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

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In the Matter of	)	
	)	
Cost-Based Terminating Compensation	)	CC Docket Nos. 95-185 and 96-98
For CMRS Providers	)	WT Docket No. 97-207

APPLICATION FOR REVIEW OF SBC COMMUNICATIONS INC.

GARY A. PHILLPS
JEFFRY A. BRUEGGEMAN
ROGER K. TOPPINS
PAUL K. MANCINI

SBC COMMUNICATIONS INC.
1401 Eye Street, NW
Suite 1100
Washington, D.C. 20005
(202) 326-8911 – phone
(202) 408-8745 – facsimile

Its Attorneys

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SUMMARY

SBC Communications Inc. (SBC) hereby submits an Application for Review of the May 9, 2001 letter issued jointly by the Wireless Telecommunications Bureau and Common Carrier Bureau (Joint Bureau Letter) in response to Sprint PCS's request for clarification of the reciprocal compensation rules.

The Joint Bureau Letter could be interpreted in a manner that is plainly inconsistent with the Commission's reciprocal compensation rules. In particular, the Joint Bureau Letter could be read as establishing a much broader definition of "additional costs" for wireless networks than the Commission previously established in the context of wireline networks. It also could be interpreted as reading the "equivalent facility" test out of the rules for purposes of determining whether a new entrant should be compensated at the tandem interconnection rate. Such interpretations would conflict with Commission precedent, as well as numerous state commission decisions issued during the past five years that properly applied the Commission's reciprocal compensation rules. Moreover, the Joint Bureau Letter is procedurally improper because it fails to discuss the comments that were filed in opposition to the rule clarifications requested by Sprint PCS.

Accordingly, the Commission should grant SBC's Application for Review and issue a clarification to avoid the possibility that its reciprocal compensation rules will be misinterpreted. In particular, the Commission should clarify that, with respect to both wireline and wireless networks, recovery of the additional costs of transport and termination is limited to local switching costs that are sensitive to an additional call that originates on another carrier's network. The Commission also should clarify that both geographic area and functional equivalence are relevant to the determination of whether a carrier is eligible to receive the

tandem interconnection rate, so that state commissions do not apply an overly restrictive interpretation of the Commission's rules.

TABLE OF CONTENTS

Page

Summary i

I. The Joint Bureau Letter Could be Interpreted in a Manner That is Plainly Inconsistent with the Commission's Reciprocal Compensation Rules 2

A. The Same Definition of "Additional Costs" Must Apply to Wireline and Wireless Networks. 3

B. Functional Equivalence Must be Considered in Determining Whether a New Entrant Should be Compensated at the Tandem Interconnection Rate 6

II. The Joint Bureau Letter is Procedurally Improper 10

III. Conclusion 11

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Pursuant to Section 1.115(a) of the Commission's rules, SBC Communications Inc. (SBC) respectfully submits this Application for Review of the May 9, 2001 letter issued jointly by the Wireless Telecommunications Bureau and Common Carrier Bureau in the above-referenced proceedings.[1]

The Joint Bureau Letter was issued in response to a February 2, 2000 letter filed by Sprint PCS that asked the Commission's staff to "reaffirm" that Commercial Mobile Radio Service (CMRS) providers are entitled to terminating compensation for *all* their "additional costs." According to Sprint PCS, state commissions were encountering some difficulty applying the Communications Act and the Commission's rules to wireless networks. The Joint Bureau Letter states that CMRS providers are entitled to receive asymmetrical compensation for any costs that "vary, to some degree, with the level of traffic that is carried on the wireless network."[2] In addition, the letter states that a new entrant is entitled to receive the tandem interconnection rate if it satisfies the geographic area test, regardless of whether its equipment is functionally

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[1] Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, and Dorothy T. Attwood, Chief, Common Carrier Bureau, to Charles McKee, Senior Attorney, Sprint PCS, CC Docket Nos. 95-185 and 96-98, and WT Docket No. 97-207, May 9, 2001 (Joint Bureau Letter).

