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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	

To: The Commission

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REPLY COMMENTS OF VANGUARD CELLULAR SYSTEMS, INC.

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May 30, 1996

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SUMMARY

Some parties to this proceeding seek to subvert the intent of the 1996 Act to open up telecommunications markets to competition while avoiding unnecessary regulation of carriers that lack the ability to block competition. The Commission should reject these efforts and remain true to Congressional intent. These reply comments address three specific areas where Commission action is necessary.

First, the Commission should adopt national standards to implement the requirements of Sections 251 and 252. Indeed, the only meaningful argument is over what standards to adopt. The standards place reasonable limits on the results of arbitrations, but should not apply to negotiated agreements. This approach will encourage successful negotiations and will retain the important state role under the 1996 Act.

Second, the Commission should not place any new regulatory burdens on CMRS providers. As Congress indicated in the 1996 Act, CMRS providers are not now LECs. There is no justification for applying incumbent LEC requirements, such as unbundling, to CMRS providers, especially as the licensing of PCS systems makes the CMRS market increasingly competitive. At the same time, the Commission should exercise its jurisdiction to adopt CMRS interconnection rules in the pending proceeding on that subject.

Third, the Commission should adopt rules that delineate the state role under the 1996 Act. It is particularly important to prevent LECs from imposing unreasonable requirements at the outset of negotiations or from otherwise delaying the negotiation and arbitration process. The Commission also should ensure that the rural and small LEC exemptions in Section 251(f) are not used to avoid competition, but only to prevent imposition of unreasonable burdens on those carriers.

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Vanguard Cellular Systems, Inc. ("Vanguard"), by its attorneys, hereby submits its reply comments in response to the *Notice of Proposed Rulemaking* in the above-referenced proceeding.[1/]

I. INTRODUCTION

Key points:

- Incumbent LECs support rules that would permit them to evade their responsibilities under the 1996 Act, while certain other commenters propose requirements for non-LECs that Congress did not intend to impose.
- National standards to govern negotiations and arbitrations are necessary to enable competition to develop.
- The Commission should not impose obligations on CMRS providers that exceed those required by the 1996 Act.
- Rural LECs should not be permitted to use the exemptions in the 1996 Act to avoid competition.

Several notable themes emerge from the comments filed in this proceeding. Incumbent local exchange carriers ("LECs") hope to convince the Commission to adopt rules

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1/ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, CC Docket No. 96-86, rel. Apr. 19, 1996 (the "*Notice*").

that will permit them to avoid their responsibilities under both the Telecommunications Act of 1996[2/] and pre-existing Communications Act provisions that were unaffected by the new statute. The LECs take this approach to prevent the Congressional intent in favor of competition from coming to fruition. Other commenters use this proceeding to try to convince the Commission to impose requirements that Congress specifically chose not to include in the 1996 Act, despite a stated Congressional desire to avoid unnecessary regulation.

These reply comments address three areas where the Commission should reject efforts to subvert the intent of the 1996 Act and, instead, should adopt rules that promote competition without imposing requirements beyond those intended by Congress. First, they demonstrate the importance of national standards to implement the local competition elements of the 1996 Act. Indeed, despite the rhetoric of some parties, the only real dispute in this proceeding concerns what standards the Commission should adopt.

Second, this reply explains why the Commission should avoid imposing new regulatory burdens on CMRS providers. While some parties argue that the Commission should treat CMRS providers as LECs, such treatment would be contrary to Congressional intent and would be inconsistent with the relative positions of CMRS providers and LECs in the marketplace. The Commission must also reject the notion that CMRS providers ought to be subject to the unbundling requirements that Congress specifically decided should apply only to incumbent LECs that presently enjoy monopoly status. At the same time, the

2/ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act").

Commission should adopt its proposal from the *CMRS Interconnection* proceeding to adopt CMRS-LEC interconnection rules pursuant to its existing authority under Section 332.[3/]

Finally, the Commission should adopt rules to govern state actions under the 1996 Act. These rules are necessary to prevent incumbent LECs from distorting the process of negotiation and arbitration mandated by the statute. The Commission also should specifically address the standards that rural and small LECs must meet to obtain exemptions from their Section 251 obligations to prevent those carriers from thwarting the development of competition in their markets.

II. THE COMMENTS REINFORCE THE NEED FOR NATIONAL STANDARDS TO CLARIFY THE REQUIREMENTS OF THE 1996 ACT [*Notice* Part II(A) ¶¶ 25-36].

Key points:

- The Commission has the power to adopt national standards to implement Sections 251 and 252.
- Without appropriate national standards, there will be significant impediments to successful negotiations and arbitrations with incumbent LECs.

