra* paragraph 52.

126. In addition, by clarifying rules for the transport and origination of traffic between CLECs and IXCs, this order should continue to ensure the ubiquity of a fully interconnected telecommunications network that consumers have come to expect.[222] We considered counter-proposals from some carriers that there should be no obligation to exchange traffic;[223] however, we believe that our approach will best satisfy the expectations of end users who have come to rely on a seamless, fully-interconnected telephone network. Further, these rules should provide considerable assurance to CLECs, many of which may be small businesses, that seek to offer their customers access to the broadest range of IXCs possible. Many of these CLECs asserted that, without such a rule, larger, more established IXCs likely would refuse to exchange traffic with them, essentially driving them out of business.[224] Our rules should address this concern by requiring IXCs to exchange traffic with CLECs that tariff rates within the benchmark, where IXCs already exchange traffic with other carriers in the same geographic area.

127. Overall, we believe that this order best balances the competing goals that we have for our rules governing CLEC switched access charges. We have not identified any additional alternatives that would have further limited the impact on small entities across-the-board while remaining consistent with Congress' pro-competitive objectives set out in the 1996 Act.

128. Report to Congress: The Commission will send a copy of the *CLEC Access Charge Reform Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of this *CLEC Access Charge Reform Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *CLEC Access Charge Reform Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

### C. Initial Regulatory Flexibility Analysis

129. As required by the Regulatory Flexibility Act (RFA),[225] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *CLEC Access Order and Further Notice* (Further Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on this Notice, which are set out in Section VI of this Order. The Commission will send a copy of this Further Notice, including this IRFA, to the Chief Counsel for Advocacy of

[222] *See supra* paragraphs 90 - 94.

[223] *See, e.g.*, AT&T Comments at 27.

[224] *See, e.g.*, Minnesota CLEC Comments at 12.

[225] *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) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

the Small Business Administration (SBA).[226] In addition, this Notice and IRFA (or summaries thereof) will be published in the Federal Register.[227]

### 1. Need for, and Objectives of, the Proposed Action

130. In this *CLEC Access Order and Further Notice*, the Commission sets a benchmark for CLEC interstate switched access services that declines over time to the competing ILEC rate.[228] In the Further Notice, the Commission seeks comment on a proposal offered by AT&T to move immediately the benchmark for CLEC 8YY access services to the competing ILEC rate and to mandatorily detariff CLEC interstate access rates for such 8YY traffic above that point.[229] The Commission seeks comment on the nature and extent of the problem alleged by AT&T and on various means of addressing CLEC 8YY access service rates. Through the Further Notice, the Commission seeks to ensure that CLEC rates for 8YY access services are just and reasonable.

### 2. Legal Basis

131. The legal basis for the action as proposed for this rulemaking is contained in sections 1-5, 201-205, 208, 251-271, 403, 502, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 208, 251-271, 403, 502, and 503.

### 3. Description and Estimate of the Number of Small Entities to Which the Proposed Action May Apply

132. We discuss above at paragraphs 115 to 116 the small entities to which this proposed action may apply. We incorporate that discussion here by reference.

### 4. Description of Proposed Reporting, Recordkeeping, and Other Compliance Requirements

133. In the *CLEC Access Order*, the Commission sets a benchmark for CLEC interstate switched access services that declines over time to the competing ILEC rate. Through the Further Notice, the Commission seeks comment on whether it should move immediately the benchmark for CLEC 8YY access services to the competing ILEC rate and mandatorily detariff CLEC interstate access rates for such 8YY access services above that point. Adopting this proposal may require CLECs to refile tariffs with the Commission or to negotiate contracts with IXCs, rather than filing tariffs.



[226] *See* 5 U.S.C. § 603(a).

[227] *See id.*

[228] *See supra* paragraphs 35 - 44 (discussing tariff benchmark mechanism).

[229] *See* AT&T March 29, 2001 letter at 1-2.

