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]

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.

(Continued from previous page)

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.

[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.

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 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

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[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.

[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.*

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 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

[177] 47 U.S.C. § 214.

[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.

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 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

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[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.*

[185] AT&T April 3, 2001 letter at 2.

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 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*

[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*).

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]

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.

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[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.

...ant Issues Raised by Public Comment in ...RFA

109. ...Order and Further Notice, we sought comment on various, alterna... ...LECs from charging unreasonable rates for their switched ... ...tentatively concluded that the proposed rule changes would have no ... ...ive burdens of competitive LECs because they would have no addition... ...[189] In response to the Notice, we received comments from more than 40 ... ...ex parte meetings addressing these issues. Among those parties, only AL... ...endent Competitive Alliance (RICA) commented specifically on t...

110. ...EL's contention that the Commission's IRFA was incomplete.[191] A... ...e Commission, in the IRFA, did not adequately address: 1) proposals in t... ...t originating access and "open-end" access services; 2) the pot... ...their tariffs or to eliminate those tariffs and negotiate individual contrac... ...dens on other carriers, such as ILECs (which, ALLTEL asserts ...fy their tariffs and perform cost studies). To the contrary, for several differe... ...de that the IRFA gave adequate notice of our proposals to address CLEC ac... ...hose to discuss, in the IRFA, the primary proposals set out in the Notice, ... in the Notice on a number of variations to those primary propo... ...A only expressly mentions proposals to address terminating ... ...to the text of the Notice, which discusses all variations of t... ...sals.[193] Moreover, we observe that the Notice and the IRFA were sufficie... ...d, including comments from many competitive LECs that likely w... ...mall businesses under the closest applicable SBA definition. The IR... ...ent information so that the public could react to the Commission's ... ...manner.[194]

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[189] *See also* ... ...iting further comment on the IRFA that was included in the *Pricing Flexibility* ...). We note that no parties addressed the IRFA in their comments to the *Safe Harbor Pr*...

[190] ALLTEL Comm... ...nts at 18.

[191] ALLTEL Co...

[192] *See also* RICA ... ...that the IRFA does not adequately assess the impact of the proposals on small CLECs).

[193] *Pricing Flexibil*... ...CC Rcd at 14353.

[194] In considering ... ...e that many commenters in the proceeding addressed the administrative b... ...oposals. We have taken the opportunity to reconsider our initial conclusions in th... ...paragraphs 119 through 127.

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 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

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[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.

[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.

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 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

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[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 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.

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 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

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[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.

[213] *See, e.g.*, ALTS Comments at 35 ("mandatory detariffing could be very costly for CLECs").

[214] *See supra* paragraph 42.

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 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

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[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.

[217] *See, e.g.*, CoreComm Comments at 1.

[218] *See supra* paragraphs 35 - 44.

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.

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

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[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.

[222] *See supra* paragraphs 90 - 94.

[223] *See, e.g.*, AT&T Comments at 27.

[224] *See, e.g.*, Minnesota CLEC Comments at 12.

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 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.

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[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).

[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.

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.

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

[230] 5 U.S.C. § 603(c).

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.

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.

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[231] *See supra* paragraphs 98 - 104.

[232] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

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.

143. That 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

[233] *See* 47 C.F.R. § 1.49.

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

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) hereof, 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) hereof, 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.

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 paragraph 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), 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) or

(ii) The lowest rate that the CLEC has tariffed for its interstate exchange access services,

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

1 not strong enough to furnish any real confident guidance
2 because of the cancellation issue.
3 ATTORNEY BENDERNAGEL: Correct.
4 THE COURT: And there are some AT&T claims
5 in Category 4, and there you say those should go to the
6 Commission because they all rest on the cancellation
7 question.
8 ATTORNEY BENDERNAGEL: Well, I don't want
9 you to send over the -- we are not in favor of you sending
10 the claims to the FCC under constructive ordering.
11 Our basic position is we want the legal
12 issue of whether, in fact, we have the right to terminate,
13 or whether we have the right, in fact, to say, "We are not
14 accepting your service," or "We are declining your
15 service," whether we have that right as a legal matter
16 under these things. We would like that legal question
17 certified over.
18 I think in terms of the Court's competence
19 and ability to deal with the question of whether, in fact,
20 it's determined -- here is what happens: I mean, if they
21 come back and they say, "AT&T, you don't have that right,"
22 we are finished here. I mean, it's over to the 208 rate
23 case, and there is nothing to decide here.
24 If they come back and they say "Oh, you do
25 have that right," we are not home free at that juncture,