

JUL 14 2004

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

In the Matter of)
)
Review of the Section 251 Unbundling) CC Docket No. 01-338
Obligations of Incumbent Local Exchange)
Carriers)

SECOND REPORT AND ORDER

Adopted: July 8, 2004

Released: July 13, 2004

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements.
Commissioner Adelstein approving in part, dissenting in part, and issuing a statement. Commissioner
Cops dissenting and issuing a statement.

TABLE OF CONTENTS

	Paragraph
I. INTRODUCTION.....	1
II. BACKGROUND.....	2
III. DISCUSSION.....	6
A. OVERVIEW.....	6
B. "ALL-OR-NOTHING" RULE.....	11
C. OTHER PROPOSALS.....	25
IV. PROCEDURAL MATTERS.....	31
A. FINAL REGULATORY FLEXIBILITY ANALYSIS.....	31
B. FINAL PAPERWORK REDUCTION ACT ANALYSIS.....	70
V. ORDERING CLAUSES.....	71

APPENDIX A – LIST OF COMMENTERS

APPENDIX B – FINAL RULES

I. INTRODUCTION

1. On August 21, 2003, the Commission initiated this Further Notice of Proposed Rulemaking¹ to determine whether it should change its interpretation of section 252(i) of the Communications Act of

¹See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (FNPRM), corrected by Errata, 18 FCC Rcd 19020 (2003), *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *petitions for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

1934, as amended (the Act), as implemented by section 51.809 of our rules (the “pick-and-choose” rule).² In this Order, we adopt a different rule in place of the current pick-and-choose rule. Specifically, we adopt an “all-or-nothing rule” that requires a requesting carrier seeking to avail itself of terms in an interconnection agreement to adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement. We find that this new rule will promote more “give-and-take” negotiations, which will produce creative agreements that are better tailored to meet carriers’ individual needs. We also conclude that this new rule will reduce negotiation time, expenses, and possible areas of dispute, while at the same time provide adequate protection against discrimination. In this Order, we advance the cause of facilities-based competition by permitting carriers to obtain mutually beneficial concessions from the incumbent local exchange carrier (LEC) in order to better serve end-user customers.

II. BACKGROUND

2. Sections 251 and 252 of the Act frame the negotiation process for developing carriers’ interconnection agreements and govern the arbitration process for the resolution of carriers’ disputes.³ Section 252(i) of the Act provides that a “local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting carrier upon the same terms and conditions as those provided in the agreement.”⁴ Eight years ago in the *Local Competition Order*, the Commission interpreted section 252(i) to mean that requesting carriers can choose among individual provisions contained in publicly filed interconnection agreements.⁵ The Commission determined that “incumbent LECs must permit third parties to obtain access under section 252(i) to any individual interconnection, service, or network element arrangement on the same terms and conditions as those contained in any agreement approved under section 252.”⁶ Thus, the Commission granted requesting carriers the right to “pick and choose” among the individual provisions of state-approved interconnection agreements without being required to accept the terms and conditions of the entire agreement. In coming to this interpretation, the Commission concluded that this approach would provide adequate protection from

²47 U.S.C. § 252(i); 47 C.F.R. § 51.809. Generally, the pick-and-choose rule in section 51.809 permits a requesting carrier to include in its interconnection agreement any individual interconnection, service, or network element contained in another carrier’s agreement approved by the state commission.

³See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, Notice of Proposed Rulemaking, 11 FCC Rcd 14171, 14179, para. 20 (1996).

⁴47 U.S.C. § 252(i).

⁵47 C.F.R. § 51.809.

⁶*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 Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16139, para. 1314 (1996) (*Local Competition Order*), modified on recon., 11 FCC Rcd 13042 (1996), *aff’d in part, vacated in part, Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (*Iowa Utils. Bd. v. FCC*), *aff’d in part, rev’d in part, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*AT&T v. Iowa Utils. Bd.*), decision on remand, *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff’d in part, rev’d in part, Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002). In conjunction with adopting this interpretation, the Commission limited competitive LECs’ ability to pick and choose provisions from other agreements to instances where: (1) the forms of interconnection are technically feasible; (2) the incumbent LEC incurs no greater costs than with the carrier who originally negotiated the agreement; (3) only a reasonable amount of time has passed since adoption of the preexisting agreement; and (4) a chosen provision is “legitimately related” to other provisions such that it cannot be adopted by itself. See *Local Competition Order*, 11 FCC Rcd at 16139-40, paras. 1315, 1317, 1319.

discrimination, while at the same time speed the emergence of robust competition.⁷ The Commission rejected the argument that the pick-and-choose rule would adversely affect negotiations by making incumbent LECs less likely to compromise.⁸

3. On review, the U.S. Court of Appeals for the Eighth Circuit (the Eighth Circuit) vacated the pick-and-choose rule. It held that the Commission's interpretation did not balance the competing policies of sections 251 and 252, finding that the rule hindered voluntarily negotiated agreements "by making incumbent LECs reluctant to grant *quids* for *quos*, so to speak, for fear that they would have to grant others the same *quids* without receiving *quos*."⁹ However, the Supreme Court reversed the Eighth Circuit decision and reinstated the pick-and-choose rule. Specifically, the Supreme Court reviewed whether the Commission's construction of section 252(i) was permissible, and held that the Commission's interpretation was reasonable. The Court went on to acknowledge that whether the Commission's interpretation would frustrate the Act's goals by impeding negotiations "is a matter eminently within the expertise of the Commission and eminently beyond our ken."¹⁰ The Court did consider the interpretation we adopt today, finding that the all-or-nothing approach "seems eminently fair."¹¹

4. On May 25, 2001, Mpower, a competitive LEC, called into question the appropriate balance of section 251's and section 252's policies when it filed a petition for forbearance and rulemaking to establish a "New Flexible Contract Mechanism Not Subject to 'Pick and Choose.'"¹² Although it has since withdrawn this petition, Mpower originally sought relief from the Commission's pick-and-choose requirement on the grounds that it inhibited innovative deal-making during negotiations.¹³ Incumbent

⁷See *Local Competition Order*, 11 FCC Rcd at 16138, para. 1312.

⁸See *id.* at para. 1313.

⁹*AT&T v. Iowa Utils. Bd.*, 525 U.S. at 377 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 801). The court also found that the structure of the Act reveals a preference for voluntarily negotiated agreements, and that the pick-and-choose rule would "thwart the negotiation process and preclude the attainment of binding negotiated agreements" because it discourages "the give-and-take process that is essential to successful negotiations." *Iowa Utils. Bd. v. FCC*, 120 F.3d at 801.

¹⁰*AT&T v. Iowa Utils. Bd.*, 525 U.S. at 396.

¹¹*Id.*

¹²Petition of Mpower Communications Corp. for Establishment of New Flexible Contract Mechanism Not Subject to "Pick and Choose," CC Docket No. 01-117 (filed May 25, 2001) (Mpower Petition); see also *Pleading Cycle Established for Comments on Mpower Petition for Forbearance and Rulemaking*, CC Docket No. 01-117, Public Notice, 16 FCC Rcd 11889 (2001). On October 14, 2003, Mpower filed to withdraw this petition. See Letter from Douglas G. Bonner, Counsel for Mpower Communications Corp., to Marlene H. Dortch, Secretary, FCC (filed Oct. 14, 2003); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order, 18 FCC Rcd 21381 (2003). The record from the Mpower proceeding has been incorporated into this proceeding. See *FNPRM*, 18 FCC Rcd at 17410, para. 714.

¹³See Mpower Petition at 9. It proposed the concept of "FLEX contracts" – voluntarily negotiated wholesale agreements that other carriers could opt into only as a "package deal," neither subject to the pick-and-choose rule nor to the state commission filing and approval requirement of section 252(e). Contrary to the assertion by ALTS, the Commission did not initiate the *FNPRM* solely because of the Mpower Petition. See Letter from Jason D. Oxman, General Counsel, ALTS, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1-2 (filed June 25, 2004) (ALTS June 25, 2004 *Ex Parte* Letter). The issues raised in the *FNPRM* are much broader than those raised by Mpower in its narrow petition. As explained in the *FNPRM*, the Mpower Petition, as well as other carrier complaints about the ineffectiveness of the negotiation process, prompted the Commission to reexamine our rule interpreting section 252(i). However, the Commission in the *FNPRM* developed its own remedy for the problems of

LECs have also argued that abandoning the rule would promote “mutually beneficial commercial business relationships between ILECs and CLECs, as opposed to the adversarial, regulation-based relationships that are more typical today.”¹⁴

5. On August 21, 2003, the Commission initiated this rulemaking to determine whether it should eliminate the pick-and-choose rule and replace it with an alternative interpretation of section 252(i).¹⁵ The Commission made three tentative conclusions and requested comment on each. First, we tentatively concluded that the Commission has legal authority to alter its interpretation of section 252(i), so long as the new rule remains a reasonable interpretation of the statutory text.¹⁶ Second, the Commission made the tentative conclusion that the current rule discourages give-and-take bargaining.¹⁷ Lastly, we tentatively concluded that the Commission should reinterpret section 252(i) so that if an incumbent LEC files for and obtains state approval for a statement of generally available terms (SGAT), the current pick-and-choose rule would apply only to that SGAT, and all other interconnection agreements would be subject to an all-or-nothing rule requiring carriers to adopt another carrier’s interconnection agreement in its entirety (the conditional SGAT proposal).¹⁸

III. DISCUSSION

A. Overview

6. As a threshold matter, we determine whether the Commission has the authority to reinterpret section 252(i). We adopt the tentative conclusion reached in the *FNPRM* that the Commission does

the pick-and-choose rule and made its own tentative conclusions independent of the Mpower Petition. Thus, the Commission incorporated the Mpower proceeding record not because its petition raised the same issues as those discussed in the *FNPRM*, but rather, because the Commission recognized that the subject matter was similar enough to warrant inclusion.