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

134. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (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.[230]

135. As mentioned above, through the Further Notice, the Commission seeks to ensure that CLEC rates for 8YY access services are just and reasonable. Our proposals may affect CLECs, by altering the rates that they may tariff for 8YY access services. At the same time, our proposals might affect indirectly IXCs that must pay access charges for 8YY traffic. Because there are both small entity IXCs and small entity CLECs – with conflicting interests in this proceeding -- we expect that small entities may be affected by any approach that we adopt. We seek an approach that both reduces opportunities for regulatory arbitrage and minimizes the burdens placed on carriers.

136. Among the alternatives proposed, the Commission seeks comment whether it should move immediately the benchmark for CLEC 8YY access services to the competing ILEC rate and mandatorily detariff CLEC interstate access rates for such 8YY access services above that point. The Commission seeks comment, to the extent that it finds that a separate benchmark is appropriate for 8YY access rates, on whether it should instead impose such a limitation only on those CLECs that offer revenue-sharing agreements to their end users or only on those CLECs that do not offer local exchange services in addition to their 8YY access services. Alternatively, the Commission seeks comment on whether the Commission should take no additional action and whether IXCs should be left to address specific instances of abuse directly with the relevant CLEC, with the aid of the Commission's complaint process where appropriate.

137. We also seek comment on whether, if we adopt a different benchmark for 8YY access services, there are any different tariff filing requirements or timetables that we might adopt to account for the resources available to small entities.[231] We ask commenters to indicate whether and how such provisions would be consistent with our goals in this proceeding, including our obligation to ensure just and reasonable rates for interstate access services.

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

138. None.



[230] 5 U.S.C. § 603(c).

[231] *See supra* paragraphs 98 - 104.

### D. Comment Filing Procedures

139. Pursuant to sections 1.415, 1.419, and 1.430 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, 1.430, interested parties may file comments within 30 days after publication in the Federal Register, and reply comments within 60 days after publication in the Federal Register. All filings should refer to CC Docket No. 96-262. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[232] Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number, CC Docket No. 96-262. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to <ecfs@fcc.gov>, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

140. Parties that choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, Room TW-B204, 445 12th Street, S.W., Washington, D.C. 20554. Regardless of whether parties choose to file electronically or by paper, parties should also serve: (1) Jane Jackson, Common Carrier Bureau, 445 12th Street, S.W., Room 5-A225, Washington, D.C. 20554; and (2) the Commission's copy contractor, International Transcription Service, Inc. (ITS), 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 857-3800, with copies of any documents filed in this proceeding. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554.

141. Parties that choose to file by paper should also submit their comments on diskette to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20036. These submissions should be on a 3.5-inch diskette formatted in a Windows-compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, CC Docket No. 96-262), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy—Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file.

142. Comments and reply comments must comply with section 1.49 and all other applicable sections of the Commission's rules.[233] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments.

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[232] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

[233] *See* 47 C.F.R. § 1.49.

143. This proceeding will continue to be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206. This will provide an opportunity for all interested parties to receive notice of the various issues raised in *ex parte* presentations made to the Commission in this proceeding; it will also allow interested parties to file responses or rebuttals to proposals made on the record in this proceeding. We find that it is in the public interest to continue this proceeding's designation as "permit-but-disclose."

144. Alternative formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426 voice. (202) 418-7365 TTY, or <bmillin@fcc.gov>. This further notice of proposed rulemaking can also be downloaded in Microsoft Word and ASCII formats at <http://www.fcc.gov/ccb/cpd>.

## VII. ORDERING CLAUSES

145. Accordingly, IT IS ORDERED that, pursuant to sections 1-5, 201-205, 303(r), 403, 502, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 303(r), 403, 502, and 503, this REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, with all attachments, including revisions to Part 61 of the Commission's rules, 47 C.F.R Part 61, is hereby ADOPTED.

146. IT IS FURTHER ORDERED that the rule revisions adopted in this Order SHALL BECOME EFFECTIVE upon approval by OMB of the modified information collection requirements adopted herein, but no sooner than thirty days after publication in the Federal Register. The Commission shall place a notice in the Federal Register announcing the effective date of the requirements and regulations adopted herein.

147. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this CLEC Access Charge Order and Further Notice, including the Final and Initial Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

# APPENDIX A
## Parties Filing Pleadings

## I. *PRICING FLEXIBILITY ORDER & NOTICE*

### A. Comments

1. Ad Hoc Telecommunications Users Committee (Ad Hoc)
2. State of Alaska (Alaska)
3. Allegiance Telecom, Inc. (Allegiance)
4. ALLTEL Communications, Inc. (ALLTEL)
5. Association for Local Telecommunications Services (ALTS)
6. American Public Communications Council (APCC)
7. AT&T Corp. (AT&T)
8. Bell Atlantic Telephone Companies (Bell Atlantic)
9. BellSouth Corporation (BellSouth)
10. Cable & Wireless USA, Inc. (Cable & Wireless)
11. Competitive Communications Group (CCG)
12. Competitive Telecommunications Association (CTA)
13. CoreComm, Limited (CoreComm)
14. Cox Communications, Inc. (Cox)
15. CTSI, Inc. (CTSI)
16. Focal Communications Corporation, Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions (Focal/Hyperion)
17. General Services Administration (GSA)
18. GTE Service Corporation (GTE)
19. State of Hawaii (Hawaii)
20. MCI WorldCom, Inc. (WorldCom)
21. McLeodUSA Telecommunications Services, Inc. (McLeodUSA)
22. MediaOne Group, Inc. (MediaOne) **(ex parte/late filing)**
23. MGC Communications, Inc. (MGC)
24. Minnesota CLEC Consortium
25. National Rural Telecom Association (NRTA)
26. National Telephone Cooperative Association (NTCA)
27. New York Department of Public Service (NYDPS)
28. Organization for the Promotion and Advancement of Small Telecommunications Cos. (OPASTCO)
29. Ranier Cable, Inc. (RCI)
30. RCN Telecom Services, Inc. (RCN)
31. Rural Independent Competitive Alliance (RICA)
32. SBC Communications, Inc. (SBC)
33. Sprint Corporation (Sprint)
34. Telecommunications Resellers Association (TRA)
35. Teligent, Inc. (Teligent)
36. Time Warner Telecom (Time Warner)
37. Total Telecommunications Services (TTS)
38. U S West, Inc. (US West)
39. United States Telephone Association (USTA)

40. Winstar Communications, Inc. (Winstar)
41. Public Service Commission of Wisconsin (Wisconsin PSC)

### B. Reply Comments

1. Allegiance
2. ALTS
3. Ad Hoc
4. AT&T
5. Bell Atlantic
6. BellSouth
7. CTSI, Inc.
8. State of Florida Public Service Commission (Fla. PSC)
9. Focal/Hyperion
10. GVNW Consulting, Inc. (GVNW)
11. GSA
12. GTE
13. ITCs, Inc. (ITCs)
14. WorldCom
15. Minnesota CLEC Consortium
16. MGC
17. RICA
18. SBC
19. Sprint
20. Time Warner
21. TRA
22. USTA
23. US West

## II. *EMERGENCY PETITION PUBLIC NOTICE*

### A. Comments

1. Allegiance **(ex parte/late filing)**
2. Association of Communications Enterprises (ASCENT)
3. AT&T
4. Buckeye Telesystem, Inc. (Buckeye)
5. Haxtun Telephone Company (Haxtun)
6. Montana Telecommunications Association (MTA)
7. NTCA
8. Sprint
9. Time Warner
10. TTS
11. U S West
12. USTA
13. WorldCom