Many commenters devote significant time to the question of whether the Commission can or should adopt national standards for Sections 251 and 252 of the Communications Act. Parties that argue against national standards are trying, explicitly or implicitly, to weaken the 1996 Act and to limit its impact on the local telephone marketplace.[4/] The Commission must

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3/ *See* Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *Notice of Proposed Rulemaking*, CC Docket No. 95-185, rel. Jan. 11, 1996.

4/ *See, e.g.*, Comments of the Ohio Public Utilities Commission at 7 (arguing that the Commission should not interfere with existing state policies despite passage of the 1996 Act). *See also* Comments of the Georgia Public Service Commission at 4; Comments of the Louisiana Public Service Commission at 7.

resist these efforts. Instead, the Commission should recognize that it has the legal authority to adopt national standards to implement Sections 251 and 252 and that it should exercise that authority to ensure that the Congressional intent to encourage competition translates into reality.

First, the Commission has the power to adopt regulations implementing Sections 251 and 252.[5] A basic principle of administrative law is that agencies are empowered to interpret their organic statutes through rules and other mechanisms to govern the behavior of parties regulated under those statutes.[6] Agencies adopt rules routinely even where a statute, such as the 1996 Act, creates a role for state or local authorities to play.[7]

In this case, Congress specifically directed the Commission to adopt rules implementing Section 251. 47 U.S.C. § 251(d). While some commenters suggest that such power is limited to certain provisions of Section 251, the statute on its face contains no such limitation. *Id.* Indeed, even Section 252 requires states to conform their arbitrations to "the regulations prescribed by the Commission pursuant to Section 251." 47 U.S.C. § 252(c)(1).

In addition, the pricing standards in Section 252(d), which the states must apply in arbitrations, are plainly linked to Section 251. The statute itself requires costs under Section 252(d)(1) and Section 252(d)(2) to be determined in conformance with Section 251 requirements, and compliance with Section 251(c) depends on meeting the Section 252(d)(1)

5/ *See, e.g.*, Comments of Tele-Communications, Inc. at 5; Comments of AT&T at 3.

6/ *See, e.g.*, *Time Warner Entertainment v. FCC*, 56 F.3d 151, 174-76 (D.C. Cir. 1995); *see also SEC v. Chenery*, 332 U.S. 194 (1947) (agency may choose how to proceed in implementing its statute).

7/ *See* 47 U.S.C. § 543(b) (cable rate regulation provisions); *see also Jenkins v. Palmer*, 62 F.3d 1083 (1995) (states administer federal program pursuant to the federal rules).

pricing requirements. 47 U.S.C. §§ 251(c), 252(d)(1), (2). Thus, the Commission must define the requirements of Section 252(d) if it is to fulfill its obligations under Section 251.[8/]

Moreover, most parties — including those who claim that national standards are impermissible — propose national standards in one form or another.[9/] For instance, many LECs propose pricing standards for various unbundled elements or services they are required to provide under the 1996 Act. These standards include specific prices that would be presumed reasonable, ceilings above which prices would have to be justified and price floors.[10/] Other parties that generally oppose national standards propose measures for the conduct of arbitrations or negotiations. For instance, USTA proposes specific national standards for determining when a LEC has received a *bona fide* request for interconnection or reciprocal transport and termination and standards for LEC exemption proceedings.[11/]

The comments establish that the issue in dispute is not so much whether the Commission should adopt national standards, but which standards should be adopted. If the Commission adopts meaningful standards, as proposed by Vanguard and other parties favoring competition, then competition will flourish as Congress intended.[12/] If, on the other

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8/ In addition, the FCC is required to arbitrate disputes when a state fails to act, meaning that the Commission has a separate responsibility to define the cost standards under Section 252(d).

9/ Review of the comments shows that at least 80 parties propose one or more national rules that go beyond the express codification of the 1996 Act.

10/ *See, e.g.*, Comments of BellSouth at 55-56; Comments of Cincinnati Bell at 30-31.

11/ *See* Comments of United States Telephone Association ("USTA") at 14-15, 87-88, 91-93.

12/ *See, e.g.*, Comments of Vanguard at 3; Comments of United States Department of Justice ("DOJ") at 5-8.

hand, the Commission enacts the minimal standards proposed by incumbents, which leave virtually every issue for open-ended arbitration, then there will be significant impediments to successful negotiations under Section 252 and to the development of marketplace competition.