¹⁴Letter from Dee May, Executive Director – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, at 3 (filed Jan. 17, 2003) (Verizon Jan. 17, 2003 *Ex Parte* Letter) (filed on behalf of BellSouth, SBC, Qwest, and Verizon).

¹⁵See *FNPRM*, 18 FCC Rcd at 17412-13, para. 720; see also Appendix A, *infra* (List of Commenters).

¹⁶See *FNPRM*, 18 FCC Rcd at 17413, para. 721.

¹⁷See *id.* at 17413, para. 722. The Commission asked whether it was correct in its tentative conclusion that the pick-and-choose rule fails to promote meaningful negotiations. For parties asserting such failure, we asked for alternative interpretations which would restore incentives and also maintain effective safeguards against discrimination. We noted our previously expressed concerns about “poison pills” and other types of discrimination, and whether such concerns could be addressed through narrower means than our current rule. See *id.* at 17413-14, paras. 722, 724. “Poison pills” are onerous provisions that could be included in an interconnection agreement, which would not negatively affect the original requesting carrier, but which would discourage other carriers from subsequently adopting the agreement. See *Local Competition Order*, 11 FCC Rcd at 16138, para. 1312.

¹⁸See *FNPRM*, 18 FCC Rcd at 17414-15, 17416, paras. 725, 728; 47 U.S.C. § 252(f). Under the proposal in the *FNPRM*, if an incumbent LEC were to decide not to file an SGAT, the pick-and-choose rule would continue to apply. In the case of non-BOC incumbent LECs (which are not subject to section 252(f)), the *FNPRM* proposed that a single interconnection agreement designated as an SGAT-equivalent could be filed with the state commission. See 18 FCC Rcd at 17414-15, para. 725. We also asked several questions related to the conditional SGAT proposal, including whether it was reasonable to interpret section 252(i) to allow carriers to opt into entire agreements, but not individual provisions, subject to satisfaction of an SGAT filing. See *id.* at 17415-16, para. 727.

indeed have the legal authority to reinterpret that provision.¹⁹ Specifically, as described below, we conclude that Congress has not directly addressed the question at issue: the degree to which interconnection, service or network element provisions from a state-approved interconnection agreement must be made available to other requesting carriers. We reach this conclusion because the plain meaning of the section's text gives rise to two different, reasonable interpretations, and because the Supreme Court expressly recognized that the Commission has leeway to reinterpret section 252(i).²⁰

7. The language in section 252(i) does not limit the Commission to a single construction. The Commission, in interpreting section 252(i) in the *Local Competition Order*, did conclude that the phrase “any interconnection, service or network element” relates “solely to the individual interconnection, service, or element being requested.”²¹ Some commenters point to that decision, and focus on the sentence's inclusion of the word “any” to demonstrate that there is only one permissible reading of section 252(i).²² However, section 252(i) does not end after the words “any other requesting telecommunications carrier”;²³ Congress included the clause “upon the same terms and conditions.”²⁴ As the Eighth Circuit explained, the referenced language “could simply indicate that an incumbent LEC would not be able to shield an individual aspect of a prior agreement from the reach of a subsequent entrant who is willing to accept the terms of the entire agreement.”²⁵ Consequently, we find that the inclusion of this phrase creates ambiguity, and today we move away from the Commission's narrow interpretation and adopt a more holistic and reasonable reading of the statute.²⁶

¹⁹See *id.* at 17413, 17416, paras. 721, 728.

²⁰*AT&T v. Iowa Utils. Bd.*, 525 U.S. at 396 (“[W]hether the Commission's approach will significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the Commission and eminently beyond our ken.”).

²¹47 U.S.C. § 252(i) (emphasis added); see *Local Competition Order*, 11 FCC Rcd at 16137-39, paras. 1310, 1315.

²²See CLEC Coalition Comments at 3 (citations omitted); PACE/CompTel Comments at 3-4. The CLEC Coalition in particular argues that the Supreme Court has held that the word “any” in a statute “has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind,’” and thus, the Commission's proposed interpretation would “render as mere surplusage,” the words “any interconnection, service or network element.” CLEC Coalition Comments at 5 (citing *United States v. Gonzales*, 520 U.S. 1, 5 (1997)); see also CLEC Coalition Reply at 7-8; MCI Comments at 4-5; MCI Reply at 3-4; Nextel Reply at 4; T-Mobile Reply at 1-3; US LEC *et al.* Reply at 7-8.

²³See 47 U.S.C. § 252(i).

²⁴See *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (holding that statutory construction is a holistic endeavor); see also *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (holding that a statute should be interpreted by looking at not only the particular statutory language, but to the design of the statute as a whole and to its object and policy).

²⁵*Iowa Utils. Bd. v. FCC*, 120 F.3d at 801 n.22.

²⁶The legislative history does not resolve the ambiguity. The CLEC Coalition argues that a statement from the Senate Commerce Committee shows clear intent. See CLEC Coalition at 3-4 (arguing that section 252(i) was intended to “make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated” (citing *Report of the Committee on Commerce, Science, and Transportation on S. 652*, S. Rpt. No. 104-23, at 21-22 (1995))). However, we find that this language falls short, for the meaning of “individual elements” is also ambiguous. Moreover, the Senate bill still contains the phrase, “upon the same terms and conditions,” and thus, it is unclear if Congress meant that any “individual elements,” “services,” “facilities” or “functions” could be taken so long as either the whole provision or the whole agreement was taken.

8. We also find strong support that section 252(i) is ambiguous from the Supreme Court's decision in *AT&T v. Iowa Utilities Board*, which held that the Commission has the expertise to determine a reasonable interpretation of section 252(i).²⁷ Several competitors rely heavily on the Court's pronouncements that the current rule "tracks the pertinent language almost exactly," and is the "most readily apparent reading."²⁸ The Supreme Court, however, did not hold that the Commission's current interpretation of section 252(i) is compelled by the statute. Had it done so, the Court would not have had to reach the question of whether the Commission's interpretation is reasonable, nor would it have acknowledged that the ability to interpret section 252(i) is a matter "eminently within the expertise" of the Commission, and would have necessarily foreclosed our ability to make any other interpretation.²⁹ We are not convinced by the CLEC Coalition's assertion that the Court confined the Commission's discretion in this area to only its ability to place limits on the pick-and-choose rule.³⁰ We find no such limitation because it does not stand to reason that the Court would declare another possible interpretation of section 252(i), *i.e.*, the all-or-nothing rule, to be "eminently fair," but then restrict the Commission's discretion to only the pick-and-choose rule.³¹ Moreover, the Commission did not irrevocably commit itself to the pick-and-choose interpretation during its appeal of the *Iowa Utilities Board* decision, as MCI suggests.³² The Supreme Court has routinely recognized that government agencies have discretion to

Lastly, we find that the CLEC Coalition's reliance upon a sole congressional source to prove legislative intent is misplaced because courts typically require other corroborating documents. See *Zuber v. Allen*, 398 U.S. 168, 186-87 (1969) (holding that when interpreting the meaning of a statute, little reliance should be placed on committee reports unless there is also accompanying floor debate by individual members of Congress).

²⁷*AT&T v. Iowa Utils. Bd.*, 525 U.S. at 396.

²⁸*Id.* See generally ALTS Comments at 3 (citations omitted); AFB *et al.* at 6-8; CLEC Coalition Comments at 4; MCI Comments at 5; PACE/CompTel Comments at 3; Sprint Comments at 5; Sprint Reply at 4; US LEC *et al.* Comments at 2; Z-Tel Comments at 14; ALTS June 25, 2004 *Ex Parte* Letter at 1.

²⁹*AT&T v. Iowa Utils. Bd.*, 525 U.S. at 396.

³⁰See CLEC Coalition Comments at 4. Specifically, the CLEC Coalition reads the Supreme Court's statement that whichever regulatory approach the Commission decides to take "is a matter eminently within the [Commission's] expertise," to curtail the Commission's authority to interpret section 252(i). See *id.* (citing *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 396).