### B. Reply Comments

1. Allegiance
2. ASCENT
3. AT&T
4. Minnesota CLEC Consortium
5. Sprint
6. RICA
7. USTA

## III. *MANDATORY DETARIFFING PUBLIC NOTICE*

### A. Comments

1. Ad Hoc
2. Allegiance
3. ASCENT
4. ALTS
5. AT&T
6. CTSI, RCN Telecom Services, Inc. and Telergy, Inc. (CTSI Joint Commenters)
7. e.spire Communications, Fairpoint Communications Solutions Corp., Intermedia Communications Inc., Newsouth Communications Corp., Nextlink Communications, Inc. and Talk.com, Inc. (collectively Joint CLEC Commenters)
8. Fairpoint Communications Solutions Corp. (Fairpoint)
9. Focal Communications Corporation (Focal)
10. GSA
11. Global Crossing North America, Inc. (Global Crossing)
12. MGC Communications, Inc. d/b/a Mpower Communications Corp., ITC^Deltacom, Inc. and Broadstreet Communications, Inc. (MGC Joint Commenters)
13. Minnesota CLEC Consortium
14. Prism Communications Services, Inc. (Prism)
15. RICA
16. Sprint
17. Teligent
18. Time Warner
19. Verizon Companies (Verizon)
20. Winstar
21. WorldCom
22. Z-Tel Communications, Inc. (Z-Tel)

### B. Reply Comments

1. Ad Hoc
2. Allegiance
3. ALTS

4. ASCENT
5. AT&T
6. Cable & Wireless
7. Centennial Communications Corp. (Centennial)
8. Joint CTSI Commenters
9. Joint CLEC Commenters
10. Focal
11. GSA
12. MGC
13. Minnesota CLEC Consortium
14. RICA
15. Sprint
16. U.S. TelePacific Corp. (US TelePacific)
17. WorldCom

## IV. *SAFE HARBOR PUBLIC NOTICE*

### A. Comments

1. ALTS
2. ASCENT
3. AT&T
4. BayRing Communications and Lightship Telecom, LLC (collectively BayRing)
5. CTSI, Inc. and Madison River Communications
6. Eschelon Telecom, Inc. (Eschelon)
7. e.spire Communications, Inc., KMC Telecom, Inc., Talk.com Holding Corp. and XO Communications, Inc.
8. FairPoint Communications Solutions Corp. (FairPoint)
9. Focal Communicaitons Corporation, RCN Telecom Services, Inc. and Winstar Communications, Inc.
10. McLeodUSA Telecommunications Services, Inc.
11. Minnesota CLEC Consortium
12. NTCA
13. OPASTCO
14. RICA
15. Sprint
16. TDS Metrocom, Inc. (TDS)
17. USTA
18. WorldCom
19. Z-Tel

### B. Reply Comments

1. AT&T
2. Ad Hoc
3. BayRing
4. CTSI, Inc.

5. Cox
6. e.spire Communications, Inc., KMC Telecom, Inc., Talk.com Holding Corp. and XO Communications, Inc.
7. Eschelon
8. FairPoint
9. Focal and Winstar
10. Minnesota CLEC Consortium
11. RICA
12. Sprint
13. Z-Tel

## APPENDIX B – Final Rules

## AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Part 61, Subpart C, of Title 47 of the Code of Federal Regulations (C.F.R.) is amended by adding section 61.26 as follows:

**61.26 Tariffing of competitive interstate switched exchange access services.**

(a) *Definitions.* For purposes of this section 61.26, the following definitions shall apply:

(1) "CLEC" shall mean a provider of interstate exchange access services that 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 service to a particular end user if that end user were not served by the CLEC.

(3) "Interstate switched exchange access services" shall include the functional equivalent of the ILEC interstate exchange access services typically associated with 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.

(4) "Non-rural ILEC" shall mean an incumbent local exchange carrier that is not a "rural telephone company" under 47 U.S.C. § 153(37).

(5) The "rate" for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.

(6) "Rural CLEC" shall mean a CLEC that does not serve (i.e., terminate traffic to or originate traffic from) any end users located within either:

(i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(ii) An urbanized area, as defined by the Census Bureau.

(b) Except as provided in paragraphs (c) and (e) of this section, a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of:

(1) The rate charged for such services by the competing ILEC or

(2) The lower of:

(i) The benchmark rate described in paragraph (c) of this section or

(ii) The lowest rate that the CLEC has tariffed for its interstate exchange access services, within the six months preceding [insert date 30 days after publication in the Federal Register].