For instance, incumbent LECs urge the Commission to avoid adopting standards for almost every element of Section 251. They argue there should be no requirement to specify even a few mandatory points of interconnection. Some LECs go so far as to claim that existing points of interconnection may not be technically feasible.[13/] Similarly, some parties suggest there should be no minimum requirement for unbundling of incumbent LEC networks, raising the spectre that there will be no new unbundling at all.[14/] If the Commission were to adopt these "non-standards," every single request for interconnection or unbundling, no matter how modest, would be subject to determination in an arbitration.[15/]

The incumbent LECs propose a similar course for pricing standards. Some propose to use switched access as the price ceiling for transport and termination, even though those rates are known to be well above cost.[16/] Others propose pricing unbundled elements at fully

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13/ *See, e.g.*, Comments of U S West at 49-50.

14/ *See* Comments of BellSouth at 26-27.

15/ By contrast, the Department of Justice proposes a much more reasonable model that would base current interconnection obligations on current technology while permitting technical requirements to evolve as technology changes. Comments of DOJ at 16-17.

16/ *See* Comments of BellSouth at 72. Of course, Section 252(d)(2) requires compensation for transport and termination to be based on the "additional cost" incurred by the terminating LEC, so an acknowledged above-cost pricing standard is plainly unlawful. 47 U.S.C. § 252(d)(2).

distributed cost *plus* an additional profit.[17] Moreover, the LECs propose these price standards not as true ceilings but as the levels above which prices must be justified by a LEC.[18] Leaving aside the total lack of justification for such high ceilings for either transport and termination or unbundled elements, they also would be meaningless: There is little chance that any interconnector would agree to prices this high in a negotiation and almost no possibility that an arbitration under the standards of Section 252(d) could result in higher prices. In other words, the "standards" proposed by the incumbent LECs, to the extent they have any meaning, would work solely to their advantage.[19] Moreover, in light of the history of LEC interconnection negotiations, the Commission may reasonably conclude that negotiations without governing standards are certain to fail to achieve the objectives of the 1996 Act.[20]

The Commission should reject incumbent LEC efforts to avoid meaningful national standards and instead should adopt a practical framework for implementation of Sections 251 and 252 that is faithful to the statute and to Congressional intent. The national standards need not dictate the results of negotiations, but should provide guidance to negotiating parties as to outcomes they might reasonably expect to achieve in arbitration so that they do not

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17/ *See* Comments of NYNEX at 71-72. *See also* Comments of Bell Atlantic at 37; Comments of Cincinnati Bell at 30-31.

18/ *See, e.g.*, Comments of BellSouth at 56.

19/ SBC Corp. takes these already-outrageous positions one step further by arguing that arbitrations under Section 252 are not binding unless affirmed by a *de novo* determination by a federal district court, which would not be subject to the time limits that govern state arbitrations under the 1996 Act. Comments of SBC Corp. at 104. As discussed below, this attempt to evade plain Congressional intent for prompt resolution of interconnection disputes is completely inconsistent with the statute. *See infra* Part IV.A.

20/ *See* Comments of Vanguard at Exhibit 1 (describing failure of incumbent LECs to negotiate in good faith).

adopt unreasonable negotiating positions. These standards also should put the burden of proving the reasonableness of any proposed costs or restrictions on the incumbent LECs, who control all of the information necessary to make these determinations.[21/]

As several other parties have shown, rules governing the permissible results of arbitrations are necessary to increase the likelihood of successful negotiations.[22/] Any mechanism that increases the likelihood of successful results is especially significant when, as will be the case in interconnection negotiations, the parties have differing incentives.[23/] Moreover, because Congress plainly favored negotiated agreements over adjudication, both by requiring negotiation before arbitration and by adopting liberal standards for approval of negotiated agreements, it is critical that the Commission adopt rules that encourage successful negotiations.[24/]

It must also be understood that a framework for arbitration should not preclude parties from reaching different results in their individual negotiations, if there is mutual agreement to do so. This flexibility makes the adoption of a specific set of guidelines particularly desirable, including upper and lower limits on compensation for reciprocal transport and termination, upper and lower limits on prices for unbundled elements and minimum technical

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21/ *See, e.g.*, Comments of AT&T at 54; Comments of the Commonwealth of Massachusetts Department of Public Utilities at 7; Comments of American Communications Services, Inc. at 60.

22/ *See, e.g.*, Comments of Cox Communications, Inc. at 24.

23/ *See* Comments of Cox Communications, Inc., Exhibit 3, Declaration of Dr. Gerald Brock, at 2 (party that incurs less cost for unsuccessful negotiation has significant advantage in negotiation process).

24/ 47 U.S.C. § 252(a), (e)(2)(A).

interconnection requirements.[25] Indeed, by giving parties the ability to negotiate away from the results that would occur in arbitration, the Commission can encourage creative negotiated solutions that benefit all parties.