[2] Joint Bureau Letter at 3.

equivalent to a tandem switch and irrespective of the amount of traffic for which tandem functions are being performed.[3]

As discussed further below, the Joint Bureau Letter could be interpreted in a manner that is plainly inconsistent with the Commission's reciprocal compensation rules.[4] In particular, the Joint Bureau Letter could be read as (i) establishing a much broader definition of "additional costs" for wireless networks than the Commission previously established in the context of wireline networks, and (ii) reading the "equivalent facility" test out of the rules for purposes of determining whether a new entrant should be compensated at the tandem interconnection rate. Such an interpretation would conflict with Commission precedent, as well as numerous state commission decisions issued during the past five years that properly applied the Commission's reciprocal compensation rules. Moreover, the Joint Bureau Letter is procedurally improper because it fails to discuss the comments that were filed in opposition to the rule clarifications requested by Sprint PCS.[5] Accordingly, SBC respectfully requests that the Commission grant this Application for Review and issue a clarification to avoid the possibility that its reciprocal compensation rules will be misinterpreted.

I. The Joint Bureau Letter Could be Interpreted in a Manner That is Plainly Inconsistent with the Commission's Reciprocal Compensation Rules

It is axiomatic that Bureaus of the Commission may not alter rules established by the Commission itself. In at least two respects, however, the Joint Bureau Letter could be interpreted as doing just that. The letter could be read to suggest that the Bureaus have revised

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[3] *Id.*

[4] 47 C.F.R. § 1.115(b)(2)(iii).

[5] 47 C.F.R. § 1.115(b)(2)(v).

the definition of "additional costs" when that term is applied to wireless networks. In addition, the letter could be interpreted in a manner that conflicts with the Commission's rules for determining when a CMRS provider or CLEC is entitled to the tandem interconnection rate. We discuss these concerns in turn below.

A. The Same Definition of "Additional Costs" Must Apply to Wireline and Wireless Networks.

In the *Local Competition Order,* the Commission held that "the 'additional cost' to the LEC of terminating a call that originates on a competing carriers' network primarily consists of the traffic-sensitive component of local switching."[6] The Commission specifically rejected the inclusion of any loop costs in reciprocal compensation rates, holding that "local loops and line ports associated with local switches do not vary in proportion to the number of calls terminated over these facilities."[7] "Such non-traffic sensitive costs," the Commission found, "should not be considered 'additional costs' when a LEC terminates a call that originated on the network of a competing carrier. For the purposes of setting rates under section 252(d)(2), only that portion of the forward-looking, economic cost of end-office switching that is recovered on a usage-sensitive basis constitutes an 'additional cost' to be recovered through termination charges."[8]

In concluding that LECs are not entitled to recover any loop costs through reciprocal compensation, the Commission effectively *limited* the universe of traffic-sensitive costs that are considered "additional costs" under its reciprocal compensation rules. The Commission did not

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[6] *In the Matter of Telecommunications Act of 1996: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16025 ¶ 1057 (1996) (*Local Competition Order*).

[7] *Id.*

[8] *Id.*

hold that loop costs do not vary at all with the amount of traffic that traverses them. Indeed, the Commission could not have so held because the proposition is demonstrably untrue: loop costs – particularly the cost of the feeder plant in a digital loop carrier architecture – increase in direct proportion to the amount of traffic that will terminate over those facilities. The more traffic there is, the more feeder plant is necessary. Therefore, the only possible reading of the *Local Competition Order* is that certain types of traffic-sensitive costs – namely, costs that are traffic sensitive over the long term – are not considered "additional costs" for purposes of the reciprocal compensation rules.

The Joint Bureau Letter does not squarely address what costs would be considered additional costs of a CMRS provider. Nevertheless, the letter could be taken to suggest that *any* cost that is traffic sensitive to *any* degree may be so considered. Citing dicta in the *Intercarrier Compensation NPRM,* the letter states:

> If a CMRS carrier can demonstrate that the costs associated with spectrum, cell sites, backhaul links, base station controllers and mobile switching centers vary, to some degree, with the level of traffic that is carried on the wireless network, a CMRS carrier can submit a cost study to justify its claim to asymmetric reciprocal compensation that includes additional traffic sensitive costs associated with those network elements.[9]

Thus, the Joint Bureau Letter fails to make clear that a CMRS provider is not entitled to recover any costs of the loop-equivalent portion of a wireless network through terminating compensation.