(c) From [insert date 30 days after publication in the Federal Register] until [insert date one year and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be $0.025 per minute. From [insert date one year and 30 days after publication in the Federal Register] until [insert date two years and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be $0.018 per minute. From [insert date two years and 30 days after publication in the Federal Register] until [insert date three years and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be $0.012 per minute. After [insert date three years and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be the rate charged for similar services by the competing ILEC, *provided, however*, that the benchmark rate for a CLEC's interstate switched exchange access services will not move to bill-and-keep, if at all, until [insert date four years and 30 days after publication in the Federal Register].

(d) Notwithstanding paragraphs (b) and (c) of this section, in the event that, after [insert date 30 days after publication in the Federal Register], a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, the CLEC shall not file a tariff for its interstate exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC.

(e) Rural exemption: Notwithstanding paragraphs (b) through (c) 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 and the transport interconnection charge. If the competing ILEC is subject to the Commission's *CALLS Order*, 65 Fed. Reg. 38684 (June 21, 2000), this rate shall be reduced by the NECA tariff's carrier common line charge.

## STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH, CONCURRING IN PART, DISSENTING IN PART

*Re:* *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262.

Until today, competitive carriers could freely enter into contracts and adopt tariffs for exchange access on terms and conditions as determined by the market. Now, as a result of this order, the tariffs and contracts that competitive carriers may offer are substantially circumscribed. Specifically, the order creates a "safe harbor" range for CLEC access charge tariffs, which, over time, coincides with the regulated tariffs of the ILECs. Although the order permits carriers to contract for access charges above the safe harbor, it is difficult to imagine the circumstances under which such contracts will be adopted. Buyers are entitled to insist on the safe harbor rate, and they have no incentive to agree to higher rates. Indeed, in most markets, buyers seek to contract a price *lower* than the posted tariff rate. The Commission's safe harbor rule is thus a kinder, gentler term for price regulation.

The majority finds this course of action necessary, because, as a result of our myriad regulations that limit separable contracts and markets for exchange access services, the parties that consume exchange access services rarely receive accurate price signals. Rather than remove the regulations that limit the clarity of price signals, the majority resorts to the opiate for regulators – price regulation.

Two wrongs do not make a right. We should correct the regulations that interfere with price signals, not enshrine price regulation forever while doing nothing to remove the regulatory barriers to exchange access services. To be sure, the Commission's adoption of price regulation in this context is probably lawful, and I do not ordinarily dissent from items that I believe are merely unwise. However, restraint in the face of unwise decisions has its limits. Here, the Commission's decision to initiate price regulation runs counter to basic economic principles as well as the deregulatory mandate of the Telecommunications Act of 1996. Accordingly, I dissent from this order with the exception of Section IV.

I concur with respect to Section IV, which clarifies the circumstances under which carriers may refuse to accept or deliver access traffic. That section reinforces the importance of contractual relationships, rather than regulatory compulsion, in setting access charges.

### I. Government, Markets, Consumer Welfare, And The Public Interest

Modern economics is laid upon two foundations: first, individuals can better protect their own interests than can others; and second, a higher social welfare – under almost any measure – is obtained by individuals making decisions in their own interest rather than by a single individual or government making decisions on behalf of others. This is the basis of market economics. While there are some situations (externalities) in which government intervention may be helpful, these are merely exceptions, not rules.

Individuals look after their own interests best when they are free to enter into whatever arrangements they choose with other individuals or businesses. When government limits the types of arrangements that individuals or businesses can make, the individuals, businesses, and society at large are no better off, and, quite likely, are worse off.

For example, individuals can purchase a loaf of bread from one of countless shops and bakeries. Or individuals can buy flour, yeast, water, and an oven from many different providers and bake their own bread. An interventionist government might issue an edict that requires millers to sell flour only to bakers and not to consumers. Such an edict would likely harm not only millers and bakers, but the bread-consuming public as well.

Governments are often confronted with petitions pleading for such intervention. Given the harm that comes from limiting freedom in the market, a wise government must be extremely careful in considering such action. A wise government must be able to distinguish between problems that warrant *attention* and those that do not and between those that warrant *intervention* and those that do not.