In addition, national standards need not (and should not) eliminate the important state role in arbitrations under the 1996 Act. The Commission's task is to set standards of reasonableness that will govern all state arbitrations. Within these bounds, the states can and should have the authority to conform their decisions to the specific requirements of individual circumstances.

Because there are such significant benefits to Commission-specified national standards to govern arbitrations under the 1996 Act, many parties support that approach, including the Department of Justice.[26] There also are many parties that, for various reasons, oppose specific pricing requirements but lend support for a framework such as Vanguard and others have proposed.[27] The level of support for national rules to govern interconnection negotiations and arbitrations under the 1996 Act, and the breadth of interests that support such a framework, provide independent corroboration that national rules are crucial to the development of competition.

25/ Many parties support placing these kinds of boundaries on arbitrated decisions. For instance, Winstar suggests using current LEC-LEC compensation levels as a boundary for compensation for transport and termination. Comments of Winstar at 32-34.

26/ *See* Comments of DOJ at 8-15; *see also* Comments of Tele-Communications, Inc. at 5; Comments of AT&T at 3.

27/ *See, e.g.*, Comments of Bay Springs Telephone Company, *et al.*, at 6; Comments of Lincoln Telephone and Telegraph Company at 9.

III. THE COMMISSION SHOULD NOT ADOPT RULES THAT WOULD INCREASE THE REGULATORY BURDENS ON CMRS PROVIDERS [*Notice* Part II(C) ¶¶ 195-197, Part II(D) ¶¶ 245-249, and Part II(C)(2)(e)(2) ¶¶ 166-169].

Key points:

- There is no basis under the 1996 Act or otherwise for treating CMRS providers as LECs.
- CMRS providers should not be subject to any unbundling obligations.
- CMRS providers are entitled to obtain interconnection under Section 332(c) of the Communications Act.

Section 251 of the 1996 Act reflects Congress' intent to promote facilities-based competition in the telecommunications marketplace.[28] Section 251 thus imposes varying obligations on different types of telecommunications service providers, with greater obligations imposed on local exchange carriers in Section 251(b) than on telecommunications carriers generally and with the heaviest obligations imposed on incumbent local exchange carriers in Section 251(c). Mindful that obligations intended to promote competition could also impair competition if imposed unnecessarily, Congress specifically concluded that the obligations in Sections 251(b) and (c) generally would not apply to CMRS providers.[29] When adopting regulations to implement Section 251, the Commission must remember that it was not Congress' intent to increase burdens on non-incumbent LECs or non-LECs unless explicitly specified in the 1996 Act. At the same time, the Commission must acknowledge and implement the CMRS-specific provisions of Section 332 of the Communications Act.

28/ *See* S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996) at 1.

29/ *See* 47 U.S.C. § 153(a)(44).

A. CMRS Providers Should Not Be Treated as LECs [*Notice* Part II(C) ¶¶ 195-197].

The 1996 Act plainly establishes that the obligations contained in Section 251(b) do not apply to persons "engaged in the provision of a commercial mobile radio service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term."[30/] At the outset, the 1996 Act excludes CMRS providers from the definition of LECs because Congress recognized that while CMRS services remain an imperfect, higher-cost substitute for local service provided via landline facilities, CMRS and LEC providers should not face the same regulatory requirements. As Vanguard discussed in its comments, Congress' determination that CMRS providers should not be treated as LECs reflects a Congressional judgment that should not be questioned by the Commission at this time.[31/] While Congress gave the Commission the authority to classify CMRS providers as LECs in the future, nothing has happened since the 1996 Act was passed to warrant such reclassification.

Some commenters, notably the National Wireless Resellers Association ("NWRA"), urge the Commission to ignore the policy choice made by Congress and declare that CMRS providers are to be treated as LECs now.[32/] NWRA correctly observes that the Commission is taking steps to promote CMRS as a competitive alternative to local service provided via landline facilities,[33/] but ignores that both Congress and the Commission have recognized

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30/ *Id.*

31/ *See* Comments of Vanguard at 20-22. *See also* Comments of the Personal Communications Industry Association ("PCIA") at 16-18.

32/ *See* Comments of NWRA at 7-11.