³¹*AT&T v. Iowa Utils. Bd.*, 525 U.S. at 396.

³²Specifically, MCI states that the Commission took the position in briefs before both the Supreme Court and the Eighth Circuit that the existing rule is the only reasonable interpretation of section 252(i). See MCI Comments at 5-6 (citing *Reply Brief for the Federal Petitioners (FCC and the United States)*, 1998 WL 396961, at *49 n.33 (June 17, 1998); *Reply Brief for the Federal Petitioners and Brief for the Federal Cross-Respondents (FCC and the United States)*, LEXIS, 1997 U.S. Briefs 826 (June 17, 1998); *Brief for Respondents (FCC and the United States)*, No. 96-3321 (8th Cir. Dec. 23, 1996)); see also MCI Reply at 4-5 n.8; Z-Tel Comments at 13.

change interpretations of ambiguous statutes,³³ and that an agency is not estopped from changing its view.³⁴

9. Unlike the Commission's attempt in the *Local Competition Order* to forecast how a new statutory framework would play out, our reassessment of the policies that will effectively advance the Act's goals today is informed by the competitive experiences compiled in our record. At the time of the *Local Competition Order*'s release, the Commission had no practical experience with the actual mechanics of interconnection agreements.³⁵ In 1996, the Commission could not have predicted the tremendous scope and sophistication of the interconnection agreement negotiation process and the commensurate breadth of bargaining and compromise.³⁶ Given the Commission's lack of practical experience at the time of the pick-and-choose rule's creation, we find that overall it made inaccurate presumptions that we now correct below.

³³See, e.g., *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996); *Rust v. Sullivan*, 500 U.S. 173, 187 (1991); *Office of Communication, Inc. of the United Church of Christ v. FCC*, 327 F.3d 1222 (D.C. Cir. 2003) (finding that the Commission had adequately explained its departure from two longstanding policies, which were based on the agency's interpretation of an ambiguous statute); see also *Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064, 1070 (D.C. Cir. 2004) (finding the Commission's explanation of its change in position regarding independent payphone providers' end-user status "more than sufficient to provide the 'reasoned explanation' we require of an agency that changes its position."); *Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 322-24 (5th Cir. 2001).

³⁴*Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). The only form of estoppel that courts recognize in this area is judicial estoppel. Judicial estoppel applies where a party assumes a successful position in a legal proceeding, and then assumes a contrary position simply because interests have changed, and is especially so if the change in position prejudices a party who acquiesced in the position formerly taken. See *New Hampshire v. Maine*, 532 U.S. 767, 749 (2001). Judicial estoppel does not apply here because the Supreme Court did not adopt the Commission's litigation position that its reading of section 252(i) was compelled by the statute. Cf. *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 130-31 (1990) (rejecting agency's later interpretation of statute where court previously determined that "[a]ny other construction . . . opens the door to the possibility of the very abuses . . . which it was the design of the statute to prohibit and punish."); see also *New Hampshire v. Maine*, 532 U.S. at 755 (finding that "broad interests of public policy may make it important to allow a change of positions that might seem inappropriate as a matter of merely private interests"); *United States v. Owens*, 54 F.3d 271, 275 (6th Cir. 1995); *NLRB v. Viola Indus. - Elevator Division, Inc.*, 979 F.2d 1384, 1393-95 (10th Cir. 1992) (en banc) (holding that even when an agency has changed its mind, the courts "should not approach the statutory construction issue *de novo* and without regard to the administrative understanding of the statutes") (citations omitted); *Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1134-36 (9th Cir. 1988) (en banc).

³⁵A requesting carrier may: (1) purchase services and elements through an SGAT in states with effective SGATs; (2) pick and choose individual provisions from existing agreements negotiated by other competitive carriers; (3) adopt an entire agreement negotiated by another competitive carrier; or (4) negotiate a new interconnection agreement with the incumbent LEC. See generally 47 U.S.C. § 252(a)(1), (f), (i).

³⁶Negotiations take typically months to complete, resulting in intricate agreements often exceeding 500 pages. See Letter from Jan S. Price, Associate Director – Federal Regulatory, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Affidavit of Terri D. Mansir, para. 5 (filed Apr. 29, 2004) (SBC Mansir Aff.). The SBC affiant, Terri D. Mansir, serves as SBC's Lead Negotiator of interconnection agreements. See *id.* at para. 1. The immense size and complexity of the agreements result from the wide range of complex issues covered by those agreements, including rates for products and services; terms and conditions under which they will be provided; and technical operational provisions. See *id.* at para. 4.

10. As discussed below, we conclude that the burdens of the current pick-and-choose rule outweigh its benefits. Specifically, based on this record, we find that the existing pick-and-choose rule fails to promote the meaningful, give-and-take negotiations envisioned by the Act. Because we find that the current pick-and-choose rule is not compelled by section 252(i) and an all-or-nothing approach better achieves statutory goals, we eliminate the pick-and-choose rule and replace it with an all-or-nothing rule. Under the all-or-nothing rule we adopt here, a requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms, and conditions of the adopted agreement. However, for reasons discussed below, we decline to adopt the *FNPRM*'s conditional SGAT proposal.³⁷ We also clarify that in order to allow this regime to have the broadest possible ability to facilitate compromise, the new all-or-nothing rule will apply to all effective interconnection agreements, including those approved and in effect before the date the new rule goes into effect. As of the effective date of the new rule, the pick-and-choose rule will no longer apply to any interconnection agreement.³⁸

B. "All-or-Nothing" Rule

11. On the record now before us, we find that the pick-and-choose rule is a disincentive to give and take in interconnection negotiations. We also find that other provisions of the Act and our rules adequately protect requesting carriers from discrimination. Therefore, we conclude that the burdens of retaining the pick-and-choose rule outweigh the benefits. We also find the all-or-nothing approach to be a reasonable interpretation of section 252(i) that will "restore incentives to engage in give-and-take negotiations while maintaining effective safeguards against discrimination."³⁹

12. *Incentives to Negotiate.* The record supports adoption of our tentative conclusion that "the pick-and-choose rule discourages the sort of give-and-take negotiations that Congress envisioned."⁴⁰ In the *Local Competition Order*, the Commission considered and rejected arguments that the pick-and-choose rule would impede interconnection negotiations by making incumbent LECs less likely to compromise.⁴¹ Eight years of experience with negotiations have proven otherwise. We conclude that, based on the record evidence, the pick-and-choose rule has "significantly impede[d] negotiations . . . by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions . . ."⁴² The result has been the adoption of largely standardized agreements with little creative bargaining to meet the needs of both the incumbent LEC and the requesting carrier.⁴³ We find that the record evidence supports our conclusion that an all-or-nothing rule would better serve the goals of sections 251 and 252 to promote negotiated interconnection agreements because it would

³⁷See section III.C, *infra*.

³⁸See Verizon Comments at 5.

³⁹*FNPRM*, 18 FCC Rcd at 17414, para. 724.

⁴⁰*Id.* at 17413, para. 722.

⁴¹See *Local Competition Order*, 11 FCC Rcd at 16138-39, para. 1313.

⁴²*AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 396.

⁴³See, e.g., Cox Comments at 2, 4; CenturyTel Comments at 3; Qwest Comments at 4; SBC Comments at 3-4; NASUCA Comments at 7; PAETEC Comments at 3; see also BellSouth Comments, CC Docket No. 01-117, at 2; Verizon Comments, CC Docket No. 01-117, at 2.

encourage incumbent LECs to make trade-offs in negotiations that they are reluctant to accept under the existing rule.⁴⁴

13. Incumbent LECs persuasively demonstrate that they seldom make significant concessions in return for some trade-off for fear that third parties will obtain the equivalent benefits without making any trade-off at all.⁴⁵ In addition, the record demonstrates that the pick-and-choose rule imposes material costs and delay on both parties and serves as a regulatory obstacle to mutually beneficial transactions. For example, incumbent LEC commenters show that, when there are proposed trade-offs that would be beneficial to their interests, they expend significant resources conferring internally to assess the risks of the pick-and-choose rule and to attempt to craft language that adequately limits the risk that a requesting carrier would be able to adopt a provision without associated trade-offs.⁴⁶ As BellSouth demonstrates, “[u]nder the specter of pick and choose, what should be a simple negotiation that could be handled in a matter of days turns into a series of meetings with numerous people, and takes significantly longer to negotiate.”⁴⁷ Moreover, incumbent LECs adduced evidence showing that the pick-and-choose rule deters them from testing and implementing mutually beneficial innovative business arrangements through interconnection agreements.⁴⁸ PAETEC, a competitive LEC, argues that facilities-based competitive LECs in particular will benefit from elimination of the pick-and-choose rule because they will be able to negotiate mutually beneficial concessions with incumbent LECs to facilitate innovative business strategies.⁴⁹ The record evidence supports our conclusion that the pick-and-choose rule “makes interconnection agreement negotiations even more difficult and removes any incentive for ILECs to negotiate any provisions other than those necessary to implement what they are legally obligated to provide CLECs” under the Act.⁵⁰ We are persuaded, based on the record before us, that the pick-and-

⁴⁴See BellSouth Comments at 6-7; CenturyTel Comments at 4-6; Qwest Comments at 6; SBC Comments at 4, 6-7; Verizon Comments at 2; see also PAETEC Comments at 1-6; Verizon Wireless Comments at 3; Florida Commission Comments at 4; New York Commission Comments at 2; Ohio Commission Comments at 3. *But see* BellSouth Comments at 4-5 (seeking forbearance from section 252(i)); USTA Comments at 5 (opposing both pick-and-choose and all-or-nothing rules).