In the above example, bread prices might be high, and the government may receive a petition to regulate the price of bread or the price of flour that millers sell to bakers. It may be that some suppliers of flour, or yeast, or baking facilities exercise some degree of market power in some local markets. Prices of these wares may exceed those that some believe to be competitive. What should the government do for the market where undue market power may be present?

Before answering the question of what the government can do for a market, the government should ask what the market can do for itself. Nothing stimulates the imagination of an entrepreneur more than observing a price that seems too high. A "high" price is an invitation to an entrepreneur for at least a momentary profit. The profit may prove transitory, ephemeral, even elusive. But the entrepreneur's struggle, investment, and efforts to capture that profit are real. The greatest threat to "high" prices from the exercise of market power is the zeal of an entrepreneur. Indeed, without the efforts to enter a market by entrepreneurs thirsting for profits, the conditions creating the market power that led to high prices in the first instance will remain in place.

Price signals are essential to entrepreneurs (as well as to consumers). Price regulation discourages entrepreneurs by destroying the hope of ever observing "high" prices. Why struggle, invest, and enter a market where profits are proscribed?

And exactly when are prices too *high* or too *low*? Prices, like beauty, are in the eye of the beholder. Different entrepreneurs and different consumers will respond differently to different price signals. The beauty of markets is that they beckon for buyers and sellers to respond to price signals. Through the responses of buyers and sellers, through the interest they exhibit and the investments they make, markets become stronger and more resilient. Price signals are the very oxygen that makes markets viable.

Price regulation is a harmful, addictive hallucinogen. It deludes those who administer it into believing that they are helping markets. Once price regulation begins, regulators seem to want more, not less, intervention as markets perform ever more poorly. Yet price regulation enervates markets by depriving them of the very oxygen that sustains them. To the outside observer, a market under price regulation is the subject of pity: listless and slowly sinking into the abyss of dysfunction. Entrepreneurship and investment wane. Problems of quality of service wax.

Perhaps there are some examples where price regulation has unambiguously succeeded. A wise government must be able to distinguish between the successes and the failures and to identify the circumstances that will lead to one and not the other. The prescription for the narcotic of price regulation that can guarantee that it does not lead to side effects more harmful than the symptoms has yet to be written.

Moreover, even where intervention may be warranted, a wise government must be able to distinguish between instances in which the harm sought to be remedied is the result of too little government intervention and instances in which the harm is caused by too much. Price regulation is rarely the first government-created wrong in a market. More often, other forms of government intervention have distorted markets leading to requests for yet more government intervention such as price regulation. In the above example, high bread prices are most likely not the result of a market externality but instead the result of excessive government intervention, which has prohibited consumers from purchasing flour directly from millers.

Two wrongs do not make a right. Price regulation should not be the solution to market failures caused by excessive regulation. Instead, the barriers to consumer transactions should be removed. Long-distance markets are a case in point.

## II. Long-Distance Service, Insurance, And Moral Hazard

This order concerns federal regulation of compensation arrangements among different, specialized providers of the component services that comprise a long-distance call. A long-distance call can be divided into five discreet, separately regulated, services: local exchange service for origination, exchange access for origination, transport, exchange access for termination, and local exchange service for termination. For each of these five services, billing and collection are also separable services.

In practice, originating local exchange service and exchange access are usually provided by a single carrier, as are terminating exchange access and local exchange service. A call involving five or more different services in five different markets is usually provided by, at most, three companies.

The consumer – the party originating the call– perceives just one market and is billed by just one company for the long-distance call, usually the IXC, which provides some, but not all, of the other services. The IXC then compensates all of the other companies providing the other services.

The actual charges associated with each of the five services in each long-distance call can vary substantially from call to call and from customer to customer. However, the customer's bill does not reflect the actual charges incurred by the carriers providing these services. Instead, the customer generally receives a bill for all long-distance calls based on the same per-minute rate, regardless of actual cost incurred. With respect to access charges, the customer's bill incorporates only an average cost, as the Commission's rules require IXCs to spread the cost of both originating and terminating access among all their end users. *See* Order ¶ 31.