33/ Comments of NWRA at 8 n.15.

that, at the present time, competition will best be served if CMRS is regulated independently from other telecommunications service offerings. Indeed, less than three years ago, Congress established a unique regulatory regime for CMRS when it passed the 1993 Budget Act,[34/] in part to promote CMRS competition. The Commission pointed to the Congressional objectives in implementing the 1993 Budget Act:

> The other congressional objective reflected in the statute was to ensure that an appropriate level of regulation be established and administered for CMRS providers. . . . By taking these steps, Congress acknowledge that neither traditional state regulation, nor conventional regulation under Title II of the Communications Act, may be necessary in all cases to promote competition or protect consumers in the mobile communications marketplace.[35/]

In its plea for the Commission to "seize this opportunity" to regulate CMRS providers as LECs,[36/] the NWRA seeks to overturn Congress' 1993 determination that CMRS be governed under a separate regulatory regime.[37/] The NWRA fails, however, to cite a single fact to suggest that circumstances have changed in the CMRS industry since the 1993 Budget Act was passed. NWRA also fails to cite any Commission determination that CMRS is a LEC substitute now or any indication in the 1996 Act or the legislative history that suggests that Congress expected the Commission to treat CMRS providers as LECs. NWRA's shallow argument thus fails to provide the Commission with any reason, fact or policy to

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34/ *See* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993). *See also* Comments of the Cellular Telecommunications Industry Association ("CTIA") at 2-4.

35/ *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1418 (1994).

36/ Comments of NWRA at 11.

37/ As the Personal Communications Industry Association points out in its Comments, there is nothing unreasonable or discriminatory in the mere fact that different technologies face different regulation. Comments of PCIA at 8 n.22.

change the current standard by which the Commission can determine whether to treat CMRS providers as LECs as set forth in the terms of Section 332 of the Communications Act.

The proper test for determining whether a CMRS provider should be treated as a LEC can be found in Section 332(c)(3), which describes when a state or local government can engage in rate regulation of a CMRS provider.[38/] For reasons set forth in Vanguard's comments, the Commission also should apply this test in determining whether to subject a CMRS provider to obligations imposed on all LECs by the 1996 Act.[39/] Congress set these requirements as an appropriate standard for imposing one form of regulation on CMRS providers, and these same requirements are well-suited to determining whether other forms of regulation should be applied to CMRS providers as well.[40/] It also is evident that CMRS providers are many years from meeting this test. For instance, while incumbent LECs market penetrations routinely exceed 95 percent, Vanguard's penetration is less than 6

38/ Under Section 332(c)(3), a CMRS provider may be subjected to rate regulation when market conditions do not sufficiently protect subscribers from unreasonable rates or when a CMRS provider is a replacement for "a substantial portion" of the LEC service in its area.

39/ Comments of Vanguard at 21-22.

40/ NWRA's argument that LEC cellular affiliates should lose their CMRS status for purposes of Section 251(c) if the current structural separation rule is eliminated is inconsistent with the language of the 1996 Act. *See* Comments of NWRA at 15-16. Section 251(c) defines "incumbent local exchange carrier" as carriers providing telephone exchange service as of the date of enactment and all successors and assigns of such carriers. *See* 47 U.S.C. § 251(h). Because a LEC CMRS affiliate does not become a "successor" or "assign" of a LEC by virtue of the end of structural separation, NWRA's argument is unpersuasive. To be treated as an incumbent LEC, a CMRS provider must meet both the requirements for being treated as a LEC and the separate requirements for being treated as an incumbent under Section 251(h)(2). In any event, NWRA's claim is merely an effort to force "unbundling" of CMRS facilities, so that its members can avoid both the obligations of a Commission licensee and the costs of constructing a network.

percent, and almost none of its customers use cellular service as a substitute for their landline service.[41/]

Moreover, when the time comes for the Commission to apply the 1993 Budget Act's standards to CMRS, those standards should be applied on a carrier-specific basis, not industry-wide as NWRA proposes.[42/] Market conditions will vary from location to location, and while CMRS may conceivably be a LEC competitor in the next few years in specific urban areas, in most of the country CMRS will take much longer to reach its full potential. If the Commission wants CMRS to develop as a viable competitive alternative to the landline local exchange network, CMRS operators must not be subject to LEC-like obligations until they are on par with the LECs.

B. The Section 251(a) Interconnection Obligation Does Not Require Unbundling of Networks [*Notice* Part II(D) ¶¶ 245-249].

NWRA also argues that the Section 251(a) interconnection obligation requires facilities-based CMRS providers to "interconnect with a wireless reseller's switch," and asks the Commission to adopt an interconnection policy "applicable to all types of services."[43/] While Vanguard agrees that the Section 251(a) interconnection obligation applies to all

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41/ *See* Statistics of Communications Common Carriers, 1994-1995, Industry Analysis Division, Federal Communications Commission at Table 2.5; *see* Comments of Vanguard at 2 (describing population served and number of customers). Further, it is difficult to predict the effect that the advent of up to six PCS licensees in Vanguard's markets will have on Vanguard's market share.