SBC does not believe the Bureaus could possibly have intended to establish an entirely new "additional cost" standard that would apply uniquely to CMRS providers. For one thing, the Bureaus do not have authority to alter the regime established by the Commission in the *Local*

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[9] Joint Bureau Letter at 2-3.

Competition Order. Moreover, even if they did have authority (which they do not) any such disparate treatment would be patently unlawful. There is no legal or policy basis upon which the Commission could rely to justify a disparate reciprocal compensation regime that takes an unlimited long-term view of traffic-sensitive costs in the context of wireless networks and, at the same time, maintains a short-term view of traffic-sensitive costs in the context of wireline networks. If the term "additional costs" is based on a short-term view of traffic-sensitive costs for wireline networks, the same must be true for wireless networks. A contrary conclusion would not only be arbitrary, but grossly discriminatory and contrary to public policy.

If anything, CMRS providers should receive less or no reciprocal compensation when they terminate traffic. After all, the reciprocal compensation regime is based on a "calling party pays" model. The premise is that end users pay for placing phone calls, but not for receiving them and, hence, the terminating carrier should be compensated by the originating carrier, which has been paid by its customer. As the Commission stated in the *Local Competition Order*: "Reciprocal compensation for transport and termination of calls is intended for a situation in which two carriers collaborate to complete a local call. In this case, the local caller pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call."[10] When a CMRS provider terminates a call, however, it is not uncompensated – it is charging its own end user for receipt of the call. Thus, allowing the CMRS provider to also receive reciprocal compensation amounts to double recovery.

SBC is not asking the Commission to rule that CMRS providers are not entitled to any reciprocal compensation for the termination of telecommunications. Nor is it asking the

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[10] *Local Competition Order*, 11 FCC Rcd at 16013 ¶ 1034.

Commission to eliminate its symmetry presumption, under which CMRS providers are entitled to overcome the presumption by showing that their termination costs exceed those of an ILEC, even though that rule also makes no sense from a public policy standpoint. After all, CMRS customers obtain the added benefit of mobility and, consistent with the principle that costs should be borne by the cost causer, should bear any additional costs associated with wireless networks. Certainly, it makes no sense for wireline customers (including customers that do not use or place calls to wireless networks) to finance any additional costs associated with wireless networks.

SBC is, however, asking the Commission to rule that CMRS providers have no *greater* right to reciprocal compensation than do wireline carriers, and that, just as wireline carriers may not recover through reciprocal compensation *all* costs that are, to some degree, traffic sensitive, neither may CMRS providers.[11] While the Commission's rules permit asymmetrical *compensation* in certain cases, it does not follow that asymmetrical *application* of its reciprocal compensation rules is permitted. The Commission held in the *Local Competition Order* that wireline carriers must recover their loop costs from their own end-user customers, rather than other carriers. Thus, the same rules must apply to wireless networks.

B. Functional Equivalence Must be Considered in Determining Whether a New Entrant Should be Compensated at the Tandem Interconnection Rate.

The Joint Bureau Letter also could be interpreted in a manner that conflicts with the Commission's rules for determining whether a CMRS provider or CLEC should be compensated at the tandem interconnection rate. As the Bureaus noted, Section 51.711(a)(3) of the rules

[11] Given the Commission's pending proposal to eliminate reciprocal compensation altogether, it would be arbitrary, to say the least, for the Bureaus to establish new reciprocal compensation cost standards that dramatically increase the amount of reciprocal compensation available to CMRS providers.

requires that the geographic area test be met before a carrier is entitled to the tandem interconnection rate.[12] What the Bureaus ignored, however, is that Section 51.701(d) of the Commission's rules defines "termination" as the switching of local telecommunications traffic "at the terminating carrier's end office switch, *or equivalent facility*."[13] Therefore, the Commission's rules define termination in relation to the *functionality* of end office switching. Given that the Commission's rules view end office switching as a *functionality* for purposes of its reciprocal compensation rules, the same should be true for tandem switching.