The IXC thus typically acts as an insurer. By charging a flat rate regardless of the actual costs of a particular call, the IXC insures against losses from the distribution of unknown charges, as well as against losses from the distribution of uncollectibles – instances where consumers fail to pay their bills. The IXC charges customers a premium for this insurance, which is more than the expected value of losses.

This system has led to four broad "problems," which are explicitly or implicitly raised in this order:

(1) Consumers are largely limited to purchasing long-distance services in packages that bundle all five regulated services, plus insurance, billing, and collection.

(2) No one, including the company bundling the long-distance services, can choose the lowest cost and highest quality providers of local exchange service and exchange access. Providers of these services are assigned independently by the originating party and the terminating party.

(3) Entry into all of the regulated services except for transport, billing, and collection is difficult. Entry into exchange access without being bundled with local exchange service is rare.

(4) Given (1), (2) and (3), providers of exchange access face a moral hazard in pricing their services. Parties consuming their services do not have a direct contractual relationship with them, and a third party insures all expenses. Under these circumstances, there are substantial economic incentives to engage in monopoly pricing. Moreover, with extremely inelastic demand over a wide range of prices resulting from the insurance scheme, the monopoly price is higher than it would be if exchange access providers contracted directly with the end users.

## III. The Regulatory Solution

The majority's solution to these problems is to engage in more government regulation – specifically, to regulate the rates that exchange access providers may charge. It is a regulatory solution, not a market solution. It does not address the root problems in either (1), (2), or (3). Consumers will still suffer from a lack of contracting options for long-distance services. No one will have the authority or incentive to seek out the lowest cost and highest quality providers of local exchange service and exchange access for long-distance calls. Market entry, particularly in exchange access, will still be difficult. Moreover, the moral hazard associated with the insurance scheme will only be limited, not cured.

Resorting to price regulation for access charges based exclusively on Section 201 jurisdiction, while perhaps lawful, is a giant step backwards for those who believe in the power of markets to allocate resources and services in society. Price regulation not required by law is a declaration of defeat by those entrusted with implementing a law dedicated to removing regulatory barriers and promoting competition in telecommunications markets. Practically every introductory economics text book describes the ills of price regulation: either prices are set too low, and supplies wither despite excess demand, or prices are set too high, and demand withers despite ample supply.

Section 201, which requires that rates be "just and reasonable," should never be invoked to require price regulation where multiple competitors are present. There is simply no better approximation of "just and reasonable" rates than those that exist in a market with multiple competitors. Where multiple competitors are present in a market, limitations on consumers' ability to perceive price competition are almost always the result of government regulation. That is certainly the problem in this order, where providers are not permitted to compete separately for transport, exchange access, and local exchange service, nor are packagers even allowed to bill separately for those services. Removing those barriers is the proper solution, not price regulation.

## IV. The Deregulatory Solution

A far different solution from that adopted in this order would be to deregulate entirely the market for long-distance services. It would allow any and all contractual arrangements to be made available to consumers. It would encourage entry into all elements of long-distance service, including separate entry into exchange access. Carriers could offer any combination of the five components of long-distance service as well as any combination of the peripheral services such as billing, collection, and insurance for variability in the range of charges. Under this market solution, all of the four problems identified above, including moral hazard in the pricing of exchange access, would be largely resolved. Exchange access providers – whether ILECs, CLECs, or competitive access providers – would have no ability, much less incentive, to subsidize other services with revenue from exchange access. Consumers could contract directly or as part of a larger package for all services, including exchange access services – presumably at the lowest price and highest quality – and be billed directly for those services. The consumer, not the regulator, would be sovereign.

Practically all markets for complex services work well without substantial government interference to set prices or prevent transactions. For example, housing, clothing, and food can be purchased on a bundled or unbundled basis through both explicit and implicit contractual arrangements. Except where government has intervened to prohibit certain explicit or implicit contractual arrangements, consumers can choose to purchase goods and services with embedded insurance against the distribution of underlying costs for components, or the consumer can purchase the components separately. Consumer welfare is enhanced with a variety of contractual options for services with varying degrees of bundling. Depriving consumers of some or all options only harms them.