42/ *See, e.g.,* Comments of the Public Utilities Commission of Ohio at 68 (suggesting that the Commission look at an individual CMRS provider's market share, diversity of network and name recognition as criteria to determine whether a CMRS provider should be classified as a LEC).

43/ Comments of NWRA at 13. Although NWRA does not mention the specifics of its proposal in its comments it has long sought "unbundling" of cellular networks into supposed component parts.

telecommunications carriers, including CMRS providers, the type of "interconnection" that NWRA seeks is available only through the incumbent LEC-specific requirements of Section 251(c) and may not be imposed on CMRS providers via Section 251(a).

Section 251(a) requires nothing more than the connection of one telecommunications network to another. It is the broadest obligation imposed on all telecommunications carriers by Congress, and is an important facet of promoting competition because no carrier can attract customers if its customers cannot "interconnect" with customers of other carriers. The terms "interconnect" and "interconnection" are standard industry terms, and were not deemed by Congress to require definition in the 1996 Act. NWRA, however, attempts to twist the meanings of these common terms to support its quest to obtain CMRS network unbundling. Section 251(a) cannot be used to support any unbundling requirement such as that requested by NWRA.

The most important evidence of what Congress intended under Section 251(a) may be seen by reference to the remainder of Section 251. The provisions of Sections 251(a), 251(b) and 251(c) are different, and each subsection imposes specific requirements on particular types of carriers. Thus, telecommunications carriers that are not LECs (including CMRS providers) are subject *only* to the provisions of Section 251(a), while incumbent LECs are subject to Section 251(a) Section 251(b) *and* Section 251(c).[44/] Only Section 251(c), which applies solely to incumbent LECs, contains an unbundling requirement. Such careful differentiation demonstrates specific Congressional intent that cannot be ignored in the manner proposed by NWRA If Congress had intended to impose an unbundling requirement on CMRS providers it could have and would have done so. It did not, and NWRA's attempt

44/ *See, e.g.*, Comments of Omnipoint Corporation at 9-10.

unilaterally to impose an unbundling requirement on CMRS providers should be rejected by the Commission out of hand as the Commission has rejected it before.[45/]

C. CMRS Providers Must Be Permitted to Obtain Interconnection Via the Provisions of Sections 332(c) and 201 [*Notice* Part II(C)(2)(e)(2) ¶¶ 166-169].

Vanguard agrees with those commenters that state that CMRS interconnection rights are governed by Sections 332(c) and 201 of the Communications Act.[46/] As the Cellular Telecommunications Industry Association points out, Congress gave the Commission jurisdiction in the 1993 Budget Act to regulate LEC-to-CMRS interconnection, and nothing in the 1996 Act indicates that Congress intended for Sections 251 and 252 to repeal the earlier statutory provisions.[47/] Congress was not addressing wireless competition when it adopted the 1996 Act because it had already done so in 1993. Instead, Congress was focusing in the 1996 Act on how to promote the emerging competition among providers of *landline* local exchange offerings.[48/]

45/ The Commission explicitly rejected a proposal by the National Cellular Resellers Association to allow resellers to interconnect their switches with cellular providers, thus forcing cellular providers to unbundle their networks. *See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, Second Notice of Proposed Rule Making, 10 FCC Rcd 10666, 10705-15 (1995). Further, the general Section 201 obligation to provide service on which Section 251(a) is based does not include an unbundling requirement. *See* Comments of NWRA at 13.

46/ *See, e.g.*, Comments of CTIA at 2-6; Comments of PCIA at 4-7; Comments of Sprint Spectrum/APC at 3-4 Comments of AT&T at 43 n.58.

47/ Comments of CTIA at 5.

48/ Comments of PCIA at 8.

While the states are eager to have the Commission abdicate its authority over CMRS interconnection and give back to the states the power to regulate CMRS rates,[49] such an approach would be contrary to the intent of Congress and would reflect misguided public policy. Just as Congress adopted a national policy for wireline telecommunications competition in the 1996 Act, Congress adopted a national policy for wireless telecommunications competition in the 1993 Budget Act. Precisely because CMRS providers have the potential to become true alternative providers of local exchange service (although they have not yet achieved this status), Congress established an apparently unique regulatory regime for CMRS in 1993. The Commission cannot and must not ignore the express intent of Congress by adopting interconnection requirements for CMRS under any statutory provisions other than Section 201 and 332(c).

IV. THE COMMISSION MUST DEFINE SPECIFIC RULES GOVERNING STATE ACTIONS [*Notice* Part III(A) ¶¶ 264-268 and Part II(F) ¶¶ 260-261].