⁴⁵See *FNPRM*, 18 FCC Rcd at 17413, para. 722; BellSouth Comments at 4-6; CenturyTel at 3; Qwest Comments at 4; SBC Comments at 3-4; Verizon Comments at 2-3; BellSouth Reply at 2; SBC Reply at 5; Florida Commission Comments at 4; New York Commission Comments at 2; Ohio Commission Comments at 3; Letter from Clint Odom, Executive Director – Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 1-2 (filed Mar. 25, 2004) (Verizon Mar. 25, 2004 *Ex Parte* Letter); see also PAETEC Comments at 3-4, 6; BellSouth Comments, CC Docket No. 01-117, at 2; Qwest Comments, CC Docket No. 01-117, at 1; USTA Reply, CC Docket No. 01-117, at 3-4.

⁴⁶See Letter from Mary L. Henze, Assistant Vice President – Federal Regulatory, BellSouth, to Marlene Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 01-338, 96-98, 98-147, Affidavit of Jerry D. Hendrix, para. 6 (filed May 11, 2004) (BellSouth Hendrix Aff.).

⁴⁷BellSouth Hendrix Aff. at para. 6; see also PAETEC Comments at 3.

⁴⁸See BellSouth Hendrix Aff. at para. 9; see also ALTS Comments at 5 (conceding that the pick-and-choose rule may “inhibit innovative deal making”); SBC Reply at 6; ALTS Reply, CC Docket No. 01-117, at 7; USTA Reply, CC Docket No. 01-117, at 5.

⁴⁹See PAETEC Comments at 6-7; see also Letter from Robert W. McCausland, Vice President, Regulatory Affairs, Sage, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Declaration of James H. Sturges, paras. 3-18 (filed June 30, 2004). *But see* Sprint Reply at 2; T-Mobile Reply at 9.

⁵⁰SBC Mansir Aff. at para. 21; see also PAETEC Comments at 3. *But see* Z-Tel Comments, CC Docket No. 01-117, at 8.

choose rule undermines negotiations by unreasonably constraining incentives to bargain during negotiations.

14. We disagree with supporters of the current pick-and-choose rule that contend the rule provides requesting carriers, especially small carriers, some measure of leverage against the incumbent LECs' stronger bargaining position even if those carriers do not actually use the pick-and-choose rule to form agreements.⁵¹ These commenters argue that, without the pick-and-choose rule, incumbent LECs will have no incentive to bargain fairly with requesting carriers, and therefore, more negotiations will end inevitably in costly and burdensome arbitrations.⁵² We find, however, that, on balance, any hypothetical disadvantage in negotiating leverage is outweighed by the potential creativity in negotiation that an all-or-nothing rule would help promote. We expect requesting carriers, large and small alike, to benefit from the incumbent LECs' increased incentives to engage in meaningful give-and-take negotiations under an all-or-nothing rule. Specifically, under the new rule, requesting carriers should be able to negotiate individually tailored interconnection agreements designed to fit their business needs more precisely. Requesting carriers with limited resources will have the option of adopting a suitable agreement in its entirety, as is common practice today,⁵³ if they decline to pursue negotiated interconnection agreements. And, while we recognize that the potential costs of arbitrations are not insignificant, the benefits of an all-or-nothing approach outweigh these transaction costs. Indeed, the arbitration process created in the Act is often invoked under the current pick-and-choose rule and will remain as a competitive safeguard for all parties.

15. We also reject commenters' related contentions that incumbent LECs would have every incentive to "slow-roll" negotiations in an effort to delay competitive entry.⁵⁴ Competitors assert that the pick-and-choose rule constrains the ability of incumbent LECs to stall negotiations because competitors can choose preexisting sections of an agreement rather than beginning from scratch.⁵⁵ Indeed, in the *Local Competition Order*, the Commission predicted that the pick-and-choose rule would be used by

⁵¹See, e.g., MCI Comments at 2, 8-12; ALTS Comments at 4, 11; CLEC Coalition Comments at 8, 12; RICA Comments at 3-4; AFB *et al.* Comments at 11-12; Z-Tel Comments at 11-12, 15-16; California Commission Comments at 3-4; Cox Comments at 5-6; LecStar Comments at 2; Mpower Comments at 6; PACE/CompTel Comments at 5; US LEC *et al.* Comments at 6; Iowa Commission Comments at 3; Lightpath Reply at 2; CLEC Coalition Reply at 8-10; AFB *et al.* Reply at 3; Sprint Reply at 3-4; AT&T Wireless Reply at 2-3; T-Mobile Reply at 6-7; Arizona Commission Reply at 4, 7; see also ASCENT Comments, CC Docket No. 01-117, at 8; Focal Comments, CC Docket No. 01-117, at 3; Z-Tel Comments, CC Docket No. 01-117, at 3, 6; WorldCom Reply, CC Docket No. 01-117, at 2; ALTS June 25, 2004 *Ex Parte* Letter at 2-3; Letter from Brent L. Johnson, Chairman of the Board, and Chris Dimock, President & CEO, OneEighty Communications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 98-147, 96-98 at 1, 3 (filed June 23, 2004) (OneEighty June 23, 2004 *Ex Parte* Letter). But see PAETEC Comments at 1-6.

⁵²See Cox Comments at 2, 4-6; PACE/CompTel Comments at 8; MCI Comments at 18-20; Z-Tel Comments at 11-12; CLEC Coalition Comments at 12; LecStar Comments at 5; California Commission Comments at 4-5; Birch Reply at 3; Lightpath Reply at 2; Sprint Reply at 2; AT&T Wireless at 3-4; Nextel Reply at 9; see also Z-Tel Comments, CC Docket No. 01-117, at 10-11; ALTS June 25, 2004 *Ex Parte* Letter at 2. But see Verizon Reply at 4.

⁵³See para. 21, *infra*.

⁵⁴See MCI Comments at 9; see also CLEC Coalition Comments at 12; Mpower Comments at 6; PACE/CompTel Comments at 8-10; CLEC Coalition Reply at 12; Arizona Commission Reply at 10-11. But see SBC Reply at 3 (arguing that incumbent LECs have no incentive to delay because most agreements contain an evergreen clause that allows the agreement to remain in effect until the effective date of a successor agreement).

⁵⁵See CLEC Coalition Comments at 12-13.

competitive LECs to expedite the creation of interconnection agreements and would “speed the emergence of robust competition.”⁵⁶ Some incumbent LEC and competitive LEC commenters agree that, after eight years of experience with interconnection negotiations, the pick-and-choose rule in practice has resulted in substantial delays in finalizing agreements, rather than expediting the process as the Commission intended.⁵⁷ Thus, we find that, based on the record, the pick-and-choose rule has not expedited the process, as the Commission expected, and that the all-or-nothing rule will not add delays in reaching agreements. Instead, we conclude that an all-or-nothing rule would benefit competitive LECs because competitive LECs that are sensitive to delay would be able to adopt whole agreements, as is common practice today,⁵⁸ while others would be able to reach agreements on individually tailored provisions more efficiently.

16. We also find that disputes over obligations under the pick-and-choose rule have become a significant obstacle to efficient negotiations of interconnection between incumbent LECs and requesting carriers. There are conflicting claims on the record with regard to abuses of the pick-and-choose rule. Incumbent LECs allege that requesting carriers have used the pick-and-choose rule to “cherry pick” beneficial terms without adopting legitimately related terms that were negotiated in the original agreement.⁵⁹ At the same time, competitive LECs allege that incumbent LECs have used the “legitimately related” requirement to deny requesting carriers provisions to which they were entitled to pick and choose in violation of section 252(i) and the Commission’s rules.⁶⁰

17. Without reaching the merits of individual accusations presented in the record, we find that the “legitimately related” requirement has become an obstacle to give-and-take negotiations rather than an incentive for give and take, as the Commission originally intended. The record before us demonstrates that attempts by requesting carriers to pick and choose often devolve into protracted disputes with accusations of anticompetitive motives on both sides. As a result, negotiations are delayed, incumbent LECs are reluctant to engage in give-and-take negotiations even where terms might be legitimately related for fear of having to defend against unreasonable pick-and-choose requests, and requesting carriers are denied the benefits of individualized agreements that meet their business needs. Accordingly, we conclude that, based on the record, the pick-and-choose rule has proven to be difficult to administer in practice and has impeded productive give-and-take negotiations as intended by the Act. Because compliance with the all-or-nothing rule we adopt here will be more easily identifiable and administrable, we expect the rule to produce fewer disputes over implementation and, therefore, to provide increased incentive for incumbent LECs to grant concessions in return for trade-offs in the normal course of negotiations.