According to the majority, 47 U.S.C. § 254(g), which requires the Commission to adopt rules governing interexchange services, presents a substantial impediment to adopting a similar market-based approach for long-distance service. *See* Order ¶ 31. Under section 254(g), the Commission's rules must "require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas." 47 U.S.C. § 254(g). In addition, these rules must "require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State." *Id.* The Commission has previously determined that section 254(g) mandates that IXCs spread the cost of exchange access among all of their end users. *See* Order ¶ 11 & n.15; *Policy and Rules Concerning the Interstate,* *Interexchange Marketplace, Implementation of § Section 254(g) of the Communications Act of 1934, as amended*, Report and Order, 11 FCC Rcd 9564, ¶ 9 (1996). As a result, IXCs billing their end users cannot pass through the actual cost of exchange access and thus cannot send their end users accurate price signals.

However, the Commission's interpretation of section 254(g) – while not unreasonable – is by no means compelled. To the contrary, the language of the statute merely requires "providers of interexchange telecommunications services" – IXCs – to provide "interexchange telecommunications services" at the same rates in different geographic areas. It says nothing about the rates for exchange access, which are generally imposed by local exchange carriers and for which IXCs act merely as billing agents. From the IXCs' perspective, these charges are no different than state-specific gross receipts taxes, which the Commission already allows IXCs to pass through to end users on a deaveraged basis. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of § Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 9564 at ¶ 12. Section 254(g) thus need not prohibit IXCs from passing through the actual costs of exchange access to their end users. Moreover, the statute is no bar to allowing local exchange carriers and special access providers to bill the actual costs of exchange access directly to end users.

If the Commission abandoned its broad reading of section 254(g) and removed the other regulatory barriers in the long-distance markets, companies could compete for business by offering differing packages of services. Some would offer to provide all billing and collection services as well as insurance for the risk associated with the distribution of access charges. Others would offer different types of insurance, and still others would offer no insurance, instead passing all charges directly to the consumer.

Indeed, despite the Commission's restrictive regulations, some companies have already begun to offer such differentiated services. For example, some carriers, such as iPhonebill, implicitly pass access charges on to customers. Rates for their long-distance service vary by the combination of the originating and terminating area code and carrier-specific three-digit exchanges. The IXC iPhonebill charges more for calls with higher access charges and less for those with lower access charges. Because customers, rather than the IXC, bear the risk associated with the distribution of access charges, iPhonebill does not charge an insurance premium for bearing that risk. Consequently, iPhonebill's rates are among the lowest of any IXC.

Other IXCs, such as OPEX and Unitel, offer originating service only to ILEC customers with low originating access charges. In this way, the risk associated with the distribution of originating access charges is reduced, and the insurance premium that these carriers charge is less than that of major IXCs offering ubiquitous service.

Removing regulatory barriers would promote the development of more services like these and would resolve the problems identified by the majority. Unfortunately, however, the majority has not chosen this course of action.

## V. CONCLUSION

The proper role of government in a free society is to protect property, enforce contracts, and tear down barriers to markets. Yet vestiges of ill-conceived government remain from the days when contracts were restricted by government fiat, when property was limited by government restrictions, and when opportunities to deploy, manipulate, and engage in the trade of property, services, and contracts, were severely curtailed.

A government of a free society should be the champion of free markets and unfettered competition. It should intercede where market barriers prevent entry but turn a cold shoulder to those who petition for price regulation or other government action noxious to a free market.

If wisely interpreted, the Telecommunications Act of 1996 would serve as a basis for the proper government role in a free society. For more than five years, however, the Act has not been interpreted wisely. Indeed, it has served as a vehicle to support the ideas of those more comfortable with the opiate of regulation than with the nourishment of competition. Such regulation is no less harmful when, as here, it is masked in pro-competitive rhetoric.

Today's order is a profound disappointment to those who seek competitive markets rather than the oxymoron of managed competition. It may be a lawful order, but it is unwise. An order that is both lawful and wise would tear down market barriers rather than erect new ones, enforce contracts rather than effectively outlaw them, and protect property rights rather than limit them.