Key points:

- The Commission must adopt specific standards governing negotiation and arbitration to avoid anticompetitive actions by incumbent LECs.
- Exemptions for rural and small carriers should be limited to individual situations where a carrier can show that a particular request for interconnection would be harmful.

Vanguard's comments demonstrated that the Commission should adopt rules to govern state actions in the negotiation and arbitration process and in acting on requests for rural

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49/ *See generally* Comments of the Ohio Public Utilities Commission at 58-59; Comments of the National Association of Regulatory Utility Commissioners at 21. LECs also oppose adoption of CMRS interconnection rules through Section 332, apparently out of fear that they will lose the ability to dictate the terms of CMRS interconnection arrangements. *See* Comments of Pacific Telesis Group at 81-83.

exemptions. Review of incumbent LEC comments reveals a critical need for specific Commission guidance because the LECs propose rules that would eviscerate the negotiation and arbitration process envisioned by Congress when it adopted the 1996 Act. The Commission should also adopt rules governing the rural exemption provisions of the 1996 Act to avoid abuses that would prevent consumers from taking advantage of competitive alternatives.

A. The Commission Should Reject Proposals Designed to Impede the Negotiation and Arbitration Process [*Notice* Part III(A) ¶¶ 264-268].

The comments demonstrate that some parties either do not understand the negotiation and arbitration process defined by the 1996 Act or hope to sabotage the statutory scheme from the outset. Incumbent LECs propose a variety of requirements that would make it difficult or impossible for most companies to begin or, for that matter, successfully complete the negotiation and arbitration process. The LEC proposals range from up-front payments as a condition of LEC consideration of an interconnection request to state-defined rules for negotiation to an outright refusal to accept the statutory arbitration process as binding. As a consequence, it is evident that the Commission must adopt specific rules that define the negotiation and arbitration process and that guard against LEC efforts to hobble the process entirely.

The LEC proposals would unreasonably limit negotiations from the start. USTA has suggested a two-page, single spaced list of requirements that it says should be met before negotiations can begin.[50/] Some LECs argue that the Commission should require an "earnest

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50/ Comments of USTA at 14-15; *see supra* Part II. Other LECs take a different view, arguing that the Commission should permit the states to adopt their own rules for (continued...)

money" deposit to offset the costs of responding to negotiation requests.[51] Either of these proposals would unreasonably limit negotiations by requiring an entity requesting interconnection to commit significant resources even before negotiations begin. They are akin to asking someone who is buying a car to describe where it will be driven and to make a non-refundable down payment before the dealer will disclose the price. Any car dealer that operated that way would get very little business. If the Commission permitted such behavior by incumbent LECs, it is similarly likely that there would be dampened demand for interconnection redounding to the benefit of the incumbent LECs. Thus, the Commission should prohibit such unreasonable preconditions to the negotiation process.

The most onerous limitation on the negotiation and arbitration process, however, is proposed by SBC Corp. SBC argues that the results of arbitration under the 1996 Act are not binding and that arbitrations are subject to *de novo* review by federal district courts.[52] SBC's argument is contrary to the statute, which does not give parties the opportunity to reject the results of arbitration and which does not give the courts the power to review interconnection disputes *de novo*.[53] Moreover, if this view were adopted, the

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50/ (...continued)
negotiations. *See, e.g.*, Comments of Ameritech at 94-95. This proposal has the same flaws as USTA's pre-negotiation checklist and, in addition, potentially would require an entity requesting interconnection to meet a different set of requirements in each state where it seeks to provide service.

51/ *See, e.g.*, Comments of BellSouth at 35-36.

52/ Comments of SBC Corp. at 103-104.

53/ 47 U.S.C. § 252(b), (c), (e) (describing arbitration process); 47 U.S.C. § 252(e)(6) (federal district court determines only "whether the agreement or statement meets the requirements of Section 251 and this section"). Based on the authority it cites, SBC's argument appears to be based on the law governing private civil suits in federal courts. That precedent does not apply to administrative decisions. Rather, procedures for judicial review
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Congressionally-mandated negotiation and arbitration process would break down completely because the defined end point of the process — 270 days — would be replaced by an indefinite period subject to a federal district court's ability to find the time to resolve detailed factual and legal issues that are largely outside its expertise.[54/]

The Commission should respond to these LEC efforts to hinder the arbitration process by adopting specific rules governing arbitrations and negotiations, as Vanguard proposed in its initial comments.[55/] The rules should require arbitrations to comply with the national standards the Commission adopts in this proceeding and should prevent states from imposing unreasonable conditions on telecommunications carriers that seek to begin negotiations under Section 252. The Commission also should clarify, for carriers that do not understand the statute, that the arbitration procedures under the 1996 Act are mandatory and binding, and that carriers will not be permitted to escape their obligation to provide unbundled elements or transport and termination under the 1996 Act by manipulating the negotiation and arbitration process.