18. **Protections Against Discrimination.** Based on the record now before us, we conclude that existing state and federal safeguards against discriminatory behavior are sufficient and that any additional protection that the current pick-and-choose rule may provide is unnecessary. In the *Local Competition Order*, the Commission concluded that the primary purpose of section 252(i) is to prevent

⁵⁶*Local Competition Order*, 11 FCC Rcd at 16138-39, para. 1313.

⁵⁷See, e.g., BellSouth Hendrix Aff. at para. 6; PAETEC Comments at 3; Cox Reply at 2-3; SBC Reply at 3-4.

⁵⁸See para. 21, *infra*.

⁵⁹See, e.g., SBC Comments at 3-4; SBC Mansir Aff. at paras. 6-7, 14-20; Verizon Comments at 2; SBC Reply at 4-5. But see LecStar Comments at 3; PACE/CompTel Comments at 6; Sprint Comments at 4-5.

⁶⁰See CLEC Coalition Comments at 13-16; see also Nextel Reply at 13; ASCENT Comments, CC Docket No. 01-117, at 8. See generally *Local Competition Order*, 11 FCC Rcd at 16139, para. 1315.

discrimination.⁶¹ The Commission considered and rejected an all-or-nothing approach because it was concerned that such a rule would be ineffective in preventing certain forms of discrimination, contrary to the intent of section 252(i),⁶² and that as a practical matter, “few new entrants would be willing to elect an entire agreement”⁶³ The current record, however, demonstrates that in practice competitive LECs frequently adopt agreements in their entirety.⁶⁴ We believe that this practice indicates that the pick-and-choose protections against discrimination are superfluous. As we stated in the *FNPRM*, we continue to have concerns about discrimination as a general matter.⁶⁵ We find, however, that the pick-and-choose rule does not afford requesting carriers protections against discrimination beyond those that would be in place under the all-or-nothing rule we adopt here. Because the pick-and-choose rule does not provide added protection against discrimination but at the same time serves a disincentive to negotiations, we conclude that the burdens of the pick-and-choose rule outweigh the benefits. Thus, we adopt the all-or-nothing rule, which we expect to encourage negotiations while protecting requesting carriers from discrimination.

19. We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i).⁶⁶ Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers. If the agreement includes terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain the benefit of the incumbent LEC’s discriminatory bargain. Because these agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.

20. Moreover, section 251(c) requires incumbent LECs to provide interconnection, unbundled network elements, telecommunications services for resale, and collocation on nondiscriminatory terms and conditions.⁶⁷ If negotiations reach an impasse, either party may petition for arbitration by the state commission.⁶⁸ Section 252 imposes deadlines for approvals and arbitrations that ensure that interconnection agreements are finalized in a timely manner.⁶⁹ Section 252(e)(1) requires carriers to file any negotiated or arbitrated interconnection agreement with the relevant state commission for approval.⁷⁰ Under section 252(e)(2)(A)(i), state commissions may reject a negotiated agreement if “the agreement (or

⁶¹ See *Local Competition Order*, 11 FCC Rcd at 16139, para. 1315.

⁶² See *id.* at 16138, para. 1312.

⁶³ *Id.*

⁶⁴ See para. 21, *infra*; see also PAETEC Comments at 2; SBC Reply at 2-3; BellSouth Reply at 1; Letter from Clint Odom, Executive Director – Federal Regulatory Advocacy, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 4 (filed Apr. 21, 2004) (Verizon Apr. 21, 2004 *Ex Parte* Letter).

⁶⁵ See *FNPRM*, 18 FCC Rcd at 17414, para. 724.

⁶⁶ See, e.g., BellSouth Reply at 1, 5; SBC Reply at 5. *But see* Lightpath Reply at 2; AFB *et al.* Reply at 3; ASCENT Comments, CC Docket No. 01-117, at 9; AT&T Reply, CC Docket No. 01-117, at 3; WorldCom Reply, CC Docket No. 01-117, at 2.

⁶⁷ 47 U.S.C. § 251(c)(2)(D), (c)(3), (c)(4)(B), (c)(6).

⁶⁸ See 47 U.S.C. § 252(b).

⁶⁹ See 47 U.S.C. § 252(b)(4)(C), (e)(4).

⁷⁰ 47 U.S.C. § 252(e)(1); see also 47 U.S.C. § 252(e)(2)(A)(i).

any portion thereof) discriminates against a telecommunications carrier not a party to the agreement⁷¹ Following a state commission determination, any party may bring an action in an appropriate federal district court to determine whether the agreement meets the requirements of sections 251 and 252.⁷² In addition, requesting carriers seeking remedies for alleged violations of section 252(i) may file complaints pursuant to section 208.⁷³ Given the statutory nondiscrimination provisions and the procedural mechanisms to ensure compliance with the Act's nondiscrimination requirements at both the state and federal levels, we conclude that the Act provides requesting carriers with adequate protections against discrimination without the pick-and-choose rule.

21. We reject commenters' arguments that, if we adopt an all-or-nothing rule, incumbent LECs will insert onerous terms or "poison pills" into agreements to discourage competitive LECs from adopting agreements in whole.⁷⁴ They argue that to avoid such onerous terms, requesting carriers will be forced into lengthy and expensive negotiations and ultimately, arbitration.⁷⁵ Indeed, in the *Local Competition Order*, the Commission expressed particular concern that an all-or-nothing rule would facilitate this type of discrimination.⁷⁶ As discussed above, we now believe that the Act provides adequate protection against discrimination, including poison pills, under an all-or-nothing rule. The record does not demonstrate that concerns with regard to poison pills have materialized over the eight years of experience with negotiated interconnection agreements.⁷⁷ Although the Commission made a predictive judgment in the *Local Competition Order* that new entrants would likely be unwilling to adopt agreements in their entirety, this prediction has simply not proven to be the case in practice.⁷⁸ While we recognize that the

⁷¹47 U.S.C. § 252(e)(2)(A)(i). In the *FNPRM*, we stated that in regard to the conditional SGAT proposal, state commissions could "reject a customized agreement as discriminatory only if the commission found that the parties intended to discriminate against other carriers. The fact that a third party might be unable to opt into the agreement as a practical matter would not constitute unreasonable discrimination in light of the availability of interconnection, UNEs, and services under the state-approved SGAT." *FNPRM*, 18 FCC Rcd at 17415, para. 725 n.2150. We clarify that, because we decline to adopt the conditional SGAT proposal, we also decline to adopt this limitation on state commissions' findings of discrimination.

⁷²47 U.S.C. § 252(e)(6).

⁷³47 U.S.C. § 208; see *Local Competition Order*, 11 FCC Rcd at 16141, para. 1321; para. 29, *supra*.

⁷⁴See ALTS Comments at 5, 8-9; CLEC Coalition Comments at 7, 9; LecStar Comments at 5-6; MCI Comments at 9, 13-14; PACE/CompTel Comments at 7; US LEC *et al.* Comments at 6-7; Z-Tel Comments at 11-12; CenturyTel Reply at 2; CLEC Coalition Reply at 10-11; MCI Reply at 8-9; T-Mobile Reply at 16; US LEC *et al.* Reply at 2-3; see also Covad Comments, CC Docket No. 01-117, at 4-6; Focal Comments, CC Docket No. 01-117, at 4-6; Z-Tel Comments, CC Docket No. 01-117, at 11; ALTS Reply, CC Docket No. 01-117, at 4; AT&T Reply, CC Docket No. 01-117, at 3; Focal Reply, CC Docket No. 01-117, at 2-3; WorldCom Reply, CC Docket No. 01-117, at 1.

⁷⁵See MCI Comments at 13; ALTS Comments at 5, 8-9; see also CLEC Coalition Comments at 12; ALTS June 25, 2004 *Ex Parte* Letter at 2; OneEighty June 23, 2004 *Ex Parte* Letter at 3-4.

⁷⁶See *Local Competition Order*, 11 FCC Rcd at 16138, para. 1312.

⁷⁷But see LecStar Comments at 5.