Further, in the *Local Competition Order*, the Commission held that transport and termination rates should vary depending on whether traffic is routed through a tandem switch precisely because the "additional costs" incurred in transporting and terminating a call are likely to vary depending on whether a tandem switch is involved.[14] That is only true if a call is, in fact, routed through a tandem or equivalent facility. In this regard, the Commission gave explicit directions to the states to consider "whether new technologies (*e.g.*, fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch" and thus whether the new entrant should be compensated at the tandem interconnection rate.[15]

During the past five years, a number of state commissions have interpreted the Commission's rules as incorporating both a geographic area and functional equivalence test. For example, the Texas Public Utilities Commission (PUC) held that, in interpreting Section

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[12] *See* 47 C.F.R. § 51.711(a)(3).

[13] 47 C.F.R. § 51.701(d) (emphasis added).

[14] *Local Competition Order*, 11 FCC Rcd at 16042 ¶ 1090.

[15] *Id.*

51.711(a)(3) of the Commission's rules, it had to give meaning to the underlying language in the *Local Competition Order*. As the Texas PUC explained:

> In that seminal order, the FCC directed state commissions to consider whether the technology employed by the CLEC is performing tandem or tandem-like functions similar to those performed by the ILEC's tandem switch in determining whether "some or all calls" terminating on the CLEC's network should be priced the same as the traffic terminated by the ILEC's tandem switch. Given the FCC's discussion in the *Local Competition Order*, the [PUC] concludes that a terminating carrier shall be compensated for any "additional costs" incurred only when it actually uses a tandem or tandem-like functions to terminate traffic in a geographic area comparable to the area served by the ILEC's tandem switch.[16]

Far from reflecting "confusion," as the Bureaus characterize it, the Texas PUC avoided an overly rigid interpretation of the Commission's rules and looked to the *Local Competition Order* for the meaning and context of the rules. While SBC may not agree that the Texas PUC reached the correct factual determination regarding the use of the CLEC's switch, the Texas PUC appropriately attempted to ensure that tandem functionality actually is provided in circumstances where tandem compensation applies.[17]

The Joint Bureau Letter, on the other hand, completely ignores Section 51.701(d) of the rules and the critical issue of whether a new entrant's switching equipment performs any of the functions of an ILEC's tandem switch.[18] AT&T already is attempting to use the Joint Bureau Letter in a state proceeding to oppose any consideration of functional equivalence. It recently

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[16] *See Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Docket No. 21982, Revised Arbitration Award, at 29 (Texas PUC August 2000).

[17] *Id.* at 37.

[18] There are several reasons why an MSC is not functionally similar to an ILEC tandem switch: (i) a call routed through a tandem switch is switched twice, whereas a call terminated at an MSC is switched just once; and (ii) the relation of the MSC to a cell site is most similar to the relation of an end office switch to a digital loop carrier remote terminal; and (iii) the main function of a tandem switch is to switch traffic from one trunk to another trunk.

filed the letter with the Public Utilities Commission of Ohio as supplemental authority for its position challenging the finding of an arbitration panel that AT&T's switches must function similar to Ameritech's tandem switches in order to receive the tandem interconnection rate. Thus, the Joint Bureau Letter could be (and is being) read as requiring that a new entrant receive compensation for tandem switching functions it is not actually providing. SBC sees no basis in the reciprocal compensation provisions of the Act under which the Commission can authorize carriers to recover costs they do not incur.