53/ (...continued)
of administrative decisions are provided for in the organic statute of an agency, as is the case here, or in general statutes such as the Administrative Review Act. *See generally* Jacob A. Stein, et al., Administrative Law § 45.01 (1996). The right to a trial on the facts is never implicated in reviews of agency action. *See generally Mathews v. Eldridge*, 424 U.S. 319 (1976) (due process does not require an evidentiary hearing prior to the termination of social security disability benefit payments); *Granfinanciear v. Nordberg,* 492 U.S. 33 (1989) (Seventh Amendment guarantee of trial by jury applies only to parties contesting matters of private right).

54/ Given the heavy workloads of federal district courts, and as BellSouth suggests, it is likely that many district courts simply would refer interconnection disputes to the Commission under the doctrine of primary jurisdiction. *See* Comments of BellSouth at 9. The Commission's resources could be overwhelmed by the number of disputes it would have to adjudicate.

55/ *See* Comments of Vanguard at 36-40.

B. Specific Standards Are Necessary to Prevent Abuse of the Rural and Small Carrier Exemptions in the 1996 Act [*Notice* Part II(F) ¶¶ 260-261].

The comments demonstrate that some rural and small carriers hope to avoid any obligations under the 1996 Act or to obtain exemptions when they should not be entitled to them. These comments reinforce Vanguard's position that the Commission should establish specific standards for state consideration of rural and small LEC exemption requests. Without such standards, there is a significant risk that some LECs will abuse the exemption process.[56/]

The comments of rural LECs suggest that they have an entitlement to broad exemptions from the requirements of the 1996 Act. They propose standards, for instance, that would place the burden of proof on an entity requesting interconnection, or that would create presumptions that would make it nearly impossible to obtain interconnection.[57/] Other rural LECs would require a binding commitment to purchase the requested services from a carrier requesting interconnection before a request would have to be considered or propose rules to limit the unbundling of rural LEC networks to minimal levels.[58/]

56/ *See, e.g.*, Comments of AT&T at 90-93; Comments of the National Cable Television Association at 67

57/ For instance, one group of rural LECs proposes a presumption that an exemption should be granted whenever a loss of 10 percent or more of a company's market share would result in a loss of 20 percent or more of its net income. Comments of Bay Springs Telephone Company *et al.* ("Bay Springs") at 11. This presumption apparently would apply whether or not there was a meaningful likelihood that the new entrant would obtain 10 percent market share. *See also* Comments of Minnesota Independent Coalition at 5 (states should be vigilant in avoiding imposing interconnection obligations on rural LECs).

58/ *See* Comments of the rural LEC consulting firm TCA, Inc. at 5; Comments of Texas Statewide Telephone Cooperative, Inc. at 5-6.

At the same time, small and rural LECs also want state commissions to have broad discretion to grant waivers of the statutory requirements under almost any circumstance. As a consequence, these carriers oppose any Commission rules that would limit the availability of exemptions under Section 251(f).[59] They do, however, support Commission rules that would make it harder for states to turn down exemption requests. For instance, USTA, acting on behalf of its small and mid-sized members, asks the Commission to adopt rules that would expand the circumstances under which an exemption could be granted and that would permit an exemption any time the LEC could suffer a financial loss as a result of competition.[60] Similarly, Cincinnati Bell asks the Commission to prevent states from adopting procedural requirements that might prevent LECs from obtaining exemptions as quickly as possible.[61] In many cases, the rules or presumptions that rural LECs propose are entirely outside the scope of the 1996 Act.

While rural and small LECs seek protection from competition, that is manifestly not the intent of Section 251(f). As the language of Section 251(f) makes clear, exemptions are to be available only when specific criteria are met. Moreover, exemptions are not intended to protect rural and small LECs from specific unreasonable requests or burdens, not from competition generally.[62] For that reason, state authority to grant waivers should be narrowly

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59/ *See, e.g.*, Comments of Bay Springs at 13-15.

60/ Comments of USTA at 91-92. Of course, one of the basic characteristics of a shift from a monopoly to a competitive market is that the monopolist's profits are decreased, so this approach effectively would preclude any competition with rural LECs.

61/ *See* Comments of Cincinnati Bell at 41-42.

62/ Notably, Section 251(f)(1) requires any state determination to be made in response to and in light of a specific request. 47 U.S.C. § 251(f)(1)(A)(ii) (determination whether "such request" is unduly burdensome), (B) (describing procedure for responding to a

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