⁷⁸For example, Verizon states that of its 3,687 effective interconnection agreements, 1,504, or 41% were adoptions of existing agreements. See Verizon Apr. 21, 2004 *Ex Parte* Letter, Attach. at 4. SBC states that in the year ending September 30, 2003, SBC executed 477 interconnection agreements, of which 282, or roughly 59%, constituted adoptions *in toto* from SBC's model agreement or from other competitive LECs' agreements. See SBC Reply at 2. BellSouth states that of its 496 operational agreements, about 23% resulted from some form of picking and choosing. See BellSouth Reply at 1. This evidence substantiates one competitive LEC's observation that "alternative negotiated terms based on perceived pick-and-choose rights are the exception rather than the rule." PAETEC at 2.

pick-and-choose rule has likely served as a deterrent to poison pill provisions to some extent, we also believe that if the Act did not already provide adequate protection against this and other forms of discrimination, incumbent LECs would have had some degree of incentive to include such terms in agreements given the widespread practice by requesting carriers of adopting entire agreements. Based on the record of this proceeding, we do not find evidence of uses of poison pills to discriminate against carriers that are not parties to the agreements. Thus, we believe this experience supports our conclusion that the Act provides adequate protection against discrimination, including poison pills, without the pick-and-choose rule. If experience under the rule we adopt today indicates that carriers are agreeing to provisions that violate the antidiscrimination mandate of the Act, we will take appropriate action as needed.

22. LecStar alleges that interconnection agreements between incumbent LECs and larger competitive LECs already contain poison pills.⁷⁹ Specifically, LecStar states that these agreements contain provisions that can only be fulfilled by larger competitive LECs, such as volume and term discounts. Although we do not make any findings regarding any particular interconnection agreement, volume or term discounts may be included in agreements so long as the volume or term of the discount is not discriminatory.⁸⁰ For instance, as discussed in the *Local Competition Order*, “where an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment.”⁸¹

23. We are similarly not persuaded by commenters that the pick-and-choose rule must be retained at a minimum for interconnection agreements between incumbent LECs and their affiliates (including wireless and section 272 separate affiliates) due to a higher risk of discrimination by incumbent LECs in favor of affiliates.⁸² We note commenters’ concerns that incumbent LECs could attempt to include poison pills in affiliate agreements.⁸³ We reaffirm, however, that the Act’s nondiscrimination provisions discussed above apply to incumbent LECs’ interconnection agreements with affiliates. We have no reason to believe, based on the record, that the Act’s protections against discrimination will be any less effective in this context.

24. Based on these findings, we conclude that the benefits, in terms of protection against discrimination, of the pick-and-choose rule do not outweigh the significant disincentive it creates to negotiated interconnection agreements. We conclude that requesting carriers will be protected against discrimination under the all-or-nothing rule and other statutory provisions. Accordingly, we eliminate the pick-and-choose rule and replace it with the all-or-nothing rule.⁸⁴

⁷⁹See LecStar Comments at 5; see also ALTS June 25, 2004 *Ex Parte* Letter at 2; OneEighty June 23, 2004 *Ex Parte* Letter at 2-3. But see CenturyTel Reply at 3-4.

⁸⁰See *Local Competition Order*, 11 FCC Rcd at 16139, para. 1315.

⁸¹*Id.*; see also *id.* (“Similarly, that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops.”).

⁸²See Nextel Reply at 14-15; T-Mobile Reply at 15-16; ALTS June 25, 2004 *Ex Parte* Letter at 2.

⁸³See, e.g., ALTS June 25, 2004 *Ex Parte* Letter at 2.

⁸⁴See Appendix B, *infra*. In its comments, BellSouth suggests that we could forbear from the requirements of section 252(i) to relieve the incumbent LECs from the pick-and-choose rule. See BellSouth Comments at 4. Instead, we adopt our new interpretation of section 252(i) as a rule of general applicability based upon the record in this rulemaking proceeding.

C. Other Proposals

25. *The Proposed SGAT Condition.* We decline to adopt our tentative conclusion that the current pick-and-choose rule would continue to apply to all approved interconnection agreements if the incumbent LEC does not file and obtain state approval for an SGAT.⁸⁵ The record of this proceeding reflects widespread opposition to the proposed SGAT condition. Incumbent LECs, competitive LECs, wireless carriers, and state commissions generally agree that there are significant legal and practical concerns with this proposal and that an SGAT condition would not afford competitors additional protection from discrimination.⁸⁶

26. Based on the record, we agree with opponents to this proposal and find that an SGAT condition would impose significant burdens on incumbent LECs, requesting carriers, and state commissions that outweigh any benefit in the form of additional protection against discrimination. Specifically, we agree with commenters that the SGAT condition would impose costs and administrative burdens on incumbent LECs to file SGATs in states currently without SGATs; on requesting carriers to participate in state SGAT proceedings; and on state commissions to conduct proceedings to review and approve the SGATs.⁸⁷ At the same time, we recognize that section 252 does not require state review before SGATs take effect; nor does it require timely updates.⁸⁸ As described above, we conclude that the existing safeguards against discrimination, including the section 252(e)(1) filing requirement and state commission approval, afford competitors adequate protection under an all-or-nothing rule.⁸⁹ Moreover, we recognize that if the SGAT condition were needed to protect against discrimination, the fact that the SGAT provision of the Act does not apply to non-BOC incumbent LECs would limit our ability to impose a uniform rule.⁹⁰ Accordingly, because we believe that the SGAT condition would be

⁸⁵See *FNPRM*, 18 FCC Rcd at 17414-15, para. 725.

⁸⁶See ALTS Comments at 9-10; CLEC Coalition Comments at 16-17; Cox Comments at 6-8; Mpower Comments at 2, 10; PACE/CompTel Comments at 7-8; RICA Comments at 5-6; AFB *et al.* Comments at 9-10; Sprint Comments at 5-7; US LEC *et al.* Comments at 7-10; MCI Comments at 2-3, 17-18, Attach., Declaration of Dayna D. Garvin (MCI Garvin Decl.); BellSouth Comments at 6-7; SBC Comments at 4-5; Verizon Comments at 5-7; Verizon Wireless Comments at 9; California Commission Comments at 5; NASUCA Comments at 23-24; AFB *et al.* Reply at 3; Arizona Commission Reply at 4, 8; AT&T Wireless Reply at 4-5; CLEC Coalition Reply at 14-16; Nextel Reply at 16; Sprint Reply at 4-5; T-Mobile Reply at 10-13; US LEC *et al.* Reply at 4; Verizon Reply at 7; Letter from Jonathan Lee, Senior Vice President, Regulatory Affairs, CompTel/ASCENT, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 98-147, 96-98 at 1-3 (filed July 1, 2004) (CompTel/ASCENT July 1, 2004 *Ex Parte* Letter); Letter from A. Renee Callahan, Counsel for MCI, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 98-147, 96-98, Attach. 1 at 5 (filed Dec. 18, 2003) (MCI Dec. 18, 2003 *Ex Parte* Letter); OneEighty June 23, 2004 *Ex Parte* Letter at 5-6.

A small number of commenters support the proposed SGAT condition as part of the overall all-or-nothing approach proposed in the *FNPRM*. See, e.g., PAETEC Comments at 6-7; CenturyTel Comments at 2, 7; Qwest Comments at 6-7; New York Commission Comments at 2; CenturyTel Reply at 4.

⁸⁷See, e.g., SBC Comments at 4-5; California Commission Comments at 5; AT&T Wireless Reply at 4-5; Verizon Apr. 21, 2004 *Ex Parte* Letter, Attach. at 6.

⁸⁸See 47 U.S.C. § 252(f); see also, e.g., MCI Comments at 2-3, 17-18, Garvin Decl.; CLEC Coalition Comments at 17; AFB *et al.* Reply at 7; T-Mobile Reply at 9; Arizona Commission Reply at 4, 8.

⁸⁹See section III.B, *supra*.

burdensome, and difficult to implement, and is unnecessary given the other protections against discrimination, we decline to impose this condition.

27. *Parties' Proposed Alternatives.* As an alternative proposal, several parties request that we clarify or modify the "legitimately related" requirement rather than replacing the pick-and-choose rule. These parties argue that by refining the rule, the Commission could provide more certainty to reduce disputes and alleviate incumbent LECs' concerns about cherry picking without abandoning the pick-and-choose rule altogether.⁹¹ We are not persuaded that modifying "legitimately related" short of an all-or-nothing rule would eliminate disputes sufficiently to encourage give-and-take negotiations. Apart from the difficulties raised by continually drawing lines and identifying trade-offs, we reject the notion that we should even assess whether provisions are legitimately related in a trade-off.⁹² Indeed, given the nature of give-and-take negotiations, we conclude that under our new interpretation, all of the provisions of a particular agreement taken together should be properly viewed as legitimately related under section 252(i). In a genuine give-and-take negotiation, otherwise unrelated provisions could be traded off for one another. By allowing these trade offs under a modified "legitimately related" rule, the incumbent LEC would continue to be burdened with demonstrating that the provisions are legitimately related, leading to the disputes that currently impede give and take in interconnection negotiations. We believe it would be difficult to craft a "legitimately related" rule that would eliminate these disputes. We believe, however, that compliance with an all-or-nothing rule can be readily determined, eliminating many of the problems associated with the pick-and-choose rule in the last eight years of negotiations. Thus, we conclude that an all-or-nothing rule is more likely to facilitate give-and-take negotiations than trying to clarify or modify the "legitimately related" requirement.