Functional equivalence also is relevant to the issue of whether ILECs have a comparable opportunity to avoid paying tandem compensation to another carrier. A CMRS provider or CLEC can establish direct connections to an ILEC's end offices, thereby avoiding the ILEC's tandem switching and common transport charges. In the case of a wireless network, an ILEC can only establish a connection to the CMRS provider's MSC – the ILEC does not have the option of avoiding a CMRS provider's MSC charges by establishing a direct connection to a cell site. Therefore, an MSC is the functional equivalent of an ILEC end-office switch for reciprocal compensation purposes because both the MSC and the ILEC end-office switch are the final point in the network where an originating carrier can extend its transport facilities without providing termination services to the called party. By focusing exclusively on geographic area, the Bureaus do not address this aspect of functional equivalence and thus create the potential for a discriminatory reciprocal compensation framework.

The Commission should clarify that both geographic area and functional equivalence are relevant to the determination of whether a carrier is eligible to receive the tandem

interconnection rate, so that state commissions do not apply an overly restrictive interpretation of the Commission's rules.

II. The Joint Bureau Letter is Procedurally Improper

The Joint Bureau Letter is procedurally improper because it completely fails to acknowledge or respond to the comments that were filed in opposition to the Sprint PCS letter. For example, the following are some of the arguments raised by commenters:

- USTA submitted a detailed analysis by Charles L. Jackson and William E. Taylor that rebutted arguments raised by Sprint PCS and its consultants. Jackson and Taylor showed that economic efficiency is achieved if additional costs incurred to provide mobility are recovered from wireless end-user customers, and they also demonstrated that, contrary to claims made by Sprint PSC, the majority of costs in a wireless network are not traffic sensitive (*i.e.*, the majority of wireless infrastructure costs are incurred just to provide the wireless equivalent of dialtone).[19]

- AT&T stated that Sprint PCS's proposed clarification would have "far-reaching effects" on every other compensation regime developed by the Commission and would allow every carrier that uses technology different from the wireline standard to "seize the opportunity to calculate compensation based on costs specific to its own situation."[20]

- BellSouth pointed out that the cost of loop-equivalent facilities in the CMRS network are currently recovered in the CMRS providers' contracts with their end users. Therefore, allowing CMRS providers to recover these costs from ILEC customers would result in either double recovery or an unwarranted competitive advantage.[21]

- U S WEST (now Qwest) demonstrated that wireline and wireless networks are organized along parallel hierarchies, perform the same functions and use shared facilities in much the same way. As U S WEST stated, "[f]or all practical purposes, Sprint PCS's network architecture is nearly a mirror image of a typical wireline digital loop carrier system."[22] Therefore, Sprint PCS's proposed approach to reciprocal compensation cannot be reconciled with the Commission's prior determination that none of the costs associated with loops is recoverable through reciprocal compensation. U S WEST cautioned that, if

[19] USTA Comments at 5.

[20] AT&T Comments at 6-7.

[21] BellSouth Comments at 5.

[22] U S WEST Comments at i.

> Sprint PCS's proposed approach were the general rule, all carriers' reciprocal compensation charges would skyrocket.[23]

The Bureau inexplicably ignores all of the comments that were filed in response to the Sprint PCS letter.

There is no question that the Bureaus' procedural error is prejudicial. It is hornbook law that regulatory agencies are required to consider evidence in the record and explain their decisionmaking. In issuing its cursory response to Sprint PCS's request for clarification, the Bureaus failed to " demonstrate the rationality of [the] decisionmaking process by responding to those comments that are relevant and significant"[24] and "failed to consider an important aspect of the problem."[25] The Bureaus' complete failure to respond to the "relevant and significant" analyses and data submitted by commenters was arbitrary and capricious, and it led directly to a letter that could be interpreted in a manner that conflicts with the Commission's reciprocal compensation rules.

III. Conclusion

For the foregoing reasons, the Commission should grant SBC's Application for Review and issue a clarification to avoid the possibility that its reciprocal compensation rules will be misinterpreted. In particular, the Commission should clarify that, with respect to both wireline and wireless networks, recovery of the additional costs of transport and termination is limited to local switching costs that are sensitive to an additional call that originates on another carrier's network. Moreover, the Commission should clarify that both geographic area and functional equivalence are relevant to the determination of whether a carrier is eligible to receive the

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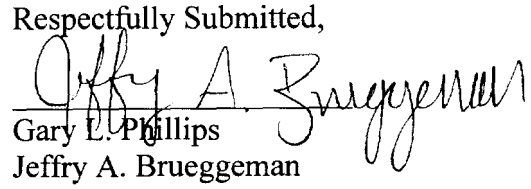
[23] *Id.*

[24] *Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998).

tandem interconnection rate, so that state commissions do not apply an overly restrictive interpretation of the Commission's rules.