28. We also reject commenters' proposals that call for us to maintain a separate pick-and-choose regime for arbitrated agreements even if we were to adopt an all-or-nothing approach for negotiated agreements.⁹³ First, we find that section 252(i), which expressly applies to agreements approved under

⁹⁰See, e.g., Sprint Comments at 6-7; CenturyTel Comments at 6-7; Verizon Comments at 5-7; see also CLEC Coalition Reply at 14-16; AFB *et al.* Reply at 6. In the *FNPRM*, we proposed to allow non-BOC incumbent LECs to file "SGAT-equivalent" interconnection agreements with state commissions. See *FNPRM*, 18 FCC Rcd at 17415, para. 727 n.2151.

⁹¹See, e.g., CLEC Coalition Comments at 18; AFB *et al.* Reply at 9; CLEC Coalition Reply at 17-19; Letter from John J. Heitmann, Counsel for KMC, Xspedius, CompTel, Focal, ALTS, NuVox, SNiP LiNK, and XO, to Magalie R. Salas, Secretary, FCC, CC Docket No. 01-338, Attach. at 2 (filed May 27, 2004) (KMC *et al.* May 27, 2004 *Ex Parte* Letter); Letter from John R. Delmore, Senior Attorney – Federal Advocacy, MCI, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1 (filed May 13, 2004).

⁹²See, e.g., BellSouth Hendrix Aff. at para. 7 ("In a true negotiation, unrelated contract provisions left to be resolved are often 'horse-traded.' For example, BellSouth may agree to a CLEC's requested provision in exchange for the CLEC's agreement to an unrelated provision.").

⁹³See, e.g., Cox Comments at 8-10; Letter from Jonathan Lee, Sr. Vice President – Regulatory Affairs, CompTel/ASCENT, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed June 9, 2004) (CompTel/ASCENT June 9, 2004 *Ex Parte* Letter); Letter from Jason D. Oxman, General Counsel, ALTS, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1-2 (filed July 1, 2004) (ALTS July 1, 2004 *Ex Parte* Letter); Letter from J.G. Harrington, Counsel For Cox, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. at 1-2 (filed June 30, 2004). *But see* Letter from Terri Hoskins, Senior Counsel, SBC, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 at 1-4 (filed June 30, 2004).

section 252, does not differentiate between negotiated and arbitrated agreements.⁹⁴ Second, we are not convinced by the argument that we must retain pick-and-choose for arbitrated agreements because the rationale for our tentative conclusion – that the pick-and-choose rule creates disincentives for give-and-take negotiations – does not apply in the context of arbitrated agreements.⁹⁵ As discussed above, the primary purpose of section 252(i) is to prevent discrimination.⁹⁶ In the context of arbitrated interconnection agreements, requesting carriers are protected from discrimination primarily by the arbitration process itself.⁹⁷ Continuing to apply the pick-and-choose rule to arbitrated agreements, therefore, is an overly broad means of fulfilling the statutory purpose of protecting against discrimination. Moreover, we believe that maintaining separate regimes for negotiated and arbitrated agreements would be unnecessarily difficult to administer in practice. Accordingly, we do not find it necessary to adopt separate regulatory regimes for negotiated and arbitrated agreements as suggested by commenters. We affirm, however, that parties are under a statutory obligation to negotiate in good faith.⁹⁸ For example, any carrier attempting to arbitrate issues that have previously been resolved in an arbitration solely to increase another party's costs would be in violation of the duty to negotiate in good faith and could be subject to enforcement.

29. A number of commenters in this proceeding propose variations of the all-or-nothing or pick-and-choose approaches, or seek various clarifications of the current requirement.⁹⁹ We decline to adopt these proposed variations or clarifications because, as discussed above, we find that the all-or-nothing rule we adopt here will better facilitate give-and-take negotiations while, at the same time, eliminating disputes regarding the scope of “legitimately related.”¹⁰⁰ We do not intend for this rulemaking to create new, potentially disruptive disputes that could bring negotiations to a standstill. To the extent that carriers attempt to engage in discrimination, such as including poison pills in agreements, we expect state commissions, in the first instance, will detect such discriminatory practices in the review and approval process under section 252(e)(1). Discriminatory provisions include, but are not limited to, such things as inserting an onerous provision into an agreement when the provision has no reasonable relationship to the

⁹⁴47 U.S.C. § 252(i). We also note that section 252(e), which requires “[a]ny interconnection agreement adopted by negotiation or arbitration” to be submitted for approval, does not differentiate between the two types of agreements. 47 U.S.C. § 252(e)(1).

⁹⁵See CompTel/ASCENT June 9, 2004 *Ex Parte* Letter at 2.

⁹⁶See para. 18, *supra*; *Local Competition Order*, 11 FCC Rcd at 16139, para. 1315.

⁹⁷See also para. 20, *supra*. An argument can even be made that arbitrated agreement language is more nondiscriminatory than negotiated agreement language.

⁹⁸47 U.S.C. § 251(c)(1).

⁹⁹See, e.g., CLEC Coalition Comments at 18-21; Cox Comments at 8-11; MCI Comments at 20-22; CLEC Coalition Reply at 17-19; MCI Reply at 15-17; NASUCA Reply at 7; Z-Tel Comments, CC Docket No. 01-117, at 15-19; KMC *et al.* May 27, 2004 *Ex Parte* Letter at 2; Letter from Mary L. Henze, Assistant Vice President – Federal Regulatory, BellSouth, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147, Attach. 1 at 1-2 (filed Apr. 27, 2004) (BellSouth Apr. 27, 2004 *Ex Parte* Letter); MCI Dec. 18, 2003 *Ex Parte* Letter, Attach. 1 at 6.

¹⁰⁰Several parties participating in this proceeding also seek Commission pronouncements regarding a host of issues beyond those raised in the *FNPRM*. See, e.g., Verizon Comments at 4 (seeking a declaration that agreements governing network elements no longer subject to mandatory unbundling are not subject to section 252(i) nor the pick-and-choose rule); Birch Reply at 4-5 (proposing structural separation of incumbent LECs into wholesale and retail operations); T-Mobile Reply at 13-15 (urging the Commission to adopt a procedure for federal arbitration of national interconnection agreements). This Order does not take a position on any issue outside the scope of the *FNPRM*.

requesting carrier's operations. We would also deem an incumbent LEC's conduct to be discriminatory if it denied a requesting carrier's request to adopt an agreement to which it is entitled under section 252(i) and our all-or-nothing rule.

30. We also reject the contention of at least one commenter that incumbent LECs should be permitted to restrict adoptions to "similarly situated" carriers.¹⁰¹ We conclude that section 252(i) does not permit incumbent LECs to limit the availability of an agreement in its entirety only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement.¹⁰² Subject to the limitations in our rules, the requesting carrier may choose to initiate negotiations or to adopt an agreement in its entirety that the requesting carrier deems appropriate for its business needs.¹⁰³ Because the all-or-nothing rule should be much more easily administered and enforced than the current rule, we do not believe that further clarifications are warranted at this time.¹⁰⁴ Moreover, we conclude that many of the clarifications sought by parties should be addressed by state commissions in the first instance.¹⁰⁵

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Analysis

31. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹⁰⁶ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *FNPRM*.¹⁰⁷ The Commission sought

¹⁰¹See *BellSouth Hendrix Aff.* at para. 11.

¹⁰²See *Local Competition Order*, 11 FCC Rcd at 16140, para. 1318.

¹⁰³Under the all-or-nothing rule we adopt here, we retain the other limitations and conditions of the existing pick-and-choose rule. See 47 C.F.R. § 51.809; Appendix B, *infra*.

¹⁰⁴We do, however, reject Verizon Wireless' argument that section 252(i) applies to all LECs and therefore governs even those interconnection agreements where neither party is an incumbent LEC. See Verizon Wireless Comments at 7 n.14 ("[A]ll interconnection agreements among competitive LEC[s], incumbent LECs, and Rural incumbent LECs must be filed and approved by the state commission, regardless of whether a particular agreement includes an ILEC as a party."); *id.* at 6-7. Section 252(i), which governs "agreements approved under [section 252]," applies only to interconnection agreements where at least one party is an incumbent LEC. 47 U.S.C. § 252(i). Sections 252(a) and 252(b) expressly state that an incumbent LEC will be a party to agreements under those sections. See 47 U.S.C. § 252(a)(1), (b)(1); see also MCI Reply at 9.

¹⁰⁵*Cf. Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337, 19340, para. 7 (2002). However, we reject BellSouth's argument that "an agreement in its entirety" does not include general terms and conditions, such as dispute resolution or escalation provisions. See BellSouth Apr. 27, 2004 *Ex Parte* Letter, Attach. 1 at 2. Under the all-or-nothing rule, all terms and conditions of an interconnection agreement will be subject to the give and take of negotiations, and therefore, all terms and conditions of the agreement, to the extent that they apply to interconnection, services, or network elements, must be included within an agreement available for adoption in its entirety under section 252(i). See also *CompTel/ASCENT* July 1, 2004 *Ex Parte* Letter at 1-3.

¹⁰⁶See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

¹⁰⁷See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on

written public comment on the proposals in the *FNPRM*, including comment on the IRFA. No comments were received on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.¹⁰⁸

1. Need for, and Objectives of, the Rule

32. This Order ensures that market-based incentives exist for incumbent and competitive LECs to negotiate innovative commercial interconnection arrangements. The current pick-and-choose rule implementing section 252(i) may discourage give-and-take negotiation because incumbent LECs may be reluctant to make significant concessions (in exchange for negotiated benefit) if those concessions become automatically available – without any trade-off – to every potential market entrant. We therefore adopt an alternative approach to implementing section 252(i), requiring third parties to opt into entire agreements, to promote more innovative and flexible arrangements between parties. This Order declines to adopt the approach proposed in the *FNPRM* that would eliminate the current pick-and-choose regime for incumbent LECs only where the incumbent LEC has filed and received state approval of an SGAT. Instead, this Order eliminates the pick-and-choose rule and replaces it with an all-or-nothing rule, regardless of whether the state has an effective SGAT.

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

33. There were no comments raised that specifically addressed the proposed rules and policies presented in the IRFA. Nonetheless, the agency considered the potential impact of the rules proposed in the IRFA on small entities.¹⁰⁹

3. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Would Apply

34. 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 rules adopted herein.¹¹⁰ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”¹¹¹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹¹² A “small business concern” is one

Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17442, para. 788 (2003) (*FNPRM*) (subsequent history omitted).

¹⁰⁸ See 5 U.S.C. § 604.

¹⁰⁹ See para. 14, *supra*.

¹¹⁰ 5 U.S.C. § 604(a)(3).

¹¹¹ 5 U.S.C. § 601(6).

¹¹² 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹¹³

35. In this section, we further describe and estimate the number of small entity licensees and regulatees that may be affected by rules adopted in this Order. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.¹¹⁴ The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,¹¹⁵ Paging,¹¹⁶ and Cellular and Other Wireless Telecommunications.¹¹⁷ Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

36. We have included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."¹¹⁸ The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.¹¹⁹ We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

37. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.¹²⁰ According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.¹²¹ Of this total, 2,201 firms had employment of 999 or fewer employees,

¹¹³ 15 U.S.C. § 632.

¹¹⁴ FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3 (May 2002) (*Trends in Telephone Service May 2002 Report*).

¹¹⁵ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (changed to 517110 in Oct. 2002).

¹¹⁶ 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in Oct. 2002).

¹¹⁷ 13 C.F.R. § 121.201, NAICS code 513322 (changed to 517212 in Oct. 2002).

¹¹⁸ 15 U.S.C. § 632.

¹¹⁹ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small-business concern," which the RFA incorporates into its own definition of "small business." See 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

¹²⁰ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

¹²¹ 1997 Economic Census, Establishment and Firm Size, Table 5, NAICS code 513310 (issued Oct. 2000).

and an additional 24 firms had employment of 1,000 employees or more.¹²² Thus, under this size standard, the great majority of firms can be considered small.

38. *Incumbent Local Exchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹²³ According to Commission data,¹²⁴ 1,337 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,337 carriers, an estimated 1,032 have 1,500 or fewer employees and 305 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our proposed action.

39. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), "Shared-Tenant Service Providers," and "Other Local Service Providers."* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹²⁵ According to Commission data,¹²⁶ 609 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 609 carriers, an estimated 458 have 1,500 or fewer employees and 151 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 35 carriers have reported that they are "Other Local Service Providers." Of the 35, an estimated 34 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by our proposed action.

40. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹²⁷ According to Commission data,¹²⁸ 261 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 223

¹²²*Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

¹²³13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517110 (changed from 513310 in October 2002).

¹²⁴FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, "Trends in Telephone Service" at Table 5.3, Page 5-5 (Aug. 2003) (*Trends in Telephone Service August 2003 Report*). This source uses data that are current as of December 31, 2001.

¹²⁵13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

¹²⁶*Trends in Telephone Service August 2003 Report* at Table 5.3.

¹²⁷13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

¹²⁸*Trends in Telephone Service August 2003 Report* at Table 5.3.

have 1,500 or fewer employees and 38 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by our proposed action.

41. *Operator Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for operator service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹²⁹ According to Commission data,¹³⁰ 23 carriers have reported that they are engaged in the provision of operator services. Of these, an estimated 22 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that the majority of OSPs are small entities that may be affected by our proposed action.

42. *Prepaid Calling Card Providers.* The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.¹³¹ According to Commission data, 32 companies reported that they were engaged in the provision of prepaid calling cards.¹³² Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.¹³³ Consequently, the Commission estimates that the great majority of prepaid calling card providers are small entities that may be affected by the rules and policies adopted herein.

43. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to "Other Toll Carriers." This category includes toll carriers that do not fall within the categories of interexchange carriers, OSPs, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.¹³⁴ According to Commission's data, 42 companies reported that their primary telecommunications service activity was the provision of payphone services.¹³⁵ Of these 42 companies, an estimated 37 have 1,500 or fewer employees and five have more than 1,500 employees.¹³⁶ Consequently, the Commission estimates that most "Other Toll Carriers" are small entities that may be affected by the rules and policies adopted herein.

44. *Wireless Service Providers.* The SBA has developed a small business size standard for wireless firms within the two broad economic census categories of "Paging"¹³⁷ and "Cellular and Other Wireless Telecommunications."¹³⁸ Under both SBA categories, a wireless business is small if it has 1,500 or

¹²⁹ 13 C.F.R. § 121.201, NAICS code 517110 (changed from 513310 in October 2002).

¹³⁰ *Trends in Telephone Service August 2003 Report* at Table 5.3.

¹³¹ 13 C.F.R. § 121.201, NAICS code 513330 (changed to 517310 in Oct. 2002).

¹³² *Trends in Telephone Service May 2002 Report* at Table 5.3.

¹³³ *Id.*

¹³⁴ 13 C.F.R. § 121.201, NAICS code 513310 (changed to 517110 in Oct. 2002).

¹³⁵ *Trends in Telephone Service May 2002 Report* at Table 5.3.

¹³⁶ *Id.*

¹³⁷ 13 C.F.R. § 121.201, NAICS code 513321 (changed to 517211 in October 2002).

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

fewer employees. For the census category of Paging, Census Bureau data for 1997 show that there were 1,320 firms in this category, total, that operated for the entire year.¹³⁹ Of this total, 1,303 firms had employment of 999 or fewer employees, and an additional 17 firms had employment of 1,000 employees or more.¹⁴⁰ Thus, under this category and associated small business size standard, the great majority of firms can be considered small. For the census category Cellular and Other Wireless Telecommunications, Census Bureau data for 1997 show that there were 977 firms in this category, total, that operated for the entire year.¹⁴¹ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.¹⁴² Thus, under this second category and size standard, the great majority of firms can, again, be considered small. *Broadband PCS.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of \$40 million or less in the three previous calendar years.¹⁴³ For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁴⁴ These standards defining "small entity" in the context of broadband PCS auctions have been approved by the SBA.¹⁴⁵ No small businesses, within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.¹⁴⁶ On March 23, 1999, the Commission re-auctioned 347 C, D, E, and F Block licenses. There were 48 small business winning bidders. On January 26, 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in this auction, 29 qualified as

¹³⁹U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000).

¹⁴⁰U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513321 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

¹⁴¹U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000).

¹⁴²U.S. Census Bureau, 1997 Economic Census, Subject Series: "Information," Table 5, Employment Size of Firms Subject to Federal Income Tax: 1997, NAICS code 513322 (issued October 2000). The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1000 employees or more."

¹⁴³See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996); see also 47 C.F.R. § 24.720(b).

¹⁴⁴See *Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996).

¹⁴⁵See, e.g., *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, PP Docket No. 93-253, Fifth Report and Order, 9 FCC Rcd 5332 (1994).

¹⁴⁶*Broadband PCS, D, E and F Block Auction Closes* (rel. Jan. 14, 1997); see also *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, WT Docket No. 97-82, Second Report and Order, 12 FCC Rcd 16436 (1997).

“small” or “very small” businesses. Subsequent events, concerning Auction 305, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In addition, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

45. *Narrowband Personal Communications Services.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second auction commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.¹⁴⁷ Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.¹⁴⁸ To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.¹⁴⁹ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.¹⁵⁰ A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.¹⁵¹ The SBA has approved these small business size standards.¹⁵² A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.¹⁵³ Three of these claimed status as a small or very small entity and won 311 licenses.

46. *220 MHz Radio Service – Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to “Cellular and

¹⁴⁷ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS*, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

¹⁴⁸ *See Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674*, Public Notice, PNWL 94-004 (rel. Aug. 2, 1994); *Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787*, Public Notice, PNWL 94-27 (rel. Nov. 9, 1994).

¹⁴⁹ *Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS*, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

¹⁵³ *See Narrowband PCS Auction Closes*, Public Notice, 16 FCC Rcd 18663 (WTB 2001).