Respectfully Submitted,



Gary L. Phillips
Jeffry A. Brueggeman
Roger K. Toppins
Paul K. Mancini

SBC Communications Inc.
1401 I Street NW 11th Floor
Washington, D.C. 20005
Phone: 202-326-8911

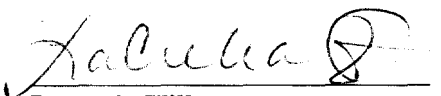
Its Attorneys

June 8, 2001

[25] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983).

CERTIFICATE OF SERVICE

I, Lacretia Hill, do hereby certify that on this 8th day of June a copy of the foregoing "Application for Review" was served by U.S. first class mail, postage paid to the parties on the attached sheets



Lacretia Hill

Karlyn Stanley
Brenda Boykin
Attorneys for Alpine PCS and Centennial
Communications Corporations
Cole Raywid & Braverman, LLP

Mark C. Rosenblum
Stephen C. Garavito
Teresa Marrero
AT&T Corp.
295 North Maple Avenue
Basking Ridge, NJ 07920

Douglas Brandon
AT&T Wireless Services, Inc
1150 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

M. Robert Sutherland
Bell South Corporation
1155 Peachtree Street NE
Suite 1800
Atlanta, Georgia 30309

Micheal F. Altschul
Vice President, General Counsel
Randall S. Coleman
Vice President for Regulatory Policy and Law
Cellular Telecommunications Industry Association
1250 Connecticut Avenue NW
Washington, DC 200036

Christine M,. Crowe
Attorney for Cellular XL Associates
Paul, Hastings, Janorsky & Walker
1299 Pennsylvania Avenue NW
Tenth Floor
Washington, DC 20004

Fredrick Joyce
Christine McLaughlin
Attorneys for Metrocall
601 Pennsylvania Ave NW
North Building 11th Floor
Washington, DC 20004

Robert L. Hoggarth Esq.
Senior Vice President and Chief of Staff for
Government Relations
Angela E. Gincarlo Esq.
Director, Federal Regulatory Affairs
Personal Communication Industry Association
500 Montgomery Street
Suite 700
Alexandria, Virginia 22314

Caressa D. Bennet
Robin E. Tuttle
Attorneys for Rural Telecommunications Group
Bennet & Bennet
1000 Vermont Avenue NW
Tenth Floor
Washington, DC 20005

Lawrence E. Sarjeant
Linda L. Kent
Keith Townsend
John W. Huner
Julie E. Rones
United States Telephone Association
1401 H Street NW
Suite 600
Washington, DC 20005

Douglas G. Bonner Esq.
Sana D. Coleman Esq.
Attorneys for Voice Stream Wireless
Arent, Fox Kintner Plotkin & Kahn PLLC.
1050 Connecticut Avenue NW
Washington, DC 20036

Michael K. Kurtis
Jerome K. Blask
Lisa L. Leibow
Attorneys for Mid-Missouri Cellular
Kurtis & Associates PC
2000 M Street NW
Suite 600
Washington, DC 20036

Russell M. Blau
Micheal C. Sloan
Counsel for Western Wireless Corporation
Swidler Berlin Shereff Friedman LLP
3000 K Street NW, Suite 300
Washington, DC 20007

Charles McKee
Senior Attorney
Sprint PCS
4900 Main Street 11th Floor
Kansas City, MO 64112

Ed Shakin
Verizon
1320 North Courthouse Road
8th Floor
Arlington, VA 22201

Craig Brown
Qwest Communications
Attorney
1801 California Street
49th Floor
Denver, CO 80202